

**Summary Justice Reform**  
**Thematic Report on the Use of**  
**Fiscal Fines**

**February 2009**

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## **Chapter 1**

### **Introduction**

- 1.1 The Inspectorate of Prosecution in Scotland (IPS) was created in December 2003. It is the independent Inspectorate for the Crown Office and Procurator Fiscal Service (COPFS), which is the sole prosecuting authority in Scotland and also responsible for investigating sudden deaths and complaints of a criminal nature against the police. The Inspectorate was put on a statutory basis by the Criminal Proceedings etc (Reform) (Scotland) Act 2007, Part 5 (sections 78 and 79) and given statutory powers and responsibilities.
- 1.2 The principal functions of the Inspectorate of Prosecution in Scotland are to inspect, or arrange for the inspection of, the operation of the Crown Office and Procurator Fiscal Service and to report to the Lord Advocate on any matter connected with the operation of the Crown Office and Procurator Fiscal Service which the Lord Advocate refers to the IPS. The overall aim is to contribute to improvements in service delivery of the Crown Office and Procurator Fiscal Service, contribute to the accountability of the Crown Office and Procurator Fiscal Service and enhance public confidence in the system of public prosecution in Scotland.
- 1.3 The IPS carries out wide ranging inspections of the 11 separate Areas of the Crown Office and Procurator Fiscal Service in Scotland together with Crown Office (Headquarters) functions. In addition it carries out thematic works either singly or more commonly in conjunction with criminal justice partners.
- 1.4 The IPS is committed to observing agreed policy on the principles of inspection including taking a customer focus, pursuing the purpose of improvement, being evidence based and publishing all reports.

- 1.5 This is the seventh thematic report prepared by the Inspectorate.
- 1.6 All reports can be viewed on the Inspectorate's website at [www.scotland.gov.uk/topics/justice/ipis](http://www.scotland.gov.uk/topics/justice/ipis).
- 1.7 In common with current thinking on inspection the Inspectorate of Prosecution in Scotland takes a risk based approach to choice of topics. Summary Justice Reform generally represented a major change in the criminal justice system and enhanced powers to Procurators Fiscal to issue Fiscal Fines was identified as a suitable topic for consideration once the system had bedded in. Accordingly this inspection became part of the IPS' Business Plan.
- 1.8 Following the introduction of enhanced Fiscal Fines there was much media focus on the use of these.
- 1.9 The Lord Advocate in answering concerns raised by Members of the Scottish Parliament in Parliament on 26 June 2008 indicated to Parliament that the Inspectorate of Prosecution in Scotland would be carrying out an inspection of the implementation of the new powers.
- 1.10 The remit therefore was to carry out a thematic report on the use of enhanced Fiscal Fines by the Crown Office and Procurator Fiscal Service.



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**February 2009**

## **Chapter 2**

### **Methodology**

- 2.1 Policy and guidance material relating to the issue of Fiscal Fines was accessed and reviewed. The guidance remains confidential but the Inspectorate of Prosecution in Scotland has access to it. A questionnaire was devised that addressed various aspects of the issue of Fiscal Fines including compliance with the in-house guidance and the results analysed.
- 2.2 This initial report looks only at Fiscal Fines issued and not Compensation Offers or other 'Direct Measures'. Nor does it look at this stage at cases taken to court where there might have been the possibility of the issue of a Fiscal Fine or other measure.
- 2.3 The Inspectorate of Prosecution in Scotland takes an evidence based approach to the work and the methodology used in this inspection was strongly evidence based. A random selection of Fiscal Fines was selected from each of the 11 Crown Office and Procurator Fiscal Service Areas in Scotland. These were cases 'closed' in the Crown Office and Procurator Fiscal Service IT system in September 2008. This meant that in practice 6 months had elapsed from the commencement of the new powers thus allowing time for the new system to bed in.
- 2.4 The cases were picked by the Inspectorate Team to cover all the available levels of Fiscal Fine and all types of case. A table is produced for each of the Areas showing the number and levels of cases examined.
- 2.5 In total about 1500 cases were examined in detail and the decision making compared to the Crown Office and Procurator Fiscal Service guidance. Because of multiple accused and multiple charges

approximately 2000 charges were examined. This represented about 40% of the cases closed that month.

- 2.6 The sample size although reasonably large is not held out to be statistically relevant but large enough to get an indication of the type of decisions made across the country and detect any emerging issues about compliance with the guidance.
- 2.7 In addition the Inspectorate Team attended much of the training on Summary Justice Reform offered by the newly opened Scottish Prosecution College in Glasgow and we are grateful to the College for facilitating this. A form of recording was devised to ensure that all the Inspectors doing this work covered the same issues as far as possible. In particular any apparent deviation from the guidance was noted.
- 2.8 Any cases identified as "apparent" breaches of policy were then taken up with the issuing offices for any comments they had. The substance of the replies are now contained in the body of this report.
- 2.9 We would like to thank the members of Crown Office and Procurator Fiscal Service staff and others who responded to our various requests for information.

## Chapter 3

### Background

**"There is at present and has been for some considerable time inordinate pressure on the criminal justice system....."**

3.1 This could be a view expressed in relation to the current criminal justice system but is in fact a quotation from the Stewart Committee's second report on Keeping Offenders Out of Court: Further Alternatives to Prosecution published in 1983<sup>1</sup>.

3.2 The remit of the Stewart Committee (which was appointed in 1977) was

**"To consider the effect on the criminal courts and the prosecution system of the volume of minor offences at present dealt with by summary prosecution and whether some other process might be devised to deal with such offences while maintaining essential safeguards for accused persons."**

3.3 Until the early 1980s there was little movement on alternatives to prosecution. A study in 1982<sup>2</sup> looked at the use of the Procurator Fiscal's discretion to prosecute and came to the conclusion that where there was sufficient evidence Scotland's prosecutors tended to prosecute and made little use of the (limited) alternatives available to them at that time.

3.4 Although Scotland did not have the principle of 'legality' as in some foreign jurisdictions where the prosecutor has no discretion and has a duty to prosecute if there is sufficient evidence (and at the highest level the facts warrant) nevertheless the decision making process was seen as coming down to whether there was sufficiency of evidence and choice of

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<sup>1</sup> Cmnd 8958

<sup>2</sup> S Moody and J Tombs 1982 Prosecution in the Public Interest, Scottish Academic Press

charges and forum. Discretion in this study was most prevalent in the negotiation of pleas once proceedings had commenced.

- 3.5 The pressure for change as demonstrated by the quotation from the Stewart Committee came not so much from any philosophical or jurisprudential shift but from pragmatism, the courts were struggling in the 1980s with the volume of business, especially minor motoring offences.
- 3.6 The Committee's first report<sup>3</sup> highlighted that in 1978 about 50% of prosecution in the summary courts related to motor vehicles with a large number pleading guilty by letter. The outcome of the work of the Committee included the introduction of Fiscal Fines (in 1987<sup>4</sup>) and increased use of alternatives to prosecution such as Social Work Diversion and Procurator Fiscal Warnings.
- 3.7 During the 1980s and 1990s increased use was made of the available alternatives. Initially Fiscal Fines were set at £25 and then increased in 1996 to a maximum of £100 (in 4 levels, £25, £50, £75 and £100). This was an 'opt in' system where in the event of failure to accept the alternative prosecution would normally follow.
- 3.8 Although the initial impetus for alternatives to prosecution was pragmatism there began to be a feeling that minor offences should be taken out of the criminal justice system altogether, partly in order to expedite processing of the business but also partly to avoid convictions for persons with only minor offending behaviour. The sledgehammer to crack a nut argument.
- 3.9 The 1982 study referred to by Moody and Tombs was followed up by them in 1993 following the introduction of the various alternatives to

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<sup>3</sup> Cmnd 8027 1980 The Motorist and Fixed Penalties

<sup>4</sup> The Criminal Justice (Scotland) Act 1987 S56



prosecution and led them to the comment "Yet within the space of no more than 10 years there has been a major reversal of this 'pro prosecution' policy".<sup>5</sup>

3.10 The ground was, therefore, prepared for a more radical approach. The next significant step was the establishment of a Committee to review summary justice in Scotland under the Chairmanship of Sheriff Principal John McInnes.

3.11 The remit of the Committee was

**"To review the provision of summary justice in Scotland, including the structures and procedures of the Sheriff Courts and District Courts as they relate to summary business and the inter-relation between the two levels of court, to make recommendations for the more efficient and effective delivery of summary justice in Scotland."**

3.12 The Committee reported in 2004 and covered a wide range of summary criminal justice topics. In particular a chapter of the report was devoted to alternatives to prosecution including proposals on new enhanced Fiscal Fines. The Committee quoted statistics showing that the introduction of Fiscal Fines in 1987 had been responsible for a significant reduction in the number of cases that would otherwise have had to be dealt with in the summary courts. The Committee came to the conclusion that there might well be scope to increase the use of Fiscal Fines but required some changes to make them more robust and effective. In particular the Committee came to the conclusion that the system of Fiscal Fines should be based on an opt out procedure rather than the opt in procedure adopted by the preceding Stewart Committee.

3.13 Under this new system an offender would be deemed to have accepted the offer unless action was taken to dispute it. The Committee invited

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<sup>5</sup> J Tombs and S Moody, *Criminal Law Review* 1993 357-367

the then Scottish Executive to consider two options, increasing the scope of Fiscal Fines to £200 or a more radical approach increasing to £500. Statistical data was given showing the impact on the courts of such rises in the level. In addition to that the Committee recommended that consideration be given to increasing the range of cases in which Fiscal Fines could be issued. The Committee also recommended that a Procurator Fiscal should be able in conjunction with a Fiscal Fine or separate from it to make a compensation offer to an alleged offender.

3.14 Following the publication of the McInnes Committee's Report in 2004 legislation was introduced into the Scottish Parliament in the form of the Criminal Proceedings etc (Reform) (Scotland) Bill which subsequently became the Criminal Proceedings etc (Reform) (Scotland) Act 2007.

3.15 Extensive consultation followed the publication of the McInnes Report and the then Scottish Executive agreed to implement many of its recommendations accepting at that stage the proposal to increase Fiscal Fines to a new limit of £500 along with detailed guidance from the Lord Advocate and that the use of the new levels of Fiscal Fines should be closely monitored<sup>6</sup>. It was also proposed that Fiscal Compensation Offers be introduced with an upper limit of £5,000, again subject to comprehensive guidelines provided by the Lord Advocate and their use and impact closely monitored.

3.16 The Bill when introduced increased the top level of Fiscal Fine to £500 but this was reduced during the Parliamentary process to £300. The relevant provisions are now contained in Section 50 of the 2007 Act.

3.17 During its course through the Scottish Parliament evidence both written and oral was obtained on the various proposals from various interested and relevant parties. There was considerable interest and discussion surrounding the proposed changes to Fiscal Fines.

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<sup>6</sup> Smarter Justice, Safer Communities published in March 2005

3.18 Various objections were made in particular -

- the Procurator Fiscal would be both prosecutor and judge/sentencer
- full facts about the offence or offender's circumstances might not be known
- it would be a 'secret' system with justice not seen to be done
- victims and the public would not see the outcome
- against the flow of increased 'transparency'

3.19 The then Lord Advocate in response to a question from an MSP seeking reassurance that the wider use of Fiscal Fines would be the correct disposal said -

**"It is important that Procurators Fiscal use the powers responsibly and proportionately, so a training programme will of course be involved...." (Scottish Parliament 2006)**

3.20 Also the then Solicitor General in response to another query regarding what guidance was then in place to ensure alternatives were used only in relation to appropriate offences and how such existing guidance would be developed to take account of the provisions of the Bill replied -

**"There is extensive guidance for Procurators Fiscal on the alternatives. It is internal confidential guidance about what type of cases would be suitable for their use. We have a work stream.....which is considering the guidance that is expected for the implementation of these provisions." (Justice 1, May 2006)**

3.21 The Solicitor General was asked for an example of some of the offences that she thought would be covered replied -

**"That is difficult to do because there is such a wide range of summary offences.....it will be important to examine the range of offences as we develop the guidance." (Justice 1, May 2006)**

- 3.22 At the meeting of the Justice 1 Committee in May 2006 concern was also expressed that if someone who had a drug and/or alcohol problem was given a Fiscal Fine the opportunity for a court issuing for example a Drug Testing and Treatment Order (DTTO) would be lost. In reply the Solicitor General indicated that the quality of information supplied by the police to the Procurator Fiscal was important in that regard (borne out by our case examination). Wider information would better inform the prosecutor's choice. In particular she was asked if any summary offences would be excluded from the use of Fiscal Fines and replied that there would be summary offences excluded as a result of the Lord Advocate's guidance which would remain confidential but certain cases would be obviously excluded such as knife crimes.
- 3.23 On being asked if the Committee should not be given some idea of how the Crown intended to use these new extended provisions the Solicitor General replied to the effect that it was a matter for an independent prosecution service and that the application of the policy would be informed by guidance and by changing circumstances that might occur. She indicated that if particular problems arose there might be variations of the policy.
- 3.24 She was again pressed on this point in Committee and the Solicitor General replied to the effect that she and the Lord Advocate were accountable to Parliament for how the disposals were used and would be reporting on that subsequently.

## **Chapter 4**

### **Implementation by Crown Office and Procurator Fiscal Service**

- 4.1 Section 50 of the 2007 Act was brought into force on 10 March 2008. Prior to that an extensive training programme was rolled out by Crown Office and Procurator Fiscal Service in the then newly opened Scottish Prosecution College in Glasgow. Staff involved in the decision making process were targeted for this training. It was wide ranging covering all aspects of summary justice reform including the availability of the new Fiscal Fines. Practical exercises as well as theory were included in this training which was run over a period of 2 days. 410 staff were trained between January and March 2008. E-learning was also used extensively in addition to face to face training. Fiscal Fines are part of 'Direct Measures' which also include compensation offers and in pilot areas, work offers (excluded from this report).
- 4.2 The policy and guidance on the issue of Fiscal Fines remains confidential. The then Solicitor General explained in Parliament during the passing of the Bill that it would not be appropriate to issue this into the public domain as there was a danger that accused persons might tailor their behaviour accordingly. (Justice 1, May 2006)
- 4.3 In recent years the Crown Office has tried to be as forthcoming as possible on policy matters. Extensive consultation has been made and advice taken in the areas of race crime, domestic abuse, knife carrying, sexual assaults and others. Giving detailed lists of offences/crimes with indicative penalties was unsurprisingly not deemed in the public interest.
- 4.4 Nevertheless the Law Officers have made as much information as possible public and in particular to the Scottish Parliament by way of detail on the number and type of offences for which Fiscal Fines have been issued since their introduction.

- 4.5 Extensive written guidance was provided to Crown Office and Procurator Fiscal Service staff in the form of circulars and updates to the Crown Office Book of Regulations (which is the standard book of instructions given to Procurators Fiscal on how they should conduct their activities). Fiscal Fines in the Book of Regulations are included under the heading of "Direct Measures" (ie cases where prosecution in court in the first instance would be a disproportionate response) and include powers available to the police to deal with minor level offending. These are in addition to the Prosecution Code which is a public document.
- 4.6 The usual rule of sufficiency of evidence applies to Direct Measures and presents a first hurdle. Thereafter the rules of the Code apply.
- 4.7 The **general** approach, however, is based on the overarching objectives of reducing offending and re-offending and maintaining and improving public confidence in the criminal justice system.
- 4.8 There is, for the first time, a **presumption in favour** of taking **action** and the decisions are **outcome focussed** requiring the issuer to decide on the appropriate outcome for the offender, the victim and the wider community and the most suitable option to achieve it. Particular regard is to be had to previous convictions and the likelihood of re-offending which can 'lift' a non-serious offence into the prosecution in court option.
- 4.9 Sentencing objectives are broken into 7 categories with **indicative** disposals shown for each of these. Some of these would attract court action rather than the issue of a Fiscal Fine.
- 4.10 The guidance having established the general ground rules then gives staff a list of situations where Fiscal Fines **must not** be issued and these include categories which are in the public domain such as violence likely to attract imprisonment, violence against police and emergency workers,

the use of knives or offensive weapons, racial or religious prejudice, domestic abuse and cases where there is a significant sexual element or the accused suffers from a mental disorder.

- 4.11 In addition to categories of crime/offences which are struck at by the nature of the offence themselves there are prohibitions on the issue of Fiscal Fines dictated by the circumstances of the offender such as the offender's record or status. This prohibition applies irrespective of what might otherwise be a minor offence.
- 4.12 There is then another general category where the issue of Fiscal Fines **may be inappropriate** and there is in effect a presumption against their use although they are not automatically excluded.
- 4.13 Following all these general principles there is very detailed guidance on individual offences and crimes including guidance on an indicative level for the Fiscal Fine. This is done "in order to achieve a consistent approach to the use of Fiscal Fines". This detailed guidance covers an array of the most common statutory and common law offences.
- 4.14 The guidance is provided on the level of Fiscal Fine and this is split into 7 segments (£50, £75, £100, £150, £200, £250 and £300).
- 4.15 All this guidance and background material was provided, among other reasons, to honour the undertakings referred to given to the Scottish Parliament by the Law Officers and represented a considerable body of work for those involved.
- 4.16 The new system then commenced in operation in March 2008. Such a change although not in principle fundamentally different from what had preceded it attracted a lot of media attention and comment from defence lawyers and others. Some 'individual' cases were cited as being inappropriate use of the new measures.

- 4.17 Information on the use of Fiscal Fines was provided by the Crown Office and Procurator Fiscal Service and the Law Officers in accordance with the undertakings given to the Scottish Parliament including an early indication of the numbers being used.
- 4.18 Letters were sent by the Law Officers to the Justice spokespersons in July 2008 in connection with implementation of the summary justice reforms and on 4 September 2008 the Lord Advocate wrote to the Justice Committee of the Scottish Parliament and the Law Society of Scotland to provide information on the implementation.
- 4.19 As recently as January 2009 updates on the number and type of Fiscal Fines issued have been given to Members of the Scottish Parliament.
- 4.20 Prior to that on 26 June 2008 the Lord Advocate when answering questions and concerns raised by MSPs at Law Officer's Question Time (when it was suggested that there were reports that cases had been 'diverted' from prosecution including cases of domestic violence and serious assault) in reply indicated that close monitoring was taking place to ensure compliance with the guidance. She also indicated that this Inspectorate intended to carry out an inspection of the implementation.
- 4.21 In particular she stated -

**"We should be cautious of becoming hysterical about the use of Fiscal Fines on the basis of anecdotal evidence. Members are aware that many solicitors in defence practice are very apprehensive about the potential loss of income because of the changes."**

- 4.22 The Inspectorate carried out this thematic report in an effort to get away from "anecdotal" evidence and to look at decisions actually made by prosecutors up and down the country.



## **Chapter 5**

### **Results**

- 5.1 As previously indicated a random selection of approximately 1500 Fiscal Fines was examined as the core piece of work of this inspection. Because of multiple accused and multiple charges this translates into approximately 2000 individual charges (about 40% of the cases closed that month).
- 5.2 This covered all 7 possible levels and the numbers examined by Area according to the level is as per the undernoted tables. A higher proportion of cases in Levels 5-7 were examined on the assumption these would be more 'serious' cases.

### **Argyll and Clyde**

LEVEL 1	12 CASES
LEVEL 2	41 CASES
LEVEL 3	46 CASES
LEVEL 4	25 CASES
LEVEL 5	19 CASES
LEVEL 6	5 CASES
LEVEL 7	2 CASES
<b>TOTAL</b>	<b>150 CASES</b>

### **Ayrshire**

LEVEL 1	5 CASES
LEVEL 2	55 CASES
LEVEL 3	20 CASES
LEVEL 4	15 CASES
LEVEL 5	5 CASES
LEVEL 6	1 CASE
<b>TOTAL</b>	<b>101 CASES</b>

### **Central**

LEVEL 1	2 CASES
LEVEL 2	44 CASES
LEVEL 3	25 CASES
LEVEL 4	21 CASES
LEVEL 5	4 CASES
LEVEL 6	1 CASE
LEVEL 7	1 CASE
<b>TOTAL</b>	<b>98 CASES</b>

### **Dumfries and Galloway**

LEVEL 1	5 CASES
LEVEL 2	32 CASES
LEVEL 3	37 CASES
LEVEL 4	10 CASES
LEVEL 5	14 CASES
LEVEL 6	3 CASES
<b>TOTAL</b>	<b>101 CASES</b>

### **Fife**

LEVEL 1	8 CASES
LEVEL 2	67 CASES
LEVEL 3	13 CASES
LEVEL 4	6 CASES
LEVEL 5	7 CASES
<b>TOTAL</b>	<b>101 CASES</b>

### **Glasgow**

LEVEL 1	31 CASES
LEVEL 2	181 CASES
LEVEL 3	39 CASES
LEVEL 4	16 CASES
LEVEL 5	25 CASES
LEVEL 6	5 CASES
LEVEL 7	5 CASES
<b>TOTAL</b>	<b>302 CASES</b>

### **Grampian**

LEVEL 1	3 CASES
LEVEL 2	49 CASES
LEVEL 3	26 CASES
LEVEL 4	17 CASES
LEVEL 5	20 CASES
LEVEL 6	2 CASES
LEVEL 7	5 CASES
<b>TOTAL</b>	<b>122 CASES</b>

### **Highlands and Islands**

LEVEL 1	4 CASES
LEVEL 2	25 CASES
LEVEL 3	25 CASES
LEVEL 4	32 CASES
LEVEL 5	7 CASES
LEVEL 6	5 CASES
LEVEL 7	2 CASES
<b>TOTAL</b>	<b>100 CASES</b>

### **Lanarkshire**

LEVEL 1	13 CASES
LEVEL 2	46 CASES
LEVEL 3	28 CASES
LEVEL 4	34 CASES
LEVEL 5	7 CASES
LEVEL 6	3 CASES
<b>TOTAL</b>	<b>131 CASES</b>

### **Lothian and Borders**

LEVEL 1	10 CASES
LEVEL 2	51 CASES
LEVEL 3	37 CASES
LEVEL 4	20 CASES
LEVEL 5	18 CASES
LEVEL 6	9 CASES
LEVEL 7	6 CASES
<b>TOTAL</b>	<b>151 CASES</b>

## **Tayside**

LEVEL 1	13 CASES
LEVEL 2	35 CASES
LEVEL 3	20 CASES
LEVEL 4	20 CASES
LEVEL 5	11 CASES
LEVEL 6	1 CASE
<b>TOTAL</b>	<b>100 CASES</b>

## **TOTAL = 1,457 CASES**

5.3 The type of cases covered included a wide range of both statutory and common law offences.

5.4 Common law offences included:-

- Assault
- Theft
- Breach of the Peace
- Malicious Damage

5.5 Statutory offences included a wide range, the most common were as follows:-

- TV licensing
- Drinking in public
- Misuse of Drugs Act (possession of Class B or C drugs)
- Littering
- Vandalism
- Certain transport offences
- Certain licensing contraventions
- A miscellaneous group of rather esoteric offences

5.6 It is too early to say what long term impact Fiscal Fines and other Direct Measures will have but the Annex shows figures obtained from the

Crown Office and Procurator Fiscal Service database. It shows an initial drop in the number of Fiscal Fines issued between April and September 2008 compared to the same period in the previous year when the increased powers were not available.

- 5.7 All of these cases were examined against the Crown Office guidance and those with apparent non compliance were raised for comments from the issuing Procurator Fiscal's Office.
- 5.8 207 cases were 'queried' with the issuing offices (about 14% of the total).
- 5.9 The most frequent query was regarding the level of Fiscal Fine issued. Most commonly this was on the basis of a level below the recommended minimum level and on a few occasions it was also queried on the basis of being too high. In total 63 such queries were made which was approximately 30% of the total number of queries.
- 5.10 The majority of responses were to the effect of accepting that there had been non compliance with the instructions given on level although there were usually explanations given in each case such as the age of the accused, the ability to pay or the very minor nature of the offending conduct.
- 5.11 25 queries related to charges of assault and given the prevalence of concern regarding assault these are dealt with later.
- 5.12 The remainder of the queries tended to fall into one of the following categories:-
  - The accused was subject to a bail order or on deferred sentence for an analogous matter

- The accused was subject to an order of court ie community service or probation order, drug treatment and testing order, restriction of liberty order, supervised attendance order and licence
- That there was information to suggest that the accused might be suffering from a mental disorder

5.13 A very small number related to non English speaking accused with no translation offered.

### **Assaults**

5.14 Most of the concerns raised about the use of the new Fiscal Fines centred on assault. The Solicitor General as recently as November 2008 in answer to a Parliamentary Question gave figures for the number of "direct measures" (including Fiscal Fines) issued for assault and assault to injury.

5.15 It is important to remember that the issue of a Fiscal Fine for assault was not new and has been in use since 1987. The previous limits were £25 (in 1987) and £100 in 1996. The new provisions extend this to £300 with the possibility of combining this with compensation offers or a stand alone compensation offer. The new system is not, therefore, innovative but an extension of the old system.

5.16 Public perception and confidence is, however, important and we therefore looked closely at the assault cases thrown up in our random sample. 142 charges of assault were examined (out of the total case sample of 1437 cases or 9.8%). This corresponds closely to Crown Office figures for direct measures used for assault as a percentage of all such issued.

5.17 The following table shows the level of Fiscal Fine issued for the 142 cases.

### **Assaults (by Level of Offer)**

<b>LEVEL</b>	<b>TOTAL</b>
Level 1 (£50)	2
Level 2 (75)	24
Level 3 (£100)	42
Level 4 (£150)	34
Level 5 (£200)	29
Level 6 (£250)	6
Level 7 (£300)	5
<b>Overall Total</b>	<b>142</b>

5.18 As at 26 January 2009 the average Sheriff Court Fine for assault was £292, the average District Court Fine for assault was £150. The average fine issued in the above 142 cases was £140.

### **Assaults Queried**

5.19 We asked for comments from the issuing Procurator Fiscal Offices on 25 out of 142 assault charges examined (17.6% of the total). This did not mean we thought the decisions were 'wrong' but wished clarification of the action taken. The following table shows the breakdown by type of query and the percentage that category of query represents out of the total number of assaults examined.

<b>Nature of Query</b>	<b>Number</b>	<b>%age of assaults examined</b>
Nature of assault <sup>7</sup>	5	3.5
Nature of assault (but satisfactory explanation given) <sup>8</sup>	9	6.3
Level low (in terms of guidance)	4	2.8
Breach of mandatory rules concerning offenders <sup>9</sup>	3	2.11
Other	4	2.8
<b>TOTAL</b>	<b>25</b>	<b>17.6%</b>

5.20 From our examination of these 142 cases in only 5 cases did we take issue with the use of the Fiscal Fine looking at the nature of the assault. This is not, of course, an exact science and these cases are not 'unlawful' but we think they should have been prosecuted. In October 2008 the guidance given to staff was tightened up and all 5 of these cases would, in our opinion, now be excluded from the issue of a Fiscal Fine. This also applies to 4 of the 9 cases where we were persuaded the issue of a Fiscal Fine was not inappropriate ie in 4 of these cases this would not now be allowed.

5.21 3 of the cases queried breached other prohibitions based on the status of the offender eg on probation. We would not have taken issue with their use in the circumstances of the case but for that self imposed Crown Office rule.

<sup>7</sup> In these 5 cases the issuing office either accepted it had been inappropriate to issue a Fiscal Fine or we agreed to differ

<sup>8</sup> In 4 of these cases the issue of a Fiscal Fine would not now be allowed following new guidelines issued in October 2008

<sup>9</sup> These rules exclude certain types of offender from the issues of a Fiscal Fine irrespective of the nature of the offence. We recommend a slight relaxation of this absolute rule (see Recommendation 2).



5.22 The 4 cases in the 'other' category included situations where the mental health of the accused might be an issue or where translations had not been done.

5.23 Overall the vast majority of Fiscal Fines for assaults were appropriate and proportionate especially looked at from the general principles of summary justice reform, in particular speedier disposal (most cases were dealt with within a few days of receipt from the police) and less inconvenience to witnesses etc.

## **Chapter 6**

### **Conclusions and Recommendations**

- 6.1 Looking at the number of cases we examined, the range of offences and the range of levels, the overarching conclusion is that the use of Fiscal Fines was proportionate and in line with the philosophy of the enhanced use of these. Most of the queries we made related to the inevitable initial bedding in of a new system and the revised guidelines issued in October 2008 went a long way to addressing issues identified in the early operation of the new system.
- 6.2 As we have previously stated the Crown Office and Procurator Fiscal Service has taken the opportunity to substantially update and expand its policy and guidance relating to the marking of cases. In particular the resulting set of offence specific guidance available to Deputes throughout the country is an extremely useful piece of work. It provides a concise summary of substantive law, procedure and guidance on acceptable further procedures based on Crown Office policy eg where Direct Measures are likely to be appropriate and if so level of fines; where court proceedings are appropriate and if so the appropriate court etc.
- 6.3 We think it entirely appropriate to commend Crown Office and Procurator Fiscal Service and those responsible for the provision of this piece of work.
- 6.4 Many of the queries we made related to the inevitable initial 'bedding in' of a new system. It must be anticipated, and indeed is good practice, that any system, particularly when involving change, is subject to assessment, review and improvement in light of practice and experience. The revised guidelines issued in October 2008 went a long way to

addressing those few issues recognised in the original guidance once put into operation.

- 6.5 There does however remain the issue of balancing the dual concerns of encouraging the careful consideration of each case (on its own facts and circumstances) while ensuring a consistency of approach to marking and decision making. We feel that there is potential conflict in aspects of the policy with the overarching general guidance which is outcome focussed, prohibited categories of offence and offenders and the detailed case specific guidance. Some of the feedback we obtained supported this. It is not immediately clear which should take priority and we accordingly recommend -

### **Recommendation 1**

**That the hierarchy of the guidance be clarified by Crown Office.**

**There requires to be a clear indication as to which aspects of the policy take precedence over others. To do otherwise risks too wide a discretion being employed by individuals and/or offices to interpret similar cases but in different ways particularly in relation to the level of fine imposed.**

- 6.6 Our second recommendation is based on our finding that in a number of cases Fiscal Fines were issued despite a prohibition contained in the overarching guidance against doing so because of the status of the offender eg when the offender was on bail for similar offences, or on deferred sentence for similar offences or were in breach of a court order (such as probation/community service order). Most of these "breaches" arose because of the very minor nature of the current offence eg littering or drinking in the street. While the aggravation that an offence has been

committed at a time the accused was subject to a court order should be brought to the court's attention, the use of prosecution essentially for that purpose seems slow, expensive, unsuitable for witnesses and unwieldy. Accordingly we recommend –

## **Recommendation 2**

**Where an accused is reported for an offence which would otherwise result in a Fiscal Fine being issued but for the fact they are subject to an existing court order, a Fiscal Fine may still be issued subject to (a) intimation to the court which made that order, (b) notice to the offender the acceptance/deemed acceptance of the Fiscal Fine will be so intimated and (c) approval so to do by the District Fiscal or equivalent.**

- 6.7 In a very small number of cases it was not clear whether consideration had been given to the possibility that the offender suffered from mental health disorders. These cases related to offences of a minor nature and there did not appear to be a direct correlation between the offending behaviour and the offences but nevertheless some of these reports did flag up the possibility that mental health problems needed to be addressed. The guidance does include instructions on that point and it would simply be a matter for highlighting it again to staff carrying out this type of work. Equally in again a very small number of cases apparent non English speaking accused were issued with Fiscal Fines without a translation being given. This would be contrary to Crown Office general policy and all that is required is to remind staff of the need to translate. We do not consider a formal recommendation is required to address these communication issues.

6.8 It was recognised at the outset of this inspection that issuing Fiscal Fines for assaults was likely to be the most contentious area. Although the issuing of Fiscal Fines for assault is not new there has been a marked extension of the types and nature of assault now considered suitable for Fiscal Fines in terms of Summary Justice Reform. It is clearly a high risk area for the Crown Office and Procurator Fiscal Service in retaining public confidence. It is the area which has been subject to most public and media scrutiny. The guidelines issued by Crown Office relating to assaults (subject to the qualification referred to in Recommendation 1 above) provide reasonable clarity and guidance for those who come to mark and make decisions on these cases. The Crown Office and Procurator Fiscal Service has introduced a system of 100% monitoring for restricted classes of cases including assaults. This ensures there is a second (more senior) opinion provided before a Fiscal Fine is issued for assault. In this high risk and fairly new area we consider this good practice. Accordingly we recommend -

### **Recommendation 3**

**The current 100% monitoring of all Fiscal Fines issued for assault be retained for the time being (until Summary Justice Reform is embedded).**

**Summary Justice Reform - Fiscal Fines**

To ascertain whether there has been any change in the use of Fiscal Fines since the new provisions came into force in March 2008 we compared data<sup>10</sup> relating to Fiscal Fines in the first six months of 2008-09 with the first six months of 2007-08.

<b>Apr - Sep 2007 (old Fiscal Fines)</b>	<b>Apr - Sep 2008 Fiscal Fines<sup>11</sup></b>	<b>% Difference</b>
28,898	20,714	<b>-28%</b>

The figures above show a 28% decrease in use of Fiscal Fines when comparing the two 6 month periods. It is assumed that part of the reason for the decrease could be the knock on effect of summary justice reform provisions for police forces that allow them to issue penalty notices for more types of crime. This should result in fewer minor crime cases being reported which would normally have been dealt with by Direct Measure.

The following table shows the difference in the number of cases reported over a period of two years - October 2006 to September 2007 and October 2007 to September 2008<sup>12</sup>.

<b>Oct 2006 - Sep 2007</b>	<b>Oct 2007 - Sep 2008</b>	<b>% Change</b>
341,425	303,774	<b>-11%</b>

<sup>10</sup> All figures are taken from those published on the Crown Office and Procurator Fiscal Service Intranet - national data - 1st marking of subjects to September 2008

<sup>11</sup> Note - these figures do not include combined offers, compensation offers or work orders

<sup>12</sup> Figures taken from statistical tables to September 2008 on Crown Office and Procurator Fiscal Service Intranet