



Evidence and Procedure Review

Proposition Paper: A New Model for Summary Criminal Court Procedure

February 2017

Scottish Courts
and Tribunals Service



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Foreword



With the digital age well and truly upon us, we are surrounded by technology that shapes our lives, connects us and transforms the way that we conduct and transact business online. Against this background we have the opportunity to reconsider fundamentally how our services are delivered.

It is fair to say that our summary criminal court procedure has not kept pace with such innovation. Our criminal courts, with their origins in the Victorian times, still rely heavily on paper transactions, postal-based practices and bringing people together in a court room for procedural hearings and trials, many months after an incident. As recent Audit Scotland reports have highlighted, this brings inherent inefficiency, delay and inconvenience.

The administration of justice is a very serious matter, involving decisions that require to be weighed properly and carefully considered. But it is also important that we grasp the opportunities of the digital age to support those decisions in a way that means justice is administered as efficiently, effectively and fairly as possible.

That is why the Justice Board asked the SCTS to lead the development of a new model for summary criminal court procedure; a model that will take full advantage of the opportunities of digital technologies to deliver a system that is modern, fair and tackles many of the issues of delay and churn associated with current practices.

The first step was to produce a high-level, outline model. This was published last February in the Evidence and Procedure Review – Next Steps report. It suggested modern technology could significantly alter existing processes that would bring about a far more effective and streamlined summary criminal court procedure. The high-level concept in that paper was broadly welcomed, and the Justice Board requested that this should be developed further.

Therefore, I am pleased to introduce this paper which describes what a new summary criminal court procedure could look like underpinned by digital case management. This is the result of constructive collaboration by a Working Group of experienced professionals from across the justice system. We know that the best proposals emerge when people with the detailed knowledge of a system are given the opportunity to apply their thinking without any constraints. The ideas developed by the Working Group form the initial step of this approach and it is now time for full dialogue on them involving people from the wider justice sector across Scotland.

To do this we will hold series of discussion events around the country. We want to hear views on whether the propositions suggested in the paper are viable, what the challenges might be and what's still missing. We would also welcome written comments. Further details on how to take part will be available on the SCTS website.

Our task now is to bring our summary criminal court procedure right into the 21st Century, not by tinkering at the edges, but by radical digital transformation to improve the quality of justice for all concerned. I am convinced that by having the right dialogue with the right people, we can realise that possibility.

Eric McQueen
Chief Executive

Introduction

1. This paper follows the publication of the [Evidence and Procedure Review Report](#) on 13 March 2015 and the [Evidence and Procedure Review – Next Steps](#) paper on 26 February 2016 and forms part of the ongoing discussion as to how the criminal justice system in Scotland can make use of modern technology to become more effective and efficient in delivering a fair trial for all.

2. The *Evidence and Procedure Review Report* discussed, amongst other issues, “churn” within the criminal justice system. Churn can broadly be described as system inefficiency where cases do not proceed upon their intended procedural path, instead having to repeat court hearings before moving to the next stage. In addition, more importantly, it brings about prolonged stress and uncertainty for those involved – most significantly victims and witnesses and the accused – as cases last longer than they should. The paper went on to summarise the factors that are widely considered to be the causes of churn. These include:

- The unavailability of key evidence
- The lack of preparation from parties
- The unavailability or non-attendance of key witnesses

3. Although measures have been taken to address churn within the system, for example, through the Making Justice Work Programme¹, the problem persists. The most recent suite of summary justice reforms, associated with the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, saw some success with the extension of the use of fiscal fines and police fixed penalty notices for antisocial behaviour, and the consequent removal of some lower level business from the courts. This did not, however, alter the underlying approach to summary court procedure and it remains a system reliant on fixed diets and in-court appearances. The result of this, as highlighted in successive reports by Audit Scotland², is a system that still features much delay, churn and inefficiency.

4. The *Next Steps* paper discussed the issue of churn further and proposed a new high-level system model for summary proceedings (reproduced in Annex A) that would fundamentally change pre-trial procedure, which in turn would hopefully reduce churn and bring about wider efficiencies in the summary justice system. It suggested a system that would utilise modern technology and place case management at the core of the process.

5. Following the publication of the *Next Steps* paper, the Justice Board commissioned the SCTS to lead further work to develop the high-level concept model into a more detailed proposition. This paper sets out that more detailed proposition for how the key principles proposed in the *Next Steps* paper might be

¹ <http://www.gov.scot/Topics/Justice/justicestrategy/programmes/mjw>

² Audit Scotland, “An overview of Scotland’s Criminal Justice System” published September 2011, and Audit Scotland, “Efficiency of Prosecuting Criminal Cases Through the Sheriff Courts” published September 2015.

incorporated into a system which utilises modern technology. Those key principles were:

- An intermediate diet and trial diet should not be allocated (and witnesses should not be cited) upon the lodging of a not guilty plea.
- All pre-trial procedure should take place as part of a digital case management process. Court hearings should only be used for contested preliminary pleas, issues or other preliminary or pre-trial applications (such as pleas to the competency or relevancy) or where it appears that parties are not discharging their obligations to prepare cases timeously and effectively.
- Strong judicial oversight of the case management process should be applied to bring about more agreement of evidence where possible, and to ensure summary trials focus on what is truly in dispute.
- Citation of witnesses should be avoided unless the trial diet is very likely to proceed. Where a witness does have to be cited, a digital update system keeps the witness informed and minimises inconvenience wherever possible.
- In the majority of cases in which guilty pleas are tendered, sentencing could be conducted digitally without the need for a court appearance on the part of the accused.

6. The proposition in this paper was developed by a project team in the SCTS, relying principally on the contribution of a Working Group of experienced practitioners from across the justice system (membership of this Group is given in Annex B). Each member of the Working Group participated in a personal capacity to make available to the project their experience of summary criminal procedure. Their contribution is entirely without prejudice to their organisation's public position on any proposals within this paper.

7. The Group developed the detailed model in the following way. As a preliminary issue, the Group understood that its role was to develop a new process model for summary justice, based in digital case management; it was not equipped or expected to identify the technology that would be required to enable a digitised system to be introduced. It acknowledged that such digital enablers would need to be in place, and therefore made some high-level assumptions about these enablers, which are described in Chapter 1.

8. Additionally, the Group did not consider in any great detail legislative changes that would be required to implement the model discussed in this paper. Given the nature of the proposals, the Scottish Government would need to give consideration to the legislation governing criminal procedure.

9. In addressing the process model itself, the Group broke down the summary justice system into a number of stages – commencement of proceedings; entering a plea; case management prior to fixing a trial diet; and sentencing. It also acknowledged that specific considerations may apply to cases where the accused is

remanded in custody, and where the accused is not legally represented. Finally, it considered some of the broader issues raised by the redesign of the system, including the implications for legal aid, and the need to ensure that the system remains sufficiently transparent.

CHAPTER 1 - DESIGNING A DIGITAL SUMMARY JUSTICE SYSTEM: THE DIGITAL ENABLERS

10. Before discussing what a new model might look like for summary proceedings this paper assumes three key “digital enablers” will be developed to underpin the transformation of the summary court process – these are:

- **Digital evidence** will increasingly become the norm
- A **Digital Evidence and Information Vault (DEIV)** will be created to allow efficient storage, disclosure and sharing of digital evidence
- A **Digital Case Management System (DCMS)** will replace existing court systems to facilitate digital case management and communication between prosecution, defence and court professionals

11. It is important to note that this paper does not discuss specific information technology, security or cost requirements in relation to the above digital enablers. Instead this paper assumes that such systems are capable of being developed. The design, costing and specification would require further work if there is a decision to take forward the new summary justice model in this paper.

Digital Evidence

12. The previous Evidence and Procedure Review reports have discussed the potential benefits of moving to a system that uses more digital evidence. There is good reason to believe that the digital capture of evidence (particularly witness evidence) would, in the vast majority of instances, not only make processes more efficient, it would also provide a better quality of evidence.

13. To summarise what has been discussed in previous Evidence and Procedure Review reports, it is assumed that the wide scale adoption of digital evidence, and the simplification of rules surrounding this, would significantly benefit the practical administration of justice, providing efficiencies and savings to organisations in the system while providing wider benefits such as increasing the early plea rate and consequently reducing churn and the citation of witnesses. Importantly, a move towards digital evidence would allow for:

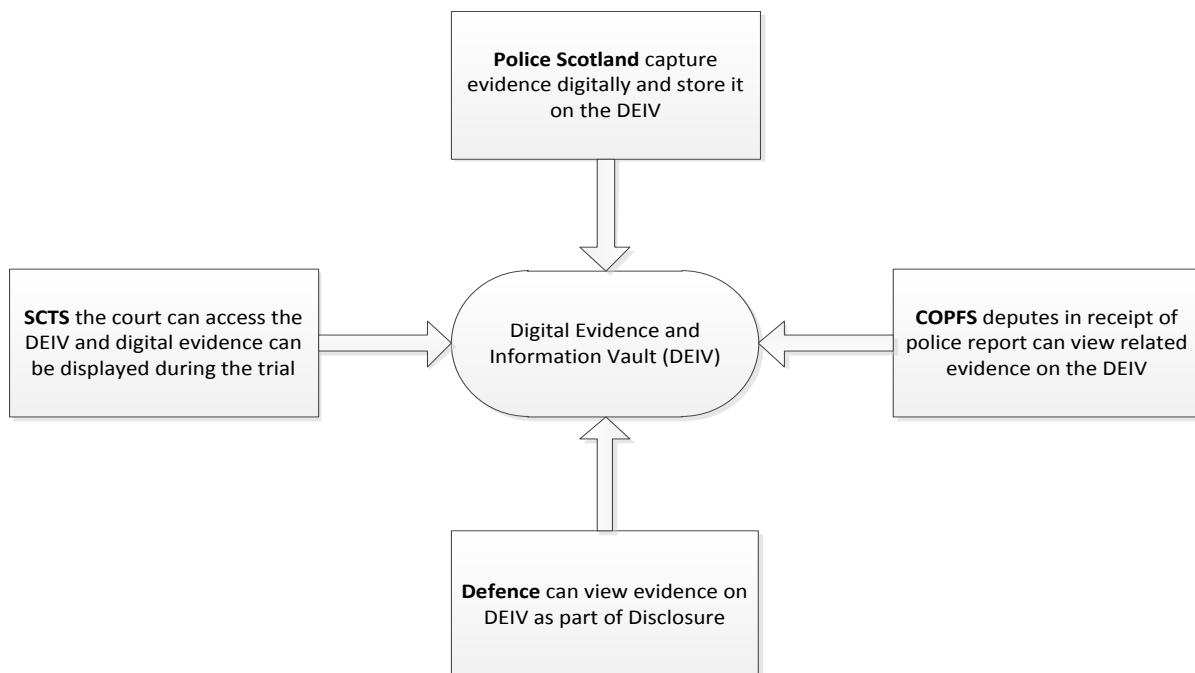
- **Better informed case marking** – Seeing evidence early (not just seeing the police report) allows prosecutors to make higher-quality and more informed decisions in relation to which charges to proceed with, whether to instruct the police to make further investigations, or indeed whether to proceed with a prosecution at all.
- **Earlier disclosure** – It is generally thought to be the case that an important factor in bringing about the early tendering of a guilty plea is the disclosure of evidence to the defence, allowing the defence solicitor to provide better-informed advice to the accused. While disclosure commences with the “summary of evidence” provided along with the summary complaint, it is often

only the later disclosure of evidence, such as CCTV footage and witness statements, that brings about resolution. A system that fully employs digital evidence could conceivably allow defence agents to see evidence (meaning CCTV evidence) earlier, which in turn would result in earlier case resolution.

Digital Evidence and Information Vault

14. The vehicle to enable these improvements to case marking and disclosure mentioned above is the Digital Evidence and Information Vault (DEIV). The DEIV is currently being developed by the Scottish Government. The concept was originally discussed in the Scottish Government's *Digital Strategy for Justice in Scotland*³, published in 2014. It proposes that "all documents, audio, pictures and video" evidence will be stored digitally in a secure vault.

15. The idea behind the DEIV is that central, digital, retention of evidence in criminal proceedings will provide efficiencies in the storage and sharing of evidence throughout the criminal process. For example, after Police Scotland stores evidence digitally within the DEIV a prosecutor in receipt of the police report will be able to securely log on to the DEIV and view all the evidence in relation to that case. Similarly, a defence solicitor receiving a summary complaint from a client would be able to securely log onto the DEIV and view all the evidence against that client once it is available. Should proceedings reach the trial stage, the DEIV can be accessed from the court and the digital evidence can be displayed during the trial.



16. This is a far cry from the current system whereby evidence, even that which is digitally captured by Police Scotland, is often passed to other justice organisations in physical format. The *Next Steps* paper highlighted this inefficiency by describing

³ <http://www.gov.scot/Resource/0045/00458026.pdf> page 7

how photographic evidence is used within the justice system⁴. In that example, photographic evidence is captured digitally by Police Scotland but has to be transformed into physical photobooks before it can be shared with other justice organisations.

17. Part of this inefficiency is caused by technical limitations of existing IT systems, and part is caused by outdated legislation. Significant resource and police officer hours currently go into the certification of evidence under schedule 8 of the Criminal Procedure (Scotland) Act 1995.

18. It is hoped a DEIV, underpinned by a modern set of rules/legislation governing its usage, would ensure all parties can securely and efficiently view available evidence in a digital format. This paper proceeds on the basis that such a DEIV will be delivered by the Scottish Government.

Digital Case Management System

19. The current case management systems used by COPFS and SCTS in relation to criminal trials were designed and implemented over a decade ago. While they are sufficiently equipped to handle cases within the existing framework, the new model suggested in this paper will require a step change in the functionality of the case management system.

20. At present the IT systems used in summary proceedings transmit fairly rudimentary information. In basic terms this is restricted to accused level information (name, address, date of birth etc.) and case level information (such as the number of charges on a complaint and the related sentences). Neither system currently allows digital input from the defence. The new digital plea and case management models discussed in Chapters 3 and 4 of this paper will require significantly more information to be passed digitally between COPFS, defence and SCTS, such as digital pleas in mitigation and supporting documents. It will also require the facility to manage the flow of cases (e.g. to issue automatic alerts and notifications, and request inputs).

21. This paper does not examine or propose what the technological solutions should be to achieve these changes. Such changes could conceivably be achieved through either the further development of existing systems or the implementation of a shared cross-justice platform or portal. For the purposes of this paper the generic term of a Digital Case Management System (DCMS) is used in reference to the above possibilities.

22. The DCMS will require to have the functionality and capacity to support an increase in users. As mentioned above, this paper proposes the defence (and unrepresented accused) will have the ability to make pleas and lodge documents digitally. This means that helpdesk/online type support will need to be available for these users as well as providing a system that can handle such increased user volumes.

⁴ Evidence and Procedure Review – Next Steps para 22

23. This paper has not analysed the specific IT requirements of any new system(s). Costing and development of these systems is a matter for the Scottish Government and individual justice organisations. Only general assumptions are made about system capabilities such as any modern IT system will allow for pleas and case management to be conducted digitally.

CHAPTER 2 – COMMENCING PROCEEDINGS DIGITALLY

24. At present, an accused person usually receives a summary complaint in one of three ways:

- 1) They are held in police custody pending a first court appearance. A summary complaint is served upon them while in custody.
- 2) They are released by Police Scotland on an “undertaking” that they appear at court on a specified day. They receive a summary complaint at court on that day.
- 3) They receive a summary complaint either through the post or served by a police officer. The summary complaint is accompanied by a citation instructing the accused person to appear at court on a certain day (or have a solicitor appear on his behalf). As an alternative to court appearance, the accused can complete a postal form and instead plead by letter on the date he/she is cited to appear.

The usage of these service methods for year 2015/16 is displayed below (note – all figures are rounded):

2015/16	Custody	Undertakings	Post/Personal Service
Sheriff Court	39,000	9,000	23,000
JP Court	2,500	1,000	51,000

25. In all three, the summary complaint calls before the court on a specific date allowing the accused person to enter a plea to the charges against him/her. If the accused person fails to appear, either in person or through a solicitor, or a plea by letter has not been received by the date of the court hearing, a warrant may be granted for his/her arrest.

Electronic service of the summary complaint

26. In relation to scenarios 1) and 2) above, it is suggested that no change be made to the method of service. Both scenarios involve an accused person either in custody or appearing in court within shortened time periods. This makes personal service of the complaint on the accused the most efficient means of commencing proceedings. Appearances from custody are discussed further in Chapter 5 of this paper. Accused released on an undertaking are discussed in paragraph 36.

27. For scenario 3), however, in many instances it should be possible to serve a summary complaint on an accused person by email. Email service of the summary complaint is already legislatively competent⁵.

⁵ Criminal Procedure (Scotland) Act 1995 Section 141(3A)

28. To allow service of a complaint via email⁶, this will require Police Scotland to record as a matter of routine the email address of an accused person, which is not done at present.

29. We were unable to ascertain figures for the number of accused persons who have an email address. If they do not, it is not considered feasible for one to be created at their point of contact with Police Scotland. Even where accused persons do have a valid email address there remains the risk that it is not recorded correctly by Police Scotland. This may happen because the accused does not state the address accurately to the police officer (and this may well occur if the accused is vulnerable or under the influence of alcohol or drugs), or there is human error in transcribing the address on to the system.

30. It must therefore be recognised from the outset that it will not be possible to serve a complaint digitally on every accused person. It is however, highly desirable that whenever possible the court system embraces digital service of documents when the opportunity is available. In instances where an email address can be obtained by Police Scotland, email service of the complaint should be the first attempted method of service. If an email address is not available then traditional methods of service of the summary complaint (by post or personal service) would be applicable.

Once service of the complaint has been effected

31. Where the accused receives a summary complaint either by email, post or by service from a police officer, instead of a citation accompanying the summary complaint as it does at present, there will be instructions directing the accused to make a plea online via the DCMS (the instruction to make a digital plea will also be accompanied by advice to the accused to seek legal advice before doing so, highlighting that a solicitor would be able to make a plea on their behalf). This replaces the traditional calling of a complaint in court for the accused person to make a plea. The process of making a digital plea is discussed further in Chapter 3.

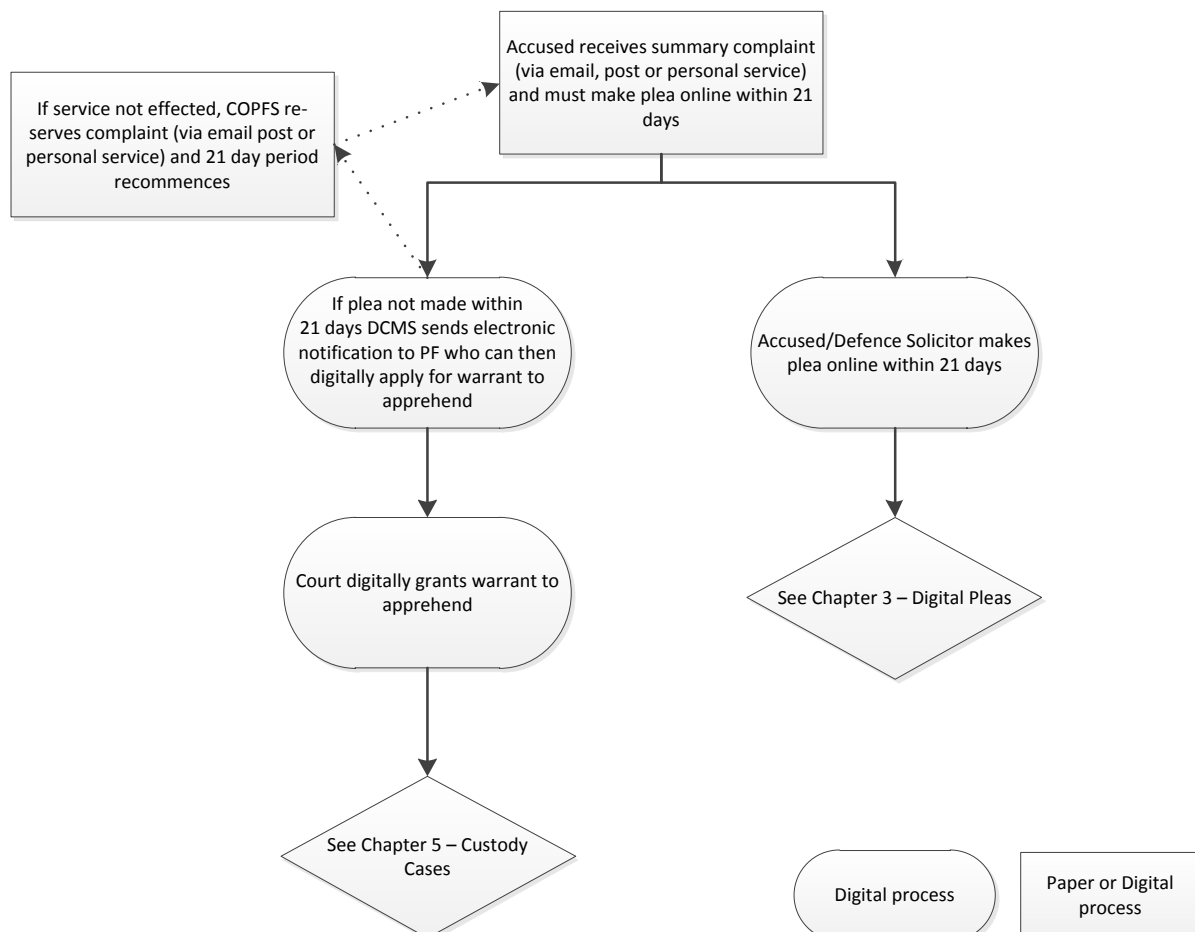
32. Should the accused fail to make a plea online within 21 days of service of the summary complaint, COPFS will be notified via the DCMS. COPFS can then request the court grants a warrant to apprehend the accused, on condition that they can provide proof of service to the court (this application for a warrant and proof of service would also be submitted digitally on the DCMS).

33. In relation to service by email, there may be several technical ways to ensure the email containing the summary complaint has been received. For example, this may be by using automatic read receipts or by directing the accused to click a box to confirm receipt of a complaint. As stated in the previous chapter, this group was not tasked with the specification of the technical solutions required to implement the new process model. It is clear that, in relation to email service, a technical solution will be

⁶ While being legislatively competent to serve the complaint by email, consideration will need to be given to the security and data protection ramifications of doing so. For example, it may be that a technical solution is not to send the complaint within the body of the email, but instead for the email to direct the accused to log-on to the DCMS to view the complaint.

required to ensure the court can be satisfied service has been effected on the accused before a warrant would be granted. If the court is not satisfied, as is sometimes the case with postal service at the moment, COPFS will have the option of instructing personal service of a copy of the summary complaint on the accused.

34. This process is summarised below:



35. There would be no time limit placed on COPFS to seek a warrant after the expiry of the 21 day period, following effective service, the accused has to make a plea.

Undertakings

36. The process of serving a complaint and making a plea online could also be applicable to undertakings. It will, however, be necessary to take into consideration the matter of what is sometimes known as “police bail”: the power available to the police to release an accused person on an undertaking to appear in court on a specified date and when doing so imposing certain additional conditions on the

accused⁷. It is important that the Court, for the duration of the summary proceedings, is able to impose its own bail conditions. It is therefore considered appropriate that in relation to accused persons released by Police Scotland on an undertaking that a first appearance in court still occurs. Once that appearance has occurred, however, and if a not guilty plea is tendered by the accused, procedure would follow along the same digital case management process as discussed in Chapter 4 of this paper.

⁷ Criminal Procedure (Scotland) Act 1995 section 22

CHAPTER 3 - DIGITAL PLEAS & DIGITAL SENTENCING

37. Once service of the summary complaint has been effected, a digital plea must be made. The making of this digital plea is the starting point for allowing ongoing digital communication with the Court, via the DCMS.

38. The majority of summary cases (roughly 85%⁸) involve an accused person who is represented by a solicitor. After making the initial plea online, solicitors will then receive digital updates in relation to the remainder of the court proceedings via the DCMS. This means ongoing digital engagement should be achieved in at least 85% of summary cases.

39. In relation to unrepresented accused it is presumed that, when making the online plea, the accused will register on the DCMS with a functioning email address at which they can then receive future digital updates in relation to the case. If an accused person does not wish to seek legal advice and does not have the means to make a plea online, he/she can attend at their local Sheriff Court building, where court staff will assist them with entering a plea, and the accused would then receive future communication regarding his/her case by letter. Before recording the accused's plea, however, court staff will reiterate to the accused the advice received with the summary complaint, suggesting he/she should seek the advice of a solicitor. If the accused wishes to speak to a solicitor at this point he/she would be directed by court staff to contact an on-call solicitor, a service which could be provided using a variety of delivery models. The accused would still have the option of instructing a solicitor to represent them after the plea is submitted.

Digital Pleas in General

40. In cases where the accused person is represented by a solicitor, a digital plea would in practice be made by that solicitor securely accessing the DCMS to enter the plea (such secure access could potentially be linked to a solicitor's smart card⁹). For unrepresented accused, the DCMS would be accessed using information provided along with the summary complaint (such as a unique code or reference number). Once accessed, the DCMS would display all the relevant charge information, including the summary of evidence, enabling a plea to be made.

41. Separately, the DEIV would allow sight of the digital evidence against the accused when it becomes available. As discussed in paragraph 13, this is important for enabling early pleas to be made, as the disclosure of evidence to the defence is regarded as one of the most important factors in bringing about the early resolution of cases, allowing the defence solicitor to provide timeous advice to the accused. It is envisaged, however, that DEIV access will only be available to solicitors and not unrepresented accused, who would need to follow traditional "disclosure by access" routes and arrange to see the evidence against them at their local COPFS office.

⁸ It is estimated between 15,000 – 20,000 accused persons are unrepresented each year. This figure however is a proxy due to the way data is recorded on the SCTS case management system in relation to solicitor representation. This figure may include persons who have legal representation at some diets but not others.

⁹ <http://www.lawscot.org.uk/members/smartcard/>

42. The remainder of this chapter presumes a solicitor would be making a plea as this is the case in the majority of summary business. If, however, the plea is being made by an unrepresented accused it should be assumed that access to the DCMS would provide the following:

- Clear “plain English” instructions on how to make a plea
- Online help functionality where the accused could seek assistance (not legal advice) from court staff in how to enter their plea
- If the accused were to decide he/she needed legal advice in relation to their plea an online link should be available to an on-call solicitor
- Clear accessibility/translation options
- Clear instructions on the next stages in the court process depending on what plea is entered, and how/when the accused will receive digital updates going forward

43. While the current letter-based plea system provides an adequate way for an accused person to enter a plea without appearance, a digital process would ensure all plea information is correctly recorded. For example, a current issue is that it is possible for an accused person to submit a plea by letter but not complete all the relevant parts of the form. This causes delay and requires follow up contact between COPFS and the accused, meaning that the case is usually continued without plea. Another common issue is for a plea to be submitted but the mitigation provided to be exculpatory. A digital system would not allow a plea to be entered until all the mandatory information has been completed on-screen and might allow a quicker communication method for COPFS to clarify inconsistent pleas with the accused.

Guilty Pleas

44. If pleading guilty, either as libelled or as a partial plea, the solicitor enters a plea on the DCMS.

45. This paper does not attempt to describe exactly how the user interface of the DCMS should work, instead it is assumed the following (or similar) will be available:

- Pleas of “guilty as libelled” or “not guilty” can quickly be made via a tick box system against the relevant charge
- Where pleas under deletion/amendment of the charge are offered there will be a simple way to input these pleas
- A tick box system for admitting or challenging previous convictions
- A field to allow the defence to input the plea in mitigation
- Relevant text fields or tick boxes to provide supplementary information. For example – to provide information on the accused’s means in order that the court might consider a financial penalty if appropriate
- The ability to lodge supporting documents such as character references

46. Where elements of the plea in mitigation or supplementary information relate to sensitive or confidential material, there will need to be a facility to ensure that these are given appropriate levels of data protection (discussed further in Chapter 9).

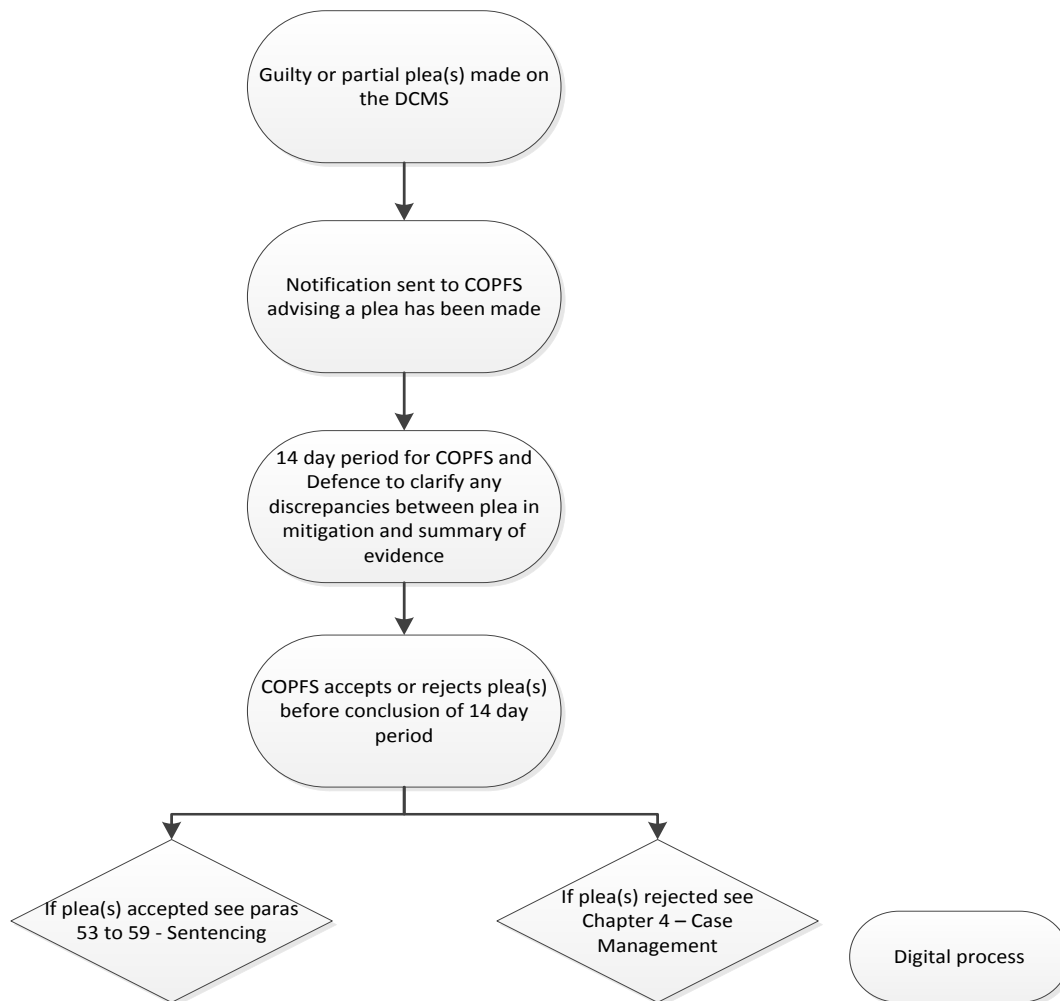
47. At this stage the defence solicitor, if they have not already done so and if appropriate for the client, should make an application for legal aid. It is imagined the DCMS will be able to provide either a direct link or access via a digital portal to the SLAB legal aid system so the solicitor can quickly and efficiently make the legal aid application at the time of lodging the plea. If a legal aid application is not made at the time of the plea, it is suggested the application should be made no later than 7 days from the plea. In turn, SLAB will grant/refuse the application within 7 days of receipt of a fully completed application.

48. Once the plea(s) and relevant details have been entered, a digital notification would be sent to COPFS advising a plea has been made.

49. Upon receipt of the digital notification COPFS will consider the plea(s) made and accept or reject it within a 14 day period. If there is any discrepancy between the plea in mitigation and the summary of evidence COPFS and the solicitor can discuss this issue within the 14 day period.

50. If the guilty plea is accepted the case proceeds to sentencing (see paragraphs 53 to 59). If the plea is not accepted the case proceeds to pre-trial case management (see Chapter 4).

This process is summarised in the diagram below:



51. While the above briefly describes a digital process for making and accepting pleas, it should also be stressed that having a digital process should not at any time preclude a phone call or face to face discussion between prosecution and defence. In a similar manner in which a solicitor and procurator fiscal may discuss a potential plea prior to the in-court calling of a case at present, it is envisaged that a solicitor will often discuss a plea with a procurator fiscal prior to lodging it on the DCMS (particularly if that plea is being offered under amendment or deletion).

52. As always, communication between defence and prosecution will allow for quicker resolution of cases. It is therefore presumed that most digital pleas would not require 14 days to be accepted or rejected by COPFS, as discussion regarding pleas will have already been held.

Digital Sentencing Following a Guilty Plea

53. Once a guilty plea has been accepted by COPFS, it should be open to the Court to sentence the accused digitally – i.e. without requiring the accused’s attendance in court. The decision to sentence digitally or in person should always be

a discretionary one for the Sheriff/JP, except where the sentence is a custodial one or where legislation requires the sentence to be delivered in court¹⁰.

54. In making the decision the Sheriff/JP will have the following available on the DCMS:

- Digital summary of evidence from COPFS replacing the current narration which at present is provided orally in court
- List of previous convictions
- Digital plea in mitigation from the defence
- Any supplementary information from the defence/accused (such as at what rate the accused could afford to pay a fine)

55. If the Sheriff/JP calls for background reports, it is envisaged these would also be available digitally to the court, COPFS and defence upon completion (and the defence would have the opportunity to digitally update the plea in mitigation after seeing the report). Should the Sheriff/JP wish to ask supplementary questions of COPFS or the defence, it is proposed this could be achieved by digital messaging on the DCMS.

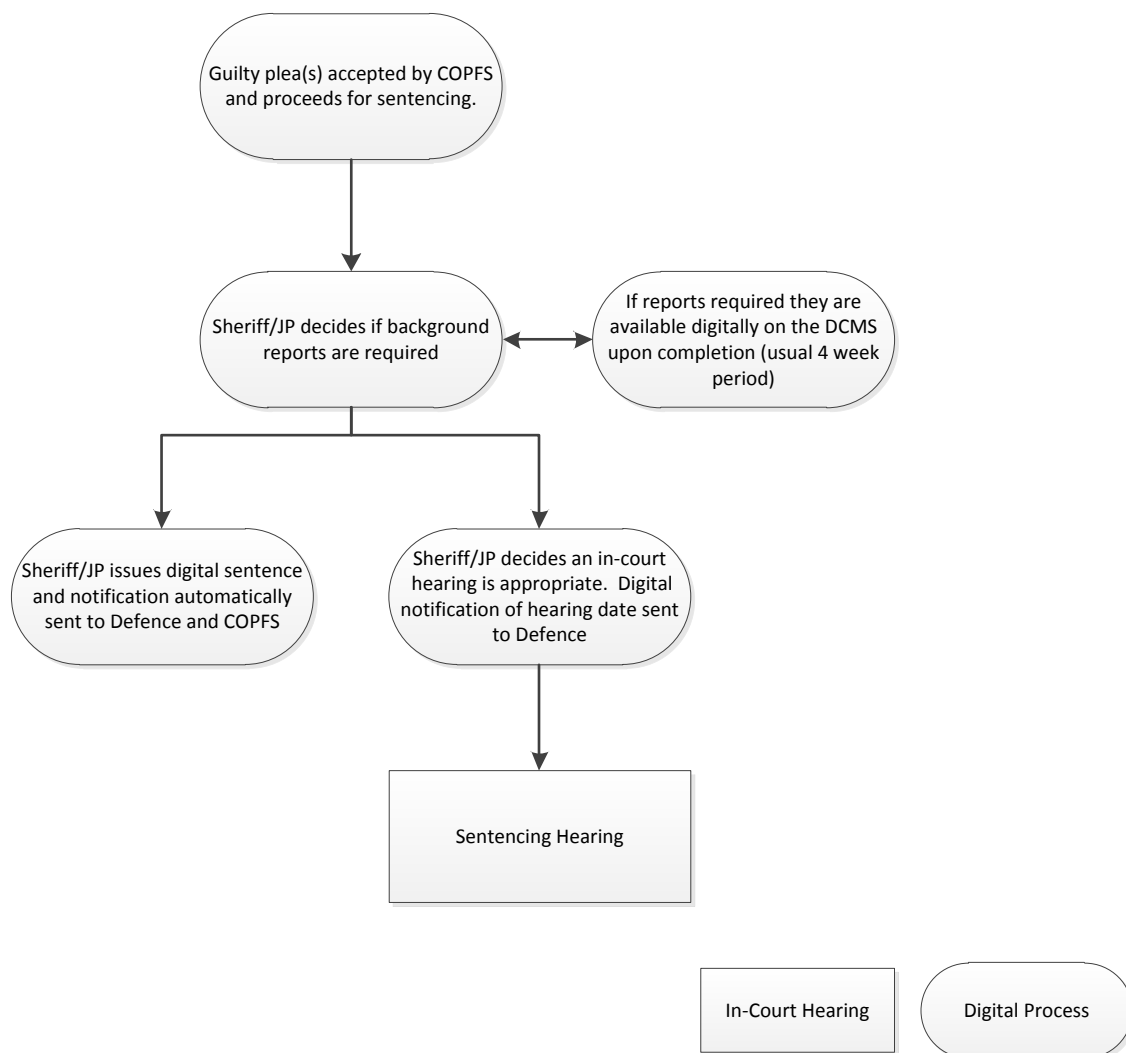
56. In deciding whether to sentence digitally, and therefore in the absence of the accused, a Sheriff/JP will, as now in relation to letter pleas, take into account matters such as the severity and circumstances of the crime and the accused's previous convictions. These would not be the sole determining factors, however. For example, it could be that a Sheriff/JP might take the view that a young offender, with few or no previous convictions, may benefit from having to appear in court. In this case it may be worth bringing the accused into court for the Sheriff/JP to give them a strong warning face-to-face, even if the ultimate sentence is an admonition. Conversely, it could be that a 2nd speeding offence by an offender merits a larger than average fine, but given that offender fully paid his/her first fine and has no other convictions, the Sheriff/JP may be happy to sentence digitally.

57. If the Sheriff/JP feels it appropriate for the accused to be sentenced digitally, the Sheriff will make the order using the DCMS. Digital notification of the sentence will be sent to the defence/accused and relevant justice organisations. This will bring the case to a close. Unless background reports are sought, a digital sentence should be issued by the court within 10 days of COPFS accepting the plea(s).

58. If the Sheriff/JP does not feel it appropriate to sentence the accused by means of a digital process, and rather wishes to see the accused in person, a traditional in-court sentencing hearing will be allocated within 28 days, and the accused will be digitally cited via the DCMS.

¹⁰ Specific consideration will need to be given to the process of lodging a digital guilty plea in relation to certain categories of offences. For example, where a guilty plea is tendered in relation to a charge that requires registration of the offender under the Sexual Offences Act 2003, then that registration occurs at the point of the guilty plea being tendered at present. Such registration may not be possible digitally and may require an in-court appearance.

59. This process is summarised in the diagram below:



Not Guilty Pleas

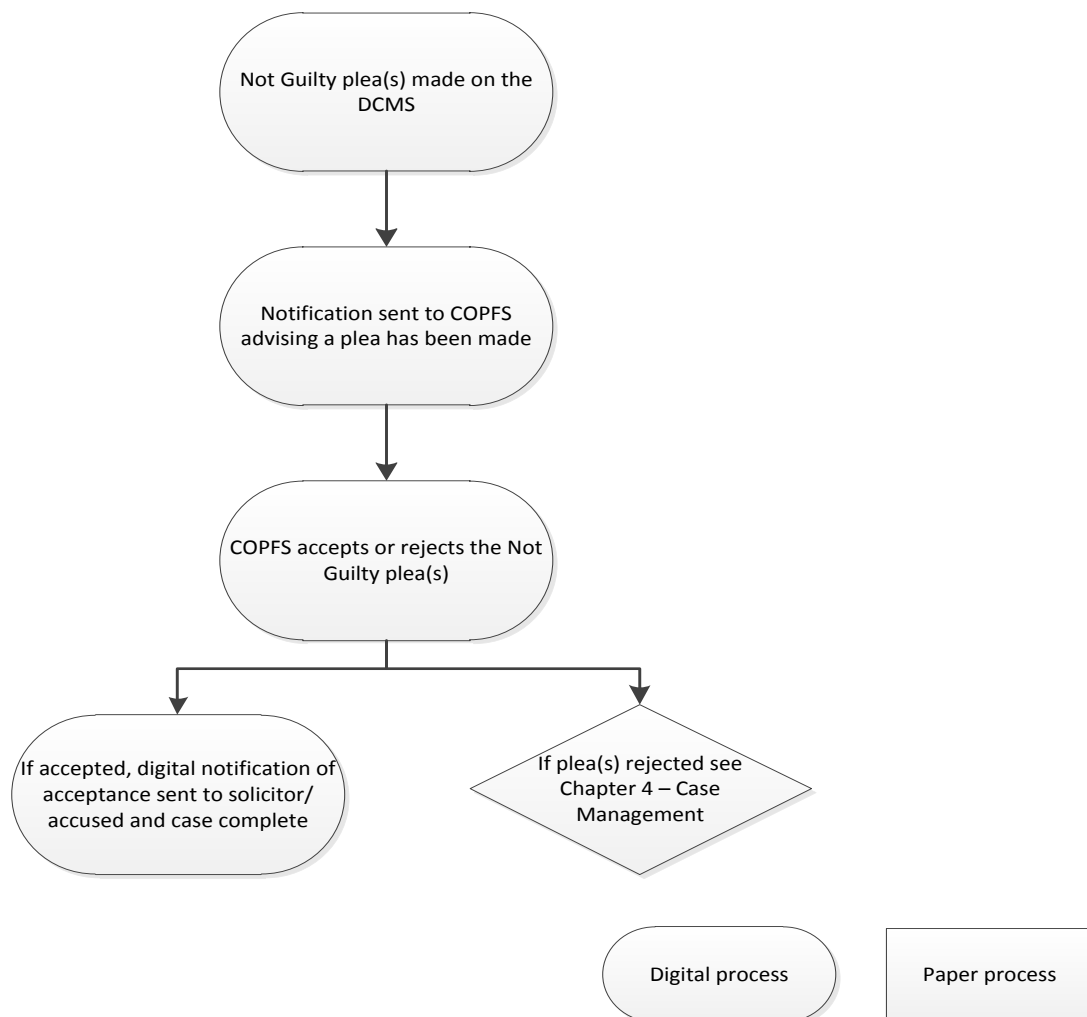
60. At present, if a plea of not guilty is tendered and not accepted by COPFS (or a full or partial plea of guilty is not accepted) an intermediate diet and a trial diet are immediately allocated.

61. Given how susceptible these diets are to churn, it is proposed that, upon the lodging of a digital not guilty plea, no future diets are set. Instead, a case would enter the case management process discussed in Chapter 4. The commencement of the case management process and its relevant time limits would begin immediately upon

COPFS rejecting the not guilty plea. The court would not be involved in the decision to allow entry of a case into the case management process.

62. If the not guilty plea(s) is accepted by COPFS, a digital notification is sent to the defence bringing the summary complaint to conclusion without the need for court involvement. There are however, only a small number of not guilty pleas accepted at the initial pleading stage (approximately 1,100 per year). It is much more likely that a case is deserted by COPFS at the initial stage of proceedings (see Chapter 7).

63. This process is summarised in the diagram below:



Preliminary Pleas

64. If a preliminary plea requires to be made (for example a plea to competency or relevancy), this will be lodged digitally on the DCMS. If the plea is opposed the court can then allocate a hearing to deal with the plea in early course. If unopposed, the court can dispose of the matter digitally.

CHAPTER 4 – CASE MANAGEMENT

65. In the current system, the practice is for an intermediate and trial diet to be allocated once a not guilty plea is tendered at a first calling or subsequent plea hearing.

66. In 2015/16 approximately 52,000 allocated trial diets called in the Sheriff Court but only 9,000 proceeded with evidence being led. In the Justice of the Peace Courts approximately 20,000 trials called but only 3,000 proceeded. The number of witnesses used in trials is not specifically recorded by any justice organisation. The *Evidence and Procedure Review – Next Steps* report estimated that the current approach means 460,000 witnesses are cited (of which 260,000 are civilian witnesses and 200,000 are police witnesses) but only 92,000 are ever required to give evidence.

67. These numbers suggest substantial efficiencies could be secured – and more so if the underlying process is appropriately modified. For example, the witness citation process in summary proceedings commences immediately upon the lodging of a not guilty plea, prior to the submission of witness statements by Police Scotland. If subsequent court diets churn, as they are prone to do, this leads to repeat citation.

68. The *Next Steps* paper proposed that instead of allocating intermediate and trial diets immediately upon a not guilty plea being tendered, a digital out-of-court case management process deals with all pre-trial procedure. The court would take on a new, more in-depth, case management role, only allowing the allocation of a trial diet and the citation of witnesses once it is content all pre-trial procedure is complete. The principal aim behind such an approach is to ensure that wherever possible, a trial diet is only allocated when it is very likely to proceed, that it will only proceed in relation to issues that are truly in dispute, and that the only witnesses cited are those required to speak to the evidence relating to the disputed issues.

How the Court’s case management role would operate

69. At present, intermediate diets give Sheriffs (or JPs with the assistance of Legal Advisors) limited opportunity to scrutinise the preparation of parties ahead of trial. This is primarily down to time constraints, where a busy court may allow little more than 2 or 3 minutes to conduct each intermediate diet due to volumes of business, and partly due to the limited information Sheriffs/JPs have before them.

70. The majority of courts utilise intermediate diet preparation forms which COPFS and the defence solicitor must complete for consideration at the intermediate diet. There is no standard form used across the country and different courts seek different information; however, most forms typically aim to capture the following:

- Are Crown and Defence fully prepared for trial?
- Has there been full disclosure?
- Have any expert reports been commissioned?
- Are all witnesses cited?
- Can any evidence be agreed?

- Expected length of trial?
- Whether an application for legal aid has been made and determined?

71. The Sheriff is unable to scrutinise most of this information in detail as he/she has no sight of the evidence at this stage of proceedings. With the introduction of the DEIV, however, there is scope for the Sheriff both to assess the extent to which uncontroversial evidence has been agreed and the steps taken to achieve this, and to challenge the parties where it appears more could be done.

72. At present a Sheriff will likely only intervene in relation to the non-agreement of evidence if the statutory procedure in relation to serving of statements of uncontroversial evidence¹¹ has been followed. Figures are not recorded by any justice organisation in relation to the numbers of these statements served. It is, however, common consensus that they are rarely used in summary proceedings.

73. If a Sheriff has readily available digital access to the witness statements and other evidence in a case via the DEIV, it should be open to him/her to challenge why certain evidence may not have been agreed.

74. As an example it is presumed that a certain percentage of witnesses, particularly police witnesses, speak to very routine matters of evidence gathering. One example of this could relate to collecting CCTV footage from its owner (often a company). In these instances the relevant police officer's statement will be particularly short and contain little information other than who owned the footage and how/where it was collected. A Sheriff performing the more in-depth case management role should be able to quickly identify via the DEIV short routine evidence gathering statements such as these (compared to lengthier witness statements) and challenge why such routine matters have not been agreed. Successfully doing so would see a reduction in police witnesses cited to trial.

75. Providing such a case management function will clearly significantly increase the amount of time a Sheriff spends considering pre-trial matters compared to the time spent presiding over intermediate diets at present. For this reason it is hoped that the timetable procedure proposed below will ensure there is adequate time for both the prosecution and defence to agree which witnesses can be agreed, and then for the Sheriff to consider the statements of the remaining witnesses that are required for trial.

How a timetable system would operate

76. Once the not guilty plea(s) is tendered, and is digitally rejected by COPFS, a timetable will be automatically generated by the DCMS outlining when key points in the pre-trial process should be completed.

77. In general terms, the timetable will require either COPFS or defence to complete certain actions within time limits monitored by the Court (via the DCMS). If

¹¹ Criminal Procedure (Scotland) Act 1995 Section 258

an action is not completed on time, the Court can allocate a Case Management Hearing allowing for shrieval intervention to keep the summary case on track.

78. Should a timetable action be completed early the remaining stages of the timetable will automatically be brought forward by the DCMS. This will allow for quicker resolution of cases rather than waiting on pre-allocated in-court hearings as would happen in the current system.

79. Similarly, if the accused wishes to change their plea to one of guilty, this can be done digitally at any point (as described in Chapter 2). The accused does not have to wait for a pre-allocated in-court hearing to tender the plea and receive a disposal which would be the case in the current system.

80. The timetable would run as follows:

81. **Step 1 – A not guilty plea is entered on the DCMS by the defence solicitor and digitally rejected by COPFS.** A timetable is then generated by the DCMS and digitally sent to COPFS and the defence.

82. Where they have not already done so, the defence solicitor must make a digital application for legal aid. This application must be made within 7 days of a not guilty plea being lodged, and granted/refused by SLAB within 7 days of receipt of a fully completed application. It is envisaged that the DCMS will be able to monitor these time limits and will be automatically updated in relation to the decision to grant/refuse legal aid.

83. **Step 2 – Full disclosure of the evidence is required within 42 days from rejection of the not guilty plea.**

84. This step assumes that disclosure is actioned to the best knowledge of COPFS at that time. The ongoing statutory duty to disclose¹² would continue beyond the 42 day period, so if any evidence was uncovered past this point it would still be disclosed later than the 42 days. Generally speaking, however, in summary cases it is unusual for additional evidence to be discovered at a late stage of proceedings.

85. It should again be noted that it is hoped the DEIV will bring about a significant decrease in the time it takes for the disclosure of evidence. It is therefore expected that the full 42 day period may not be required in every case.

86. **Step 3 – The accused has 14 days to consider his/her position in the light of the evidence made available during Step 2 in consultation with his/her solicitor.**

87. Full disclosure will enable solicitors to provide full advice to their client in relation to all the evidence in the case and not just in relation to the summary of evidence received with the complaint. It is expected that a significant proportion of cases will resolve at this stage.

¹² Criminal Justice and Licensing (Scotland) Act 2010 s123

88. Step 4 – COPFS sends to the defence solicitor, via the DCMS and within 14 days, information to commence the process of agreeing evidence.

89. If full disclosure has occurred at Step 2, and the solicitor has had the opportunity to advise their client at Step 3, it can be presumed that a trial diet is now likely required if a plea has not been entered. As such, consideration should be given to agreeing evidence of witnesses wherever possible, with a primary focus on avoiding those witnesses whose evidence is uncontroversial from being cited to court.

90. While the intention of this process is to prevent citation of witnesses (meaning that the witness' evidence is agreed in its entirety), it should be noted however this process does not preclude seeking to agree only part of a witness' evidence. While partial agreement of a witness' evidence clearly will not prevent that witness from being cited to the trial, it may still bring specific benefits (for example agreement of identification in advance of the trial would eliminate the need for dock identification at trial, and allow for the special measures of a screen or live television link to be put in place for vulnerable and child witnesses).

91. Two options emerged as the most straightforward for the purposes of agreeing witness evidence. The Working Group could not, however, reach a settled view on a preferred option. These options were:

92. Option 1 – As soon as possible, and within 14 days from the expiry of Step 3, COPFS will send to the defence solicitor, via the DCMS, a digital list of all witnesses they intend to call to trial. This is to allow the defence solicitor to make an assessment of which witnesses need not be called to trial because their evidence can be agreed (see Step 5).

93. Option 2 - As soon as possible, and within 14 days from the expiry of Step 3, COPFS will send to the defence solicitor, via the DCMS, a notice outlining which witnesses COPFS consider being capable of agreement.

94. Both options seek to establish which witnesses are capable of agreement, but they differ in which party is required to make the initial assessment of that issue. Option 1 requires the defence to make an assessment of the Crown witness list in its entirety and to identify which witnesses it views as uncontroversial. Option 2 requires the Crown first to consider their witness statements and assess which witnesses may be deemed as uncontroversial, before issuing a notice to the defence containing its assessment. This matter will require wider consultation as views differ on who this duty should fall to and where the burden and initial assessment of matters which are uncontroversial should rest.

95. Regardless if Option 1 or 2 is chosen, at this stage COPFS should also, via the DCMS, send the defence notice of any proposed supplementary applications to be made, such as vulnerable witness applications.

96. **Step 5 - A 14 day period for the defence to consider what evidence is capable of agreement. By the end of the 14 day period a Joint Record is submitted to court.**

97. The defence solicitor considers the list of witnesses (Option 1) or the notice (Option 2) with a view to agreeing if any of the witnesses would be cited only to speak to uncontroversial evidence that is not in dispute. For example, the police officer or civilian witness whose only involvement was to produce or collect CCTV evidence of the alleged offence (as described in paragraph 74) is highly likely to be considered uncontroversial and is capable of agreement.

98. As recently outlined in *Ashif & Ashraf v HMA*¹³, both parties have an obligation to take all reasonable steps to agree matters that are uncontroversial within the confines of procedure set out in current legislation¹⁴. We would propose that, whether as part of the defence solicitor's consideration of the list of witnesses (Option 1) or the notice (Option 2), any future legislation should specify this obligation, to take reasonable steps to agree matters that are uncontroversial.

99. If a witness' evidence can be agreed, the defence solicitor will notify COPFS via the DCMS (perhaps in the form of an on-screen list that a defence solicitor accessing the DCMS can one-click accept or reject), that witness' evidence is not in dispute, which would avoid the witness being cited to attend at trial.

100. If the evidence of a witness is in dispute, whether partially or in its entirety, the defence solicitor would signify on the DCMS that witness' evidence cannot be agreed, and it would then be a matter for COPFS whether that witness is required for trial.

101. Additionally at this stage the defence will also, via the DCMS, consider any supplementary applications received from COPFS such as vulnerable witness applications. These could be listed on the DCMS for simple one-click acceptance or rejection by the defence. At this point the defence will also send to COPFS, via the DCMS, a list of any defence witnesses to be called and notice of any special defence.

102. At the conclusion of the 14 day period COPFS will lodge a digital Joint Record confirming all matters that have been agreed including a final list of witnesses and supplementary applications. Discussion between COPFS and defence may be useful at this stage to ensure accuracy of the Joint Record. The Joint Record will also include all other standard information the court would require to know at this stage of proceedings, such as the anticipated length of the trial diet. While in traditional paper terms creation of this Joint Record may prove time-consuming, it is envisioned that the DCMS will amalgamate matters agreed by the defence into a prepared digital Joint Record for COPFS to submit.

¹³ *Ashif & Ashraf v HMA* 2015 HCJAC 100

¹⁴ Sections 257/258 of the Criminal Procedure (Scotland) Act 1995

103. Step 6 - The Sheriff will consider the digital Joint Record within 14 days of it being lodged.

104. At this stage the Sheriff will perform the case management function discussed above in paragraphs 69 to 75. If after considering the Joint Record, seeing the history of communication between COPFS and defence on the DCMS, and viewing any relevant statements and evidence available on the DEIV, the Sheriff is content all reasonable steps have been taken by Crown and Defence to agree if any witness evidence can be considered uncontroversial, the Sheriff will direct a trial diet be allocated and that witnesses be cited.

105. If the Sheriff is not content, he/she may allocate an in-court Case Management Hearing to discuss matters with parties.

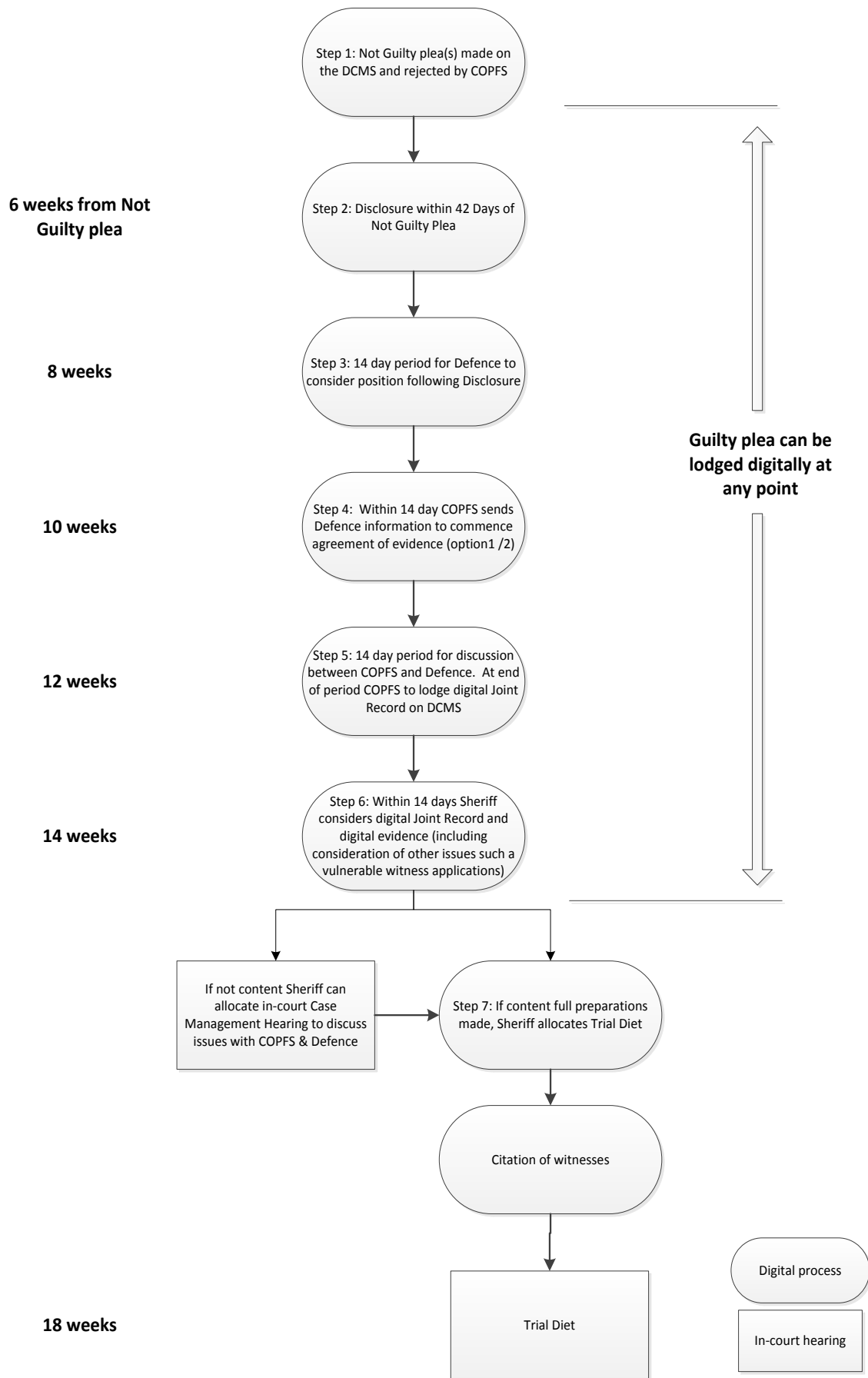
106. Step 7 - A trial diet is allocated approximately 28 days hence.

107. A DCMS that can access the diary/scheduling information from solicitors enrolled on the DCMS and Police Scotland witness scheduling information should be able to minimise inconvenience and automatically allocate a trial diet where all (or at least most) witnesses are available. Notification of the trial date is sent digitally to parties, and witnesses are then cited by COPFS (the citation of civilian witnesses is discussed further in Chapter 10).

108. The citation of witnesses at this much later stage of proceedings should allow COPFS to only cite witnesses to speak to the evidence that hasn't been agreed as part of the case management process. It can reasonably be anticipated that it will mean a reduction in witnesses cited, compared to current procedure where all witnesses are cited upon the lodging of a not guilty plea.

109. The later citation of witnesses may also see some improvement in witness attendance rates at trial, as it will provide a more immediate reminder of the date of a trial diet, in contrast to what is often several months between the date being communicated to the witnesses immediately following a not guilty plea, and the trial diet.

110. The timetable is shown in the following diagram:



Altering the timetable

111. Should either COPFS or the defence require an extension to a time period within the timetable, an application for extension can be made by motion procedure. The party seeking the change to the timetable would specify the length of extension sought and the reason for requiring it. Such a motion would be made digitally on the DCMS.

112. Notification of a motion being lodged would automatically be sent from the DCMS to the other party who would have the opportunity to oppose the motion within 48 hours of receiving notification.

113. If no opposition to the motion is lodged on the DCMS, the extension to the timetable is automatically granted. The DCMS would alter the timetable automatically and parties would be notified of new time periods.

114. If opposition to the motion is lodged on the DCMS, notification will be sent from the DCMS to the clerk of court who will then allocate an in-court Case Management Hearing where the Sheriff will hear submissions from parties in relation to the application for extension.

115. Should a timetable period default and there has been no application for extension, this will be flagged by the DCMS. The clerk of court can then make enquires as to whether a motion for extension will be forthcoming. If it is not then the clerk will allocate a Case Management Hearing where parties will be expected to explain the timetable lapse to the Sheriff.

116. Should the trial diet require to be adjourned (for example due to witness non-attendance) after the case has passed Step 7, a new trial diet can be allocated by the court at the earliest convenient date, which it is hoped would, in most cases, be within four weeks. The Court should however consider commencing the trial diet on the original day if at all possible with a view to part-hearing the trial, to minimise inconvenience to those witnesses that did attend.

Changes of Plea During the Case Management Process

117. At any point during the case management process, up to the point of the allocation of the trial diet, the accused can make a plea of guilty. This would be submitted on the DCMS as per digital pleas discussed in Chapter 3. Such a plea, if accepted, would bring a halt to the case management process and cancel the remainder of the timetable events.

118. If a plea is to be tendered after the allocation of the trial diet (Step 7), that plea should be made at the date of the diet (although if a plea is agreed between the Crown and defence in advance of the diet, witnesses could still be countermanded).

Enforcing the timetable

119. It is important that all those involved in the process: Police Scotland, COPFS, SCTS, the judiciary, the legal profession and the accused adhere to the timetable. A key benefit sought by introducing a timetable is to prevent the delay and churn within the current system where case preparation is often not complete by the time the Sheriff considers a case at the intermediate diet.

120. Current provisions are often seen to be deficient as a result of the absence of sanctions available to the court where there is non-compliance. It is therefore suggested that further consideration should be given to the possibility for sanctions.

121. In relation to COPFS, a possible option might be for the Sheriff to have a power to bring an end to proceedings if it is viewed, after a breach in the timetable, that there has been unnecessary delay on the part of COPFS in conducting the prosecution.

122. In relation to defence solicitors, one option may be for the Sheriff to instruct that notification of the solicitor's failure to comply with a timetable step or action be sent by the clerk of court to SLAB for consideration in the context of the firm's quality review and their ongoing registration to provide legal aid. Consideration will also need to be given to sanction for cases where legal representation is privately funded.

Case Management in the Justice of the Peace Court

123. Consideration requires to be given to the suitability of the Justice of the Peace courts in relation to delivering the type of case management discussed in this chapter.

124. The introduction of more proactive judicial case management fundamentally alters the nature of the process. The question then arises of how Justice of the Peace court cases would be managed prior to trial, in particular whether lay JPs can reasonably be expected to exercise this enhanced function.

125. One option may be to enhance the case management role of the legal advisor, who would have to consider whether all case preparation has been completed (Step 6 in the timetable); assess whether there have been any lapses in case preparation; and enforce any breaches of the timetable through imposing the appropriate sanction. The legal advisor is, however, not a judicial office holder, and such an approach may extend their duties too far into the realm of judicial decision-making.

126. This might be addressed by having a legal advisor sitting with a JP (as the judicial office holder), to deliver the management of a case together. This would, however, require JPs to be available on a much more regular and flexible basis than they are at present in some courts. A primary driver of the timetable procedure is to ensure summary business is dealt with digitally as soon as it can be, and not waiting for pre-allocated in-court hearings as happens in the current system.

127. The alternative, and recommended, option is that for the purposes of case management within the Justice of the Peace courts case management is conducted by Summary Sheriffs exercising their concurrent jurisdiction¹⁵. Once the case management process is completed, the complaint will be allocated for trial before a JP.

¹⁵ Courts Reform (Scotland) Act 2014 section 129.

CHAPTER 5 – CASE MANAGEMENT: CUSTODY CASES

Not Guilty Pleas at the Initial Custody Appearance

128. The *Next Steps* paper proposes that an accused person appearing from custody would do so only to enter a plea and have the question of his/her liberty determined by the court. No future diets would be assigned in relation to a not guilty plea, and the case would enter the case management process as described in Chapter 4 (albeit with shorter time periods as an accused person may only be held in custody in relation to summary proceedings for 40 days).

129. While the importance of adhering to the case management timetable is discussed in Chapter 4, it is impossible to predict how often timetable events will default past their specified time limits. Keeping in mind the requirement for a custody trial to be held within 40 days, the view in the *Next Steps* paper was therefore reconsidered.

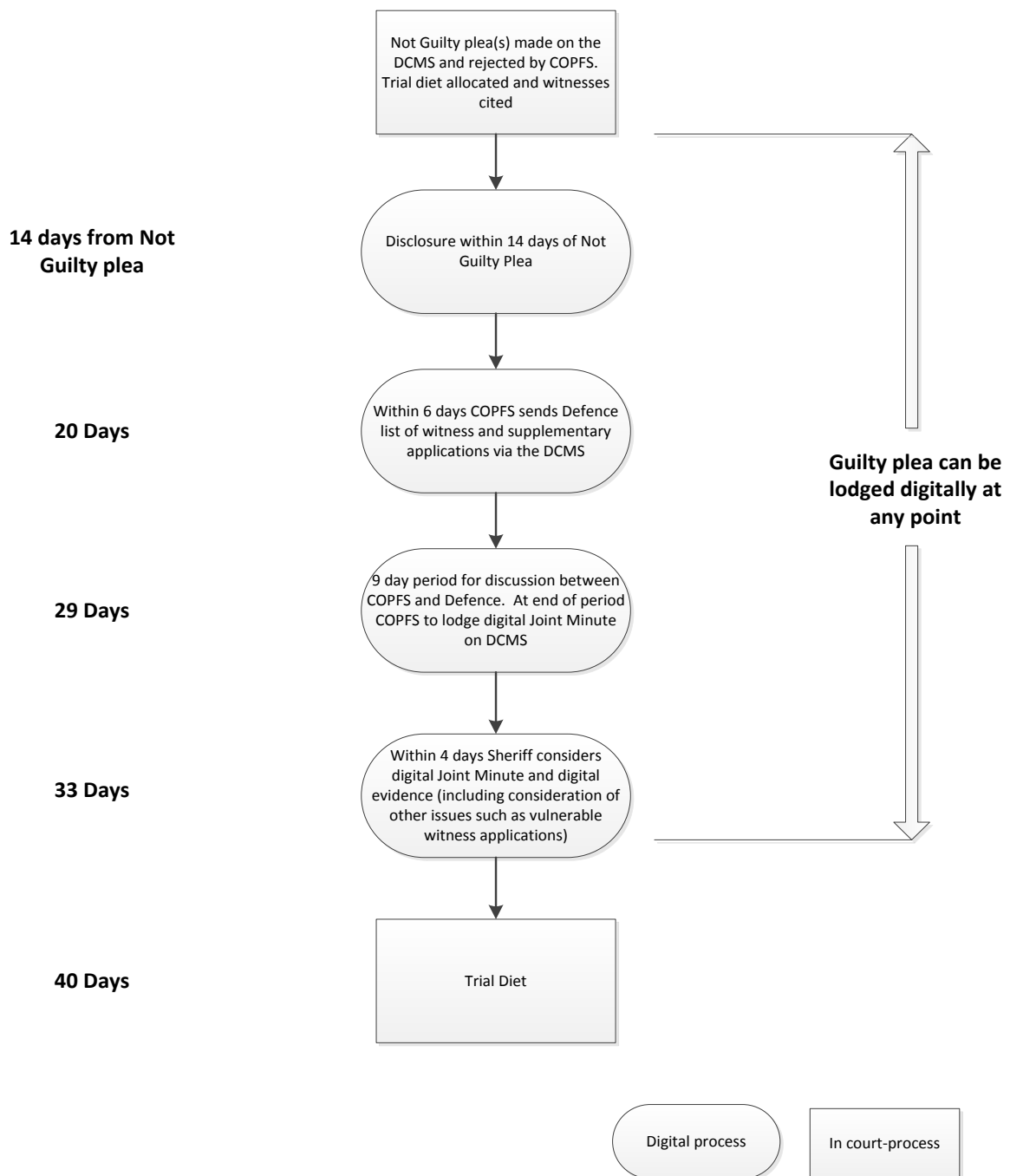
130. One question arising is just how susceptible custody cases are to churn using the current model of allocating an intermediate diet and trial diet upon the lodging of a not guilty plea. It is estimated approximately 700 intermediate diets repeat (churn) in relation to custody cases each year – this is less than 20% and favourable compared to diets repeating in 39% of summary cases more generally. Very few custody trial diets repeat, primarily due to there being no time to re-allocate a trial diet before the expiry of the 40 day period.

131. While it is impossible to say with certainty, it is speculated that the fact that a custody trial must occur within 40 days is a strong driver for COPFS and defence to ensure preparation for trial is completed timeously, compared to non-custody summary cases.

132. This lower instance of churn could still be improved upon, however. It is therefore suggested that the process for custody trials should broadly mirror the case management process discussed in Chapter 4 with a view to ensuring pre-trial discussion and agreement occurs between COPFS and defence. The two significant differences to the model in Chapter 4 would be that 1) a trial diet would be allocated, and witnesses cited, when a not guilty plea is tendered to ensure the right of the accused to a trial within 40 days is protected and there is adequate time to cite witnesses before that trial. 2) The defence are not afforded a two week period after disclosure to discuss matters with their client. With video conferencing now available in all Scottish prisons it is envisaged any necessary conversation between solicitor and client can occur more expeditiously in custody cases.

133. The allocation of a trial diet and related 40 day time limit would mean little room for variation of the timetable by motion procedure. It would also mean the case management role of the Sheriff is diminished as a trial diet is already allocated. It would, however, still allow the Sheriff to challenge parties in relation to the agreement of evidence with the hope of countermanding witnesses cited for the trial that are not truly needed.

134. The timetable is illustrated in the following diagram:



Guilty Pleas at the Initial Custody Appearance

135. As is the current situation, when a guilty plea is tendered by an accused person on his/her first appearance from custody (and said plea is accepted by COPFS), the Court has the option of sentencing immediately or deferring sentence (e.g. for background reports). This would not change under the new model. The Sheriff would, however, have the option of allowing any deferred sentence to be issued digitally rather than requiring a court appearance should he/she think it is appropriate.

CHAPTER 6 – CASE MANAGEMENT: UNREPRESENTED ACCUSED

136. Unrepresented accused will always require extra attention from the court due to the fact they do not have legal support to explain procedural/evidential rules and the court process.

137. It is the Court's duty to ensure that an unrepresented accused receives a fair trial and, accordingly, to guide him/her in such a way that allows for an adequate airing of their defence. Equally, it is the Court's duty to ensure that justice for a victim is not delayed by an unrepresented accused either ignoring or delaying court procedure, or by allowing an incompetent defence to be put forward.

138. Current legislation¹⁶ militates against any meaningful agreement of evidence between COPFS and an unrepresented accused. This is because there is an inherent risk in the advantage experienced lawyers would have over unrepresented accused persons when discussing evidential matters as part of any case management process.

139. It is therefore suggested that, in contrast to the type of case management discussed in Chapters 4 and 5, the Court should have a more face-to-face role with unrepresented accused rather than allowing the process to be conducted digitally. This would initially be achieved by allocating an in-court case management hearing following the accused making an initial not guilty plea digitally.

140. The benefit of not allocating the case management hearing until after the initial digital plea is made means that those accused pleading guilty at the first opportunity (approximately 20,000 unrepresented accused) still have the potential to be dealt with digitally should the Sheriff/JP wish to sentence digitally as discussed in Chapter 3.

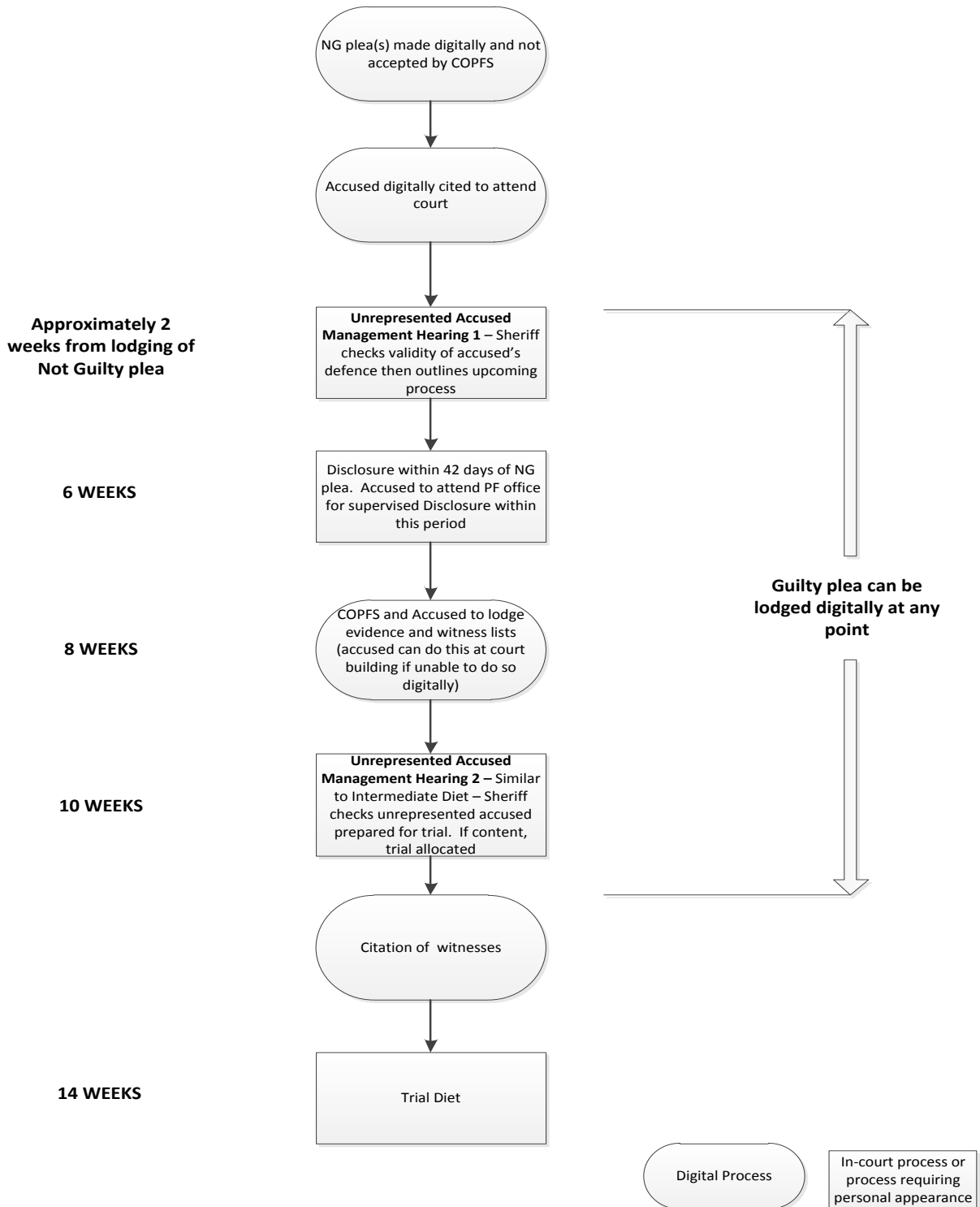
141. At the Case Management Hearing, the Sheriff would have the opportunity to enquire with the accused about the nature of their defence and outline the next procedural steps in the process. It is hoped that the Sheriff, performing perhaps a slightly more inquisitorial role than currently he/she has time to do at an intermediate diet, will be able to flush out any incompetent or spurious defence. Doing so at this stage, before the allocation of a trial diet, will in some instances prevent the need for a trial and the citation and inconvenience of witnesses.

142. A second Case Management Hearing would take place following disclosure and the lodging of witness lists. This hearing would provide a similar function to an intermediate diet with the Sheriff checking that both parties (particularly the unrepresented accused) are prepared for trial. The Sheriff will of course have the added benefit of the evidence being available on the DEIV. Only if the Sheriff is content full preparations are made will a trial diet be allocated and witnesses cited.

143. If this approach were to be adopted it may be worth considering, particularly for larger courts, dealing with all unrepresented accused on the same days, perhaps

¹⁶ Criminal Procedure (Scotland) Act 1995 Section 257 (2)

as part of an “Unrepresented Accused Court”. While this court would no doubt proceed more slowly than average, it should allow Sheriffs the time in dealing with unrepresented accused which is often restricted due to the volume of business in some courts.



CHAPTER 7 – DESERTION OF A CASE BY COPFS

144. COPFS currently has the ability to desert a case in three ways:

- 1) By directing the Court to treat a case as Not Called. This, as it sounds, involves the clerk of court not calling a case despite it having an allocated hearing for that date. If a case does not call in court on the allocated date, it falls. COPFS may have the option of re-raising the case at a later date subject to preliminary challenge.
- 2) Desert Pro Loco et Tempore (DPLT). This is where COPFS has decided not to proceed against the accused for the time being, and makes a motion to the Court asking to desert the case. This motion may be opposed by the Defence. COPFS may have the option of re-raising the case at a later date subject to preliminary challenge by defence.
- 3) Desert Simpliciter (DS). This is where COPFS has decided not to proceed against the accused, and makes a motion to the Court asking to desert the case. A case which is deserted simpliciter cannot be re-raised. It should be noted however that COPFS rarely use this option and where it is counted in the table below, most instances of a case being DS will be on the motion of the defence or of the Court's own accord.

145. These methods are used to varying degrees in the current court process:

	2013-14		2014-15		2015-16	
Count of verdicts per accused person per complaint	JP Court	Sheriff Court	JP Court	Sheriff Court	JP Court	Sheriff Court
Summary New						
<i>Not Called</i>	5144	800	6897	661	3773	598
<i>Deserted pro loco et tempore</i>	168	47	105	43	98	42
<i>Deserted Simpliciter</i>	65	7	76	1	28	7
Total	5377	854	7078	705	3899	647
Continue without plea						
<i>Not Called</i>	3510	603	3767	591	2815	559
<i>Deserted pro loco et tempore</i>	289	153	183	96	156	112
<i>Deserted Simpliciter</i>	60	10	70	14	36	3
Total	3859	766	4020	701	3007	674
Intermediate diet						
<i>Not Called</i>	1102	2082	1394	2350	1456	2257
<i>Deserted pro loco et tempore</i>	203	799	207	535	177	441
<i>Deserted Simpliciter</i>	22	58	35	60	41	50
Total	1327	2939	1636	2945	1674	2748
Trial						
<i>Not Called</i>	1801	2844	2160	3432	2591	4462
<i>Deserted pro loco et tempore</i>	418	1509	331	1474	352	1513
<i>Deserted Simpliciter</i>	492	1289	879	2050	1040	1771
Total	2711	5642	3370	6956	3983	7746

146. With the digital plea system and digital case management models discussed earlier in this paper it is clear that the methods of deserting a case would have to change. Primarily, COPFS' preferred method of disposing of a case by way of treating it as Not Called would cease to exist as there will be no specific pre-trial hearing dates to "Not Call" a case on.

147. Instead it is suggested that COPFS be able to digitally withdraw a case on the DCMS at any time prior to the trial diet (and upon doing so a digital notification would be sent to the defence/accused had they appeared in the case by that point). Similarly to a case being not called or DPLT, COPFS would, assuming it otherwise to be competent, have the option to re-raise a case in the future after such a digital withdrawal.

148. While the defence have the opportunity to object to a DPLT motion in the current system, the numbers in the above table show relatively few cases are DPLT pre-trial. Of those numbers it is not recorded how many motions to DLPT are opposed by the defence but it is assumed to be a very low proportion.

149. If a case reaches the point of the trial diet COPFS should no longer be able to digitally withdraw the case. Instead, the traditional methods of deserting a case on the day of the trial diet would apply.

150. As an aside, it is suggested that, in a digital process, and in an era where access to justice for all is generally held to be something to be aimed for, it would be appropriate to replace the Latin names for these disposals with plain English versions.

CHAPTER 8 – LEGAL AID

151. The scope of the proposals¹⁷ means that it is likely that there will have to be changes to the way the legal aid system is designed. Since the enactment of the Legal Aid (Scotland) Act 1986, the legal aid system has developed to facilitate changes to the current summary criminal justice system, its processes and the actions to be taken by those involved. However, the legal aid system, as currently designed, will not be able to facilitate the changes in practice and procedure which are required to make the proposals succeed. The changes to legal aid proposed here would require primary legislation and would be an opportunity to streamline the legal aid system.

A single type of legal aid

152. Currently, to obtain publicly funded representation, an applicant must apply for Assistance by Way of Representation (ABWOR) for guilty pleas or summary criminal legal aid for not guilty pleas. The different legal aid types have different tests and different processes; some are granted by the solicitor and others by SLAB. The different tests and processes mean that there can be differences in who will qualify and they act as drivers for decisions on the plea the accused will make. Consideration should be given to creating one type of legal aid to remove these differences.

153. A single type of legal aid application could be made to SLAB after receipt of the complaint, regardless of the type of plea, and before the accused person and their solicitor have considered the plea to be made. Regardless of the plea, an application would have to be made within 7 days of the plea and would be monitored as part of the case management process.

154. Consideration would have to be given to the tests to be met to qualify for a single type of legal aid. Currently, there are different financial tests and different 'Interests of Justice' tests for ABWOR (guilty pleas) and summary criminal legal aid (not guilty pleas). Some issues for consideration are outlined below.

Simplified financial test

155. A single legal aid type would suggest the development of a single financial test. Consideration would have to be given to whether this should be the current summary criminal legal aid test (administered by SLAB), the current ABWOR test (administered by the solicitor) or a new test.

156. Eligibility levels will have to be set by the Scottish Government; however, consideration could be given to making it simpler to assess disposable income by using standardised allowances for standard household expenditure, thereby removing the need for verification of expenditure.

¹⁷ The proposals begin from the point a complaint is served. Therefore, this section on legal aid excludes consideration of the legal aid which will be available for police station advice. This will be the subject of separate work by the Scottish Government and SLAB.

A re-focussed Interest of Justice test

157. It may also be necessary to re-consider the factors to be assessed in an 'Interest of Justice' test. For summary criminal legal aid, the accused who pleads 'not guilty' must have a non-frivolous defence. It may be appropriate to consider whether that will still be relevant in the proposed system with its emphasis on the early availability of evidence and the work to be done by the solicitor in the early stages to analyse that evidence, communicate with their client about the appropriate plea and to engage with COPFS.

158. This suggests that the focus of the 'Interest of Justice' factors should perhaps be on the nature and circumstances of the accused person and their ability to either present their defence or to raise issues in mitigation.

159. Changing the tests (either financial or interests of justice) may result in some more people qualifying for legal aid and therefore additional legal aid costs.

160. The new proposals are designed to ensure work is done at the earliest stages of the case. Therefore, the earlier that legal aid is in place, the earlier a solicitor can begin work. Not all applications for summary criminal legal aid are received within timescales currently requested by SLAB. To encourage a change in practice and to ensure that the legal aid process operates for the benefit of the new proposed procedures, the new proposals suggest that there should be timescales within which legal aid should be applied for and granted.

Accused persons appearing from custody

161. Where an accused person appears from custody, there is insufficient time to apply for legal aid and the accused person requires a form of legal aid to be available immediately. Currently, a duty solicitor or the 'appointed solicitor' can provide publicly funded legal assistance for accused persons appearing from custody. The duty solicitor process is straightforward and would require little adjustment. ABWOR is used by the appointed solicitor. Under the proposal to have a single type of legal aid, if a simplified financial test and a re-focussed 'Interest of Justice' test are designed to be easily applied by the appointed solicitor, this could smooth access to legal assistance to those appearing from custody who have a prior solicitor-client relationship. Alternatively, a form of automatic legal aid could be developed to cover the appearance with a follow-up application of tests by SLAB for any subsequent procedure.

Fee structure

162. Currently, solicitors are paid a fixed fee for summary criminal legal assistance. It is proposed that a fixed fee structure remains. To encourage and appropriately award the work that needs to be done at the earlier stages, one option would be that the fixed fee is split and an interim payment is due at the end of the case management process. The second part of the fee could be due at the end of the case, if the case passes Step 7 when a trial diet is scheduled.

CHAPTER 9 – ONLINE PUBLICATION AND TRANSPARENCY OF A DIGITAL SYSTEM

163. The previous chapters in this paper describe a model that, if working optimally, will see the majority of traditional pre-trial hearings being conducted digitally between the Court, COPFS and defence agents. Many cases will be disposed of digitally. This is in contrast to the current position where all summary criminal business following the service of a summary complaint is conducted in open court.

164. While it is well known to court professionals that our courts do not commonly see any attendees other than accused persons and press reporters, the fact that courts remain open to the public is an important part of transparency in our justice system. It is a commonly used phrase that “justice must be seen to be done” and a digital system should adhere to this principle.

165. There are, however, differing views on how such transparency in a digital system can be achieved.

166. One option would be to automatically publish information regarding summary cases on the SCTS website. Some consideration has been given to the appropriate information for publication. As a general starting point, the new approach should not provide less information than is currently available through attendance at an open court. For example, in relation to a guilty plea the DCMS would publish the following:

- The charge(s) on the summary complaint
- The digital summary of evidence from COPFS
- The digital plea in mitigation from the defence
- The sentence from the court

167. There will, however, need to be care taken in relation to information that is sensitive, confidential or prejudicial to any party. This applies to information submitted by both COPFS and the defence. A plea in mitigation may, for example, make reference to an accused’s medical history or personal financial circumstances, some of which may be confidential. Equally, on occasion COPFS will wish to let the court know that an accused person has been assisting Police Scotland with their enquiries. This may place them at risk from other parties. This information is usually submitted in court by a written note to the bench. This will instead need to be communicated to the court via the DCMS; it will be essential to ensure that this information is protected so that the DCMS does not automatically publish it upon completion of the case. Similarly, applications to prevent or restrict disclosure, or hearings involving Special Counsel¹⁸ will need to be protected from publication by an automated system.

168. While such a practice of publicising what would have been heard in open court has clear benefits in relation to transparency of the system, and for victims

¹⁸ Criminal Justice and Licensing (Scotland) Act 2010 sections 146 to 152

finding out what has occurred in cases, it does however need to be carefully considered and may have adverse consequences.

169. For example, it could be that publication of the details of a case (albeit with a victim's name redacted) causes more emotional damage to the victim who may wish to simply put the incident behind them.

170. Similarly, as publication of details of a case on the internet is difficult to remove, this may have lasting impact on the offender and impact on prospects of successful rehabilitation in some instances. There is also consideration to be given in relation to the expiry of previous convictions and how publication of sentencing information on the internet may provide a more permanent marker against the accused than the conviction itself.

171. The issue of transparency of the justice system is one so fundamental that it will require full public consultation and careful consideration by the Scottish Government. What can be agreed however is that simply not making any information available in relation to cases disposed of digitally is unacceptable and denies public awareness as to the administration of justice.

CHAPTER 10 – DIGITAL INTERACTION WITH VICTIMS AND WITNESSES

172. A recommendation in the 2011 Audit Scotland¹⁹ report was that victims and witnesses should be kept better informed about what is happening in their case – and this has been a driver for criminal justice organisations for some time.

173. While the COPFS Victim Information and Advice (VIA) service provides personal updates and advice to child complainers and to complainers of crime in cases of domestic abuse, hate crime and sexual crime, the vast majority of witnesses receive only a citation in relation to a summary complaint advising them when they are required to appear at court to give evidence.

174. The ‘Getting People to Court’ Project saw the introduction of a scheme in which COPFS sends text messages to some witnesses to remind them when to come to court to give evidence. This acts as a follow up to the paper citation, and relies on the witnesses providing their mobile phone numbers to Police Scotland at the time that their witness statement is taken. This scheme currently sees 41% of witnesses provide their mobile phone number to Police Scotland.

175. It is conceivable the introduction of the DCMS could provide more regular updates to a witness should they wish to receive them. Automatic updates could be generated for the following:

- Advising the witness if a not guilty plea is lodged and that the case is entering a case management process. Future updates would be sent
- Update when/if a trial is allocated including citation information (discussed further below)
- Advising the witness if a guilty plea has been lodged and that they will no longer be required to attend at a trial diet
- Advising the witness when a sentence is issued and what that sentence is

176. It may be that the information in such updates (particularly the citation information) would be too lengthy to send by regular text message, and would need to be sent by email. Witnesses would therefore have to be willing to supply their email address to Police Scotland if they want to receive this service.

Citation of the witness to the trial diet

177. From the point of view of the efficiency of the system, arguably the most important information a witness receives is the time/date when they are required to appear at a trial diet.

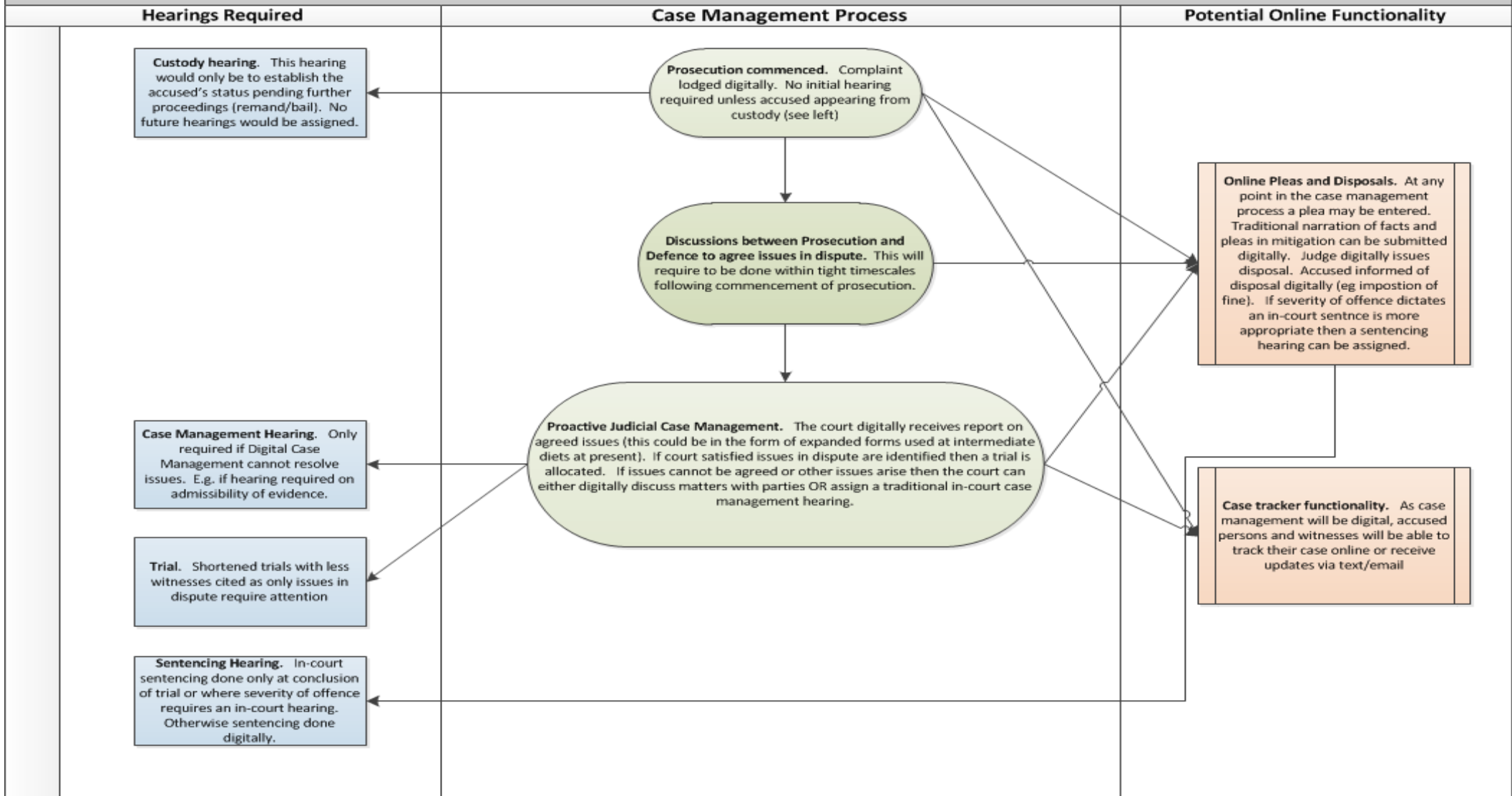
178. When the trial diet is allocated in the case management process discussed in Chapter 4 it would be desirable if witnesses were digitally cited (this could be done through the DCMS).

¹⁹ Audit Scotland, “An overview of Scotland’s Criminal Justice System” published September 2011

179. To enable this to occur Police Scotland would have to ensure contact email addresses are taken from civilian witnesses. While this is susceptible to some of the same problems with accurately recording email addresses for accused persons (discussed in Chapter 2), it is suggested that Police Scotland, as a matter of practice, record email addresses of witnesses if available with a view to allowing digital citation of those witnesses at the point of allocation of the trial diet in the case management process.

180. Over time it is hoped that the use of email addresses as a point of contact for witnesses will become more prevalent. This will allow more information to be communicated to witnesses than they receive at present, and will keep them better informed, hopefully minimising stress and inconvenience which being involved as a witness in a criminal case may cause them.

What a Digital Case Management Process Might Look Like – Summary Proceedings



ANNEX B – MEMBERSHIP OF THE WORKING GROUP

The Working Group comprised the following:

- Andrew Allan, Superintendent, Police Scotland
- Janet Blackstock, Sheriff Clerk, SCTS
- David Dickson, Justice Directorate, Scottish Government
- John Dunn, Deputy Crown Agent, COPFS
- Marie-Louise Fox, Director of Operations, SLAB
- Catherine Fraser, Legal Advisor, SCTS
- Peter Lockhart, Solicitor, Law Society of Scotland
- James Mulgrew, Solicitor Advocate, Law Society of Scotland
- Sheriff Principal Duncan Murray
- Sheriff James Williamson

Meetings of the Group were facilitated by the project team of Tim Barraclough, Chief Development and Innovation Officer, Scottish Courts and Tribunals Service, and Chris Crowther, seconded to SCTS from Scottish Government Justice Directorate.

ANNEX C – INTERIM SYSTEM IMPROVEMENT MEASURES

It is acknowledged that it will take some years to introduce the model outlined in the preceding chapters. This is due to the time that would be required not only for the development of IT systems and the passage of legislation, but also for the promotion, training and support needed to assist all those used to dealing with summary procedure in its current format to adapt to new procedures and modes of working.

The members of the Working Group recognised that interim measures might bring about improvements in the system and also assist in moving towards a digital summary justice system. The Working Group believed there was merit in these being explored further.

Listed below is a summary of these suggestions. It should be noted that these suggestions were not discussed in depth by the Group and they have not been evaluated in any great detail at this stage. Rather they represent suggestions offered by members of the Working Group for further development. Significant work is still required to evaluate them further, to consider the viability of the options and, where appropriate, develop potential implementation strategies. There may also be other opportunities or initiatives that should be considered. SCTS will initiate a project in 2017 to examine the scope for such interim measures to be tested and applied.

- Introduction of a Summary Practice Note, similar to that introduced for Sheriff and Jury Procedure, designed to promote and encourage early engagement of the parties in case preparation and management.
- Piloting the increased use of Statements of Uncontroversial Evidence to see what impact this has in relation to the agreement of evidence.
- Piloting the allocation of a trial diet only after the Sheriff is satisfied at the intermediate diet that case-preparation is complete.
- Seeking to encourage the use of letter pleas and sentencing in absence on the basis of a letter plea. This might be incorporated in a Practice Note.
- Commencing trials, recognising these may be part heard. This allows witnesses who have attended to give their evidence and avoids them being re-cited. The fact a trial will be commenced may result in a last-minute plea in any event which concludes matters. While there are some challenges in fixing the continued trial diet these can be overcome. This might be incorporated in a Practice Note.
- Consideration of whether a trial should be adjourned where a warrant is granted following the nonappearance of an accused at an intermediate diet. This might be incorporated in a Practice Note. (This will require the police to be proactive in enforcing the warrant between its grant and the trial date)

- Police Scotland should routinely attempt to obtain an email address from accused persons and witnesses. This will allow the piloting of electronic service of the summary complaint and witness citations.
- Piloting allocation of a hearing when an unrepresented accused submits a not guilty plea via letter. An early in-court hearing should be fixed to allow the Sheriff the opportunity to enquire with the accused about the nature of their defence and outline the next procedural steps in the process.
- A greater use of joint minutes to accelerate diets and enter pleas/cancel witnesses in advance of trials. These could be lodged using email/electronic signatures.
- Focusing further on work to prevent the non-attendance of witnesses. Consideration of different ways of interacting with Crown witnesses to keep them updated / maintain a sense of obligation / catch any allegations of intimidation at an early stage / pro-actively give access to their witness statement.
- Further work should be commissioned to analyse the number of cases that have evidential reports produced by other agencies – drugs, fingerprints etc to assess the benefit of looking to improve the timescales in which these are produced/disclosed as anecdotally the Working Group considered them to be a cause of churn in many cases.