Scotland and the Alternative Disposal: Thinking Differently?

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Abstract

Since its introduction to Scotland, the system of alternatives to prosecution has grown significantly both in terms of use and in the widening of available alternative measures. Despite this, there has been very little research carried out on alternative measures in Scotland.

What will follow is a comparative study of the Scottish system with the system of the Netherlands. Prior to recent changes, the Netherlands' system operated a model similar to that of Scotland but now operates a significantly more comprehensive range of alternatives to court prosecutions.

It is concluded that alternatives to prosecution are imperative in a rounded justice system, but there are areas of development that may be feasible to improve the system in Scotland. In addition, recommendations are made for such improvements to the current system in Scotland and there is identification of areas for further research.

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potuit, *decuit*, *ergo fecit*

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Halle, this work is dedicated to you (if you ever actually read it) take it as proof that life whilst difficult, at times, is always worth the effort. You are capable of achieving whatever you want by hard work and perseverance.

I declare that, except where explicit reference is made to the contribution of others, this dissertation is the result of my work and has not been submitted for any other degree at the University of Glasgow or any other institution.

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Introduction

Since the introduction of alternatives to prosecution to the Scottish criminal justice system in 1988, there has been significant use of such alternatives as well as several variations of the type available for use by the public prosecutor in Scotland. Although there have been two significant Government reviews considering the introduction and development of alternatives to prosecution in Scotland (the Stewart Committee in 1977 and the McInnes Committee in 2004), there exists a notable absence of independent comparative or qualitative research conducted into the use, type, and nature of alternative disposals in Scotland.[1]

This research was undertaken for the purposes of understanding the development, use and system of the alternative disposals in the criminal justice system, understanding any improvements which could be made to the Scottish system, whilst maintaining the integrity of the process and protection of the actors within the system.

The researcher examines the use, type, and nature of alternative disposals in Scotland. It compares and contrasts these with the alternatives to prosecution under the system in the Netherlands. Although comparative studies of European prosecution systems have previously been undertaken, notably Leigh and Hall William's study of the systems in the Netherlands, Sweden and Denmark, they have not considered the prosecutor's role in the sentencing of offenders via alternatives to prosecution.[2]

Scotland introduced the 'fiscal fine' in 1988 at a maximum sum of £25.00, rising to £300 by 2007.[3] Since then, Scotland has further developed the alternative to prosecution system to include work orders, compensation orders and combined fiscal fine and work orders. Indeed, over the last 50 years, the systems of alternatives to prosecution in both the Netherlands and Scotland have developed significantly. However, the jurisdictions have taken significantly different pathways in the range of powers available to the public

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[1] Julia Fionda, Public Prosecutors and Discretion: A Comparative Study (Clarendon Press 1995). Fionda undertakes comparative research between Scotland, Netherlands, Germany and in England and Wales, however this research expressly considers how the system operates, rather than the operation of the system *per se*.

[2] Leonard Herschel Leigh and John Eryl Hall Williams, The Management of the Prosecution Process in Denmark, Sweden, and the Netherlands (James Hall 1981).

[3] The Coronavirus No 2 (Scotland) Act 2020 has temporarily increased this amount to £500: The impact of this temporary rise is not considered within this research, as the change was made during the writing phase of the research.

prosecutor. The Netherlands' system was chosen for comparative research due to the differences in the range of the alternatives from those in Scotland. This enables the research to be formed from a consideration of different developments and to consider the impact, to examine the system's use, and then to consider what developments may be possible in Scotland.

The Scottish criminal law system is traditionally viewed as adversarial. The state conducts criminal cases before a judge or a judge and jury.[4] The judge and/or jury is master of the facts and the law and determines or otherwise the accused's guilt.[5] The Netherlands is a 'moderately adversarial' or 'moderately inquisitorial' system. This system involves a judge and the prosecutor in investigating the "truth" of any criminal behaviour.[6]

This research explores both the Scottish and Dutch system of alternatives to prosecution with a critical examination of the Scottish system as it currently operates. Recommendations of potential developments to the Scots system are made and, by implication, aspects of the Netherlands' system are rejected.

This research presents results from a statistical analysis undertaken to understand the prevalence of the alternatives to prosecution in each jurisdiction, with specific inquiries about the operation of the particular alternatives in relation to the nature of the offences. It was anticipated that a direct examination of the jurisdictions' data would allow for direct comparative conclusions. The limitations of the comparison are discussed further in Chapter 1.

A literature review was undertaken to examine previous enquiries and the establishment of alternatives in each jurisdiction. This ensured a fuller understanding of the prevailing circumstances in the jurisdictions. The review enabled the statistical analysis to be underpinned by knowledge of the jurisdictions' circumstances during the developments. The literature review is incorporated throughout the research.

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[4] In a jury trial (Solemn proceedings), the jury are the masters of the facts and the Judge being the master of the law. In summary proceedings, the Sheriff is the master of the law and the facts.

[5] See Timothy H Jones and Ian Taggart, Criminal Law (6th edn, W Green 2015). There have been suggestions that Scotland has been developing more towards an inquisitorial style in summary criminal matters, see Chapter 6.3.

[6] Marianne FH Hirsch Ballin, Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States, vol 9789067048 (TMC Asser Press 2012).

Whilst it has been possible to make a variety of recommendations for further consideration it is not anticipated that the recommendations in this research will be adopted in the format suggested. This research acknowledges and presents potential developments that, with further study and detailed quantitative and qualitative research, may frame and inform any implementation of this research's recommendations. The researcher also recognises criticisms regarding the import of one jurisdiction's response to criminal behaviour into another jurisdiction:

> Direct transplants from foreign legal systems have often been criticised on two distinct grounds. In the first place, a transplant of a legal rule may prove inappropriate because of the different social and economic structures of the two societies…A second objection to transplants of legal rules insists that legal concepts fit into clusters of concepts which together comprise a coherent and consistent set of rules and principles for the regulation of some aspect of social life. One cannot transplant a single foreign concept into domestic law without undermining the coherence of its conceptual scheme, which ultimately causes confusion and inconsistency.[7]

Throughout this research, the researcher uses the term "victim" when referring to the complainer of the criminal action to the police and subsequently named as the complainer in the criminal action in Scotland. The term is not used in a prejudicial manner or to elicit an attribution of guilt against an accused person. The term is used as all persons in the statistical data have had a punishment imposed and not chosen to challenge the imposition of the alternative to prosecution.

The term "accused" is used through this research for simplicity in referring to the person given an alternative disposal to prosecution. There are various stages in which a person transitions from being accused of the criminal offence then accepting the alternative and in the Netherlands is "convicted". The term accused is not used to imply, or elicit a sense, that the person was guilty or not guilty of the offence, but merely to refer to their status in the justice system.

[7] Hugh Collins, 'Methods and Aims of Comparative Contract Law' (1989) 11 Oxford Journal of Legal Studies 396.

The Scottish system, at times, refers to direct measures, referring to the public prosecutor taking direct action against an accused person. For the sake of consistency and comparison between the two countries, the term 'alternative to prosecution' is used throughout the research. Furthermore, it is arguable that some aspects of the system in the Netherlands are prosecution outwith a court setting. For the purposes of this research, all prosecutor-imposed disposals are referred to as alternatives to prosecution.[8]

Within Scotland there is a schema called "Diversion from Prosecution". This scheme is a system which enables the public prosecutor to refer a case directly to social work or partner agencies whereby the public prosecutor assesses that diversion from prosecution is in the public interest. Any decision to make a diversion from prosecution results in prosecutorial action is delayed until around three months after the commencement of this diversion. In some circumstances the decision to divert from prosecution comes with a waiver from prosecution subject to successful completion of the diversion. This thesis does not include an examination of the diversion from prosecution, but considers only alternatives to prosecution, commonly called in Scotland 'Direct Measures', whereby a criminal sanction is imposed upon an accused person directly by the public prosecutor.

In Chapter 1, the methodological approach undertaken is set out. Consideration is given to the researcher's reflexivity in conducting this research, the philosophical and ontological implications which this had on the research and how these were mitigated. The comparative models' strengths and weaknesses are examined, alongside the statistical analysis approach and the attempts undertaken by the researcher to gain further insight using statutory enquiry methods of public bodies in Scotland. The methodologies chapter is included in the interests of an open and transparent understanding of the research, the limitations in its process, and how the method helped explore the alternative disposal systems in both jurisdictions.

The public prosecutor's role in Scotland is examined in Chapter 2, in order to better illuminate the role which the public prosecutor in Scotland has in the criminal justice system and how the public prosecutor operates within that framework. The historical position and the development of the alternatives are set out to frame the Scottish system's development and the arguments promulgated in Scotland both for and against the

[8] See Community Justice Scotland: https://communityjustice.scot/wp-content/uploads/2020/06/Diversion-from-Prosecution-Guidance-Version-4.0-FINAL-VERSION-April-2020.pdf, accessed 10th November 2020

introduction of the system of alternatives. Each alternative is explored as to the limits of the power and the current prevalence of each alternative. This chapter frames the research from the Scottish perspective and allows for an understanding to be gained prior to drawing comparisons between each jurisdiction.

In Chapter 3, the researcher examines the system of the Netherlands. The researcher examines the prosecution system, the prosecutor's role, and the historical development of the system. The mechanisms of alternatives to prosecution are explored and the prevalence of each alternative is examined. This chapter frames the research and allows for an understanding to be gained prior to drawing comparisons between each jurisdiction.

Building on the context of both jurisdictions, Chapter 4 considers the Dutch case-marking system. This chapter draws on a statistical analysis of the Scottish criminal justice system's operation of the alternative disposals, given its human case marking methodology and questions the consistency in offering an alternative to prosecution in Scotland. This chapter raises questions about the process, the transparency of the Scottish system and the economic impact of alternatives. The researcher highlights areas for development in the Scottish system.

In Chapter 5, the researcher considers the role and position of the victim in both jurisdictions. This chapter identifies Scotland's opportunity to further explore how the victim is recognised and engaged within the criminal justice system. This potential area for development, discovered during this research, forms a key recommendation in Chapter 7.

The models of criminal justice in which Scotland operates are examined within Chapter 6. The nature of the system of criminal justice as impacted by the introduction of alternatives to prosecution will be considered.

Chapter 7 concludes this research. The researcher draws conclusions and sets out recommendations for further research before developing Scotland's system. These recommendations enable further reflection on the Scottish criminal justice system.

This research is a singular comparative study. It represents a starting point for a fuller consideration of alternatives in Scotland's criminal justice system. If developments to the

system are considered for implementation in Scotland, they must be evidence-based, viable and for the benefit of the publicly funded criminal justice system.

This research presents an opportunity to consider the Scottish system and changes that may be considered for implementation to improve the system. The purpose of this research is not to establish the elements of the system operating in the Netherlands for export into the Scottish system, but to illustrate what learnings can be taken from another system of alternative disposals and how, potentially, the Scottish system can develop from the experience of another jurisdiction.

Chapter 1: Research Methodologies

This chapter outlines the research methodologies of the research. The researcher sets out their reflexivity and how its impact was mitigated throughout. The comparative approach undertaken, approaches to statistical collection, analysis and the limitations imposed upon the research are all outlined and considered.

The chapter is included so that this research is presented in an open and transparent manner. The researcher further acknowledges the limitations and need for further research beyond the scope of this research.

1.1 The Researcher's Reflexivity

Rice and Essy suggest that researchers should undertake thematic analysis having taken a passive stance rather than by hypotheses or being impacted by their own assumptions. [9] In the researcher's view, this is unrealistic as no research takes place in a silo and fails to be impacted by the researcher's ontological, epistemological, and perhaps even metaphysical standpoint. What can be achieved is to limit the impact this has and effectively mitigate it as the research develops.[10]

When I initially approached the task of examining the research question, I can now admit that I made errors. I had come to the law as a mature student, undertaking the LLB and DPLP in the only university (Robert Gordon University) to offer both of these programs entirely online and with international students from various jurisdictions with the majority being full time working professionals studying part-time. Nevertheless, I still had the idealism generally associated with youth and despite being a pragmatist in my business life, became an idealist for the law and its implementation in criminal practice.

I read of alternative disposals in Scotland while studying for the Diploma in Professional Legal Practice. Initially I felt contempt for them, at least from a limited understanding of their use and at best from a legal purist perspective. I came to this research with this background but after months of reading, studying, challenging and personal growth

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[9] Pranee Liamputtong Rice and Douglas Ezzy, Qualitative Research Methods: A Health Focus (Oxford University Press 1999).

[10] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 Qualitative Research in Psychology 77.

through this research, do I still feel contempt for them? No. Did it hinder my early reading and research? Yes. Did I have to re-do significant parts of work and re-reading of materials once I became consciously aware of the limitations I, as the researcher, had imposed? Yes, I did. During the research, did I become an avid supporter of Alternative Disposals in Scotland? No, I did not. I became an academic lawyer with a passion for the Scottish criminal justice system, who seeks balanced but advantageous developments in Scotland.

The last paragraph may have seemed like a personal exploration of my journey during this research, and to an extent it is. It is fundamentally at the core of the conclusions and recommendations of this research. It is a reflective statement which acknowledges the unconscious bias and the impact that this could have had on this research. If bias is not acutely monitored and challenged, it undermines the independence of thought and analysis of data required in research.[11] A failure to challenge a researcher's own bias, be it conscious or sub-conscious, leads to research which is not rigorous and fails to stand the test of time or scrutiny. The effects of the researcher's impact on this research have been mitigated throughout. As suggested by Fook, it is essential that a researcher not only becomes aware of the impact that they have on the research but fundamentally challenges their domination of the research question to "challenge unexamined assumptions inherent in her or his own thinking."[12]

Reflexivity allows the researcher to challenge themselves and develop their hypothesis and ultimately leads to a more balanced and discerned thesis.

> The researcher's positionality/ies does not exist independently of the research process nor does it completely determine the latter. Instead, this must be seen as a dialogue – challenging perspectives and assumptions both about the social world and of the researcher him/herself. This enriches the research process and its outcomes.[13]

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[11] Robert J MacCoun, 'Biases in the Interpretation and Use of Research Results' (1998) 49 Annual Review of Psychology 259.

[12] Jan Fook, 'Reflexivity as Method' (1999) 9 Annual Review of Health Social Science 11.

[13] Erlinda C Palaganas *et al*, 'The Qualitative Report Reflexivity in Qualitative Research' (2017) 22 The Qualitative Report at 426.

Alternative disposals in the Scottish justice system serve a vital function in our criminal justice system without which the costs, the time delays, the care of the victims, witnesses and accused, would all be inferior to the present circumstances. This reality does not mean that we cannot improve the system in Scotland. This research was undertaken for the purposes of understanding the development, use and system of the alternative disposals in the criminal justice system, understanding any improvements which could be made to the Scottish system, whilst maintaining the integrity of the process and protection of the actors within the system.

As indicated in the introduction to this thesis the Netherlands was selected as a comparator due to the wide range of alternatives to prosecution and the period of time which alternatives have operated within the Dutch criminal law system. The writer, whilst not being fluent in Dutch, has been able to circumvent difficulties in language due to the ability of the Dutch office of national statistics providing information in English and Dutch, alongside an explanation of each term and its use. Due to the wide dual language in Dutch academia a review of relevant materials was substantively possible.

During the research, informal discussions took place with both academics and practitioners. These were unstructured discussions to garnish thoughts and gain insight into practices which might be examined in this research. Often, practitioners merely expressed an interest in what was being researched and offered their unsolicited views on the system or practices in the Scottish criminal justice system. These conversations did not form part of the research and nor is anecdotal evidence considered in this research. However, it did prove fruitful for understanding areas for examination and exploration, even if for future research. Particular applications of the current system were checked with practitioners for confirmation, or otherwise, that descriptions and matters of procedure contained within this research are accurate at the time of writing.

Sarat and Sibley suggest that the researcher must be wary of the "pull of policy" in research, highlighting that orientating research at government policymakers may undermine the objectivity of the research in and of itself. [14] This research has not been designed or conducted with the policymakers' mind-set in active consciousness but from the researcher's interest in the topic and a developing desire to see the criminal justice

[14] Austin Sarat and Susan Silbey, 'The Pull of the Policy Audience' (1988) 10 Law & Policy 97.

system in Scotland become more balanced and seek solutions to ever-challenging circumstances. The comparisons and analysis undertaken in this research were not to prove or disprove a hypothesis. Instead, the data was analysed, with matters for further investigation studied and considered.

This research was anticipated to be simple and straightforward: compare and contrast each of the methods; examine the strengths and weaknesses of each system; produce results and recommendations. Unfortunately, that was not the case, and acknowledgement must be given to the issues which arose during the research period and indeed the brief comparison made between the data and engagement of the public bodies in each jurisdiction.[15] This research was not subject to ethical review as the data used was publicly available and did not fall into the categories whereby ethical approval was required.

1.2 Comparative Research

Comparative research, in a legal context, provides significant insight when done in reflective context. It allows for a deeper understanding of our society and the socio-legal impact. Comparative research permits an examination of our culture, context and system of operation against another. It allows conclusions to be drawn as to the strengths and weaknesses of the systems involved in the comparison.

> Comparative analysis enhances the understanding of one's own society by placing its familiar structures and routines against those of other systems (understanding); comparison heightens our awareness of other systems, cultures, and patterns of thinking and acting, thereby casting a fresh light on our own political communication arrangements and enabling us to contrast them critically with those prevalent in other countries (awareness); comparison allows for the testing of theories across diverse settings and for the evaluating of the scope and significance of certain phenomena, thereby contributing to the development of universally applicable theory (generalization); comparison prevents scholars from over-generalizing based on their own, often idiosyncratic, experiences and challenges, claims to ethnocentrism or naïve universalism (relativization); and comparison provides access to a wide range

[15] See 1.3

> of alternative options and problem solutions that can facilitate or reveal a way out of similar dilemmas at home (alternatives).[16]

Comparative study prevents research from an over generalisation of the particular theory or the application of naïve universalisms to a preference of a particular system. Comparative research provides access to alternative options and considerations, which facilitates the development of ideas and solutions to similar issues.

> Comparative research guides our attention to the explanatory relevance of the contextual environment for communication outcomes and aims to understand how the systemic context shapes communication phenomena differently in different settings. The research is based on the assumption that different parameters of political and media systems differentially promote or constrain communication roles and behaviours of organizations and actors within those systems.[17]

This research is naturally limited by the constraints of comparative research. However,

> comparison is a mode of scientific analysis that sets out to investigate systematically two or more entities in respect to their similarities and differences, to arrive at understanding, explanation and further conclusions.[18]

In acknowledging the weaknesses of a comparative study, we face the reality of the research.

This research seeks to overcome the limitations of, or at least mitigate where possible, the comparative methodology by acknowledging areas where further research is required and not merely suggesting a *fait accompli.* The researcher has not allowed comparisons to be drawn where there is a lack of data available from one or other of the systems, but highlighted the gap, to effectively mitigate any construct bias.

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[16] Frank Esser and Rens Vliegenthart, 'Comparative Research Methods' (2017) The International Encyclopedia of Communication Research Methods 1 - 22 at 2 .

[17] ibid.

[18] Jürgen Kocka, 'The Uses of Comparative History' (1996) Societies made up of history 198 -209.

1.3 Statistical Analysis

The comparison of statistics between jurisdictions brings inherent limitations by the very fact that jurisdictions vary in their collection and storage of data, their differential jurisdictional structure, methodology of collection, and the differences in the criminal law processes. The datasets analysed in this data naturally contained these limitations, the effects of which are mitigated where possible.[19]

In the analysis, the researcher initially set out on a path of examining the prevalence of the alternatives to prosecution in each jurisdiction. Upon understanding the use of each alternative, an examination of the methodology, the facts and circumstances against the criteria for the use of alternatives to prosecution was expected. An examination of the prevalence of alternatives according to the stereotypical gender markers was undertaken. This examination was to consider any variation and understand the causation and justification of a variation where it existed. The same process was expected regarding the ethnicity of accused persons.

Once the prevalence of an alternatives system was understood, research was undertaken into the economic value of the alternatives system in Scotland. The purpose of this was to test the arguments, discovered in the literature review, that alternatives represented a significant saving to the public purse in Scotland. The research examines the potential future savings to the public purse in Scotland should the system be further developed.

It was anticipated that a direct comparison from the data would have allowed conclusions to be drawn as to the potential effects of introducing a system to Scotland. It has only been possible to partially complete this task in this research.

The Scottish Government official *Criminal Proceedings in Scotland* bulletins provide the beginnings of research into the criminal justice system in Scotland; these published figures give generic insights into the overall trends in the criminal justice system in Scotland but do not allow for any detailed analysis.[20]

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[19] See Anna Alvazzi Del Frate, 'Crime and Criminal Justice Statistics Challenges' (2010) International Statistics on Crime and Justice 167.

[20] The Scottish Government, 'Criminal Proceedings in Scotland, 2009-10' (2011).

Having been unable to draw conclusions from the published data, detailed statutory requests were submitted to the responsible public bodies to seek this information. The results of these requests are reviewed in 1.3.1. The lack of available statistics, in several areas, led to a change in the expected outcomes of this research, it became necessary to make recommendations for further research into the data and developments of the Scottish data system.

1.3.1 Additional Data Requests

Requests under the Freedom of Information (Scotland) Act 2002, were made to the Crown Office and Procurator Fiscal Service (COPFS) in August 2020, in an attempt to research the data. The response stated:

> The COPFS case management database is a live, operating database. It is designed to meet our business needs in relation to the processing of criminal cases, and the information within it is structured accordingly. We do not have a separate statistical database and hold only operational data needed for business purposes….In order to identify the information requested, Crown Office staff would be required to consider individually each report submitted in relation to the request and the time taken to complete this task would exceed the upper cost limit.[21]

COPFS, in numerous requests, were unable to provide the data to allow a full analysis of the alternative disposals systems in Scotland, although partial data was made available via the Scottish Government. The gaps and lack of available statistical analysis available from COPFS highlights an area for development to ensure that strategy and policy are developed in a manner which is evidence-based and effective.[22] The lack of primary sourced information within COPFS and examination of the

[21] Freedom of Information Response from COPFS, upper cost limit is £600.

[22] The significant question concerning this lack of data is whether we should be concerned at all by this, indeed it may be suggested that alternatives to prosecution are mostly used in cases concerning *mala prohibita* rather than offences which are malum in se. We cannot substantiate that claim in of itself. Indeed, from the data available publicly we know that recorded police warnings have been used nine times for sexual offences and that the fiscal fine has been used five times to dispose of sexual offences. See R.M. White, "Out of Court and Out of Sight: how often are 'alternatives to prosecution' used?" (2008) 12 Edin LR 481

statistical trends within COPFS is a cause for concern which is explored within Chapter 4 of this research.

Further responses were received from the Scottish Government in response to the information requested. The Scottish government did not refuse to provide any information held due to the £600 limit, and refusals only occurred where the data was not collected or held by them.

1.3.2 The Netherlands' Data

The data position in Scotland is to be contrasted by the approach in the Netherlands, where an open-source data enquiry site is available, which allows researchers to query all data available from the criminal justice system directly.[23] Researchers can apply multiple date and data filters to the data and create source data tables for particular enquiries. The researcher contacted the Office of National Statistics in the Netherlands for more specific information via email, and this was provided within 48 working hours via a direct link to the open data source where the query criteria had been created for this research. The provision of the information in English, allowed for direct comparisons to be made between the nature of alternatives being used and the frequency, without first relying on translation services.[24]

1.3.3 Conclusion

This research, the methodological approach and the challenges encountered required the researcher to be flexible in approach to maintain the integrity of this research. In the researcher's view the research provides a significant insight into the type, use and operation of the alternatives to prosecution system in Scotland and provides a commencement point for future research to further improve the criminal justice system in Scotland.

[23] Data from the Netherlands can be queried in an annualised format not with live data.

[24] The researcher requested the information in English, the Dutch authorities provided the information in both English and Dutch. The information was provided via a hyperlink into the Dutch criminal justice system where the data had been provided with the open and adjustable filters enabling the subset to be interrogated further and further subsets of data to be created.

Chapter 2: The Role of the Prosecutor and the System of Alternatives in Scotland

This chapter considers the historical background, the role of the public prosecutor in Scotland and the context of the development of the alternatives. It notes the objections and findings from the Stewart Committee and the McInnes Committee and their role in the creation of and the furtherance of the alternatives system. The chapter concludes with an outline of the available alternatives in Scotland detailing the limitations which apply to their use.

2.1 The Prosecution System in Scotland

In Scotland, offences are prosecuted at the sole discretion of the Lord Advocate,[25] acting through an Advocate Depute in the most serious offences and through Procurators' Fiscal and their deputes in less serious offences. COPFS has absolute discretion in determining how to act or proceed in any matter which is reported to them or indeed any investigations they wish to make into a crime.[26] The Sheriff Courts (Scotland) Act 1876 established the role of the public prosecutor.[27]

The Lord Advocate is the *Dominus Litis* and master of the instance in Scots Law.[28] The Police Service is not required to report every instance of potential criminality to COPFS. [29] It is not uncommon for COPFS to direct the police not to report particular criminal offences or to issue an informal warning or, where applicable, to issue a fixed penalty notice.[30] COPFS are not required by statute to prosecute every criminal offence reported to them where there is a sufficiency of evidence that a crime has been committed. The

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[25] The first significant step towards this position in Scotland, occurred through an Act of Parliament in 1587 CAP. 77 and by the 1700s any person wishing to bring a private prosecution required the consent of the Lord Advocate see Wilfred Guild Normand, 'The Public Prosecutor in Scotland' (1938) 54 Law Quarterly Review. at 345

[26] COPFS is also responsible for the investigation of sudden deaths and fatal accident inquiries. This aspect of their role is not considered in this research.

[27] It has been suggested that this role in a practical sense had been devolved from Sheriffs much earlier than this see: Susan Moody and Jacqueline Tombs, Prosecution in the Public Interest (Scottish Academic Press 1982).

[28] There are exceptions to this, but they are so limited it is unnecessary to consider them here. Private prosecutions in Scotland are technically still possible but given their extreme rarity the subject of this research is not impacted by not considering them – See Further: Neil Gow, 'Private Prosecutions' (1995) Criminal Law Bulletin 6.

[29] An investigation may also be undertaken by another appointed body such has The Health and Safety Executive.

[30] The Scottish Parliament, 'The Summary Justice Review Committee: Report to Ministers' (2004), at 8.6

Prosecution Code is a non-statutory code issued by the Lord Advocate. The code outlines the considerations which a prosecutor considers when deciding, how or if, to proceed with a criminal complaint.

The two-stage process is outlined by COPFS as follows: firstly, to establish whether there is "sufficient admissible, reliable and credible evidence of a crime committed by the accused."[31] Once the first test is satisfied, the prosecutor will apply the "public interest test" and only prosecute where it is in the public interest to do so.[32]

The public interest test is not simple or straightforward. In reaching a conclusion on the public interest test, the prosecutor is required to apply their mind to the thirteen factors which require to be considered and these are listed in the Prosecution Code as follows:

- nature and gravity of the offence;
- impact of the offence on the victim and other witnesses;
- age, background and personal circumstances of the accused;
- age and personal circumstances of the victim and other witnesses;
- the attitude of the victim;
- the motive for the crime;
- age of the offence;
- mitigating circumstances;
- effect of prosecution on the accused;
- risk of further offending;

[31] Crown Office and Procurator Fiscal Service, 'Prosecution Code' (Crown Office 2001).
[32] ibid. at 6.

- availability of a more appropriate civil remedy;
- powers of the court; and
- public concern.[33]

The *Summary Justice Reform Thematic Report on the Use of Fiscal Fines* [34] highlighted the objections made to alternatives being used, the primary objection being that the COPFS would be both the prosecutor and judge/sentencer.[35] In addition, concerns in Scotland have been raised at the lack of external supervision, control and quality management of COPFS.[36] There have been significant criticisms of the decision-making process used by each depute and the variation between deputes, particularly in respect of the wide variation between different locales in Scotland.[37]

Prior to 2007, there was no statutory independent oversight, inspection or evaluation in Scotland of the Prosecution Service. In 2007, the role of the Inspectorate of Prosecution in Scotland was given statutory status. [38] The role of the Inspectorate of Prosecution in Scotland is to arrange the inspection of the COPFS and report to the Lord Advocate on its findings. The inspectorate will seek to make recommendations to the Lord Advocate, which shall lead to improvements in COPFS. The issues of oversight and consistency are further explored in Chapter 4.

There have been significant developments over the last 15 years in respect of the rights of the victim in criminal proceedings. In 2005, COPFS announced that:

[33] ibid, at 6-8.

[34] Inspectorate of Prosecution in Scotland, 'Summary Justice Reform: Thematic Report on the Use of Fiscal Fines' (2009).

[35] ibid. at 10.

[36] See: Peter Duff and Neil Hutton, Criminal Justice in Scotland (Ashgate 1999), at 126.

[37] The Scottish Parliament (n 29).

[38] Criminal Proceedings etc. (Reform) (Scotland) Act 2007. Part 5 S78 & 79.

> Wherever possible, victims and next-of-kin who request it are now provided with an explanation for the decision to take no proceedings. Alternatively, where proceedings have been commenced, an explanation of the decision to discontinue proceedings or to accept a plea to a lesser charge can be explained.[39]

From the 1st of July 2015, a statutory right to review a decision by COPFS not to prosecute was introduced.[40] Where an accused has been informed of no further action, a renunciation of the right to prosecute is irrevocable.[41] Significantly, there is no right of review whereby an alternative to prosecution has been offered.[42] Chapter 5 considers the role of the victim in the alternatives to prosecution system.

Fionda[43] highlights a significant issue relevant to the Scottish system: that prosecutors are not required to give reasons for their decisions. Whilst the right to review has been introduced in Scotland, since Fionda's research, this has had a limited impact on the public's understanding of the prosecution system. This lack of public understanding of the prosecutorial system in Scotland serves to undermine the public's trust in a system that they do not understand.[44]

2.2 Development of Alternative Disposals in Scotland

In the 21st century, Scots law fundamentally changed its approach to the criminal system of the State prosecuting individuals in the public interest. These developments include the systems of alternatives to prosecution, plea bargaining/charge bargaining and sentence discounts for the accused person tendering a plea prior to a trial.[45]

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[39] Crown Office and Procurator Fiscal Service, 'COPFS Annual Report 2003 - 2004' (2004), at 6.

[40] The Victims and Witnesses (Scotland) Act 2014 at S4.

[41] *Thom v HM Advocate* [1976] J.C. 48.

[42] Crown Office and Procurator Fiscal Service, 'Lord Advocate's Rules: Review of a Decision Not to Prosecute - Section 4 of the Victims and Witnesses (Scotland) Act 2014' (2015).

[43] Fionda (n 1), at 211.

[44] Hazel Croall, Gerry Mooney and Mary Munro, 'Crime, Justice and Society in Scotland' [2016] Crime, justice and society in Scotland.

[45] ibid.

The historical position, at least in case law, was that there should be no advantage to an accused in the early adoption of a guilty plea and this was to be actively discouraged. In *Strawthorn v McLeod*[46] the court stated that:

> In this country, there is the presumption of innocence, and an accused person is entitled to go to trial and leave the Crown to establish his guilt if the Crown can. It is wrong therefore that an accused person should be put in a position of realising that if he pleads guilty early enough, he will receive a lower sentence than he otherwise would receive for the offence.[47]

The jurisprudence in Scotland has significantly changed this position whereby sentencing discounting has become a significant feature of the early guilty plea in Scots law.[48] Moreover, it has been suggested that the accused who accepts an alternative to prosecution receives a "double discount" by both a reduced sentence and avoiding a formal conviction.[49]

Whilst the discussion and use of alternative disposals with the prosecutor imposing a "sentence" on an accused is likely to present issues to the legal purist, it is the case that the prosecutor has been involved in sentencing in Scotland since the very creation of COPFS. Indeed, White states that the conditional offer "is punishment without prosecution and constitutes a highly institutionalised plea bargain, removing protections from the guilty, transferring enormous but unaccountable power to the Crown Office."[50] The reality is that COPFS drafts the charge the accused faces; can amend the charge and detail before and during the trial;[51] chooses the type of prosecution the accused is to face and decides the trial's forum.[52] All of these matters directly impact the sentence which may be imposed on the accused.

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[46] *Strawthorn v McLeod* [1987] S.C.C.R 413.

[47] Ibid.

[48] See – 1995 Act S.196; see *Du Plooy v HM Advocate*, 2005, 1 JC at Para 7. For Further discussion on sentence discounting and plea bargaining see: Cyrus Tata and Jay M Gormley, 'Sentencing and Plea Bargaining' (2016) 1 Oxford Handbooks Online 1.

[49] The Scottish Parliament (n 29), at 11.49

[50] R.M. White, "'Decriminalisation'? A pernicious hypocrisy?" (2009) 13 Edin LR 108.

[51] See the Criminal Procedure (Scotland) Act (1995) 1995. Ss 96 & 159.

[52] Particular offences are reserved to the exclusive jurisdiction of the High Court of Justiciary, these offences are traditionally known as "Pleas of the Crown", Rape and Murder being the most common.

2.3 The Stewart Committee

In 1988, the first alternative to prosecution was introduced to Scotland in the form of a fiscal fine. The Stewart Committee was established in 1977 with a remit to consider and study alternatives to prosecution. This remit was a direct attempt to understand what levers could be used to reduce the number of offenders being processed through the court system. The Stewart Committee published two reports, the first recommending the widening of the powers to issue fixed penalty notices for traffic offences[53] and the second considered the introduction of various alternatives to divert offenders from prosecution for a range of statutory and common law offences.[54] The Committee concluded that due to the nature of the Scottish prosecution service, the measures which they proposed could be introduced causing little disruption to the functioning of the criminal justice system.

The Stewart Committee recommended the introduction of the 'fiscal fine' by a majority. The minority were distinctly against the introduction of alternatives. Furthermore, respondents to the Committee's call for evidence raised significant objections to the alternative measures, including the chair of the Committee, the Law Society of Scotland, The Sheriffs' Association and the Scottish Council for Civil Liberties. The minority argued that the basis for proceeding was based on a fundamental misjudgement of applying a system used in European countries with an inquisitorial system of prosecution and could not be said to apply in the Scottish adversarial system. The robust rejection by the minority alleged that the system would leave the independent prosecutors as a "surrogate judge"[55] with the Sheriffs' Association suggesting that it would question the judicial role of determining guilt and imposing the punishment on the offender.[56]

The majority were of the view that they needed to deal with the problems in the criminal justice system without being stuck in a philosophical mindset which failed to adequately deal with the issues the justice system faced. The majority stated: "The delays which are

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[53] Stewart Commitee, 'The Motorist and Fixed Penalties, 1st Report, Cmnd. 8027'.

[54] Lord Stewart, Keeping Offenders out of Court: Further Alternatives to Prosecution: Second Report of the Committee on Alternatives to Prosecution Appointed by the Secretary of State for Scotland and the Lord Advocate, vol 8958 (HMSO 1983).

[55] ibid.Para 4.39.

[56] ibid.Para 4.26.

evident in the system may cause more difficulty and inconvenience for the offender and more concern to him than any niceties of the philosophy of justice."[57]

Despite the minority view, Lord Stewart expressed, "one of the primary duties of the State is to provide and maintain a system of law and order which in our view should be founded upon the principle of independent judicial determination not only of guilt … but of punishment of offenders."[58] The Criminal Justice (Scotland) Act[59] introduced the system of the fiscal fine, limited at the time to the sum of £25. Fiscal fines first operated on the basis that the fine, or at least the first instalment of the fine, must be paid within 28 days to be deemed as accepted. Providing this occurred, no criminal proceedings were permitted to follow.[60] By 1991, the use of the fiscal fine had reached a rate of 4.2% of all reported criminal offences and bypassing the use of fiscal warning letters at 3.8%.[61] In the period between the introduction of the fiscal fine to 1991 there was a significant drop in the prosecution rate from 92% in 1982 to 53%.[62]

The level of the fiscal fine was amended in 1996 to introduce four levels: £25; £50; £75; and £100.[63] In 1998-1999, COPFS received 244,000 reports of criminal offences with 51,000 offences disposed of by an alternative method,[64] 9% of accused persons were issued with a fiscal warning letter, and 7.78% of accused persons were issued with a fiscal fine. In 2003 - 2004, COPFS received 248,000 reports of criminal offences, with alternative disposals being used in 62,000 cases, fiscal warning letters being 8.8% and fiscal fines accounting for 12.09%.[65] In the same period, the percentage of persons where proceedings were brought in court fell from 62.29% to 57.18%.[66]

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[57] ibid.Para 4.38.

[58] ibid.Para 4.41.

[59] Criminal Justice (Scotland) Act 1987.

[60] Peter Duff, 'The Prosecutor Fine' (1994) 14 Oxford Journal of Legal Studies 565.

[61] The Scottish Government, (n 19) Table 6 and Table 21.

[62] See Moody and Tombs (n 26) at 367.

[63] Criminal Procedure (Scotland) Act (1995). s.302 Version in Force 1st April 1996.

[64] Fiscal Warning 22,000, Diversion 1,000, fiscal fine 19,000, conditional offer 9,000.

[65] Fiscal Warning 22,000, Diversion 1,000, fiscal fine 30,000, conditional offer 9,000.

[66] The Scottish Government, Criminal Proceedings in Scotland (n 19)

2.4 The McInnes Committee

The McInnes Committee was established in 2004 to review the operation of summary justice in Scotland and made several recommendations.[67]

The first recommendation was an amendment to the levels of the fiscal fine enabling COPFS to impose fines to a maximum of £500, more closely matching the fines imposed by the courts under summary proceedings.[68] This recommendation was implemented by the Criminal Proceedings etc. (Scotland) Act 2007, but with the maximum fine being set at £300.[69]

The second recommendation was that the fiscal fine should be disclosed to the court if the accused was subsequently convicted of another offence. This recommendation was qualified with a limitation to a period between two and five years. The Scottish ministers accepted this recommendation which was implemented in the 2007 Act. The period for disclosure was set at two years from the date of acceptance of the fiscal fine.[70]

Thirdly, the Committee recommended that the fiscal fines should be changed to an opt-out system, which required the accused to actively opt-out of the fine and take action to reject the fiscal fine. This change was significant and attracted severe criticism at the committee stage of the Bill. However, the Bill was passed, and any person "offered" a fiscal fine as an alternative must now actively take steps to reject the offer.[71] The accused could no longer simply ignore the offer made by the prosecutor but instead had to take action to reject the offer, within 28 days or longer if the offer specifies.

The Committee recommended that the prosecutor should be empowered to offer the accused the option of making restitution to the victim by way of a compensation order. [72]

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[67] The Scottish Parliament (n 29).

[68] ibid.

[69] Summary proceedings are proceedings conducted in the Justice of the Peace court or the Sheriff court before a Justice/Sheriff sitting alone (without a jury). Summary proceedings are reserved (traditionally) for the more minor criminal offences in Scotland.

[70] Criminal Proceedings etc. (Reform) (Scotland) Act 2007 s.50.

[71] ibid.

[72] This is significant in that it contains the subtle change of the fiscal deciding who a victim is rather than being a complainer in criminal proceedings and thus be consequence that the accused was an offender, whereas previous the fiscal fine was not viewed as a criminal conviction, the use of the word victim in this context brings, at least in the choice of language confirmation that the complainer was indeed a victim.

A marked difference between the fiscal fine and the compensation order was that the State would not receive the compensation but that the victim would receive this. The Scottish Executive accepted this recommendation with the order not exceeding level five on the standard scale.[73] The 2007 Act significantly makes a distinction between the method of acceptance of a compensation order and the changes to the fiscal fine. The compensation order shall only be deemed to be accepted if the accused makes payment within 28 days or another period as may be specified in the offer.[74]

The 2007 Act permits the COPFS to make a combined offer to the accused whereby both a fiscal fine and a compensation order may be made. An accused person could be fined £300 as a fiscal fine and have a compensation order of £5,000 imposed without ever having appeared before a court.

The Scottish Executive developed the recommendations of the McInnes Committee. The Scottish Executive introduced into the Bill the system of 'work orders', and this was enacted in the 2007 Act.[75] A work order is effectively a community payback order offered by the prosecutor to accused persons. The Act enables the prosecutor to offer to an accused person a specified number of hours of unpaid work in respect of any offence which is competent to be proceeded with under summary procedure. The work order offer, unlike the fiscal fine, requires the accused to accept the offer within 28 days of being offered. The work order is limited to a maximum of 50 hours.[76] For reasons which this research could not establish the Government elected not to align the work order with the community payback order powers of the Sheriff in the manner which the fiscal fine was aligned with the powers of the Sheriff in summary proceedings.

It is important to note that the imposition of the fiscal fine, compensation order and the work order, will not be treated as "a conviction" but is disclosable to the court within two

[73] Criminal Proceedings etc. (Reform) (Scotland) Act 2007 s.50

[74] ibid s50(2).

[75] ibid s.51.

[76] Criminal Procedure (Scotland) Act (1995), s301 ZA (3).

years, from the date of acceptance by the accused, should they subsequently be convicted.[77]

Following the 2007 Act, the 2008/2009 criminal proceedings statistics report showed that COPFS received 250,000 reports of criminal offences with 70,000 alternatives to prosecutions being accepted (28%).[78] The new combined fiscal fine and compensation order was only used in 1.42% of alternatives, compensation orders was used in 2.85% and the increased fiscal fine being used in 54% of all alternatives used.[79]

The statistics, from 2018/2019, show that COPFS received 171,000 criminal offence reports with COPFS alternatives being accepted in 35,597 cases (46.62%). The combined fiscal fine and compensation order being used in 8.93% of alternatives, compensation orders being used in 2.19% and the increased fiscal fine being used in 51.81% of all alternatives used.[80]

In their criticisms in the McInnes report, Lockhart and Murray commented:

> many offenders need support and advice in the community, not more fines which they cannot pay. Courts are in a position to provide these services through the various non-custodial sentences now available.[81]

In highlighting the non-custodial sentencing options available to the courts, it may be suggested that by giving similar powers to the prosecutor to use a broader range of alternatives, offenders may be able to receive the support and advice in the community whilst serving the punishment part of the sentence.[82] It may be suggested that this is needed at an earlier stage than is possible via the delay-ridden court system. The challenge

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[77] It has been suggested anecdotally to the researcher that Alternatives to disposals have appeared on Criminal record checks via Disclosure Scotland for longer than this period, but no investigations were undertaken as this is outwith the scope of this research.

[78] The Scottish Government, 'Criminal Proceedings in Scotland, 2009-10' (n 19)-% calculations are the researcher's calculation from the figures.

[79] ibid - percentage calculations are the researcher's calculation from the figures.

[80] ibid.-% calculations are the researcher's calculation from the figures. During the course of the research the 2019 – 2020 figures were published however due to the impact of Covid-19 the figures had been significantly impacted as to reduce their effectiveness in allowing comparisons to be drawn.

[81] The Scottish Parliament (n 29).

[82] It could legitimately be suggested that given the increase in fines, highlighted in this research, that this community approach has not been embraced fully.

to an effective system which serves both the interests of justice and the offender is the limited information which the prosecutor has available to them to enable the imposition of an order which will address the needs of the offender to work towards rehabilitation. The sentencer is, however, required to balance the needs of the offender against the other aims of sentencing policy.[83]

The introduction of the fiscal fine in 1988 was the first significant stage in a policy shift towards the pursuit of efficiency in Scotland, it has been suggested that this was the beginning of the steady journey towards prosecutorial sentencing.[84] Morrow proffers his opinion in that "this is not justice. There are innocent persons who will simply pay the fine to get rid of the matter, and there will be people who have been guilty of serious offences, only too happy to be diverted to avoid the wrath of the court." [85] Callander suggests that the introduction of the fiscal fine was an early symptom of the system's increasing propensity to view minor crime as presenting a bureaucratic problem.[86] The first reforms to the fiscal fines followed the McInnes committee which recommended the reform of the fine in furtherance of summary justice reform towards a system which is "efficient in the use of time and resources."[87] Callander further suggests that the pursuance of these efficiency measures which had been recommended were made at the expense of fairness and effectiveness of the system.[88]

2.5 Circumstances of the Offender

In Scotland, the sentencing Sheriff can, and in particular circumstances must,[89] call for background reports. These reports include an assessment of the ability of the offender to undertake unpaid work, a criminal justice social work report to understand the circumstances of the offender and offending behaviour, psychological reports, and any report which the Sheriff may deem necessary to allow the court to reach a decision on

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[83] For information on the purposes and aims of sentencing see: https://www.scottishsentencingcouncil.org.uk/about-sentencing/introduction-to-sentencing/, accessed 10th August 2020.

[84] Fionda, Public Prosecutors and Discretion: A comparative Study at P. 237

[85] M., Morrow, "Justice Diverted" 2008, The Journal of the Law Society of Scotland

[86] I Callander, "The pursuit of efficiency in the reform of the Scottish fiscal fine: should we opt out of the conditional offer?" 2013 SLT (News) 37-42 (Part 1)

[87] The Summary Justice Review Committee: Report to Ministers (2004), (McInnes Report Para 2.2)

[88] I Callander, "The pursuit of efficiency in the reform of the Scottish fiscal fine: should we opt out of the conditional offer?" 2013 SLT (News) 47-53 (Part 2)

[89] See The Criminal Procedure Scotland Act 1995 s203.

sentencing. The value of such reports is recognised in Scots law, particularly, with first time offenders or those facing a custodial sentence for the first time. Such reports allow the Sheriff to form an overall impression of the offender, not just the offending behaviour, understand which aspects of the offender's life require to be addressed and in what form, and have advice concerning the attitude of the offender towards methodologies of addressing offending behaviour. Velasquez's research on the sentencing practices of sheriffs states that the background reports are essential in the Sheriff selecting the correct sentence:

> the CJSWR (Criminal Justice Social Work Report) and the PiM (Plea in Mitigation) are the critical data that help the Sheriff to move from a draft of a sentence towards a narrative of the nature of the offence and the offender. These narratives help the Judge to determine the 'right' sentence.[90]

In the system of diversion from prosecution[91], The National Guidelines on Diversion from Prosecution in Scotland permits an assessment to be conducted on an accused person.[92] This assessment considers antecedent information on mental health, alcohol/drugs, risk, vulnerabilities, disabilities, attitude to offending, family dynamics and education/employment and training.[93] This information is all made available to the public prosecutor in a diversion assessment. It is not made available or conducted in respect of the imposition of the alternative to prosecution.

In 2011 the Scottish Government report highlighted that the circumstances of the offender and the mitigatory factors to the offending behaviour were a weakness in the Scottish system.[94] In 2020, Her Majesty's Chief Inspector of Prosecution in Scotland, reported to the Lord Advocate that "the key theme arising from our examination of the cases was that SPRs[95] were too often not completed with sufficient information about the young

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[90] Javier Velásquez Valenzuela, 'Doing Justice: Sentencing Practices in Scottish Sheriff Courts' (University of Glasgow 2018).

[91] See explanation in the Introduction of the difference between a diversion from prosecution and an alternative to prosecution.

[92] Community Justice Scotland, 'National Guidelines on Diversion from Prosecution in Scotland' (2020).

[93] ibid.

[94] Patsy Richards et al, 'Crime and Justice Summary Justice Reform: Evaluation of Direct Measures' (2011) at 5.16.

[95] Standard Police Reports, are the reports issued by Police Scotland to COPFS and contain details of the charge, accused and circumstances of the offence and auxiliary information.

person's mental health and other vulnerabilities."[96] To date, no steps have been taken to address this fundamental weakness in the alternatives system.

2.6 Driving Offences

Following the Stewart Committee, the majority of driving offences in Scotland are dealt with by way of the imposition of a fixed penalty notice issued by Police Scotland.[97] The most common disqualification method of a driver in Scotland is the "totting up" ban. Totting up is where the accused person has accumulated 12 points on their driving licence and automatically has a ban imposed by the court unless there are exceptional hardships in the imposition of a ban.[98] It is required that the offender be summonsed to court to have the ban imposed.[99] An accused person who will trigger 12 points on their driving licence appears at a pleading diet in the Sheriff Court, whereby if they plead guilty a 6-month driving ban would be imposed. The accused may request an exceptional hardship hearing which will be scheduled for a future date.[100] This process is distinguished from the system in the Netherlands.[101]

In Scotland, for the period 2009/2010 – 2018/2019, 123,231 criminal cases in respect of speeding offences have proceeded to court, with an average of 12,323 cases per year. 99% of these cases resulted in a financial penalty.[102]

Whilst more detailed consideration is given in the recommendation section of this thesis, it would appear that making the "totting up" procedure an administrative function with an option to request a trial or exceptional hardship hearing would be a viable consideration to the system in Scotland, given that the statute stipulates a minimum period of ban under the "totting up" procedure.[103]

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[96] 'HM Inspectorate of Prosecution in Scotland: Annual Report 2019 to 2020' https://www.gov.scot/publications/hm-inspectorate-prosecution-scotland-annual-report-2019-20/pages/3/ accessed 22 December 2020.

[97] See 2.3.

[98] See Road Traffic Act 1998 C.53 Part II s35.

[99] Road Traffic Act 1988 s35.

[100] ibid.

[101] See Chapter 3.

[102] The Scottish Government, 'Criminal Proceedings in Scotland, 2009-10' (n 19).

[103] Road Traffic Act 1988 s35.

2.7 Discount on Sentence

Scotland operates a policy of recognising the utilitarian value of the early guilty plea in the Scottish Court system. An accused pleading guilty at the earliest opportunity receives a discount on the headline sentence which the court would have otherwise imposed.[104] The maximum discount available in Scotland upon the tendering of a guilty plea is one third. For example: if the Sheriff deems the appropriate sentence is a fine of £300, then this may be discounted to £200. There is no legislative requirement in the application of a discount to the use of alternatives to prosecution. This discounting policy creates a scenario whereby, particularly with financial penalties, an accused person may be better to reject the alternative, go to court and receive the discount on the sentence.[105]

The average court fine in the last ten years is £200 with the average amount in 2017 -2018 and 2018 – 2019 being £230. [106] Arguably, the powers of the public prosecutor to impose a fiscal fine of up to £300 raises questions of the economic purpose of processing these cases through the court system. As suggested in this research, however, the economic perspective is only one element to be considered in a rounded, effective, and respected criminal justice system. The framing of sentencing policy in Scotland, the purposes of sentencing and the consistency of sentencing approaches have been reformed in Scotland by the introduction of the Scottish Sentencing Council.[107]

2.8 Scottish Sentencing Council

The Scottish Sentencing Council was created in 2010 with the purpose of establishing and ensuring the formulation of consistent sentencing practices in Scotland. [108] At the point of creation of the Scottish Sentencing Council, Scotland was recognised as making the most use of prison sentences compared to similar neighbouring jurisdictions.[109] Given that the

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[104] Criminal Procedure (Scotland) Act (1995), s196.

[105] See: Tata and Gormley (n 47).

[106] The Scottish Government, 'Costs of the Criminal Justice System in Scotland Dataset' (2017).

[107] At the time of writing only one sentencing guideline has been promulgated to the High Court by the Scottish Sentencing council. – See The Scottish Sentencing Council, 'Introduction to the Scottish Sentencing Council' <https://www.scottishsentencingcouncil.org.uk/about-sentencing/introduction-to-sentencing/> accessed 18 October 2020.

[108] ibid.

[109] Sarah Armstrong and Yarin Eski, 'Scottish Crime, Punishment and Justice Cost Trends in Comparative Context' (The Scottish Centre for Crime and Justice Research 2011).

policymakers and those involved in the criminal justice system came together to recognise that there was/is inconsistency in the imposition of sentences in Scotland, it is somewhat surprising that the Scottish Sentencing Council has no remit to consider the consistency of the imposition of penalties by the public prosecutor in Scotland.

Scotland, traditionally, has not operated a system whereby the sentencing is directed by the actions of the prosecutor, or in the large majority of Scotland by sentencing directed by statute. Indeed, in Scotland, the public prosecutor has no locus to be heard on sentencing at the first instance but may appeal against an unduly lenient sentence in the public interest.[110]

There has been a shift in Scotland in the larger number of statutory offences being introduced[111] with mandatory minimum sentences included in statute as well as legislation relating to the presumption against short sentences in Scotland.[112]

There appears to be no methodology of ensuring that there is a consistency across the Scottish criminal justice system as to the appropriate range of punishments which an offender may receive. The position regarding consistency is discussed further in Chapter 4.

2.9 Economic Rationale

The introduction of alternatives to prosecution was developed primarily to achieve an economic advantage to the public purse;[113] if Scotland were to develop a system whereby COPFS had similar powers to those available in the Netherlands what is there to be gained from an economic perspective?

The costs of a court procedure in Scotland are only available as estimations, highlighted in Chapter 1, the system already in place in Scotland saves a significant amount of taxpayer's

[110] Criminal Procedure (Scotland) Act (1995), s228 (a).

[111] See James Chalmers and Fiona Leverick, 'Scotland: Twice as Much Criminal Law as England?' (2013) 17 Edinburgh Law Review 376 which demonstrates that in 2010/11 twice the number of criminal offences were created in Scotland, versus the number created in England.

[112] Presumption Against Short Periods of Imprisonment (Scotland) Order 2019.

[113] See 2.3 on the Stewart Committee.

money and meets the utilitarian managerialist approach adopted in recent years in Scotland.

In 2018 – 2019, there were 73,703 cases proceeded at Sheriff Summary or Justice of the Peace court.[114] In terms of a sentencing basis for analysis, 15,206 cases were disposed of via a community payback order, 37,294 via a financial penalty, and 13,676 cases where the sentence was an absolute discharge or admonition. If a system were to be adopted in Scotland similar to that of the Netherlands, a further 66,176 cases become available for consideration under a punishment order schema.[115]

It is unrealistic to expect every case which previously would have proceeded to court to be appropriately disposed of via an alternative disposal. The Court has a significant role to play in the deterrence of crime merely by a person having to appear in court in the first place. However, it is realistic for the public to expect justice to be delivered swiftly, effectively, and economically.

Table 1, below, demonstrates the potential gross savings in disposing of all sentences via an alternative disposal schema, based on the percentage of cases which may then become available under a developed alternatives system.

[114] The Scottish Government, 'Costs of the Criminal Justice System in Scotland Dataset' (n 104).
[115] ibid.

Table 1 - Case Cost Calculation - Scotland[116]

% of cases	**10**	**25**	**33**	**50**	**60**	**75**
Number of Cases	6,618	16,544	21,838	33,088	39,706	49,632
Cost per case (£)	1,114	1,114	1,114	1,114	1,114	1,114
Total gross savings (£)	7,372,452	18,430,016	24,327,532	36,860,032	44,232,484	55,290,048

In Scotland, of the cases proceeded within court, significant numbers are resolved by the tendering of a guilty plea. In 2015 – 2016, in the Justice of the Peace Court 29,665 of cases (or 94%) proceeding were resolved by plea. In Sheriff Summary proceedings, 47,057 plea resolutions were obtained from 52,673 summary cases, being 89% of cases and in Sheriff Solemn proceedings, 4,398 cases were resolved by a plea from 5,513 cases, being 79%.[117] Given the significantly high proportion of cases resolved by plea and the statistical data regarding the sentences imposed on an accused in the JP and Sheriff Summary court any development of the alternative measures system, must be suitably robust to ensure a reduction in the number of cases proceeding to a court setting. Cases, it may be suggested, should only proceed to court where the circumstances dictate that the court is the only suitable method of addressing the offending behaviour.

If there were no criminal offending in Scotland, it would, logically, be a significant saving to the public purse in Scotland. While this might be a philosophical aim, it is also

[116] The Calculation of the costs in Table 1 is derived from The Scottish Government, 'Costs of the Criminal Justice System in Scotland Dataset' (2017) by averaging the Scottish Government figure of the total costs of each type of case.

[117] Scottish Parliament Justice Committee Publications, 'Lord Advocate: Evidence to the Justice Committee of the Scottish Parliament' (2020).

unrealistic and unachievable. Crime is a fact of everyday life; it is a societal norm.[118] This reality, however, does not mean that practical steps cannot be taken to reduce criminal offending and seek the rehabilitation of offenders. The justice system is often said to be directed to the rehabilitation of offenders being for the broader good of society. Indeed, the practice in Scotland is to refer to the sentence imposed on the offender rather than 'the punishment'.[119] McNeill argues, however, that:

> no amount of person change can secure desistance if change is not recognised and supported by the community (social rehabilitation), by the law and by the State (judicial rehabilitation). Without these informal and formal recognitions, legitimate opportunities will not become available, and (a) return to offending may be made more likely.[120]

2.10 Conclusions

Since the introduction in Scotland of alternatives to prosecution there has been sustained development to the available disposals. As Callandar suggests:

> Extending the fiscal's discretionary sentencing powers aggravates unease over the disparity endemic to hidden decision making, and heightens concern for adequate levels of transparency within the justice system.[121]

Since 1988, the use, frequency, and number of alternatives to prosecution have continued to rise. These developments have occurred without any further review, evaluation, or examination as to the impact on the criminal justice system in Scotland, or the actors involved in the process or the public whom they are designed to serve.

In summary, the currently available alternatives in Scots Criminal law are as follows:

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[118] Marcus Felson and Rachel Boba, Crime and Everyday Life (4th edn, SAGE Publications 2010).

[119] See: Lord President & Lord Justice Clerk Carloway, 'Sacro Sentencing: Beyond Punishment and Deterrence' (2013).

[120] Fergus McNeill, 'Desistance and Criminal Justice in Scotland' (2016) Crime, justice and society in Scotland 200.

[121] I Callander, "The pursuit of efficiency in the reform of the Scottish fiscal fine: should we opt out of the conditional offer?" 2013 SLT (News) 37-42 (Part 1)

Table 2 – Alternatives to Prosecution (Direct Measures) in Scotland

Alternative	Comment
Fiscal Warning Letter/Verbal	A warning that the accused could have been prosecuted in court and is warned as to future conduct.
Fiscal Fine	Fines can range from £50 to £500
Compensation order	Maximum compensation £3,000
Fiscal Work Order	10-50 hours of unpaid work
Reparation and Mediation	To provide the opportunity for a person responsible for a crime to engage in a restorative process and to make amends for their actions to the person harmed by their crime

Chapter 3: The Role of the Prosecutor and the System of Alternatives in the Netherlands

In this chapter, the system of alternatives to prosecution in the Netherlands is considered. This chapter considers the available alternatives, how the system of public prosecution has developed and the current position.

3.1 The Prosecution System in the Netherlands

The criminal court procedure of the Netherlands is an inquisitorial system developed from the French legal system as a result of the occupation of the Netherlands from 1810 to 1814. In 1827, legislation created a system of law and created the role of the public prosecutor.[122]

It has been suggested that the Dutch prosecutor functions in an intermediary position between the Judiciary and the Executive.[123]

> The Dutch Prosecutor has been recognized as a sentencer for many years, as witness the prosecutor's title of 'standing magistrate' as compared with the 'sitting magistrate' which is the term given to the judiciary.[124]

The system in the Netherlands has faced significant criticisms in respect of the role of the public prosecutor by their having judicial powers but not having the same independent powers as the Judiciary.[125]

In 1999, an amendment to the 1827 Act was passed. [126] This amendment clarified and developed the role of the public prosecutor to its current position. This development occurred following a request from the Minister of Justice to establish a commission to study the functioning of the prosecution service and address the functional challenges faced by the prosecution service.[127]

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[122] Wet op de Zamenstelling der Regterlijke Magt en het Beleid der Justitie van 18 april 1827, Stb. 1827.

[123] Tony Paul Marguery, 'Unity and Diversity of the Public Prosecution Services in Europe. A Study of the Czech, Dutch, French and Polish Systems' (s.n 2008) at 6

[124] Fionda (n 1) at 239.

[125] Marguery (n 111) at 6.

[126] Wet Van 19 April 1999, Stb. 1999, 194.

[127] Jan Pieter Hendrik Donner, 'Het Functioneren van Het Openbaar Ministerie Binnen de Rechtshandhaving' (1994).

The purpose of the system of prosecution in the Netherlands, Openbaar Ministrie (O.M.), as required by the Judicial Organisation Act is to: maintain the law; prosecute persons suspected of having committed offences; and ensure that sentences given by the courts are effectively enforced. [128] The manner in which the O.M. is to conduct these roles is also contained within statute.[129] A deputy represents the O.M. in each of the ten regions of the Netherlands, called the Chief Prosecutor of that region, who in turn is represented by deputies who conduct the daily business of the prosecution service.

The O.M. has the exclusive power to bring prosecution proceedings against any person in the Netherlands.[130] The O.M. is required to operate within national guidelines. These guidelines are prescribed by the Minister of Justice, who ensures enforcement through the Office of the O.M.. The guidelines are produced for the O.M., after consultation with the Board of Attorneys-General.[131]

The 1999 report clarified the relationship between the Government, in particular the Minister of Justice, and the prosecution service. Article one of the 1827 Act, as amended, articulates that the public prosecutor serves as a judicial official but is still under the authority of the Minister of Justice. The Dutch prosecutor is required to enforce the criminal law and to carry out any other task provided by law.[132]

The prosecutor has a wide range of power in criminal cases: whether to proceed with the prosecution; to impose an alternative to prosecution, or to take no action. This is commonly referred to as 'the opportunity principle' or the 'expediency principle'.[133] The criminal code[134] provides that once the investigation stage is completed the prosecution

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[128] Wet rechterlijke organisatie[RO]Art 124. Recently, with the introduction of the strafbeschikking (punishment order), the prosecuting definition has also been extended to include prosecution by means of a strafbeschikking (punishment order). Article 167 lid1 and 242 lid1 Sv.

[129] Wetboek van Strafvordering, wet van 15 januari 1921, houdende vastelling van een Wetboek van Strafvordering. 1921., houdende vastelling van een Wetboek van Strafvordering, Act in force from 1926 and Wetboek van Strafrecht, wet van 2 maart 1881, Stb.35 1881.

[130] There are some bodies with powers to impose a fine upon citizens, but this is of a limited nature and is outwith the scope of this research.

[131] College van procureurs generaal. The regular meetings of this body have become an important control mechanism of the policy execution by the OM. Since 1995 the "meeting" has been transformed into a "college" and was formally recognised in the (new) Wet op de rechterlijke organisatie (1999).

[132] Criminal Code of the Netherlands Article 124.

[133] Opportuniteitsbeginsel. For a more detailed description of expediency, see Hans de Doelder, 'De Teloorgang van Het Opportuniteitsbeginsel' [2005] Praktisch strafrecht, Liber amoricum JM Reijntjes. Also Christina Petronella Maria Cleiren and Johannes F Nijboer, Tekst En Commentaar Strafrecht (Kluwer 1997).

[134] 'Criminal Code of the Netherlands' (2012) Articles 167 & 242.

service decides upon the charge, whether proceedings should be brought at all, whether to use an alternative to prosecution or whether to issue a summons to appear in court.

The prosecutor has a general power to waive prosecution for "reasons of public interest."[135] The supervisory board has issued generic guidelines which are given great credence which may be deviated from in particular circumstances. The public prosecutor can waive prosecution if any of the following circumstances apply:

- a response other than penal measures or sanctions is preferable, or would be more effective;
- the prosecution would be disproportionate, unjust or ineffective in relation to the nature of the offence;
- the prosecution would be disproportionate, unjust or ineffective for reasons related to the offender;
- the prosecution would be contrary to the interests of the State; and
- the prosecution would be contrary to the interests of the victim.

Prior to proceeding against an accused the prosecutor is required to consider whether to dismiss the case due to a warrant of law. These reasons for a warrant of law are:

- the accused was incorrectly charged as a suspect;
- insufficient evidence in law to proceed;
- inadmissibility of a prosecution;
- the court does not have jurisdiction over the case;
- the act does not constitute a crime; and

[135] See Section 167 of the Criminal Code of the Netherlands.

- the offender is not criminally liable due to a justification or complete defence to the crime.

The expediency principle has been subject to development, in its interpretation, since it was given statutory recognition in the criminal code in 1926.[136] Anderson[137] suggests that this can be broadly broken down into three phases: the "negative phase" (Pre 1970); "positive interpretation" (1970 – 1985); and the "Judicial Intervention phase" (1985 -). The 'negative phase' was the period whereby prosecution was the norm, and as a generality, all offences were prosecuted. The 'positive interpretation' period was summarised as the question for the prosecutor being 'why prosecute?' rather than 'why not prosecute?'.[138]

The Judicial Intervention phase requires the prosecutor to act either by prosecution or by using their quasi-judicial function. During the period of the 1980s, politicians in the Netherlands expressed dissatisfaction with the prosecution system, particularly the less than robust response to cases, with significant numbers of cases being disposed of via unconditional waivers. In response to the criticism of the then prevalent system in the Netherlands a policy document was produced. This policy document considered the broader range of powers given to the prosecutor and how these powers were to be used. The policy outlined the steps to be taken between 1985 and 1990 to 'improve the maintenance of law and order'.[139] This development resulted in a significant drop in unconditional waivers by approximately 50%. By 1990, 43% of cases, were processed in court and 51% disposed of using transactions.

In 1999, the Netherlands introduced the Polaris – Guidelines. The Polaris - Guidelines is a system brought in to standardise the decision-making process of prosecutors without removing the prosecutors' discretion. For each criminal offence reported to the prosecutor, a number of "sentencing points" are attributed to all aspects of the offence. This system is

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[136] 'Criminal Code of the Netherlands' (n 122) Articles 167 and 242.

[137] Adriaan Mauritz Anderson, 'Alternative Disposal of Criminal Cases by the Prosecutor: Comparing the Netherlands and South Africa' (University of Amsterdam 2014).

[138] JMAV Moons, 'Het Opportuniteitsbeginsel. Enige Notities over Zijn Inhoud En Omvang' (1969) Nederlands Juris tenblad 485.

[139] See The Government of the Netherlands, 'Samenleving En Criminaliteit: Een Beleidsplan Voor de Kommende Jaren' (1985).

outlined in the Board of Prosecutors General policy document.[140] The system considers aggravating circumstances such as the use of a weapon in an assault or prior criminal convictions. The Polaris - Guidelines were developed to produce case options available to each prosecutor based on the crime reported. The prosecutor is permitted to deviate from the guidelines but must give a written reason to the chief prosecutor, and where the deviation from the guidelines may be perceived to be significant it must be approved by the regional chief prosecutor.[141] The Polaris system is considered further in Chapter 4.

3.2 Development of Alternatives to Prosecution in the Netherlands

In the Netherlands, a report to the prosecutor may not necessarily result in traditional court proceedings. The O.M. has a variety of alternative disposals available for their use. These are a diversion to the settlement of reconciliation between the victim and the offender; use of a caution - oral or written admonition; a transaction; a punishment order; and a conditional waiver.

Diversion to settlement of reconciliation between the victim and the offender is a system which attempts to reduce crime or escalation of criminal behaviour whilst addressing the needs of the victim. Diversion to reconciliation can only apply where the conduct is so minor that the prosecutor would be minded to apply an unconditional waiver from criminal proceedings. If the conduct is more serious, after the reconciliation, a conditional waiver or transaction may be imposed. The reconciliation does not involve the prosecutor, and the outcome of the reconciliation does not bind them. The prosecutor is, however, obliged to consider the outcome of reconciliation when making a prosecutorial decision.

A caution – oral or written admonition - can be summarised as an action by the prosecutor to intimate to the accused that they have broken the law and they should consider themselves fortunate not to have criminal proceedings brought against them. This caution is applied in circumstances where it would be disproportionate to impose another penalty but where the prosecutor deems it necessary to warn the accused.

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[140] 'Netherlands Public Prosecution Service at a Glance | Publication | Public Prosecution Service' <https://www.prosecutionservice.nl/documents/publications/openbaar-ministerie/algemeen/alles/netherlands-public-prosecution-service-at-a-glance> accessed 8 November 2020.

[141] See Peter J Tak, The Dutch Criminal Justice System (Wolf Legal Publishers 2008).

In last twenty years, the percentage of cases disposed of using these first two alternatives ranged from 7.79% of cases in 2001 to 2.15% of cases in 2018. The peak arose in 2002 at 7.85% of all cases.[142]

The 'Transaction' was introduced by statute in 1921.[143] Prior to 1983 this was reserved for cases whereby the law prescribed a sentence of only a fine. In 1983, following the Financial Penalties Committee report, the criminal code was amended to those offences which carry a statutory prison sentence of less than six years.[144] The term transaction effectively covers several conditional discharges from criminal proceedings and contains a variety of alternative measures to prosecution. The legislative framework for the functioning of transactions in the Netherlands is found in Article 74 of the criminal code.[145]

Table 3 below summaries the available transaction types:

[142] Researcher's Calculation, based on Statistics supplied by the Statistics Netherlands Info Service available at– http://opendata.cbs.nl/statline/#/CBS/nl/dataset/83944NED/table?ts=1594642130803.

[143] An in-depth review of the historical development of transactie, see P Osinga, 'Transactie in Strafzaken' [1992] Arnhem. Diss. UvA.

[144] 'Criminal Code of the Netherlands' (n 122): Section 74 CC, Financial Penalties Act 1983.

[145] 'Criminal Code of the Netherlands' (n 122).

Table 3 - Transaction Types in the Netherlands

Transaction Type	Comment
Fine	Not less than three Euros and not more than maximum statutory fine
Relinquishing/renunciation of title to objects that have been seized and that are subject to forfeiture or confiscation[146]	Ownership of the item is given to the State
Surrendering or payment of the estimated value to the State of objects subject to forfeiture or confiscation	This applies to articles that can be forfeited, but which are not in the custody of the State
Forfeiture of items or payment of a sum being the estimated gain from the criminal offence	Similar to the proceeds of crime legislation in Scotland.[147]
Compensation Order	Payment for the damage caused by the criminal offence either in full or partial compensation.[148]
Work Order	Unpaid work or training lasting a maximum of 120 hours.

The Transaction is the most widely used alternative by the prosecution service. During the last twenty years, disposals of cases by transaction ranged between 34.64% (2001) to 25.54% (2018), with the peak usage being 36.02% of cases in 2012.[149]

[146] Article 33 Sr. prescribes the articles that are open for forfeiture whereas Article 36(c) and 36(d) Sr. prescribes which articles may be confiscated.

[147] Article 36 (e) Sr. also called the "plukze" legislation.

[148] Similar to the determination of the illegally obtained benefit, the prosecutor can estimate the correct damage.

[149] Researcher's calculation, based on statistics supplied by the Statistics Netherlands Info Service –Available at http://opendata.cbs.nl/statline/#/CBS/nl/dataset/83944NED/table?ts=1594642130803.

A significant difference between the Scottish system and that of the Netherlands is the ability of the Dutch prosecutor to declare the guilt of an accused, impose a criminal sanction, and record a criminal record without the requirement for the accused to attend a court. This criminal sanction is in the form of a punishment order, to require the offender to complete a sentence such as: unpaid work (community payback order); payment of a fine; a driving disqualification; make payment of a compensation order or a forfeiture order. The punishment order does not, unlike other alternatives, require the consent of the offender; it is the imposition of a punishment on the offender after the prosecutor has determined the guilt of the accused.

One particular type of punishment order available to the prosecutor in the Netherlands is the power to impose a disqualification from driving on the offender. In the Netherlands, the public prosecutor, via a punishment order, has the discretion to impose a driving ban of up to six months.

The accused has the right to appeal a punishment order and have this appeal heard in court. If an objection is lodged to the order, the O.M. has three options available in deciding how to proceed. The prosecutor can withdraw the charge and order, change the order, or issue a summons to court. Where the prosecutor changes the order, the accused has the right to challenge the order as amended. If the prosecutor withdraws the charge and punishment order the option to prosecute lapses. In the case of issuing a summons, the case is then held in court in the usual manner.[150]

The effectiveness of the punishment order was considered in the evaluation of "bestuurlijke strafbeschikking."[151] The report concluded that the punishment order did not result in a drop in offences or lead to a change in offending behaviour but reduced the weight of the business on the court service.[152] In light of the lack of comparative data available in Scotland being made available an examination of the effectiveness of the alternative measures was somewhat limited.[153]

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[150] See Criminal Code – Ss 255 to 257.

[151] Sander Flight et al, 'Bestuurlijke Strafbeschikking En Bestuurlijke Boete Overlast: Evaluatie Na Drie Jaar' (DSP-Groep 2012).

[152] ibid.

[153] See Chapter 1.

In 2010, 5.72% of reports to the public prosecutor were disposed of by using a punishment order, rising to 15.87% in 2018.[154] The median figure over this period was 16.44% of cases.

The conditional waiver, the final alternative available to the prosecutor, is non statutory but may be offered to an accused where the prosecutor is of the view that this would be preferable and in the public interest rather than prosecution. Such conditional waivers may include conditions which the prosecutor sees fit, such as the accused attending for alcohol or drug treatment. In the period, 2001 to 2018, conditional waivers were the least used alternative with the 2001 use accounting for 1.05% of all alternative disposals and in 2018 4.69%. A peak was reached in 2014 of 5.01%.[155]

The use of alternatives to prosecution, with the exclusion of the punishment order, is not registered against the offenders' criminal records and is not available to the court for consideration in any future criminal proceedings at any point.

In the Dutch system, it is compulsory to inform the victim that an alternative has been offered to the accused. The victim has the power to challenge a decision to offer an alternative to prosecution formally. Article 12 of the Dutch criminal code provides that any person with a direct interest can challenge the decision of the prosecutor.[156] If a person challenges the decision of the prosecutor, it is for the court to judge whether the prosecutor decided correctly. If the court upholds the complaint, it can direct the prosecutor to prosecute or continue a prosecution. Some commentators suggest that the Dutch prosecutor is *dominus litis;* given the power of review by the court, it is questionable that this is, in reality, the case.[157]

The use of alternatives to prosecution, in the Netherlands, in the last twenty years has fluctuated from 34.64% (2001), of all cases reported to the prosecutor, to 25.54% (2018).

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[154] Researchers Calculation, based on Statistics supplied by the Statistics Netherlands Info Service –Available at http://opendata.cbs.nl/statline/#/CBS/nl/dataset/83944NED/table?ts=1594642130803. Accessed 19th November 2020.

[155] Ibid.

[156] 'Criminal Code of the Netherlands' (n 122). Articles 250 & 262.

[157] See Anderson (n 125).

The peak was reached in 2002 at 36.02% of all offences which proceeded either by prosecution or use of an alternative.

3.3 Discount on Sentence

In the Netherlands, accused persons receive a maximum discount of 20% on sentence in a guilty plea, and this is automatically applied in the imposition of a punishment order. The system permits the prosecutor to ask the judge for a more severe sentence should the accused not have a valid objection to the punishment order but insists on being heard in court.[158]

Furthermore, the judicial sentencing guidelines are not the same guidelines adhered to by the prosecutors.[159] It is particularly striking, considering previous research findings, that judges actually impose the sanction requested by the prosecutor in less than half of cases.[160] Given the stated differences between the prosecutor's requested punishment and the Judge's imposition of a sentence, there is no reason to believe that the same differences would not apply to punishment orders, *mutatis mutandis*. The Justice Minister has directly addressed this concern in stating that the reason for this is to discourage accused persons from frivolously objecting to punishment orders and to continue to alleviate the pressures on the court system.[161]

3.4 European Convention on Human Rights Compliance

A further consideration of any imposition of a criminal sanction by the State is the European Convention of Human Rights (ECHR), particularly Article 6. The Netherlands is a member of the European Union and is obliged to comply with the convention. A criminal charge may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence."[162] An accused person waiving their right to a hearing before an impartial tribunal will only be

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[158] States General of the Netherlands, 'Parliamentary Papers I, 2005/06, 29 849, C'.

[159] Prosecutors use the Polaris guidelines system, the Judge use Orientation Points guidelines.

[160] Anne Marie Slotboom et al, 'De Relatie Tussen Eis En Vonnis: Strafvordering En Straftoemeting in Vier Arrondissementen' (1992) 8 Justitiële verkenningen 59.

[161] States General of the Netherlands (n 146).

[162] *De weer v Belgium* (1980) 2 EHRR 439 459 at 46.

considered a valid waiver whereby the accused has made "a voluntary, informed and unequivocal election not to claim their right."[163]

The Netherlands' compliance with the Convention rights of the accused has been a point of debate.[164] The ECHR states that the imposition of administrative fines complies with Article 6 providing that the access to the courts is guaranteed.[165] The accused, in the failure to lodge opposition to the punishment order, is waiving their right to have the case heard by a court. It is arguable, therefore, that the accused person retains the right to have their case heard by an independent tribunal per Article 6.[166] At the implementation of the punishment order, in the criminal code of the Netherlands, the Dutch Justice Minister addressed this point in a ministerial statement concerning the compatibility with Article 6 saying:

> It can be concluded from ECHR case law that an extrajudicial 'preliminary procedure' would not encounter objections, provided an appeal to the court is possible which meets the requirements of the Convention.[167]

3.5 Circumstances of the Accused

In the Netherlands, the accused has a limited right to be heard by the prosecutor. This right to be heard occurs before the imposition of a punishment order. The criminal code requires that the prosecutor hear from the accused before the imposition of a punishment order requiring community service or disqualification from driving.[168] For fines above €2,000 the accused has the right to be heard by the prosecutor with legal counsel. This right to be heard provides an opportunity for the accused person to make representations to the prosecutor as to the appropriate disposal in the case and offer mitigating factors to the

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[163] *Millar v Dickson* [2001] UKPC D 4; 2002 SC (PC) 30.– see also: *McGowan v B* [2011] UKSC 54 para.18

[164] See: Anderson (n 125).

[165] *Öztürk case (* ECHR 21 – 2 – 1984), Series A 73, NJ 1988, 937 and *Bendenoun case* (ECHR 24 – 2 – 1994), Series A 284, NJ 1994, 496 m.nt.EAA.

[166] See Cleiren and Nijboer (n 121) at 863–864.

[167] Parliamentary Papers II 2004/05, 29 849, 3.

[168] Criminal Code – S257c, at 1.

offending behaviour, or to provide information to the public prosecutor which may directly impact the nature of conditions attached to any punishment order imposed.[169]

3.6 Conclusion

In the Netherlands, there has been significant development of the alternative disposals system since its introduction. At each stage of the development of the alternatives system in the Netherlands, it has been a policy-driven approach, responding to the societal challenges and issues facing the Netherlands.[170] The implementation, use and enforcement of alternatives in the Netherlands are somewhat different from that of Scotland. These differences are examined in the forthcoming chapters.

In summary, the alternatives available to the prosecutor in the Netherlands are as follows:

Table 4 - Alternatives to Prosecution in the Netherlands

Alternative	Comment
Diversion	The accused is given the opportunity to undertake an appropriate programme for their needs in order to avoid prosecution.
Caution (oral or written)	A warning that the accused could have been prosecuted in court and is warned as to future conduct.
Transaction	Maximum compensation €3,000
Punishment Order or Penalty Order	Fine, community service (unpaid work), disqualification from driving, compensation order or forfeiture order
Conditional Waiver	A condition is placed upon the accused, which must be satisfied prior to the waiving of the right to prosecute.

[169] 'Criminal Code of the Netherlands' (n 122). S257(c), at 1.

[170] See 3.1 – Paragraph on Expediency Principle and the phasing of the development of the system in the Netherlands.

Chapter 4: Consistency in the Offer of an Alternative to Prosecution

This chapter considers the consistency of an offer of an alternative to prosecution in both jurisdictions and upon a statistical analysis of the position seeks to draw conclusions and raise questions as to the position in Scotland versus the operation of the system in the Netherlands.

> All are equal before the law and are entitled without any discrimination to the equal protection of the law.[171]

This Universal Declaration of Human Rights is a fundamental consideration in any system of law. In this research we consider how the system of alternatives to prosecution operate in respect of equal treatment before the law. Noting that there is no onus on member states to prove compliance, Article 7 of the declaration, by its very nature, poses questions concerning alternatives to prosecution in Scotland as compared to those in the Netherlands regarding the equal treatment of persons in the alternative disposals system, the protections to ensure equal treatment in the operation of the systems, and whether the Scottish system offers adequate protection to ensure all are treated equally.

4.1 *Case Marking in Scotland*

In the Scottish system, prosecutors are bound by the prosecution code and are required to follow guidelines issued by the Lord Advocate. Neither the prosecution code nor the Lord Advocate's guidelines have a basis in statute, and nor can they be enforced through the courts.[172] COPFS does not publish the Lord Advocate's guidelines in full and states:

> Lord Advocate's Guidelines or prosecution policy and guidance is only published where its publication would not, or would not be likely to, prejudice substantially the prevention or detection of crime; the apprehension or prosecution of offenders; or the administration of justice. Prejudice may include allowing offenders to circumvent the law by restricting their offending to

[171] Universal Declaration of Human Rights 1948 (United Nations), Article 7.

[172] See Chapter 6.

conduct which falls short of a prosecution threshold or, for example, a threshold which determines the prosecution forum.[173]

It is therefore not possible to examine the guidelines used by prosecutors to understand the particular criteria applied to every case beyond the statistical analysis of the offences with the same *nomen juris*.[174] This lack of ability to critically examine the guidelines or the criteria creates a situation where it is impossible to understand in which circumstances, when particularly applied, the use of alternatives to prosecution is ruled out nor, indeed, in which circumstances would an alternative always be applied. Given that COPFS employs approximately 500 Procurators Fiscal's[175] who are responsible individually for applying the guidelines to particular cases, the lack of transparency of the decision-making process used by COPFS raises significant concerns. This lack of transparency gives rise to concern that all persons may not be treated equally.

Moody and Tombs[176] established that decision making in COPFS was significantly based upon individual judgement, but that "common perceptions of appropriate goals and methods of achieving such goals" were gained over time by individual fiscals. This individualist approach to case marking gives rise to concerns regarding the consistency of approach and fairness to all persons involved in the Scottish criminal justice system. These concerns, however, cannot be substantiated and without a full review of the COPFS decision-making process. It is recognised that this would require significant time, resources, and access, given the number of decision-makers and unique nature of each case presented to an individual fiscal.

Since the research of Moody and Tombs in 1982, as far as this researcher has been able to establish, there has been limited access to the COPFS for researchers. An FOI requested was submitted to COPFS asking:

(a) Since Moody and Tombs (1982) were given researcher access to COPFS, how many researchers have been given access to COPFS for the purposes of

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[173] Crown Office and Procurator Fiscal Service, 'Prosecution Policy and Guidance' (2020) https://www.copfs.gov.uk/publications/prosecution-policy-and-guidance accessed 18 October 2020.

[174] See James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 Modern Law Review 217 for a critique of the history of the labelling of criminal offences.

[175] See - 'HM Inspectorate of Prosecution in Scotland (n 86).

[176] Moody and Tombs (n 26).

> conducting academic research? Please state the years in which access has been given and where possible provide the topic of the research for which access was agreed. (b) Please provide copies of any policy document on granting of researcher access to COPFS.

COPFS responded: "The information you have requested is not recorded by the COPFS, therefore, in terms of Section 17 of FOISA COPFS does not hold the information you have requested." Thus, it would appear that, there is not a standard researcher access policy operating within COPFS and only a limited number of researchers have had access over the last forty years. Whilst there are limited examples of access and participation of COPFS employees in research, the researcher was not able to compare this versus the number of requests for access made to COPFS.[177]

4.2 Case Marking in the Netherlands

The Netherlands operates a system for the automatic grading of offences to standardise the options available to the prosecutor in a particular case, called the BOS - Polaris System. Polaris directs a prosecutor by the application of points to each aspect of the offending behaviour and particulars of the offence. The guidelines and points-based system are publicly available, and any person with the full facts of the case can examine how the system is applied to particular circumstances. Each offence by its *nomen juris* is categorised and awarded a number of points; aggravating circumstances are applied, and points allocated based on the degree of aggravation and the accused's criminal record is applied with further points being accumulated where relevant. In addition, any mitigating circumstances can be applied, resulting in a reduction in the number of points.

Tak gives an example of the application of the Polaris System:[178]

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[177] The researcher is aware of some recent research projects where representatives from COPFS have participated, the researcher could not establish access for substantive and wide ranging access since Moody and Tombs. See For example: Leverick and Duff, Adjournments of Summary Criminal Cases in the Sheriff Courts (2008), Leverick, Chalmers and Duff, An Evaluation of the Pilot Victim Statement Schemes in Scotland (2007)

[178] Tak (n 129).

Offence/Nature	**Number of points**
Assault	12 Points
Injury sustained (Light injury no medical treatment)	+ 3 Points
Injury sustained (Medical Treatment required)	+ 8 Points
Injury sustained (specialist medical treatment required)	+ 21 Points
Injury sustained (Severe Injury)	+ 35 Points
Assault with blunt weapon	+ 7 Points
Assault with stabbing	+ 17 Points
Assault with firearm	+ 52 Points
Assault (With Sporting Event aggravation)	+ 25% added to total
Assault on Public Servant, professional in course of their duties or where victim was a person trying to prevent an assault	Total points are doubled
Assault committed against a victim in a dependent relationship with accused	+ 33% added to total
Victim was arbitrarily chosen by accused	+ 25% added to total

The points are added together, with a balancing calculation applied, and not all points are fully counted in directing the prosecutor to the outcome. Points up to 180 are fully counted, between 181 and 540 are halved, and anything above 541 is quartered. In the application of the guidelines, each point is a fine of 22 Euro, one day of imprisonment or two hours of community service. The prosecutor then applies the guidelines to the options for proceeding with the case. Any case below 30 points, a fine transaction is applied. Between 30 and 60

points, the prosecutor may only use a task penalty. Above 61 points, there will be an indictment.[179]

As stated in Chapter 3, the prosecutor in the Netherlands is permitted to depart from the guidelines. A written reason must be recorded for doing so and where there is a significant departure from the guidelines the chief prosecutor is accountable to the Minister of Justice for justifying any such divergence.

A further protective measure is built into the system of the Netherlands in the form of the judiciary. In 1990, the Dutch High Court stated that the propriety of deviation from the guidelines is a question of law, not fact.[180] The Dutch High Court stated that if these guidelines for prosecutors have the status as if they were law, then a judge is entitled to examine the activities of the public prosecutor in every case to ensure compliance with the guidelines. In Scotland, the guidelines are not published and are guarded against publication, nor do they have the status as being treated as law.

It is suggested that the system in the Netherlands, and a standardised system of case marking, allows for transparency and accountability of the decision-making processes of the prosecutor without removing the discretionary elements. An automated system allows for comparisons in the application of the scoring system between the regional prosecutors' offices. This ability allows for transparency, quality control and management of the decision-making processes.

In addition, a defence agent can advise a client on the likely outcome of a case and the options in the particular circumstances by application of the guidelines. This system enables the defence agent to provide advice to the accused concerning the likelihood of success in challenging a decision of the public prosecutor through the appeals process before the client accepts/rejects an offer of an alternative.

Whilst it is outwith the scope of this research, it is suggested that precise early advice to an accused person may lead to an earlier resolution of particular cases. It may be the case that

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[179] See: ibid at 9.6.

[180] 'Hoge Raad, 19 June 1990' (*Nederlandse Juriprudentie*, 1991) https://www.navigator.nl/document/id34199006192317nj1991119dosred/ecli-nl-hr-1990-zc8556-nj-1991-119-hr-19-06-1990-nr-2317besch-richtlijn-en-recht-in-art-99-ro accessed 15 April 2021.

alongside early disclosure of evidence and a full understanding of case marking decisions by defence agents, it would be likely to reduce case elongation and late pleas.[181]

The transparent process in the Netherlands enables both victims and accused persons to develop an understanding, or at least be given advice, on the likely outcome of a criminal complaint. This process underpins and enables an appeals system to operate for both the accused and the victim in criminal offences in the Netherlands. The table below shows the number of appeals against a prosecutor's decision which resulted in the case being heard in court.

Table 5 - % of Opposed Cases (Netherlands)

	2013	2014	2015	2016	2017	2018	2019
Registered court criminal cases	210,565	212,325	191,450	190,850	172,265	170,235	188,105
Total decisions by the Public Prosecution Service	224,330	221,805	203,875	202,530	185,030	181,210	192,670
Summons	107,505	109,590	106,005	105,280	99,505	97,400	95,160
Calls to court in response to opposition	1520	2145	1255	2175	1210	1955	1025
Total Alternatives	115,305	110,070	96,615	95,070	84,315	81,855	96,495
% of Cases Opposed for Alternative as % of all Alternatives	1.32%	1.95%	1.30%	2.29%	1.44%	2.39%	1.06%
% of Cases Opposed for Alternative as % of Total Cases	0.72%	1.01%	0.66%	1.14%	0.69%	1.15%	0.54%

4.3 Consistency in Scotland

The system in Scotland requires that an individual prosecutor considers each offence which is marked, and decisions are taken by an individual within or outwith the Lord Advocate's

[181] See Justice Committee The Scottish Parliament, 'Role and Purpose of the Crown Office and Procurator Fiscal Service' (2017), at 28. See also Jenia Iontcheva Turner, 'Transparency in Plea Bargaining' (2021) 96, 973. Discussing transparency in plea negotiation in the USA and the dangers of procedures behind closed doors. See further, Fiona Leverick, 'Plea and Confession Bargaining in Scotland', Report to the XVIIth International Congress of Comparative Law, (2006).

guidance. Whilst the COPFS publishes the factors taken into consideration when making decisions on a particular case,[182] COPFS will not publish prosecutor guidelines as it may:

> allow(ing) offenders to circumvent the law by restricting their offending to conduct which falls short of a prosecution threshold or, for example, a threshold which determines the prosecution forum.[183]

It is respectfully suggested that this statement gives rise to a criticism of the decision-making process in and of itself. If the fear of publishing the guidance is that offenders may moderate their behaviour to less serious offences to avoid prosecution or only commit offences for which they will only receive a warning letter, then this should lead to a reduction in serious offending. It may be suggested that this would be a societal good. However, this fear could also be alleviated if guidelines recognised persistent minor offending and would lead to an escalation of the prosecutor's case management decision.[184]

Although the prosecution service in Scotland permits the victim to formally request a review of a decision, it is difficult to understand the basis on which an argument could be made that the decision is flawed based on policy, guidelines, or misuse of discretion when the guidelines which inform the decision-making process are not publicly available. It may be the case that this leads to a situation where a victim of crime requests a review of a decision, and it is limited in its force as there can be no factual basis to disagree other than to say that the unqualified victim is unhappy with the decision. The victim review process and the consideration of the victim in criminal complaints are considered further in Chapter 5.

Furthermore, there is no formal basis on which an accused can request a review if they believe a prosecutor's decision is: fundamentally unfair; fails to apply the Lord Advocate's guidance properly; or that they are being treated substantially different to another person who has committed the same offence, in similar circumstances. For example: Person A is charged with a section 38 offence under the Criminal Justice Licencing (Scotland) Act 2010 by shouting and swearing in a public place. Person B and C are both charged with the same offence. All persons have no criminal record, and all *facta probanda* are the same. In this

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[182] See Chapter 2.1

[183] ibid.

[184] See Chalmers and Leverick (n 162), Section – Communication to Offenders, which highlights the importance of the offender being aware of the offences and the censure which they may attract.

situation it is possible, in Scotland, that Person A may be offered an alternative, Person B informed that no proceedings would take place and a Person C is summonsed to court. The only option open to Person A is to reject the offer of an alternative and elect to go to court.[185]

Does this happen in Scotland? Within the limits of this research, it is not possible to answer that question definitively other than to say it is possible. It is significant that since 1993, the powers of the procurator to use alternative disposals have increased significantly with no quality management process or significant public scrutiny of their effectiveness.[186]

Furthermore, in the case of prosecutor warning letters, the accused has no right to protest innocence of the conduct alleged, there is no route of appeal and no methodology to reach an independent tribunal, which it may be suggested is not compliant with Article 6 of the European Convention on Human Rights. According to the Prosecution Policy and Guidance, the public interest test and the sufficiency test must be met prior to the issuing of the fiscal warning letter.[187] There is no requirement for the admission of guilt by the accused. There is a presumption of guilt made by the prosecutor in the issuing of the letter.

It may be that there being no methodology for an accused person to reject a fiscal warning letter and have the case heard before an independent and impartial tribunal, for the accused to seek a declaration that they are not guilty of the criminal offence, is problematic for the Scottish system.[188] Whether or not an accused person would seek to instigate the case calling in court and any perceived risk which this may have is another matter, but for the integrity of the Scottish system, this is a matter which requires to be addressed.[189]

The Richards's Evaluation[190] raised in their interviews that Justice of the Peace (JPs) members of the judiciary raised significant concerns about the widening of the powers of the fiscal direct measures as a failure to appreciate the nature of the offending behaviour, the measures required to reduce the likelihood of re-offending and address the causes of the offending behaviour. Indeed, JPs suggested that this consideration was not even part of the consideration of a fiscal

[185] See Fionda (n 1) on the public prosecutor's discretion.

[186] RM White considered Alternatives to prosecution in 2008 and 2009, alongside the Richards et al evaluation published in 2011

[187] Crown Office and Procurator Fiscal Service, (n 161).

[188] See 3.4 on compliance with the European Convention on Human Rights.

[189] The Scottish Parliament (n 29).

[190] P Richards et al., , "Summary Justice: Evaluation of Direct Measures" Scottish Government Social Research 2011

imposing an alternative. It requires to be stated however that whilst the JPs objected in principle to the widening of the fiscal's power, which necessarily impacts on the volume of work in the JP court, they were less critical of the increase in scope of the Police powers, which in all likelihood would have been dealt with by the "old style" fiscal fines. Conversely some of the JP focus groups in this evaluation suggested that more serious offences were being prosecuted in the JP court.

Further information presented from the Richards's evaluation raises issues of gender when being offered various types of direct measures and highlights that further research after a more longitudinal period has passed since the Richards's review, to properly contribute to the consideration of effectiveness and legitimacy of the use of direct measures.[191]

The Richards's evaluation also raises the suggestion that Fiscals considered the nature of offending behaviour, previous alternative disposals and wider social circumstances of the offender. It is difficult to understand how a fiscal could be in possession of all the facts that a court would be aware of at sentencing via a social enquiry report. Issues included in the evaluation highlight the financial capability of the offender to make payments to the fine, whereby information and the personal circumstances would be known to a court imposing a financial penalty. The nature and extent of enquiries made by fiscals into the offender and offending behaviour are unclear and require further examination in this study to properly examine whether there is a prospective of contributing to addressing the underlying causes of offending behaviour, although the fiscal does have the power to divert to other services, it is unclear from previous research how, when and why these decisions are reached or actually used.[192]

One of the significant concerns raised in various anecdotal pieces are that DMs are being used multiple times against the same offenders. This anecdotal evidence continues to be heard in the agent's room and in self-evidenced pieces published. The statistics from 2008 – 2009 contained in the Richard's evaluation does not support the anecdotal evidence, however the one year period of data is limited and lacks the data to conduct a proper analysis. This research considers the data available over a ten year period. The data from 2008 – 2009 requires comment in that offenders receiving more than 2 DM was only 1.78% of cases, the crown office data does not present information as to the jurisdiction on where the DM was issued from to highlight any regional discrepancies either procedurally or in practice.

Further information contained in the Richards's evaluation notes that in the small print of a Police DMs and in the fiscal letter notes that the accepting of the penalty will not appear in criminal

[191] See Chapter 4 for discussion and examination of the consistency of the offer of an alternative.

[192] See Chapter 2.5 of the circumstances where an offender assessment is undertaken during a diversion from prosecution and not used in the assessment for the use of alternative to prosecution.

records search but may be available to the court for a period of two years. The accused person is informed that the DM will be disclosed under enhanced disclosure in terms of Part V of the Police Act 1997. It is unclear in the Richard's evaluation what understanding accused persons have of enhanced disclosure or indeed the possible impact that an acceptance of such a measure could have on future careers particularly in professions whereby PVG scheme registration is required. The research undertaken here examines this issue in some detail and reports on the challenges to this disclosure scheme has under the European Convention of Human Rights and to the proper and full rehabilitation of offenders.

The Richard's evaluation highlights via the JP working group that person familiar with the criminal justice system or persons who have made early access to an agent to act on their behalf may have an opportunity to make representations in respect of the DM and highlights the significant inequality of arms which exists between the court process and the process involved in the DM. The Richard's evaluation does not draw any evidence or conclusions from this belief other than making the statement. Further information and studies are required to fully understand the process and defects which may or may not exist in this process and any resulting effects.

Consideration in the evaluation to the public perception of DMs and other sentencing lacks insight in the report and is considered merely in three paragraphs (5.11 – 5.13), this research has included significant research with the victims of crime and the wider public. It is worth noting an important sentence in the evaluation at 5.13 whereby fiscals had stated that the public did not understand that the case might go to court to be deserted by the Crown. The evaluation does not consider this important sentence any further. This, potentially, gives rise to an allegation that COPFS are using alternatives in cases which ultimately would have been abandoned. This requires further significant information and research to fully understand this aspect of the use of Alternatives.

The conclusions section of the evaluation only dedicates one paragraph to the interests of justice and fairness towards the accused person but offers only anecdotal examples and a generalised comment of information sharing being a widespread problem. The significance for this research being that the interests of justice and fairness towards the accused/victims and society. It is unsurprising given the apparent motives towards an economic model that there is not a fuller longitudinal study into the likelihood of the innocent accepting alternatives to prosecution and the implications that this has for society and our criminal justice system, if indeed it can be established by evidence. Indeed, it is suggested by White that "the presumption of innocence and

the value of fairness are reinterpreted from an obligation on the state to prove its case, to an obligation on an accused to take positive action to invoke judicial process." [193]

4.4 Inspection Service in Scotland

In Scotland, Her Majesty's Inspector of Prosecution (HMIPS) has as its aim "to enhance the quality of service provided by and secure public confidence in the COPFS through independent inspection and evaluation to enhance the effectiveness of and to promote excellence in the prosecution service in Scotland."[194] To date, there has not been a study or inspection undertaken by HMIPS to understand the consistency of decision-making processes concerning the use of alternatives to prosecution and the application of the Lord Advocate's guidelines.

The Thematic Report on the use of fiscal fines[195] in and the Thematic Report on the use of compensation orders[196] both raised concerns and made recommendations concerning the application of alternatives to particular cases. There is no available report on the applicability of the guidelines, the consistency of application of the guidelines or the effective and consistent use of the alternatives to prosecution.

The creation of the HMIPS seems to raise at least an inspection profile, the limited publication of information may imply a lack of proper scrutiny of prosecutorial decisions. Indeed, the concerns of the former Solicitor General of Scotland, in 1980, appear not to have been fully addressed in the way that such public services are subject to scrutiny:

> When the system accords the public prosecutor a discretion, it must also create machinery for guarding against its abuse, whether corruptly or misguidedly. Answerability to Parliament is not the only possibility; the courts or the Ombudsman could provide the check.[197]

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[193] R.M. White, "The Summary Criminal Proceedings(Abolition) (Scotland) Act 2007? A Critical view of Part 3 of the Criminal Proceedings Etc (Reform) (Scotland) Act 2007" 2008 Juridical Review 215. p.240

[194] Scottish Executive, 'Inspectorate of Prosecution in Scotland: About Us' https://www.webarchive.org.uk/wayback/archive/20180528124331/http://www.gov.scot/about/public-bodies/ipis/about-us accessed 18 October 2020.

[195] Inspectorate of Prosecution in Scotland (n 33).

[196] Inspectorate of Prosecution in Scotland, 'Summary Justice Reform Thematic Report on the Use of Compensation Offers and Combined Fiscal Fines and Compensation Offers' (2010).

[197] Lord McCluskey, 'The Prosecutor's Discretion' [1980] International Journal of Medical Law.1:5 at 8

Indeed, in the Scottish Parliament Justice Committee investigation,[198] concerns were raised about the independence of the inspectorate in their policy of "routinely employing seconded or former COPFS staff."[199]

4.5 Scottish Statistical Analysis

In the period 2010/11 - 2019/20, the use of the fiscal fine dropped significantly and generically across all fiscal offices in Scotland as a percentage of the total alternative disposals issued with a rise in the use of the combined fine and compensation order. A sample of four offices is given below:

Table 6 - Selected Fiscal Offices: Fiscal Fine and Combined Order (Scotland)

	Aberdeen		**Edinburgh**		**Glasgow**		**Hamilton**	
	2010/ 2011	**2019/ 2020**	**2010/ 2011**	**2019/ 2020**	**2010/ 2011**	**2019/ 2020**	**2010/ 2011**	**2019/ 2020**
Total Number of disposals	3267	3066	6170	5048	18410	9033	4406	3390
Fiscal Warning Letter	17%	6.22%	13.58%	12.04%	19.16%	11.98%	20.23%	10.40%
Fiscal Fine	54.93%	52.51%	50.47%	29.52%	52.11%	43.62%	34.53%	26.32%
Compensation Order	1.63%	0.97%	2.04%	1.55%	1.28%	0.95%	3.34%	0.65%
Combined Fine and Compensation	3.65%	9.65%	1.88%	9.71%	1.71%	7.90%	10.93%	20.74%

[198] The Scottish Parliament (n 168).

[199] ibid at 2.

It is difficult, given the lack of available statistical information, to understand the rationale of the drop in the use of particular methods of alternative disposals or indeed, the reasoning behind each change. Further understanding of these changes in the last ten years is required. It is crucial to understand if these changes have developed due to particular regional concerns around particular offending behaviour and policy decisions have been taken to take a hard-line approach against particular offending, or whether it is due to individual prosecutor preference.

Significant shifts in the use of alternatives over the period and wide variations in the use during the period, suggest that the variance gives rise to the potential of similar offences being treated differently in each fiscal office area. The number of cases whereby an alternative was used has generally remained the same; however, there are wide variations and changes in the use of particular alternatives to prosecution, for example, Edinburgh reports a drop of 20.95% in the use of the fiscal fine and Glasgow an 8.49% drop.

When examining each regional office in the table above we can see that the use of the combined fiscal fine and compensation order varies widely between the offices, with the Aberdeen Fiscal's office using the combined offer in 9.65% of cases and Hamilton using the same alternative in 20.74% of cases.

Further analysis of the breakdown per prosecutor's office reveals between 2010 and 2020 the vast majority of local procurator fiscal offices, 26 offices, report a percentage rise in the number of reports offered an alternative to prosecution and only 14 offices reporting a drop in the percentage of cases whereby an alternative to prosecution was offered.[200]

Whilst the majority of local prosecutors' offices report a rise in alternative usage, there was not a material rise in overall percentage terms. The percentage of the alternatives used in the overall number of cases, does not suggest a significant rise in the use of alternatives in the examined period: 26.41% in 2010/2011 and 27.61% in 2019/2020. This change does represent a rise in the number of cases where an alternative was used. It is noteworthy that the number of cases reported to the public prosecutor fell significantly during the same period from 276,000 to 171,000.[201]

[200] Data available as a result of an FOI Request (October 2020) to COPFS.

[201] The Scottish Government, 'Crime and Justice : Criminal Proceedings in Scotland, 2018-19' (2018).

What cannot be explained by this research is the significant variation between the percentages of cases whereby the alternative was considered an appropriate disposal, nor indeed can consistency of approach between local prosecutors' regions be thoroughly examined beyond the figures and percentages for each local office. Examination on the *nomen juris* of the offences reported to each local prosecutor's office was not possible, as COPFS were unable to make this information available. [202]

The basis of this change of suitability, in the majority of local prosecutors' offices, cannot be examined in the context of the prosecution policy by comparing the prosecutor's code available in 2010 and the code in use in the 2018 – 2019 period.

It would be logical to assume that the drop in offending behaviour in Scotland would have led to a reduction in the number of alternatives offered to accused persons, and this is indeed the case. The total number of disposals in the period dropped from 69,989 to 46,805. In the same period the percentage rise of cases whereby an alternative was used, within the confines of data which the public prosecutor will release, cannot be logically explained nor can the significant variations between local prosecutors' offices.

In Scotland, 82% of all persons convicted of offences are male and 18% female. In the use of the fiscal fine, 63% of disposals were given to male offenders and 37% to female offenders. Therefore, it is possible to draw the inference, concerning fiscal fines, that statistically females are given a disproportionate percentage of fiscal fines when compared to the conviction rate, based upon gender alone.[203]

Considering the *nomen juris* of an offence, in 2018 – 2019, females were convicted of 2.71% of sexual offences but received 16.66% of fiscal fines issued for sexual offences. In crimes of dishonesty, 24.5% of convictions were by female offenders, who received 37% of fiscal fines for the offence. For crimes of fire-raising, vandalism, etc., 13.02% of convictions were female, but they received 8% of fiscal fines for such offences. For common assault, 24.58% of convictions were by female offenders, but 29% of fiscal fines for common assault were given to female offenders. For motor vehicle offenders, 18.20% of convictions were by

[202] Data available as a result of an FOI Request (September 2020) to COPFS.

[203] 'Criminal Proceedings in Scotland: 2018-2019' https://www.gov.scot/publications/criminal-proceedings-scotland-2018-19/ accessed 8 November 2020.

female offenders, but 28.9% of fiscal fines were issued to females.[204] It is clear, in consideration of the particular *nomen juris,* female offenders are issued a disproportionally high percentage of the fiscal fines issued. This comparison is naturally not without its limitations, as each offence is judged by the particular circumstances with all the relevant considerations, as outlined in Chapter 2. However, the abnormality in the statistical analysis does lead to questions which, as considered in Chapters 2 and 7 of this research, require further empirical data and analysis.

A criticism of the above analysis may be that the main offence categorisation provided by the Scottish Government figures does not allow a direct association on aggravating circumstances which may escalate an offence to court proceedings rather than an alternative disposal. This criticism, being an accepted criticism of the limited nature of this research, requires consideration of the nature and statistics of aggravated offending behaviour. In offences with aggravated offending behaviour, males are statistically more likely to be convicted of an aggravated offence, 88% of offences with an aggravation convicted in court are male and 12% female. It may be the case that offending behaviour by females is less likely to be aggravated, and this may justify the variation in gender-based disposals.[205] This suggestion, however, does not provide a full and satisfactory discovery of the use of discretion and consistency in the offer of an alternative. It does not justify beyond question the statistical abnormality highlighted in this research. Further empirical research is required to consider the statistics more fully and to draw firm conclusions of this nature.[206]

It would appear the inconsistencies, or at least the suggestion of inconsistency, in the data requires the Scottish criminal justice system to contemplate the operation of bias, the operation of unsuitable net widening and the effectiveness of appropriate checks and balances. In 2015, COPFS introduced a system of centralised case marking in summary cases through the creation of the "Initial Case Processing Hub" being located in Stirling, Hamilton, and Paisley. The stated aim of the hubs was to improve consistency at the outset of the processing of criminal complaints.[207]

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[204] The Scottish Government, (n 19). People Convicted by gender and main offence table 6 and table 21.

[205] ibid, table 12.

[206] See Chapter 7.

[207] Crown Office and Procurator Fiscal Service, Strategic Plan 2015 - 2018'.

The Justice Committee of the Scottish Parliament, in their 2017 review of the COPFS, considered the effect of the centralised case processing hubs. The Committee's report expressly examines the differential opinions on the effect of the centralised processing hubs as to the consistency and appropriateness of the approach in particular cases, without conducting a detailed review into the issues of consistency and approach raised in response to the committee's call for evidence. The Committee's review remains superficial in the examination of the concerns raised about consistency and appropriateness of disposals in the work of the COPFS.[208] It remains the case, at the time of writing, that no independent examination of the consistency in case marking by COPFS has been undertaken.

Since the creation of the centralised marking hub, it is clear that the statistical abnormalities between the regions examined in Table 6 remain despite the creation of the centralised marking hubs and their stated aim of consistency. Table 7 below provides further information of the use of alternatives since the creation of the centralised marking hubs.

[208] The Scottish Parliament (n 168).

Table 7 – Use of Alternatives since the Creation of the Hubs[209] (Scotland)

Office	Total Alternatives 2016	Total Alternatives 2019		Change in total numbers of alternative disposals used
Aberdeen	2957	2431		-526
Edinburgh	4527	3514		-1013
Glasgow	12928	7009		-5919
Hamilton	3484	2586		-898
Office	Warning Letters 2016	% of Total	Warning Letters 2019	% of Total
Aberdeen	372	12.58%	319	13.12%
Edinburgh	679	15.00%	608	17.30%
Glasgow	2526	19.54%	1082	15.44%
Hamilton	498	14.29%	211	8.16%
Office	Conditional Offers of Fixed Penalties Paid 2016	% of Total	Conditional Offers of Fixed Penalties Paid 2019	% of Total
Aberdeen	947	32.03%	1037	42.66%
Edinburgh	623	13.76%	847	24.10%
Glasgow	1253	9.69%	1186	16.92%
Hamilton	452	12.97%	228	8.82%
Office	Fiscal Fines Paid/Accepted 2016	% of Total	Fiscal Fines Paid/Accepted 2019	% of Total
Aberdeen	1022	34.56%	807	33.20%
Edinburgh	1521	33.60%	1490	42.40%
Glasgow	5454	42.19%	3940	56.21%
Hamilton	1739	49.91%	1780	68.83%
Office	Compensation Orders Accepted 2016	% of Total	Compensation Orders Accepted 2019	% of Total
Aberdeen	47	1.59%	20	0.82%
Edinburgh	75	1.66%	78	2.22%
Glasgow	136	1.05%	86	1.23%
Hamilton	27	0.77%	33	1.28%
Office	Combined Fiscal Fines/Compensation Orders Accepted 2016	% of Total	Combined Fiscal Fines/Compensation Orders Accepted 2019	% of Total
Aberdeen	123	4.16%	247	10.16%
Edinburgh	284	6.27%	490	13.94%
Glasgow	681	5.27%	714	10.19%
Hamilton	165	4.74%	327	12.65%

The researcher anticipated examining the use of the alternative to prosecution as related to the ethnicity of the accused. The Scottish Government and COPFS were unable to provide a breakdown of the race of persons offered an alternative to prosecution. The Scottish

[209] (n 186). – Calculation and format of this table is the researchers with data from the source.

Government state that they do not hold this information as it is not collected. It is somewhat concerning that data essential to examine the fairness and equality of treatment of persons in the alternatives to prosecution system is not collected, measured, or examined to ensure that compliance with the requirements of Article 7 of the Universal Declaration on Human Rights is ensured or at least monitored.

Whilst, in the Netherlands, 84% of all criminal offences are committed by male suspects and 16% by female offenders. 77% of all alternative disposals are given to male offenders and 23% to female offenders.[210] Whilst there is still a net difference between male and female offenders in the percentage disposals given this difference is significantly smaller than the differential in the Scottish statistics. It is possible to draw the inference that the differential between the jurisdictions suggests that the application of the case marking methodology in the Netherlands results in a greater standardisation in the outcome as between the genders. This being said, as is stated above, it is not possible to be conclusive without further investigation and data being made available in Scotland.[211]

A further consideration in the appropriate use of alternative disposals is where the accused has previous convictions. The system of the Netherlands automatically applies a calculation as part of the case marking decision to ensure that all previous convictions are considered appropriately, per the Dutch code. As discussed above, the COPFS mark cases manually by individuals and further the availability of the prosecutors' code is limited.[212] Thus, it is not possible to consider the consistency of the application of the guidance for the use of alternatives to prosecution where an offender has multiple previous alternatives to prosecution. The public perception of the multiple uses of alternatives, with the same offenders, is out with the scope of this research. Given the position of the application of the guidance in the Netherlands to ensure that escalating and repeat offending is dealt with by the court, it is necessary to consider the position in Scotland.

In Scotland, in 2018-2019, 7,830 offenders with two or more previous alternatives to prosecution were given a subsequent alternative to prosecution, with 1,137 of these being

[210] Percentage calculation is the researcher's, calculation based up National Netherlands Statistics, available here: https://opendata.cbs.nl/statline/#/CBS/nl/dataset/83944NED/table?ts=1594642130803.

[211] A breakdown by regional areas in the Netherlands was not possible as all regional stats are stored centrally and reported as one dataset.

[212] See Chapter 1.

persons with more than six previous offences whereby an alternative was used.[213] Table 8 below, provides further detail:

Table 8 - Individuals given non-court disposals, by number of previous non-court disposals (Scotland).

Financial year[3]	Number of previous non-court disposals[4]						
	0	**1**	**2**	**3**	**4**	**5**	**6 or more**
2008-09	50,964	4,002	693	201	54	32	23
2009-10	42,987	7,575	1,858	540	178	98	97
2010-11	40,801	9,219	2,780	902	338	158	217
2011-12	44,604	11,681	4,077	1,534	663	272	451
2012-13	51,234	15,455	6,019	2,551	1,131	499	740
2013-14	46,327	14,233	6,360	2,957	1,473	726	1,166
2014-15	34,914	10,617	5,112	2,610	1,474	819	1,314
2015-16	34,046	10,643	5,297	2,848	1,513	905	1,466
2016-17	22,844	7,187	3,597	1,985	1,126	680	1,284
2017-18	22,702	7,052	3,735	2,091	1,169	691	1,229
2018-19	19,592	5,750	3,150	1,814	1,086	643	1,137

In in the last ten years, 9,124 offenders with six or more previous offences were offered alternatives to prosecution. In 2008/2009 repeated use of alternatives to prosecution

[213] Data available as a result of an FOI Request (September 2020) to Scottish Government.

represented 9% of all alternatives used, this figure by 2016/2017 had risen to 41% of alternatives used and has been consistently at 41% for the last three years. It is somewhat surprising that over 40% of alternatives are given to those with previous alternative disposals. This variance raises questions as to the effectiveness of the methodologies of dealing with habitual offenders.

What is the current policy, and how does it apply in consideration of the statistical information above? Are alternatives to prosecution suitable in cases where there is previous offending behaviour, and if so, what should be the policy in their use? As indicated in Chapter 1, an examination of the policy as it stands at present was not possible and neither was an examination of the historical development of the policy. An examination of the above statistics against the policy has not been possible. What is clear, however, from the Scottish Government 2011 report is that alternatives to prosecution were accepted as proportionate, particularly for first-time offenders.[214] The concern that alternatives to prosecution acting as a deterrent to persistent offenders are less effective highlights the need for a re-examination of the use of alternatives to prosecution whereby the same offender has had this disposal on multiple occasions.[215]

The continued development of administrative justice, has the potential to be problematic as suggested by Fionda:

> Allowing administrative justice to progress to such an extent, no matter how necessary or desirable…. risks abuse of power by the prosecutor. Rights of defendants to a fair hearing, the opportunity to defend the charges made against them and appeals against the justice of the 'conviction' or the severity of the sentence may be overlooked, and the temptation for the prosecutor to enter into a bargain with the defence to avoid a trial in a case where the guilt of the accused is in doubt may be overwhelming. [216]

[214] ibid. (n 84) at 5.6.

[215] (n 84). at 5.15.

[216] Fionda (n 1).

4.6 Conclusion

In this chapter a statistical comparison has been conducted between the systems of the Netherlands and that of Scotland, the systems of case marking in both jurisdictions, and considered the consistency in the offer of an alternative to prosecution. Whilst it is not possible to draw definitive conclusions on areas for development in the Scottish system it remains clear that there are areas of concern regarding the consistency in the offer of an alternative to prosecution. The protective measures built into the system of the Netherlands appears to offer a greater balance than that which is presently operating in Scotland.[217]

The consistency and quality of decision-making processes bring confidence and public trust in a system.[218] For alternatives to prosecution to succeed in their stated aims in the justice system, consistency, fairness, and transparency must be fundamental aspects of the decision-making process.

This need is particularly the case where the impact on the victim of crime is considered but also for the viability of the continued public support of the criminal justice system in Scotland.[219]

The finding in the 2011 report on alternatives to prosecution in Scotland states that:

> On balance, the concerns raised are outweighed by the weight of positive evidence gathered by this evaluation on the day-to-day operation of DMs (Direct Measures).[220]

Any future development of the alternatives system in Scotland requires not just an economic advantage but an improvement to the system of alternatives for all stakeholders in the criminal justice system.

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[217] See Chapter 3 regarding the right of appeal against decisions of the prosecutor.

[218] See Valerie Braithwaite, 'Communal and Exchange Trust Norms, Their Value Base and Relevance to Institutional Trust', Trust and Goverance (Russell Sage Foundation 1998), at 46.

[219] See Chapter 5.

[220] (n 84).

Chapter 5: Alternative disposals and consideration of the Victim

This research has considered the use of alternatives, punishment, and the operation of the public prosecutor in both jurisdictions. This chapter considers the victim of crime in the context of alternative disposals. It compares and contrasts differences in the approach of Scotland and the Netherlands in respect of the role of the victim in the alternative disposal systems. The purpose of considering the victim, in respect of alternative disposals is so that Scotland can:

> provide a platform for mature reflection on the direction we in Scotland now take to better support and care for victims of crime. Their collective experiences deserve careful consideration and a response from the criminal justice system – and wider society – which is sensitive to their needs and respectful of their individual experience and trauma.[221]

Successive Scottish Governments have made significant statements regarding the victims of crime and the services offered to victims to enable them to feel supported by the criminal justice system. As a result of these policy decisions, there have been various measures introduced to recognise the harm that a victim experiences by the very nature of being a victim of crime. These measures include the creation by the Scottish Government of the Victims' Taskforce, whose primary role is "to coordinate and drive action to improve the experiences of victims and witnesses within the criminal justice system."[222]

The Scottish Government currently invests around £18 million per year in supporting victims of crime. [223] This investment includes funding of services such as Victim Support Scotland. In the last twenty years, there have been significant investment and developments in the understanding of, engagement with, and support offered to victims of crime. These have significantly improved in the last twenty years, and indeed further

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[221] Lesley Thomson, 'Review of Victim Care in the Justice Sector in Scotland. Report and Recommendations' (2017).

[222] The Scottish Government, 'Victims Taskforce' https://www.gov.scot/groups/victims-taskforce/ accessed 18 October 2020. The Victims Taskforce was established in 2018.

[223] The Scottish Government, 'Victims and Witnesses' https://www.gov.scot/policies/victims-and-witnesses/ accessed 18 October 2020.

significant actions have been developed and implemented in the criminal justice system in the last five years.

Fionda[224] suggests that the criminal justice system must recognise that the victim is entitled to consideration in a process that is ordinarily offender orientated. Fionda further suggests that this is achieved by the application of a restorative philosophy whereby sentencing options such as compensation and the victim's satisfaction with the outcome of a particular case may be considered as a primary objective.

Criticisms, in the alternative disposal system, in respect of victim care are suggested by Christie:

> The victim is a particularly heavy loser in this situation. Not only has he suffered, lost materially, or become hurt, physically or otherwise…. but above all he has lost participation in his own case. It is the crown that comes into the spotlight, not the victim. [225]

This research considers the position of the victim in the alternative disposal system and gives focus to the differences between the two jurisdictions. These differences are considered so that the comparison may draw out features of victim care which may offer an opportunity to address the criticisms of Christie and offer developments to the Scottish system.

5.1 The Rights of the Victim

In Scotland, the rights of the victim are contained within the Victim Code.[226] The code confirms that the victim has the right, if the case is not prosecuted, to be told the reasons why and to request a review of that decision.

The Lord Advocate has produced guidance on the implementation by COPFS of section 4 of the Victims and Witnesses (Scotland) Act 2014. This guidance outlines how a victim may request a review of the decision not to prosecute an accused person and how this will

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[224] Fionda (n 1).

[225] Nils Christie, 'Conflicts as Property' (1977) 17 British Journal of Criminology 1.

[226] The Scottish Government, 'Victims' Code for Scotland' https://mygov.scot/victims-code-scotland accessed 18 October 2020.

be handled. There are areas of the decision-making process which are excluded from the request to review a decision, including the use of a "direct measure."[227]

Duff suggests when referencing the position of the accused rights, that they:

> are at times no more than rhetorical devices which vary in their degree and weight during differing stages of the justice system, depending on other competing values which have to be incorporated.[228]

This argument may be extended to the rights of victims in the criminal justice system in Scotland, such as in the use of alternative measures to dispose of complaints quickly and efficiently.

At present in Scotland the victim's right to review is limited, significantly, to only those cases whereby a decision to take no further action has been made as outlined above. From the data available,[229] the volume of the victim's right to review cases would generally be considered an insignificant number, as demonstrated in the table below:

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[227] Crown Office and Procurator Fiscal Service, (n 41).

[228] Peter Duff, 'The Agreement of Uncontroversial Evidence and the Presumption of Innocence: An Insoluble Dilemma?' (2002) 6 Edinburgh Law Review 25.

[229] https://www.copfs.gov.uk/publications/statistics - Accessed 10th September 2020 – To access, click COPFS performance, reports from COPFS Response and information unit and then the relevant Victims' Right to review Annual Report.

Table 9 - Victim Right to Review Statistics (Scotland).

Year	No. of NFA	Applications for review	% of NFA	Decisions Overturned	% Overturned	Decisions Upheld	% Upheld
2018-2019	18,861	183	0.97%	21	11%	162	89%
2017-2018	22,209	214	0.96%	20	9%	194	91%
2016-2017	29,937	166	0.55%	17	10%	149	90%
Three Year Average	23,669	188	0.79%	19	10%	168	90 %

It is essential to recognise that the current system in Scotland permits a victim right to review when the decision has been to take no further action. Applying the calculated the three-year average above and the percentage of the decisions overturned to cases where an alternative was used allows the researcher to assess the potential impact of extending the victim right to review to include those cases where the intended action by the prosecutor is the use of an alternative.

In consideration of the same three-year period, the potential number of reviews generated by the extension of the Victim Right to Review, using the three-year average in the preceding table reveals the following:

Table 10 - Potential Reviews of Alternative Disposals (Scotland).

Year	Alternative Disposal Used	Average % applied	Potential Victim Reviews	Potential Upheld	Potential Overturned
2018-2019	35,597	0.79%	281	253	28
2017-2018	41,835	0.79%	330	297	33
2016-2017	41,825	0.79%	330	297	33
Potential Three-year Average	39,752	0.79%	314	283	31

Any extension of the victim right to review has a consequence to the economic cost of running the public prosecution service in Scotland. Given the economic position, we must consider the broader implications of the improvement of victim care in Scotland. In this research, it is a fundamental aim to seek developments in the justice system in Scotland where improvements can be justified.

There may be one further option available to a victim to have a decision of the public prosecutor reviewed via the Judicial Review mechanism. The court, in a judicial review, utilises its inherent power to review a decision of a public body. The scope of the Judicial Review in Scotland is explained in *West v Secretary of State for Scotland.*[230]

> The following propositions are intended therefore to define the principles by reference to which the competency of all applications to the supervisory jurisdiction under Rule of Court 260B is to be determined:
>
> 1. The Court of Session has power, in the exercise of its supervisory jurisdiction, to regulate the process by which decisions are taken by any person or body to

[230] *West v Secretary of State for Scotland* (1992) SC 385 at 413.

whom a jurisdiction, power or authority has been delegated or entrusted by statute, agreement or any other instrument.

2. The sole purpose for which the supervisory jurisdiction may be exercised is to ensure that the person or body does not exceed or abuse that jurisdiction, power or authority or fail to do what the jurisdiction, power or authority requires.

3. The competency of the application does not depend upon any distinction between public law and private law, nor is it confined to those cases which English law has accepted as amenable to judicial review, nor is it correct in regard to issues about competency to describe judicial review under Rule of Court 260B as a public law remedy.

In the last twenty years, there has only been one petition for a judicial review of a decision not to prosecute. The unreported case of *Szula v Her Majesty's Advocate*[231] concerned the decision not to prosecute an allegation of historical sexual abuse. This petition did not proceed to a full Judicial Review hearing based on senior counsel's advice to the pursuer before the commencement of the hearing. Therefore, the court has not pronounced on whether a judicial review is available as a method of redress against a decision of the public prosecutor. The pursuer, in this case, did seek to take the case to the European Court of Human Rights[232]; however, this was rejected by the court at the application stage.

Article 8 of the European Convention of Human Rights places a positive obligation on the State to have in place a legal framework which protects the physical and psychological integrity of each person.[233] Whilst it has never been argued, to date, in a Scottish Court that this failure to have a formal redress to an independent tribunal against a decision of the public prosecutor is a breach of Article 8 of the European Convention, it may be considered arguable. The failure to have the formal independent redress scheme may, given the psychological impact of such decisions, be found to be a failure to protect the psychological integrity of each person and thus be a breach of Article 8. Naturally, the more serious the offending behaviour is and the greater the impact on the victim, the higher

[231] Case Sourced via Faculty of Advocates Library of Petitions for Judicial Review.
[232] *Szula v The United Kingdom*, ECHR, Application Number: 18727/06 (2006).
[233] *XY v the Netherlands* [1985] ECHR 8978/80.

the likelihood that the failure to provide the independent tribunal would be found to be a breach of Article 8.

5.2 Victim Representation in Scotland

The Thomson review found that despite many attempts to improve the treatment of victims of crime by the criminal justice system in Scotland, the level of dissatisfaction among victims of crime remained high. [234] The review considered the tensions between the independent prosecution service making decisions in the public interest which are not always compatible with the victim's interests. Thomson recommends that further work is undertaken to "recognise the victim's needs as the priority, rather than, potentially, a competing priority."[235] The Thomson review did not consider the impact on the victim of prosecutorial decisions, but widely considers the impact of being a victim of a crime and entering the criminal justice system in Scotland as a victim and, potentially, a witness in proceedings.

In consideration of the competing pressures and tensions, it may be that the organisation making the prosecution decision, and potentially being subject of a victim request to review, cannot be the independent and supportive decision-maker concerning the victim due to a direct conflict of interest.[236] As Thomson points out, often, the victim is unhappy to discover "that the public prosecutor is not their lawyer."[237]

Consideration is not given in The Thomson review as to methods of facilitating the victim to feel that they have a voice and are represented in proceedings or pre-trial proceedings particularly where a prosecutor decides to offer an alternative to prosecution or not to proceed with prosecution at all.

The courts in Scotland have expressly criticised the conduct of the prosecution in consulting the victim in the process of accepting a plea. *Fox v HM Advocate*[238]*, obiter,* the

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[234] Thomson (n 203).

[235] ibid, at 4.15.

[236] The position in England & Wales is that an independent review is conducted, see Jessica Ware, 'Lord Janner Sex Abuse Claims: CPS Grants Review on Decision Not to Charge Dementia Sufferer Peer' The Independent (2015).

[237] Thomson (n 203) at 4.2.

[238] *Fox v HM Advocate* [2002] S.C.C.R 647.

court states that involvement in the discussions relating to a tendering of a plea with witnesses, and thus by extension complainers, is an irregularity and should not occur and indeed may in particular circumstances materially prejudice any future trial.

McPherson highlights in her research that defence agents have raised particular concern on the prominence and potential influence which a victim or their family can play in the Crown's decision-making process with Senior Counsel in that research suggesting that:

> [The] prosecution have gone from simply a position to inform, and to keep informed the victim's family, almost at times to a point of effectively consulting with them as to whether a plea in such and such circumstances is a good idea. Or worse, well maybe not worse, but certainly equally as badly, not making decisions which are correct in law because they fear some sort of backlash from the deceased's family in the press.[239]

The conflicting role of the Crown and its agents is to be contrasted between the clear and distinctive role of the defence solicitor, whom Kiser suggests, has two prominent roles. [240] Firstly, to act as the advocate for the accused by representing them and secondly to provide legal advice.

In the context of sexual offending and the leading of sexual history evidence this has been given particular consideration as Raitt notes in her research considering the case for independent representation for complainers in sexual offence cases:

> Prosecutors cannot press the complainer's interests above the interests of others. They cannot take instructions directly from a complainer. There is no lawyer-client relationship between a prosecutor and a complainer – and thus none of the characteristics of that relationship are based upon trust, confidentiality, and legitimate partisanship. The Crown's role as a public prosecutor and officer of the court inevitably restricts the scope for supporting the complainer. [This

[239] Rachel McPherson, 'The Rise of Agreed Narratives in Scottish Criminal Procedure ' Juridical Review 141. (2013).

[240] Kiser distinguishes between a defence agents role, providing these two components, but adds that advocacy is the emotional part of the role, whereas the advisory role should be neutral: Randall Kiser, How Leading Lawyers Think: Expert Insights into Judgment and Advocacy (Springer 2011).

> Victim's] interests are subordinated to wider concerns, possibly without even the opportunity of being canvassed before a judge.[241]

The conflict between the public interest role of the prosecutor and the victim comes into sharp contrast when their duty prevents the prosecutor from discussing aspects of a case with a victim. The Inspectorate of Prosecution in Scotland has acknowledged this conflict:

> [m]any victims erroneously assume that their relationship with the prosecutor is comparable to that between the accused and his/her lawyer. This is not the case. The public prosecutor acts independently in the public interest. Assessment of the public interest involves consideration of competing interests, including the interests of the victim, the accused and the wider community. Prosecuting in the public interest prevents the prosecutor from discussing certain aspects of the evidence with the victim during the investigation or at any court proceedings.[242]

It has been recognised that the Crown cannot adequately represent the victim in criminal proceedings. In the case of *WF, Petitioner*[243] the Court expressly recognised that it was not for the Crown to represent the complainer in the application to recover medical records in criminal proceedings and certainly the defence agent would not be in a position to do so. It was necessary, to protect the victim's Article 8 right under the European Convention of Human Rights, that the victim be represented in proceedings.[244]

The court in *RR v HMA*[245] imposed an obligation on the COPFS to expressly seek the complainers' views in relation to any application engaging the aforementioned Article 8 rights and thus, it may be suggested, has further highlighted the express conflict between the duties of the public prosecutor and the needs of the victim. This will particularly be the

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[241] Fiona E Raitt, 'Independent Legal Representation for Complainants in Rape Trials', Rethinking Rape Law: International and Comparative Perspectives (2010), 7.10-7.12.

[242] 'Inspectorate of Prosecution in Scotland: Thematic Review of the Investigation and Prosecution of Sexual Crimes' (2017). para 194.

[243] *WF v Scottish Ministers* (2016) CSOH 27.

[244] Keane and Convery conducted separate and detailed research into the rights of victims to be represented in applications under section 275 of the Criminal Procedure (Scotland) Act 1995 and considers the conflicting nature of the public prosecutor's role. – Eamon PH Keane and Tony Convery, 'Proposal for Independent Legal Representation for Complainers Where an Application Is Made to Lead Evidence of Their Sexual History or Character' (2020).

[245] *RR v Her Majesty's Advocate* [2021] HCJAC 21.

case whereby the prosecutor requires to lead evidence covered by the victim's Article 8 rights, but the views of the victim are contrary to the public interest and evidential tests applied by the public prosecutor.

In her research, when considering the role the Crown has in sexual offences, Raitt further highlights that there is an "awkward juxtaposition of the two distinct roles that the prosecutor is expected to fulfil."[246] Firstly, highlighting the duty incumbent on the prosecutor to ensure that the accused is treated fairly within the criminal justice system and secondly that the Crown does not represent any individual or victim of crime.

It remains to be considered whether the distinction in the role of the prosecutor still exists considering the development of alternatives in Scotland. The traditional model of an adversarial system is one in which the prosecutor is leading evidence to prove the guilt of the accused, and the defence is representing the accused and advocating for them. The increasing variety of alternatives to prosecution and managerialist justice offered by the prosecution service gives rise to consideration as to whether the minority criticisms in the Stewart report discussed in Chapter 2 have been vindicated.

5.3 Victim Representation in the Netherlands

In the Netherlands, a victim or any person with a direct interest in the case has the right to challenge a decision of the public prosecutor formally.[247] The EU Directive 2012/29/EU required European countries to afford certain rights to victims of crimes; the Dutch response was to instigate several developments in the Code of Criminal procedure which has a chapter dedicated to the rights of the victim.

In 2006, the Netherlands introduced access to state-funded legal assistance for the victim in criminal proceedings. The provision of legal aid to a maximum of 1,155 Euro per case for the victim's lawyer, non-means-tested, is to pay for attendance at police interrogations, studying the public prosecutor's file, establishing damages for the victim, drafting a

[246] Raitt (n 223).

[247] 'Criminal Code of the Netherlands' (n 122) Article 12.

victim's impact statement and verbal statements to the court and attending/representing the victim at the trial.

In 2016, in the Netherlands, the victim's right to speak became unlimited, allowing victims to state their views on the effect the offence had on them, the culpability of the accused and their view on the appropriate sentence which the accused should face.

The victim in the Netherlands, via the victim solicitor, has certain rights which do not presently exist in Scotland. The victim in the Netherlands has the right to access the case file,[248] which permits access to all documents which are relevant to them, being the complete case file or parts of said file. Further, the prosecutor may provide access to the file electronically, in person or provide access to the file under supervision.[249] The prosecutor can refuse to provide the case file in three circumstances: firstly, access to the file would have a severe impact on the victim; secondly, it would hinder the police investigation and thirdly could impact on national security. Prior to denying access to the case file, an order must be received from a judge. On the occasion of a refusal to access the case file, the victim can appeal to the court.[250]

A further right of the victim in the Netherlands is to add documents to the prosecutor's file.[251] The right to add documents to the prosecutor's file includes such things as medical files or reports from expert psychologists to show the impact on the victim. The prosecutor can refuse to include documents in the prosecutor's file on the same basis as the refusal to give access to the file and the right of appeal to the court remains for the victim.[252]s

If the victim, or 'direct interest party', seeks to challenge the decision, this is filed with the Court of Appeal within three months of the decision being reached. The appeal court has the power to overturn the decision of the prosecutor or uphold the decision:

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[248] ibid. Article 51b SV.

[249] Whilst outwith the scope of this research, the research acknowledges the potential difficulties in such access. Issues such as lack of legal training and understanding may be overcome by the use of the "victim lawyer".

[250] Nieke A Elbers et al, 'The Role of Victims' Lawyers in Criminal Proceedings in the Netherlands' (2020) European Journal of Criminology 1477370820931851.

[251] 'Criminal Code of the Netherlands' (n 122). Article 51b SS2, SV

[252] Nieke A Elbers et al (n 237).

> If the Court of Appeal has jurisdiction to hear the complaint, the complaint of the complainant is admissible, and the Court of Appeal is of the opinion that prosecution or further prosecution should have taken place, the Court of Appeal shall order institution or continuation of prosecution of the offence to which the complaint relates. Unless the Court of Appeal determines otherwise, the prosecution may not be instituted or continued by the issuance of a punishment order.[253]

An appeal is heard administratively in the Court of Appeal or a hearing in chambers. At a hearing in chambers, the victim or direct interest party, the prosecution service and the accused may be represented and make oral submissions concerning the appeal. In an administrative decision, written submissions may be made by all parties.

The government in the Netherlands has invested funds to develop specialised victim lawyers to ensure and promote the rights of victims. Elbers et al.[254] study in 2020 concluded that the victims' lawyer in the courtroom, the victim right of appeal, victim access to the case file, the right to claim compensation had made a significant and essential contribution to victim participation in criminal proceedings.

5.4 Conclusion

The criticisms made by Christie, highlighted in the introduction to this chapter, appear to be less relevant in the system of the Netherlands, where there are formal mechanisms at every stage of the decision-making process by the public prosecutor where the victim can be involved, take action and not lose participation in the case.

In light of the recent developments of the victim-centred approach in Scotland there have been moves to address the harm caused to the victim not only by the offence but also by

[253] Criminal Code of the Netherlands, Section 12(i).

[254] Elbers *et al* (n 237).

the disconnect from the proceedings. Herman suggests that the path to recovery for the victim is based upon the empowerment of the victim.

> The core experiences of psychological traumas are disempowerment and disconnection from others…. Recovery, therefore, is based upon the empowerment of the survivor and the creation of new connections.[255]

There may be a concern from an economic perspective of introducing any such statutory right of appeal for the victim. If a robust, fair, and transparent system is put in place, Scotland would improve the system as a whole. It may lead to independence and confidence in an already significantly conflicted relationship, between the public prosecutor and the victim. Scotland ultimately needs to address further the challenges, trauma and feelings of dis-empowerment faced by the victims of crime.

The forgoing analysis of the position in Scotland is not to suggest that an increase in victim's rights in Scotland would automatically lead to a greater punishment focus in Scotland being led by victims. Indeed, Simpson's research on prisons and prison alternatives suggests that with education of the public and victims both become less inclined towards imprisonment and severe sentencing models and they become more supportive of alternative sanctions. Simpson's research suggests that both victims and the public at large value the principles of equity and fairness in regard to the accused's economic, social, and cultural circumstances.[256]

This being suggested, Felson and Pare's [257] research regarding violence against women identified a significant relationship between severity of sentence and victim satisfaction.

Having considered the position in Scotland regarding the victim's engagement with alternatives recommendations are made in Chapter 7 of this research to develop the system in Scotland.

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[255] Judith Herman, Trauma and Recovery: The Aftermath of Violence (Basic Books 1992).

[256] Paul L Simpson and Tarik Sabry, 'Assessing the Public's Views on Prison and Prison Alternatives: Findings from Public Deliberation Research in Three Australian Cities' (2020) 11 Journal of Deliberative Democracy 12.

[257] Richard B Felson and Paul-Philippe Pare, 'Gender and the Victim's Experience with the Criminal Justice System' (2008) 37 Social Science Research 202.

Chapter 6: Models of Criminal Justice

> Models provide a useful way to cope with the complexity of the criminal process. They allow details to be simplified and common themes and trends to be highlighted.[258]

The introduction of alternatives to prosecution in Scotland fundamentally changed the prosecutorial decision-making process, the methodology of disposing of criminal cases, and as such the model of criminal justice which Scotland had until this point been operating.[259]

This chapter considers the models of criminal justice which may influence the Scottish system. Within the limitations of this research, it is not possible to conduct a significant exegesis of the variety of promulgated models. Focus is given to those which have been subject of significant academic examination, alongside academic theories which, following the literature review, offer an opportunity to consider the alternative disposal system. An overview of the principles of the Netherlands approach and development to principles of justice is contained within Chapter 3.

6.1 Packer's Models of Criminal Justice

The traditional view of the decision-making process regarding whether or not to prosecute, as suggested by Packer,[260] offers two models which consider the process and its underlying motivations in criminal law.

The first, the due process, model suggests that the criminal justice system constitutes an 'obstacle course' which a prosecutor must overcome before a conviction should be, or can be, satisfactorily achieved. In the first model, Packer suggests that the system is designed to be cautious and allow criminal prosecutions to run their course before an independent

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[258] Kent Roach, 'Four Models of the Criminal Process' (1999) 89 The Journal of Criminal Law and Criminology (1973-) 671.

[259] See Chapter 1 on The Stewart Committee.

[260] William HR Charles and Herbert L Packer, 'The Limits of the Criminal Sanction' (1970) 20 The University of Toronto Law Journal 109.

tribunal where the presumption of innocence dominates until, if and when, a finding of guilt is declared.

The second of Packer's models is the crime control model. This model lays a significant focus on the speed and finality of a justice system in the name of an effective and efficient criminal justice system. This second model seeks to process cases and punish offenders at the earliest possible opportunity and avoid intricate procedures, disputes, or contentious issues. Indeed, as Packer states:

> It follows that extra-judicial processes should be preferred to judicial processes, informal operations to formal ones. But informality is not enough; there must also be uniformity. Routine, stereotyped procedures are essential if large numbers are to be handled.[261]

The introduction and frequent use of the alternative disposal methodology prevalent in Scotland does not fit easily with Packer's definitions.[262] The mere existence of alternatives to prosecution in Scotland indicates that Scotland does not operate within Packer's first model. The suggestion, which could logically be drawn by the existence of alternatives to prosecution in Scotland, is that Scotland operates the second of Packer's models.

This suggestion cannot be substantiated, however, as the prosecutor must navigate the obstacle course of principles and rules that exist in Scotland before the imposition of an alternative to prosecution. Scotland seeks to maintain the integrity of the rules and procedural policies whilst seeking efficiency in using alternatives to prosecution. This can be corroborated by the Lord Advocate's evidence to the Justice Committee of the Scottish Parliament:

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[261] ibid at 159.

[262] See Chapter 3 for discussion on the Dutch expediency principle.

> On receipt of a report alleging that a criminal offence has been committed, Procurators Fiscal must apply the test for prosecutorial action set out in the published Prosecution Code. The first step is to consider whether the report describes a crime known to the law of Scotland. Thereafter, the prosecutor must decide if there is sufficient evidence to establish the essential facts of the case i.e., there must be two sources of evidence which indicate that the crime was committed and that the accused person was the perpetrator. Without sufficient evidence in law, the Procurator Fiscal cannot take prosecutorial action. Finally, assuming that the first two questions are answered affirmatively, the prosecutor must decide what action, if any, best serves the public interest.[263]

6.2 Roach's Models of Criminal Justice

Development and criticism of Packer's models[264] can be found in the work of Roach.[265] Roach suggests that Packer's models "may still strike a chord, but slowly and surely, they are becoming as out of date as other hits of the 1960's." [266] Roach suggests that Packer's two models are inadequate in their nature as they no longer speak to the normalisation of the criminal process; are inflexible in their approach to new developments; and they fail to rationalise new empirical data which has surfaced since the 1960's, such as victim rights, feminism, race issues and lack of victim reporting of crimes.

Roach creates two further models of victims' rights: one, the punitive model, which relies on criminal sanction and punishment; and secondly a non-punitive model which focusses on crime prevention and restorative justice. The first, the punitive model, Roach describes as a 'rollercoaster'. Roach suggests this model has "linear orientation of the crime control and due process models as it moves towards trials, appeals, and punishments, but the ride is bumpier because of the well documented failure of the criminal sanction to control crime and respect victims and new political cases which put due process claims against victim's

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[263] Scottish Parliament Justice Committee Publications, 'Lord Advocate: Evidence to the Justice Committee of the Scottish Parliament' (2020).

[264] See - John Griffiths, 'Ideology in Criminal Procedure or A Third "Model" of the Criminal Process' (1970) 79 The Yale Law Journal 359; Michael King, The Framework of Criminal Justice (Croom Helm London 1981) at 2.

[265] Roach (n 242).

[266] ibid at 673.

rights."[267] The non-punitive model is represented by a "circle which symbolizes successful crime prevention through family and community building and successful acts of restorative justice."[268] Roach suggests that the non-punitive model is more holistic and encapsulates a wider view of the causes and nature of the criminal offending.

Roach, whilst promoting two additional models of criminal justice and suggesting a blended approach between the four models (Packer's original, supplemented by his own two models), ultimately concludes that his and Packer's models are doomed to failure:

> There is irony is my optimistic conclusion that non-punitive forms of victim's rights could lead to less reliance on the criminal sanction. Thirty-five years ago, Herbert Packer made the very same prediction about due process and much of this paper was devoted to explaining why he was wrong. Due process has proven to be consistent with increased crime control as measured by expanding prison populations. Seeing victims' rights as a means to decrease reliance on the criminal sanction may be repeating Packer's mistake, but in a much more obvious manner. Victims' rights could not only be consistent with increased crime control but could enable legitimate punitive outcomes much more directly that due process. My pessimistic conclusion is that victims' rights will continue as the new and improved face of crime control.[269]

6.3 Walker's Model of Criminal Justice

Walker suggests that the model of justice to be applied in a criminal setting is that of a wedding cake. [270] The bottom tier of the cake represents the majority of the criminal offences dealt with by the system. Offences in this category are generally dealt with by a financial penalty and may include low level anti-social behaviour and minor traffic offences. The second tier of the cake is filled with lower-level offences which generally result in a plea to a reduced charge and are likely to end up with a financial penalty or lower end of the scale community pay back orders. The third tier is made up of offences which are classed as serious offences, such as assault to injury or offenders with significant

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[267] Roach (n 242).

[268] ibid.

[269] Ibid at 715.

[270] Samuel Walker, Sense and Nonsense About Crime and Drugs: A Policy Guide, Fourth Edition (4th Editio, Wadsworth Publishing 2006).

prior convictions and are offences by persons who are likely to be sentenced to custody should they be convicted. The top tier in the wedding cake analogy referred to by Walker as the "celebrated cases" are those which are the smallest part of the criminal justice system but are likely to be most featured in the media or attract the most severe form of punishment available in the criminal justice system. Walker's model is particularly useful in the context of understanding the problems facing the hidden nature of the criminal justice system. The vast majority of the cases dealt with by COPFS are hidden in nature and little is understood of the system of case resolution and management.[271]

Applying the wedding cake model alongside that of Packer and Roach, we can come to a synergy of the models of criminal justice - policy decisions are made via a mechanism of the models of justice (Packer and Roach) and applied by the public prosecutor in a system symbolised by the wedding cake.

6.4 The Alternative System in Scotland and Models

Having considered the models of Packer, Roach and Walker it becomes incumbent to consider how these models apply against the system of alternatives operating within the Scottish criminal justice system.

Prior to the introduction of alternative disposals, the model in Scotland seems to fit squarely within Packer's first model i.e., all offences must be processed through the criminal courts where it is in the public interest to do so. The prosecution service must discharge the burden of proof and the accused's rights are protected procedurally above all else.[272] With the introduction of the alternative disposals, it may be argued that the Scottish system adopted the second of Packer's Models in relation to the level of offences at the bottom of Walker's wedding cake model. As the system of alternatives developed, Packer's second model became more prevalent in Scotland for offences within the first two tiers of Walker's model. [273]

[271] See Chapter 4.

[272] See Chapter 2.

[273] See Chapter 4.

Roach's two additional models were incorporated into Scotland by the use of diversion from prosecution and expansion of community disposals in Scotland, rather than through the use of alternatives to prosecution.[274]

It may be suggested that for the upper tiers of Walker's wedding cake model, Scotland operates from Packer's first model, the middle tiers of Walker operate between the first and second of Packer and the lower tiers operate distinctly.

This suggestion, however, may be too simplistic in its nature. It may be suggested that even cases proceeding under the first of Packer's models in Scotland have been subject to influences of the first model. Duff suggests that the adversarial system in Scotland has been introducing aspects of Packer's second Model into the first by the duty to agree evidence, pre-trial hearings, and disclosure of evidence.[275] It may be suggested that the operation of Packer's first model in the top tier of offences is undermined by the operation of elements of his second model in the system which purports to operate from the first.

6.5 Criminal Justice Systematic Practices

Tata has suggested that the criminal justice system requires a "ritual individualization" to successfully operate.[276] The actors within the criminal justice system must view themselves as upholding the fundamental principles of innocence, free choice of the accused and active participation in the case by providing an individualised service. This system of fundamental principles, Tata suggests, is potentially in conflict with the demands of the criminal justice system operating as a perfunctory mass case disposal system.

'Ritual individualization' requires four key transitions in an accused person's journey to enable the ritualisation and transformation of the person from accused to convicted and case disposed. The first is the personal story as their unique narrative is told, representing the person freely participating in the criminal justice system. Second is the social circumstances of the accused being mitigated and minimised, with the third being ambiguous admissions of guilt transforming into full, free, and sincere admissions.

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[274] See 'Community Justice Scotland' <https://communityjustice.scot/> accessed 13 April 2021.

[275] Peter Duff, 'Intermediate Diets and the Agreement of Evidence: A Move Towards Inquisitorial Culture?' (1998) Juridical Review 349.

[276] Cyrus Tata, '"Ritual Individualization": Creative Genius at Sentencing, Mitigation, and Conviction' (2019) 46 Journal of Law and Society 112.

Finally, the accused is represented as an offender resigned to their punishment which is forthcoming.[277]

The potential conflict for Tata is found in the actors' role in the system. They must convince themselves that they truly represent the fundamental principles of the justice system, but at the same time provide a service to a client which is unique and, on the surface, seems to represent their best interests at all times. Tata further suggests that "Individualization work achieves case normalisation, thus managing the potential menace of ambiguous or seemingly defiant defendant postures."[278]

In the system of alternative disposals, anecdotal evidence suggests that they are imposed and accepted without an accused person seeking legal advice. In Scotland, it may be suggested that applying Tata's theory to the system of alternatives also removes the potentially troublesome defence agent who seeks to throw obstacles in the form of rules of evidence, sufficiency, and legitimate defences in the way of the expeditious case disposal system. It may be the case that the 'ritual individualization' theory could be applied in the normalisation of the presumption of guilt on the part of COPFS to offences whereby an alternative is offered, and the potential menace of a defiant accused is mitigated by only the vague possibility of them receiving legal advice or being influenced by the nature of the letter style which contains the offer of the alternative disposal. Tata suggests that the "genius" of the 'ritual individualization' is that it achieves status change. [279]

It may be suggested that the *"genius"* of the alternative disposal system is the transformation of the accused to a convicted person with a disposed case, without the ritual of the criminal justice system.

6.6 Criminal Justice Models in Scotland

In *Woolmington v DPP* Viscount Sankey made his famous reference to the "Golden Thread" of the criminal justice system, being the presumption of innocence.[280] It is suggested that the system of alternative disposals and the models of criminal justice in

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[277] ibid.

[278] ibid at 113.

[279] ibid at 113 – Tata expressly references the Latin root of the word Genius "gignere (beget) as a create and tutelary guardian force or spirit.

[280] *Woolmington v DPP* [1935] UKHL1.

Scotland, somewhat undermine this proposition. Indeed, Tata suggests that ritual individualism is required so that the actors in the justice system can maintain their attachment to notions of justice without proof of the notions applying in reality or in practice beyond their pretence.

The ritual individualism is applied to and by an accused, whereby they consider the criminal justice system and the path open to them in their particular circumstances. Do they force COPFS to apply Packer's first model of criminal justice and run the risk of a formal criminal conviction or accept an alternative and avoid this risk by payment of a sum of money or a time limited fiscal work order? Does COPFS apply the model of Walker in the assessment of which tier the offence falls into and apply the alternatives to the bottom tier's and by implication follow the second of Packer's models?[281] If the accused is ordained to appear before a court, do they use the informal mechanisms (plea bargaining)[282] to tender a plea of guilty to a reduced charge and by this nature cross the boundary between Packer's two models and bring themselves to the community restitution of Roach's models?

6.7 Conclusion

It is the researcher's conclusion that Scotland does not operate exclusively within Packer's models, Roaches development of the models, Walkers tiers, nor any of the promulgated models to date.

The reality of the situation, as far as this research has been able to establish, is that the Scottish system is a mosaic of criminal justice models. There are parts of the criminal justice system which operate primarily from Packer's first model, with elements of the second, as suggested by Duff,[283] while other aspects of the system operate solely from the second of Packer's models with the constraints of the prosecutor's tests.[284] Roach's diversion and rehabilitative model appears to operate within the alternative disposal system alongside the court disposals aimed at community rehabilitation. It appears that the

[281] See Chapter 4.
[282] Leverick (n 168).
[283] Duff (n 14).
[284] See Chapter 2.

decision-making process broadly follows that of Walker's tiers with the pathways open to the public prosecutor determined by the nature and features of the particular offence.[285]

The researcher concludes that Scotland operates a 'mosaic model' of the previously promulgated models of criminal justice and has operated a selective *modus operandi* of blending the models into the current justice system as it operates. This 'mosaic model' is influenced by the operation of ritual individualism of the accused and the public prosecutor so that justice is done without the complexities of the formal criminal trial. It is the researcher's view that a balance must be struck between the development of the criminal justice system and a conscious decision-making process regarding the models of criminal justice which should be prevalent within Scotland. Furthermore, engagement with the victims of crime should be added into the mosaic development of Scotland's model of criminal justice.[286]

[285] Whilst it is outwith the scope of this research, the contrasting involvement of the victim in criminal proceedings, between Scotland and the Netherlands, and what influence this has on the models of justice in each country is a matter worthy of exploration.

[286] See Chapter 5.

Chapter 7: Conclusion and Recommendations

7.1 Conclusions

This research was undertaken for the purposes of understanding the development, use and system of the alternative disposals in the criminal justice system, understanding any improvements which could be made to the Scottish system, whilst maintaining the integrity of the process and protection of the actors within the system. During the course of the research, the researcher has drawn conclusions on the system in Scotland and sought where possible to outline a possible future direction for the development of alternative disposals in the Scottish criminal justice system.

Alternatives can be used as a mechanism to reduce pressure on an overburdened court system and the economic impact of offending behaviour on a society where the offending behaviour *per se* does not require the imposition of a sentence in court.

Since the system of alternatives was introduced in Scotland it has been developed, tweaked, and extended to where more than 46% of cases reported to COPFS are dealt with by use of an alternative.[287] In the course of this research, it has become apparent that the areas identified in the Summary Justice Reform report[288] have not been addressed in any tangible way. This research highlights further areas of development in the Scottish system and highlights the urgent need for further research.

The conclusions contained in this research are a result of the comparative study between the system of the Netherlands and Scotland. The comparisons between Scotland and the Netherlands has allowed this research to offer opportunities for Scotland to develop its criminal justice system. Where it has not been possible to make a recommendation without qualification the recommendation is so qualified.

[287] 'Criminal Proceedings in Scotland: 2018-2019 (n 186).

[288] Richards *et al* (n 84).

7.2 Recommendations

- **Introduction of Statistical Analysis of the Effectiveness of Alternative Disposals**

This research has highlighted that there is little effective statistical analysis in the Scottish criminal justice system.[289] There is no available analysis of the effectiveness of alternative disposals. There is no available evidence on the rehabilitative effects of alternative disposals or the effects of public confidence in the justice system by the use of these methods. It is recommended that a robust system of the analysis of statistics and access to the criminal justice system for external researchers be established. This analysis and access is required in order that effective decisions can be taken concerning crime reduction programs, rehabilitation and treatment programs, the socio-economic impact of changes and developments to the criminal justice system for the greater good of society.

Fionda[290] suggests that the apparent solution to the accountability problem is the reluctance to acknowledge the prosecutor's role as a person imposing a criminal sanction when contrasted with the role in the Netherlands where this is publicly acknowledged. Fionda further highlights that this contrasting role must be opened up to public scrutiny as without this accountability for the actual sentencing, the role is unlikely to develop.[291] Given that the imposition of an alternative has been in place in Scotland for a considerable period, the research highlights areas of concern which require open, transparent accountability in the public interest.

The continued use of the alternative disposal system, or indeed expansion of the alternative disposal system, without the corresponding creation of statistical analysis of the impact and effectiveness of the current and future methodologies, would be to accept that the introduction of such methods would be made solely from an economic perspective and without consideration of the broader aims of a criminal justice system.

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[289] See Chapters 1,2, and 4.

[290] Fionda (n 1) at 210.

[291] ibid.

The methods of arriving at the present systems in the Netherlands and Scotland have varied dramatically. If the idea of prosecutorial imposition of sanctions in Scotland is viewed as an overall societal good, then there is no reason why the system in Scotland should not seek to develop further, providing the appropriate safeguards are put in place. A utilitarian approach, or managerialist approach, to the criminal justice system and the extent to which it can operate within a jurisdiction is a matter for the policymakers and the elected officials. Indeed, the operation of an expedient justice system which seeks to safeguard all rights of an accused person may in of itself be contradictory.[292] These principles and policy decisions require to be balanced between the benefits of implementing them and the inherent risks which they pose.

This research concludes that the balance in Scotland requires to be addressed whilst still maintaining the possibility of further developments of the current system.

- **Introduction of a publicly available marking system**

This research highlights that decisions of the COPFS in Scotland lack transparency. COPFS is open to legitimate criticism of the statistical data available and the lack of scrutiny that it affords.[293] Accordingly, it is recommended that Scotland should adopt a simplified, open and transparent system which is accessible to the public and gives the public confidence that all persons are treated equally before the law. It is recommended that Scotland should develop a Polaris style system.

By application of a similar system to that of the Netherlands of points application to each offence, aggravation, and mitigating factor the process of case marking and consideration by a prosecutor may be significantly streamlined. It is thought that this may lead to a reduction in the number of unnecessary pleading diets in the Summary Sheriff Court system.

A Polaris style system would allow each offence to be viewed on its objective facts with consideration of any aggravating or mitigating factors allowing for a more coherent, transparent system for both the accused and the prosecution service. It may diminish any suggestion of disparity in prosecutorial decisions. Naturally, any system will not have the ability to have all, and every circumstance automatically accounted for, thus there remains

[292] See 6.1, Packer suggests that these two paradigms are diametrically opposed.

[293] See Chapters 1,2,4 and 5.

the need for the professional to fall back on their experience where the particular or peculiar circumstances require this. Further, any deviation from the marking guidelines would be recorded and require justification in determining the outcome and be subject to legitimate scrutiny.

The researcher concludes that this may increase the speed of the decision-making process, bring clarity to the public of the decision-making process and in the long-term lead to a reduction in the cost of the manual case marking process.

A standardised system would allow advice to be given to an accused person as to the likely outcome of a complaint/plea; manage the expectation of the victims of crime; allow policy decisions to be made at an early stage to escalate sentencing or to make rehabilitative decisions; and be open to scrutiny.

It is recommended that an independent body be responsible for the creation of the marking system. This independent body should be composed of a mix of the Judiciary, prosecution and defence solicitors, victim representatives and lay members. These members should have the insight, experience, and procedural knowledge to develop a system which will be in accord with the traditions of the criminal justice system in Scotland. It is recommended that expert views on the determination of sentencing guidelines are included in the establishment of the body. This body must have the respect and consultative methodology to breed trust into the system from its very beginnings through to the implementation of the system, ensuring that it is fit for purpose and shall stand the test of time.

Furthermore, it is recommended that an independent point review system be put in place, so that should particular criminal offending trends be identified that the system has the flexibility to update the points system and escalate the management of particular types of offending should the need arise. This process must, however, be open, transparent, and published so that it is open to legitimate scrutiny.

- **Accused Right of Appeal**

It is the researcher's view that considering the highlighted apparent inconsistency in the Scottish criminal justice system[294] that the accused should be afforded the right to appeal to an administrative tribunal against a decision of the prosecutor. It is again recommended that the appeal system is based on written submissions only with the only appeal grounds being on the application of the recommended Polaris style system and any use of discretion.

The appeal to an independent tribunal will introduce independence from the COPFS which has ultimately been considering appeals against their own decisions and will allow for a more transparent system in which the public could have real confidence.

Trust and confidence in the justice system is a critical societal norm which must be maintained to ensure the continued support of the rule of law. The right of appeal against the decision of the public prosecutor whilst perhaps an inventive step is a limited appeal on one of two grounds: (i) error in law in the application of the suggested Polaris system, (ii) improper use of discretion.

- **Victim Right of Appeal**

It is recommended that the system of victim review decisions be extended. Victims should have a right to appeal via an administrative tribunal against a decision of the prosecutor.

It is recommended that this be an appeal system operating on written submissions only concerning the application of the Polaris style system and any use of discretion and its reasonableness.

An appeal to an independent tribunal would allow for independence from the prosecution system, which ultimately has been considering appeals against their own decisions. This would allow for a more transparent system in which the public could have real confidence.

This recommendation would open to scrutiny the current request to review a decision, allowing for greater transparency and independence from the prosecution service. The objectivity of the public prosecutor is far more likely to be preserved if there is a clear

[294] See Chapter 4.

separation of roles between the prosecutor and the victim, rather than the quasi-representative position as it stands in Scotland.

If the legal system in Scotland is serious about better serving the victims of crime, then an open, transparent, and externally supervised process will allow for better engagement with the victims of crime and ensure that the victim code is updated to include the aforementioned provisions.

The researcher recommends a limited right of appeal. The appeal grounds being: (i) an error of law in the application of the recommended Polaris system and (ii) improper use of discretion.

The constraints and monitoring of the proper use of discretion in Scots law is not unfamiliar territory for the Scots legal system.[295] A modified system applying the prosecutorial decisions should be able to be achieved with further research and investment.

The researcher having come to this restricted and limited development acknowledges that taking the research as a whole it is necessary for Scotland to widen its engagement with the victims of crime to improve the criminal justice system. The findings of this research in respect of the impact and value felt by victims of crime in the Netherlands should not easily be dismissed. This widening of engagement and development of the system will not be without an economic cost, this must be balanced against the identified need for development and the needs of the victims of crime.

- **Introduction of the Fiscal Punishment Order**

It is recommended that Scotland further explores the system of Punishment Orders for implementation into Scotland. It is readily acknowledged that significant further research on the exact model is required prior to any introduction.[296]

The disposals of Scottish cases for the period of 2010 to 2018 suggests that an average of 15,588 cases which received community sentences could be disposed of using a fiscal punishment order and not proceed in a court-based setting. In addition, an average of 53,622

[295] The process of Judicial Review is discussed in Chapter 5.

[296] The researcher has designed a proposed model of operation, which can be made available upon request.

cases would become eligible for disposal under the suggested system. An average of 16,188 cases which received other non-custodial sentences may also be appropriately dealt by a punishment order.

Naturally not all of these cases would remain suitable for a fiscal punishment order a percentage will still require a criminal trial under the traditional model, for example where the accused refuses this alternative and elects for a trial or in the model rejects the disposal offered and seeks a judicially imposed sentence. Given that only 15% of trials called in the Justice of the Peace Court and 17% of trials called in the Sheriff court in Scotland result in evidence being led in the trial, it is anticipated that this system may result in significant time and financial savings in the Justice of the Peace and Sheriff Courts. This development may lead to reduced waiting times, improving memory evidence and ensuring that victims' and accused persons' experience of the Scottish justice system are improved.

In the Netherlands, only 0.75% of all offers of disposal from the prosecutor are rejected, and an average of 1,520 cases per year elect for judicial intervention. Given the differences in the number of reported criminal cases in Scotland and the Netherlands, it would be anticipated that these figures would be relatively similar.[297]

The suggestion of introducing the power to COPFS to impose a sentence on an accused may initially appear alien. However, COPFS is already imposing a criminal sanction and the alternatives in use in Scotland form "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence."[298]

The introduction of the fiscal punishment order should not occur without giving a full and detailed consideration to the implications of such a system. Consideration to the controversies inherent within such a system and the concerns raised in this research and by others as to the safeguards required for such a system.

> The repercussion of maximised "efficiency" is that an increasing bulk of crime is now being addressed as a bureaucratic problem. Extending the fiscal's discretionary sentencing powers aggravates unease over the disparity endemic

[297] Scotland since 2016 – 2019 on average 3,000 more criminal cases reported to prosecutors per year, 2018 – 2019 this was only 1,000 cases and is statistically irrelevant for the purposes of the research.

[298] *De weer* v Belgium (1980) 2 EHRR 439 459, para. 46

> to hidden decision making, and heightens concern for adequate levels of transparency within the justice system. The implications of these developments, and the doubt as to whether this "tier" is subject to sufficient safeguards.[299]

It is further recommend that a period is established for legal advice to be offered to an accused prior to the imposition of the punishment order, similar to that of the Netherlands.[300]

Whilst outwith the scope of this research, it must be considered that further development to the alternative disposal system in Scotland is required from an economic perspective, given the Presumption Against Short Periods of Imprisonment (Scotland) Order 2019, which extended the presumption against custodial sentences of less than 12 months. There is likely then to be a further increase in the coming years of financial penalties and community service orders being imposed by the expensive summary court procedure.

7.3 Further Research

Whilst the researcher has made recommendations based on the findings of this research, several areas require further research before any implementation of the recommendations could be taken forward. The researcher suggests that urgent further research is required into the operation of the alternatives system in Scotland. The matters highlighted by this research concerning the rehabilitative methods and effectiveness of alternatives in the course of offender behaviour, development of the assessment reports in the diversion scheme into the alternatives system, improvement in the data available and recorded in Scotland and the operation of unconscious and sub-conscious bias in the decision-making processes should be given particular attention.

7.4 Conclusion

This research has examined the use of the alternatives to prosecution in Scotland from inception to the growth and development of the system in Scotland and has presented a comparative study of the system with that of the Netherlands. The research offers an opportunity for a critical examination of the Scottish system and explored developments and learnings from the system of the Netherlands.

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[299] I Callander, "The pursuit of efficiency in the reform of the Scottish fiscal fine: should we opt out of the conditional offer?" 2013 SLT (News) 37-42 (Part 1) pg. 5

[300] See Chapter 3.

During this research, the world faced a significant health crisis with the outbreak of Covid-19. This has led to significant delays in the processing of criminal cases within the court system and perhaps increases the urgency with which developments to the alternative disposal system are required.

This research has concluded that alternatives to prosecution are imperative in a rounded justice system but there are areas where the Scottish system can be developed. The recommendations offer improvements to the current system in Scotland which allows development of the criminal justice system in a fair, balanced, and progressive manner.

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