Direct Measures in Scotland:

A conflict with the Principles of Justice?

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Abstract

This thesis is a critical analysis of the system of Direct Measures (DMs) in Scotland. The DM is an alternative to prosecution in a court and is controlled by the public prosecutor. DMs were first introduced in Scotland in Criminal Justice (Scotland) Act 1987, following the recommendation of the Stewart Committee, and the system was expanded in the Criminal Proceedings etc (Reform) (Scotland) Act 2007, following the recommendations of the McInnes Committee. This thesis explores the system of DMs in Scotland and sets out the historical development of the system and its current operation before moving to consider the system's relationship with the principles of justice.

The purpose of undertaking this research was to seek to achieve three objectives. The first of these was to critically examine the original justifications for the introduction of DMs in Scotland and establish whether they remain valid. These original justifications centred around a prediction that criminal case numbers would increase significantly, but this prediction failed to materialise. However, the conclusion was reached that DMs are still a vital component of the system as even though case numbers have fallen since their introduction, if the cases presently dealt with by DM were introduced back into a criminal court system beset by delays, this would be highly problematic.

Having established that there is a justification for the system of DMs, albeit not the one that was originally proposed, the second objective of the research was to assess the extent to which the DM system conforms to the principles of justice. Three principles of justice were drawn from the McInnes Review – efficiency, effectiveness and fairness – but further work was needed to identify their key components. As such, efficiency was divided into time efficiency and financial efficiency. Drawing on literature relating to the aims of the criminal sanction, effectiveness was identified as having five component parts: retribution, deterrence, rehabilitation, protection of the public and reparation. Fairness was sub-divided into four key

components: accuracy of outcome, consistency, proportionality and representation. The research then proceeded to analyse the operation of the DM system and it was concluded that there were a number of areas where it could not be said to align with the principles of justice.

The third aim of the research was to bring together the findings from the first two objectives and consider whether changes could be made to the Scottish system of DMs that would better align it with the principles of justice. As an aid to identifying possible developments of the Scottish system, this research undertook a comparative examination with the system of the Netherlands. As a result, a number of developments were proposed, namely: the introduction of improved data in the Scottish system; the undertaking of a full economic analysis of the Scottish system; the introduction of legal representation of accused persons in the DM system; and that consideration should be given to the adoption of a partially automated case marking system. It is argued that these developments, and the widening of the DM system in Scotland, is both possible and legitimate.

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Veni, vidi, vici

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There are several people to whom thanks are due! But alas this acknowledgement section counts towards the overall word limit of the thesis and thus I must be short!

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In my masters thesis I dedicated that work to Halle, this PhD is also dedicated to you (if you ever actually read it). Take it as proof that while life can be difficult at times nothing is insurmountable with hard work, and it is always worth the effort. You are capable of achieving whatever you want by hard work and perseverance.

Author’s declaration

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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Chapter 1: Introduction.

This doctoral thesis presents a critical examination of the system of direct measures (DMs) in Scotland. The use of DMs is not unique to the Scottish criminal justice system and features widely across many legal systems. A DM is a prosecutorial action against an accused person whereby the public prosecutor deems that it is in the public interest to act against an accused person but that prosecution in a court setting is not required and the case can be disposed of without the involvement of the court. An offer is made to the accused that – if they accept a sanction – no further action will be taken. The accused is not obliged to accept.[1] If they refuse the offer the Crown may take prosecutorial action in a court setting against the accused person.

The public prosecutor in Scotland states that the DM system is only used in less serious cases for the purposes of saving members of the public the inconvenience of attending as witnesses and freeing up court time to deal with more serious cases.[2] Prior to the introduction of DMs in Scotland, the public prosecutor could warn, orally or in writing, an accused person, bring court proceedings, or take no further action. The system of the DM was introduced in Scotland in 1987 providing a suite of prosecutorial options which had not previously existed and thereafter expanded in scope and remit in 2007.[3] Initially the only option was a prosecutorial fine (often referred to as a "fiscal fine"). The expansion added two further DMs - the fiscal compensation order and the fiscal work order.[4]

The historical position in Scotland was that all offences, whereby the public prosecutor deemed it in the public interest, should be tried before a court and a

[1] Although as we will see later on, the system in Scotland has changed from one where the accused must actively accept the offer, to one where they are deemed to have accepted if they do not 'opt-out'. This will be discussed further in chapter 2.

[2] See Crown Office and Procurator Fiscal Service, 'Alternative to Prosecution' < https://www.copfs.gov.uk/the-justice-process/scotland-s-criminal-justice-system/#alternatives-to-prosecution> accessed 4 December 2021.

[3] The full history and development of the DM in Scotland is covered in detail within chapter 2 of this research.

[4] The term fiscal refers to Procurator Fiscal a term which is defined within the section 1.4 of this research.

sanction imposed upon the accused, if convicted. This led, as some suggest, to an inordinate pressure on the criminal courts in Scotland.[5] The Scottish tradition of the courts is to focus, upon conviction of an accused, on the correct sentence, with rehabilitation of the offender being a primary consideration. This contention requires scrutiny where the public prosecutor makes an offer of an alternative to prosecution versus a decision to prosecute.[6] As is explored within this research, the DM is still the imposition of a criminal sanction, the imposition of a punishment on an accused person which by its use fails to consider a primary consideration of the sentencing schema operating in Scotland.[7]

1.1 Justification for examining the system of DMs.

At first glance, people may look at the DM system and think that it is a much easier and quicker method of dealing with minor offending behaviour, considering that there is little point in wasting valuable public resources on minor matters. Certainly, the majority of offences disposed of via DMs are not the high-profile offences which the public generally see reported in the media. So why should we even be concerned and examine this form of procedural justice?[8]

In Scotland, between 2010 and 2020, an average of 57,871 criminal offences per year were disposed of via the use of a prosecutor-imposed DM.[9] The vast majority of the population in Scotland are highly unlikely to ever come across the criminal

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[5] Scottish Home and Health Department and Crown Office, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 2.01, 12 (Stewart Committee).

[6] See Scottish Sentencing Council, 'Purpose of Sentencing' (2021) <www.scottishsentencingcouncil.org.uk> accessed 4 December 2021.

[7] The use of the term criminal sanction is discussed at length within chapter three of this research. DMs are not recorded as a criminal conviction on the accused's criminal record and being subject to a criminal sanction should not be conflated with the sanction resulting in a criminal record.

[8] See chapter 3.2 of this research for a simple consideration of Procedural Justice.

[9] Scottish Government, 'Criminal Proceedings in Scotland: 2019 – 2020' (A National Statistics Publication, 18 May 2021) Table 20, 85. This table provides all Fiscal Direct Measure disposals, including road traffic offences, whereby the Direct Measure was imposed by the prosecutor (i.e. excluding those imposed by the police). <www.gov.scot/binaries/content/documents/govscot/publications/statistics/2021/05/criminal-proceedings-scotland-2019-20/documents/criminal-proceedings-scotland-2019-20/criminal-proceedings-scotland-2019-20/govscot%3Adocument/criminal-proceedings-scotland-2019-20.pdf> accessed 3rd December 2021.

justice system and indeed are unlikely to be interested in such a nuanced aspect of the criminal justice system in Scotland, but this does not mean that it is any less important. To quote an old adage: the public interest is not necessarily that in which the public is interested. Indeed, it can be suggested that such a high number of cases being disposed of via DM, when on average 111,000 cases per year go to court,[10] means that the system of DM should be subject to close and detailed scrutiny.

In Scotland, at the time of writing, there is significant consideration being given to the removal of jury trials in sexual offence cases, the removal of the not proven verdict and other significant changes in the criminal justice system, with a Bill, the first stage in the consideration of potential future legislation, being brought forward to Parliament.[11] None of these changes affects as large a number of criminal complaints as those for which DMs are used.[12] Whilst it is not suggested that offences for which a DM is issued have the impact that offences impacted by the Bill have, the DM system touches a greater number of cases than any other single aspect of the criminal justice system in Scotland. Given that more than 40% all criminal reports to COPFS result in the use of an alternative disposal, it is essential that this significant area of the Scottish criminal justice system is examined in detail.[13] This research explores an area which has been largely bypassed for research in Scotland – DMs have been subject to little scrutiny in Scotland. This research attempts to fill this gap and thus offers an original contribution to knowledge. Given that it has just

[10] Scottish Government, 'Criminal Proceedings in Scotland: 2019 – 2020' (A National Statistics Publication, 18 May 2021) Table 20, 85 <www.gov.scot/binaries/content/documents/govscot/publications/statistics/2021/05/criminal-proceedings-scotland-2019-20/documents/criminal-proceedings-scotland-2019-20/criminal-proceedings-scotland-2019-20/govscot%3Adocument/criminal-proceedings-scotland-2019-20.pdf> accessed 3rd December 2021.

[11] SP Bill 26 Victims, Witnesses, and Justice Reform (Scotland) Bill [as introduced] Session 6 (2023).

[12] SP Bill 26 Victims, Witnesses, and Justice Reform (Scotland) Bill [as introduced] Session 6 (2023).

[13] Scottish Government, 'Crime & Justice: Criminal Proceedings in Scotland: 2018 - 2019' (A National Statistics Publication for Scotland, 31 March 2020) tables 19 - 22 <www.gov.scot/binaries/content/documents/govscot/publications/statistics/2020/03/criminal-proceedings-scotland-2018-19/documents/crime-justice-criminal-proceedings-scotland-2018-19/crime-justice-criminal-proceedings-scotland-2018-19/govscot%3Adocument/crime-justice-criminal-proceedings-scotland-2018-19.pdf> accessed 8 November 2020.

been suggested that the system of DMs has been largely bypassed, however, it does fall to be considered what previous studies have been undertaken into DMs.

1.2 Previous studies.

This section outlines existing academic research into DMs. It focuses on academic work, but it should also be acknowledged that there have been two official reports that led to the introduction and subsequent expansion of DMs (the Stewart committee report[14] and the McInnes committee report[15]) and one Scottish Government funded evaluation of the DM system (the Richards evaluation[16]). These three pieces of work are valuable, but they do not make the sort of contribution to knowledge that academic research can, in terms of scrutinising DMs systematically against foundational principles. These reports are extensively considered throughout the remainder of this research but will not be discussed further here.

Perhaps the most eminent and detailed study of the prosecution service in Scotland dates from 1982, being the book authored by Moody and Tombs entitled *Prosecution in the Public Interest*.[17] Moody and Tombs were granted access to the Scottish prosecution service in order to undertake a study of how prosecutors make decisions. Whilst it is unlikely to be disputed that this is the most significant Scottish research into the prosecution service, it was published in 1982 and did not consider DMs directly as they had not yet been introduced. This research includes detailed consideration of cases, interviews with procurator fiscals and an in-depth review of the prosecution service in what was unprecedented access to the operation of the public prosecutor in Scotland. No further research in this depth, or with this level of access to the public prosecutor, has since been undertaken by academics, to this

[14] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983).

[15] The McInnes Committee, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004).

[16] Richards, P., Richards, E., Devon, C., Morris, S. and Mellows-Facer, A., Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011).

[17] Susan R. Moody and Jacqueline Tombs, Prosecution in the Public Interest (Scottish Academic Press 1982).

researcher's knowledge. Thus, although this study does provide some helpful insights into the prosecution culture in Scotland, it gives little insight into the current working practices or indeed any consideration of the DM system as it operates now. Instead, it gives a strong and helpful starting point for any study where the public prosecutor in Scotland is considered.

There has been further academic work since that of Moody and Tombs, but this has not been on anything like the same scale. Whilst each of these contributions form discussion points and expose some of the issues to be considered when conducting an in-depth examination of the DM system in Scotland, each of these are within the context of small journal articles or discursive legal news articles on the developments in Scotland at the time of the article.

The first academic consideration of the Scottish prosecution system post Moody and Tombs was in 1993, by Duff in his article *The Prosecutor Fine and Social Control*.[18] By this time DMs had been introduced in Scotland and Duff's work focused on this development. Duff argues in this piece that the introduction of the fiscal fine represented a significant shift towards an administrative and bureaucratic style of criminal justice. In this article Duff is summarising the findings of research conducted for the public prosecutor in 1991, which itself is not publicly available.[19] It is therefore not possible to add any further information on the methodology or approach of the underlying research relied on by Duff in this article. The research raises various concerns about the introduction of DMs – such as net widening and the effect on administrative processes – which are all considered later in the thesis. Duff also published a further article, *The Prosecutor Fine*, in 1994.[20] In this article Duff sets out the development of the system of prosecution via the Stewart committee and the differences in the Dutch and Scottish "fiscal fine" system, contrasting them with a proposed system in England. Duff outlines the impact of the fiscal fine and its scale of use in Scotland in 1994. However, both of these articles are now some

[18] Peter Duff, 'The Prosecutor Fine and Social Control' (1993) 33 British Journal of Criminology 481.

[19] Peter Duff, 'The Prosecutor Fine and Social Control' (1993) 33 British Journal of Criminology 481, 485.

[20] Peter Duff 'The Prosecutor Fine' (1994) 14(4) Oxford Journal of Legal Studies 565.

thirty years out of date, both statistically and regarding the operation of the DM system in Scotland.

For the purposes of completeness, it is worth mentioning two other articles by Duff, *Intermediate Diets and the Agreement of Evidence: A Move Towards Inquisitorial Culture in 1998*[21] and *The Agreement of Uncontroversial Evidence and the Presumption of Innocence: An Insoluble Dilemma*?[22] Both articles make reference to the system of DMs as undermining the principle of the presumption of innocence in the Scottish criminal justice system, but do not significantly add to the knowledge or data set out in his 1993 and 1994 articles.

Subsequent to Duff, Robin White examined, across three articles, aspects of the system of DMs. In 2007, White offered a critical examination of the Criminal Proceedings Etc (Reform) (Scotland) Act 2007 (which expanded the range of DMs available in Scotland), which White suggested is all about moving all but a minority of summary criminal offences out of the courts.[23] In his 2008 article, White examined the frequency of the use of the DMs available in Scotland, by reference to the criminal justice statistics available.[24] In 2009, White concluded his series of articles concerning DMs by suggesting they have been, and remain, an unacceptable form of plea bargaining. Indeed, he suggests that the DM:

> 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.[25]

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

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

[23] Robin 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.

[24] Robin White, 'Out of Court and Out of Sight: How Often are Alternatives to Prosecution used?' (2008) 12 Edinburgh Law Review 481.

[25] Robin M. White, 'Decriminalisation: A Pernicious Hypocrisy?' (2009) 13 Edinburgh Law Review 108.

Like Duff, White's examination of the DM system is now outdated, especially as it was written so close to the introduction of the developments post McInnes,[26] which will not have had time to 'bed-in'. It is also a very limited examination. All three articles are very short and do not undertake any kind of comprehensive evaluation of the DM system, focusing instead on discrete issues.

Finally, Isla Callander has published a two-part article examining the fiscal fine and the opt out procedure.[27] In the first part Callander examines the concept of the fiscal fine and its resolution of the criminal action by the state without the need for attendance in court.[28] In the second part, Callander considers the significance of the change from opt-in (the system previously used for DMs) to opt-out.[29] Whilst Callander raises the fundamental concerns regarding the change to the opt out and opt in process, her work focuses solely on this issue, whereas this thesis focuses on a detailed examination of the DM system as a whole. The issues that she raises will be considered in more detail later in this thesis.

Aside from these contributions which directly address aspects of the DM system in Scotland, there has also been work which looks at the prosecution system more broadly,[30] often comparing it to the prosecution system that exists in other jurisdictions.[31] Indeed, this researcher's own masters research conducted a singular comparative study of DMs with those operating within the system of the

[26] See chapter 2 of this research.

[27] The change that was made to the DM system whereby the accused is now deemed to accept a DM if they do not actively reject it. This is discussed in Chapter 2 of this research.

[28] Isla Mairi Fraser Callander, 'The Pursuit of Efficiency in the Reform of the Scottish fiscal fine: Should we opt Out of the Conditional Offer? Part 1' (2013) 5 SLT 37.

[29] In addition, see: Isla Mairi Fraser Callander, 'The Pursuit of Efficiency in the Reform of the Scottish fiscal fine: Should we opt Out of the Conditional Offer? Part 2' (2013) 6 SLT 47.

[30] See e.g. Lord McCluskey, 'Public Prosecutors and Public Defenders: The Scottish Experience' 1977, paper given at the Council of Europe Study visit to Edinburgh.

[31] See e.g. Albert V Sheehan, Criminal procedure in Scotland and France: A Comparative Study, with Particular Emphasis on the Role of the Public Prosecutor (HM Stationery Office 1975).

Netherlands.[32] There has also been work in other jurisdictions, looking at measures similar to DMs that exist there,[33] or comparing prosecution systems across Europe or further afield.[34] However, there has never been a major and comprehensive study of the whole suite of DMs in Scotland – existing research, as we have seen, only considers singular aspects of the alternative disposal system and not the system in the round. This research, therefore, provides an original contribution to the academic and practical understanding of the system of DMs in Scotland, providing a reflective but forward-looking consideration of the future of DMs in Scotland, and particularly a unique consideration of the DM system's relationship with the principles of justice.

Having examined the existing research on aspects of the Scottish system of DMs, it is clear that there is a need to address the research gap in Scotland and offer an original consideration of the principles of justice in relation to the operation of the DM system. Having established this, we now turn to the extent of this thesis and exactly what is covered and within scope.

1.3 Aims and scope of this thesis.

Before setting out the aims of this research, it is necessary to explain what it does, and does not, cover. The Scottish system, at times, refers to DMs and alternatives to prosecution (ATP) interchangeably. In this research, when referring to the public prosecutor taking direct action against an accused person in the form of a fine, compensation order or work order, the term DM is used. Within Scotland there is also a schema called "Diversion from Prosecution".[35] This scheme is a system which

[32] Dan McManus, 'Scotland and the alternative disposal: Thinking differently' (LLM(R) Thesis, University of Glasgow 2021).

[33] See e.g. John H Langbein, 'Controlling Prosecutorial Discretion in Germany' (1974) 41 The University of Chicago Law Review 439; Stephen Thaman, 'The Penal Order: Prosecutorial Sentencing as a Model for Criminal Justice Reform?' in Erik Luna & Marianne Wade (eds), The Prosecutor in Transnational Perspective (OUP 2012).

[34] See e.g. Julia Fionda, Public Prosecutors and Discretion: A Comparative Study (OUP 1995); Gwladys Gillieron, Public Prosecutors in the United States and Europe: A Comparative Analysis with Special Focus on Switzerland, France, and Germany (Cham: Springer 2013).

[35] For extensive coverage, links to studies and in-depth coverage of the extent of Diversion from Prosecution see: Community Justice Scotland, 'Learning Hub' (2023) <www.communityjustice.scot/learning-hub> accessed 26 August 2023. The Learning hub and the CJS website in general provides significant resources to understand the Wider ATP system in Scotland.

enables the public prosecutor to refer a case directly to social work or partner agencies when 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 being 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 diversion from prosecution but considers only DMs whereby a criminal sanction is imposed/offered to an accused person directly by the public prosecutor.[36]

There is one further direct clarification required in respect of the limitations of what is considered as a DM for the purposes of this research. Police disposals, where the police issue a fixed penalty notice or a police warning, are aspects which, whilst reported in the criminal justice statistics, are excluded from analysis within this research as they do not fall within the criteria of a DM taken by the public prosecutor in lieu of prosecution in court.

Having established that the thesis will focus on DMs, it is necessary to set out its aims. The overall aim of the thesis is to undertake a comprehensive examination of the DM system in Scotland as it presently operates. In the McInnes report that led to an expansion in the DM system, it was said that there are three central tenets of any justice system – effectiveness, fairness and efficiency (subsequently "the principles of justice"). As will be explained in more detail in chapter 2, it is these principles that will be used as evaluative criteria for the DM system. Guided by this aim, the research has three broad objectives as follows:

(i) The first focuses on the efficiency principle. The research will examine the original justification for having a system of DMs – that were based on efficiency – against available data in order to establish both whether this was a compelling justification at the time of their introduction and whether this justification – or new

[36] For further information of alternatives to prosecution in this context see: Community Justice Scotland, 'Justice System Maps: Explore the Scottish Justice System Map' (2022) <www.communityjustice.scot/scottish_justice_system> accessed 3rd November 2022.

efficiency-based justifications – exist in a modern criminal justice system in Scotland. It will conclude that while there is some doubt as to whether the introduction of DMs was in fact justified by efficiency or whether this justification continues to exist, it would now be impossible to abandon the DM system without incurrent significant additional costs and delays into the criminal justice system. As such, the need for DMs – or a similar system – remains.

(ii) The second objective focuses on the other two principles of justice, effectiveness and fairness. Setting aside efficiency issues, the research will assess whether the existing system of DMs is effective and fair. It will conclude that there are a number of problems in this regard.

(iii) The third objective brings together these two strands of research and considers whether it is possible to develop the system of DMs to improve its fairness and effectiveness, whilst not impacting the efficiency benefits it brings. In doing so, it is informed by comparative research into the system of alternatives to prosecution that exists in the Netherlands. Ultimately, this research reaches the conclusion that improvements are required in the system in Scotland to address the discovered discrepancies between the principles of justice and the operation of the DM system in Scotland but that these changes can be made without disposing of the system of DMs.

Having outlined the scope of this research we are now in a position to consider the terminology which will consistently be used to throughout the research.

1.4 Terminology used in this research.

The use of terminology in research can often be considered a confusing or controversial choice made by the researcher. It is hoped that this is not the case in this research! Where one term is used instead of another the choice has been made for purely practical reasons and without a particular philosophical leaning or intention to prejudice the reader to one view or another.

Throughout this paper, 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 relating to DMs have had a punishment imposed and have not chosen to challenge the imposition of the DM.[37] It must be acknowledged that the researcher has selected this term as it also conforms with the research finding that the DM is in itself a criminal sanction.[38] In both the Stewart committee and the McInnes committee reports the term victim is used and thus for consistency the use of this term is helpful.[39]

The term "accused" is used through this research for simplicity in referring to the person offered a DM. There are various stages in which a person transitions from being accused of the criminal offence to accepting the DM depending on which DM the accused is offered. 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. Further the use of the term "accused" is consistent with the understanding reached by this research of the DM as a criminal sanction.[40] It is also a term which is consistent with both the Stewart and McInnes committee reports.

A further term used consistently throughout the research is that of public prosecutor. When we refer to the term public prosecutor, we regard this as a solicitor qualified in the jurisdiction which is being considered, employed/engaged by the state for the purposes of conducting a prosecution in the name of that state.[41] Directly related to the term public prosecutor is the term Procurator Fiscal (PF), which is the term given to the public prosecutor in Scotland. Having defined the

[37] As we shall come to discover, this choice not to challenge the imposition is complicated and multifaceted and is discussed further within this research.

[38] See Chapter 3 at 3.4 within this research.

[39] See Chapter 2 and 3 within this research for consideration of both reports.

[40] See Chapter 3 at 3.4 within this research.

[41] There is an oddity in the Scottish system which allows the Lord Advocate to appoint any person as a procurator fiscal depute whether they be a qualified solicitor or not. However, in practice, that the Crown Office and Procurator Fiscal Service only advertise posts requiring qualified Scottish solicitors. As such, this anomaly is not considered further in the research.

term Procurator Fiscal, it is also necessary to define the term Crown Office and Procurator Fiscal Service (COPFS). COPFS is the agency responsible for public prosecution and it is also the death investigation authority. It makes prosecutorial decisions entirely independently of the state or any other state agency.[42]

Throughout the research the terms Sheriff and Sheriff Court are used. The term Sheriff is the title given in Scotland to the Judge in a court case heard in the Sheriff Court.[43] The Sheriff Court is simply the court building whereby criminal and civil cases are heard under the authority of the presiding sheriff. Within the Sheriff Court there are two types of criminal proceedings undertaken, which are Summary and Solemn criminal proceedings.

Summary proceedings are the mostly commonly referred to type of proceedings in this research and are defined as:

> These are court proceedings for less serious criminal offences. The charges for these appear on a 'complaint'. These cases call before a justice of the peace or a sheriff sitting without a jury.[44]

Whilst Solemn proceedings are referred to less in this research, Solemn proceedings are defined as:

[42] For more information on the COPFS see: Crown Office & Procurator Fiscal Service, 'About COPFS: Our Role in the Justice Process' (21 May 2021) < www.copfs.gov.uk/about-copfs/our-role-in-the-justice-process> accessed 26 August 2023.

[43] For a detailed History and outline of the Sheriff in Scotland see: James Ferguson, 'Sheriff in Scotland' (1910) 22 Juridical Review 105. It should be noted that the term Sheriff is not the only term used to refer to a "Judge" in Scotland but for the purposes of this research it is the most common referred to. For more information on judicial officer holders see: Judiciary of Scotland, 'Judiciary: Juridical Office Holders' (2023) <www.judiciary.scot/home/judiciary/judicial-office-holders> accessed 26 August 2023.

[44] Scottish Sentencing Council, 'About Sentencing: Jargon Buster: Complaint' (2023) < www.scottishsentencingcouncil.org.uk/about-sentencing/jargon-buster/?firstLetter=C> accessed 23 September 2023.

> These are court proceedings for more serious criminal offences. The charges for these appear on an indictment and cases call before a judge and a jury of 15 people in Scotland.[45]

Little will be said about Solemn proceedings. As will become apparent later in the thesis, DMs can only be offered when the offence would have been prosecuted under Summary proceedings.

Finally, throughout this research, the term "representation" is used to refer to the accused having an opportunity to have their views put forward and have a voice in the process. This does not necessarily mean *legal* representation, but it will be argued in the thesis that legal representation is sometimes necessary for the accused to represent their views effectively. Care will be taken in the reminder of the thesis to distinguish between representation as a general concept and *legal* representation by using the term "legal representation" where this is what is meant.

Whilst the available DMs are explored in chapter 2, it is helpful to say a little more here about the three types of DM that currently exist: the fiscal fine, the fiscal compensation order, and the fiscal work order. A fiscal fine is a financial penalty imposed upon an accused person by the PF in Scotland in response to a criminal allegation having been made against the accused person.[46] As with a court imposed fine, the proceeds go to the state. The fiscal compensation order is a financial penalty imposed[47] upon the accused person by the PF but whereby the penalty is used to compensate the victim of the criminal action alleged against the accused person.[48] The fiscal work order is an order imposed upon an accused person whereby the accused person must carry out a set number of hours of work in the community.[49]

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[45] Scottish Sentencing Council, 'About Sentencing: Jargon Buster: Complaint' (2023) < www.scottishsentencingcouncil.org.uk/about-sentencing/jargon-buster/?firstLetter=C> accessed 23 September 2023.

[46] See s.302 of the 1995 Act.

[47] The use of the word imposed here may initially appear to be controversial however as is established by this research when discussing the developments of the DM system in Chapter 2 it is appropriate.

[48] See s.302A of the 1995 Act.

[49] See s.303ZA of the 1995 Act.

1.5 Methodological approach.

The following section is essential to understanding the approach which is taken throughout the research and how the researcher approached this study and significant undertaking of work over the longer period of research.

1.5.1 Researcher's Development.

In the researcher's masters thesis, within that methodology section, there was a significant proportion dedicated to the researcher's reflexivity.[50] Reflexivity is generally considered in research as the researcher's impact on the research and how their own beliefs have impacted on the research.[51] I have elected not to write a fully reflective piece in this thesis, but have to acknowledge that reflexivity was particularly important during the masters research and continued to be important throughout this PhD research. Many of the self-reflective criticisms of the masters research were again true and brought areas for development of the researcher in responding positively to these challenges as I approached this research.[52] There was also a different challenge in this research, that did not arise in the masters thesis, and that was to be constantly mindful of ensuring that concepts and ideas were being re-examined anew, without slipping into uncritically adopting or being overly invested in the findings and conclusions of my masters thesis. Two things mitigated this concern: the high-quality level of supervision from two supervisors who have taken great delight in testing, challenging, disagreeing, and attempting to counter just about every argument made in this thesis; and secondly, that there is a quantitative and qualitative difference in the depth of study and research required in a PhD compared to an LLM by Research. The PhD is a significantly more detailed analysis and some of the findings I report here undermine findings which I previously reported in the masters research. An example of this is that in the masters thesis, I formed the view that the Dutch punishment order system could be implemented in

[50] Dan McManus, 'Scotland and the alternative disposal: Thinking differently' (LLM(R) Thesis, University of Glasgow 2021).1.1.

[51] For further information on reflexivity in qualitative research see: Kathryn Haynes, 'Reflexivity in Qualitative Research' in Gillian Symon and Catherine Cassell (eds), Qualitative Organizational Research: Core Methods and Current Challenges (Sage 2012).

[52] Dan McManus, 'Scotland and the alternative disposal: Thinking differently' (LLM(R) Thesis, University of Glasgow 2021).1.1.

Scotland. This is not a view that I would now hold, following a deeper consideration of the interplay of the various aspects of the Scottish criminal justice system. Therefore, whilst acknowledging that the reflexivity of the researcher naturally impacts any research and the researcher themselves, everything that can be done to limit its impact and effectively mitigate it has been done within in this project.

There is one reflection, however, which is worth highlighting and that is the exact limitations of this research, what to include and what not to include. In early versions of the full draft of this research there was consideration of the Dutch system of victim participation in the DM system, a novel aspect and a subject which is very "current" in debates in the Scottish criminal justice system at present. Whilst it still presents this researcher with pangs of guilt for not including consideration of the victim, the principles of victim-centred justice and the system of the Netherlands in relation to victims, it simply was not possible within the limitations of this research to include it and do so in the manner that such a topic deserves thus I must leave this to someone else.

1.5.2 Research Approach.

Throughout the research period, traditional doctrinal research methods were used from within a legal context.[53] Traditional doctrinal legal research methods focus on black letter law contained in statutory provisions, case law from first instance cases and appellate cases and whilst these, where they exist, are considered in this research their impact on the practical reality of the system of DMs in Scotland is limited. Within this research the doctrinal legal approach was more relevant in the consideration of the comparative jurisdiction of the Netherlands, due to its codified legal system, than it was in Scotland and therefore a socio-legal approach is taken, which includes empirical work alongside traditional legal research.

The socio-legal approach is taken as it considers the law in context and in the tangible realities of the system in operation, leading to not only a theoretical context but also consideration of the practical operation of the system of DMs. This socio-legal research builds on doctrinal research, which leads to an improvement

[53] For an understanding of law specific research methods see: Dawn Watkins & Mandy Burton (eds), Research Methods in Law (2nd edn, Routledge 2017).

and development in the field of legal scholarship in Scotland, and hopefully, specifically in the field of DMs in the criminal justice system.[54]

Socio-legal research has been attributed to the legal realist tradition. Legal realism is the theory that proposes that all law derives from prevailing social interests and public policy.[55] Legal realism is often accused of rejecting purely doctrinal or black letter approaches to law and suggesting that it is necessary to understand both the black letter law and the law in the reality of people's lives.[56] There has been a developing division of legal realism which has led to the theory of "new" and "old" legal realism. Old legal realism has been defined as that which is concerned with solely judicial decision making and particularly sentencing as a public perception exercise,[57] whereas new legal realism takes a broader interest in the legal system from the operation of the system in practice.[58] This research takes the approach that whilst black letter law and pure statistical analysis may be informative, produce originality in research and contribute to the body of knowledge in particular areas of law, it cannot in isolation provide a broad and full picture of the research area. It is necessary that this research looks not only at the law itself and the prevalence of the DMs but at the practical experience of another system which operates DMs and considers the operation of this system and what wisdom can be gained from it, which in and of itself justifies why we are undertaking in this research an element of comparative research, to which we shall give consideration shortly. We ignore the wisdom of experience at our peril.

1.5.3 Literature Review and Secondary Data.

Having identified the areas which this research should further explore to provide an in-depth original examination of the DM system, the research conducted a literature

[54] See John Baldwin and Gwynn Davis, 'Empirical Research in Law' in Mark Tushnet and Peter Cane (eds), The Oxford Handbook of Legal Studies (OUP 2005).

[55] Hanoch Dagan and Roy Kreitner, 'The New Legal Realism and the Realist View of Law' (2018) 43(2) Law & Social Inquiry 528.

[56] The Author has rejected using the term "Law in Action" due to the complexities and debates over law in action v living law development, see: David Nelken, 'Law in Action or Living Law? Back to the beginning in Sociology of Law' (1984) 4(2) Legal Studies 157.

[57] But see: Tracey E George, Mitu Gulati and Ann C McGinley, 'The New Old Legal Realism' (2011) 105(2) Northwestern University Law Review 689.

[58] Stewart Macaulay, 'The New Versus the Old Legal Realism: Things Ain't What They Used to Be' 2005(2) Wisconsin Law Review 365.

review into the system of DMs and in relation to the principles of justice. The literature research, which built upon the masters research undertaken by the researcher, was initially conducted by employing search terms such as: DM; "alternatives to prosecution"; "alternatives to court"; "fiscal fine"; "Public Prosecutor discretion"; "diversion from prosecution"; "prosecutor sentence"; "out of court disposal"; "principles of justice"; "principles of criminal justice"; and snowballed terms and linked articles and citations.[59] A further search of previous academic research was conducted, considering published PhD and masters research and a wide range of publications across the globe. It is fair to say that most of the research in these areas is disproportionately focussed on police disposals and other alternatives to prosecution (an area outwith the scope of this research) in all jurisdictions found rather than direct disposals by the public prosecutor. The initial literature search was supplemented through snowballing research citations, which led to a number of remotely linked articles for consideration containing minor insights, and personal knowledge of literature. The researcher has previously conducted comparative research on DMs, which created a fall-back position of research discovered previously which could be developed upon. For the purposes of clarity, the process of the literature review was ongoing throughout the research and indeed was ongoing almost until the point of submission of the research for examination. Literature, developments in academic thinking, and the practical operation of a justice system are not static things and thus the research approach to this review was dynamic and ongoing until the last possible moment prior to submission.

Having considered the research in the historical chapter and the matters raised when examining the principles of justice, it became necessary to conduct a statistical analysis of aspects of the criminal justice system in Scotland. The comparison of statistics brings inherent limitations by the very fact that only particular datasets are collected by Police Scotland, COPFS, Scottish Courts and Tribunals Service (SCTS)

[59] The term snowballing in this context refers to the practice of reading an article and then considering the articles and literature quoted by that and following on from there and so on and so forth. For a detailed description of snowballing, see: Jesse D Lecy and Kate E Beatty, 'Representative Literature Reviews Using Constrained Snowball Sampling and Citation Network Analysis (1 January 2012) <https://ssrn.com/abstract=1992601> accessed 3rd November 2022.

and the Scottish Government. The datasets analysed in this research naturally contained these limitations, the effects of which are mitigated where possible.[60] The researcher has remained balanced in drawing conclusions from statistical analysis based on the limitations of such data. This being said, there are significant difficulties in the collection of data from Police Scotland, COPFS, SCTS and the Scottish Government, each holding their own data collection methodologies and case processing and recording system, none of which integrate or interact with each other, and some even do not allow for the data collected to be interrogated. Further criticism and comments are made regarding data throughout the research and whilst it is highly unusual in a methodology section to indicate a conclusion, it is difficult not to conclude already that the data limits, collection, presentation, and the usefulness of it in the current formats is problematic for the criminal justice system in Scotland.

The principal data was gathered via the Scottish Criminal Justice published statistics. Following analysis of this data and considering the gaps in data which were evident, Freedom of Information (FOI) requests were submitted to various bodies. Appendix 1 outlines each of the FOI requests submitted. There was a total of 24 FOI requests whereby content from the responses have resulted in inclusion in this thesis. The questions asked, and a summary of the response, is included in the appendix to the thesis. There is one frequent response which is worthy of highlighting in particular and is not limited to COPFS:

> 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

[60] See Anna Alvazzi del Frate, 'Crime and Criminal Justice Statistics Challenges' in Stefan Harrendorf, Markku Heiskanen and Steven Malby (eds), International Statistics on Crime and Justice (European Institute for Crime Prevention and Control, HEUNI 2010) 167.

in relation to the request and the time taken to complete this task would exceed the upper cost limit.[61]

It is fair to state that the lack of available data, particularly from systems which do hold the data, is astonishing. Whilst this researcher is no computer expert, it is considered that there must be a solution to these issues. When the data does exist in the computer system, it really is inadequate in the technological age to be operating in this manner. It is a further issue where what could be considered fundamental evaluative data is not even viewed or considered. It was particularly frustrating that during the course of the research writing up phase, data on waiting times and case progression which were previously refused under FOI, were subsequently published by the Scottish Government. As a result of some responses regarding the number of Sheriffs in Scotland being refused as the data was not held, the researcher spent a significant amount of time manually counting and cross checking the manual count from the formerly published year books called the Scottish Legal Directory from the archives of the University of Glasgow. Whilst this enabled data to be collected and reported upon based on the researcher's own counting of the data, this is obviously subject to limitations and for the Scottish Court and Tribunal Service and the Scottish Justiciary Office not to hold historical records on Shrieval appointments is disappointing.

To summarise, a mixed method approach was adopted which combined primary qualitative data with secondary analysis of datasets available from the Scottish Government published data, or via Freedom of Information requests. A statistical analysis was conducted on available information on the use of DMs in Scotland, which included a breakdown of the number of DMs issued, the number of each type of DM issued, the enforcement of DMs and the offending history of the persons offered DMs. Once these factors were understood, research was undertaken into the economic value of the alternatives system in Scotland. The purpose of this was to test the argument that alternatives represented a significant saving to the public purse in Scotland.

[61] Freedom of Information response from COPFS, upper cost limit is £600.

During this research, the COVID-19 pandemic struck the United Kingdom (and elsewhere) and subjected the researcher to strange and unusual working conditions but more importantly this has had a significant impact on the statistical analysis which is conducted within this research. This is due to the court system effectively ceasing for significant periods of time or working in a manner which was not comparable to any other previous years and indeed in a manner which had never been seen before. Whilst the actions and reactions of the legal system to Covid-19 and the methods of dealing with criminal behaviour during the pandemic would be worthy of significant research in and of itself, it is not possible to do that within this research, therefore, a decision was made to exclude from consideration data from March 2020 onwards or where it was necessary or prudent to use it then it was qualified where used.[62]

It is necessary to accept that socio-legal research and legal empiricism are commonly associated with making proposals for law reform.[63] Whilst often socio-legal research may lead to developments of the law, this research has not been primarily conducted with a view to influencing public policy or criminal justice policy in Scotland. Nonetheless, the research does conclude with some recommendations for change. This research has not been funded by public bodies in Scotland but fully funded by the researcher. That being said, the caution of Sarat and Sibley[64] to be mindful of the "pull of policy" and its pitfalls has been cautiously approached throughout. This research is conducted purely from the researcher's own interests with all research questions being developed being those which the researcher viewed as important to offer a significant piece of research addressing the under-researched area of DMs in Scotland.

1.6 Comparative Research.

Having considered the Scottish system and its strengths and weaknesses in relation to the principles of justice, comparative research with the system of the Netherlands

[62] For example, data post March 2020 is used for the analysis of COPFS Staff and number of Sheriffs, but the pandemic showed no impact on these statistics.

[63] Herbert M Kritzer, 'The (Nearly) Forgotten Early Empirical Legal Research' (26 June 2009) Minnesota Legal Studies Research Paper no 09-26 <https://ssrn.com/abstract=1426312> accessed 3rd November 2023.

[64] Austin Sarat and Susan Silbey, 'The Pull of the Policy Audience' (1988) 10(2) Law & Policy 97.

was undertaken. The system of the Netherlands was chosen as the comparator due to the length of time the system had operated DMs, the development journey of the Dutch system, the range of DMs available and, from the previous knowledge of the researcher, the significant differences in the Dutch system compared to the Scottish system.

This comparative research offers an opportunity to enhance the system in Scotland and indeed understand and challenge the familiar structures and routines of the system in Scotland and ask the question of whether we can improve our system. Comparative research offers the opportunity to test theories of development and conclusions drawn in one system in comparison to another and come to an educated decision on the route forward and learning points to be developed which can offer a methodology to resolving issues which may have been identified in the primary jurisdiction.[65]

A key decision taken during this research was the selection of comparative jurisdictions, how many to consider and the parameters of the comparison. Ultimately a number of jurisdictions were considered, over months, and ruled out for a variety of reasons. In reality, the choice of one jurisdiction came down to two matters: first, the lack of space in the thesis and secondly finding an additional jurisdiction which was an adequate comparison but offered something different to was already being offered by looking at the Netherlands.[66] A further matter of consideration was the language barrier. The researcher is not fluent in Dutch and certainly lacks the technical terms used in the Dutch legal system. This potential difficulty has been overcome by the ability of the Dutch Office of National Statistics providing information in English and Dutch, alongside an explanation of each term and its use. In addition, by using the official English version of the code of criminal of procedure and the criminal code provided additional ease of access and compatibility for understanding and comparison. Further obstacles were overcome

[65] Frank Esser and Rens Vliegenthart, 'Comparative Research Methods', The International Encyclopedia of Communication Research Methods (1 August 2017) para 2 <https://doi.org/10.1002/9781118901731.iecrm0035> accessed 4th November 2022.

[66] The researcher considered systems operating in Canada, Czech Republic, Finland, Sweden, Germany, Italy, Austria and states within Australia.

due to the wide dual language use in Dutch academia, which meant a review of relevant materials was substantively possible. Given that only one comparative jurisdiction is selected, this is naturally going to provide an area of criticism or perceived weakness in this research. This criticism at some level may be justified but does not extinguish the validity of this research in its aims to provide an explanatory relevance of the contextual environment of DMs in Scotland and how they can be improved to ensure a better relationship with the principles of justice.

A further question which arises is whether it is valid or useful to compare the Scottish system with that of the Netherlands, especially as the Dutch system is traditionally considered as an inquisitorial system and the Scottish system is traditionally considered as an adversarial system.[67] It has, however, been suggested that both the Scottish and Dutch systems have become increasingly mixed[68] and the distinction between adversarial and inquisitorial procedure is not as stark as it once was.[69] An additional consideration is that the Dutch system has codified criminal law and criminal procedure. This might suggest that it is not a good comparator, as Scots criminal law is still largely a common law system. However, the Scots criminal procedure is codified, primarily in the Criminal Procedure (Scotland) Act 1995, so the two systems are very similar in this respect, lessening concerns about the appropriateness of the comparison. Whilst it is important to recognise that there are fundamental differences between the two systems, it makes very little difference to this research's consideration of the systems and their relationship with the

[67] For an examination of the differences between adversarial and inquisitorial systems see: Peter J Van Koppen and Steven D Penrod, 'Adversarial or Inquisitorial: Comparing Systems' in Peter J Van Koppen and Steven D Penrod (eds), Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems (Perspectives in Law and Psychology vol 17, Springer 2003).

[68] For consideration of the Netherlands system, see: Marianne F Hirsch Ballin, Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States (TMC Asser Press, Springer Science & Business Media 2012). For a Scottish systems consideration see: Peter Duff, 'Disclosure in Scottish Criminal Procedure: Another Step in an Inquisitorial Direction?' (2007) 11(3) The International Journal of Evidence & Proof 153.

[69] See e.g. John Jackson and Sarah Summers, The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions (Cambridge University Press 2012); Sarah Summers, Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights (Bloomsbury Publishing 2007).

principles of justice, particularly in terms of what Scotland stands to gain from the comparison.

The Dutch system is, therefore, a suitable comparable jurisdiction for us to seek learning for the Scottish DM system as both contain aspects of the adversarial and inquisitorial systems, they both codify criminal procedure and, as we shall discuss shortly, the process of prosecution is also similar, as are the preliminary tests which the prosecutor must apply to any reported criminal case when deciding whether or not to prosecute.

This is not to suggest that the Dutch system is a panacea for the Scottish system and, indeed, as the research explores, the only aspects given consideration are those which have been judged to offer a learning and development opportunity for Scotland. Indeed, acknowledging that the Dutch system may offer learning for the Scots system necessitates a brief consideration of the difficulties of attempting to transplant one element of a legal system into a different jurisdiction. Collins suggests there are two main objections to attempting direct transplants from one legal system to another:

> 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.[70]

In this research we do not seek to directly transplant the Dutch system of DMs into the Scottish system. Rather we seek to identify individual elements of the Dutch

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

system which might improve the Scottish system, while also fitting well with existing Scottish criminal procedure. Indeed, we seek to address the warning of Weber about comparative studies:

> [A] comparative study [sh]ould not aim at finding 'analogies' and 'parallels', as is done by those engrossed in the currently fashionable enterprise of constructing general schemes of development. The aim should, rather, be precisely the opposite: to identify and define the individuality of each development, the characteristics which made the one conclude in a manner so different from that of the other. This done, one can then determine the causes which led to these differences.[71]

With the warning of Weber in mind, we must acknowledge the weakness and potential criticism which can be made of comparative research, but this researcher is confident that comparable research is indeed a scientific research tool which enables a systematic approach to two or more systems which explores their strengths and difficulties, and which enables the research to develop understandings, explanations and establish conclusions.[72]

Within this chapter we have outlined the scope of the research to be undertaken, the terminology used throughout, the structure and content of the research and have just concluded our consideration of the methodological approach taken. We now turn to the final section of this introductory chapter, which outlines the content of the thesis on a chapter-by-chapter basis.

1.7 Structure of the remainder of the research.

Chapter 2 of this research considers the historical position in Scotland in terms of the criminal justice system and its development into a system which uses DMs. We consider the system prior to the introduction of DMs before moving on to consider

[71] Max Weber, The Agrarian Sociology of Ancient Civilizations (RI Frank tr, 2nd edn, Verso 2013) 385.

[72] Jürgen Kocka, 'The Uses of Comparative History' in Ragnar Björk and Karl Molin (eds), Societies Made Up of History: Essays in Histography, Intellectual History, Professionalisation, Historical Social Theory & Proto-Industrialisation (Akademitryck AB 1996) 197.

the two major parliamentary committee reports into the system of DMs and the development of the DM system. Within this chapter we consider the development from the committee reports to the practice as it exists in Scotland, at the time of writing, prior to considering in the widest sense the pros and cons of the DM system in Scotland from a principled perspective.

From understanding the historical position and the development of the system in Scotland which arose, we move to evaluate the DM system. Chapter 2 concludes by identifying the principles that will be used in this evaluation. Drawing from the McInnes Report, three principles of justice are identified – effectiveness, fairness and efficiency which will then be considered in the chapters that follow.

Chapter 3 is concerned with effectiveness. In order to identify the components of effectiveness that are relevant to DMs, it is argued that DMs are a criminal sanction and therefore we can draw on existing literature relating to the effectiveness of criminal sanctions. Having established this, the focus turns to what the aims of a criminal sanction might be and five aims are identified: retribution, deterrence, rehabilitation, protection of the public and reparation. Having explored the theoretical basis of the principles, we then apply this learning to the practical operation of the DM system in Scotland. The chapter concludes that there are areas of development required in deterrence, rehabilitation, protection of the public and individual retribution.

Having considered effectiveness, the first of the three principles of justice, in chapter 3, the research then moves, in chapter 4, to the consideration of the principle of fairness. The component parts of fairness considered within this research are accuracy of outcome, consistency, proportionality/parsimony and representation. To ensure a consistency of approach the principles are firstly set out in their theoretical framework before being applied to the system of DMs in Scotland. The fourth chapter of the research concludes that there are issues around confidence in the accuracy of outcome, consistency of the public prosecutor, limited issues in proportionality and perhaps the most pressing issue is the need to address weaknesses in legal representation of accused persons in light of the concerning statistical analysis in this chapter.

The third and final principle of justice considered in this research, within chapter 5, is efficiency. The starting point, as with the previous two chapters, is firstly to define the principle of efficiency as it relates to this research then move to consider the theoretical basis and then, continuing the methodological approach, applying this against the practical operation of the DM system in Scotland. Chapter 5 discovers and examines perhaps the most surprising and question-raising findings. This chapter concludes that the original justification for DMs no longer exists in Scotland, but that DMs remain a required function of the criminal justice system. Further conclusions contained within this research call into question the efficiency of the DM system and the lack of available quantifiable measurements to assess the efficiency of the DM system.

Chapter 6 follows on from the consideration of the principles of justice and their application to the system in Scotland by undertaking comparative research in the jurisdiction of the Netherlands. Within this chapter, particular areas of the DM system of the Netherlands are explored and it is concluded that Scotland can learn from these in order to better develop its relationship with the principles of justice.

We then move to consider the conclusions and recommendations of this research in chapter 7, which brings to an end this research of the DM system in Scotland. In this conclusion, the researcher suggests that a unique piece of research has been undertaken in Scotland and offers insight into part of the system of alternatives to prosecution in Scotland which offers real potential to further improve and develop the criminal justice system in Scotland.

Having now outlined, within this introductory chapter, the justification for examining the DM system, the previous studies conducted in relation to DMs in Scotland and their extent, the terminology used in this research, the methodological approach and finally the layout of the remainder of this research we now turn to chapter 2 of this thesis on the history and development of the DM system in Scotland.

Chapter 2: History and Development of DMs in Scotland.

The introduction of Direct Measures (DMs) into Scotland represented a paradigm shift in the management of criminal complaints in Scotland. In this chapter consideration is given to the development of the system of DMs in Scotland, setting out the position prior to the introduction of DMs, the introduction of the DMs and then the later developments. First, to understand the history and the development of the DM system, it is necessary to provide brief background information on how crime in Scotland is prosecuted. As we progress through the exploration of the history and development of the system of DMs in Scotland, we shall from the McInnes report identify the evaluative criteria (the principles of justice) which will be used throughout the research before outlining the system as it operates in practice now. By the conclusion of this chapter, we shall understand the process of how crime is prosecuted in Scotland and the process, and developments recommended by the committees charged with consideration of DMs in Scotland. This shall lead us to chapter 3 where we begin our considerations of DMs in the light of the principles of justice.

2.1 Criminal Prosecution in Scotland.

The prosecution of crime in Scotland is undertaken in the name of the Lord Advocate, who is assisted by the Solicitor General and Advocate Deputes collectively known as Crown Counsel. Crown Counsel are responsible for the prosecution of the most serious criminal offences in Scotland. Procurators Fiscal (PF) are commissioned by the Lord Advocate to act as their representatives across Scotland. The PF is assisted by commissioned deputes. The PF is responsible for the investigation of crime and the prosecution of cases in Sheriff Courts and Justice of the Peace (JP) Courts. The Sheriff Court is responsible for summary prosecutions and those solemn prosecutions which do not pass the threshold for prosecution in the High Court of justiciary.[73] The JP Court is where the least serious summary offences are prosecuted.

[73] See Scottish Courts and Tribunals, 'About Sheriff Courts' <www.scotcourts.gov.uk/the-courts/sheriff-court/about-sheriff-courts> (2023) accessed 12 September 2023.

The PF in Scotland has the widest possible discretion in dealing with criminal reports on whether to prosecute or not, subject, not to statute, but the direction of the Lord Advocate. A PF receives from the Police a Standard Police Report (SPR) which details the criminal allegation against an accused, presents a summary of the incident and the available evidence contained within it, alongside any exculpatory information and circumstances of the accused where available. This report is considered by the PF who then makes a prosecutorial decision on how, or whether, to proceed with any action against an accused person.[74] They are guided in this by the Prosecution Code,[75] which sets out the tests that are to be used in determining whether to prosecute and the factors that must be considered in making that decision. There are two steps to this test – prosecution should only be undertaken when there is "sufficient admissible evidence to justify commencing proceedings" and where it would be in the public interest to do so. Where there is sufficient admissible evidence, the prosecutor can either prosecute or choose one of a number of alternatives to prosecution (including DMs), depending on what is considered to be in the public interest. There are thirteen factors set out in the Prosecution Code that should be considered when deciding whether a course of action is in the public interest.[76] These are: 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; availability of a more appropriate civil remedy; powers of the court; and public concern.

In the study conducted by Moody and Tombs, there was an examination of the views of procurator fiscals in relation to the application of these guidelines and the approach taken by some to case marking.[77] There are no modern external examples,

[74] For an introduction to the process of Criminal Law see: Sarah Christie, An Introduction to Scots Criminal Law (Dundee University Press 2009) ch 1.
[75] Crown Office and Procurator Fiscal Service, 'Prosecution Code' (Crown Office 2001).
[76] It is important to note that the prosecution code is guidance of the Lord Advocate, and it is not a statutory basis.
[77] Susan R. Moody and Jacqueline Tombs, Prosecution in the public interest (Scottish Academic Press 1982) ch 4.

as far as this researcher can establish, of academic research in Scotland considering the current and prevalent attitudes and culture towards case marking in Scotland and the application of the 13 steps.

2.2 System Prior to the Criminal Justice (Scotland) Act 1987.

Prior to the introduction of DMs in Scotland, via the Criminal Justice (Scotland) Act 1987, there was a general feeling amongst several groups that there was an inordinate pressure on the criminal justice system which was leading to a significant decline in standards.[78] It was felt that the courts and the public prosecutor in Scotland were not equipped to deal with the significant number of cases if the level of law enforcement was to be maintained:

> In the field of criminal proceedings, the outlook is ominous. If recent trends continue, the number of solemn prosecutions could increase by about half and the number of summary prosecutions will double, in the next ten years.[79]

For the understanding and framing of this research, it is important to appreciate how the system in Scotland operated prior to the changes in 1987. Prior to the 1987 Act, when an SPR was received, the PF had only three options: not proceeding with the criminal complaint, issuing a written/verbal warning to the accused person or proceeding with the criminal complaint. In 1979, 288,203 criminal complaints were received by the PF, with 34,065 (11.7%) cases marked as no proceedings.[80] By 1986, the PF received 358,369 criminal complaints, with 71,228 being marked as no proceedings (19.87%).[81] These figures perfectly illustrate the difficulties that were facing the criminal justice system and that ultimately led to the introduction of DMs. More cases were being reported to the PF, with a higher proportion of these cases being marked as 'no proceedings'. It is difficult to escape a conclusion that at least

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[78] Scottish Home and Health Department and Crown Office, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 2.01, 12 (Stewart Committee).

[79] Grant committee Report, at para 33, as quoted within Stewart committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 2.04, 16.

[80] Stewart committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 2.01, 12.

[81] National Audit Office, 'Prosecution of Crime in Scotland: Review of the Procurator Fiscal Service' (Report by the Comptroller and Auditor General, HMSO 1989) Table 3, 15; para 4.8, 16.

some of this increase was due to the PF not having the resources to prosecute all the cases that merited a response.

Indeed, the research conducted by Moody and Tombs, published in 1982, raised concern regarding the use of the "no proceedings" option on the part of PFs, highlighting that it appeared at times that some offences were being disposed of for the convenience of the system rather than in the public interest.[82]

By 1989,[83] The National Audit Office report highlighted concerns raised by Moody and Tombs and the Stewart committee into the use of the no proceedings disposal by PFs:

> There may well be good reasons why cases are marked "no proceedings". Decisions depend upon the weight of evidence, the likelihood of successful prosecution, the seriousness of the case, and the likely attitudes of the local bench. These matters are also affected by the judgements and preferences of individual procurators fiscal. No instructions are given by fiscals to the police not to report particular offences, but guidance may be given on the circumstances which should be taken into account. However, the police may continue to report a type of offence even where the procurator fiscal is known to take no proceedings in such cases. A fiscal's reasons for not proceeding with a case are confidential.
>
> There is a risk to the administration of justice if cases are not pursued for reasons other than the merits of the case, and if there are wide variations between fiscal offices in the chances of an individual reported offence not being pursued. In the National Audit Office's view, the wide differences between offices in the proportion of cases marked "no proceedings" and the recognition that the levels of such cases are influenced by factors other than the merits of the case suggest that more needs to be done to monitor the extent to which this occurs, to identify reasons and to consider possible

[82] Susan R. Moody and Jacqueline Tombs, Prosecution in the public interest (Scottish Academic Press 1982) ch 4.
[83] Although published in 1989 the consideration period by the National Audit Office was prior to and the months following the passing of the legislation before it was introduced into operation by COPFS.

remedies in terms of better guidance and more consistent standards and possibly redeployment of staff.[84]

Thus, it is clear that prior to the 1987 Act, there was significant pressure on the public prosecutor in Scotland arising from the volume of cases with which they were dealing and the way in which cases were being disposed of. Looking at the resources required by COPFS to manage this volume of case work, in 1987 COPFS employed 250 legal staff and 770 administrative support staff who prosecuted in court a total of 287,141 cases.[85] As we move to our analysis of the economic value of DMs in chapter 6, we shall use these figures to compare the staffing of COPFS prior to the introduction of DMs to compare with the staffing requirements post the introduction and development of DMs in Scotland.

2.3 Purpose, Remit and Conclusions of the Stewart Committee.

In response to the pressures of criminal case business on the public prosecutor and the court system, the government of the time established the Stewart committee. The Stewart committee was made up of 12 full members, who were all involved either at the time or formerly in the criminal justice system including police officers and Sheriffs. Lord Stewart M.C. was the chairperson of the committee. In reaching their final report the committee had held 79 meetings to discuss the considerations of the report, they conducted a literature review, took written and oral evidence from interested parties and visited COPFS offices and other jurisdictions.[86]

The remit of the committee was:

> To consider the effect on the criminal courts and the prosecution system of the volume of minor offences at present dealt with by summary prosecution and

[84] National Audit Office, 'Prosecution of Crime in Scotland: Review of the Prosecutor Fiscal Service' (Report by the Comptroller and Auditor General, HMSO 1989) paras 4.4 – 4.5.
[85] National Audit Office, 'Prosecution of Crime in Scotland: Review of the Prosecutor Fiscal Service' (Report by the Comptroller and Auditor General, HMSO 1989 paras5.1-5.12, Table 3.
[86] For a full methodology statement from the committee see: Stewart committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 2.01, 10.

whether some other process might be devised to deal with such offences while maintaining essential safeguards for accused persons.[87]

The committee's first report looked at fixed penalties for road traffic offences and will not be considered here.[88] Of interest here is its second report, which looked more widely at alternatives to prosecution. In short, the committee recommended the introduction of a system of DMs to address the pressures caused by the volume of minor offences dealt with by summary procedure. These would, according to the committee, save time and money. The committee stated that:

The extent of savings in time and money would, of course, depend on a number of variable factors, such as the type of offence included within the alternative scheme, the number of those offences, the proportion of offenders who are prepared to acknowledge guilt without court appearance and the general acceptability of an alternative system. To a large extent, as with the fixed penalty system, these are imponderables. We consider, however, from our own practical experience and our knowledge of the use of similar procedures abroad, that such alternatives could be an effective way of reducing the workload on the prosecutor, his office and the courts.[89]

The Stewart committee sought to justify the DM schema in four ways. First, they noted that in many cases the prosecution of offenders in court who commit minor offences could be an inappropriate and exaggerated response to the behaviour.[90] The second justification was that the process of the prosecution and court appearance(s) could label and stigmatise offenders in a harmful way.[91] The third justification was that that some offenders require help, not the stigma of conviction and that help via a DM would be available more quickly.[92] The fourth justification

[87] Stewart committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 2.01, 12.
[88] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983).
[89] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 2.17, 24.
[90] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 2.18, 24.
[91] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 2.22, 26.
[92] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 2.22, 26.

was that the DM schema would relieve the pressure on the court system.[93] As we consider the principles of justice within chapter 3 and explore these justifications there, it suffices here to merely state what the justifications were.

The committee struggled with the definition of "minor offence" due to the complexity of the Scottish system of categorising a wide range of conduct under similar titles, with many potentially serious offences being categorised alongside relatively minor offences.[94] For example, a simple singular open-handed slap to the face is categorised as an assault, as is multiple closed fist punches directly to the face where blows continued to be struck after the victim had fallen into unconsciousness and the accused person been physically restrained by police officers. The Stewart committee therefore elected not to list particular offences which would be suitable for a DM but instead suggested a wide criterion related to both the accused person and the nature of the offending behaviour.[95]

What, exactly then, did the Stewart committee propose? They started out by saying that the following forms of a DM were acceptable in Scotland:

> (a) the police constable on the beat may decide not to report an offence but to give an informal warning to the offender on the spot;
>
> (b) the supervisory officer at the police station may decide not to submit an offence report to the fiscal but to give a formal warning to the offender;
>
> (c) the procurator fiscal may decide to take no action, not because of any doubt about discharging the burden of proof, but because the personal circumstances of the offender and/or the nature of the offence suggest that criminal proceedings are not in the public interest;
>
> (d) the procurator fiscal may decide to take no action on the basis that the offender has in the meantime taken steps to rectify a defect or an omission;

[93] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 2.22, 26.
[94] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 1.05, 10.
[95] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 1.05, 10.

(e) the procurator fiscal may give a warning;

(f) the offender may agree to a suggestion that he seeks or continues with medical and/or psychiatric treatment;

(g) the offender may be referred to, or may agree to maintain existing contacts with, a voluntary or statutory social welfare agency for treatment or practical assistance. In some instances, a voluntary or statutory social welfare agency may mediate in family or neighbourhood disputes;

(h) the offender may make reparation to the victim; and

(i) the procurator fiscal may offer the offender the opportunity of paying a fine.[96]

Due to the limitations of this research, we shall only consider those measures which are directly imposed by the procurator fiscal ((c), (d), (e), (f) (g), (h) and (i)). Whilst these instances were all recommended by the Stewart committee, (c) was already in existence under the wide discretion of the PF in Scotland, as were (d), (e) and (f).[97] Thus, for our practical consideration we are left with (h), the offender making reparation to the victim and (i) the PF offering the offender the opportunity to pay a fine. These are described in more detail below.

Reparation to the victim was recommended primarily by the committee in the form of a monetary payment, but they expressly considered that this could also be by public service such as the removal of litter or graffiti. The committee in their recommendations placed a limitation on the use of reparation whereby they considered that it should not be used in cases where there was a physical injury to the victim. The committee further considered that the reparation could not be paid in instalments and that it should only be a conditional discharge from prosecution

[96] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 3.03, 28.
[97] Although it is important to note that (f) was not a requirement to undertake medical treatment, but an agreement to a suggestion and in a similar vein (g).

with the right to prosecute only being renounced with full payment of the reparation sum.[98]

The discussion paper forming part of the committee's work considered that a fine offered by the PF to an accused person should be an option which must be positively accepted by the accused person and the accused person should have the right of recourse to the court at all times by declining to accept the offer. The committee proposed that the PF should be able to offer the fiscal fine for all minor offences subject to the Lord Advocate's discretion.[99]

Furthermore, the Stewart committee was keen to acknowledge that the proposed DM system did not mean that summary cases should never call before the court, but that the court system was appropriate only for cases where the facts of the charge were denied, where there was debate about whether the Crown had the right to prosecute at all or where the offence alleged was said not to be a crime.[100]

2.4 Objections to the Stewart Committee Proposals.

During the consultation period prior to the publication of the report, there were a number of significant objections received by the committee regarding the proposed schema. In addition to the objections from consultees, the committee was subject to a minority of their members objecting to the proposals. For the most part, these opposing views were reflected in each of the considerations in the report, rather than a separate 'dissenting opinion' being on the main recommendations. There was, however, one published note of objection to one recommendation,[101] and such was the dissent that the report published the dissenting opinion. Here we shall consider the objections received alongside the majority's response to the minority objection and the subsequent recommendations of the committee.

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[98] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 3.03, 28.
[99] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 4.25, 55.
[100] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 2.18, 24.
[101] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 6.0, 82.

The objections received can generally be considered in the following five categories: the principled objection; lack of consideration of the accused's circumstances; pleas as to the competency or relevancy of the offence; exclusion of other penalties which may be more suitable; and involving the public prosecutor in the matter of sentencing an accused person.[102]

The first objection is a principled one regarding the separation of powers between the judicial role and the role of the public prosecutor: the objection is that DMs involve a substitute for judicial decision making whereby the accused person's sentence is determined by the court after hearing from both parties and that in the place of this a one-sided offer of criminal sanction would be imposed without hearing from the accused as to the circumstances.[103] The majority of the committee responded by saying that where there is no dispute as to the guilt of the accused person, the matter was no different to what Parliament had already created in the system of endorsable fixed penalty notices for road traffic offences.[104] The committee went further, stating that there was not, in their view, an infringement of the judicial principle in relation to the determination of guilt, as the PF would merely be making an offer to an accused person and it was a matter for the accused person to admit guilt or reject the offer.[105]

The second objection, the lack of consideration of the accused person, was that the disposal would be considered without any information on the circumstances of the accused which might have mitigated the penalty if the case was heard in court.[106] The minority view was that the system as it was proposed to operate would not afford the opportunity for the accused person to put forward their particular

[102] The Minority objections are contained within the report: Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) within the relevant sections dealing with each recommendation. The external response objections are contained within separate submission documents which were requested as part of an FOI request conducted in March 2022.
[103] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 4.39, 60.
[104] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) paras 4.27 - 4.28, 55.
[105] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) paras 4.28 - 4.29, 55.
[106] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 4.42.

circumstances and narrate their position regarding the allegation. The majority of the committee felt that this was not a relevant issue.[107] They responded that reporting police officers would make known to the public prosecutor any relevant information.[108] In addition, their view was that systems at that time in operation in Sweden and the Netherlands already operated successfully in this way. In the majority view there was no valid objection on this basis. The majority went further and considered that even where a case went to court and an accused person pled guilty via letter but did not complete the means assessment form then the court would still impose a penalty, often a financial penalty. In this respect, the DM process was not significantly different to the court process. The committee further re-emphasised the accused person's protection of rejecting the penalty and having the matter heard in court and the ability to receive legal advice under the advice and assistance scheme as it then operated.[109]

The third objection was that challenges to the competency and relevancy of the charge are not possible under the system of DMs proposed.[110] These challenges are circumstances whereby the explanation given by the accused, normally in court, is inconsistent with the plea of guilty and thus the court would refuse to accept the plea. The committee responded to this objection by arguing that the time period they were recommending between the offer of the DM and the acceptance of it was sufficient to enable the accused person to get legal advice and any matters as to pleas of relevancy or competency would be dealt with by the accused's legal representative.[111] Further, the committee suggested that, given the nature of the offending for which a DM should be issued, these issues were unlikely to arise, and that the objection was of no real significance.[112]

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[107] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 4.31, 56.
[108] This research examines this element when the Standard Police Report is considered in Chapter 4.
[109] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 4.31, 56.
[110] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 4.32, 56 - 57.
[111] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 4.32, 56 - 57.
[112] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 4.32, 56 - 57.

The fourth objection almost combined the principled objection and the lack of consideration of the accused person in a singular new objection focussing not on guilt, but on the criminal sanction.[113] Effectively, this objection was that if the case called in court, then the court would have the option to make an independent judicial assessment of the circumstances of the particular case and the particular accused person, and indeed the court may simply absolutely discharge the accused person, admonish them, defer sentence to be of good behaviour or impose a treatment program to meet the particular needs of the offender. The committee felt that these objections could not be upheld without considering the actual disposals of both the district courts and the summary sheriff cases. The committee's reasoning for rejecting this objection was that the vast majority of district court cases and summary sheriff court cases were already dealt with by the imposition of a fine and combined with the fiscal's exercise of discretion over the use of fiscal warning letters and informal agreements for the offenders to seek treatment, this was sufficient to deal with the objection.[114]

The fifth and final objection, the sentencing objection, was that the DM scheme would involve the independent public prosecutor in the role of sentencing an accused person, rather than prosecuting them and leaving sentencing as a matter for the court.[115] This, in the view of the objectors, was a constitutional principle which should not be crossed. The committee rejected this argument, stating that the real objection was not that the PF would be involved in sentencing (as in their view this was already the case by the PF's power to select the forum of prosecution), but that they would be involved in the assessment of the level of the financial penalty to be imposed, which in the committee's view did not violate the constitutional principle.[116]

[113] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 4.41, 60 - 61.
[114] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 4.33, 57.
[115] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 4.42, 61.
[116] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 4.34, 57 - 58.

The minority of the committee felt that their objections were significant enough, in their view, to lodge them and require them to be noted. Whilst there was no objection from the minority in relation to the other forms of DMs listed earlier, they were in agreement that these matters were simply the s*tatus quo* as this power was already inherent in the discretion of the PF.[117] In relation to the fiscal fine, the minority formally stated that the offer of a fine to an accused person with the amount being determined by the PF was outside the role of the fiscal and contained significant possibilities of undesirable consequences. The minority view was that the continental inquisitorial systems which were examined by the committee (such as Sweden and the Netherlands) DMs worked there due to the nature of the prosecution system, whereas Scotland operated a unique common law system with the separation of powers being fundamental to the constitutional status. The minority further rejected the safeguard supported by the majority that the accused could reject the offer and take legal advice. They held the view that the pressure on the scheme which was required for it to be effective targeted the most vulnerable, who were least likely to resist the pressure and offer of the PF.[118]

In the majority view of the committee, balancing the criticisms outlined above, and the remit with which the committee was charged, the DM schema which they proposed would meet the remit of the committee of reducing the pressure on the summary criminal courts in Scotland whilst also fulfilling the further part of their remit of maintaining essential safeguards for accused persons.[119]

The committee considered, within chapter 5 of its report, the essential safeguards required in the system of DMs for the accused person. They considered six such safeguards. The first was that the case marking decision would remain within the independent public prosecutor's office. In the committee's view, the application of

[117] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 4.39, 60.
[118] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) paras 4.43 - 4.44, 61 - 62.
[119] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) paras 4.27 - 4.38, 58 - 59.

the public interest test by the PF[120] was essential and further that this test should be applied solely by the independent public prosecutor.[121]

The second procedural safeguard in the recommended system was the criteria to be applied in cases considered for a DM. The committee came to the view that having considered all the factors that they were not in a position to recommend a specific list of offences or circumstances where a DM must be used but that this decision required to be taken on a consideration of the full facts of the particular accused and the facts of the case, based on the criteria already considered by the public prosecutor in Scotland in applying the public interest test.[122] The only change from this was that in summary prosecutions, the fiscal should consider prosecution as an ultimate step and that consideration should first be given to a DM rather than a court-based prosecution.[123]

The third procedural safeguard considered by the committee was whether there was a requirement for additional statutory safeguards or mechanisms to rectify any defect or omission in lieu of prosecution. The committee felt that the system should be simple, if the accused accepted the offer of the DM, then this should be an end of the matter and if they did not then prosecution should follow.[124]

The admission of guilt on the part of the accused was considered as the fourth procedural safeguard. In relation to the fiscal fine, the committee were of the view that an acceptance of the offer of a fiscal fine should be the equivalent of a conviction and should be recorded as such. However, due to this, the committee recommended that there should be a formal acceptance by the accused and admission of guilt. In the view of the committee, this could take the form of a tear off return slip on the offer of a fiscal fine with the offender's signature.[125]

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[120] This is part of the two-stage prosecution test in the Prosecution Code as explained in chapter 1.
[121] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 5.03, 63.
[122] See chapter 1 where the public interest test is discussed.
[123] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 5.05, 64.
[124] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 5.06, 65.
[125] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 5.06, 69.

The fifth procedural safeguard the committee considered was the limitation of the value of the fine. In order to recommend this safeguard the committee took the view that the fines should be matched with the disposals normally given in (what was then) the district court.[126] They came to the view that because 97% of district court fines were below £50, the limit on the DM should be £50. The committee further recommended that the fiscal fine should not be available to be paid in instalments and that a singular payment of the fine was all that was required, to ensure that no further administrative burden would be placed on the PF.[127] The minority of the committee also objected to this recommendation and felt that this unfairly put those with little means at a distinct disadvantage and unfairly prejudiced those with little means to pay a financial penalty in one instalment versus those accused persons who would be able to do so and in turn avoid a court prosecution.[128]

The final safeguard considered was consistency of the offer. The committee rejected that consistency in the application of the DM system was required by directive from the committee but suggested that, unlike judges, the PF service was managed and under management controls to enable consistency in the offer to be achieved.

> So far as Scotland is concerned, we consider that the decision as to what action if any should be taken in relation to alleged criminal conduct, should rest as at present with the public prosecutor, who is in the best position to ensure reasonable impartiality, consistency and efficiency.[129]

[126] At this time the District Court was the lowest form of criminal court in Scotland, formed by the District Court (Scotland) Act 1975. For a history of the District Court in Scotland see – The Scottish Justices Association, 'History of Justices of the Peace' (The Saltire Society, 2022) <https://www.scottishjustices.org/about/history-of-justices-of-the-peace/> accessed 24 June 2022. The District Court has now been replaced by the Justice of the Peace Court.
[127] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 5.18, 70.
[128] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) paras 4.39 – 4.44, 60.
[129] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 4.19. 51.

They also pointed out that consistency in sentencing had never been a hallmark of Scottish justice.[130] The committee, acknowledging this lack of consistency took no steps and made no recommendations to fundamentally ensure consistency other that the opaque reference to the management conditions of the COPFS. It is unclear from this whether the view of the committee was that consistency in DMs could be achieved via management of the public prosecutor whereas the independence of each judge made this difficult. Within chapter 5 of this research, we further consider the element of consistency of sentencing when considering the component parts of the principle of fairness.

The committee took the further step, having set out the safeguards discussed above, of dedicating a separate part of the report to what they named "the essential safeguard".[131] The essential safeguard for the committee was the right to go to court and have the allegations tested before any punishment is imposed. The committee considered that there was indeed a danger if legal rights were ignored for the purposes of achieving a good social end. They concluded that there should be no attempt to apply pressure to an accused person into accepting the DM. Thus, the committee recommended that it should be clearly explained to the accused person that they have the right to go to court and a right to obtain legal advice. In this section, the committee again re-emphasised the earlier consideration: that in the interests of justice the system could only fairly operate with the acceptance of the offer by the accused person who had been clearly advised of the consequences of accepting it.[132]

To summarise, for the purposes of this research, the key recommendation was the introduction of the fiscal fine, set at a single level of £50. The person receiving the offer of a fiscal fine would require to actively take steps to accept it by returning a tear off slip and that the fiscal fine should count as a criminal conviction and be recorded as such.

[130] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 5.19, 70 - 71.
[131] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 5.23, 72.
[132] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 5.23, 72.

2.5 Implementation of the Stewart Committee Recommendations.

Following the Stewart committee, the Parliament passed The Criminal Justice (Scotland) Act 1987 which implemented most of the recommendations outlined above and coming fully into force from 12th October 1988. The system of the fiscal fine was introduced but limited at the time to the sum of £25, rather than the maximum of £50 that the Stewart committee proposed. 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. It is important to state that this was the exact point made in the note of dissent by the member of the committee, Mr. J.D. Waterhouse, that instalments should be permitted which was dismissed by the majority but accepted by parliament.[133] Providing this first payment occurred, no criminal proceedings were permitted to follow.[134] In the period, afterwards, and subject to later criticism in the McInnes report, the fine operated on this basis.

The Government chose not to follow the Stewart committee's recommendation and record the DM as a criminal conviction, but this was balanced by the recording of the DM on any record of the accused whereby it was available to COPFS in consideration of any future case marking decisions.[135]

By 1991, 4 years after the Act came into force, the use of the fiscal fine had reached a rate of 4.2% of all reported criminal offences, bypassing the use of fiscal warning letters at 3.8%.[136] Alongside this, from the period 1982 to 1991 there was a significant drop in the proportion of cases calling in court, from 92% in 1982 to 53% in 1991.[137]

In 1996, the level of the fiscal fine was amended within the Criminal Procedure (Scotland) Act 1995, to introduce four levels of fine (£25, £50, £75 and £100). These

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[133] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 6.0, 82.

[134] Peter Robert Duff, 'The Prosecutor Fine' (1994) 14(4) Oxford Journal of Legal Studies 565.

[135] There is no record, which this researcher can establish, within the Bill, the Committee consideration, or the House of Lord's amendment as to why this recommendation was not contained within the original Bill or amendments to the Bill.

[136] Peter Duff, 'The Prosecutor Fine and Social Control: The Introduction of the fiscal fine to Scotland' (1993) 33(4) The British Journal of Criminology 501, 486.

[137] Susan R Moody and Jacqueline Tombs, "Alternatives to Prosecution: the Public Interest Redefined" (1993) Crim. L.R. 357, 367.

fine levels and the system of DMs remained until the post McInnes legislation, but in essence the system remained void of significant changes prior to the McInnes committee, which we shall discuss in the following section.

2.6 Purpose, Remit and Conclusions of the McInnes Committee.

The McInnes committee was established by the then Justice Minister (now Lord Wallace) to seek a more efficient and prompt summary criminal justice system.[138] The Review of Summary Justice committee, report to ministers, under the chair of Sheriff Principal John McInnes, commonly called the McInnes report, reported to ministers in January 2007. The committee was made up of 15 members predominantly from the legal profession and third sector criminal justice groups and local authority representatives. The committee met 23 times in formal sessions with subgroups meeting on several occasions.[139] The formal remit of the committee was:

> To review the provision of summary justice in Scotland, including the structures and procedures of the sheriff courts and district courts as they relate to summary business and the inter-relation between the two levels of court, and to make recommendations for the more efficient and effective delivery of summary justice in Scotland.[140]

The guiding principle for the committee following their remit was a general sense that it was thought that the need to impose swift justice on an offender was a requirement to ensure that offenders felt that there was an effective sanction for their behaviour and the criminal sanction should be tailored and delivered to the accused person as swiftly as possible.[141] Ultimately this formed the guiding principles of the committee in reaching their recommendations, which we shall now consider.

The McInnes committee ultimately recommended five significant changes to the system of DMs. Firstly, they recommended that the opt-in system be changed to an

[138] The McInnes Committee, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 1.2, 1 (McInnes Report).
[139] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 1.4, 2.
[140] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 1.3, 1.
[141] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) paras 2.06 - 2.12, 6 - 8.

opt-out system, whereby the offer of a fiscal fine becomes a registered fine if, after a specified period, the accused does not respond. Second, they recommended that the system of DMs be extended to a wider range of offences. Third, they recommended that the fiscal fine be disclosable to a court in future proceedings. Fourth, they recommended that a compensation order be added to the suite of DMs available to the public prosecutor. Fifth, they recommend that there be more stringent enforcement of the DMs which are offered. We shall discuss each recommendation in turn prior to considering which of these proposals were ultimately implemented by the Scottish Government.

The first significant recommendation was to change the system whereby the accused had to actively accept the DM (opt-in) to one where the accused must actively challenge the DM (opt-out) to avoid it being imposed. Under the old opt-in system, if the accused did not respond to the offer, the PF could not impose it, but would need to bring court proceedings. The committee stated that:

> In this context, we feel that it is no longer acceptable for an offender to be able passively to frustrate the interests of justice through inaction. We accept that a basic tenet of fairness – and of ECHR compliance – is that any person must have an opportunity to challenge any decision which is likely to result in the imposition of a penal sanction before a properly constituted, independent and impartial tribunal. When a case is heard before a court it is for the Crown to prove the case; the offender remains innocent until proved guilty. But we do not consider it incompatible with fairness to expect an alleged offender to take some active steps to exercise his or her right to a hearing. Provided, therefore, that the offender is duly informed of any action to be taken against him or her, the committee felt that, in relation to minor penalties not creating a criminal record, it should be for the offender actively to request that the case against him or her be tried in court.[142]

The justification for this change from the committee was that:

[142] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) paras 2.7 - 2.8, 7.

> the committee believes there could be a significant reduction in the number of less serious cases prosecuted in the courts……Present figures indicate that around half of all fiscal fine offers are not accepted. It is believed that many of those failed fiscal fine offers reach court out of inertia on the part of the accused rather than a wish actively to contest the allegation. About 75% of those who are prosecuted having failed to accept a fiscal fine plead guilty. Visits to district courts and discussions with officials there suggested that a substantial proportion of cases appearing before the court are failed fiscal fine offers. Figures showing the exact proportion are not available, but Crown Office statistics drawn from 2002-03 data suggest that 70% of district court cases are new to the system (and therefore not offers of diversion which have been rejected). Much of the remaining 30% will, however, represent prosecutions where a fiscal fine offer has not been accepted.[143]

The committee sought to negate the potential further difficulties with the proposed opt-out system by recommending what they described as the safeguard mechanism of service. The first element of their recommended safeguards was for police officers to inform the accused that the address which the police was given is where any papers would be served upon them.[144] The second element of the safeguard, in the committee's recognition of those who are illiterate, or of no fixed abode or away from home for a prolonged period of time, was to create the ability for the fiscal fine to be recalled, providing that the accused could demonstrate that they had not received the DM.[145] In a case where they had not received but wished to pay the fiscal fine, this would be without the late payment surcharge and in circumstances where they could demonstrate sufficient reason for not having received the fiscal fine and wished to challenge the imposition then this notice could be recalled, and the PF could proceed by raising court proceedings.[146] In addition, should the notice

[143] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 7.38, 68.
[144] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 11.26, 114.
[145] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 11.26, 114.
[146] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 11.26, 114.

fail to be recalled by the PF then the accused would have the ability to appeal to a single sheriff in the summary court.[147]

The second formal recommendation of the committee was that DMs should be made more widely available, more flexible and more robust to enable the courts to focus on the more rapid handling of serious crimes and offences, whilst giving the PF the range of powers they need to respond quickly and appropriately to minor offences.[148]

As such, the committee recommended an increase in the maximum amount of the fiscal fine from £100 to £500. This would increase the range of offences for which a DM could appropriately be used and align the fiscal fine to that of the court fines system.[149] The committee justified the recommended increase by further noting that an accused person receives a double benefit of accepting the fiscal fine, in that they receive a fine which was significantly lower than that which would be imposed by a court, and they avoid the recording of the criminal sanction as a criminal record. The committee noted that this balance should be addressed by the increase in the fiscal fine not being to a level where it may disincentivise the accused from accepting it.[150]

The third recommendation of the committee was that the non-acceptance of a fiscal fine offer be disclosable to the court in connection with the prosecution of the offence in court and that any previous DMs would be disclosed to a court if the person reoffends. It was recommended to ministers that this period be between two and five years.[151] As we discussed above, this was partially in line with the Stewart committee recommendation that the DM was recorded as a criminal conviction, which was ultimately not implemented in the 1987 Act. Although the third recommendation did not seek to record the DM as a criminal conviction, it did seek

[147] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 11.26, 114.
[148] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) no 27, 20.
[149] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) no 25, 20.
[150] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 11.42, 120.
[151] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) no 27, 20; para 11.17, 110.

to have a period where they were disclosed to the court in any subsequent proceedings.

In their fourth recommendation, the committee recommended the introduction of a fiscal compensation order which could be combined with the fiscal fine or offered independently of the fiscal fine.[152] The committee recommended that the compensation order should have no prescribed upper limit and that a compensation order would be enforceable in the same way as the proposed changes to fiscal fines. The committee further recommended that the safeguards outlined above in relation to the fiscal fine would also apply to the compensation order.[153]

The fifth recommendation was that the fiscal fine enforcement system should be more stringent.[154] As such, they recommended that the fine became a registered fine after the period of opportunity to be paid and become enforceable. The committee examined the enforcement of similar systems in other jurisdictions and concluded that:

> We examined the arrangements which are available to prosecutors in the Netherlands. There, the prosecutor may offer a prosecutor fine, which gives the offender a period of time in which to pay the penalty in full. The document also serves as a form of summons, and if the penalty is not paid by the specified date, the case will automatically call-in court. We considered that this procedure would offer no significant improvements over the present arrangements, i.e., it would tend to encourage inactivity on the part of the accused and lead to cases ending up in the court process where the issue was not necessarily proof of guilt or innocence. Inactivity on the part of those offered fiscal fines causes significant additional resources to be deployed, especially in relation to those that have chaotic lifestyles. By and large they will be prosecuted, usually in the district court, where they will eventually

[152] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) no 33, 21.
[153] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) no 33, 21.
[154] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 11.19, 111.

plead guilty in most cases …. This is a second process and a further expenditure of resources for a relatively minor offence.[155]

Thus, the committee elected to recommend that fines immediately become registered fines after the period to object to the DM had lapsed.

In summary, the five recommendations of the committee were that the acceptance of DMs be changed to the opt-out procedure, that the offer of the DM be widened to a greater number of offences, the fine amount be increased, that DMs become disclosable to the court for a period of time and that the compensation order be introduced to the suite of DMs available to COPFS to dispose of criminal complaints.

As can be seen from the examination undertaken in this research of the justifications examined in the Stewart committee report and having now examined the justifications in the McInnes committee report we can see that the general thrust of the justifications have changed. In the Stewart committee we have seen the four reasons given as to why DMs should be introduced and not all of them related to efficiency; by the time of McInnes it seems that efficiency is the only principle that is at the forefront of the consideration.

2.7 Objections to the McInnes Committee Proposals.

As was the case with the Stewart committee there was a minority and majority view on the report. A minority in the McInnes committee dissented and objected in particular to the change from the opt-in system favoured by the Stewart committee to an opt-out system. The majority stated in response to the minority that they believed the number of cases where injustice could occur would be relatively small and could be corrected by the operation of the safeguard mechanism outlined above.[156] The two dissenters stated that they were in agreement with the Stewart committee and argued that the danger of contravening the principle of "deeming guilt by silence" was contrary to the interests of justice, although they did so

[155] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 11.20, 112.
[156] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) paras 11.28 - 11.29, 115.

without defining or exploring the concept of the interests of justice any further.[157] All of these issues will be further discussed later in this thesis. The other objections by the minority are objections not related to DMs and thus do not require to be considered within this research.

2.8 Implementation of the McInnes Committee Proposals.

Following publication of the McInnes committee report The Scottish Government then consulted on the recommendations of the McInnes committee and published their response in March 2005 under the report entitled *Smarter Justice, Safer Communities, Summary Justice Reform Next Steps.*[158] This led subsequently to a Bill in the Scottish Parliament, which was debated and was enacted as the Criminal Proceedings etc (Reform) (Scotland) Act 2007.[159]

In the Policy Memorandum accompanying the Bill it was explained that rationale behind the changes to be included in Criminal Procedure (Reform) (Scotland) Act 2007 could be explained as follows:

> It is important that the penalty imposed in respect of an offence is proportionate. It is also important that court time is used effectively. A court intervention, which is a resource intensive and often lengthy process, should only be used in cases where the severity of the offence clearly requires it, the accusation is genuinely in dispute or where there are circumstances relating to the offender (such as their previous record) that make a court disposal appropriate. In cases of minor offending a quick, rigorously enforced and proportionate non-court penalty is likely to be more effective in deterring reoffending. Such a penalty can also be administered more efficiently ensuring that those cases requiring a court hearing can themselves reach court with the minimum of delay.[160]

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[157] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) no 31, 264.
[158] Safer Scotland and Scottish Executive, Smarter Justice Safer Communities: Summary Justice Reform Next Steps (Scottish Executive 2005).
[159] Policy Memorandum for SP Bill 55 Criminal Proceedings etc (Reform) (Scotland) Bill [as introduced] Session 2 (2006) 45.
[160] Policy Memorandum for SP Bill 55 Criminal Proceedings etc (Reform) (Scotland) Bill [as introduced] Session 2 (2006) 45.

The vast majority of the McInnes committee's proposals were adopted by the Government in *Smarter Justice* and were implemented in the 2007 Act.[161] As such, the Act introduced the fiscal compensation order (although they limited this to a maximum of £5,000, rather than leaving it unlimited as the McInnes committee had suggested). It increased the level of the fiscal fine, as recommended by McInnes, although this was limited to a maximum of £300 (rather than the £500 the McInnes committee had proposed). The Act also implemented the recommendation of McInnes that the DM should be disclosed to a court in subsequent proceedings for a period of two years and that the COPFS should keep a record on each accused who has received a previous DM in order that they may be considered in any future case marking decision. The criminal history system in Scotland, managed by The Scottish Criminal Records Office, retains DMs for twenty years or until the age of 40, whichever is longer.[162] The DM may be disclosed in an enhanced Disclosure Scotland or Protection of Vulnerable Groups Scheme Certificate (PVG) where it is deemed relevant to those applications.[163]

Finally, the Scottish Government accepted what may be considered as the most controversial recommendation of the McInnes report and changed the system to opt-out for fiscal fines rather than the Stewart committee preference of the opt-in system as a fundamental protection for the accused.

There was, however, one provision of the Act which did not stem from the McInnes committee. The Scottish Government introduced a system of fiscal work orders, which was not considered in the McInnes report at all. The fiscal work order allows the PF to offer a work order of a maximum of 50 hours as a DM, whereby the alleged offence is triable by the summary courts. The work order was introduced initially as

[161] The Criminal Proceedings Etc (Reform) (Scotland) Act 2007. The provisions in relation to DMs are contained within Sections 50 to 54.
[162] FOI Response – Scottish Government, 23rd September 2021.
[163] See - Richards evaluation, Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011) para 2. Enhanced Disclosure and PVG are forms of criminal record checks which can be undertaken by organisations and employers – see Scottish Government, 'Organisations: Disclosure Scotland' (Scottish Government 2023) <www.mygov.scot/organisations/disclosure-scotland> accessed 9th September 2023.

a pilot.[164] Very little explanation of the decision to introduce work orders is given by the Government, other than that it stemmed from the consultation process and from their own "criminal justice plan".[165] Likewise, the Policy Memorandum to the Bill states only that they "will also allow the prosecutor to suggest a community based penalty where the nature of the alleged offence in question makes such a disposable more appropriate than a financial penalty".[166]

No further changes have been made to the system of DMs since the McInnes committee's recommendations came into force.[167] The present system of DMs is provided for in the Criminal Procedure (Scotland) Act 1995 (as amended by the Criminal Proceedings Etc (Reform) (Scotland) Act 2007 Act). As such, the system of available DMs which operates in Scotland as at the time of writing is as follows:

[164] See: Safer Scotland and Scottish Executive, Smarter Justice Safer Communities: Summary Justice Reform Next Steps (Scottish Executive 2005. 3. Policy Memorandum for SP Bill 55 Criminal Proceedings etc (Reform) (Scotland) Bill [as introduced] Session 2 (2006) 45, 50. Following the Pilot the WO was made available across Scotland.
[165] See - Scottish Parliament, Criminal Proceedings etc (Reform) (Scotland) Bill (SP Bill 55): Policy Memorandum (Scottish Executive 2006) paras 239 – 255, 49 – 52.
[166] Policy Memorandum, para 241.
[167] The Coronavirus (Scotland) Act 2020 made temporary changes to the DM levels increasing the fiscal fine to £500.00; this is not considered here as at the time of writing the Scottish Government are consulting on making this change permanent. Given the concerns raised in this research, there needs to be careful consideration of the implications of this and the relationship to the principles of justice prior to this proceeding.

Table 1*:* Available Direct Measures in Scotland.[168]

Alternative	Comment
Fiscal Warning Letter/Verbal Warning	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[169]
Compensation Order	Maximum compensation £5,000
Fiscal Work Order	10-50 hours of unpaid work

2.9 Evaluating the System of Direct Measures.

The aim of this research was to evaluate the system of DMs as it presently operates in Scotland. In order to achieve this, it is necessary to identify evaluative criteria to be used. To do so it begins by considering what was said in the Stewart and McInnes reports.

As was outlined above, the remit of the Stewart committee was:

> To consider the effect on the criminal courts and the prosecution system of the volume of minor offences at present dealt with by summary prosecution and whether some other process might be devised to deal with such offences while maintaining essential safeguards for accused persons.[170]

[168] Dan McManus, 'Scotland and the Alternative Disposal: Thinking Differently' (LLM(R) Thesis, University of Glasgow 2021). The Criminal Procedure (Scotland) Act 1995 SS 302 – 303ZB, set out the power of the public prosecutor to make said offers.
[169] The amount of the Fiscal fine is not contained within the Criminal Procedure (Scotland) Act 1995, but S302 (7) provides that the secretary of state shall prescribe the range of fines in secondary legislation.
[170] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 1.01, 9.

Throughout the second report of the Stewart committee, which recommended the introduction of the system of alternatives to prosecution in Scotland, the committee did not expressly deal with or consider in detail the principles of justice which might act as an evaluative model for the criminal justice system in Scotland.[171] The committee did state that their objective was to identify an economical way of dealing with the significant delays in the Scottish summary justice system and that the accused person is more likely to be troubled by the problems in the system rather than consideration of any philosophy of justice:

> The delays which are 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.[172]

Any criticism of the committee to fully engage with the principles of justice would be unfair, however, if we did not examine what the committee suggests are essential safeguards that should accompany the introduction of a system of DMs. It is here that we can find an implicit recognition of the criteria that must be met to maintain a principled system of justice. The Stewart committee stated that:

> It is necessary to examine the procedures which exist, or which will need to be created in the light of that part of our remit which requires us to "maintain essential safeguards for accused persons". The procedures which have to be followed when prosecuting individuals in the criminal courts are designed to protect the individual and to ensure a fair trial. Emphasis should continue to be placed on the rights and interests of the individual but, when the offender does not wish to deny his guilt of a minor offence which may be better dealt with by diversionary means, the formality associated with the court process is

[171] As outlined previously the first Stewart committee report was irrelevant to the consideration of DMs and related to Police fixed penalty notices.
[172] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 4.38, 59.

> not necessary. A shorter, less cumbersome procedure is preferable in such cases provided that safeguards are incorporated in the procedure itself.[173]

This being said, the only safeguard which the committee directly engaged with was the right of an accused to decline an offer of an alternative and seek independent legal advice, should they choose to do so. The committee was expressly clear that in their view, and one presumes based on the principles of justice, that the system of alternatives could only proceed in their recommended format with the express consent of the person accused:

> With the use of these options, we consider that it should be clearly explained to the offender that he has a right to go to court and a right to obtain legal advice. It is also important that such alternatives to prosecution can only be used with the active acceptance of the offender. The option offered therefore should be clearly defined and the offender clearly advised of the consequences of his taking it.[174]

The Stewart committee at no time, in their report, considered how to assess the effectiveness of the then proposed alternatives to prosecution, except for their potential effectiveness at removing business from the summary sheriff court. It could be suggested that this was entirely legitimate given the remit of the committee outlined above. For the Stewart committee, there was a clear correlation between effectiveness and efficiency in summary justice. In relation to efficiency, the committee noted that, while the issues which then existed could have been resolved by more sheriffs and judges, more procurators fiscal, and the provision of better facilities, they came to the view that:

[173] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 5.02, 63.
[174] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 5.23, 71 – 72.

> if the law-and-order budget has to compete with and be restricted by other social priorities, then some other more economical methods must be found if enforcement of the criminal law is to be maintained at an acceptable level.[175]

In consideration of the principle of proportionality in the criminal process, the majority of the Stewart committee were of the view that:

> There are some offences which do not necessarily merit the full panoply of the present prosecution process…..other minor offences…could be adequately disposed of by other methods which are more appropriate and often less expensive.[176]

It was not the purpose of the committee to propose a widespread decriminalisation of some offences and they did not seek to consider the proportionality of bringing criminal proceedings for particular offences, per se, but instead confined their considerations to matters of the procedure of the prosecution of minor offences.

The committee did not engage in any significant manner with the exact offences which could be solely disposed of using their proposed alternatives to prosecution other than those which are triable via the summary justice system. Indeed, the committee accepted that due to the structure of the *nomen juris* of common law offences in Scotland, the criminal behaviour covered by the type of offence could be so wide that it was a matter for the PF to decide on the particular facts of a case whether the use of alternatives to prosecution was an acceptable methodology for disposing of that particular case.

Throughout the Stewart committee report there are concerns raised, and dismissed, concerning the consistency of application of the methods available, at that time, to the PF in disposing of criminal cases. Indeed, a prime example of the dismissal of concerns is found in the general approach the committee took to dealing with the issue of consistency. The hope of the committee was that guidance from the Lord

[175] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 2.12, 21.
[176] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 2.12, 21.

Advocate and the introduction of DMs could lead to a greater consistency in the disposal of criminal cases.[177] Indeed, the committee expressly refers to the academic work of Moody and Tombs, which cast doubt on the consistency of application in PFs' decision-making process.[178]

The effects of DMs on offenders, in terms of rehabilitation, are not considered by the Stewart committee. However, they did recommend that records are kept by the COPFS of previous DMs and that these could be considered when exercising the PF's judgement on the most appropriate route for future offending behaviour. This implicit consideration may be as to effective rehabilitation or given the consideration of the committee as the appropriateness of DMs only to minor offending and not escalating/persistent criminal behaviour. On balance, however, it is not unreasonable that some of these matters were not given a full consideration given the remit of the committee outlined previously.

To summarise, then, the concepts of economy, consistency and proportionality present a starting point for identifying criteria that might help us evaluate DMs, but the Stewart committee does not organise these into any explicit principles. For this we need to look at the work, some 20 years later, of the McInnes committee.

The McInnes committee stated that there are three central tenets of any justice system, claiming that these are: fairness, effectiveness, and efficiency.[179] These three central tenets, having been adopted by the McInnes committee, provide a useful framework which captures the relevant issues for an examination of the DM system and thus these are the criteria adopted by this research for its evaluation of the DM system.

Unlike the Stewart committee, the McInnes committee went on to give some, albeit limited, consideration to what these criteria might entail. In terms of fairness, they stated that fairness should be a key principle and that the system of DMs must be

[177] See - Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) paras 3.17, 4.05, 4.19 and 5.19 for examples.
[178] See - Susan R Moody and Jacqueline Tombs, Prosecution in the public interest (Scottish Academic Press Ltd 1982).
[179] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) 7-8.

capable of being fair to all persons it interacts with, be it witnesses, accused persons, or victims.[180] The committee criticised the previous system in Scotland, whereby an accused person could merely await the Crown to bring their case to the test and do nothing else, stating that:

> We do not consider it incompatible with fairness to expect an offender to take some active steps to exercise his or her right to a hearing. Provided, therefore, that the offender is duly informed of any action to be taken against him or her, the committee felt that, in relation to minor penalties, not creating a criminal record, it should be for the offender to actively request that the case against him or her be tried in court.[181]

In terms of effectiveness, the McInnes committee felt that effectiveness in the summary justice system was comprised of a number of factors, namely that it should be effective in punishing, deterring crime, and helping to rehabilitate offenders.[182] To achieve deterrence, they stated, action needs to be taken quickly to maintain the link between the action and the consequence in the offender's mind.[183] The McInnes committee suggests that to have effective punishment(s) is at the heart of the criminal justice system.[184] They state that a penalty is only effective if it is consistently enforced and that offenders know that a penalty will "bite".[185] Further they state that confidence in the system is undermined, as is effectiveness, if it becomes clear to the wider public that penalties are not enforced.[186]

[180] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) 9.
[181] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) paras 2.7 - 2.8, 7.
[182] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) 9. For the discussion on rehabilitation of offenders see 3.2.3.
[183] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 2.9, 7.
[184] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 2.9, 7.
[185] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 2.11, 7.
[186] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 2.11, 7.

In terms of efficiency, the McInnes committee suggested it is found when the most effective use of time and resources is achieved.[187] They suggested that efficiency is achieved and is best served when cases are dealt with proportionately as soon as possible after they are detected and that information flows and exchanges between criminal justice partners are streamlined. The committee went further in stating that speed of the system was essential and concluded that a speedy disposal, keeping formalities to the minimum, was required in the interests of fairness.[188] The committee suggested the principle that quick action is effective action, in their view of summary justice.[189] It was the view of the committee that efficiency in terms of speed can be achieved without a loss of fairness to the accused person. The committee concluded that speed was part of the consideration of fairness to all persons involved in the criminal justice system, including those who were most vulnerable, the accused, witnesses, and victims:

> The committee felt that a more summary system was of considerable value; indeed, it regarded speeding up the process of justice as core to what it was trying to achieve. Speedier justice benefits everyone involved in the process but is particularly helpful to those who find the process most stressful – those who are vulnerable for any reason.[190]

The committee also discussed two further principles that cut across categories. The first was proportionality. They felt that proportionality was about ensuring the balance between taking action to achieve deterrence from future offending but ensuring that the use of public resources is efficient and in the public interest.[191]

Second, the McInnes committee stressed that consistency in the decision-making process was essential to the overarching principles of justice and that 'post code'

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[187] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) 9.
[188] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 2.14, 7.
[189] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 2.38, 16.
[190] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 2.14, 8.
[191] This thesis will, unlike McInnes, will consider proportionality as a component of fairness.

justice is not acceptable.[192] The committee did point out that sentencing was outwith its remit, but stated that even with DMs, consistency of application is required.[193]

Following the McInnes report, there have been three formal evaluations of some parts of the DM system in Scotland. The first two were both undertaken by Her Majesty's Inspectorate of Prosecution – one in 2009 examined only fiscal fines;[194] the second in 2010 examined fiscal compensation orders (including combined fiscal fine and compensation order cases).[195] In the 2009 report, the Inspectorate took a random selection of fiscal fines from each of the 11 COPFS areas in Scotland which had been marked as closed. A total of 1500 fines were examined. COPFS suggest that this was approximately 40% of fiscal fines closed in a single month. It is acknowledged in the methodological section of the HMIPS report that this sample size is not held out to be statistically relevant.[196] Nonetheless, concerns were raised by Her Majesty's Inspectorate regarding the offer and use of fiscal fines in respect of fairness, consistency and equality.[197] As this research shall come to suggest given the issues identified even in this small sample, extrapolation of these to the total number of DMs given should at minimum be grounds for a larger scale review and analysis and at the most give serious cause for concern.

[192] Postcode justice can be described as one postal code getting justice and another one not, simply because of the postcode.
[193] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 2.15, 8-9.
[194] HM Inspectorate of Prosecution in Scotland, Summary Justice Reform: Thematic Report on the Use of Fiscal Fines (Scottish Government 2009).
[195] HM Inspectorate of Prosecution in Scotland, Summary Justice Reform Thematic Report on the Use of Compensation Offers and Combined Fiscal Fines and Compensation Offers (Scottish Government, 2010).
[196] HM Inspectorate of Prosecution in Scotland, Summary Justice Reform: Thematic Report on the Use of Fiscal Fines (Scottish Government 2009) para 2.6, 6.
[197] See - HM Inspectorate of Prosecution in Scotland, Summary Justice Reform: Thematic Report on the Use of Fiscal Fines (Scottish Government 2009) para 6.5, 27.

The 2010 report on fiscal compensation orders also raised within it issues of consistency,[198] and fairness as to the payment terms offered to an accused person.[199] The 2010 report examined only 270 cases in which a compensation order had been issued – 75% of all cases in which a compensation order was made in the single month of May 2009.[200] As such, this too is a very small sample, but nonetheless raises important concerns.

The third official evaluation undertaken is that of Richards et al,[201] which was commissioned and funded by the Scottish Government. The researchers examined published data on the use of DMs and attempted to undertake a cost-benefit analysis. They undertook 71 interviews with stakeholders including PFs and the police. They also undertook a survey of those offered DMs (1,700 surveys were sent out, but only 78 were returned) and they interviewed 19 people who had been offered DMs.[202] issues of fairness, consistency and equality of treatment were raised throughout, with concerns raised about perception of pressure not to challenge the DM,[203] the information available as to the accused's personal circumstances,[204] and whether in the interests of justice the DM offered would have a positive effect on

[198] HM Inspectorate of Prosecution in Scotland, Summary Justice Reform Thematic Report on the Use of Compensation Offers and Combined Fiscal Fines and Compensation Offers (Scottish Government, 2010) para 6.4, 24.
[199] HM Inspectorate of Prosecution in Scotland, Summary Justice Reform Thematic Report on the Use of Compensation Offers and Combined Fiscal Fines and Compensation Offers (Scottish Government, 2010) para 6.6, 26.
[200] HM Inspectorate of Prosecution in Scotland, Summary Justice Reform Thematic Report on the Use of Compensation Offers and Combined Fiscal Fines and Compensation Offers (Scottish Government, 2010) para 2.4, 5.
[201] Richards, P., Richards, E., Devon, C., Morris, S. and Mellows-Facer, A., Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011).
[202] Richards, P., Richards, E., Devon, C., Morris, S. and Mellows-Facer, A., Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011) paras 1.19-1.27.
[203] Richards, P., Richards, E., Devon, C., Morris, S. and Mellows-Facer, A., Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011). evaluation para 3.44.
[204] Richards, P., Richards, E., Devon, C., Morris, S. and Mellows-Facer, A., Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011). evaluation para 3.17.

the accused's offending behaviour.[205] These findings are built on in the remainder of the thesis.

To summarise, then, by identifying the three overarching principles of efficiency, effectiveness and fairness, the McInnes report gives us a useful basic framework which can be used to evaluate the system of DMs. The Stewart report, the McInnes report and the more recent evaluations provide us with some suggestions as to what might be covered by each of these overarching criteria, and this will be discussed in detail in the next three chapters.

2.10 The Victim Rationale/Wider Public.

As was outlined in the introduction, it is outwith the scope of this research to consider the interests of victims in detail. That said, it is worth noting that, in some respects, victims' interests overlap with interests of the accused. This is most obvious from the perspective of time saving and waiting time for resolution to the criminal complaint. In court proceedings, it is likely to be some time before a matter comes to court to be dealt with, even under summary proceedings. It was suggested in both the Stewart[206] and McInnes[207] reports that this is detrimental to both victims and the wider public (as well as to the accused). This viewpoint is further supported by the harm that significant delays can have on victims of criminal offences. In the Justice Journey's report on the lived experience of victim-survivors of rape and serious sexual assault delays in court scheduling are often cited as a significant cause of frustration and increase anxiety levels about the whole process.[208]

It is also the case that DMs can have further advantages for victims. Victims of crime and their position in relation to the system of DMs is only considered in Stewart and

[205] Richards, P., Richards, E., Devon, C., Morris, S. and Mellows-Facer, A., Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011). evaluation para 3.18.
[206] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 4.26, 64.
[207] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 2.26, 12.
[208] Oona Brooks May, Michelle Burman and Lisa Bradley, 'Justice Journeys, Informing Policy and Practice Through Lived Experience of Victim-Survivors of Rape and Serious Sexual Assault' (Report no 4/2019, SCCJR August 2019) <https://eprints.gla.ac.uk/194911/1/194911.pdf> accessed 3rd August 2022.

McInnes from the perspective of the time saving advantages DMs provide. However, it can legitimately be stated that these reports are of their times in terms of victim awareness. Certainly since they were published we have seen huge developments in the position of the victim within the criminal justice system, as the then Solicitor General for Scotland notes:

> Their (victims)[209] 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.[210]

Two additional benefits to victims of the use of DMs are that they avoid the need for victims to give evidence in court and that they give victims the knowledge that the accused has been sanctioned (as opposed to no further action being taken or – if the case is prosecuted – the outcome could be an acquittal). In relation to the first of these, it has been suggested that the experience of giving evidence in court can re-traumatise victims of crime and is detrimental to their interests of moving on from the effects of the criminal behaviour upon them.[211] This is supported by academic research published in Scotland which suggests that victims feel harmed and damaged by proceedings within court, indeed it was suggested that harm was a more common experience that healing in the court experience.[212]

It might also be said, of course, that DMs have disadvantages for victims. A victim of crime might see the DM as a 'soft option' and might at least wish to be able to object to it being offered, something that is not possible under the present system. In addition there is a wide range of literature which suggests that some victims of crime wish to have their voice heard in proceedings, have their day in court, or

[209] Word Added.
[210] Lesley Thomson, Review of Victim Care in the Justice Sector in Scotland (Report and Recommendations, COPFS 2017).
[211] See - Victim Support Scotland, 'Online Courts for Domestic Abuse Cases' (21 January 2022) <https://victimsupport.scot/about-us/news-list/new-report-recommends-online-courts-for-domestic-abuse-cases/> accessed 2 May 2022.
[212] Sarah Armstrong et al, Measuring Justice: Defining concepts, Developing Practice (The Scottish Centre for Crime & Justice Research, November 2020) <https://eprints.gla.ac.uk/263531/1/263531.pdf> accessed 1st August 2021.

desire a feeling of taking back control from the person who offended against them.[213] Detailed consideration of these points is not within the scope of this thesis, but as a key component of the operation of the system of justice in Scotland, we require at least to set the scene on the position of victims in relation to DMs.[214] This aspect will become relevant in our consideration of the safeguarding measures which exist in the Netherlands but are absent in the Scottish system.

2.11 Conclusion.

Within this chapter, we have considered the historical development of the system of DMs as it came into being in Scotland and its subsequent developments, whereby we have considered the two main reports and their recommendations. The researcher proposes an evaluative model for DMs, drawn from the principles contained either implicitly or explicitly within the Stewart and McInnes committee reports. The three evaluative principles, which collectively comprise the principles of justice, are effectiveness, fairness and efficiency. These three principles are considered in turn over the next three chapters – chapter three considers effectiveness, chapter four fairness and chapter five efficiency. Each chapter follows a similar structure in that the theoretical components of each principle will first be discussed and identified before these are applied to the DM system as it presently exists in Scotland.

[213] Lesley Thomson, Review of Victim Care in the Justice Sector in Scotland (Report and Recommendations, COPFS 2017).
[214] For a more detailed discussion of the position of the victim in the system of DMs in Scotland and the Netherlands, see Dan McManus, 'Scotland and the Alternative Disposal: Thinking differently' (LLM(R) thesis, University of Glasgow 2021) ch 5.

Chapter 3: Effectiveness.

In chapter 2, the two major committee reports on the formation, use and development of DMs were discussed. This examination provided a fundamental understanding of the purpose and underlying principles of the establishment of the DM system in Scotland. This also allowed the three principles of justice against which the system of DMs should be evaluated to be established: effectiveness; fairness; and efficiency.

Whilst these principles were drawn from the Stewart committee, and particularly the McInnes report, neither report expressly spells out the relevant components of the principles. This is the first of three consecutive chapters which seek to address this issue and it does so in relation to effectiveness. In this chapter, two main elements will be covered: it shall be established that the DM is in fact a criminal sanction by application of the theoretical understanding and practical reality of the DM; this will help us to identify principles that can be used to evaluate effectiveness, as the literature on the purposes of the criminal sanction can be drawn on in this respect. Having established this, the research shall move to consideration of the concept of effectiveness and identify the 'effectiveness' criteria which might be legitimately applied to DMs.

As this chapter considers each of the sub-principles of effectiveness which this research proposes, it shall become apparent that there are areas for development within the Scottish system which would align the system more closely with the principles of justice.

3.1. DMs as a Criminal Sanction.

As indicated above, the first argument is to establish that DMs are, in effect, a criminal sanction. It should be made clear at the outset that this is not meant to imply that accepting a DM in Scotland is recorded as a criminal *conviction* – clearly it is not. But it will be argued here that the DM is a criminal measure, and this will allow us to use established criteria relating to the effectiveness of criminal sanctions as evaluative criteria in respect of DMs. In order to determine whether the DM is indeed a criminal sanction, the criteria from the European Court of Human Rights (ECtHR) will be examined. Having demonstrated that the DM is indeed a criminal

sanction as far as the ECtHR is concerned, the chapter shall then move to considering the features of criminal punishment and whether they are present in the system of DMs.

The system of DMs, as outlined in chapter 2, results in an offer of a DM being made to the accused which, if not rejected within twenty-eight days, is deemed to be accepted. Whilst it is true to state that the DM is an offer, the statistical evidence suggests that it is very rarely declined.[215] In *Öztürk v Germany*, the ECtHR considered whether an offer of an alternative was indeed a criminal sanction and fell within the ambit of Article 6(2), which only applies to criminal proceedings. The Court concluded that the imposition of a punishment by the public prosecutor can indeed be a criminal sanction.[216]

The *Ozturk* case was in respect of the offer of the Scottish equivalent of a fixed penalty notice (FPN) and the right of an interpreter to challenge such a notice, under German law.[217] The German courts had upheld that, as this was a FPN, there was no right to an interpreter, as the FPN was not a criminal sanction.[218] The ECtHR upheld that the FPN was a criminal sanction and thus the rights available in criminal proceedings must be available to an accused in the challenging of an FPN. This position is explored below. In *Bendenoun v France* , the French authorities attempted to avoid disclosure of evidence to the defence on the basis that the imposition of a tax penalty was not a criminal proceeding but a civil proceeding.[219] The ECtHR held that proceedings by the court against an individual were quasi-criminal and as such, the imposition of a sanction by the state afforded the accused

[215] See chapter 4 within this research.

[216] See Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR). Article 6(1) of the Convention requires that every person in the determination of a criminal charge against them has the right to a fair and public hearing within a reasonable time and before an independent tribunal. Article 6(2) requires that every person charged with a criminal offence shall be presumed innocent until proved guilty according to law and triggers the protections under Article 6(3).

[217] See Öztürk v Germany (1984) 6 EHRR 409.

[218] See ECHR Article 6(2), which requires that the accused in criminal proceedings has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.

[219] Bendenoun v France (1994) 18 EHRR 54.

the protections of Article 6(2) of the convention of human rights. Thus, a conclusion can be drawn that any offer of a penalty against an accused may be considered at least a quasi-criminal sanction. The fact that the sanction is not imposed in a court setting does not allow the state to avoid its requirements to adhere the requirements of Article 6(2).

The conclusion that the DM is likely to be seen as a criminal sanction and, therefore, a punishment can be further supported by more theoretical material on the nature of punishment. The most prevalent definition of the characteristics of punishment is that of Hart, who identifies five components: (1) the punishment must consist of something generally considered unpleasant; (2) the accused person must have breached a legal rule; (3) the punishment must be levied against the person committing the offence; (4) it must be imposed intentionally by a third party to the offender; (5) it must be imposed by the legal authority within the jurisdiction in which the offence was committed.[220] Hart's principles of punishment have subsequently been extensively discussed, but remain fundamentally accepted as useful evaluative criteria to determine whether a measure is, in fact, a punishment.[221] As such, within this research Hart's fundamental principles shall be applied to the system of DMs.

In terms of Hart's first criterion, DMs generally involve the imposition of a financial penalty, a compensation order or a period of work and as outlined earlier in this thesis it is fair to suggest that all of these DMs would be reasonably classified as being an unpleasant imposition. As such, the first criterion of Hart's test is met.

The fact that DMs can only be offered to an accused person who has breached the criminal law and that it was that person who committed the breach allows the second and third tests of Hart's criteria to be met.

[220] HLA Hart, 'The Presidential Address: Prolegomenon to the Principles of Punishment' (1960) 60 Proceedings of the Aristotelian Society 1.

[221] See e.g. Andrew Von Hirsch, Censure and Sanctions (reprint edn, Oxford University Press 1993) 10-11.

The fourth of Hart's criteria is more controversial and thus this criterion shall be considered after discussing the fifth part of the test. The fifth part of the test is satisfied by the fact that the legislation was introduced, developed, and changed by statutory framework, by a competent authority and the system is further operated by the public prosecutor in Scotland.

As indicated above, the fourth of Hart's criteria is more controversial in respect of DMs. Hart's fourth criterion requires that the measure be "imposed" by the authority. It may be argued that, technically, the public prosecutor in Scotland only makes an *offer* of the DM and does not impose it, therefore, the fourth criterion is not met. However, the deemed acceptance (post McInnes) of DMs and the statistical analysis which shows that only a tiny minority of offers are rejected would tend to lend a reasonable person to conclude that DMs to all intents and purpose are imposed upon an accused person.[222] The rate of fiscal fine rejection in 2021 was 449 rejections of 18,366 fiscal fines offered, a rate of only 2.4%.[223]

Having considered the leading theory about what constitutes a criminal sanction and applied this to the system of DMs in Scotland, it is argued that that the system of DMs as it operates within Scotland is a system of criminal sanctions. If this argument is accepted, it means that we can draw on existing literature relating to the purposes of the criminal sanction and utilise these as measures of the effectiveness of DMs. But even if this argument is not accepted, this body of literature still contains useful principles of effectiveness that can be used in the remainder of this section. The following section goes on to consider the purposes of the criminal sanction in more detail.

[222] See chapter 4 for discussion on the opt in and opt out developments and discussion on representation.

[223] Figures extracted from Scottish Conservative FOI Request 2021; Law Society of Scotland, '30% of Rejected fiscal fines Not Prosecuted: FOI Release' (22 July 2021) <www.lawscot.org.uk/news-and-events/legal-news/30-of-rejected-fiscal-fines-not-prosecuted-foi-release/> accessed 7th September 2022; the Number of fiscal fines from - Scottish Government 'Criminal Proceedings in Scotland: 2020 - 2021' (A National Statistics Publication, 21 June 2022) <www.gov.scot/publications/criminal-proceedings-scotland-2020-21/> accessed 19 August 2023.

3.2. Principles of Criminal Sanction/Punishment.

It should be said at the outset that, within the limitations of this research, it is not possible to have a full discussion of each theory of the purposes of the criminal sanction, and the inherent conflicts, and debates within these theories. However, it is important to acknowledge that many of these debates remain unresolved. Indeed, even Rousseau, widely seen as a leading proponent of the social contract, leaves the purpose of the criminal sanction as ambiguous.[224] That said, there is broad agreement, in the literature, on what the primary aims of the criminal sanction might be, these being retribution, reduction of crime/deterrence, rehabilitation, protection of the public and reparation.[225] This is echoed in the first approved guideline of the Scottish Sentencing Council, which sets out the purposes of sentencing as protection of the public, punishment, rehabilitation of offenders, "giving the offender the chance to make amends" and "expressing society's disapproval of offending behaviour".[226] Although expressed slightly differently, these principles mirror those from the academic literature. The following sub-sections discuss each of these in turn.

3.2.1 Retribution.

The first aim or purpose that a criminal sanction might serve is retribution. Retribution may be considered an outdated word and may better be considered as the punishment element of the criminal sanction.[227] Retribution, or desert theory,

[224] See Corey Brettschneider, 'Rights Within the Social Contract: Rousseau on Punishment' in Austin Sarat and Lawrence Douglas (eds), Law as Punishment/Law as Regulation (Stanford University Press 2011).

[225] For an overview of the variety of Criminal Punishment theories see: RA Duff, Punishment, Communication and Community (Oxford University Press 2001). See also Jeremy Horder, Ashworth's Principles of Criminal Law (9th edn, Oxford University Press 2016) ch 1.5 and ch 4. For a practical examination on the results of these principles see RM McFatter, 'Purposes of Punishment: Effects of Utilities of Criminal Sanctions on Perceived Appropriateness' (1982) 67(3) Journal of Applied Psychology 255.

[226] See Scottish Sentencing Council, 'Guideline Principles and Purposes of Sentencing: Sentencing Guideline' (26 November 2018) para 5 <www.scottishsentencingcouncil.org.uk/media/1964/guideline-principles-and-purposes-of-sentencing.pdf> accessed 8 July 2022.

[227] The justification for the use of the term criminal sanction is explored in chapter 3.01.

is one of two interlocking justifications of punishment according to Von Hirsh.[228] For the purposes of this research, retribution is the imposition of the punishment on the accused for their criminal actions which shows to the community at large and the offender that this kind of behaviour is unacceptable and expresses society's disapproval of their conduct.[229]

It is said that a criminal sanction, at some level, inflicts upon the accused person a punishment as a consequence of their criminal action. The theory of retribution as punishment properly belongs in the study of philosophical anthropology and the nature of personhood but has been widely integrated into the theory of criminal justice.

Retribution can be traced back to the code of Ur-Nammu (2050 BC), the laws of Eshnunna (2000 BC) and, perhaps more widely known, the code of Babylonian of Hummurabi (1750 BC) in what is collectively understood as the Cuneiform law, the principle of *Lex Talionis,* that is every error of law deserves a retaliation.[230] The principle of retribution is contained in every major religious tradition, from the Christian understanding of Adam and Eve being punished for eating the apple and exclusion from the garden, the Qurʾān discussing punishment by Allah for those who are disobedient to Allah's law and the philosophy of Buddhism and its philosophical position on bad karma.

The theory of retribution was further developed in the enlightenment period of philosophy, where the Kantian theory of retribution was expressed as follows:

> Even if a civil society were dissolved through the unanimous vote of its members (e.g., if an island society decided to dissolve with its members spreading themselves over the rest of the earth), the last murderer within its prison first must be executed so that he experiences what his own deeds are worth and the bloodguilt does not cling to the society that did not insist on this

[228] Andrew Von Hirsch, Censure and Sanctions (Reprint edn, Oxford University Press 1993).

[229] Andrew Ashworth, Sentencing and Criminal Justice (Law in Context, 6th edn, Cambridge University Press 2015) para 3.3.5.

[230] See - Ephraim Avigdor Speiser, 'Cuneiform Law and the History of Civilization' (1963) 107(6) Proceedings of the American Philosophical Society 536.

punishment: since, if so, it can be seen as having participated in that public violation of justice.[231]

Indeed, the theory of retribution requires that only those who committed the act and had the mental element to commit the act are those who are to be punished - the commonly used terms in law of *mens rea* and *actus reus*. Providing both are present, the law is permitted to take retribution. Further, Scots law has introduced an express requirement, in custodial sentencing, that a proportion of the sentence must be declared as the punishment part.[232]

Having now introduced the principles of the criminal sanction and considered the theoretical basis of retribution the fundamental importance of the theory of retribution to the purpose of the criminal sanction can be understood. It has been established that retribution requires the imposition of a punishment on the accused for their criminal actions which demonstrates to both the community at large and the individual that this kind of criminal conduct will not be tolerated and expresses the community's disapproval of said conduct. This research shall examine, in our practical application of this theory to the system of DMs, whether in fact this is achieved, or whether 'retribution' is even necessary for the type of offences which DMs are imposed as the criminal sanction. [233]

3.2.2 Deterrence.

The second purpose of the criminal sanction to be considered is deterrence, the so-called:

[231] Kant's works are cited according to Kant's Gesammelte Schriften, Preu~ische Akademie der Wissenschaften (vols. 1-22), Deutsche Akademie der Wissenschaf-ten zu Berlin (vol. 23), Deutsche Akademie der Wissenschaften zu Berlin/ Akademie der Wissenschaften zu G6ttingen (vols. 24-26), Akademie der Wis- senschaften der DDR/Akademie der Wissenschaften zu G6ttingen (since vol. 27). The translations of the Kant texts are from BS Byrd, 'Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution' (1989) 8(2) Law and Philosophy 151.

[232] For Further information on this element of sentencing see: Scottish Sentencing Council, 'About Sentencing: Prison Sentences' <www.scottishsentencingcouncil.org.uk/about-sentencing/prison-sentences/> accessed 24 May 2022.

[233] See chapter 3.2.1

> Mephistophelian bargain, whereby we agree to do evil to the condemned in return for a reduction in risk to everyone.[234]

There are two senses in which the criminal sanction might operate to deter individuals from committing crimes: individual deterrence and general deterrence. As much as they are distinct the theories cannot be completely separated. General deterrence refers to the idea that the criminal must be punished for the purposes of ensuring others are deterred from committing similar criminal acts.[235] The leading proponent of the theory of deterrence is Jeremy Bentham, but it can also be inferred from the work of Thomas Hobbes and Cesare Beccaria.[236] For Hobbes, the theory of deterrence is that the accused, in breaching the social contract, should be punished in order that the rest of society sees the punishment and maintains their social contract between the community and the individual. For Beccaria, the theory was that crime and punishment should be equal in order that others do not commit crimes. For Bentham, the theory of deterrence operates on the basis of a hedonistic philosophy that punishment was unpleasant, applied swiftly, with certainty and must be severe.[237]

General deterrence theory relies on the principle that members of wider society will not act illegally for fear of the criminal sanction and that the threat of a criminal sanction will have a psychological effect to prevent persons from committing any criminal offence.[238] Ashworth describes the deterrence element of a sentence as "consequentialist" in that the mode of operation looks at the punishment as that which causes the deterrence element rather than the reverse. This model relies upon the argument of threat and fear both at an individual level and at that of a

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[234] David J Smith, 'Less Crime Without More Punishment' (1999) 3(3) Edinburgh Law Review 294.

[235] Anthony Ellis, 'A Deterrence Theory of Punishment' (2003) 53(212) The Philosophical Quarterly 337.

[236] Philip Schofield, 'The First Steps Rightly Directed in the Track of Legislation: Jeremy Bentham on Cesare Beccaria's Essay on Crimes and Punishments' (2019) 4 Diciottesimo Secolo 65.

[237] The position of these philosophers is contained and summarised within the work of Philip Schofield, 'The First Steps Rightly Directed in the Track of Legislation: Jeremy Bentham on Cesare Beccaria's Essay on Crimes and Punishments' [2019] 4 Diciottesimo Secolo 65.

[238] See Timothy H Jones and Ian Taggart, Criminal Law (7th edn, W Green 2018) 7.

general deterrence.[239] For example: a student who has no criminal convictions for drug possession would see the criminal punishment imposed on those who have been sentenced for such an offence and would be deterred from engaging in this offence because of the punishment they may face.

Individual deterrence theory suggests that an individual who has personally experienced a criminal sanction is thought to be deterred from future criminal conduct due to their experience of that criminal sanction.[240] For example: the student previously convicted of drugs possession who receives a community payback order and has to sacrifice his free time for six months to complete the order, would never wish to be found guilty of the offence again and pay this price. The difference between the two theories may be nuanced in the sense that under the general deterrence theory, society perceives the criminal sanction widely as something to be avoided whereas the individual avoids future criminal sanctions because of their effect on him as an individual. It may be that the true position is that the theories co-operate and interchange depending on the attitude of the person perceiving the criminal sanction. In deterrence theory, the principle that justice must be seen to be done begins to develop (a principle which perhaps conflicts with the principle of proportionality, which will be considered in the following chapter on fairness).

There are widespread considerations of deterrence theory in academic circles, particularly by criminological and socio-legal researchers. One critique is that the assumption made in general terms about deterrence is that people may be deterred by the length of a sentence or the severity of a sanction, whereas behavioural science suggests that what is actually a more effective deterrent is the fear or effect of being caught at all.[241] Whilst it is outwith the scope this research to discuss this in detail, it is worth understanding as well that both of these positions necessarily require a rational actor as the accused person, an assumption that can be questioned. The vulnerable accused may not be influenced by either of these things

[239] Andrew Ashworth, Sentencing and Criminal Justice (Law in Context, 5th edn, Cambridge University Press 2012) ch 3.

[240] Jack P. Gibbs, 'Deterrence Theory and Research' in Gary B Melton (ed), The law as a Behavioural Instrument (University of Nebraska Press 1986).

[241] Paul H. Robinson and John M. Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24(2) Oxford Journal of Legal Studies 173-205.

if they are not capable of understanding the proceedings they have been engaged in.[242]

Thus, for the purposes of this research, deterrence as a purpose of the criminal sanction is the idea that the punishment should deter the individual from future criminal behaviour and society as a wider group from offending at all.

3.2.3 Rehabilitation.

Having considered the first two principles of effectiveness, the third principle will now be considered: the rehabilitation of offenders. The rehabilitation of offenders is no doubt a laudable aim: treat the accused person of the ill which causes them to offend, they will not offend again, and crime will reduce. This simple explanation is no doubt open to criticism, but it also captures the element of what the purpose of a rehabilitative sentence purpose actually is: to make it less likely that the accused person will offend again.

Whilst rehabilitation has been subject to wide ranging discussion[243] and imperfect attempts to define rehabilitation as part of the theory of the criminal sanction have been made, it can be considered thus:

> taking away the desire to offend, is the aim of reformist or rehabilitative punishment. The objective of reform or rehabilitation is to reintegrate the offender into society after a period of punishment, and to design the content of the punishment so as to achieve this.[244]

An in-depth study of rehabilitation is outwith the scope of this research.[245] For the purposes of this research, a simple practical understanding of rehabilitation will be

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[242] For a deeper understanding of rational actor and deterrence see: FC Zagare. Rationality and Deterrence. World Politics. 1990;42(2):238-260.

[243] Indeed, Google Scholar lists over 486,00 scholarly articles for the term Rehabilitation of Offenders.

[244] Barbara Hudson, Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory (2nd edn, Open University Press 2003).

[245] For an in-depth discussion of the history and development of Rehabilitation theories see Fergus McNeill, 'Punishment as Rehabilitation' Encyclopedia of Criminology and Criminal Justice (21 February 2014) 4195 <https://doi.org/10.1007/978-1-4614-5690-2_347> accessed 6th March 2022.

adopted, as part of the criminal sanction which has been described as correctional rehabilitation, as argued by McNeill:

> Correctional rehabilitation……is concerned with effecting positive change in individuals. As such it is the model most commonly associated with treatment programs or other forms of offence- or offender-focused intervention. At its heart is the notion that many offenders can change for the better, given the right support. The idea of correction implies that the offender can and should be 'normalised' or 'resocialised' in line with commonly accepted (though rarely explicitly articulated) standards of behaviour.[246]

It is correct to say that numerous evaluations of rehabilitation schemes have always produced mixed results, especially when the focus is on reconviction rates.[247] It may be suggested, as it has been by Ashworth, that even if there has been mixed success there are sound humanitarian reasons for maintaining a focus on rehabilitation in systems of criminal sanction.[248] Ashworth and Zedner, in reflecting positions held by some, suggest that the court based system is not always appropriate or effective in dealing with ongoing criminal conduct and continual offending.[249] This is perhaps also a challenge to DMs, as shall be discussed in the analysis of the DM system whereby we discover a repeated multiple use of DMs for the same offenders.[250]

Rehabilitation requires fundamentally a change in the person being rehabilitated and thus the criminal sanction must provide the conditions by which the person is enabled to turn away from future criminal behaviour.[251] This being said the

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[246] Fergus McNeill, 'Punishment as Rehabilitation' Encyclopedia of Criminology and Criminal Justice (21 February 2014) 4195 <https://doi.org/10.1007/978-1-4614-5690-2_347 > accessed 6th March 2022.

[247] Andrew Ashworth, Sentencing and Criminal Justice (Law in Context, 5th edn, Cambridge University Press 2012) s 3.3.4.

[248] Andrew Ashworth, Sentencing and Criminal Justice (Law in Context, 5th edn, Cambridge University Press 2012) s 3.3.44.

[249] Andrew Ashworth & Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) 2 Criminal Law and Philosophy 21.

[250] See Table 2, in chapter 3.2.2, in this research.

[251] Fergus McNeill, 'Punishment as Rehabilitation' Encyclopedia of Criminology and Criminal Justice (21 February 2014) 4195 <https://doi.org/10.1007/978-1-4614-5690-2_347 > accessed 6th March 2022.

rehabilitation of offenders is not a straightforward or simple exercise and neither is an attempt to examine the rehabilitation of offenders. Certainly, some may consider that rehabilitation may be simply a de-escalation of offending behaviour. Moving from assault to permanent disfigurement to simple breaches of the peace would be an example of a progressive rehabilitation, but yet short of a life free of criminal activity. It is not possible within the limitations of the data available in Scotland and within the methodological approach of this research to consider the nuances of rehabilitation to this level. Thus, as the practical operation of the system of DMs is considered, it falls to be examined whether there is any evidence that DMs create the environment by which a person is enabled to turn away from future criminal behaviour and to consider whether the rehabilitation rate of offenders who receive a DM is consistent with the wider picture of rehabilitation.[252]

3.2.4 Protection of the public.

The research now turns to the fourth purpose of punishment: the protection of the public. Protection of the public as a purpose of the criminal sanction can be seen in two ways: the rehabilitative nature of sentencing, and the preventative measure of incapacitating the accused person, which stops them from committing offences in the community as they are in custody or otherwise incapacitated.[253] The rehabilitative aspect of public protection was considered above. This section will focus on the incapacitation aspect of public protection. Scotland has a wide range of measures designed for the protection of the public, including life sentences, hospital treatment orders, restriction of liberty orders and the most severe being an order for lifelong restriction.[254]

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[252] For an overview of the Rehabilitation schemes which operate in Scotland see: Community Justice Scotland, 'Creating a Safer Scotland' (2023) <www.communityjustice.scot> accessed 9 September 2023.

[253] For a discussion of these two different senses of public protection, see e.g. M. Bagaric, 'In search of a coherent approach to community protection in sentencing' (2020) 46(3) Monash University Law Review 79-115. Of course, this does not stop them from committing further offences while they are in custody, although with the element of supervision there it maybe becomes more difficult.

[254] For further discussion on orders for lifelong restriction see: Elaine A Ferguson, 'A Sentence of Last Resort: The Order for Lifelong Restriction and the Sentencing of Dangerous Offenders in Scotland' (PhD thesis, University of Glasgow 2021).

Given that no DM in Scotland can impose a period in custody, discussion of this aim of the criminal sanction does not feature heavily within this research,[255] although some brief consideration will be given to the idea of a DM that restricts the liberty of the offender (akin to the restriction of liberty order that can be imposed by a court).[256] In the recent past in Scotland, bail conditions have been extended to include the ability of the court to place the offender on a restriction of liberty condition which requires the accused person to remain within an appointed address between certain times, commonly between 7pm and 7am.[257] This is thought to have a strong public protection basis where the offender's behaviour occurs at night or where there are indicators in the criminal history of the accused that this measure provides some form of public protection. Indeed, some sheriffs have suggested that the restriction of liberty can be imposed for a longer period than other sentencing options:

> About one-third of the Sheriffs suggested that this disposal provided the opportunity to give the public some protection - "this gives the neighbourhood a break - some respite" - and one considered that although prison obviously provided that respite, this disposal could be imposed for longer periods than the offender would normally expect to spend in jail.[258]

All of that said, even if the DM does not restrict the liberty of the accused in any way, there is a natural overlap between rehabilitation, deterrence, and the protection of the public.

3.2.5 Reparation.

Having considered the first four elements of the criminal sanction, the fifth and final element considered within this research, reparation theory, is now examined. Reparation as a principle in law refers to "…the process and result of remedying the

[255] See Andrew Ashworth, Sentencing and Criminal Justice (Law in Context, 5th edn, Cambridge University Press 2012) s 3.3.3 for an overview of the arguments of incapacitate criminal sanction.

[256] See chapter 7.3.5

[257] The Management of Offenders (Scotland) Act 2019 (asp 14) pt 1, s 1.

[258] David Lobley and David Smith, evaluation of Electronically Monitored Restriction of Liberty Orders (The Scottish Executive Central Research Unit 2000) para 4.6, 23.

damage or harm caused by an unlawful act."[259] Reparation can come in different forms. It could be monetary, or it could be in terms of the accused making some other type of contribution to the community. Reparation theory itself has been subject to a wide discussion and variety of models deserving of a thesis of its own.[260] For the purposes of this research, it is sufficient to broadly introduce the two main theories of reparation: reparation to the state and reparation to the victim.

Reparation theory between the state and the community can intrinsically be seen in the Scottish system, as discussed in chapter 1, whereby prosecutions are undertaken by the state against the offender. This system recognises that the offender offends against society, in a wider sense, when they breach the norms of conduct expected by the criminal law. This state reparation model suggests that society is a balance, this balance requires that when an offender does wrong to the community that the state impose a punishment to rebalance and restore the equilibrium between the state and the offender. For example: the offender guilty of a breach of the peace receives a fine, society was disturbed and thus the payment of the fine to the public purse restores the equilibrium between the offender and the state.[261]

The idea of reparation to the individual victim of a criminal act is one that can be debated as it might be argued that the victim of crime is not the appropriate recipient reparation, as far as criminal sanctions are concerned.[262] The legal purist may suggest that the state brings the criminal action, and the court imposes the criminal sanction upon the convicted person. As such, the victim has no place in

[259] Margaret Urban Walker, 'The Expressive Burden of Reparations: Putting Meaning into Money, Words, and Things' in Alice MacLachlan and Allen Speight (eds), Justice, Responsibility and Reconciliation in the Wake of Conflict (Boston Studies in Philosophy Religion and Public Life 1, Springer 2013).

[260] For example: Cavadino and Dignan have developed a typology which embraces six possible models of reparative justice (Conventional model with limited elements of reparation; 'Victim allocution model'; Diversion model; Separatist model; Court-led hybrid model; and Integrated 'restorative justice' model.

[261] Paul Griseri, 'Punishment and Reparation' (1985) 35(141) Philosophical Quarterly 394.

[262] See WF v Scottish Ministers [2016] CSOH 27 for a wide discussion on the role of the victim in criminal prosecutions, particularly in this case whereby the complainer was permitted to object to the recovery of documents on the basis of the European Convention on Human Rights.

receiving reparation from the criminal courts and their right to damages belongs in the realm of the civil courts.[263]

Discussion of the rightful place of the victim within criminal proceedings lies outwith the scope of this thesis. What does further this research into the DM system is to recognise that in Scotland, as elsewhere, there has been a consistent development of the victim's role in reparation theory in practice. As noted by Ashworth, there has been a steady increase in the role of the victim in criminal proceedings in Scotland over the last 20 years.[264] There have been developments of victim support services, victim impact statements for sentencing hearings, an obligation on the public prosecutor to consider the victim in prosecutorial decision making and the introduction of the right of the victim to request a review of a decision not to prosecute being formalised in a written code and in statute.[265] As such, in this research, it is accepted that the person harmed by the criminal action should not be neglected in any system of criminal justice and whilst their role is not that of independent legal actor, they should be given significant consideration in the outcome of any criminal complaint which originates with a wrong being done to them. This research will seek to establish whether or not DMs are an effective reparative measure. Thus, as the practical operation of the system of DMs is considered, focus will be given as to whether there is any evidence that DMs create the environment by which an accused person makes reparation and whether the reparation, if any, is consistent with the theoretical basis for reparation.

[263] See Bruce R Jacob, 'Reparation or Restitution by the Criminal Offender to his Victim: Applicability of an Ancient Concept in the Modern Correctional Process' (1970) 60(2) Journal of Criminal Law and Criminology, art 3.

[264] See chapter 3.1.

[265] Victims and Witnesses (Scotland) Act 2014 (asp 1) s 1 and s 1(a); see also Scottish Government, 'Victims and Witnesses' (Policy document, Justice Directorate 2022) <https://www.gov.scot/policies/victims-and-witnesses/> accessed 8 July 2022; Scottish Government, 'Victims Code for Scotland' (Scottish Government 2018) <www.mygov.scot/binaries/mygov/browse/justice-law/contact-police-victim-support/victim-witness-rights/documents-victims-code/victims-code-for-scotland/victims-code-scotland.pdf> accessed 29 August 2022.

3.3 Applying Criminal Sanction/Punishment Principles to the System of DMs.

Having outlined each of the key components of effectiveness of the criminal sanction, the focus of this research now moves to evaluate to what extent, if any, the system of DMs in Scotland achieves these purposes.

3.3.1 Retribution.

In this section, the practical application of retribution theory to the system of DMs shall be explored. It will consider whether this is achieved and whether it is even necessary for the type of offences for which DMs are imposed.

In developing his theory of criminal law and adjudication, Antony Duff argues that there is no appropriate means of imposing a criminal sanction other than via a criminal court.[266] For Antony Duff, in order for retribution to be effective it must come with the public condemnation of the wrong – the criminal act is that which causes damage to society. Anthony Duff indeed in a further article in 2007 maintains that retribution is only effective because it is imposed within a public criminal court – in other words public denunciation is a necessary component of retribution.[267]

Peter Duff argues similarly that the introduction of the fiscal fine can be seen as an overarching move to minor criminal offences being treated as a mere administrative process, rather than being dealt with as a function of the criminal law through the courts:

> The introduction and operation of the fiscal fine illustrates nicely an increasingly bureaucratic and administrative approach to crime, criminals, and the criminal law. As we have seen, the Stewart committee was set up to consider how to reduce the pressure, which was resulting from the volume of summary prosecution, upon the courts and the fiscal service. It was thus concerned with diversion primarily as a method of facilitating the efficient and cost-effective management of cases rather than for any other reasons. Its principal recommendation, namely the introduction of the prosecutor fine,

[266] See Antony Duff, Answering for Crime: Responsibility and Liability in the Criminal Law (Hart 2007), ch 8.

[267] See Antony Duff and others, The Trial-on-Trial Volume Three: Towards a Normative Theory of the Criminal Trial (Hart 2007).

> betrays a preconception that the major problem presented by minor crime is essentially administrative. Consequently, the solution is the introduction of a measure which enables a range of petty offences to be dealt with by straightforward, bureaucratic procedures…. Consequently, the discourse surrounding the fiscal fine attaches little importance either to the legal and moral content of the criminal law …. or to the appropriate treatment of offenders... Such issues are simply not regarded as central.[268]

As such, DMs may take away the retributive function of the criminal sanction, a point that is made by Roberts and Zuckerman as follows:

> Any account of criminal adjudication would be seriously incomplete without reference to the message of blame which penal hard treatment is meant to convey. It is precisely the denunciatory censuring quality of punishment which distinguishes the penal voice of retributive justice from other modalities of state coercion, like taxation or civil penalties…only criminal proceedings involve judgements of moral wrongdoing which an accused is publicly called to account and, if found guilty, solemnly condemned in the name of the community.[269]

Thus, whilst it might be accepted that DMs impose some sort of retributive punishment on an accused person, it cannot be said, if you accept Anthony Duff's arguments, that the full retributive value of the criminal sanction is achieved via DMs. The majority of DMs are akin to an administrative transaction: receive the fiscal fine or compensation order; if you have the money, pay the fine and move on.

Whilst Anthony Duff's argument is attractive, *per se*, it would be imprudent to lose sight of the intertwined nature of the principles of justice with the discussion on the outcome of proportionality of the criminal sanction versus the nature of the offence. If the other aspects of the criminal sanction are achieved by the system of the DM, is it necessary to have the retributive value achieved via the system of DM? In other

[268] Peter Duff, 'The Prosecutor Fine and Social Control: The Introduction of the fiscal fine to Scotland' (1993) 33(4) The British Journal of Criminology 501.

[269] Paul Roberts and Adrian Zukerman, Criminal Evidence (2nd edn, Oxford University Press 2010) ch 1.2.

words, does it matter if the full retributive force of the criminal sanction is not present in DMs?

This researcher suggests there are difficulties in claiming that criminal law requires the component of public denunciation suggested by Duff. This does not happen even if someone is convicted in the court system, as it is often the case that no-one is present in court to watch (other than the accused and the legal professionals involved in the case) or there is no media coverage of the conviction. This diminishes the argument that DMs without public denunciation are nothing more than a civil penalty. Public denunciation is part or rather can be part of a criminal sanction but is not an always required component.

Returning to retribution more broadly, it was stated that this research would debate whether retribution theory is applicable for offences dealt with by way of a DM. Indeed, it can be seen in the arguments of both Duffs above that they would believe that principle of retribution is not achieved via a DM. It is possible that both Duffs are basing their statements on the modern definition of retribution theory promulgated by Kant that a society that does not insist on seeing the punishment is in fact participating in the violation of the principles of justice.[270], perhaps the answer is to consider further back in the theory of retribution as this research suggests, above, that the important consideration is the *Lex Talionis* and without the later developments of the theory it could be suggested even at a very basic level some form of retribution is present in the vast majority of the DMs offered in Scotland, with the exclusion perhaps of the warnings which may be offered and existed at common law prior to the creation of the system of DMs in Scotland.

Even if the argument above that retribution theory in its primitive form exists, then the further discussion around whether retribution is even necessary requires consideration. This question, it can be suggested, is closely linked to proportionality and whether the system of DMs as it exists now is proportionate and if it is then this

[270] Kant's works are cited according to Kant's Gesammelte Schriften, Preu~ische Akademie der Wissenschaften (vols. 1-22), Deutsche Akademie der Wissenschaf-ten zu Berlin (vol. 23), Deutsche Akademie der Wissenschaften zu Berlin/ Akademie der Wissenschaften zu G6ttingen (vols. 24-26), Akademie der Wis- senschaften der DDR/Akademie der Wissenschaften zu G6ttingen (since vol. 27). The translations of the Kant texts are from BS Byrd, 'Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution' (1989) 8(2) Law and Philosophy 151

would suggest that if the principle of retribution is missing, but the system is proportionate then perhaps the principle of retribution is not required. Proportionality is considered in the following chapter on fairness and when this research turns to recommendations and developments of the system, it will seek to find a balance between the two principles.

3.3.2 Deterrence.

Having considered the practical application of the principle of retribution, this chapter now turns its consideration to the principle of deterrence and sets the principle against the practical reality of the system of DMs as they operate in Scotland. In this subsection general deterrence will be considered before moving to the individual deterrence.

In terms of general deterrence, this research has been unable to conclude that there is any directly attributable evidence that the imposition of a DM has a general deterrent effect. As shall be demonstrated when the principle of fairness is considered, the lack of publicity and lack of visible public sanction, may be a reason for this. It is, however, helpful to be reminded of the Halliday report which concluded that the limited evidence "provides no basis for making causal connection(s) between variations in sentence severity and the differences in deterrent effects."[271] It may therefore be the case that DMs are unlikely to have any general deterrence function, but that they may be an effective individual deterrent.

One way of assessing whether or not DMs are an effective individual deterrent is to look to whether or not individuals receive multiple DMs. If this is the case, it would suggest that their effectiveness may be limited in this respect. Table 2 below sets out the number of persons who received multiple non-court disposals in the period between 2008 to 2019. It shows that DMs are, indeed, being used repeatedly against the same offenders, with the percentage of 'repeat offenders' rising over a 10-year period from 9% to 38%.

[271] Home Office, Making Punishment Work: Report of a Review of the Sentencing Framework for England and Wales (Home Office 2001) 129 (The Halliday Report).

Table 2: Number of persons receiving multiple non-court disposals 2008-09 and 2018-19.[272]

Financial year[3]	Number of previous non-court disposals							
	0	1	2	3	4	5	6 or more	% Repeat Offenders
2008-09	50,964	4,002	693	201	54	32	23	9
2009-10	42,987	7,575	1,858	540	178	98	97	19
2010-11	40,801	9,219	2,780	902	338	158	217	25
2011-12	44,604	11,681	4,077	1,534	663	272	451	29
2012-13	51,234	15,455	6,019	2,551	1,131	499	740	33
2013-14	46,327	14,233	6,360	2,957	1,473	726	1,166	35
2014-15	34,914	10,617	5,112	2,610	1,474	819	1,314	36
2015-16	34,046	10,643	5,297	2,848	1,513	905	1,466	37
2016-17	22,844	7,187	3,597	1,985	1,126	680	1,284	38
2017-18	22,702	7,052	3,735	2,091	1,169	691	1,229	38
2018-19	19,592	5,750	3,150	1,814	1,086	643	1,137	38

Thus, from a deterrence perspective, by 2018 – 2019, 38% of offenders receiving DMs were not receiving the DM for the first time but were 'repeat offenders'. At an immediate glance this may call into question the effectiveness of DMs as an individual deterrent. This analysis as it stands at present would give rise to two considerations: either any development of the system of DMs has not been conducted through a lens of reducing re-offending or it represents a concern that the system of DMs is not monitored consistently or accurately to ensure future developments are evidence based and in line with the principles of justice. However, it would be a flawed analysis without first considering what the general repeat offender rate is in Scotland for summary offences generally, before drawing a comparison between the general reconviction rate and that of those disposed of via DM. To begin that

[272] Source A: FOI Request, COPFS, September 2020, originally quoted in Source B and adapted from: Dan McManus, 'Scotland and the alternative disposal: Thinking differently' (LL.M(R) thesis, University of Glasgow 2021) ch 4.

comparison we shall, within Table 3, examine the reconviction rates of summary offences.[273]

Table 3: Reconviction rate in summary offences 2009-10 to 2018-19.[274]

Year	Number of offenders	Reconviction rate (%)
2009-10	47,416	30.6
2010-11	44,707	30.1
2011-12	43,819	29.6
2012-13	41,696	28.9
2013-14	42,177	28.5
2014-15	43,614	28.4
2015-16	44,050	27.3
2016-17	40,591	27.4
2017-18	36,674	26.4
2018-19	32,912	28.3

Thus, a direct comparison of the two rates of reoffending (as set out in tables 2 and 3) would tend to suggest that, by 2018 – 2019, the DM has a higher re-conviction rate by nearly ten percentage points. What this does not tell us is the number of offenders who initially receive a DM and who subsequently re-offend, who are then prosecuted in court. Unfortunately, neither COPFS nor the Scottish Government could provide this data under an FOI.[275] This suggests that the data is not monitored or evaluated in this way, suggesting the full evaluative models of the effects and purposes of DMs

[273] It may be suggested that as summary offences may result in imprisonment then an element should be excluded, given that the number of offenders sentenced to less than a year in custody in 2018 – 2019, was around 1 – 2% of the overall cases. However, it is unnecessary for the conclusions to exclude these cases – see Scottish Government Justice Analytical Services, 'Scottish Prison Population Statistics 2019-2020' (Official Statistics Publication for Scotland, Scottish Government 17 July 2020) <www.gov.scot/publications/scottish-prison-population-statistics-2019-20/documents/> accessed 20 September 2022.

[274] Data available from the Scottish Government, 'Reconviction Rates Scotland: 2018-19 Offender Cohort' (National Statistics Publication for Scotland, 4 October 2021) <www.gov.scot/publications/reconviction-rates-scotland-2018-19-offender-cohort/pages/10/> accessed 8 July 2022.

[275] FOI request 13th July 2022.

are not considered or framed by either body. This does also mean that the analysis undertaken here has its limitations.

Reflecting on the evidence set out above, a conclusion can be drawn that there is some limited evidence that DMs are no better at meeting the aims of deterrence theory than court imposed criminal sanctions and indeed the rate of recidivism may even be higher.

3.3.3 Rehabilitation.

Turning to the third principle of rehabilitation, the issue that will be considered here is whether DMs have any rehabilitative effects, in terms of addressing the issues that caused the accused to offend in the first place. This is different to whether DMs act as a deterrent and operate to prevent re-offending in that way – the issue that was considered in the section above.

There is some evidence from England and Wales which suggests that out of court disposals with rehabilitative conditions attached may be effective. Out of Court disposals are in effect any disposal by the state without the accused person having to attend a court proceeding. One study found that out of court disposals which have rehabilitative conditions attached to them are more effective when compared to court-based disposals when considering the criteria of reducing harm, providing a reduction in reoffending and sustaining confidence and satisfaction in the system.[276] Another study, however, which looked at pilot projects in England, concluded that there was no significant difference in rehabilitative outcomes when comparing the two processes.[277]

But this research is not directly relevant to DMs because there are no DMs which specifically refer an offender to a treatment or rehabilitation program. Indeed, as

[276] Peter Neyroud, 'Out of Court Disposals Managed by the Police: A Review of the Evidence: Commissioned by the National Police Chief's Council of England and Wales' (University of Cambridge 2018) 2 – 3 <www.npcc.police.uk/SysSiteAssets/media/downloads/publications/publications-log/2018/out-of-court-disposals-managed-by-the-police--a-review-of-the-evidence.pdf> accessed 17 December 2022.

[277] Aidan Mews and Rachel Sturrock, Out of Court Disposals Pilot: Cautions Reoffending Analysis (Ministry of Justice 2018).

demonstrated below, in Table 4, which lays out the number and type of DM disposals from 2011 to 2020, the vast majority of DMs are given in the form of a fiscal fine.

Table 4: COPFS fiscal fine disposals 2011-12 to 2019-20.[278]

	2011-12	**2012-13**	**2013-14**	**2014-15**	**2015-16**	**2016-17**	**2017-18**	**2018-19**	**2019-20**
All COPFS disposals	**67,738**	**87,591**	**82,357**	**63,116**	**62,461**	**41,823**	**41,835**	**35,620**	**36,459**
Fiscal fine	42,212	47,969	47,259	36,314	34,477	21,825	22,693	18,460	18,366
% Of DMs which are Fiscal fines.	62.32	54.76	57.38	57.54	55.20	52.18	54.24	51.82	50.37

The rehabilitative function is performed by other alternatives to prosecution which exist in the Scottish system, and which lie outwith the scope of the thesis.[279] Thus, it can be concluded that within the system of DMs there are no specific rehabilitative measures built into the system and as such this particular aim of the criminal sanction is not being explicitly met.

It can also be suggested that the persistent and high-level use of financial penalties in the DM system in Scotland may indeed act against a rehabilitative function, and further that financial penalties and their use require a much further and deeper analysis as to the effects on the person receiving the DM. As Amy Cullen argues:

> Above all, the international qualitative empirical work on financial punishment illustrates the very tangible practical and emotional consequences that punishment through financial deprivation has on those who cannot afford to

[278] Scottish Government, 'Criminal Proceedings in Scotland: 2019 – 2020' (A National Statistics Publication, 18 May 2021) <www.gov.scot/binaries/content/documents/govscot/publications/statistics/2021/05/criminal-proceedings-scotland-2019-20/documents/criminal-proceedings-scotland-2019-20/criminal-proceedings-scotland-2019-20/govscot%3Adocument/criminal-proceedings-scotland-2019-20.pdf> accessed 3rd December 2021.

[279] For further information see: Community Justice Scotland, 'Creating a Safer Scotland' (2022) <communityjustice.scot> accessed 17 December 2022.

pay and the damaging consequences this has for those subjected to a financial penalty, as well as those around them.[280]

While there may be no DM that has an explicitly rehabilitative purpose, there is an argument that DMs can avoid the stigma and other elements which directly *inhibit* rehabilitation, and this will be considered in chapter 4.[281] The issue of stigma and labelling associated with the court process naturally impedes rehabilitation and thus DMs might have an advantage over court measures in terms of not actively impeding rehabilitation in the way that an encounter with the court process might do. In-fact court proceedings may offer a better outcome towards rehabilitation as the offender may wish to avoid any future re-stigmatisation, sentencing powers and the possibility of press coverage of a court appearance and the difficulties a formal criminal conviction may have on employment. However, this is somewhat speculative and there is no empirical evidence to support this in the Scots DM system.[282]

3.3.4 Protection of the public.

Given that no DM in Scotland contains the ability to impose a period of time in custody then the consideration of this aim of the criminal sanction is limited within this research.[283] This being said, as is acknowledged above, the overlap between the different principles allows it to be stated that the effects of the deterrence and rehabilitation elements of an effective criminal sanction at present do impact on the protection of the public, as if DMs are an effective deterrent there will be less crime and thus fewer victims.

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[280] Amy Cullen, 'No Longer 'Little Studied'. Challenging criminological narratives about financial punishment.' Scottish Centre for Crime & Justice Research. 2022.

[281] Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' [2008] 2 Criminal Law and Philosophy 21.

[282] There are studies which show evidence that any formal contract with the criminal justice system actually increases the likelihood of further offending rather than decreasing it. This work has not been done in relation to DMs See: L. McAra & S. McVie, 'Causes and impact of Offending and Criminal Justice Pathways: Follow up of the Edinburgh Study Cohort at Age 35. (University of Edinburgh, 2022). For the offenders view of court punishment and stigma and its impact, see Sarah Armstrong and Beth Weaver, 'User View of Punishment: The Dynamics of Community-Based Punishment: Insider Views from the Outside' (Research Report no 03/2011, SCCJR March 2011) <https://ub01.unituebingen.de/xmlui/bitstream/handle/10900/82006/SCCJR_Report_2011_03.pdf?sequence=1&isAllowed=y> accessed 3 March 2023.

[283] Andrew Ashworth, Sentencing and Criminal Justice (Law in Context, 5th edn, Cambridge University Press 2012) ch 3.3.3 for an overview of the arguments of incapacitate criminal sanction.

While it is clear that DMs at present do not have any element of restriction of liberty that could act to protect the public, it is worth exploring whether or not some form of incapacitation might be suitable as a DM. The researcher is immediately ruling out that DMs could ever impose a period of imprisonment as this clearly falls into the scope of the role of the criminal courts and presents multi-faceted difficulties.[284] However, this does leave other options, such as a less restrictive form of restriction. Other areas of the criminal justice system in Scotland could be considered in respect of this.

As indicated above, in the recent past, in Scotland, bail conditions have been extended to include the ability of the court to place the offender on a restriction of liberty condition which requires the accused person to remain within an appointed address between certain times, commonly between 7pm and 7am.[285] This is often thought to have a strong public protection basis where the offender's behaviour occurs at night or where there are indicators in the criminal history of the accused that this measure provides some form of public protection.[286]

The purpose of not having a DM which enables a limitation to the offender's time in the community is something which this research considers, in that this research debates whether the inclusion of some form of restriction of liberty order should be considered for implementation in the DM schema.[287]

3.3.5 Reparation.

In this subsection consideration is given to the final principle, that of reparation. The consideration of the theory of reparation established two principled reparative models: to the community/state and to the individual victim. It can clearly be seen that the community payback order and, within the system of DMs, the fiscal work

[284] For a discussion on the debate regarding the cross over between judicial decision making and prosecutor-imposed punishment see the Sheriff Association objection in the Stewart Report: Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983).

[285] Management of Offenders (Scotland) Act 2019 (asp 14).

[286] This change to the Bail system and additional restrictions on non-convicted persons was subject to criticisms, which were mitigated by the fact that the condition was subject to oversight by the court.

[287] See chapter 7.

order contain a significant element of reparation to the community for the offending behaviour. Further, within the DMs schema, the fiscal fine contains reparation to the state/community and the compensation order contains the possibility of reparation directly to the victim.

It is clear, then, that DMs do offer reparative possibilities. It is also clear that such reparation can have benefits for the person concerned. In Armstrong and Weaver's research on the views of the punished in respect of their sentence, offenders generally viewed community payback orders as having the greatest exoteric effect on their views towards reparation.[288] Indeed, it was clear from the responses in Armstrong and Weaver's report that the community payback order was effective in making the offender understand that they were making reparation as a result of their offending behaviour:

> Aye….to pay back to the community after you done something wrong…. it's to give something back – to pay back – and you do, you put a lot into the community. I mean its about punishment as well.
>
> It made me feel like I'd paid back what I done wrong. What I did didn't hurt the people I helped on community service, but I got the chance to help somebody else like the old people with their grass and the weans decorating their youth club.[289]

It is clear, then, that there is certainly further potential for DMs to be reparative in addition to fiscal fines. For DMs to achieve this potential, use would have to be made of the fiscal work order. But is this happening in practice? It would seem not and that, instead, since the introduction of fiscal work orders in 2015 there has been no significant uptake of this. This is illustrated in Table 5.

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[288] Sarah Armstrong and Beth Weaver, 'User View of Punishment: The dynamics of Community-Based Punishment: Insider Views from the Outside' (Research Report no 03/2011, SCCJR March 2011) <https://ub01.unituebingen.de/xmlui/bitstream/handle/10900/82006/SCCJR_Report_2011_03.pdf?sequence=1&isAllowed=y> accessed 6 February 2023.

[289] Sarah Armstrong and Beth Weaver, 'User View of Punishment: The dynamics of Community-Based Punishment: Insider Views from the Outside' (Research Report no 03/2011, SCCJR March 2011) 9 <https://ub01.unituebingen.de/xmlui/bitstream/handle/10900/82006/SCCJR_Report_2011_03.pdf?sequence=1&isAllowed=y> accessed 6 February 2023.

Table 5: Number of fiscal work orders issued between 2015-16 and 2019-20.[290]

	2015-16	2016-17	2017-18	2018-19	2019-20
No of Fiscal Work Orders	503	884	1025	632	247
% all DMs	0.74	1.01	1.24	1.00	0.40

As Table 5 above shows, there has been little use of fiscal work orders as an overall percentage of the number of DMs offered. The 2019 – 2020 figure which obviously has materially changed due to the Covid-19 pandemic can be disregarded. However, in general terms, the rate has been consistently low.

But why is this? In terms of the reasoning for the limited use of work orders, perhaps parallels can be drawn with the reasons in the McInnes report that a widening and increased use of financial DMs would occur if the penalty was greater. It may be that the same could be said of work orders, which would suggest that the number of hours which can be imposed should be increased from the current limitation of 50 hours. Indeed, the figures for the fiscal fine demonstrate that this has increased in use after the implementation of a widening of the range of fines.[291] Or indeed, it may be suggested that individual PFs are reluctant to use them as they believe the work order to better be given as a judicially imposed criminal sanction.

Turning to the individual reparation aspect of the DM system, the use of compensation orders when combined with the fiscal fine have been steadily rising

[290] Adapted from, Scottish Government, 'Criminal Justice Social Work Statistics in Scotland: 2019-20' (A National Statistics Publication for Scotland, 8 March 2021) para 5.4 <www.gov.scot/publications/criminal-justice-social-work-statistics-scotland-2019-20/pages/44/> accessed 17 December 2021.

[291] See Scottish Government, 'Criminal Justice Social Work Statistics in Scotland: 2019-20' (A National Statistics Publication for Scotland, 8 March 2021) para 5.4 <www.gov.scot/publications/criminal-justice-social-work-statistics-scotland-2019-20/pages/44/> accessed 17 December 2021.

over the last ten years. This is demonstrated in Table 6, which presents figures on the number of combined fines plus compensation orders.

Table 6: Number of combined fine and compensation issued between 2011-12 and 2019-20.[292]

	2011 -12	**2012 -13**	**2013 -14**	**2014 -15**	**2015 -16**	**2016 -17**	**2017 -18**	**2018 -19**	**2019 -20**
All COPFS disposals	67,738	87,591	82,357	63,116	62,461	41,823	41,835	35,620	36,459
Fiscal combined fine plus compensation	2,715	2,334	1,930	1,986	2,671	2,217	1,979	3,180	3,844
% Of Total Disposals (DMs)	4.01	2.66	2.34	3.15	4.28	5.30	4.73	8.93	10.54

What can also be established, following an FOI request, is that the value of the compensation order has also steadily risen, but the average amount remains below the maximum level permitted. This is shown in Table 7 below:

[292] See Scottish Government, 'Criminal Justice Social Work Statistics in Scotland: 2019-20' (A National Statistics Publication for Scotland, 8 March 2021) Table 32 <www.gov.scot/publications/criminal-justice-social-work-statistics-scotland-2019-20/pages/44/> accessed 17 December 2022. Compensation orders can be issued independently of the fine element, but the number of cases where this happens is statistically so small that it is not presented separately in the justice statistics, in addition the argument made in this thesis remains whether issued as a combined or singular order.

Table 7: Average value of fine (combined offer) between 2008-09 and 2019-20. [293]

Average Combined Offer (fiscal fine & Compensation) to accused.	
Financial Year	**Average Fine (£)**
2008-09	195
2009-10	166
2010-11	161
2011-12	155
2012-13	179
2013-14	179
2014-15	175
2015-16	193
2016-17	231
2017-18	225
2018-19	234
2019-20	216

Table 8 below considers the average fine amount in court and via PF disposal. If we consider the use of the reparative orders available within the schema of DMs as a comparison with the court offers of compensation/fine, what can be seen from Table 8 is that court ordered compensation is slightly higher than that which is offered in the form of a DM, but not so significant as to justify court process (especially when consideration is given to the fact that offences going before the court should be more serious).[294] This suggests that if there was an alignment, along with other measures, that the number of persons who could have cases disposed of via DM and still meet a similar reparative effect could be increased.

[293] FOI Request – June 2022.

[294] We are reminded that both the Stewart Committee and McInnes Committee state that DMs are to be used for low level offences and that court is to be kept for more serious summary offences.

Table 8: Average fines and numbers between 2011-12 and 2019-20[295]

Type of disposal	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20
All COPFS disposals	67,738	87,591	82,357	63,116	62,461	41,823	41,835	35,620	36,459
Fiscal combined fine plus compensation	2,715	2,334	1,930	1,986	2,671	2,217	1,979	3,180	3,844
Number of Fiscal compensation	1,323	1,023	783	597	506	669	1,216	779	618
Average Combined Offer (fiscal fine & Compensation) (£)	155	179	179	175	193	231	225	234	216
COURT SANCTIONS									
Court Based Fine	58,395	52,661	56,921	55,939	49,100	44,213	38,447	36,495	33,906
Number of Compensation Orders	925	768	874	840	772	725	788	788	793
Average Compensation Amount Court (£)	200	200	200	200	200	250	290	250	250

Having considered the practical application of the theory of reparation against the system of DMs in Scotland, the researcher would argue that three things can be demonstrated. Firstly, a similarity in the financial amounts in terms of the individual reparation to community and society between the court and the DM system.

[295] Combined from FOI Information and Scottish Criminal Court Statistics, Court Statistics available from Scottish Government, 'Criminal Justice Social Work Statistics in Scotland: 2019-20' (A National Statistics Publication for Scotland, 8 March 2021) <www.gov.scot/publications/criminal-justice-social-work-statistics-scotland-2019-20/pages/44/> accessed 17 December 2022.

Secondly, a lesser effect in terms of general reparation, given the court and fiscal fine financial amounts that is court really offering a greater reparation to the community for those offences which by nature of being in court should be more serious? Thirdly an underuse in the form of DM work orders and compensation orders in the prosecutor disposals can be seen. Consideration of what developments this research recommends as a result of this, are detailed in chapter 7.

3.4 Conclusions.

This chapter set out to examine the first principle of justice considered in this research: effectiveness. It first identified, drawing on the purposes of the criminal sanction, that effectiveness could be assessed through retribution, deterrence, rehabilitation, protection of the public and reparation theory.

This research argues that five significant conclusions to this chapter can be drawn. First, through the examination of the principles in respect of retribution, that whilst there is an obvious value in the system of DMs it does not achieve the full retributive value of the criminal sanction when compared with those offences disposed of by court proceedings. An obvious conclusion is that a retributive value is required in the system of DMs, but that it must be a proportionate response to the level of criminal offending.

Second, in respect of the principle of deterrence, it has been established that there is limited evidence of a general deterrent effect of the DM system and further, that there is limited evidence of an individual deterrent effect when compared to court proceedings. In fact, the individual deterrent effect may be less than court proceedings. Indeed, evidence of the number of repeated uses of DMs with individual accused persons was presented showing a significantly re-use rate of DMs in Scotland which has been rising over the last ten years and with a noticeably higher "reconviction rate" present in DMs than in court proceedings.

Third, this research has found that there is limited evidence of any significant difference in the prospect of rehabilitation through the use of DMs versus comparable court proceedings and in fact court proceedings may offer a better outcome towards rehabilitation as the offender may wish to avoid any future re-

stigmatisation, sentencing powers and the possibility of press coverage of a court appearance and the difficulties a formal criminal conviction may have on employment.

Fourth, in consideration of the protection of the public element of effectiveness, this research has found that this principle is intertwined with the other outcomes possible from the system of DMs if they are effective, but that express measures for the purposes of protection of the public are not present in the DM system. This research has raised electronic monitoring orders as part of bail conditions and suggests that further consideration is given to this in introducing a potential element of public protection to the system of DMs in Scotland.

Fifth, in terms of reparation, it has been established that both the court and the DM system contain provision for reparation to be made both to society and to individual victims. It also suggested, however, that there may be scope to increase the use of fiscal work orders and fiscal compensation orders. This research has considered the fiscal fine alongside the average court disposals and raised questions in respect of the limited difference in disposal amount for court fines and fiscal fines and compensation orders especially whereby the more serious offences should be prosecuted in court and therefore one would expect the penalty to be higher.

In summary, then, a number of areas where the effectiveness of DMs might be improved have been identified, namely, the introduction of further elements for the protection of the public, increased use of DMs whereby the court disposal is on a similar level to those which are available in the DM system and consideration of the development of a rehabilitative function within the DM system. Having considered the principle of effectiveness the research now moves in the following chapter to consider the principles of fairness as they apply theoretically and in practice to the system of DMs.

Chapter 4: Fairness.

In the previous chapter, the theories and principles of an effective criminal sanction were outlined and applied to the system of DMs within Scotland. This chapter examines the second principle of justice – that of fairness. The starting point in respect of this, for this research, is how to frame an assessment of fairness. This chapter begins by establishing the criteria by which this assessment of the system of DMs shall be made. Having established the criteria, the chapter moves to examine each of the components of fairness in theory and considers their practical application to the system of DMs. Within this chapter, the primary consideration is fairness to the accused, and although it is also recognised that fairness to victims is a significant area of concern this will not be discussed in detail as it is not within the scope of the thesis.

4.1 Defining the Principles of Fairness.

Whilst just about every introductory text on criminal law refers to overarching principles of fairness in the criminal justice system, there are surprisingly few definitive theories of what comprises fairness in the criminal justice context.[296] As was established in the previous chapter, from as far back as the Old Testament with community sanctions against persons we can see the development of rules in a justice system as a methodology to protect the principle of fairness, with this being inherent to the criminal justice system before the legitimate imposition of a criminal sanction on behalf of the community by the state.

The principles of fairness, effectiveness and efficiency do not have firm delineations between them and as was suggested, in chapter 2, they are better considered not as individual principles but as a mosaic of principles interlinked and interwoven. That said, this chapter proposes four key components to assess fairness in the DM system in Scotland: accuracy of outcome, consistency, proportionality/parsimony, and representation. These components have been extrapolated from the Stewart

[296] For an example of an introductory text referencing fairness, but without fully defining what is meant by fairness, see Sarah Christie, An Introduction to Scots Criminal Law (2nd edn, Dundee University Press 2009) ch 2.

and McInnes committees but are also broadly in line with relevant academic literature.

As was suggested in the introduction to this research, there has been limited examination of DMs in Scotland. We can, however, draw from the experience of other jurisdictions. Ashworth and Zedner have discussed criticisms levelled at DMs for ignoring the canons of procedural fairness.[297] Ashworth and Zedner go on to say that it has been argued, from an effectiveness perspective, that the court-based system is ineffective because of "canons of procedural fairness", the attendance of witnesses or other technical issues which are required in the court-based system.[298] It can be argued that the approach taken by those criticising DMs from this perspective take a narrow approach to the consideration of effectiveness. As we have explored in the previous chapter, effectiveness is not just about imposing a criminal sanction; it is about ensuring that the system in and of itself adheres to the principles of justice and has fairness, as a component part, at its core. As we approach the exploration of the principle of fairness in this chapter, we should be mindful that, at least in the views discussed by Ashworth and Zedner, there is a suggestion that DMs are designed to avoid the canons of procedural fairness which would be required in court proceedings. If this can be established, then in this researcher's view, there are fundamental concerns for a democratic society which would require to be addressed.

It is necessary, therefore, to assess the system against the theories of fairness and consider whether Ashworth and Zedner are correct that DMs ignore the canons of procedural fairness. If this is the case, there are questions about how we develop the system to bring balance, have integrity in the system of DMs to ensure it respects the fundamental principles of justice. Having discerned the assessment criteria, accuracy of outcome, consistency, proportionality/parsimony and representation,

[297] Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) 2(2) Criminal Law and Philosophy 21.
[298] Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) 2(2) Criminal Law and Philosophy 21.

this chapter now examines in more detail the theoretical considerations relevant to each one.

4.1.1 Accuracy of Outcome.

The first element of fairness proposed, within this research, is that of accuracy of the outcome. Within a criminal justice context this leads us to the ultimate purpose of the system: that is to find, accurately, the truth of the accusation against an accused person. As the US Supreme Court put it in *Rose v Clark*:

> The central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence.[299]

Whilst the doctrine of accuracy of outcome has obviously been considered in court settings, it has also received much academic focus by foundational theorists such as Roberts, Zuckerman[300] and Ashworth.[301] Further, Galligan suggests that:

> Accurate decisions themselves constitute an important element of fair treatment, which in turn constitutes an important element of respect for persons.[302]

Thus, Galligan suggests that accuracy of outcome is an essential element of fairness in the treatment of the accused person. Many procedures in the criminal justice system are founded on this rationale. For example, the ability to appeal against a court imposed criminal sanction, it has been suggested, exists not only to correct errors of process and procedure but also for the purposes of ensuring accuracy of outcome.[303] It has also been suggested that the rule of double jeopardy has been relaxed for reasons of accuracy of outcome.[304] Given the widespread nature and the

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[299] Rose v Clark 478 US 570 (1986) 577.

[300] Paul Roberts & Adrian Zuckerman, Criminal Evidence (2nd edn, OUP 2010). This is discussed throughout the book, but specifically in chapter 3, 4, 5 and 6.

[301] Jeremy Horder, Ashworth's Principles of Criminal Law (10th edn, OUP 2022), ch. 1.

[302] Dennis James Galligan, Due Process and Fair Procedures: A Study of Administrative Procedures (OUP 1996) 78.

[303] Keith A Findley, 'Innocence Protection in the Appellate Process' (2009) 93 Marquette Law Review 591.

[304] Kenneth G Coffin, 'Double Take: Evaluating Double Jeopardy Reform' (2010) 85 Notre Dame Law Review 771.

consideration by foundational theorists, we can consider accuracy of outcome as playing a crucial role in the criminal justice system as a whole and thus it must be considered as playing a crucial role when we assess fairness in the system of DMs in Scotland.

Vriend suggests that fairness and the accuracy of outcome are two notions, which although intertwined, can be differentiated in the sense that a "fair" trial can take place, but a factually incorrect outcome can occur.[305] This research considers this to be a factually correct statement; *Omnia praesumuntur rite et solemniter esse acta*, we can have easily the most fair system in the world which equally balances the rights of all parties and puts all relevant evidence before the decision maker but that does not reach the factually correct verdict in respect of the innocence or guilt of the accused person. Indeed it can be understood that procedures that feel fair (e.g. an accused feels they are participating) may not actually be fair (e.g. if in reality only lip service is paid to what an accused says). In other words, fairness of *procedure* and fairness of *outcome* are not the same thing.

It is not controversial to state that any criminal justice system concerned with fairness should always seek accuracy of outcome. This research rejects the proposition of Vriend and instead argues that the remit of the principle of fairness must be and is wider than simply fair procedures. Simply having procedures which are fair is not enough. Having fair procedures which lead to inaccurate outcomes does not fulfil the overarching principle of fairness. Therefore, fairness must include as an essential part the accuracy of outcome. This is to say: inaccurate outcomes are unfair, even if the procedures that lead to them are not.

Accuracy of outcome is important to society, to victims and to the accused person. In relation to society, accuracy of outcome matters so the public have trust in the criminal justice system. There are two considerations in relation to the public trust: first, the public believe that if they are innocent of an accusation, they will not be convicted. Second, that those who commit offences are being caught and

[305] Koen Vriend, 'Avoiding a Full Criminal Trial: Fair Trial Rights, Diversions and Shortcuts in Dutch and International Criminal Proceedings' in Gerhard Werle & Moritz Vormbaum (eds), International Criminal Justice Series, vol 8 (Springer 2016) 22.

adequately punished. Jackson and Bradford suggest in their study that public trust in the system of criminal justice is based on the public's overall perception of the fairness of the system and its effectiveness.[306] Therefore, we can understand that public trust is gained from the perceptions of fairness of the system rather than public trust contributing to the fairness of the system.

In relation to the victim, accuracy of outcome matters because of the impact that being a victim of crime has on a person. We know the harm inflicted upon victims when they feel justice has not been done.[307] It has long been recognised that victim confidence in the justice system is maintained when the guilty are brought to justice.[308] Or, perhaps more accurately, the victim believes that the guilty person has been brought to justice. It is submitted that the knowledge by the victim that someone has been caught is insufficient but rather that the correct person has been caught is what is important.[309] The requirement to properly support the victim of crime is to ensure that the correct person is censured for the criminal behaviour due to the destructive effect which a victim may experience should a criminal sanction be overturned. It would be unfair to a victim who has received closure in relation to an offence only for the issue to be re-opened. Issues in factual accuracy are likely to undermine trust in the criminal justice system from the perspective of the victim.

We now turn to the main consideration of the accused person in respect of accuracy of outcome. In the forthcoming narrative we shall consider why accuracy of outcome is important to the accused person; why criminal sanctions, incorrectly imposed, harm the accused person;[310] and whether this harm still applies even though a DM is a relatively minor sanction. Having considered these three aspects, we shall

[306] Jonathan Jackson and Ben Bradford, 'What is Trust and Confidence in the Police?' (2010) 4(3) Policing: A Journal of Policy and Practice 241.

[307] For an understanding of the impact on Victims, see Jim Parsons and Tiffany Bergin, 'The Impact of Criminal Justice Involvement on Victims' Mental Health' (2010) 23(2) Journal of Traumatic Stress: Official Publication of the International Society for Traumatic Stress Studies 182.

[308] See Jo-Anne M Wemmers, Victims in the Criminal Justice System (Kugler Publications 1996), ch 8,

[309] See James R Acker, 'The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free' (2013) 76 Albany Law Review 1629.

[310] Whilst acknowledging that a criminal sanction imposed correctly does inflict a harm also, this consideration is outwith the scope of this research.

conclude our examination of accuracy of outcome by considering whether 100% accuracy of outcome is ever achievable and if it is not then how this should be dealt with.

Unfair, inaccurate outcomes have a significant impact on the accused person. It has been established that there are harms which are inflicted upon accused persons and their families when an innocent person is sanctioned.[311] We know that these harms have financial implications and psychological impact on the accused.[312] In addition, a criminal sanction being imposed on an innocent person is fundamentally unfair and undermines trust in the criminal justice system. There is a plethora of literature on the stigma attached to being censured incorrectly by the state, supplemented by significant literature on the impacts which this has on the person's life.[313]

The question in relation to this research is whether the impact on the accused person is still relevant when the criminal sanction is a DM? The answer to this question is yes. Whilst, as explored in chapter 2, the intention behind DMs was that they are to be used for dealing with minor offences, DMs were not intended to carry the stigma of a court-imposed criminal sanction. Indeed, it was the second justification for the creation of the DM system in the Stewart committee.[314] Given the lack of publicity surrounding the imposition of DMs, it can be accepted that the stigma attached to DMs is significantly less, if it exists at all, than that which is encountered during

[311] For insight into the harms caused to accused persons and their family, see Jennifer Wildeman, Michael Costelloe and Robert Schehr, 'Experiencing Wrongful and Unlawful Conviction' (2011) 50(7) Journal of Offender Rehabilitation 411; Sion Jenkins, 'Secondary Victims and the Trauma of Wrongful Conviction: Families and Children's Perspectives on Imprisonment, Release and Adjustment' (2013) 46 Australian and New Zealand Journal of Criminology 119.; SK Brooks and N Greenberg, "Psychological impact of being wrongfully accused of criminal offences: a systematic literature review" (2021) 61 Medicine, Science and the Law 44-54.

[312] For an overview of the views of those who are punished on the implications for them, see Sarah Armstrong and Beth Weaver, 'User Views of Punishment: The Dynamics of Community Based Punishment: Insider Views From the Outside' (Research Report No 03/2011, SCCJR 2011) <www.sccjr.ac.uk/wp-content/uploads/2012/11/Report_2011_03_User_Views_of_Punishment-1.pdf> accessed 6 February 2023.

[313] See Zieva Dauber Konvisser, 'What Happened to Me Can Happen to Anybody – Women Exonerees Speak Out' (2015) 3(2) Texas A&M Law Review 303; Benjamin Alexander-Bloch and others, 'Mental Health Characteristics of Exonerees: A Preliminary Exploration' (2020) 26(8) Psychology, Crime & Law 768; Kathryn Campbell and Myriam Denov, 'The Burden of Innocence: Coping with a Wrongful Imprisonment' (2004) 46(2) Canadian Journal of Criminology and Criminal Justice 139.

[314] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 2.22, 26.

court proceedings.[315] However, just because the stigma of a DM is less than court proceedings does not mean that it is fair to allow the imposition of a DM upon an innocent accused or place value in a system which allows this to happen. There are further implications for the inaccurately sanctioned accused. DMs continue to have impact for an accused person whereby they may be disclosed in future criminal proceedings, family law proceedings and in enhanced disclosure and PVG checks.[316]

The perfect criminal justice system, if perfect is capable of existing, is one that would always get it right – that is, the factually guilty are convicted and sanctioned and the factually innocent would be exonerated.[317] In the context of DMs this would mean that no innocent person would ever accept a DM and no guilty person would be allowed to avoid a criminal sanction. It is unlikely that any criminal justice system, other than perhaps in Plato's cave, will ever achieve perfect accuracy. Thus, as this research moves towards areas of development, a pragmatic approach is required, whereby perfect accuracy is unlikely to ever be achieved.

Where does this leave us and how should we resolve this issue of accuracy of outcome? The principle of accuracy holds that decisions are taken on informed opinion to the greatest extent possible and that such information is processed with a minimum of error. The commonly heard statement, that it is better that an innocent man go free that a guilty man be convicted, has a long tradition in legal writing and has appeared in various forms over the course of hundreds of years, highlighting its importance to the principles of law. Voltaire, expressed: "tis more prudence to acquit two Persons, tho' actually guilty, than to pass Sentence of Condemnation on one that is virtuous and innocent."[318] Blackstone's *ratio,*[319] explained in his seminal work, is that "it is better that ten guilty persons escape

[315] See Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) 2(2) Criminal Law and Philosophy 21, 25.

[316] Disclosure and PVG are statutory forms of criminal record checks undertaken by employers, voluntary organisations. PVG checks are a legal requirement for any person working with vulnerable groups.

[317] See John Rawls, A Theory of Justice (Revised edn, Harvard University Press 1999) 73 – 78.

[318] Zadig Voltaire 53 (1749, Photo Reprint 1974).

[319] Whilst Blackstone is often credited with this maxim, it can be traced prior to him in Voltaire.

than that one innocent one suffer".[320] Blackstone's *ratio* in the context of accuracy of outcome within a criminal trial is examined by Campbell, Ashworth and Redmayne and presented as an error preference and any error preference should be to acquit the guilty than convict the innocent:

> The objectives of the criminal trial are to determine accurately and fairly whether or not a person has committed a particular criminal offence. But this may be too simple; saying a little more about trials generates a slightly richer theory of criminal process. Accurate decision making is an important function of criminal trials, but complete accuracy is unattainable: trials are fallible. Of the two sorts of 'concluding' errors in a criminal trial—acquitting a guilty person or convicting an innocent person—the latter is more serious, since it involves a grievous wrong against a specific individual whereas the former does not, although it reflects badly on the system, may disappoint, or hurt the victim or witnesses, and may reduce community confidence. To protect against convicting the innocent, the prosecution must prove its case beyond reasonable doubt. The implication of this heavy burden of proof is that of the errors made by criminal courts, more will involve acquitting the guilty than convicting the innocent. Criminal trials thus incorporate an 'error preference'; this is a cardinal value of the criminal process. Though it is arguable that this error preference should influence the pre-trial process just as it moulds the trial.[321]

Although in agreement with Campbell, Ashworth, and Redmayne, it is asserted that application of this to the system of DMs holds that if accuracy of outcome is not 100% achievable, which this research has accepted, then the error preference must be in favour of the accused person not being sanctioned, even if as a result of this some guilty people escape the criminal sanction. We can even see this principle elicited in the burden of proof in criminal trials in Scotland, which is beyond all reasonable doubt. As DeKay explains:

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[320] William Blackstone, Commentaries on the Laws of England (1765) Bl Comm IV ch 27, 358.

[321] Liz Campbell, Andrew Ashworth and Mike Redmayne, The Criminal Process (5th edn, Oxford University Press 2019). 26.

> Higher standards of proof lead to more erroneous acquittals and fewer erroneous convictions, all else being equal.[322]

Applying this to the system of DMs, while it is true that the prosecutor should be satisfied that there is a sufficiency of evidence before offering a DM, there is not the same level of protection as there is in the court system. In relation to DMs, whether the offence is proved beyond reasonable doubt is considered only by a single prosecutor. It is not tested by a court (as it would be if a case goes to trial) or considered by a defence solicitor (if the case is settled by a guilty plea).

We can further see that an accused person can appeal against a verdict, as a protection against an inaccurate outcome,[323] due to an error of law or misdirection of the fact finder, among other bases, but all under the requirement that one or more of the bases has led to a miscarriage of justice.[324] The protections which are available within the criminal trial but are absent from the system of DMs emphasises even more clearly that, as this this research argues, the principle of innocence is surely more important than someone guilty escaping a minor sanction. This is especially the case in relation to DMs, where the offence is likely to be minor, compared to more serious offences, where a guilty person escaping a criminal sanction might result in a danger to the public: for example, compare the extent of the potential harm of failing to convict a serious sexual offender who is factually guilty of multiple rapes and who may rape again with failing to sanction a person who committed theft by shoplifting.

Having explored the importance of accuracy of outcome in the context of fairness, this research accepts that accuracy of outcome is essential to public trust in the system of justice, and is essential to the rights of the accused, the rights of the victim and the legitimacy of the state to impose a criminal sanction upon any person.

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[322] Michael DeKay, 'The Difference between Blackstone-Like Error Ratios and Probabilistic Standards of Proof' (1996) 21 Law & Social Inquiry 95.

[323] Appeals in Scotland must pass what is called a sift. That is the appeal must meet a minimum standard prior to the court allowing an appeal. A description of the process is available from Scottish Court and Tribunal Service, 'Criminal Appeals' (2022) <www.scotcourts.gov.uk/the-courts/supreme-courts/high-court/criminal-appeals> accessed 10 December 2022.

[324] See Part X of the Criminal Procedure (Scotland) Act 1995, whereby the appeals from summary proceedings procedure is set out.

It is acknowledged that the current application of DMs for minor offences is less likely to have a significant impact on victims or the public at large in respect of the general confidence in the system itself. Having accepted this, however, it does not mean it is possible to conclude that accuracy of outcome is unimportant, particularly for an accused person. Accuracy of outcome therefore means that no person who factually is not guilty of the offence of which they are accused should accept the DM. Having now explored the first theoretical element of fairness, we now turn to the second element proposed, this being consistency.

4.1.2 Consistency.

The second component of fairness is consistency. The importance of consistency of outcome is stressed in many introductory texts to sentencing and criminal justice and would appear to be a principle that is immediately accessible to all persons and perhaps to a non-lawyer appears to be immediately understandable.[325] Even the dictionary definition of consistency as "consistent behaviour or treatment", leaves us with perhaps a straightforward understanding that the justice system should be consistent in everything that it does and that is the end of it. There is a general bank phrase to which some turn in an attempt to define consistency:

> The standard phraseology 'the extent to which like cases are treated alike' captures the essence of the concept, but it also disguises its complexities.[326]

Consistency and disparity of sentencing has dominated academic thinking in sentencing for a significant period of time,[327] but it is not easy to define. Coons even suggests that in his work he will not seek to define what consistency is but will seek to highlight what inconsistency is:

> This Essay, however, makes no effort to exhaust the possible moral and legal meanings of consistency or to establish one meaning as primary. My three

[325] See for example: Andrew Ashworth and Jeremy Horder, Principles of Criminal law (8th edn, OUP 2016). 97.

[326] Jose Pina-Sánchez and Robin Linacre, 'Refining the Measurement of Consistency in Sentencing: A Methodological Review' (2016) 44 International Journal of Law, Crime and Justice 68.

[327] Cyrus Tata and Neil Hutton, 'What 'Rules' in Sentencing? Consistency and Disparity in the Absence of Rules' (1998) 26(3) International Journal of the Sociology of Law 339. See particularly the introductory remarks.

> "interpretations" of consistency avoided defining the term itself. My need is the narrower one of establishing the conditions of inconsistency. Once that is done, consistency will remain the residual category.[328]

None of this suggests that we cannot find a working definition of what we mean by consistency for the purposes of this research or indeed that it is something which we should avoid doing, and this research will address this question.

Aligned with the other principles of fairness, the quest for consistency, or at least the understanding of the theory, can be traced in its philosophical roots. As far back as the philosophical position of Aristotle we can understand that a fair application of the law requires that accused persons be afforded similar treatment and any deviation from such treatment be justified.[329] In the converse, we are warned that there is also the danger when seeking to achieve consistency that we end up with an unfair system which affects those least likely to respond to it, the so called 'levelling down' objection to consistency. That is, that the requirement of consistency can be achieved by consistently replicating unfair or more severe punishments that are necessary on the whole by use of wrongful forms of punishment for the purposes of achieving equality. Thus, by seeking equality we can treat people badly or remove the benefits which the system would normally afford persons.[330] Again, it can be seen that there is an integration between the variety of principles. While one might suggest that these principles should be able to co-exist, this researcher's view is that in a practical legal system we see the principles of proportionality and consistency potentially having to be pragmatically balanced against each other in order that one principle's flaw does not compromise the other's intention. This position is supported by Tyler, who suggests that when it

[328] John E Coons, 'Consistency' (1987) 75 California Law Review 59, 66.

[329] Aristotle, Nicomachean Ethics (H Rackman ed, Perseus 2023) Vol <www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0054%3Abook%3D3> accessed 14 August 2023.

[330] Nils Holtug, 'Egalitarianism and the Levelling Down Objection (1998) 58(2) Analysis 166. See also Deborah L Brake, 'When Equality Leaves Everyone Worse Off: The Problem of Levelling Down in Equality Law' (2004) 46 William and Mary Law Review 513; Sandra Fredman, 'Breaking the Mold: Equality as a Proactive Duty' (2012) 60 The American Journal of Comparative Law 265; Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 International Journal of Constitutional Law 712.

comes to the objectives of the criminal justice system we are faced with a set-off principle:

> The existence of varying criteria of procedural fairness also raises the question of how those criteria are related. The importance of their relationship lies in the choice of decision-making procedures. In the distributive justice literature, the decisions of leaders have been regarded as value trade-offs between objectives that cannot be simultaneously realized. For example, because many have argued that productivity and social harmony cannot be achieved at the same time, policy makers have had to move back and forth between the use of differing rules of distributive justice, each of which maximizes the attainment of one objective at the expense of the other … The concern here is with the extent to which such trade-offs also occur with procedures.[331]

As Tyler suggests, the move back and forth between different rules leads to a trade-off between one for the other. It is not suggested in this research that a trade-off is required, but instead a pragmatic balance between the intention of each of the principles.[332] At least this research will argue that it should be possible to respect both principles.

It is argued that consistency and equality before the law does not mean that consistent outcomes return the same outcome in each and every case. Consistency for the purpose of considering the DM system instead means a consistent application of the rules and procedure of making the offer of the DM. Peters suggest that equality and consistency cannot be considered together and that any attempt to do so is futile.[333] It has been suggested that equality only requires that "people for whom a certain treatment is prescribed by the standard should all be given the treatment prescribed by that standard."[334] Indeed the inconsistency of prosecutorial

[331] Tom R Tyler, 'What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 Law & Society Review 103.

[332] See also: Elizabeth Tiarks, 'Restorative Justice, Consistency and Proportionality: Examining the Trade-off' (2019) 38 Criminal Justice Ethics 103.

[333] See; Christopher J Peters, 'Equality Revisited' (1996) 110 Harvard Law Review 1210.

[334] Peter Westen, 'The Empty Idea of Equality' (1982) 95 Harvard Law Review 537.

decisions has presented issues to the fundamental principle of treating similar cases alike.[335]

For the purposes of our consideration of the principle of consistency in relation to the DM system in Scotland, whilst acknowledging that it is an incomplete and minimalist understanding of consistency, we can accept that in DMs consistency should be that two accused persons with indistinct differences in their cases and circumstances should be treated alike. As we have already referred to Hart, it is perhaps useful to be reminded of his position in relation to consistency.

> This meaning connotes the principle of treating like cases alike, though the criteria of when cases are alike will be, so far, only the general elements specified in the rules.[336]

4.1.3 Proportionality/Parsimony.

Having now considered the principles of accuracy of outcome and consistency, we turn our consideration to the principles of proportionality and parsimony. In this section, we concentrate primarily on the principle of proportionality and its influence as a principle. The principle of parsimony is straightforward and for the purposes of this research it suffices to define it and apply it to the system of DMs in Scotland.

The starting point is to define what we mean, when we use the terms, before proceeding to consider what the terms mean in theory and in the context of DMs. We can define what this research means by proportionality by reference to Ashworth and Von Hirsch's 'Desert Rationale':

The desert rationale rests on the idea that the penal sanction should fairly reflect the degree of reprehensibleness (Sic) (that is, the harmfulness and culpability) of the actor's conduct. This comports with common-sense notions of justice, that how severely a person is punished should depend on the degree of blameworthiness of his conduct. The perspective also helps to resolve the tension over whether penal

[335] Ronald F Wright & Marc L Miller, 'The Worldwide Accountability Deficit for Prosecutors' (2010) 67 Washington & Lee Law Review 1587.

[336] HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593, 623 – 624.

policy should favour societal interests or the interests of offenders. In desert theory, the societal interest is expressed in the recognition that typical crimes (e.g., those of force and fraud) are *wrongs*, for which public censure through criminal sanction is due. The offender's interests are protected through his right not to be subjected to a sanction that is more onerous than the degree of blameworthiness his conduct would warrant.[337]

For the purposes of this research a sufficient definition is outlined in the quote above and that is: a criminal sanction should reflect the culpability of the accused but be no more onerous than the element of blameworthiness which it should attract. Whilst other theories debate what is meant by proportionality and debate what harm should be measured to set a criminal sanction, such as harm to the victim or that one sentence would more severely impact on a section of society more than another,[338] there is general agreement in Scotland that sentencing should fall within a range which is open to the decision maker, although this range is not always published, unless there is a sentencing guideline.[339]

As the Ashworth quote above has highlighted, it has been suggested that the principle of proportionality has been and remains problematic, but this does not, however, lessen its importance as a principle of justice, nor does it mean that it can be rejected.[340]

The principle of parsimony is intrinsically linked to the principle of proportionality but does stand alone as a distinct principle. The parsimony principle is that punishment should be used as little as is possible. Occam's razor is a principle that is perhaps universally familiar as a principle of moral philosophy from which we derive the legal maxim of *entia non sunt multiplicanda praeter necessitatem*, that

[337] Andrew Von Hirsch and Andrew Ashworth, 'Proportionate Sentencing: Exploring the Principles' (Online edn, Oxford Academic 2005) 1–11.

[338] For example, primary carers of children are more likely to be affected by a custodial sentence.

[339] For examples of being within and outwith the range of available sentences see JB v HM Advocate [2020] HCJAC 35 [7]; HM Advocate v Lindsay [2020] HCJAC 26 [7].

[340] See Joel Goh, 'Proportionality - An Unattainable Ideal in the Criminal Justice System' (2013) 2 Manchester Review of Law, Crime & Ethics 41.

is, entities should not be multiplied beyond that which is necessary.[341] In the context of a criminal justice system, parsimony has been expressed in many different ways but with similar end positions. Morris describes the principle as the aim of "the least restrictive sanction necessary to achieve social purposes."[342] Von Hirsch describes the principle as no more punishment than is necessary for deterrence.[343] It has been suggested that the historical development of the principle of parsimony belongs to an era whereby sentiment of sanction and practice were more measured with a view to less punitive sanctions in criminal law.[344]

Indeed, in the spirit of parsimony, we can use Packer's phraseology as a clear summary: "Punishment is lamentable, but necessary."[345] For this research the principle of parsimony is considered primarily from the perspective of Morris, in that it is the least restrictive sanction necessary to achieve the purpose of a criminal sanction.

Having defined both concepts, considered in this chapter, parsimony needs no further discussion in relation to this research's examination, but the principle of proportionality does require further examination, and it is to this examination we now turn. Proportionality has been expressed as the principle which requires that a criminal sanction should be neither more severe nor too lenient than reflects the moral blameworthiness of the accused. However, proportionality is more than just the desert rationale discussed above.

Reflecting culpability is part of this, but when considering a criminal sanction other factors such as the harm caused by the offence and the circumstances of the offender, the impact on the victim and others affected by the case and the particular

[341] For a full discussion of Okham's razor see Roger Ariew, 'Ockham's Razor: A Historical and Philosophical Analysis of Ockham's Principle of Parsimony' (PhD thesis, University of Illinois at Urbana-Champaign 1976).

[342] Norval Morris, The Future of Imprisonment (University of Chicago Press 1974).

[343] Andrew Von Hirsch, 'Proportionality in the Philosophy of Punishment: From Why Punish? to How Much?' (1990) 1(2) Criminal Law Forum 259.

[344] See Mary Bosworth, 'Introduction: Reinventing Penal Parsimony' (2010) 14(3) Theoretical Criminology 251.

[345] Herbert Packer, The Limits of the Criminal Sanction (Stanford University Press 1968).

circumstances of the offender require to be considered. These factors also feed into decisions about proportionality, although it will not always be easy to balance them.

There is a widespread debate on how to measure proportionality but for the purposes of this research the question comes down to: should it be a) that a sanction must be proportional to culpability or b) that it must be proportional to culpability and harm.[346] The difficulty is that these two things will not always pull in the same direction; you can have a very culpable accused who causes very little harm to an individual e.g., attempting to pervert the course of justice or the opposite e.g., death by driving without an insurance policy.

How, then, do you assess a scale of proportionality? Which of these measures should prevail? Ashworth, in his book on sentencing and criminal justice, suggests that:

> Some US systems have approached this by constructing sentencing 'grids', which classify offences into various groups and then assign guideline sentences to them, leaving the courts with more or less discretion. In Finland, Article 6 of the Penal Code provides simply that 'punishment shall be measured so that it is in just proportion to the damage and danger caused by the offence and to the guilt of the offender manifested in the offence'. Chapter 29 of the Swedish Criminal Code, introduced in 1989, provides that sentences should be based on the penal value of the offence: 'The penal value is determined with special regard to the harm, offence, or risk which the conduct involved, what the accused realized or should have realized about it, and the intentions and motives of the accused.[347]

Thus, Ashworth promulgates that the offence should be measured by the harm it caused and by the culpability of the accused. Nothing which is argued in this research actually turns on the answer to this debate and thus there is no attempt in this research to come to a conclusive view either way. Thus, this research shall simply

[346] For a wider examination of the difficulties, see Joel Goh, 'Proportionality - An Unattainable Ideal in the Criminal Justice System' (2013) 2 Manchester Review of Law, Crime & Ethics 41.

[347] Andrew Ashworth, Sentencing and Criminal Justice (Law in Context, 6th edn, Cambridge University Press 2015) para 4.1.

define proportionality as requiring to be reflective of the seriousness of the offence and will assume that this can be measured by harm and culpability.

Having stated this research's position that DMs should be proportional to the seriousness of the offence, it may be the case that court proceedings are not necessary for minor offending, as Ashworth and Zedner explain:

> It is argued that court proceedings are unnecessary where the defendant is willing to plead guilty, and that for some lesser forms of offending a court hearing may not be needed to examine the defendant's fault or may not be necessary at all for all minor offences since almost all defendants are willing to accept some lesser, swifter resolution of the case.[348]

In examining these two suggestions which identify court-based disposals as being unnecessary and thus disproportionate, insofar as DMs are used for minor offences, the minor sanctions which they attract may be considered proportionate.[349] As was discussed, in chapter 3, Ashworth and Zedner suggest that DMs may be a proportionate response to low level offending and that court-based disposals are unnecessary in these circumstances.

In respect of the principles of proportionality and parsimony, we have defined our understanding that proportionality requires that a criminal sanction should be neither more severe nor too lenient than reflects the seriousness of the offence and that parsimony requires that the criminal sanction should only be to the level as required to serve the purposes of the criminal sanction, which we have considered in chapter 3. This chapter will now look at the principle of representation.

4.1.4 Representation.

Having discussed the first three elements of fairness (accuracy of outcome, consistency, and proportionality/parsimony) we now turn to the consideration of representation.

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[348] Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the changing character of Crime, Procedure and Sanctions' (2008) 2 Criminal Law and Philosophy 21, 23.

[349] Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the changing character of Crime, Procedure and Sanctions' (2008) 2 Criminal Law and Philosophy 21, 23.

Representation is the idea that persons are able to communicate their values, views, and concerns about a procedure prior to the decision being made about them.[350] In Tyler's examination of procedural justice and how to assess the fairness of legal procedures, he suggests of all his examinations of citizens' experience of procedural justice, that representation is "the most important issue" in how citizens experience procedural justice and their perceptions of it.[351] Spencer similarly suggests that the representation of the accused is essential to ensure their self-determination and commitment to change.[352] However, the theory of representation entails a much wider basis in the communication of the accused in proceedings, having their voice heard in the proceedings and being an active participant in the cases in which they are accused of committing a criminal offence.

If one compares and contrasts theorists who examine the evaluation of the justice of procedures, there are few concepts on which there is complete agreement. Tyler, for example, suggests that if we compare the works of Thibaut and Walker with that of Leventhal, we find that the only common element between the two is that of representation.[353] It may be confidently stated that representation is one facet of fairness in the justice system that most theorists agree on even where they disagree on the other component parts of fairness, or the particular role that a component part plays.

Why is the voice of the accused important? Some would suggest that it is essential and important in its own right in a rounded criminal justice system to treat an accused person with respect as an autonomous human being with a voice in the process. Durkheim, in his theory of the sacrality of the person, argues that the voice

[350] GS Leventhal, 'What Should be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships' in Kenneth J Gergen, Mart S Greenberg and Richard H Willis (eds) Social Exchange: Advances in Theory and Research (Springer 1980) 27 – 55.

[351] Tom R Tyler, 'What Is Procedural Justice - Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 Law and Society Review 103.

[352] Pauline Spencer, 'A View from the Bench: A Judicial Perspective on Legal Representation, Court Excellence and Therapeutic Jurisprudence' in Asher Flynn and Jacqueline Hodgson (eds), Access to Justice & Legal Aid: Comparative Perspectives on Unmet Legal Need (Bloomsbury 2017) 97.

[353] Tom R Tyler, 'What Is Procedural Justice - Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 Law and Society Review 103.

of the accused person is necessary for the legitimacy of the criminal sanction.[354] Indeed, as Duff *et al* suggest:

> if our aim is to explain why we or the courts are entitled to call the defendant to account, this answer is incomplete: it suggests a reason why defendants should be allowed to give an account of themselves, but not yet why they should be called to account—which implies a demand or expectation that they ought to answer the charge and offer an account of themselves.[355]

Whilst Duff e*t al* and indeed Durkheim make an important point of principle, the primary concern of this research is on the more instrumental reasons why representation is important, and this is because it is the only way in which an accused person can communicate pertinent information about themselves which is material to the legal process. It is submitted that these two fundamental values of representation are important firstly for the legitimacy of the criminal justice system and secondly for instrumental reasons.

In law, we often think of representation as meaning the appearance of a solicitor for an accused person, either at a police station or in court. But this raises the question of whether this is a component part of representation or whether representation can be achieved by the accused alone. It may be that representation can be achieved by the accused alone in the first, more theoretical sense. But in the more instrumental sense, the accused person will not always be able to represent their views. Here we must consider the lack of knowledge and expertise of many accused persons in relation to criminal proceedings. It can be fairly stated that many accused persons are unlikely to be aware of the possibility of acquittal, of the Crown failing to raise proceedings against them should they refuse a DM or of the legal hurdles that the Crown must pass to successfully prosecute a case. An accused person may be unaware of defences which may be available to them or the possibility

[354] Hans Joas, 'Punishment and Respect: The Sacralization of the Person and Its Endangerment' (2008) 8 Journal of Classical Sociology 159.
[355] Anthony Raymond Duff and others, The Trial on Trial: Volume 3: Towards a Normative Theory of the Criminal Trial (Bloomsbury Publishing 2007) 4.

of mitigating the sentence imposed in court.[356] Without *legal* representation, there remains a distinct possibility that these matters, alongside the lack of safeguards for vulnerable accused persons, mean that the system of DMs could be considered as fundamentally flawed in terms of fairness.

The most important consideration here is that a lack of legal representation may lead to an inaccurate outcome, so in that sense these two components of fairness are closely related. We can see in the case of *Stephen Gayne v Procurator Fiscal Glasgow*, where the High Court, sitting as an appeal court, outlined the importance of legal representation, although disagreeing in the rate of pay for the solicitor, the court clearly outlines the fundamental importance of representation in a general sense.[357]

Indeed, in the HM Inspectorate of Prosecutions report in 2009, several cases were highlighted, within those sampled during their report, where fiscal fines had been issued to those who do not speak English with no translation of the fine offer given or where there was a detectable mental health issue.[358] This was highlighted again in the 2011 Scottish Government research, whereby more than one quarter of those having received a DM reported that they had a disability of both a physical and mental nature.[359] Whilst the figures available in the 2011 report only provide a combined figure of both physical and mental disability, we can envisage where a physical disability, such as blindness, would present issues of fairness in being able to read an offer of a DM. We can also further suggest that whilst not all mental disabilities may mean that the accused does not understand the notice of an offer of a DM, there will certainly be a proportion where the fairness of the notice could

[356] For an overview of the burdens on the Crown to prove a criminal allegation to the required standard see: Margaret Ross and others (eds) Walker and Walker: The Law of Evidence in Scotland (4th edn, Bloomsbury Academic 2015) ch 2.

[357] Stephen Gayne v Procurator Fiscal Glasgow [1999] HCJAC Appeal No 1206/99.

[358] HM Inspectorate of Prosecution in Scotland, Summary Justice Reform: Thematic Report on the Use of fiscal fines, (2009), 5.12 – 5.13.

[359] Richards, P., Richards, E., Devon, C., Morris, S. and Mellows-Facer, A., Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011). evaluation para 3.2.

validly be called into question, without the person receiving some form of assistance and representation. Following the HMIPS report above, it can be argued that these issues remain today, as we shall discover in this chapter when we discuss the Standard police report to COPFS. Thus, it is a central tenet of fairness that *legal* representation is available and accessible to all accused persons. As we shall come to discover when we examine the practical application of the principle of representation, the implications of accepting an offer of a DM are not something some accused persons are able to effectively understand on their own. In summary, legal representation is crucial to secure all the aspects of fairness which we are considering in this chapter. This has been accepted both by the United Nations and in domestic case law. Indeed, even in the earlier discussion in this research, in chapter 2, we acknowledged the Stewart committee's view that, in the proposed DM system, legal representation was considered an important safeguard.

The United Nations principles and guidelines on access to legal aid in criminal justice systems require the state to afford accused persons legal aid to fund representation at all stages of the criminal process. This is regarded as a fundamental consideration in any balanced legal system.[360] Scots law, at least since *Cadder*, has recognised the importance of the safeguards afforded by providing legal representation at the earliest possible stages in criminal proceedings.[361] Indeed, legal representation was described as not even being capable of mitigation because of other protections afforded in Scots law:

> There is room for a restriction of the right of access to a solicitor during the police interrogation, but only if there are compelling reasons in the light of the particular circumstances of the case which make the presence of a solicitor impracticable. The guarantees otherwise available are entirely commendable. But they are, in truth, incapable of removing the disadvantage that a detainee will suffer if, not having had access to a solicitor for advice before he is questioned by the police, he makes incriminating admissions or says something

[360] United Nations, Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (Report of the 3rd Committee A/67/458, UNODC 2012) para 14.

[361] Cadder v HM Advocate [2010] UKSC 43.

> which enables the police to obtain incriminating evidence from other sources which is then used against him at his trial. Much was made, of course, of the rule of Scots law that there must be corroboration of a confession by independent evidence. But there was independent evidence in Salduz. The reasoning in that case offers no prospect of its ruling being held not to apply because any confession must under Scots law be corroborated.[362]

The *obiter* comments in the *Cadder* decision above suggest there are compelling reasons for a solicitor to be present during the examination of an accused. This leaves a position that a solicitor being present during interview is viewed as essential, but not essential after a public prosecutor makes a case decision to offer an accused person a criminal sanction. This research argues that it is clear and obvious for the exact instrumental reasons expressed in *Cadder* that an accused person continues to receive representation after the offer of a DM is made. The subtle difference of the face-to-face interview requiring solicitor advice and a written letter from the public prosecutor not warranting the same protections does not stand up to any serious scrutiny. Thus, this research argues that the principles elicited in *Cadder* are just as important in the system of DMs in Scotland for the overarching fairness of the system to be maintained.

Thus, as has been set out in this subsection, representation, as a component of fairness, is necessary for the legitimacy of the criminal justice system and is critically important for instrumental reasons. Legitimacy might achieved by the accused representing their own views, but the instrumental argument for representation, this thesis has argued, can only be effectively met with *legal* representation.

Having established the principles by which this research assesses the theoretical basis of fairness, we now turn to the practical application in the system of DMs in Scotland.

[362] Cadder v HM Advocate [2010] UKSC 43 [50].

4.2 Applying the Principles to Direct Measures.

Having considered the components of the principle of fairness, we now move to the application of the identified criteria to the system of DMs in Scotland. The identified criteria will be considered and then applied to the system as it operates, considering what primary and secondary evidence is available to measure the DM system and its overall adherence to the principles of fairness.

The starting point is to acknowledge the work contained within the Scottish Government funded Richards evaluation, *Summary Justice Reform: evaluation of Direct Measures* which in 2011 was the first consideration of the DM system as a whole.[363] Some of the discusion below develops points that were considered in the Richards evaluation, although the discussion here is, it is argued, more detailed and also proceeds to propose measures that can address the issues raised. It is important to note, too, that whilst Richards research work provides valuable insights it is, at the time of writing, twelve years old.[364]

This Scottish Government funded evaluation project raised significant issues which are considered in more detail later in this section. What can be established and as this research shall demonstrate is that these issues in the Scottish DM system are not new and furthermore for the first time, they are examined against the principles of justice to understand the impact on the integrity of the justice system in Scotland.

4.2.1 Accuracy of Outcome.

Accuracy of outcome, as we have discovered, requires that only the factually guilty are subject to a criminal sanction; those who are not guilty, or where the facts of the evidence leave the public prosecutor in a position whereby the case cannot be proven, are not subject to a criminal sanction; and any error preference should be

[363] Richards, P., Richards, E., Devon, C., Morris, S. and Mellows-Facer, A., Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011). evaluation, Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011).

[364] In addition to the other limitations when dealing with small sample sizes discussed in this research.

given to not sanctioning the potentially innocent. In this section we shall examine the system of DMs against this fundamental component of the principle of fairness.

In respect of our practical consideration of the system of DMs, the starting point with the principle of accuracy of outcome is to consider the principle which requires that DMs should only be offered where there is a sufficiency of evidence that a crime has been committed and that it has been committed by the accused person.[365] The public prosecutor in Scotland, as was discussed in chapter 2, receives a report from the police, a Standard Police Report (SPR). The public prosecutor then applies the guidance provided by the Lord Advocate to case marking decisions before reaching a decision on how the complaint against the accused should proceed.

The SPR represents the starting point of criminal proceedings against an accused person. Therefore, it is essential that the SPR provides sufficient reliable and credible information to ensure that the basis of the decision of the public prosecutor is sound and results in an accurate outcome. It is important, given the consequences for the principle of accuracy of outcome, that there is confidence in the content and nature of the SPR. Can we have this level of confidence in the SPR? Given the evidence available, it is not possible to have the necessary level of confidence in the SPR as shall now be explained.

There are two main reports which support the view that there are concerns regarding the content of the SPR. Firstly, the Richards evaluation in their exploration and evaluation of the DM system in Scotland, received various levels of responses raising concerns about the information regarding accused persons in the questionnaire responses:

> JPs felt that the background information available to fiscals was limited. Fiscals are unable to order social enquiry reports (SERs), so JPs felt that by issuing DMs fiscals were not looking in enough depth at the issues behind the offending.[366] Defence agents agreed and felt that notably, there was

[365] See: Crown Office and Procurator Fiscal Service, 'Prosecution Code' (Publications, COPFS 1 May 2001) <www.copfs.gov.uk/publications/prosecution-code> accessed 8th October 2022.

[366] Justice of the Peace. Scotland's lowest level of Judge.

> insufficient information on means to pay, and on linking to enforcement information on whether previous fines and DMs had been paid.[367]

In addition, the Richards evaluation found that PFs also felt they would benefit from further information on the accused's circumstances and needs:

> [M]any fiscals said that they would welcome even better information given the number of issues to be considered (public interest, seriousness of the offence, previous convictions, impact on victims and witnesses, extent of damage or loss and the accused person's circumstances including any illnesses) …. offenders are not obliged to give the police information on means but officers will report for example employment status. While ability to pay is said to be 'not necessarily' a consideration under the guidance, a few fiscals said they had personally marked a case for a FF when they would not have done had they had more information about the nature of an assault, or a person's circumstances including means to pay.[368]

The Richards evaluation was, of course, some 12 years ago and matters may have improved, although the findings of this research discussed shortly suggest that this is not the case.

The second report is His Majesty's Inspectorate of Prosecution Scotland (HMIPS) [369] report on Summary Case Preparation.[370] HMIPS is the independent inspector of prosecution in Scotland charged with examining the system and operation of prosecution across Scotland. In 2012, their report examined the COPFS legal and

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[367] Richards, P., Richards, E., Devon, C., Morris, S. and Mellows-Facer, A. , Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011).evaluation, Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011) para 3.18, 28.

[368] Richards, P., Richards, E., Devon, C., Morris, S. and Mellows-Facer, A. , Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011).evaluation, Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011) para 3.22, 29.

[369] For More Information on HMIPS see – HM Inspectorate of Prosecution in Scotland, 'About Us: Our Purpose, Vision and Values' (September 2023) <www.prosecutioninspectorate.scot/about-us/our-purpose> accessed 3 September 2023.

[370] HM Inspectorate of Prosecution in Scotland <https://www.prosecutioninspectorate.scot/publications/thematic-report-on-summary-case-preparation/> accessed 10 February 2024.

administrative management of summary cases across eight district fiscal offices, examining closed and open cases throughout the various summary case marking and preparation stages. This raised issues regarding SPRs and the information contained within them as only being a summary of the evidence available against an accused person.[371]

Given that the offer of a DM is made on the summary of evidence and matters contained within the SPR, we can surmise that these decisions are not taken based on fully informed opinion. As we see, from the HMIPS report, basic information on the accused such as first language, job status, exculpatory or mitigating circumstances is not always included in the SPR:[372]

> In a very small number of cases, it was not clear whether consideration had been given to the possibility that the offender suffered from mental health disorders…. Equally in again a very small number of cases apparent non-English-speaking accused were issued with fiscal fines without a translation being given.[373]

There is perhaps an argument here that this only happened in a small number of cases, but the HMIPS report only reveals this where information actually existed that the person did not speak English or where there was a mental impairment. Given the lack of recording of this information discovered during this research,[374] combined with the information from HMIPS whereby lack of English or mental impairment was recorded and the DM was still issued and issued in English, there is significant cause for concern. It is important to highlight that only 1500 cases were examined by HMIPS

[371] HM Inspectorate of Prosecution Scotland, 'Summary Case Preparation Thematic Report' (Scottish Government, August 2012) <www.prosecutioninspectorate.scot/media/ektnkatm/thematic-report-on-summary-case-preparation.pdf> accessed 26 April 2022.

[372] HM Inspectorate of Prosecution Scotland, 'Summary Case Preparation Thematic Report' (Scottish Government, August 2012) <www.prosecutioninspectorate.scot/media/ektnkatm/thematic-report-on-summary-case-preparation.pdf> accessed 26 April 2022.

[373] HM Inspectorate of Prosecution in Scotland, 'Summary Justice Reform Thematic Report on the Use of Compensation Offers and Combined fiscal fines and Compensation Offers' (Scottish Government, February 2010) 28 <https://www.prosecutioninspectorate.scot/media/lerhhcwc/thematic-report-on-the-use-of-compensation-offers-and-combined-fiscal-fines-and-compensation-offers.pdf> accessed 26 April 2022.

[374] See 4.2.1 within this research.

in their review, representing 40% of fiscal fines issued that month. Whilst in percentage terms the number may be small, when extrapolated there are a significant number of cases where this issue may arise and, even then, the inspection is unlikely to have identified all cases in which this was a problem.[375]

Further, given the long term and consistent criticism of the SPR process as far back as Moody and Tombs and as recently as the *Summary Justice Thematic Review of Summary Justice*, it can be fairly stated that these matters give continuing cause for concern when considering accuracy within this framework.[376]

All of these problems are compounded by the opt-out procedure. As noted in chapter 2, following the McInnes report, the system of DMs switched from an opt-in procedure (where the accused had to actively accept the DM) to an opt-out procedure (where the accused is deemed to accept the measure if they do not contest it within 28 days). The relevance of the guilt of the accused is left aside and the offer deemed accepted.[377] Within the opt-out procedure there is no active participation of the accused required, therefore, it is fair to say guilt is not relevant to the imposition or acceptance of a DM. There is no formal requirement for the burden of proof beyond a reasonable doubt to be established before a DM can be issued.[378] Nor is there a requirement for an accused person to formally acknowledge guilt prior to a DM becoming effective. The acknowledgement of guilt under the Stewart committee recommendations came from the active participation of the accused person in accepting the DM and the committee saw the opt-in procedure as

[375] HM Inspectorate of Prosecution in Scotland, 'Summary Justice Reform Thematic Report on the Use of Compensation Offers and Combined fiscal fines and Compensation Offers' (Scottish Government, February 2010) 28 <https://www.prosecutioninspectorate.scot/media/lerhhcwc/thematic-report-on-the-use-of-compensation-offers-and-combined-fiscal-fines-and-compensation-offers.pdf> accessed 26 April 2022.

[376] HM Inspectorate of Prosecution Scotland, 'Summary Case Preparation Thematic Report' (Scottish Government, August 2012) <www.prosecutioninspectorate.scot/media/ektnkatm/thematic-report-on-summary-case-preparation.pdf> accessed 26 April 2022.

[377] Or at least the active statement which may attribute guilt of formally accepting the DM.

[378] There is a burden on the Crown to ensure there is a bare sufficiency of evidence contained within the Lord Advocates guidance to prosecutors.

the ultimate safeguard protecting the accused from unfairness.[379] Whilst the opt-in procedure allowed at least an appearance of the acceptance of guilt, since the change to opt-out this at least creates an impression that the acceptance of guilt is no longer required.

As has been established from the exploration above there may be problems with accuracy of outcome within the DM System in Scotland. This being the case, however, we must consider whether there are adequate safeguards which render these fears over accuracy of outcome as unfounded. There are two possible safeguards which this research has identified: the reversal procedure; and the ability of the accused to opt-out.

Turning to the first important of these two safeguards, the reversal procedure, it is clear that there is a process within COPFS that decisions to offer a DM or otherwise can be reversed prior to the issuing of them to the accused person, as part of the standard COPFS case marking review process.[380] This process is in effect where the case is double marked by two public prosecutors; it is given an initial case marking decision which is then reviewed and either upheld or the case marking decision changed. This being said, both public prosecutors are operating from the same information contained within the SPR, and if that is not accurate or is lacking important information, then double marking does not safeguard against this. This is a double check against any failure to consider the legal tests set out in the Lord Advocate's guidance. Additionally, double marking is a process that operates before the offer is made to the accused. When an offer is made by the public prosecutor to the accused person, the Crown Office is not in a position to withdraw the offer

[379] The active participation of the accused was seen as an essential safeguard see - Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 5.23.

[380] See – Lord Advocate's letter to Justice Committee of Scottish Parliament referring to first marking decisions <https://archive2021.parliament.scot/S5_JusticeCommittee/General%20Documents/20200902_LAtoAT_Fiscal_Fines_-_.pdf> accessed 29th April 2022. During the second marking phase or audit procedure a more senior public prosecutor can change the prosecutorial decision. This, however, is subject to audit being conducted or the case being selected for second marking. This research has been unable to establish a process or procedure whereby the accused can seek to have the case marking decision re-examined.

providing the accused person satisfies the terms of the offer.[381] The accused cannot ask for the decision to be reviewed by a second PF. Their only option is to actively reject the offer.

The second safeguarding measure, then, is that the accused can opt-out of the DM process. As this, in this researcher's view, is the most important safeguard, we should examine how effective it is in practice. There are five reasons why this safeguard is problematic: (1) the knowledge of the accused of stateable defences; (2) the ability of the accused to effectively challenge the DM; (3) the understanding of the accused of the offer and potential consequences of rejecting it; (4) the vulnerable accused; and (5) the coercive nature of the offer. In this section of this chapter, we shall consider reasons three and five with reasons one, two and four considered within the representation subsection at 4.2.4.

Turning to the third reason , the understanding of the accused of the offer of a DM, the ability of the accused person to understand the offer of a DM presents the system with intrinsic issues which require to be addressed. It has been established, in research, over many years that accused persons may not be able to read or write, speak English or have other mental/physical challenges which mean they may not be able to understand an offer of a DM.[382] These issues become more significant when we consider that people receiving the offer of a DM may have vulnerabilities. These vulnerabilities such as low literacy levels, language barriers and disabilities further add to concerns that an accused may not understand the offer of a DM, have capacity to respond to the offer or have the ability to actually reject an offer. The McInnes committee gave very little consideration to vulnerability, the impact upon the accused nor indeed any consideration that the accused simply lacks the ability to understand the offer or consequences of the offer due to vulnerability.[383]

[381] See HM Advocate v Paul Cooney [2022] HCJAC 10. This case refers to a no prosecution letter being binding, considering the offer of the direct measure contains a similar statement that if the conditions are satisfied the person shall not be prosecuted in court, the researcher is of the view mutatis mutandis.

[382] For one example of research in Scotland in this area, see Roger Houchin, "Social exclusion and imprisonment in Scotland." Glasgow: Glasgow Caledonian University [2005]

[383] See McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 11.25. The Committee merely state that a mechanism to prevent injustice

The Richards evaluation established that there were significant proportions of people accepting DMs who are vulnerable and may not understand the notices:

> …of the 72 people who answered the survey question, 17 (one quarter) considered that they had a disability…. of the 19 people interviewed, several described difficult circumstances at the time of the incident or that were on-going. These included mental and physical disabilities, receiving counselling, and alcohol dependencies.[384]

It should be acknowledged that a limitation of the methodology of the above report is that the vulnerabilities are self-identified and not confirmed independently. Therefore, whilst the person may identify as having a disability there may not actually be such a disability, or indeed the reverse that those with a disability are failing to disclose. This very fact combined with the lack of an ability to record disabilities and vulnerabilities remains concerning for the Scottish criminal justice system.

These concerns, regarding vulnerable accused persons, are further supported by Community Justice Scotland's report on firsthand experiences of the justice system, which examines the accused person's journey through the criminal justice system.[385] The Community Justice Scotland report collates and summarises the qualitative research conducted by this agency whereby they conducted 15 in depth interviews with persons who were actively engaged with, still navigating or had just completed engagement with the criminal justice system in Scotland and found that:[386]

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such as this is essential, without fundamentally dealing with what mechanisms are required to safeguard the vulnerable accused.

[384] Richards, P., Richards, E., Devon, C., Morris, S. and Mellows-Facer, A., Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011). evaluation) para 3.4, 26.

[385] Community Justice Scotland, 'Rules for Them and Rules for Us: First-hand Experiences of the Justice System in Scotland' (Research Report, January 2021) <communityjustice.scot/wp-content/uploads/2021/01/Rules-for-Them-and-Rules-for-Us.pdf> accessed 26 April 2022.

[386] Community Justice Scotland, 'Rules for Them and Rules for Us: First-hand Experiences of the Justice System in Scotland' (Research Report, January 2021) 9 – 12 <communityjustice.scot/wp-content/uploads/2021/01/Rules-for-Them-and-Rules-for-Us.pdf> accessed 26 April 2022.

> Lengthy, complex information in notices issued in writing by COPFS were described as hard to understand by many individuals, particularly those with literacy issues.[387]

The vulnerability of an accused person and the switch to opt-out rather than opt-in presents a fundamental challenge to the overarching fairness of the system of DMs. To investigate this further, FOI requests were submitted to Police Scotland, COPFS and the Scottish Courts and Tribunal Service (SCTS) to attempt to ascertain the extent of vulnerable persons coming into contact with the criminal justice system.

It has been established by an FOI request that, in court, translation services were used 25,668 times in the period between 2018 and 2021, in both solemn and summary proceedings.[388] SCTS refused to provide information within court records as to any other recorded vulnerabilities of accused persons under S37(1) of the Freedom of Information (Scotland) Act.

In order to compare and contrast this information, COPFS were asked three questions:

1. How many persons reported to COPFS for a criminal offence had an identifiable disability or vulnerability and were offered a DM?
2. How many accused persons offered a DM had been indicated as not having English as their first language in the Standard Police Report?
3. How many times has the letter offering a DM been issued in a non-standard (English) format?

COPFS advised in relation to question one, that there was no automated recording of a disability/vulnerability and any information regarding this which may be held

[387] Community Justice Scotland, 'Rules for Them and Rules for Us: First-hand Experiences of the Justice System in Scotland' (Research Report, January 2021) 4 <communityjustice.scot/wp-content/uploads/2021/01/Rules-for-Them-and-Rules-for-Us.pdf> accessed 26 April 2022.
[388] FOI Request, response SCTS 30th August 2022. SCTS were unable to provide information solely for summary cases.

would be within the note sections of each criminal report and thus they could not provide this information. In relation to question two, the same answer was provided, and also that this information is not recorded in a manner which could be extracted, if indeed it is held. In relation to the third question, COPFS advised that whilst it may be possible to issue a DM in an alternative format, the number of or if any were issued in an alternative format is not recorded on the COPFS database.[389] If we recall the discussion earlier in this chapter from the previous HMIPS reports it re-enforces why the lack of recording or demonstrable evidence that persons who have a DM imposed on them are capable of understanding the notice is concerning for a criminal justice system which considers fairness to the accused to be of importance.

Police Scotland advised that, in the period 2018 to 2021, 13,202 persons were marked in the national computer system as requiring translation services. Police Scotland were unable to advise how many persons required the use of translation services during the course of an interview under caution. Police Scotland was unable to advise how many SPRs to COPFS informed COPFS that the accused person's first language was not English. Police Scotland was able to advise that, in the period 2018 to 2021, 7,399 persons required an appropriate adult to be present during an interview or period in police custody.[390] It is important to note that there is no recording of whether an accused person can read or write, or any recording of a learning disability as a formal requirement to be completed within the SPR.

Whilst this information is interesting and concerning, what does it mean to the overall picture of fairness of the DM system in Scotland? The data allows us to draw some qualified conclusions. The first of these is that the failure of COPFS/Police Scotland to record translation and vulnerability needs of accused persons raises questions as to how their obligations under the Equality Act 2010 are met, let alone ensure that the system of DMs is used in a fair manner. Further, given the number of persons requiring translation services in the last three years alone, a failure to record or even know if and how an accused person has received a DM from COPFS in

[389] COPFS FOI Response, August 2022.

[390] Police Scotland, FOI Response August 2022.

a language that they can understand is a fundamental failure to ensure fairness in the system.[391] Combining this with the opt-out procedure, the lack of legal advice taken regarding DMs raises concerns that vulnerable persons by virtue of disability or lack of English could be discriminated against due to their lack of ability to process or understand the information given to them in comparison to a person without a disability or who speaks English as a first language.[392] To give an example of this: Accused Person A, who only speaks Italian uses a translation service during Police interview, and they are reported to COPFS. This accused person's offences are deemed suitable for a DM. Accused person A is issued an offer of a fiscal fine in English, which becomes a registered fine after 28 days. We know that it is highly unlikely that this person would seek legal advice as they perhaps do not even know they need it.[393] Where are the safeguards in this system to protect the most vulnerable in society and ensure fairness? A vulnerable accused person receiving legal advice would certainly, at least, mitigate the vulnerability of the accused, but as we shall discover when we discuss representation this is simply not happening at a level which would offer an adequate safeguard. This leaves us with serious concerns about accuracy of outcome in relation to DMs, especially given that this research will also show that very few accused persons seek legal advice before accepting a DM.[394]

Having considered the understanding of the accused of the offer of a DM, we can now turn to the fifth reason why the opt-out process is an inadequate safeguard: the coercive nature of the offer. The accused may be aware that they are factually innocent of the offence, but they may nonetheless not challenge the DM because of the coercive nature of the offer. What is the coercive nature of the offer? The most coercive aspect of the offer of a DM is contained within the offer letter itself. The opening paragraph of that letter states that the Crown has a sufficiency of evidence to bring proceedings against the accused and that if the accused rejects the offer of

[391] and a failure to ensure the accused can have a voice in the process see chapters 4.1.4 and 4.2.4.
[392] The lack of legal advice regarding DMs is discussed in the representation section below.

[393] See chapter 4.2.4 within this research.

[394] See chapter 4.2.4 for discussion and Table 11 for statistics.

the DM, this will lead to court proceedings being taken against them. This paragraph can be seen as coercive in that the reference to the sufficiency of evidence could be interpreted as the court process being very unlikely to lead to an acquittal, so the accused may feel that they are better off accepting the DM, as at least, then the matter will be quickly closed and will not be hanging over them. In addition, the accused may wish to avoid a court process for other reasons.[395] As was explored earlier, DMs were intended not to carry the stigma of a court-imposed criminal sanction, so there is a stigma-related coercion operating on the accused that, should they reject the offer of the DM, they face the stigma of a court proceeding/trial, potential media coverage of the proceeding and every impact that this may have. They may also fear that the sanction imposed at court may be more severe than the one included in the offer.

Some have suggested that coercive approaches in sentencing discounting are acceptable as they tackle the backlog of time delays, an issue discussed in chapter 5 of this research. For example, Leverick, when discussing sentencing discounts, suggests that:

> If a significant proportion of accused can be persuaded through the offer of a sentence discount to plead guilty at an early stage, then this could go some way to tackling such delays in the system.[396]

The question is, however, whether the coercive nature of the offer is fair and acceptable. The short answer to this in this researcher's view is that it is not, at least not in the system of DMs as it stands at present with a lack of safeguards because there is a real danger that a non-understanding accused unwittingly "accepts" a DM, or acceptance for convenience, or fear of court conviction occurs. It is not even just the view of this researcher; it is the view of the accused who have accepted the DM as the Richards evaluation found:

[395] There are parallels here with the system of sentencing discount, charge and plea bargaining, see: Lucy Welsh, Layla Skinns and Andrew Sanders, Sanders & Young's Criminal Justice (5th edn, OUP 2021) ch 7.

[396] Fiona Leverick, 'Tensions and Balances, Costs and Rewards: the Sentence Discount in Scotland' (2004) 8(3) Edinburgh Law Review 360, 376.

> People were asked if they felt 'pressurised' to accept the penalty in any way, and around a dozen people said that they did. The reasons given were the risk of going to court, of getting a bigger fine, of being imprisoned or of having a record. One person felt pressurised because they did not have a lawyer and another because of their treatment by the police. The view of these people can be summed up by one who said "They threaten you with a worse charge".[397]

It should be again re-iterated that there were only 57 respondents to this question in the Richards evaluation, but whilst it is a small representative sample, it still confirms, even in this limited sense, the overarching concern raised in this research.[398]

To conclude our examination of accuracy of outcome, there are significant concerns over whether the principle of accuracy of outcome is being upheld in the system of DMs as it cannot be said with any significant level of confidence that they are **only** being accepted by persons who are factually guilty. This stems from flaws in the SPR process meaning the PF may not be in possession of all the information which is relevant to innocence or guilt. This argument may be countered by stating that the factually innocent accused can simply reject the offer and ask for a court process. This is not an effective safeguard as the pressure to accept may be too coercive, even for an innocent accused. In addition, the accused may not realise they are factually innocent, that is, they have a stateable defence. The opt-out process means that an accused person does not even have to formally acknowledge guilt and increases the danger that factually innocent people do not opt-out as they cannot understand the offer in the first place.

4.2.2 Consistency.

Having considered the practical application of the principle of accuracy of outcome, we now turn to the application of consistency in the system of DMs in Scotland. In

[397] Richards, P., Richards, E., Devon, C., Morris, S. and Mellows-Facer, A., Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011). evaluation para 3.44, 34.

[398] Richards, P., Richards, E., Devon, C., Morris, S. and Mellows-Facer, A., Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011). evaluation para 3.44, 34.

this sub-section we shall address two separate issues which may exist in the system. First, that individual PFs make different decisions when faced with exactly the same information, or information with insignificant differences, and secondly that information is missing from the SPR to the COPFS, leading to the COPFS not having the fullest possible knowledge of a case prior to reaching a case marking decision. Both of these issues can lead to inconsistency of outcome.

Criminal reports in Scotland are assessed by the COPFS in Scotland via the centralised case marking hubs.[399] The processing of each criminal report by the public prosecutor requires that each report is individually examined, "marked", and decisions are taken within or outwith the Lord Advocate's guidance. Whilst this research does not expressly consider the case marking system by an examination of the individual cases against the Lord Advocate's guidance and the exact guidance is not available for public examination,[400] it is possible by considering previous research into the case marking system and statistical analysis to draw conclusions. [401]

Turning to the first issue, that individual PFs may make different decisions when faced with the same information, Moody and Tombs established that the decision-making processes of fiscals vary widely in terms of the information they receive from reporting agencies and the individual fiscals' perceptions of their own roles. Moody and Tombs established this information from their interviews with individual fiscals and their own observations of decisions taken on particular criminal reports and the variances between individual PFs depute.

[399] Crown Office and Procurator Fiscal Service, 'Strategic Plan 2015 – 2018' (COPFS 3 February 2015) <www.scottishlegal.com/articles/copfs-strategic-plan-2015-2018-aims-improve-quality-justice-victims-witnesses> accessed 21st March 2022.

[400] The full guidance is not available for public examination for reasons which do not stand up to any form of serious scrutiny. See Dan McManus, 'Scotland and the alternative disposal: Thinking differently' (LLM(R) thesis, University of Glasgow 2021).

[401] See Crown Office and Procurator Fiscal Service, 'Publications: Prosecution Policy and Guidance' (COPFS 2021) <www.copfs.gov.uk/publications/?before=&after=&publication=3162&publication=3165&keyword> accessed 12 December 2021.

Three comments in particular are important in respect of decision-making processes:

> The apparent freedom which the Scottish prosecutor has in marking is restricted by the way in which other criminal justice agencies operate and the increase bureaucratisation of criminal justice. In addition, the nature of the fiscal service itself and fiscals' own perceptions of their role as prosecutors' structure prosecutorial decision making……. It is clear that fiscals vary considerably in their exercise of the no pro-option and do not necessarily deal with similar types of offences or accused person in the same way……. Variation is accepted as inevitable: 'if you start to look for uniformity you tread on dangerous ground…you have got to take account of the variability of fiscals and the varying geographical differences and mores of the area'. There are differences between offices: 'there are bound to be regional variations. In the Western Isles context behaviour A is really serious, behaviour B is not serious. In Edinburgh, it is the other way round'; and between fiscals: 'the criteria in each district must vary according to the attitudes of the fiscal'; all fiscals are individuals, 'they all have their particular idiosyncrasies'. For example, a fiscal may have his own way of classifying assaults.[402]

These very findings by Moody and Tombs raise questions regarding consistency and how this might apply in the decision to offer a DM. If a decision is subject to the "attitudes" of a particular fiscal, it raises the question of luck as to the outcome that an accused person may receive.[403]

Although Moody and Tombs published their research forty years ago, consistency concerns have remained. These can be supported in more recent times by HMIPS, who make comments regarding the lack of standardised audit and cross checking at initial case marking stage. The report of the Inspectorate states that:

[402] Susan R Moody and Jacqueline Tombs, Prosecution in the Public Interest (Scottish Academic Press 1982) 50, 52-53, 79.

[403] For a full discussion of luck in the criminal law, see Kimberly D Kessler, 'Role of Luck in the Criminal Law' (1993) 142 University of Pennsylvania Law Review 2183.

> We canvassed views from some of the legal managers around the country about their practice in reviewing cases at audit. There were differing approaches. A couple of managers indicated to us that it was their practice to review the choice of forum and check that the charges were properly drafted in FOS audit but would not look at the instructions for trial preparation at this audit. Others claimed to review all aspects of the marking work including the trial preparation work. In one office we learned that FOS auditing was not being undertaken at all due to the resource intensive nature of this monitoring. It was impossible to tell from the IT system, even where the audit had clearly taken place, to what extent the case preparation element had been reviewed.[404]

Indeed, HMIPS reported that early court diets were being used to weed out inappropriate decisions to prosecute. Dubious decisions only arise where there has been a fundamental failure to give proper and full consideration to the facts.

> We found that preparation for intermediate diets was usually the first occasion (after the case had been marked) that any thought was given to the case as a whole. Pressure to prepare for such diets we felt led to a culture of preparing for the intermediate diet itself rather than taking a holistic view of the case. It was apparent it was being used as a 'long stop' to weed out dubious decisions to prosecute in the first place.[405]

We can understand, from the HMIPS report, that there are safeguards in the court process itself against dubious decision making by the public prosecutor which can be "caught" at the Intermediate Diet stage, despite the imperfections of this in

[404] HM Inspectorate of Prosecution Scotland, Thematic Report on Summary Case Preparation (Inspection Report, The Scottish Government August 2012) para 158, 28.

[405] Her Majesty's Inspectorate of Prosecution Scotland, Thematic Report on Summary Case Preparation (Inspection Report, The Scottish Government August 2012).

itself.[406] This protection, to weed out dubious decisions, does not exist as a safeguard in the DM system as the case never comes before a court unless the accused opts out of the DM.

Concerns have previously been raised over the consistency of approach between local prosecutors' offices throughout Scotland and it has been confirmed that these inconsistencies have continued since the creation of the centralised marking hub system.[407] Central marking hubs were created to improve consistency at the outset of the processing of criminal complaints.[408] Given that the concerns recently expressed still remain it is debateable that there has been any improvement in the consistency of case marking.[409]

Prior to turning to the second issue within the subsection, it is useful to outline exactly what is contained within the SPR and when certain information is provided to COPFS. The Police Scotland Standard Operating Procedure (SOP) outlines what information is provided to COPFS and when. For a summary case, whereby a police officer believes a summary offence has been committed, the SPR should be completed which provides a description of the locus, a description of the events, any medical evidence which may be available, any admissions made in interview or incriminating statements, the details of the police caution and charge and a summary of witness evidence available.[410] The initial summary of evidence provided to the COPFS is generally used to make case marking decisions and full statements from witnesses are not provided. Indeed, as the SOP outlines:

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[406] An Intermediary Diet is a pre-trial case hearing at which point the court enquiries into the state of preparation of both the crown and the defence agents for trial. It further allows changes of pleas or discontinuation of a case.

[407] See Dan McManus, 'Scotland and the alternative disposal: Thinking Differently' (LLM(R) thesis, University of Glasgow 2021).

[408] Crown Office and Procurator Fiscal Service, 'Strategic Plan 2015 – 2018' (COPFS 3 February 2015) <www.scottishlegal.com/articles/copfs-strategic-plan-2015-2018-aims-improve-quality-justice-victims-witnesses> accessed 21 March 2022.

[409] See Dan McManus, 'Scotland and the alternative disposal: Thinking Differently' (LLM(R) thesis, University of Glasgow 2021).

[410] Police Scotland, 'Case Reporting: Standard Operating Procedure' (Official Publication Scheme, Police Scotland 24 July 2018) <www.scotland.police.uk/spa-media/s5mj2mwo/case-reporting-sop.pdf> accessed 3 September 2023.

(iii) In summary custody cases, all statements should be submitted within 7 calendar days of the accused's plea of not guilty being recorded by the court.
(iv) In summary bail/Ordained to Appear cases, statements should be submitted within 28 calendar days of the accused's plea of not guilty being tendered.[411]

Turning to the second issue considered within this subsection, the information provided to the COPFS via the SPR, HMIPS have raised concerns that in many cases PFs solely rely on the SPR in making decisions on particular cases, without fully considering all of the available evidence, as outlined in the preceding two paragraphs, and thus only perceive the case through the lens of the reporting officer:

> The cases where full statements were read tended to be cases which were not straightforward or where the Fiscal had highlighted issues from the SPR. In terms of adding value to the case and in terms of legal analysis a reading of the full statements is essential. The SPR is the version of events filtered through the mind of the reporting officer. The full statements are the version of events in the words of the witness themselves. There is no substitute for reading these in preparing a case for trial. The reporting officer in summarising the evidence may have glossed over or omitted facts as spoken to by the witness which could be pivotal to the conduct of the trial or important in the context of agreement of evidence which will be missed if the full statements are not read. This is as likely in a simple case as it is in a complex case. Additional witnesses may need to be cited and others countermanded.[412]

The difficulty arising, in terms of consistency, is that one PF who is in possession of and reads the full statements is in a better position to assess the appropriate outcome of the case compared to the situation of another PF having a summarised

[411] Police Scotland, 'Case Reporting: Standard Operating Procedure' para 7.1.1(iv) (Official Publication Scheme, Police Scotland 24 July 2018 <www.scotland.police.uk/spa-media/s5mj2mwo/case-reporting-sop.pdf> accessed 3 September 2023.

[412] Her Majesty's Inspectorate of Prosecution Scotland, Thematic Report on Summary Case Preparation (Inspection Report, The Scottish Government, August 2012) 58 – 59.

version through the lens of a police officer.[413] This raises issues not just in terms of consistency, but also in terms of accuracy of outcome. Thus, in both academic research and in the 2018 review, considered above, we are faced with evidence that consistency has been and remains a significant issue in COPFS, with case decisions being made at times with only a summary of a case.[414] It is the understanding established by this research, in summary cases, that the case marking decision is taken on the basis of the SPR and without full statements being provided by the reporting officer.[415] Thus, the dependency on the summary of the police officer and the lack of full statements is likely to lead to situations whereby different decisions on similar cases will be reached on the basis of incomplete information and information tainted by a partial view of the case.

Therefore, it can be concluded that there are two issues; first, inconsistent decisions *per se*; and second, inconsistent decisions because of missing information being provided to COPFS. Although acknowledging that elements of the following conclusion is formed, partially, from a report from 2012, we can conclude then that in terms of consistency in the DM system, there may be fundamental issues contributing to the overarching question of fairness which need to be addressed in the consideration of the development of the system of DMs in Scotland, which this research seeks to address in chapter 7. Prior to turning to these considerations, we now consider the application of the principles of proportionality and parsimony.

[413] This raises issues not just in terms of consistency, but also in terms of accuracy of outcome.
[414] There is widespread discussion on the elements of luck and chance in the prosecution of criminal offences and whilst it is not possible within this research to discuss the impact of this see – Di Yang, 'Luck in Crime and Punishment: Essays in Metaphysics and Legal Theory' (PhD thesis, University of Edinburgh 2018).

[415] A useful map of this process is available from Community Justice Scotland, 'Scottish Justice System: Fiscal Direct Measure' <communityjustice.scot/scottish_justice_system/process/fiscal-direct-measure> accessed 25 November 2022. In addition - HM Inspectorate of Prosecution Scotland, Thematic Report on Summary Case Preparation (Inspection Report, The Scottish Government August 2012) provides a commentary on the stages at which full statements are sought, when the case is cited for court.

4.2.3 Proportionality/Parsimony.

Proportionality requires that a criminal sanction should reflect the seriousness of the offence (however this is measured) and be neither too severe nor too lenient. Parsimony requires that the criminal sanction should only be to the level required to serve the purposes of the criminal sanction, as discussed in chapter 3. In this subsection we move to the practical consideration of proportionality and parsimony.

Turning first to proportionality, both the Stewart committee and the McInnes report highlighted that the use of DMs for minor offences with the available sanctions being at the lower end of those available to the summary court were generally felt to be a proportionate response to minor offending. Indeed, the Stewart committee's view was that the whole court process and sentencing may be disproportionate to low level offending behaviour.[416] Assuming that we do not have infinite resources, this view, perhaps, is one which can be accepted.

If an accused fully and freely accepts guilt, the criminal sanction is proportionate to the behaviour and the conduct is of a level which renders the imposition of the criminal sanction within the levels of the DM scheme, then it is fair to accept that DMs when used for minor offences are a proportionate response. This may not, however, be the definitive reality of the practical operation of the system in Scotland. As this research has noted, there are issues surrounding the admission of guilt which were explored in the accuracy of outcome element of this chapter, where it was argued that we cannot be confident that only the factually guilty are accepting DMs. There are also further issues surrounding the definition of minor offending in Scotland, which are now considered.

It is argued that DMs are proportionate, in theory, because they are supposed to be offered only in relation to very minor offending behaviour. Indeed, this is supported by the Policy Memorandum, introducing the Criminal Proceedings etc. (Reform)

[416] See Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) paras 2.17 - 2.18.

(Scotland) Bill, to the Scottish Parliament which discussed the developments to the DM system following the McInnes committee.

> It is important that the penalty imposed in respect of an offence is proportionate. It is also important that court time is used effectively. A court intervention, which is a resource intensive and often lengthy process, should only be used in cases where the severity of the offence clearly requires it, the accusation is genuinely in dispute or where there are circumstances relating to the offender (such as their previous record) that make a court disposal appropriate. In cases of minor offending a quick, rigorously enforced and proportionate…[417]

As the policy memorandum states, then, that the aim was to make DMs more widely available and more flexible as they are proportionate as we do have limited resources in the criminal justice system and therefore it is not unreasonable that the lowest level of offending is dealt with outwith the court setting, assuming all other components of fairness are satisfied. Whilst this is all very well in theory, in practice this is very difficult to apply as it is difficult to reach consensus on what is meant by seriousness of an offence.

It can be said, as a starting point, that what has been considered a minor offence for the purpose of the DM system has changed over time. As was outlined, in chapter 2 of this research, the DM was originally only offered for offences previously prosecuted in the District/Justice of the Peace court but following the systems developments can now be offered for any offence for which a summary prosecution is competent.

The legislative test, however, does not help us very much in determining when an offence is 'minor', as there are few offences which *must* be prosecuted under solemn procedure.[418] A consensus on the point at which an offence becomes too

[417] Policy Memorandum for SP Bill 55 Criminal Proceedings etc (Reform) (Scotland) Bill [as introduced] Session 2 (2006) 45.

[418] Whilst traditionally only pleas of the Crown are required to be tried under the solemn procedure. The pleas of the Crown are Murder, treason and rape. This being true generally what would be accepted by most as the most serious offences are tried under the solemn procedure.

serious to ever be offered a DM would provide, perhaps, a helpful guide but alas it is not published or available for examination.[419]

This difficulty is further exacerbated in the Scottish context as a single common law offence, such as an assault, can cover a wide range of behaviour. An assault can involve anything from a light push to a person causing them to fall to the ground to an assault whereby the accused inflicts numerous blows with the fist and leaves the person unconscious.[420] Indeed, as acknowledged in chapter 2, the Stewart committee avoided defining conduct which was to be expressly considered as minor.[421] Whilst this research does not require to define this fully, within the researcher's masters thesis research consideration was given to the introduction of a similar system of automated offence grading. The masters research considered that this could achieve a greater consistency and strive towards improvement in fairness withing the Scottish system of DMs, as this research had established those offences with a *nomen juris* of assault, possession of drugs and theft had been given a DM.[422]

Ultimately the COPFS are guided only by the Lord Advocate's prosecution guidance in circumstances where a DM can be offered. Whilst the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 made significant changes to the Criminal Procedure (Scotland) Act 1995 in respect of the management of the fiscal fine to include the opt out procedure and consequential amendments, it makes no reference whatsoever to the discretion and its operation by the COPFS in summary proceedings matters.[423]

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[419] The current COPFS guidelines for applying a direct measure are redacted from the prosecutor's manual published and it is unclear how this guidance was created, is measured, and applied. See Crown Office and Procurator Fiscal Service, 'Prosecution Code' (Publications, COPFS 1 May 2001) <www.copfs.gov.uk/publications/prosecution-code/html/> accessed 10 December 2022.

[420] See Andrew M Cubie, Scots Criminal Law (3rd edn, Bloomsbury 2010) para 9.1, 141.

[421] The case marking system of the Netherlands provides a consideration for a different methodology here, See chapter 6.

[422] See Dan McManus, 'Scotland and the Alternative Disposal: Thinking differently' (LLM(R) thesis, University of Glasgow 2021).

[423] For a Detailed explanation of the amendments made to the Act to permit the changes described in this research see – Explanatory Notes to the SP Criminal Proceedings etc (Reform) (Scotland) Bill [as introduced] Session 2 2006.

In the researcher's masters research, attempts to uncover the exact limitations applied by COPFS when DMs cannot be offered, the circumstances where it will never be offered, and the principles used to make such a determination, was criticised but, as at the time of writing these concerns remain valid and concerning.[424] COPFS will not publish the guidance regarding this so as to avoid an accused person adjusting more serious offending to minor offending in terms of the guidance to ensure the punishment is likely to be a DM.[425] It has though generally been accepted that DMs would not be offered for offending behaviour which would be prosecuted under solemn proceedings. Indeed, even in early academic data the solemn criminal proceedings data was removed prior to calculating the percentage of criminal reports receiving a DM.[426]

As was identified in the theoretical discussion, there is a further consideration. In Ashworth and Zedner's discussion, there is a suggestion that the court process may be somewhat unnecessary for people who are willing to plead guilty to minor offences.[427] This is a position, it is argued, that cannot be fully accepted when balanced against the individual circumstances of matters such as offending history of the accused. It is right and proper that some offenders face court for their offences, whereby the offending behaviours are deemed to be so serious that a DM would be unsuitable. There is a legitimate argument that for minor offences court may be disproportionate whereby the accused accepts guilt. Accepting this as a basis for proceeding, then, we must ensure that the sanction to which the accused becomes subject to is in line with the principle of parsimony, but also proportionate to the offence.

[424] Dan McManus, 'Scotland and the Alternative Disposal: Thinking differently' (LLM(R) thesis, University of Glasgow 2021) ch 4.3.

[425] Crown Office and Procurator Fiscal Service, 'Prosecution Code' (Publications, COPFS 1 May 2001) <www.copfs.gov.uk/publications/prosecution-code/html/> accessed 10 December 2022.

[426] See Peter Duff, 'The Prosecutor Fine and Social Control: The Introduction of the fiscal fine to Scotland' (1993) 33 The British Journal of Criminology 481, 486.

[427] Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime Procedure and Sanctions' (2008) 2 Criminal Law and Philosophy 21, 23.

In order to do this, we can assess the levels of the most common financial DM sanctions used in Scotland, the fiscal fine and compensation orders. This information is presented in Table 9 below:

Table 9: Average fine & compensation DM V court between 2012-13 and 2020-21[428]

Type of disposal	12/13	13/14	14/15	15/16	16/17	17/18	18/19	19/20	20/21
Court Based Average Fine (£)	200	200	180	200	200	200	230	230	240
fiscal fine Average (£)	96	94	100	105	112	114	108	118	124
Average Court Based Compensation (£)	200	200	200	200	250	290	250	250	250
Average DM Compensation (£)	195	202	206	184	182	210	251	231	235

Pertinent information can be drawn from this data in relation to the principle of parsimony. First, the level of the fiscal fine is significantly below that of the average court fine. This aligns with the principles of parsimony and proportionality as it would suggest that the offences being disposed of are of a less serious nature than those disposed of in court. Thus, we can confirm in respect of fines that the proportionate fine when considered with the seriousness of the offence appears to be correct; fiscal fine = less serious = smaller fine, court proceedings = more serious = higher fine.

Second, we can consider the average compensation figure from court versus the DM. These figures show less of a differential and indeed in some years the average compensation order figure has been higher for DMs than the average court figure. This would tend to suggest that there is a question of whether the level of compensation used by the public prosecutor is potentially too high for the "minor" offences where the DM is used versus court-imposed compensation orders. Given

[428] Adapted from 2020 – 2021 Criminal Statistics in Scottish Government, (A National Statistics Publication, 21 June 2022) <www.gov.scot/publications/criminal-proceedings-scotland-2020-21/> accessed 19 August 2023; COPFS FOI July 2022.

that the fine available to the public prosecutor is to the value of £300 and the compensation amount is a maximum of £5,000, it could be suggested that the system of DMs are not being utilised in the number of cases that they could be, especially considering the court based disposals for both compensation and fines, averages, are both within the remit of the fiscal fine disposal.[429] This may suggest that if the levels for DMs were set to be proportionate and the levels to which they are used are consistently below this, then some cases may be disproportionately being taken to court when a more proportionate response would be to utilise the full range of the DM levels and vice versa. This cannot be resolved until a mechanism of defining suitable "minor offences" is identified, something which we explore in chapter 7 of this research when the case marking system is discussed further.

A further issue of utilising the DMs to the most appropriate level is that of net-widening. As identified by Cohen, net-widening is the expansion of social control over individuals whereby previously the state would not seek to impose a control on the individual.[430] Net-widening may be in issue whereby conduct which previously would not have been subject of a criminal sanction (when DMs did not exist) now falls within the scope of the DM system. We see the first indication of this in the finding of Moody and Tombs that some fiscals are inclined to be stuck in the quandary of 'too serious to do nothing and not serious enough for court', a gap in the then operation of the criminal justice system which the system of DMs could certainly fill but raises questions of parsimony and proportionality.[431] As argued, by Peter Duff, DMs have widened the effects of the criminal sanction upon those who previously would not have been subject to a criminal sanction which presents us with a quandary in relation to DMs and the principle of parsimony.[432] Peter Duff argues that following an initial abundance of welcoming noises about diverting people away from the criminal justice system the reality has been reflected in a growing unease

[429] This limit was increased, from £300 - £500, during 2020 due to the covid 19 pandemic, at the time of writing it is unclear whether this will remain a permanent change.
[430] Stanley Cohen, Vision of Social Control (Polity Press, 1985) 41-42.

[431] Susan R Moody and Jacqueline Tombs, Prosecution in the Public Interest (Scottish Academic Press 1982) ch 4.

[432] Peter Duff, 'The Prosecutor Fine and Social Control: The Introduction of the fiscal fine to Scotland' (1993) 33 The British Journal of Criminology 481.

amongst criminologists about the net widening effects of the system.[433] Indeed the quandary of the DMs and the principle of parsimony requires further discussion beyond the early exploration of Peter Duff.

As has just been discussed, there is a quandary presented by the introduction of DMs to deal with conduct which was previously not subject to a criminal sanction and was more likely to be dealt with via the issuing of no proceedings against an accused or a simple warning letter.[434] Can this difficulty be substantiated and is there evidence that the principle of parsimony is compromised by the system of DMs? In the Richards evaluation, public prosecutors interviewed suggested that this may have happened:

> Some fiscals said that some 'no action/no proceedings' (see below) markings might now be marked DM but gave only hypothetical examples. One was a previous no pro on grounds of disproportionate cost or public interest, not worth putting to the JP court, such as non-payment of a £20 taxi fare which might now get an FCO. Similarly, where a case did not warrant going to court in the past, a PF could now say to the accused that the behaviour was unacceptable. But interviewees had not themselves done this or seen evidence of this.[435]

Indeed, even early criminal law textbooks, following the introduction of the DMs, suggest that the fiscal fine is to be used to fill the gap between not serious enough for court but too serious to let go:

[433] Peter Duff, 'The Prosecutor Fine and Social Control: The Introduction of the fiscal fine to Scotland' (1993) 33 The British Journal of Criminology 481.

[434] For Further on the net-widening effects on DMs, see - Peter Duff, 'The Prosecutor Fine and Social Control: The Introduction of the fiscal fine to Scotland' (1993) 33 The British Journal of Criminology 481.

[435] Richards, P., Richards, E., Devon, C., Morris, S. and Mellows-Facer, A., Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011). evaluation. para 4.4, 43.

> It is envisaged that fiscal fines will be a halfway house to be used in cases which merit more than a simple warning but yet do not merit the full paraphernalia of prosecution.[436]

Can these positions be supported? This research can suggest that the effects of net widening can be supported by examining the statistical outcomes of cases. Table 10, below, sets out the number of cases disposed of by COPFS, the type of disposal used and the overall COPFS disposal as a percentage of the type. Table 10 shows the position in 1987, in relation to the number of cases whereby no further action was taken and there after an examination between 2012 to 2021 showing the development of DMs and its relation to the NFA figures. Table 10 ultimately suggests the view in the Richards evaluation in the quote above is supported. Whilst not falling into the trap of assuming that correlation gives causation, it at least can give an indicative position when compared to historical data. Given the unique nature of each criminal offence the ability to be categorical from the statistical analysis is limited.

As can be established from examining Table 10, below, cases which previously were subject to a no prosecution letter or a written warning letter and which now receive a DM are being brought within the realm of criminal sanction, whereby previously they would not have been. This may well be an indication that DMs fall foul of the principle of parsimony. We can see further in Table 10 that the percentage of no further action (NFA) cases has hovered between 9% and 12%, but as compared to the NFA figures from 1987 we can see a substantial difference, from 16.7% in 1987 or 59,019 cases.[437] Therefore, it can be seen from 1987 to 2019-2020 where there is a 5% percentage point reduction (added to the number of cases reducing in the period), that this represents a significant drop in the number of cases being marked as NFA following the introduction of DMs.

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[436] Albert V Sheenan and David Dickson, Criminal Procedure (Butterworths 1990) 73.

[437] Peter Duff, 'The Prosecutor Fine and Social Control: The Introduction of the fiscal fine to Scotland' (1993) 33 The British Journal of Criminology 481.

Table 10: All COPFS Direct Measure disposals between 2012-13 and 2020-21[438]

Type of disposal	1987	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21
All COPFS disposals		**87,591**	**82,357**	**63,116**	**62,461**	**41,823**	**41,835**	**35,620**	**36,459**	**34,078**
Fiscal fine		47,969	47,259	36,314	34,477	21,825	22,693	18,460	18,366	13,242
As % of Overall COPFS Disposal		**55**	**57**	**58**	**55**	**52**	**54**	**52**	**50**	**39**
Fiscal fixed penalty		21,669	23,467	15,488	10,748	8,430	6,546	6,977	7,959	10,790
As % of Overall COPFS Disposal		**25**	**28**	**25**	**17**	**20**	**16**	**20**	**22**	**32**
Fiscal warning		14,526	8,863	8,698	14,041	8,665	9,390	6,216	5,662	6,974
As % of Overall COPFS Disposal		**17**	**11**	**14**	**22**	**21**	**22**	**17**	**16**	**20**
Fiscal combined fine plus compensation		2,334	1,930	1,986	2,671	2,217	1,979	3,180	3,844	2,100
As % of Overall COPFS Disposal		**3**	**2**	**3**	**4**	**5**	**5**	**9**	**11**	**6**
Fiscal compensation		1,023	783	597	506	669	1,216	779	618	965
As % of Overall COPFS Disposal		**1**	**1**	**1**	**1**	**2**	**3**	**2**	**2**	**3**
Total Number of NFA	59.019	35,000	28,000	27,000	26,000	21,000	21,000	18,000	16,000	16,000
% total of NFA as % of Total Cases	16.7	12	10	11	12	11	12	11	9	10

Considering the NFA figure from 1987 above in Table 10, we can see a significant change in the number of NFAs and resultant criminal sanctions to the position in

[438] Adapted from - Scottish Government, Criminal Justice Social Work Statistics in Scotland 2019-20 (A National Statistics Publication for Scotland, Scottish Government 8 March 2021).

2020-2021. This is further supported in the *Summary Justice Reform: evaluation of Fiscal Work Orders* report. There is significant evidence which established that cases which previously would have been subject to no further action by the public prosecutor are now being marked for disposal via a fiscal fine.[439] As demonstrated in the Table 10, above, in more recent times this practice of using DMs rather than taking NFA has become the routine method of case disposal. This does not dilute the fact that as a result of DMs persons are subject to a criminal sanction who previously would not have been. This does not, necessarily, lead to a conclusion that the imposition of a sanction is disproportionate. This does raise the question in relation to parsimony that, if there was no criminal sanction before the creation of the DM, is there a necessity that a criminal sanction now be imposed just because the option is available to the public prosecutor?

In this sub-section, we have considered the components of parsimony and proportionality in relation to the system of DMs in Scotland. We have identified areas of concern namely: having accepted that DMs are proportionate for use in respect of minor offences, there are still persistent issues in the definition of minor offences; second, there appears to be under use of the fiscal compensation system and those which are used are disproportionate when compared to court based compensation orders; third, there remain concerns around the offences which previously would have been selected for no prosecution which now have a criminal sanction imposed contrary to the principle of parsimony; fourth, the levels at which the fiscal fine are currently imposed are well within the limits permitted by statute and thus there are likely offences being tried in court which would fall within the limits of the fiscal fine, particularly considering the average court fine levels. These issues shall be explored further in the conclusions and recommendations section of this research in chapter 7, combined with the matters we have raised in the accuracy of outcome and consistency. To complete, the examination contained within this research of the principles of fairness, we now turn our attention to representation.

[439] Richards, P., Richards, E., Devon, C., Morris, S. and Mellows-Facer, A., Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011). evaluation paras 4.4 – 4.9.

4.2.4 Representation.

Having considered the practical implication of the component parts of accuracy of outcome, consistency, and participation/parsimony, the focus of this research now turns to the consideration of the final component of fairness, representation. As discussed in the theoretical consideration of the principle there are two main reasons why representation is a critical component of fairness: firstly, representation as legitimacy; and secondly, representation as essential for instrumental reasons. In this sub-section we shall consider representation as legitimacy prior to turning to the consideration of representation as important for instrumental reasons.

As was discussed above, representation as legitimacy argues that it is important to treat the accused as an autonomous person who has a voice in the process being initiated against them by the state. The primary consideration of representation as legitimacy is now explored by consideration of the opt-out procedure adopted in Scotland since the developments recommended by the McInnes committee. First, we should revisit the views of the Stewart committee. The focus given by the Stewart committee to the accused person opting in and actively accepting the offer of a DM was seen as an essential safeguard within the operation of DMs. Consent was viewed by the Stewart committee as offering a fundamental legitimacy to the system of DMs:

> We reiterate what we said in the first report to the effect that the cornerstone of any system which seeks to remove cases from the normal prosecution process must be preservation of the individual's right to have the allegations against him brought before and established in a criminal court before any punishment is imposed on him. This is the essential safeguard. Otherwise, we see no objection to diverting cases with the ***consent of the offender*** *(emphasis added)* to other out of court procedures. [440]

[440] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 5.06, 69.

Whilst it is fair to say there is limited evidence that there was any real level of engagement in the process even under the opt-in process, there was at least a requirement upon the accused to engage in the process in some form. This being true, in the interests of balance there was still no check that the accused person fundamentally understood what they were agreeing to. Nevertheless, there was at least the guise that their voice was heard in that they had to actively engage and take steps to accept the DM. How did this change in the development of DMs in Scotland? As discussed, in chapter 2, the lack of engagement and consideration of safeguarding mechanisms in the McInnes committee developments of the DM system are of material concern in the overall fairness of the DMs system. The opt-out process, the process whereby the offer of a DM is deemed as accepted, without active refusal by the accused, significantly reduces the potential for the accused to have a voice in the process. There is no longer even a pretense that the accused should engage with the process or be afforded the opportunity to express their views. At a minimum under the opt-in process the accused used their voice to consent to the imposition of the DM. This has now gone.

The McInnes committee, on whose recommendation the opt-out procedure was introduced, failed, in this researcher's view, to engage fully in consideration of the fundamental protections for the accused person. One such fundamental protection is the presumption of innocence that being that every accused person enjoys the right to be presumed innocent.[441] The manner in which the fundamental right to the presumption of innocence is set aside is concerning. In the context of the opt-out procedure, the McInnes committee stated:

> We also take the view that, in the same way that many do not actively contest fiscal fines and FPNs at present, they will be similarly unlikely to make active use of the safeguard mechanism unless they have a genuine case. We believe that a simple mechanism that enables apparent injustices to be righted without

[441] For more on the presumption of innocence see Pamela Ferguson. 'The Presumption of Innocence and its Role in the Criminal Process'. (2016) Crim Law Forum 27, 131–158

recourse to expensive and time-consuming procedures is consistent with the approach we take to summary justice throughout this report.[442]

The suggestion in the McInnes committee, quoted above, that just because many do not actively contest fiscal fines and merely accept them, fails to consider the intertwined and multifaceted difficulties faced by an accused person, such as vulnerability, understanding and the coercive nature of the offer of a DM, which this research explores.[443] Such failure to fully consider the difficulties faced by accused persons is unfortunately consistent throughout the McInnes committee report, with the constant justification as seen above being the expense and time-consuming procedures which a court-based approach would require. In addition, if the McInnes committee is correct and that most just accept the DM then the safeguard of leaving as an opt-in measure for those who cannot opt-out would seem to be a proportionate safeguard in the system.

Despite the criticisms of the opt-out system, it does remain compliant with the restrictions imposed on the state by Article 6 and thus the system meets its minimum obligations under the European Convention on Human Rights.[444] It can be suggested, however, that the move to the opt-out system has significantly reduced the accused person's ability to have a voice in the process. The fact that a DM can be binding on accused person with no engagement whatsoever by the accused is especially concerning for vulnerable accused who may not even understand the offer they have received, a matter which we will discuss in the forthcoming section.

We now turn to our second consideration of representation: representation as important for instrumental reasons; that is, it is the only way in which an accused person can communicate pertinent information about themselves which is material

[442] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) paras 11.21 – 11.27.
[443] See chapter 4.2.1.

[444] See - Isla Mairi Fraser Callander, 'The Pursuit of Efficiency in the Reform of the Scottish fiscal fine: Should we Opt Out of the Conditional Offer? Part 1' (2013) 5 SLT 37; Isla Mairi Fraser Callander, 'The Pursuit of Efficiency in the Reform of the Scottish fiscal fine: Should we Opt Out of the Conditional Offer? Part 2' (2013) 6 SLT 47.

to the legal process. As defined earlier, representation here means *legal* representation, as many accused persons will not have the expertise needed to understand and communicate what is relevant information.

There is no requirement in Scotland that a person who receives an offer of a DM also receives legal representation or advice prior to the DM becoming binding on them, indeed within the Richards evaluation there is some evidence that the vast majority of people do not. [445] The Richards evaluation, with its sample size of 78 returned questionnaires, does not represent a significant number of respondents given how many persons are issued a DM.[446] This research provides further evidence that this indeed is the case and goes beyond the small sample size of the Richards evaluation. As we turn to the instrumental consideration of the principle of representation, we shall explore this further. First, we shall consider how legal advice is given in Scotland in the majority of cases.

The predominant provision of criminal legal advice provided in Scotland is via criminal legal advice and assistance from the Scottish Legal Aid Board (SLAB). Advice and assistance is available to any person whereby the advice and assistance is in the following circumstances:

Advice and assistance consists of two main elements:[447]

- Oral or written advice provided to a person by a solicitor.
- On the application of Scots law to any circumstances which have arisen in relation to your client.
- As to any steps that the client might appropriately take, having regard to the application of Scots law to those circumstances.

[445] Richards, P., Richards, E., Devon, C., Morris, S. and Mellows-Facer, A. , Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011).evaluationevaluation32.

[446] Indeed, the Richards evaluation references more than 38,000 fiscal fines being issued in their sample period, see -evaluation Richards, P., Richards, E., Devon, C., Morris, S. and Mellows-Facer, A. , Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011). Table A2b, 65.

[447] Legal Aid (Scotland) Act 1986, s 6.

- Assistance provided to a client by a solicitor in taking any of the steps, on which you can provide advice, either by taking such steps on the client's behalf or assisting the client in taking such steps.[448]

In particular, at the time of writing, the fee claimable by the Solicitor acting in relation to a DM, is fixed by SLAB to the maximum sum of £45.00.[449]

In order to assess the extent to which those offered a DM receive legal advice prior to acceptance, a FOI request was sent to SLAB. The results of that request are shown in Table 11, below. This research establishes that only a very small proportion of those who were offered a DM received legal advice prior to acceptance. Whilst acknowledging the limitation of not being able to establish the number of persons possibly paying privately for legal advice before accepting a DM, there is no reason to suggest that this would be a significant figure even if added to the figures below.

Table 11, below, demonstrates that in 2010 less than 2% of all persons being offered DMs received legal advice and this figure in the last 10 years has dropped significantly to 0.68% of all persons being offered DMs. We also see that not only as a percentage of the number of DMs has the figure dropped but has also dropped from over one thousand cases in 2010-11 to less than 250 cases in 2019-20.

[448] Scottish Legal Aid Board, 'Availability of Advice and Assistance' (SLAB 2022) <www.slab.org.uk/guidance/definition-of-criminal-advice-and-assistance/> accessed 7 September 2022.

[449] See Scottish Legal Aid Board, 'Initial Limits and Increases in Authorised Expenditure' (SLAB 2022) <www.slab.org.uk/guidance/initial-limits-and-increases-in-authorised-expenditure> accessed 7 September 2022. The maximum sum being £45.00 but this is paid on a time in line basis, in fifteen-minute time blocks.

Table 11:SLAB Direct Measures advice and assistance between 2010-11 and 2019-20.[450]

Year	Number of Slab Cases	Number of Direct Measures	% of DMs Receiving Legal advice
2010-11	1,063	60,099	1.77
2011-12	868	67,378	1.29
2012-13	848	87,591	0.97
2013-14	719	82,357	0.87
2014-15	503	63,116	0.80
2015-16	448	62,461	0.72
2016-17	367	41,823	0.88
2017-18	351	41,835	0.84
2018-19	272	35,620	0.76
2019-20	246	36,426	0.68

As can be recalled from the consideration of the theory, there are issues for any accused person: first, the accused's alertness to the potential defences; second, the discharge of the burden on the Crown and the mirage of matters required in court proceedings: and third, the lack of mitigation on behalf of the accused. These three considerations require a level of legal knowledge and training that an accused person is unlikely to have. A conclusion may be drawn that there is a distinct possibility that the system of DMs may be considered to be fundamentally flawed when assessed in terms of fairness.

In addition to this, the lack of safeguards for vulnerable accused, discussed above under accuracy of outcome, presents significant obstacles to the fairness of the DM system which perhaps should have increased the need for representation of accused persons as a safeguard. The issues, highlighted in this research, combined with the assumption of the accused as a person capable of choice leaves the reader with the warning of Barbara Hudson ringing in their ears:

[450] Available as a result of FOI August 2022.

> The notion of free will that is assumed in the ideas of culpability….is a much stronger notion than that usually experienced by the poor and powerless. That individuals have choice is a basic legal assumption: that circumstances constrain choice is not. Legal reasoning seems unable to appreciate that the existential view of the world as an area for acting out free choices is a perspective of the privileged, and that potential for self-actualization is far from apparent to those whose lives are constricted by material or ideological handicaps.[451]

The system of DM in Scotland as it currently stands seems unable to appreciate the circumstances of people who are locked out of their basic legal choices by the system's own operation, particularly those with a disability or those who simply cannot express or understand English.

4.3 Conclusion.

In this chapter, the set of criteria for assessing the fairness of DMs in Scotland, within this research, was established, namely: accuracy of outcome, consistency, proportionality/parsimony and representation. In the consideration of the issues raised in the Stewart committee, the McInnes report, the Richards valuation and having examined this against the framework established, the following can be understood in respect of accuracy of outcome: there is a lack of proper control procedures in the case marking system and a lack of audit procedures which causes significant concern. Further persistent issues discovered by this research with the recording of information in the SPR present fundamental issues in respect of accuracy of outcome and represent a fundamental concern regarding vulnerable accused persons. This research has established that there is at least the possibility of an accused person who is innocent of the accusation made against them by the state accepting a DM due to lack of language, understanding, vulnerability, disability or inducement.

[451] Barbara Hudson, 'Punishing the Poor: A Critique of the Dominance of Legal Reasoning in Penal Policy and Practice', in Anthony Duff and others (eds), Penal Theory and Practice: Tradition and Innovation in Criminal Justice (Fulbright Papers 15, Manchester University Press 1994) 302.

Regarding the criteria of consistency, it has been suggested that there may be flaws in two respects: inconsistency of decisions *per se* and inconsistent decisions because of a lack of information. In relation to the latter, key missing information from SPRs may result in inconsistent decisions being taken across Scotland via the central marking hubs. While inappropriate prosecutorial decisions are often, as suggested by HMIPS, "weeded" out when a decision to prosecute is already made (via a preliminary court diet), no such safeguard exists in relation to DMs.[452]

In the third criterion of proportionality/parsimony, it has been argued in this research that DMs are proportionate for use in respect of minor offences, but there are still persistent issues in the definition of minor offences. Second, there appears to be an underuse of the fiscal compensation orders and third those which are used are disproportionate when compared to court-based compensation orders. Fourth, this being said, the levels of fiscal fine and compensation orders are significantly below those permitted by law and without significant differences from the court process and that suggests that some offences may be being processed through court which could otherwise be dealt with via the DM system. Fifth, there remain concerns around the offences which previously would have been selected for no prosecution but now have a criminal sanction imposed contrary to the principle of parsimony.

In respect of the fourth component of fairness, there are significant concerns raised regarding the principle of representation of an accused person and their ability to have a voice within the DM system in Scotland and have their fundamental rights protected. This research has discovered a significant drop, from already low levels, in the proportion of accused persons offered DMs who receive legal advice. This leads to a question of some distance between the system in practice and the idea, as expressed by the McInnes committee, that representation is a fundamental safeguard for an accused person offered a DM. Indeed, when combined with the issues highlighted in the preceding three paragraphs this represents a fundamental concern for the justice system in Scotland and its relationship with the principles of justice.

[452] See HMIPS quote at 4.2.2.

Having identified that there may be fundamental issues with the operation of the system of DMs in Scotland we must be mindful that fairness in any situation may not be subject to the dictatorship of relativism but often requires a trade-off between that which is in the wider interests of society versus that of an individual and as such a pragmatic view is often required. In the exploration of fairness, this research has sought to maintain the pragmatic view and as such, we continue this methodology in our analysis of the principle of efficiency to which we now move our focus.

Chapter 5: Efficiency.

As was established in chapter 2, both the Stewart committee and the McInnes committee outlined that the reason for the introduction and development of DMs was to alleviate pressure on the court system in Scotland. Indeed, McInnes states that this was to ensure a more "efficient use…of time and resources".[453] Therefore, we can say that DMs were regarded by Stewart and McInnes as a more efficient way of dealing with minor criminal offences than the summary court process, but does this belief stand up to scrutiny? Within this chapter we shall explore whether there is substantive evidence for this claim and whether it still holds true today.

In the previous two chapters we considered the principles of effectiveness and fairness from a theoretical and practical perspective. In those chapters we first defined what the principle meant and the contributing elements, and then sought to apply the principles to the operation of the DM system in Scotland. This chapter continues this systematic approach by firstly defining the principle of efficiency, and thereafter seeking to apply this to the practical operation of the system of DMs in Scotland. Therefore, we now turn to defining efficiency and its importance.

5.1 Defining efficiency and its importance.

In this research we shall consider two primary components of efficiency in relation to DMs. These two primary components have been identified by Callander as cost effectiveness and time efficiency.[454]

To understand these terms is essential to understanding how they contribute to overall efficiency in the Scottish criminal justice system. Cost effectiveness, in this research context, is whether the cost of the DM system is a lesser burden on the public purse than the court system would be for the same offences. Time efficiency for the purposes of this research is whether having a system of DMs saves time in reaching an outcome to the criminal complaint in comparison to the court-based resolution of criminal complaints. Both cost effectiveness and time efficiency were

[453] McInnes Report, The Summary Justice Review Committee: Report to Ministers (Scottish Executive 2004) para 2.2.

[454] Isla Mairi Fraser Callander, 'The Pursuit of Efficiency in the Reform of the Scottish fiscal fine: Should we Opt Out of the Conditional Offer? Part 1' (2013) 5 SLT 37.

identified in the Stewart committee report and the McInnes report as factors justifying the introduction of DMs; both stated in introducing and expanding the use of DMs, that they were seeking to resolve issues of speed in the criminal justice system and ensure that justice was delivered in a cost-effective manner.[455] Thus, for the purposes of this research, the criteria which shall be considered in respect of efficiency are economic efficiency and speed of resolution as efficiency when compared to the court process.

A focus on cost and time efficiency in criminal justice is often associated with the idea of 'managerialist justice', which sacrifices principle for time and cost savings.[456] Managerialist justice creates a criminal justice system where the public is the consumer and the public prosecutor the manager. The manager is tasked with ensuring the process is completed to the end result without a consideration of the principles which underpin the justice system, without consideration of being transformational and achieving life changing outcomes, but instead focused on ensuring that the system measurements and statistics are achieved.[457]

McEwan has described the managerialist approach as attempting to process large numbers of cases at minimal costs.[458] Likewise, Thomason sets out the idea of managerialist justice as follows:

> Boiled down to its essentials, managerialism is an ideology which is typified by an emphasis on productivity (case management), cost efficiency (cuts to legal aid and the courts budget) and consumerism (focussing on

[455] See chapter 2.

[456] Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing character of Crime, Procedure and Sanctions' (2008) 2 Criminal Law and Philosophy (2008) 21, 39-40.

[457] See Antonie A G Peters, 'Main Currents in Criminal Law Theory', in Jan Van Dijk and others (eds), Criminal Law in Action: An Overview of Current Issues in Western Societies (Brill | Nijhoff 1986).

[458] Jenny McEwan, 'From Adversarial to Managerialism: Criminal Justice in Transition' (2011) 31 Legal Studies 519, 522.

> complainants/victims and witnesses as "consumers" of criminal justice) at the expense of human rights and due process.[459]

A similar description is provided by Gray and Jenkins, who suggest managerialist justice is:

> the pursuit of efficiency, effectiveness and value for money; responsibility is to be decentralised, lower-level operatives made aware of and accountable for the costs of their operations, targets are to be established... In brief, we are offered a world where bureaucrats (and ministers) are redefined as accountable managers, public sector operations sub-divided into businesses, and the public seen as the customer.[460]

As can be seen from the brief outline of managerial justice above, and as has been explored in the previous chapters, there are concerns about effectiveness and fairness in the system of DMs which must be addressed. It perhaps suggests that this raises the issue of whether cost saving is at risk of compromising the other principles of justice we have identified in chapters 3 and 4. Whilst these issues have been raised, this research will examine efficiency of time and cost and consider whether these present a valid justification for the DM System.

The focus of this chapter is on efficiency and whilst the managerialist approach which seems to be adopted does give rise to concern, it is important to note that seeking efficiency is not a negative matter *per se*. There are, perhaps, three reasons we can identify as to why it is important. The first is set out by Dandurand:

> An inefficient criminal justice process damages the credibility of the justice system and arguably weakens the rule of law. It potentially affects the rights of defendants, and it raises issues of access to justice for victims of crime. In many countries, the criminal justice system's poor performance, its lack of

[459] Matt Thomason, 'Admitting Evidence by Agreement: Recalibrating Managerialism and Adversarial in Crown Court Criminal Trials', (2021) 9 Criminal Law Review 727.

[460] Andrew Gray and William I Jenkins, 'Accountable Management in British Central Government: Some Reflections on the Financial Management Initiative' (1986) 2(3) Financial Accountability & Management 171.

> timeliness, its many perceived inefficiencies, and its frequent failure to meet public expectations are a serious concern.[461]

Dandurand suggests that efficiency is essential to the credibility of a criminal justice system and without it the rule of law in any democratic system would be undermined. Whilst it may be over-stating it somewhat to suggest that the rule of law is undermined by an inefficient system,[462] what can be accepted is that lengthy delays in the criminal justice system are likely to affect public confidence in and engagement with the criminal justice system. This point will not be discussed further.

The second reason why efficiency is important is that time inefficiencies have a detrimental impact on accused persons, victims, and witnesses. The consequences of delays in criminal trials are discussed by Burman and Brooks-Hay, who argue that delays affect the confidence of the victim in getting justice and decrease the engagement of witnesses with the process. Delays can also heighten anxiety and risk further harm to the well-being of victims and witnesses as a result.[463]

The third reason is that cost inefficiencies are detrimental to the public purse – they have a cost to the taxpayer. Unless the taxpayer is willing to contribute significantly more to the public purse, saving costs means that other important priorities such as health and education can be funded. It is the second and third points which will be discussed further in this chapter as they are specific to the areas which this research shall explore.

As a further preliminary point, and as indicated above, we are examining the efficiency of DMs versus the court process. In order to do so, we must first understand the differences in process from (a) the point when a criminal complaint via a Standard Police Report (SPR) is received by COFPS to (b) the point of imposition

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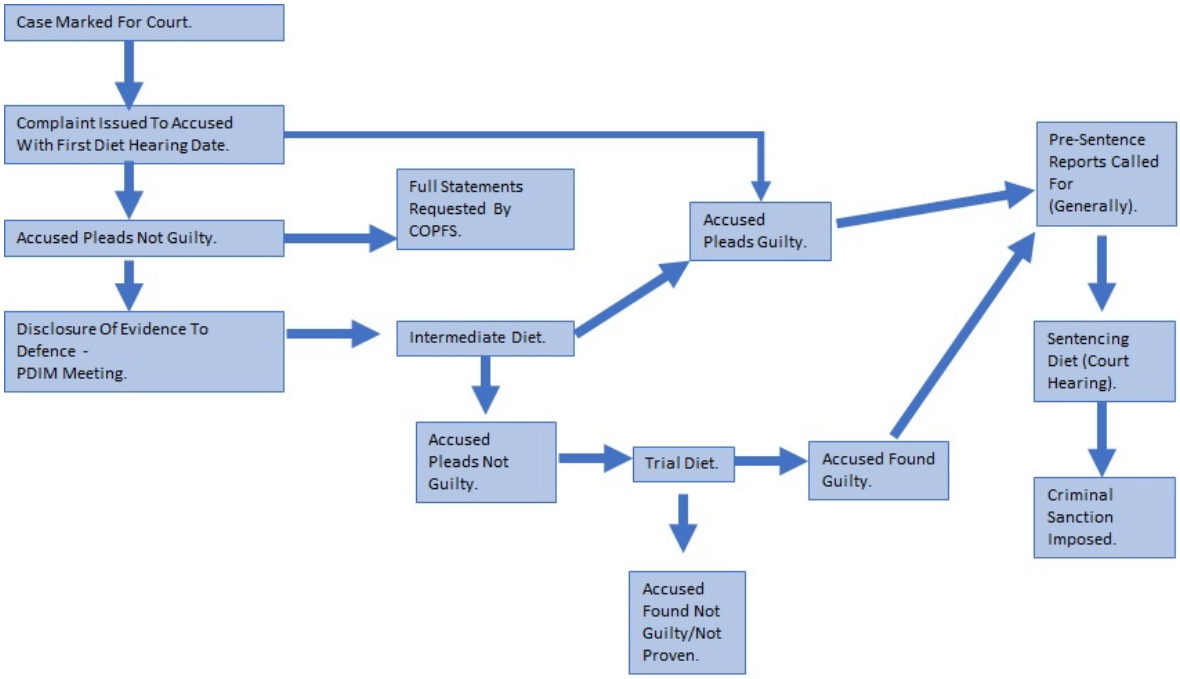
[461] Yvon Dandurand, 'Criminal Justice Reform and the System's Efficiency' (2014) 25 Criminal Law Forum 383.

[462] Interrogation of this claim lies beyond the scope of this research.

[463] See Michele Burman and Oona Brooks-Hay, 'Delays in Trials: The Implication for Victim-survivors of Rape and Serious Sexual Assault' (Briefing Paper, The Scottish Centre for Crime and Justice Research, July 2020) <www.sccjr.ac.uk/wp-content/uploads/2020/08/Delays-in-Trials-SCCJR-Briefing-Paper_July-2020.pdf> accessed 19 August 2023.

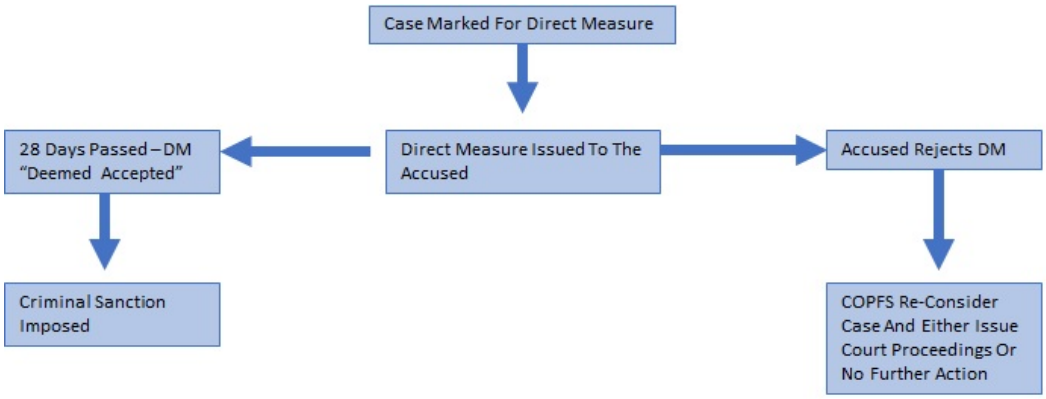
of the criminal sanction, in both the DM system and also in the summary court-based system. In Figure 1 below we can see the potential summary case resolution process and within Figure 2 we can see the DM process.[464] It should also be noted that Figure 1 is, likely, an over-simplification of the court process, as it assumes that everything will proceed on first calling, whereas in reality there is evidence that there can be multiple hearings in the same case.

Figure 1 - Summary Court Process



[464] Figure 1 and 2 flow from the point of the case marking decision. As is outlined in this research the case marking decision is taken after the submission of the Standard Police Report (SPR) to COPFS.

Figure 2 - Direct Measure Process



By examining the system of DMs and the court system process as set out in Figures 1 and 2, we can see that there are several procedural requirements of the court-based system which do not exist in the DM system.[465] The DM process is significantly simpler and thus is often assumed to be a much more efficient process for the criminal justice system in Scotland when compared to the summary criminal court system. This research shall examine this assumption in relation to our two components of efficiency. Having outlined the system in Scotland and the components of efficiency that this chapter will be considering, we now turn to the first of these components, which is speed as efficiency.

5.2 Speed as Efficiency.

What we mean in terms of speed in this context, is the passage of time from the point of when an SPR is received by COPFS to the outcome of a particular criminal report, to enable the comparison between the DM process and the court process from an efficiency perspective.[466] In this section we will consider the theoretical basis of the importance of speed in the criminal justice system. Thereafter, we will

[465] See The Criminal Procedure (Scotland) Act 1995, ss 201–203. Within Figure 1, reference is made to pre-sentencing reports, correctly named Criminal Justice Social Work Reports. These reports are mandated in particular circumstances but are generally called for to enable the court to determine the most suitable method of disposing of the case. The court can, unless mandated, waive the need for reports if the report would provide no material assistance to the court.

[466] Outcome from this perspective refers to the conclusion of the criminal proceedings, be it a DM, a verdict of acquittal in a trial, a conviction in trial or dismissal of the case in court.

consider the fundamental right contained within Article 6 of the European Convention on Human Rights (ECHR) as it relates to speed in the criminal justice system. Having completed this consideration, this research will move to the practical implications of this research for the system of DMs in Scotland.

Prior to the consideration of speed as a component part of efficiency itself, it is useful to be reminded of the interconnected nature of the issues which are being considered in this research. As suggested, in chapter 4, the principle of fairness, we are reminded that the participation, or a mechanism for participation, of the accused person is an essential part of fairness and perceptions of fairness are essential to the justification of any procedural justice system. Thus, in our consideration of speed of decision making we remain mindful of the need for time to allow the participation of the accused as a component part.[467]

Turning first to the consideration of speed, as a component part of efficiency, it can be understood from management theory that an important component of justice is the perception of the participants, and legitimacy comes from their expectations of the process.[468] We can further understand that the period of time from incident to a decision-making process causes an emotional reaction from the actors in the system which they wish to avoid due to the uncertainty that it creates.[469] As was explored, in chapter 4, there are impacts for the accused, the victim and witnesses in the waiting time for the outcome of the criminal case.[470] We see a clear example of a desire, in particular cases, to attempt to bring as speedy a resolution as possible by accelerating the processing of some cases. One example of this can be found in cases involving domestic abuse due to the recognition that these cases can cause

[467] Jason A Colquitt and John C Shaw, 'How should organizational justice be measured?' in Jerald E Greenberg & Jason A Colquitt (eds), Handbook of Organizational Justice (Psychology Press 2005) 113.

[468] Tom R Tyler, 'Psychological Perspectives on Legitimacy and Legitimation', (2006) 57 Annual review of Psychology 375.

[469] See Timothy D Wilson and others, 'The Pleasure of Uncertainty: Prolonging Positive Moods in Ways People do not Anticipate' (2005) 88 Journal of Personality and Social Psychology 5.

[470] For further discussion of the impact on victims see – John D Jackson, 'Justice for All: Putting Victims at the Heart of Criminal Justice?', (2003) 30 Journal of Law and Society 309.

particular stress to complainers, witnesses and accused persons while they are waiting for the case to conclude.[471]

The position of victims, accused persons, and witnesses and the impact of delays in the criminal justice system are crucial to upholding a principled legal system, they are crucial to the individuals involved and unjustifiable delays are detrimental to all involved in the justice system and involved in the process. For victims of crime, they "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".[472] We must remember that victims of crime desire an outcome and conclusion to their traumatic experience of being a victim of crime and have closure to their experience.[473] It is worth also highlighting that victims of crime are a diverse group and even minor offending may still be highly impactful and traumatic on the victim.[474] The longer a case takes, the longer they have to wait for this.

For accused persons, delays in the system may elongate suspensions from employment, whilst awaiting resolution to the criminal case against them, uncertainty as to their future and the impact that criminal charges have upon their families and personal circumstances.[475] For witnesses to crime, waiting to know if they are required as witnesses, the anxiety of deterioration of their memory of events over time and their ability to recall evidence in court and simply the knowledge of an impending appearance in court as a witness are all matters which

[471] For discussion on the impact on victims see – Michele Burman and Oona Brooks-Hay, 'Delays in Trials: the implications for victim-survivors of rape and serious sexual assault: an update' (2021) SCCJR.

[472] Lesley Thomson, 'Review of Victim Care in the Justice Sector in Scotland: Report and Recommendations' (COPFS 1 January 2017) < https://www.copfs.gov.uk/media/5dglv10m/review-of-victim-care-in-the-justice-sector-in-scotland.pdf> accessed 19 August 2023.

[473] For an overview of the impact of delays and the closure sought by victims in sexual offences, see - Michele Burman and Oona Brooks-Hay, 'Delays in Trials: The Implication for Victim-survivors of Rape and Serious Sexual Assault' (Briefing Paper, The Scottish Centre for Crime and Justice Research July 2020) <www.sccjr.ac.uk/wp-content/uploads/2020/08/Delays-in-Trials-SCCJR-Briefing-Paper_July-2020.pdf> accessed 19 August 2023.

[474] Sue Moody, 'Criminal Justice in Scotland' Ch. 'Victims of Crime'. (1999) Routledge.

[475] This impact has been recognised by Audit Scotland in their report on Criminal Courts backlog - Audit Scotland, 'Criminal Courts Backlog' (Auditor General May 2023) <www.audit-scotland.gov.uk/uploads/docs/report/2023/nr_230525_criminal_courts_backlog.pdf> accessed 22 September 2023.

lay a heavy burden on the criminal justice system to dispose of criminal cases within a reasonable time.

If we accept that the actors within the criminal justice system need time to consider materials and prepare courses of action against an accused person and that the accused person will be seeking a resolution to the matter, as will the victim, then we must consider what is an efficient use of time. What expectations are too fast and what course of action is too slow? Valkeapää and Seppälä suggest that:

> … very fast or very slow decision-making processes may create concerns and uncertainty about the quality of decision-making process and decrease perceived legitimacy of the decision…Prolonged or poorly prepared decisions put a person in a disadvantaged position in comparison with relevant others, while also creating a feeling of undeserved treatment. As the well-known legal maxim puts it, "justice delayed is justice denied." [476]

What can be established, it is suggested, from this quote is that there are challenges when decisions are taken too quickly. A full consideration of all the pertinent information is required and time should be taken to gather all relevant information for consideration prior to a decision-making process occurring whilst recognising that the time taken to gather all material information must also be reasonable. Indeed, it has been suggested that decisions which are taken too quickly indicate problems in the decision-making process itself,[477] a point that links in with what was argued in chapter 4 regarding incomplete information in the SPR forming the basis of decision making.

There are, of course, also issues with a system which is too slow. Both the Stewart committee and the McInnes report suggest that DMs were necessary to relieve the pressure on an overburdened court system. [478] Thus, if DMs did not exist, would the volume of cases requiring to be dealt with in court lead to a system which was

[476] Annukka Valkeapää and Tuija Seppälä, 'Speed of Decision-Making as a Procedural Justice Principle' (2014) 27 Social Justice Research 305.

[477] Brent A Scott, Jason A Colquitt and E Layne Paddock, 'An Actor-Focused Model of Justice Rule Adherence and Violation: The role of Managerial Motives and Discretion' (2009) 94 Journal of Applied Psychology 756.

[478] See chapter 2 of this research.

overburdened and become too slow? This would also present issues for accused persons, witnesses and victims and potentially be contrary to the principle of efficiency in respect of speed.[479]

It can be further established, by reference to the Audit Scotland report into the efficiency of prosecuting criminal cases through the Sheriff Courts, that in the mind of the Government and Audit Scotland, speed is considered through the prism of three stages: the Police, the fiscal decision-making process and the court process.[480] For the purposes of this research the role of the public prosecutor shall be examined and the time required to conclude a case in court versus the time required by the DM system. This research shall not consider the time taken by the police in the course of their investigations and time taken to report the case to the public prosecutor.

As Valkeapää *and* Seppälä (quoted above) indicate, a system which is too slow or indeed too quick presents problems in and of itself. However, what is too quick or what is too slow and how do we define these?

The ECHR may provide an insight into this matter. Article 6 of the ECHR recognises that the speed of decision making in criminal cases can raise human rights concerns. Article 6 provides that:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[481]

[479] This research does not consider any impact on Police Scotland on any additional workload as a result of requiring processing of full statements to allow for court proceedings.

[480] Audit Scotland, 'Efficiency of Prosecuting Criminal Cases Through the Sheriff Court' (Auditor General for Scotland, September 2015) <www.audit-scotland.gov.uk/uploads/docs/report/2015/nr_150924_sheriff_courts.pdf> accessed 19 August 2023.

[481] European Convention on Human rights Article 6(1).

As has already been argued, the DM is a criminal sanction and falls within the scope of the ECHR.[482] The recognition of speed within the Convention gives us a clear indication that speed of decision making is a component part of justice in criminal cases.

Having established that speed is an important value recognised by the ECHR, can any assistance be gained from the Convention as to what is meant by a reasonable period of time? The ECHR protections apply, normally, once a court proceeding has commenced, the *dies a quo* being the first date on which proceedings are instigated and the *dies ad quem* being the date in which the determination of the court is given. There have been a significant number of cases which have outlined how the European Court will determine what is a reasonable period of time and which have found that this can only be determined by considering the complexity of the case, the conduct of the parties, action of the member state, and the general importance of the case.[483]

There are no known cases of the European Court determining whether a reasonable period would apply to a decision being made too quickly or indeed the criteria that would be applied to this. Indeed, the European Commission on the Efficiency of Justice has stated that it is necessary that member states be given an objective that the processing of cases must be within an "optimum and foreseeable time frame".[484] This research is not suggesting that, even if you were to remove the DM system in Scotland and re-introduce all of the cases which currently receive a DM back into the summary court system, this would result in a breach of Article 6 of the ECHR, but this does not mean that long delays which fall short of breaching Article 6 should be accepted or are acceptable.

[482] See chapter 3.01 of this research.

[483] Kurzac & Ors v Poland [2011] ECHR 622; Obermeier v Austria [1990] ECHR 15; Editions Periscope v France [1992] ECHR 43; Darnell v The United Kingdom [1993] ECHR 47; Allenet de Ribemont v France (interpretation) [1996] ECHR 27.

[484] European Commission on the Efficiency of Justice (CEPEJ), 'A New Objective for Judicial Systems: The Processing of Each Case Within an Optimum and Foreseeable Time: Framework Programme,' (2004) 19 REV 2, 3.

Therefore, we turn to examine the principles in domestic law as related to the rights contained within Article 6. The importance of the value of speed of efficiency is recognised within Scotland in the Criminal Procedure (Scotland) Act 1995 which determines that:

136: Time limit for certain offences.

(1) Proceedings under this Part of this Act in respect of any offence to which this section applies shall be commenced— (a) within six months after the contravention occurred; (b) in the case of a continuous contravention, within six months after the last date of such contravention, and it shall be competent in a prosecution of a contravention mentioned in paragraph (b) above to include the entire period during which the contravention occurred. (2) This section applies to any offence triable only summarily and consisting of the contravention of any enactment unless the enactment fixes a different time limit. (3) For the purposes of this section proceedings shall be deemed to be commenced on the date on which a warrant to apprehend or to cite the accused is granted, if the warrant is executed without undue delay.[485]

Therefore, Scots law has determined that an accused person, reported for a statutory offence, triable by summary proceedings, must be before the court within 6 months.[486] This would require the case to be marked by COPFS and the requisite paperwork to be issued to the accused and issue a court date within six months. Whilst this time frame has never been challenged as being too long before an accused person is before a court, this research accepts that it is highly likely that this would be found to be a reasonable period. COPFS has an internal target that

[485] Criminal Procedure (Scotland) Act 1995, s136. It should be noted that the Coronavirus (Scotland) Act 2020, extended the 6-month time limit to 12 months, the date of revocation of this temporary measure is yet to be advised. It should be further noted that this section does not apply to common law offences.

[486] It should be noted that at the time of writing the Coronavirus (Scotland) Act 2020, extends this time limit to 12 months, it is unclear when this provision shall be removed and when reversion to the original time limits occurs.

75% of all cases are marked, and the marking decision is implemented, within four weeks of the receipt of the SPR.[487]

As can be recalled, from Figure 1 and Figure 2, there is additional work required when COPFS mark a case for court and it may be the case that any further requirements made by developing the DM system or by adding additional procedural steps, or requirements, is likely to impact on the administration of justice within a reasonable time period.[488] As Figures 1 and 2 indicate, the DM system saves a number of court hearings when compared to normal summary court proceedings. Indeed, the reduced number of hearings and the speed of resolution is likely to be one of the reasons why an accused person may accept a DM in the first place.[489]

Setting aside the other issues, in the system of DMs, the question remains as to whether we can justify the claim that the DM system in Scotland actually saves time compared to the court process. There is no published literature which, at this stage, either confirms this as a position or denies it. This question is one which we shall return to and explore as the practical application of the DM system in Scotland is examined.

In this section, this research has established why speed as efficiency is important. It has been established that it is not the only value that matters and that cases being disposed of too quickly might compromise other principles. This chapter now moves to considering the economic rationale for efficiency.

5.3 Economic Rationale.

The economic justification for DMs is rooted in the idea that the criminal justice system is funded by the public purse. As was explored in the introduction to this

[487] See - Crown Office and Procurator Fiscal Service, 'Performance Against Key Targets April 2021 to March 2022' (COPFS 2022) <www.copfs.gov.uk/media/kpopye5b/performance-against-key-targets-april-2021-to-march-2022.pdf> accessed 20 September 2022.

[488] We recall the discussion from chapter 4 on the SPR and the finding that in summary matters that full statements etc. are not called for until after the decision to issue court proceedings is made by COPFS.

[489] There are parallels here with the reasons why accused persons plead guilty although in the latter case the incentive for doing so is more likely to be the sentence discount which they are likely to receive for doing so.[489]

chapter, inefficiencies are a waste of public funds which has a detrimental effect on the ability of the state to invest in other public priorities.

Whilst the full value of the economics of a criminal justice system is outwith the scope of this research, it is insightful to consider the idea of economic rationale as it is commonly used when considering a justice system. A consideration of the economics of justice has long been written about and is certainly not a new exploration. From the work of Monteqzuieu[490] in 1748 to Becker[491] in 1968 and beyond, the economics of the criminal justice system has attracted interest. It is often subject to media scrutiny and sensationalist headlines.[492] In this research we consider in a balanced and methodological manner the economics of the DM system in Scotland in comparison to the court process. We are reminded of the discussion above on the need for efficiency to avoid wasting public funds.

The idea that it is important, within the criminal justice system, to be efficient in the drawings on the public purse is recognised in the Prosecution Code.[493] Although the Prosecution Code does not explicitly refer to cost as being a relevant factor in decision making, it impliedly does so, as it contains a public interest test. The public interest test recognises that even where there is sufficient evidence that a crime has been committed, prosecution may still not take place if it is not in the interests of "the victim, the accused and the wider community". While the public interest is not always going to relate to cost, as there may be other reasons why prosecution is inappropriate (such as the stress it would involve for the victim), this does suggest that cost is a relevant factor. The value for money concept, especially where the money is coming from the public purse, is uncontroversial. That said, whilst people

[490] Charles-Louis Montesquieu, The Spirit of Law (first published 1748, University of California Press 1977).

[491] Gary Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 Journal of Political Economy169.

[492] Chris Clements, '1 Million Monster, Limbs and Loch Killer' Daily Record (Glasgow, 20 August 2015) <www.dailyrecord.co.uk/news/scottish-news/1million-monster-limbs-loch-killer-6282012> accessed 3rd January 2022.

[493] An outline of the public interest test can be found here: Crown Office and Procurator Fiscal Service, 'Prosecution Code, Criteria for Decisions' (2022) para 3 <www.copfs.gov.uk/publications/prosecution-code/html/#criteria-for-decisions> accessed 29 November 2022.

may not appreciate funds being spent in a criminal justice system, with which most persons will never interact, it remains fundamental to a democratic society that a functioning and well-funded justice system operates.

Crime and punishment, certainly in the 21st century, has featured highly in the agenda of political parties or at least in manifestos and public statements. In Scotland, it has not been uncommon for political parties to lay claim to be the party of law and order and calling for harsher punishments for offenders.[494] This being said, political parties have also pursued the arguments for an economically viable model of criminal justice. The most common argument for development of and changes to the DMs system in Scotland is the economic value of the system. Indeed, alternatives to prosecution were developed primarily to achieve an economic advantage to the public purse.[495]

Prior to concluding the consideration of the theoretical basis of economic efficiency, there is one further preliminary consideration before we can make an assessment of the economic efficiency in Scotland of DMs versus the court system – we need to try and calculate the cost of each component part of each system. However, any attempt to assess the economic benefits of the criminal justice system in Scotland is fraught with difficulties. This is due to failures to record at a micro level the costs associated with each case progressing through the criminal justice system and align cases with their individual costs. Indeed, the Auditor General of Scotland has commented, repeatedly, that there is limited information on the full costs of prosecuting criminal cases through the sheriff courts in Scotland.[496] As such, there is no precise information available to enable analysis at the level of a step-by-step

[494] For instance, see - Rajeev Syal, 'Labour Evokes Blair's 'Tough on Crime' Slogan in Bid to Take on Tories' The Guardian (London, 27 September 2021) <www.theguardian.com/politics/2021/sep/27/labour-evokes-blairs-tough-on-slogan-in-bid-to-take-on-tories> accessed 3 January 2022 <https://fifeconservatives.uk/index.php/press-releases/2701-scottish-conservatives-demand-action-on-soft-touch-justice> accessed 3 January 2022.

[495] See chapter 2.

[496] Audit Scotland, 'Efficiency of Prosecuting Criminal Cases Through the Sheriff Court' (Report by the Auditor General for Scotland, 24 September 2015) 7 <www.audit-scotland.gov.uk/uploads/docs/report/2015/nr_150924_sheriff_courts.pdf> accessed 3 January 2022.

process of the criminal justice system in Scotland.[497] At present all published information is based on averages of averages.

As far as this research has been able to establish, no research has attempted this comparison in Scotland before. This has been attempted in England in Gibson's review of Out of Court Disposals (OOCDs).[498] Out of Court disposals are in effect any disposal by the state without the accused person having to attend a court proceeding. Gibson's review suggests that OOCDs are more efficient than charging an accused person, but that they have their own costs and, rather than efficiency savings themselves, OOCDs result in the transfer of costs from the courts to other divisions of the criminal justice system. An example of a transferred cost in the DM system may be the additional record keeping burden and administrative processes for the Scottish Court and Tribunal Service and COPFS. This suggests that if we are to examine the overall economic benefit, then as we prepare to turn to our practical examination, we must be conscious of the cost transfer aspects of the DM system. This issue in respect of the economic rationale for any criminal sanction also requires us to turn back to our consideration of effectiveness discussed in chapter 2. If the DM is not effective in rehabilitating offenders to reduce the likelihood of reoffending but instead allows what is colloquially called the 'roundabout offender'[499] to continue, then the system is not only ineffective in dealing with the fundamental requirement of rehabilitation, but indeed is a contributor to the continuing cycle of costs to the criminal justice system. Even if the direct costs of DMs can be established to be cheaper, they may still be more costly if they are less effective than court processes in achieving deterrence and/or rehabilitation. It is beyond the scope of this research to attempt a calculation of these and thus the assessment which is about to be undertaken will have this limitation.

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[497] Audit Scotland, 'Efficiency of Prosecuting Criminal Cases Through the Sheriff Court' (Report by the Auditor General for Scotland, 24 September 2015) <www.audit-scotland.gov.uk/uploads/docs/report/2015/nr_150924_sheriff_courts.pdf> accessed 3 January 2022.

[498] Cerys Gibson, 'Out of Court Disposals: A Review of Policy, Operation and Research Evidence' (Sentencing Academy, February 2021) <www.sentencingacademy.org.uk/wp-content/uploads/2023/08/Out-of-Court-Disposals.pdf> accessed 3 January 2022.

[499] The roundabout offender is a term used to refer to an offender who continues in the cycle of going round and round the justice system from offence, sanction, offence and sanction. This is an anecdotal term used by practitioners and offenders.

Finally, an assessment of the cost efficiency in the criminal justice system must not be confused with cost reduction. If the methodology is about cost reduction rather than cost efficiency, then adherence to the principles of justice may be set aside to achieve one principle over the other, but there requires to be an honesty about this.[500] The justifications, set out in chapter 2, suggest that DMs are about cost efficiency rather than cost savings. The differences, for the purpose of this research, is that cost reduction approaches are solely about reducing the cost of the criminal justice system whereas cost efficiency is about achieving principled justice where cost is important but is not the only consideration. In our practical examination of the economic rationale, we shall examine the cost efficiency of the DM system in Scotland as it operates now.

If we were to accept the base level of the economic argument, put forth by governments in their responses to Stewart and McInnes,[501] that the DM system saves the public pursue significant sums of money and low-level offenders still incur criminal sanction for their actions, then this is no doubt a qualitative good for the public purse, but this requires to be examined to establish whether or not DMs achieve this in reality. Leaving aside the arguments of the rights of an accused person, which we have considered in the previous two chapters, then an examination of the economic argument of the DMs system, to ensure that the base level economic argument is accurate, is required.

Whether this base level economic argument is accurate shall be examined as we turn to the practical consideration of the operation of the DM system in Scotland. This chapter will first consider the practical application of speed as efficiency in the DM system.

[500] Luke Marsh, 'Leveson's Narrow Pursuit of Justice: Efficiency and Outcomes in the Criminal Process' (2016) 45 Common Law World Review 51, 53-54.

[501] Policy Memorandum for SP Bill 55 Criminal Proceedings etc (Reform) (Scotland) Bill [as introduced] Session 2 (2006) 45 at 219.

5.4 Speed of the DM System in Scotland.

The challenge forecast for the Scottish criminal justice system at the time that the Stewart committee considered the introduction of DMs was that:

> In the field of criminal proceedings, the outlook is ominous. If recent trends continue, the number of solemn prosecutions could increase by about half and the number of summary prosecutions will double, in the next ten years.[502]

As demonstrated via Figures 1 and 2 above, at an extremely basic level, the DM system does save time. The SPR is received by COPFS, a case marking decision is made within four weeks, generally, and a criminal sanction offered to the accused is binding after 28 days. Therefore, at this extremely basic level of understanding, DMs can be justified because cases where a DM is accepted resolve far more quickly than cases that involve a court process. However, it is more complicated than this.

The primary justification made in the Stewart committee report was that the ever-increasing case numbers warranted the creation of the DM system in Scotland. This provides the starting point of this research's examination. Has this ever-increasing case load justification been borne out? This chapter now turns to examine this.

The development of DMs was primarily in response to an exponential rise in the number of criminal complaints. The Stewart committee report stated that in 1979 370,923 criminal complaints were received by COPFS, whereas by 1980 this had risen to 464,781 criminal complaints, an increase of 93,858 complaints.[503] Since the McInnes report was published in 2007, however, the volume of criminal complaints has taken a marked downward shift, as shown by Table 12:

[502] Grant Committee Report, at para 33, as quoted within Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) 16.

[503] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) 14.

Table 12: Number of COPFS cases between 2010-11 and 2019-20 between 2010-11 and 2019-20.[504]

	2010-11	2011-12	20212-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20
COPFS Criminal Reports (thousands)	266	276	281	294	244	226	196	178	171	170

As demonstrated by Table 12, the number of criminal complaints has more than halved since the Stewart committee report. Logically, therefore, the number of cases which could potentially be marked for court proceedings are at least half of the number at the time of the Stewart committee. It is clear then that the exponential rise in cases that was forecast by the Stewart committee and used as a justification for introducing DMs has not materialised. This alone does not necessarily mean that the justification that DMs are necessary to save court time no longer exists. It may be that although fewer cases are being passed to the PF, a larger proportion of those cases are being prosecuted. However, Table 13 below establishes that the number of cases going to court has also dropped significantly since 1980, even if we add the number of complaints now receiving a DM back into the figures:

Table 13: Total COPFS court cases and DMs between 2009-10 and 2018-19 (Numbers in Thousands).[505]

	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
All COPFS disposals	59	60	67	88	82	63	62	41	42	36
People proceeded against in court	136	131	125	117	122	123	117	107	96	90
Total Number of Potential Court Cases	195	191	192	205	204	186	179	148	138	126

[504] Scottish Government, Criminal Proceedings in Scotland 2020-21 (A National Statistics Publication, 21 June 2022).

[505] Scottish Government, Crime and Justice: Criminal Proceedings in Scotland 2018-19 (A National Statistics Publication, 31 March 2020).

Table 13 establishes that, even if you add the total number of cases disposed of via a DM in the last 10 years back into the number of cases proceeded with in court, these figures are still significantly below the figures which justified the introduction of DMs in Scotland in the first place. Therefore, if there are fewer cases in the criminal courts, then it might be thought that the specific time justification for DMs as was previously promulgated does not exist. That is unless the number of courts, sheriffs, and prosecutors has been reduced for financial reasons thereby reducing the capacity of the court system. This, therefore, leads to the question of the number of sheriffs and the number of public prosecutors. Table 14, below, examines the number of sheriffs in Scotland, which is followed by an analysis of the number of public prosecutors in Scotland.

Table 14: Total number of Sheriffs between 1985 and 2020.[506]

	1985	**2003**	**2016**	**2017**	**2018**	**2019**	**2020**
Sheriffs	99	144	126	121	126	124	120
Summary Sheriffs	n/a	n/a	15	34	36	40	39
Part Time Sheriffs	Included in Total above	Included in Total above	38	36	33	30	29
Part time Summary Sheriffs	n/a	n/a	6	5	5	4	2
Total Number	99	144	185	196	200	198	190
Total Number of Criminal Cases in Sheriff Court	288,000	290,000	63,996	63,200	60,290	55,881	61,761
Total Number of Civil Cases in Sheriff Court	163,124	115,326	73,363	71,389	78,905	69,832	72,262
Total Number of Cases	451,124	405,326	137,359	134,589	139,195	125,713	134,023

[506] This information was compiled for the period 1985 to 2016 from the Scottish Law Directories for each period, the figures from 2017 – 2020 via a FOI to the Scottish Court and Tribunal Service.

Table 14 demonstrates that the number of sheriffs has not decreased materially since DMs were introduced and, in fact, an increase in sheriff headcount by 91 has occurred in the period from 1985 to 2020, whilst the total number of sheriff court civil claims and criminal cases has reduced from 451,124 to 134,023. Thus, there has been no decrease in the resource of judges available in the sheriff court system in Scotland. Whilst accepting that there have been other material changes in the Scottish system over the same period of time, such as the introduction of preliminary hearings, intermediate diets and other judicial interventionalist style approaches being required of sheriffs, this potential impact and changes merely serves to strengthen the point that a fuller examination of these figures is required, as this research will recommend. Having examined these figures, we shall examine the staffing resources of the public prosecutor in Scotland.

Having conducted a FOI request to COPFS, this researcher was told that no records of the total number of prosecution staff employed by COPFS exists prior to 2004. Having checked the Stewart committee and the McInnes committee reports, there was no data available in these reports which establishes the number of prosecutors employed or the volume of resources which would have been required to deal with the predicted case trajectory. However, having conducted a search of Parliamentary Hansard records, two matters can be established: In 1985, COPFS employed 968 staff with 669.5 of these staff being non-qualified.[507] Whilst being aware of the difficulties in verifying the exact levels of staff employed by COPFS using this method, it does allow for a reasonable calculation that 298.5 staff were legally qualified staff and therefore procurator(s) fiscal or fiscals depute.[508] What this research is able to establish, from the FOI, is that in 2004 the total number of prosecutors employed by COPFS was 376.1 FTE at the level of Trainee Solicitors, Procurator Fiscal Depute, Senior Procurator Fiscal Depute and Principal Procurator Fiscal Depute. By 2022, the total number of FTE public prosecutors was 678.9.[509]

[507] HC Deb 25 July 1985, Vol 83, col 638 W; HC Deb 20 April 1988, Vol 131, col 476 W.

[508] There is a further oddity in Scotland that a person can be called as a Fiscal Depute without being a qualified Solicitor, however, in modern times this is unheard of and indeed Advertisements for PFD's now specifically require this.

[509] COPFS, FOI Response December 2022.

Therefore, we can establish that the likely change in prosecution staff available for the sheriff courts in Scotland is from 298.5 prosecutors to 678.9, representing an increase of more than 127% in qualified employed public prosecutors.

It should be stated that this research has not sought to establish the exact justifications for these increases and the operational deployment within COPFS. Further research on the operation of COPFS would be helpful. This should be sought to examine and justify the public expenditure while the number of criminal cases has dropped in such a significant manner. There may be justifications such as public prosecutors dealing with policy teams, historical enquiries, and additional hearings in courts than there was previously, though it cannot be established simply and without further significant work whether these increases are justifiable and that they accord with the efficiency principle.

Having now established that the case load justification for the introduction of DMs as originally stated may no longer exist and that there has been no decrease in the number of sheriffs or prosecutors in Scotland, it is appropriate to consider whether another justification for DMs from those proffered by the Stewart and McInnes reports is available.

One possibility is that although there are fewer cases, these cases are more complex and therefore take up more time. This was suggested by Lady Dorrian, the Lord Justice Clerk, in her speech to the Scottish Association for the Study of Offending, where she stated that cases in the Scottish justice system have become much more complicated in terms of the nature and length of evidence.[510] One way of measuring this might be to look at the time that a case takes to progress through the system, as it might be assumed that more complex cases take longer to prepare and therefore take longer to conclude. Is it the case, then, that the summary courts are taking longer??

In order to attempt to answer this question, an FOI was submitted to Scottish Courts and Tribunal Service (SCTS). This FOI sought to establish the average length of time of a complaint being registered to the outcome of the case in summary proceedings

[510] Lady Dorrian, 'Remarks from the Chair' (SASO Annual Conference, Edinburgh 2022).

in Scotland. SCTS refused to provide the information as the time required to give this information would exceed the £600 statutory limit on providing this information, due to the fact that their operational database is not built to provide information for analysis and it would require an individual to examine every case and the relevant dates.[511] It is somewhat surprising that this key metric is not easily available to calculate, especially considering some additional research on projected averages on the time from not guilty plea to a trial was available.[512] Having conducted further enquiries and examined the SCTS Covid-19 backlog reports and projections, it was discovered, as shown in Table 15, below, that the base timeline from a not guilty plea to a trial commencing is 23 weeks.

Table 15: Projected average timeframe from not guilty plea to trial Sheriff summary.[513]

Sheriff Court Summary	Projected Average weeks to Evidence Led Trial as at the end of					
5000 Complaints Registered per month	Mar-22	Mar-23	Mar-24	Mar-25	Mar-26	Mar-27
Baseline (No COVID / 33 Trial courts)	23	23	23	23	23	23
43 Trial courts from April 2022	50	30	23	23	23	23
33 Trial courts from April 2023	50	30	23	23	23	23

If the average time from a not guilty plea to the trial diet is 23 weeks, it can be safely assumed that the baseline period from a guilty plea, at first diet, to a case resolution is likely to be significantly less than 23 weeks. The period of time for case resolution in the Stewart committee report for the time between a not guilty plea and a trial diet was stated to be between four and six months.[514] Therefore, despite the introduction of DMs, and a significant increase in the number of sheriffs (Table 14) and in public prosecutors, there has been no significant improvement in the length of time between a not guilty plea and the length of time to a trial, 5.75

[511] FOI Response, Scottish Court and Tribunal Service, December 2022.

[512] This presumes that this baseline measurement was based on actual examination of data and not a randomised figure selected, there is no available information to establish whether this is the case or not.

[513] Scottish Court and Tribunal Service, 'Criminal Court Recovery Modelling' (September 2022) <www.scotcourts.gov.uk/docs/default-source/default-document-library/reports-and-data/scts-modelling-report-09-22-final.pdf> accessed 30 December 2022.

[514] Stewart Committee, Keeping Offenders Out of Court: Further Alternatives to Prosecution (Committee Report, Cmnd 8958, 1983) para 2.08, 19.

months at the time of writing versus the four to six months in the Stewart committee report.

Whilst the SCTS has published this information, the Scottish Government has separately published statistics. Table 16 below shows the number of weeks, over seven years, for the time from the pleading diet to trial diet. This suggests that the period of time from pleading diet to trial diet has been significantly less than the SCTS data. It is unclear why there is a difference in the calculations between the SCTS figures (Table 15) and the Scottish Government calculations (Table 16), and further unclear why the baseline measurement in the SCTS figures is set higher than the average figure of the last seven years. It is acknowledged that the SCTS table, excluding column one is projected figures versus actuals from the Scottish Government. However if the SCTS data has used a different base set of data to generate these models from that used in the calculation of the seven-year average, then the justification for this change from the annual published data is unclear.

Table 16: Scottish Government figures pertaining to period between pleading diet and trial diet between 2014-2020.[515]

Year	2014	2015	2016	2017	2018	2019	2020
Period from Pleading Diet to Trial Diet (Number of Weeks)	19	15	14	13	12	12	18

On the basis of the Table 16 data, we can establish, at least prior to Covid-19, the average period of waiting for a trial diet was a little over four months and, therefore, still aligned with the original periods highlighted in the Stewart committee report. This enables us to conclude that there has been no improvement to the time delays in the Scottish system since the introduction of DMs, despite the significant reduction in case numbers (Table 12), significant increase in sheriffs in Scotland (Table 14), and significant increase in available public prosecutors.

[515] Statistics showing the length of time to process cases in Scotland from caution to verdict. Data provided by the Crown Office and Procurator Fiscal Service, the Scottish Courts and Tribunals Service and Police Scotland. Scottish Government, 'Criminal Justice Monitoring Data' (22 November 2022) <www.gov.scot/publications/criminal-justice-monitoring-data-monthly-statistics/> accessed 30th December 2022.

Whilst this gives some limited support to the assertion of Lady Dorrian, that cases are taking significantly longer to prepare and are more complicated, the lack of an ability to examine the information means that it has not been possible to substantiate the claim of Lady Dorrian, referenced above, or indeed whether the fact that more complicated cases actually have any impact on summary criminal justice. The Stewart committee proffered that:

> If resources are not made available to provide more courts and more prosecutors, then the consequences of delay in themselves would justify a search for adequate alternatives to the present forms of response to law breaking.[516]

This research has established that the number of prosecutors is significantly higher, as is the number of sheriffs, whilst the number of cases is significantly lower since the Stewart committee introduced DMs and the McInnes report widened and developed the available DMs in Scotland.

This would suggest that the justification for DMs may no longer exist, as these figures indicate that there may be capacity in the system to deal with these cases in the courts. Setting that point aside, we do need to consider what would happen if we reverted to the pre-Stewart position and brought the DM cases back into the court system (without addressing the puzzling issue of how these increased numbers of PFs/sheriffs are being employed). What impact would this have on the principle of speed as efficiency?

In order to consider this question, we can turn to Table 17, which shows the volume of cases in the sheriff summary court and the potential impact of re-introducing the number of cases disposed of via a DM. Whilst this Table does not take account of any cases which the public prosecutor would choose not to raise proceedings against, we can see that the volume of cases and the resultant impact would be problematic for speed as efficiency.[517]

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[516] Stewart Committee Report Keeping Offenders Out of Court: Further Alternatives to Prosecution, Cmnd 8958, HMSO, 1983 at 2.08 Pg. 19.

[517] For figures on 'no further action' cases in Scotland, see chapter 4.2.3.

Table 17: Volume of Summary business 2014 – 2020. [518]

Sheriff Summary Court	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
Complaints registered	71,350	72,242	70,717	65,646	59,777	65,490
Complaints called for first time	62,864	63,996	63,200	60,290	55,881	61,761
Complaints called for 'Continued Without Plea' hearing	13,380	13,571	14,800	13,990	12,163	14,851
Complaints called in Intermediate Diet court	82,076	87,127	79,245	73,970	67,979	70,652
Trials called	46,352	52,366	49,767	49,259	43,742	40,729
Trials called where evidence was led	8,912	9,425	8,982	8,245	7,731	6,946
Trials adjourned due to lack of court time	2,847	3,218	2,706	2,331	1,755	1,230
Percentage of trials adjourned due to lack of court time (rounded) %	6.10	6.10	5.40	4.70	4.00	3.00
Trials scheduled at end of period	20,298	18,297	16,013	13,839	11,272	13,971
Complaints concluded	66,209	68,907	67,702	62,675	57,982	57,256
% of Complaints Concluded versus Complaints Registered	92.79	95.38	95.74	95.47	97.00	87.43
Number of DMs	63,116	62,461	41,823	41,835	35,620	36,426
% Increase in Complaints Registered	88.46	86.46	59.14	63.73	59.59	55.62
% Increase in Complaints Called for First Time	100.40	97.60	66.18	69.39	63.74	58.98
Resultant Increase in Trials adjourned due to lack of court time	8259	8278	6119	5086	3827	3057

Table 17 demonstrates that based on the 2019/2010 numbers, removing the DM system would likely result in a 58.98% increase in cases calling in court and increase

[518] Adapted from - Scottish Courts and Tribunal Services, 'Quarterly Criminal Court Statistics Quarter Four 2018-19' (4th Statistical Bulletin, Official Statistics Bulletin for Scotland 2019) <www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/criminal-court-statistics/qcc4/scts-quarterly-criminal-court-statistics---bulletin-q4-2018-19.pdf?sfvrsn=2> accessed 17 November 2022.

of cases being adjourned by the court, *motu proprio*, in the region of 3000 cases.[519] This latter figure was arrived at by (a) calculating the percentage of cases presently delayed, (b) using that percentage figure to estimate the additional number of cases that would be delayed if DMs were added back into the system, and (c) adding that number to the number of cases presently delayed.

Thus, purely on a speed as efficiency basis, the impact of removing the DM system in Scotland would present fundamental challenges to speed as efficiency in the criminal justice system. In addition, this would lead to further adverse impacts on witnesses, complainers and accused persons due to the resultant increase in adjournments. Dealing solely with the situation as it stands, the number of cases being flooded back into the court system would be problematic, unless other measures were taken to make court business more time efficient.

In bringing this section of our analysis to a conclusion, we have established that the justification for DMs may no longer exist as it was originally promulgated, in both the Stewart committee McInnes committee reports. Nevertheless, there has been no significant improvement in court delays since the introduction of DMs, despite there being significant increases in the number of Sheriffs and public prosecutors in Scotland. The removal of the DM system in Scotland would cause significant difficulties for the court system, victims, witnesses and accused persons. Therefore, in respect of speed as efficiency in the criminal justice system, DMs do represent a significant benefit to the criminal justice system in Scotland.

5.5 Economic Value of Direct Measures in Scotland.

We now turn to the practical examination of the economic value of DMs in Scotland. The introduction of DMs, as well as being introduced to prevent delay in summary criminal cases, was also developed to achieve an economic advantage to the public purse. The aim of this section is to assess the extent to which DMs do, in fact, have economic advantages.

At the outset, it is essential to be clear on the limitations of this analysis. It does not proport to be a full economic analysis of the DM system in Scotland for reasons

[519] This presumes, of course, that the Public Prosecutor would continue the prosecution and not simply mark the case as no further action.

which shall become clear and it does not take account of the indirect costs or cost transference that might result from DMs. Nonetheless, it provides a basis from which some useful conclusions can be drawn.

The first point to be made is that any attempt to obtain a definitive cost model of what it costs to convict a person in court in Scotland is a movable feast. It depends vastly on the court in which the prosecution takes place, the stage at which the accused person pleads guilty, the number of and type of hearing(s) prior to the tendering of the plea, whether deferral of sentence has to take place for social enquiry reports, or whether the person is sentenced at the same time as they plead guilty. Table 18, below, sets out summary criminal case costs, published in 2019, which are the relevant costs in the context of DMs, because the sorts of case being dealt with by DMs would be summary cases if they were prosecuted. Table 18 includes not only the direct court costs, but also the prosecution costs and legal aid costs of the average summary criminal case.

Table 18: Sheriff Court average costs 2016-2017.[520]

Court	Stage	Prosecution Cost (£)	Average Court Costs (£)	Average Legal Aid (£)	Total Average Cost (£)
Sheriff Court summary (includes stipendiary cases)	Guilty plea at pleading diet	444	105	565	1,114
	Continued without plea then guilty plea tendered	444	154	565	1,163
	Guilty plea at intermediate diet	444	203	584	1,231
	Guilty plea at trial diet	444	308	584	1,336
	Trials - Evidence led	444	1,679	764	2,887
	Average cost of procedure	444	430	604	1,478

[520] Scottish Government, 'Cost of the Criminal Justice System in Scotland Dataset 2016-17' (Crime and Justice Statistics, December 2019) <www.gov.scot/publications/costs-of-the-criminal-justice-system-in-scotland-dataset-2016-17-published-december-2019/> accessed 10 December 2022, figures appear to be rounded figures from Scottish Government.

From Table 18, we can understand (and remembering the limitations of these figures discussed above), that in 2016-17 a guilty plea at first calling cost the public purse £1,114 per case. If we accept the premise that all persons who receive the offer of a DM are in fact guilty, would be prosecuted at summary level in the sheriff court and would plead guilty in court at the first calling of the case, then we can calculate an estimation of the saving which the DM system in Scotland might generate to the public purse. We do this in Table 19, taking the number of DMs issued and multiplying this by the average cost of pleading guilty at the pleading diet from Table 18.

Table 19: DMs Cost if pleading in Sheriff Court 2010-11 to 2018-19.[521]

Year	Number of DMs	Cost if Plea At pleading Diet Sheriff (£)
2010 – 11	60,099	66,950,286
2011 – 12	67,378	75,059,092
2012 – 13	87,591	97,576,374
2013 – 14	63,116	70,311,224
2014 – 15	62,461	69,581,554
2015 – 16	41,823	46,590,822
2016 – 17	41,835	46,604,190
2017 – 18	35,620	39,680,680
2018 – 19	36,426	40,578,564
Average	55,150	61,436,976

Table 18 and the subsequent calculations in Table 19 include a legal aid cost for the representation of the accused. Whilst, as we have established, there is, in the vast majority of cases, no associated legal aid costs in the DM system, it is legitimate to

[521] The calculations in Table 19, are made from the costs predicated in Table 18 and include the same cost lines.

leave legal aid costs in the above calculations as the cost does exist in the Sheriff Court.[522]

Thus, in a simple analysis, it could be said that the annual economic cost of DMs, as an average of the last ten years, is in the region of £61 million, but this simple calculation does not consider the cost of the running of the DMs system. Therefore, the next step in our analysis is to consider what the costs of running the system of DM might be. The Richards evaluation attempted to provide a cost analysis of the system of DMs but acknowledges many of the same challenges discussed in this work in respect of the collection of data and raw costs of each stage of the criminal justice system.[523] The figures presented in the Richards evaluation, as acknowledged in the report, were based on tentatively based costs and not broken down into a cost per DM basis. The Richard Evaluation suggests net savings annually of £0.7 million, but this data, as is accepted by the evaluations authors, lacks consideration of the number of challenges lodged to DMs, accepts as a benefit of the system cases being considered solely on the basis of the SPR, no legal aid being granted to accused persons and pre-supposes longer term effective of re-offending, all matters which are considered in more depth in this research. Therefore, such challenges of the data found by the Richards evaluation support this researcher's conclusion that in-depth data analysis is urgently needed.[524] Has the position changed since the time of the Richard's evaluation?

An FOI request to the Scottish Government resulted in the information that the average cost of a DM lies within the range of £1,150 to £1,550.[525] However, the response to the FOI indicates that these figures were compiled during a pilot program, reported on in August 2011, and that the estimated cost of a single DM once the system was running at capacity was anticipated to be £500, although it is

[522] This is an acceptance within this research; however, it is important to recall that legal aid in these circumstances would be means tested. For the figures on DMs receiving legal aid see chapter 4.2.4 within this research.

[523] Richards, P., Richards, E., Devon, C., Morris, S. and Mellows-Facer, A., Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011). evaluation 4; annex 3.

[524] Richards, P., Richards, E., Devon, C., Morris, S. and Mellows-Facer, A. , Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011).Table 4.1.

[525] See Scottish Government FOI Response 23th October 2020.

entirely unclear how these figures were calculated to enable an analysis of this estimate and its appropriateness.[526] It is unfortunate that there is no data available to enable a refreshed calculation of the cost of running the DM system in Scotland. Within Table 20, below, we use the range of estimated costs, and we examine the cost of the direct measures system (a) at the anticipated cost of £500 and (b) at both the low end and (c) at high end of the range discovered from the FOI response.

Table 20: Cost of a Direct Measure 2010-11 to 2018-19.[527]

Year	Number of DMs	Cost at £500 (£)	Cost at £1,150 (£)	Cost at £1,550 (£)
2010 -11	60,099	30,049,500	69,113,850	93,153,450
2011 - 12	67,378	33,689,000	77,484,700	104,435,900
2012 - 13	87,591	43,795,500	100,729,650	135,766,050
2013 - 14	63,116	31,558,000	72,583,400	97,829,800
2014 - 15	62,461	31,230,500	71,830,150	96,814,550
2015 - 16	41,823	20,911,500	48,096,450	64,825,650
2016 - 17	41,835	20,917,500	48,110,250	64,844,250
2017 - 18	35,620	17,810,000	40,963,000	55,211,000
2018 - 19	36,426	18,213,000	41,889,900	56,460,300
Average	55,150	27,575,000	63,422,500	85,482,500

Prior to concluding what may be established from these figures we firstly need to acknowledge the limitation of this information. Firstly, they were taken from a pilot project and the estimation is more than ten years old. Even an attempt at applying an increase to account for inflation over this period would likely result in a significantly increased figure in each aspect. Thus, we can establish that if the predicted figure of £500 per disposal is accurate and has been achieved, by deducting the average annual cost of a plea in the summary courts in Table 19 (£61,436,976) from the average annual cost of a DM in Table 20 (£27,575,000), then the average net saving of DMs versus court proceedings over the last 10 years was circa £34 million per annum. If the mid-point of the scale compiled from the pilot programme is the accurate cost, then the DM system in Scotland costs on average

[526] Indeed even the Richards Review was unable to quantify this – Richards, P., Richards, E., Devon, C., Morris, S. and Mellows-Facer, A., Summary Justice Reform: evaluation of Direct Measures (Crime and Justice Social Research Series, Scottish Government 2011). evaluation ch 4.
[527] FOI Request, Scottish Government Response 21st October 2021.

£2 million more per annum than disposing of the cases in court. If the upper end of the scale identified is accurate, then the DM system in Scotland costs on average £24 million more per annum than the court disposal system. Having set out the potential saving or cost of the DM system, we now turn to consider the utilisation of the fiscal fine and whether the full potential saving could have been achieved, particularly where court proceedings were used by COPFS to seek imposition of a criminal sanction rather than imposing a criminal sanction via a DM.

This research established, in chapter 4 (Table 9), that the level of the fiscal fine imposed is significantly below the permitted level of £300. We further established that the average court fine for the last 10 years has been lower than the amount permitted in the system of DMs.[528] It is possible, then, that there are a number of cases being processed in court whereby the criminal sanction-imposed falls within permitted levels of the fiscal fine. Therefore, if the £500 cost of a DM can be substantiated, then there are a number of cases having sanction imposed within the court system which may be more efficiently disposed of via the DM system, leading to further cost efficiencies being achieved.[529] This being said, if the £500 level cannot be substantiated then this falls to be dismissed.

The analysis is more complicated still. Another factor to be considered is the effectiveness of collecting fines. This is important because money received in fines is directed back into the criminal justice system. If there is a difference between DMs and court-imposed fines in this respect, this may wipe out any benefit in the cost savings from disposing of more cases via a DM. That is, if court fines are more effectively collected and the money reposited than in the DM system, then the differential may wipe out the economic efficiency of the process. To examine this economic impact, we shall now consider the position in relation to fine collection in the Sheriff Court system versus the DM system.

[528] Table 9.
[529] The Coronavirus (Scotland) Act 2020 extended the maximum fiscal fine to £500, this was said to be a temporary measure and as such the previous statutory figure of £300 is used.

In the fiscal years 2018-19 to 2020-21, the Sheriff Court fine collection statistics reveal that there were a total of 38,293 Sheriff Court fines to be collected.[530] This resulted in the collection statistics showing 75.2% being fully collected and 9.5% being on track for collection, a total of 84.7%.[531] This represents a total of £17.3 million of fines being paid or on track for payment.[532] In comparison, the DM imposed 58,058 fines and compensation orders, and statistics demonstrate that 67.3% of fines were fully collected and 10.4% were on track for collection, a total of 77.7%. The DM total financial representation of this is £7.9 million fully paid or on track for payment.[533] Thus we can understand from these figures that court fines are more likely to be paid in full or be on track to be paid in full by seven percentage points. We can, therefore, conclude from an economic efficiency perspective that DMs are less likely to be effective at generating revenue for the public finances and any transfer of business from the Sheriff Court to the DM system may result in an economic differential from a fines collection perspective. The reasons for this differential are outwith the scope of this research and whilst in our consideration of the economic impact of DMs it is important to understand the full impact of DMs, the underlying reasons for the collection differential requires a full examination and study which this research is unable to do.

As is accepted, there are natural limitations to the calculations within this chapter, as we only consider the direct costs of the DM system in Scotland. In contrast, as we understand from Gibson's study above, it is more complicated than this because of indirect and transferred costs. In addition, from this analysis, it is certainly not possible to confirm that DMs achieve an economic advantage because this would require a) the £500 costs to be achieved in reality and b) the indirect costs of DMs (in terms of reducing offending etc) are at least no different to or are less than that

[530] Scottish Court and Tribunal Service, 'Quarterly Fines Report 53' (Quarter 4 2021-22, Official Statistic Publication for Scotland 2022) 10 <www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/quarterly-fines-reports/qfr53/quarterly-fines-report-53---2021-22-q4.pdf?sfvrsn=54db77cf_2> accessed 18 December 2022.

[531] Via instalments or an approved payment plan.

[532] This figure also includes compensation orders.

[533] Scottish Court and Tribunal Service, 'Quarterly Fines Report 53' (Quarter 4 2021-22, Official Statistic Publication for Scotland 2022) 10 <www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/quarterly-fines-reports/qfr53/quarterly-fines-report-53---2021-22-q4.pdf?sfvrsn=54db77cf_2> accessed 18 December 2022.

which is achieved via a court imposed criminal sanction. What we can say is that unless a full scale and detailed economic analysis was undertaken to substantiate the anticipated cost of DMs at £500 or to confirm the exact costs of the DM system in Scotland, there remains a doubt as to whether the system in Scotland at present achieves an economic advantage.

Therefore, within the limitations of this research we have been unable to establish beyond that the economic benefits of DMs outweigh the significant concerns identified in the previous chapters regarding the principles of justice.

5.6 Conclusion.

At the outset of this chapter, we set out to establish whether the system of DMs in Scotland could be justified from a perspective of speed as efficiency and economic efficiency. This research suggests that, from a speed as efficiency consideration, the original justification for DMs in Scotland from a volume of cases perspective may no longer exist. However, there would still be problems should the system of DMs be removed from the available options to the public prosecutor, and this would have a significant impact on the efficiency of the criminal justice system in Scotland, particularly on accused persons, victims, and witnesses. Whilst the justifications as originally stated in the Stewart and McInnes committee reports may no longer be substantiated, we have established that a new justification for DMs now exists in that without the system of DMs, there would be significant issues for speed as efficiency in the Scottish criminal justice system. The argument for keeping the system of DMs in Scotland starts from a significantly different base level because of the significant drop in number of SPRs to COPFS. This perhaps raises more questions about the efficiency of the Scottish Judiciary, court service and the public prosecutor service in Scotland than it answers, but it is clear that as things stand, abolishing DMs and incorporating those cases back into the summary justice process would cause delays in case conclusion times.

The picture regarding cost is less clear. This chapter has shown that there is room for doubt as to whether DMs actually save money at all, compared to the cost of the summary court process. This too raises questions about the economic efficiency of the prosecution of crime in Scotland, although these are outside the scope of this

thesis. The best that can be concluded is that DMs probably do save money - as long as the projected cost of £500 per DM that was predicted in the DM pilot has actually been achieved. It does have to be remembered, though, that this calculation is necessarily a simplistic one; it does not take account of the indirect costs of DMs compared to a court measure, as identified by Gibson in her equivalent English research.

The tension between justice and efficiency is, perhaps, the greatest ongoing battle in the criminal justice system but tends to be hidden behind popularist views of cost savings, value for money and other such terms. What is never acknowledged (publicly, at least), by government ministers, is the risk that a cost savings approach poses to the overarching principles of justice. It has been suggested that these are simply two principles that must be diametrically opposed, and we should normally expect one to be a trade-off for the other.[534] It could be said that the issues of fairness and effectiveness are secondary to cost efficiency. This is not the approach this research will take. This research seeks to identify possible methods whereby we have a system in Scotland that can achieve fairness (or at least not compromise it to the extent that it presently is), be effective and be cost efficient. Whilst seeking to do this, a pragmatic view is required, as this research has done throughout.

With this in mind, and as we come to this research's conclusion of the exploration of the principles of effectiveness, fairness, and efficiency, we recall that in chapters 3 and 4, this research identified a number of issues with DMs in terms of their effectiveness and fairness.

In chapter 3, which considered the principle of effectiveness, we came to understand that there were issues in respect of the principles of deterrence (both general and individual), rehabilitation, protection of the public and that there are indications of an underuse of the fiscal work order and compensation schemas when compared against court proceedings. In particular it was argued that a retributive value is required in the system of DMs, but that it must be a proportionate response to the level of criminal offending. Second that there was limited evidence of a

[534] Brian Barry, Political Argument (2nd edn reissue, University of California Press 1990).

general deterrent effect and that there may be a lesser individual deterrent effect. Third, a lack of evidence of a rehabilitative effect. Fourth, that there may be no public protection element of effectiveness in the system of DMs and finally, there may be concerns regarding the under use of the combined fine and compensation orders in the DM system in Scotland.

In chapter 4, where the principle of fairness was considered, an evidence-based understanding was reached that there were issues surrounding the accuracy of outcome due to problems with the case marking system, recording of information in the SPR and a lack of audit procedures. In addition to this, when the matter of consistency was examined, there were two issues identified, inconsistent decisions *per se* and inconsistent decisions due to a lack of recorded information. In chapter 4 it was accepted that DMs are a proportionate response to minor offending behaviours but that there are persistent issues with the definition of minor offences, an underuse of compensation orders and concerns around net-widening caused by the DM system. Finally, as representation was considered, it was established that there was little opportunity for the voice of the accused to be heard, via representation or at all, in the decision-making process.

In an attempt to find a methodology of addressing the issues of fairness and effectiveness that do not compromise the cost and time efficiency of the DM system, or at least, if they do lead to delays and increased cost, that these can be justified on restoring the balance of fairness and effectiveness in the DM system in Scotland, this research now turns to an examination of the DM system in the jurisdiction of the Netherlands and seeks to understand what this system might offer to the operation of the DM system in Scotland.

Chapter 6: The Netherlands.

Having concluded the examination of the Scottish system of DMs in respect of the principles of justice, this research now turns its focus to consideration of areas of potential development through learning from an alternative system. The system chosen for comparison is the Netherlands and the reasons for choosing it were set out in chapter 1. Looking at the Netherlands, we shall consider whether any improvements can be identified that could be implemented in the Scottish system in order to better align it with the principles of justice.

In this chapter we will set out to understand the history of the DM in the Netherlands, the developments which have occurred within the DM system and how the system currently operates. We will then move to consider particular areas of the Dutch system which might offer material benefits to the Scottish system. Prior to commencing this analysis, it is essential to remember, as was outlined in the methodology section in the introductory chapter, that this comparison is not meant to be a comprehensive legal comparison of the two systems, nor is it being suggested that elements of the Dutch system can simply be transplanted into Scotland without further consideration. Rather it is intended to identify any particular aspects of the Dutch system that might align the Scottish system more closely with the principles of justice.

Having outlined the purpose of this chapter and what this research seeks to learn from the examination of the Dutch system, the history and present operation of the system of DMs in the Netherlands will now be introduced before moving to consider the case marking system, representation and appeals. These three aspects have been selected for further discussion as they offer the most potential for improving the Scottish system of DMs.

6.1 History of and Present System of Direct Measures in the Netherlands.

The Dutch system of the DM has a much longer history than its Scottish equivalent but has also been subject to significantly more development and change as we shall now come to understand. To develop this understanding within this research we will first consider the case progression of criminal complaints in the Netherlands.

The system of case progression from the reporting body to the public prosecutor, generally, follows a similar path to that of Scotland, as outlined in chapter 2, in that the reporting body, normally the police, report an accused person to the public prosecutor to make the decision on how the criminal complaint should proceed. In line with the position in Scotland, the Dutch prosecutor can decide not to proceed with a case in the public interest. Generally, the Dutch system follows the same two stage test as Scotland; first, is there a sufficiency of evidence? Second, is it in the public interest to prosecute? This being the case, the two-stage approach is considered together in the Dutch Code of Criminal Procedure.[535]

When the public prosecutor brings criminal proceedings in the public interest, there are a variety of options available to them. These range from a DM to a court-based prosecution. As this research's focus is on the system of DMs then we now turn to consider the position of these in the Dutch criminal justice system.

The Dutch system has a long tradition of using DMs, beginning in 1838. The primary reason for the introduction of a system of DMs was to improve the efficiency by which criminal complaints are resolved.[536] The initial system of the DM in the Netherlands was for offences whereby the only statutory sentence was a financial penalty.[537] As the system of the Netherlands began to develop, there was a widening of the sanctions available and of the circumstances in which they would be used. This widening occurred to relieve pressure on the criminal justice system.[538] Similarly to the system in Scotland, there have been developments within the scope of the DM system in the Netherlands. The first significant development to the DM occurred in 1983 when the scope was widened to allow the DM to be available to all offences where the maximum prescribed sentence was less than six years in

[535] Code of Criminal Procedure, s 167.

[536] Peter J P Tak, 'Methods of Diversion Used by the Prosecution Services in the Netherlands and other European Countries' in UNAFEI (eds) 135th International Senior Seminar Visiting Experts Papers Resource Material Series No 74 (University of Radboud 2008) 54; ET Luining, 'The Dutch Punishment Order: Controversy, Comparison and Compromise' (Master thesis, University of Leiden 2014) 7.

[537] Peter JP Tak, The Dutch Criminal Justice System (3rd edn, Wolf Legal Publishers 2008) 87.

[538] Peter J P Tak, 'Methods of Diversion Used by the Prosecution Services in the Netherlands and other European Countries' in UNAFEI (eds) 135th International Senior Seminar Visiting Experts Papers Resource Material Series No 74 (University of Radboud 2008) 54; ET Luining, 'The Dutch Punishment Order: Controversy, Comparison and Compromise' (Master thesis, University of Leiden 2014) 7.

custody.[539] This is clearly at odds with the Scottish system, where offences which are likely to receive a custodial sentence in excess of five years are triable in the High Court of Justiciary and would be highly unlikely to receive a DM.[540] As was averred, in chapter 4, the DM system in Scotland is not used for offences which are likely to receive a custodial sentence, because DMs are reserved for 'minor offences'. This does not mean, necessarily, that the system in the Netherlands has a disproportionate response to the offending behaviour. As we concluded in chapter 4, all criminal justice systems have limited resources, and it is not unreasonable that some offending behaviour is dealt with outwith a court setting.

A further development occurred in 2008 which has meant that there has been, in effect, two systems of DMs operating in the Netherlands, with the latest version of the system now on track to replace the former system of DMs. The former system of DMs (the transaction) operated similarly to the system in Scotland, with the significant difference being the opt-out/opt-in practice (which is discussed below). The 2008 developments and amendments to the law of the Netherlands introduced the system of the Punishment Order (PO).[541] At the time of writing, the system of the PO has just about completely replaced the former system of the transaction. As such, we shall consider the PO system as it operates now. For the purposes of understanding the system as it operates now, however, we must first understand how the transaction system operated, as many of the developments and current operations of the system now find their roots and foundations in the system of the transaction.

In 1983, the transaction could only be offered in cases whereby the maximum sentence was a fine,[542] whereas following the amendments to what was then Article

[539] D Van Daele, Het Openbaar Ministerie en de Afhandeling van Strafzaken in Duitsland (Leuven University Press 2003); Henk van de Bunt and Jean-Louis van Gelder, 'The Dutch Prosecution Service' (2012) 41 Crime and Justice 117.

[540] See - The Criminal Procedure (Scotland) Act 1995, s 3. For clarity, any offence in Scotland may be tried in a sheriff court, except for the pleas of the Crown, but no sentence in excess of five years may be passed by the Sheriff and must be either heard in the High Court or remitted to the High Court of Justiciary for sentencing.

[541] Wet OM-afdoening van 7 Juli 2006, Stb 330.

[542] Code of Criminal Procedure of the Netherlands Section 74 CC Version in force 1983; Financial Penalties Act 1983.

74 of the Dutch Criminal Procedure Code, it became legitimate to offer a transaction for offences subject to a maximum of six years in custody. The transaction was not recorded on the criminal record of the accused and must have been actively accepted by the accused person with an admission of guilt in accepting the transaction.

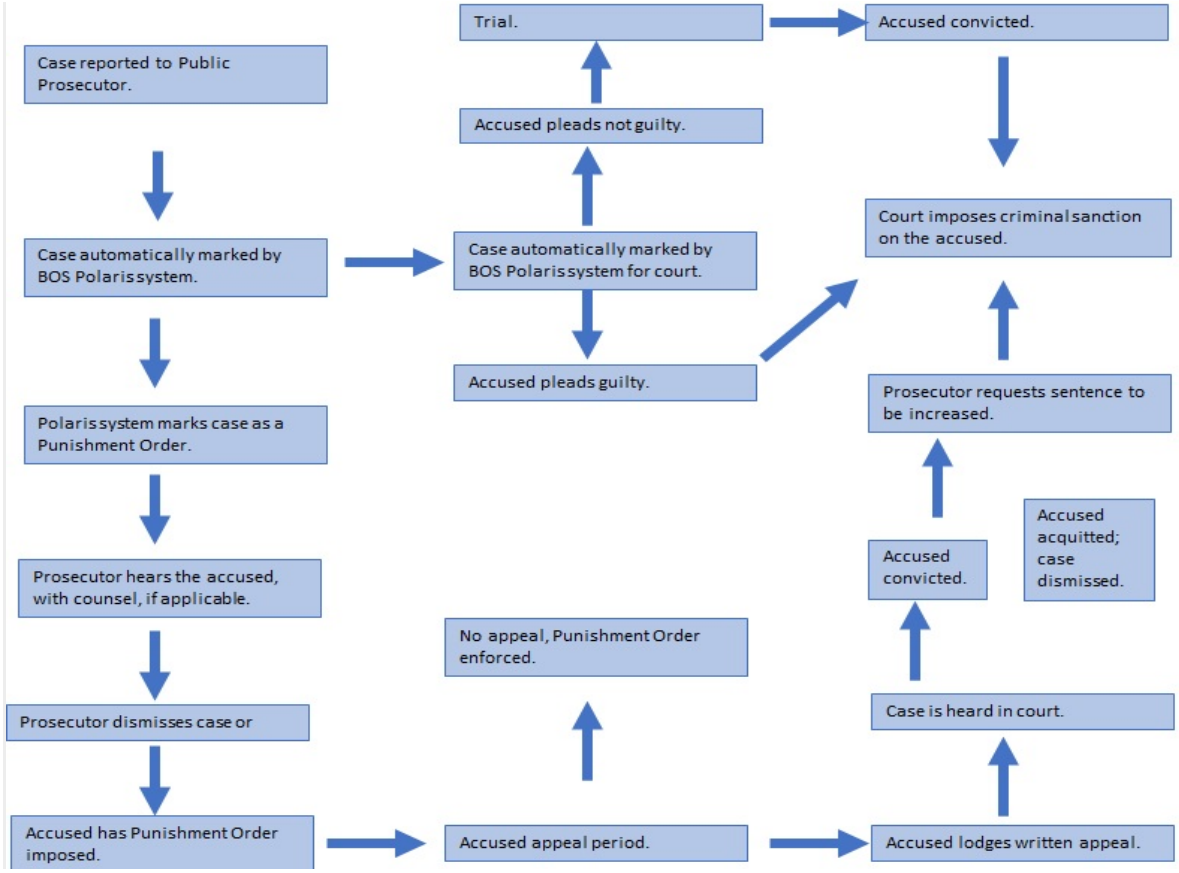
In terms of the available types of DM, section 257a of the Code of Criminal Procedure provides that the present available DMs are; community service up to a maximum of one hundred and eighty hours; a fine; withdrawal from circulation, withdrawal of a driving licence;[543] and a compensation order.[544]

As can be recalled from our consideration in chapter 2, and in particular Table 1, there are no significant differences, in nature and type, between the available DMs in the Netherlands and the system in Scotland. Both systems have fines, compensation orders, and work orders. The system in Scotland does not have forfeiture or confiscation of property or seizure of gains from criminal acts. One difference is that, unlike Scotland, the fine in the Netherlands is only limited by the statutory maximum for the offence, whereas in Scotland the fine is limited to £300.[545] In addition, a further difference, which is important for the purposes of this research, is the number of hours of unpaid work which can be imposed in the Netherlands, which is significantly higher than in Scotland, and the recovery of goods and forfeiture of the proceeds of crime can all be required by the public prosecutor. For the sake of completeness, we can also understand that the warning system via written or verbal communication that is available in Scotland to an accused does not exist in the Dutch system.

Having outlined the Dutch system prior to the introduction of the Punishment Order (PO), we can now consider how the system operates with the PO. As outlined above, since 2008 the PO has been replacing the former system of the transaction and at the time of writing has all but done so. In order to facilitate the following discussion

[543] Withdrawal from circulation refers to the forfeiture of goods.
[544] Code of Criminal Procedure S257(a). The code also permits traffic offences to be subject to a disqualification, as the Scots system does not deal with traffic infringements under the DM system, but under the Fixed Penalty system and is out of the scope of this research it is unnecessary to consider here.
[545] See chapter 2 for discussion of the "temporary" increase to the fiscal fine.

on how the system of the PO operates, Figure 3 outlines how a criminal case



progresses from the police report to the prosecutor to the case resolution:

Figure 3: Netherlands Case Progression process.[546]

When a reporting body, normally the police, makes a report to the public prosecutor in the Netherlands, the case goes through the case marking system which we shall consider within section 6.2 of this chapter.

As we can see from Figure 3, there are some significant differences in the progress of a case in the PO system in the Netherlands from the system in Scotland. Two of these differences are the hearing of the accused with counsel and the appeals process. These will be discussed in detail later as, together with the case marking system, they are two of the features of the Dutch system that the research suggests could be considered as presenting an opportunity for the criminal justice system in

[546] Table created by the researcher from the Code of Criminal Procedure and his own research.

Scotland. Before we discuss these two features in detail, however, there are some other aspects of the operation of the PO system which are important to understand.

It is important to note that a significant difference between the Dutch transaction system and PO system is the change from an opt-in to an opt-out process. Prior to the creation of the PO, the Dutch system operated on the basis of an opt-in system, as did the Scottish system prior to the recommendations of the McInnes report being introduced. Since the creation of the PO, the Dutch system has, like Scotland, moved to an opt-out system.[547] With this change came two different time periods operating in relation to the opt-out. For offences where the financial penalty is €340 or lower, the accused has 14 days from the day on which they receive the PO (or it becomes known to them) to refuse it.[548] If they do not do this within the time period, then they become subject to the PO and have a criminal record.[549] For offences where the financial penalty is more than €340, the procedure is the same, but the time period in which they can refuse the PO is longer at six weeks.[550]

For a comparison with Scotland, the phrase "when the accused becomes aware of the PO" is important. In Scotland, after the period of 28 days the DM is irrevocable; there are no provisions by which an accused person can say they were unaware of the DM, and they would have challenged it or indeed could not possibly have understood it - the law simply does not allow for this.[551]

In cases where the accused does object to the PO, the procedure in the Netherlands and Scotland is similar but not identical. If the accused objects, in both jurisdictions

[547] ET Luining, 'The Dutch Punishment Order: Controversy, Comparison and Compromise' (Master thesis, University of Leiden 2014) 8.

[548] ET Luining, 'The Dutch Punishment Order: Controversy, Comparison and Compromise' (Master thesis, University of Leiden 2014) 28.

[549] ET Luining, 'The Dutch Punishment Order: Controversy, Comparison and Compromise' (Master thesis, University of Leiden 2014) 10.

[550] See - ET Luining, 'The Dutch Punishment Order: Controversy, Comparison and Compromise' (Master thesis, University of Leiden 2014) 26. The reason for the difference in the two periods is unclear, but it can be suggested as being due to the requirement for the higher levels for compulsory engagement with the accused and their agent, discussed further in the representation sub-section.

[551] There is perhaps a suggestion that this could be subject to a judicial review in Scotland, but this has never been tested.

the public prosecutor has the option either to revoke the DM and refer the case to court or cease the prosecution.[552] In the Netherlands, however, there are two additional options available to the public prosecutor. First, they could review the PO which was initially adjudicated as appropriate and enforce a different type of PO.[553] Second, they could simply refuse the objection and impose the PO and the accused would have to lodge an appeal to the court against this decision.[554] If the accused remains dissatisfied with the imposition of the PO they may appeal to the court of appeal against the PO.[555]

The second significant difference in the PO system versus the transaction system is that the accused person receives a formal criminal record by the imposition of the PO, which was not the case under the old transaction system. It is important to note that this change was implemented alongside additional safeguards which are considered in the representation section below, which do not presently exist in the Scottish system, alongside the objection process and the appeals system referred to above.

With this change came the third difference between the PO and the transaction: the PO is served on the accused in person, where possible, although provision is made within the criminal code that a copy can be issued to the accused's registered address, from public record.[556] It may be legitimately suggested that this personal service of the PO overcomes the difficulties discovered in this research whereby in Scotland the accused does not receive the PO due to the postal system or change of address etc. In addition, in the Dutch system with the periods for objection and appeal being crucial to the checks and balances afforded by the system then proof of service on the accused becomes crucial.

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[552] Code of Criminal Procedure, Netherlands, Section 257.

[553] ET Luining, 'The Dutch Punishment Order: Controversy, Comparison and Compromise' (Master thesis, University of Leiden 2014) 25.

[554] There are further powers available to the public prosecutor should an accused appeal to the court, which is considered in further detail in the appeal section of this chapter.

[555] ET Luining, 'The Dutch Punishment Order: Controversy, Comparison and Compromise' (Master thesis, University of Leiden 2014) 25-26.

[556] Code of Criminal Procedure (Netherlands) Section 257d, para 1-2; ET Luining, 'The Dutch Punishment Order: Controversy, Comparison and Compromise' (Master thesis, University of Leiden 2014) 23–24.

Whilst being immediately understandable as a method of overcoming the criticisms levelled at the DM system in this research, this personal service on the accused of every single DM would require the absorption of what would be not insignificant costs or the creation of a service methodology which would need to be costed and in either case could be highly problematic for the cost as efficiency and resourcing evaluation of the system. Whilst acknowledging that this costing and consideration would be required before being categorical in a rejection of this aspect of the system, for the purposes of this research this is not a matter which will be considered for development in Scotland.

It has been suggested that an efficiency advantage was lost in the Dutch system in their move from the transaction to the PO. Wijkerslooth suggests that under the system of transactions DMs would be offered to the accused without the case being fully prepared for trial and this was understood by the accused's legal representatives and the public prosecutor, but the advantages of no criminal record and a lesser criminal sanction meant this was accepted by both sides and neither would seek the case being fully prepared as a trade-off for the benefits to the accused.[557] Wijkerslooth goes on to suggest that the position of the accused is different under the system of POs, as the loss of the benefits of accepting the DM, being no criminal record and a lesser punishment, would then lead the accused to seek the case to be fully prepared and object to the imposition of the PO, leading to the Dutch system becoming less efficient.[558]

We can draw a comparison with the system of the Standard Police Report (SPR) and the concerns this research has raised about decisions being made through the lens of a police officer rather than on the full evidence of the case. Therefore, we can say that under the transaction system, the Netherlands operated a similar methodology of the case being resolved only on partial information. Since the introduction of the PO, the public prosecutor must be fully prepared for trial should

[557] JL Wijkerslooth, 'De Strafbeschikking' in L Loeber (ed) Het Wetsvoorstel OMafdoening en de Verhouding Tussen Strafrechtelijke en Bestuursrechtelijke 81 Handhaving: Vereniging voor Wetgeving en Wetgevingsbeleid (Netherlands, Wolf Legal Publishers 2007).

[558] JL Wijkerslooth, 'De Strafbeschikking' in L Loeber (ed) Het Wetsvoorstel OMafdoening en de Verhouding Tussen Strafrechtelijke en Bestuursrechtelijke 81 Handhaving: Vereniging voor Wetgeving en Wetgevingsbeleid (Netherlands, Wolf Legal Publishers 2007).

the accused object to the PO and, as we discussed in chapter 4, this better aligns with the principles of justice that case marking decisions are made in full possession of all the available information.[559] This being the case we can understand from our examination, in chapter 5, that the requirement to have a case fully prepared before issuing a DM would be problematic from a 'time as efficiency' perspective for the Scottish system. Should a conclusion be drawn in this research that there be a requirement for COPFS to make decisions based on full statements rather than on the SPR such a requirement would create an additional burden and pressure on the system in Scotland and would be likely to lead to delays and this would impact on the time efficiency of the system.[560] This being the case, it would be a matter of interest for further research to understand how the Dutch system has managed to reduce the period of time required to impose the DM, whereas the Scottish system has remained static.

Continuing this efficiency consideration, we can establish by examination of previous research that, as of 2012, the average period of time from a criminal complaint being made to the public prosecutor in the Netherlands to resolution for all DMs was 15 weeks. Transactions on average took nine weeks, whereas POs took only five weeks.[561] Therefore, we can establish that following the introduction in the Dutch system, the PO took only a third of the average time in comparison to other DMs and saved on average a period of four weeks for the public prosecutor in terms of speed of processing. This is despite the requirements of case preparation outlined above.[562]

In the preceding paragraphs the operation of aspects of the PO system have been considered and swiftly excluded from further consideration such as the personal

[559] JL Wijkerslooth, 'De Strafbeschikking' in L Loeber (ed) Het Wetsvoorstel OMafdoening en de Verhouding Tussen Strafrechtelijke en Bestuursrechtelijke 81 Handhaving: Vereniging voor Wetgeving en Wetgevingsbeleid (Netherlands, Wolf Legal Publishers 2007).

[560] The underlying causes of this in Scotland are outwith the scope of this research but further examination of this is necessary to truly understand the inefficiencies in the Scottish system and potential remedies to this.

[561] SN Kalidien and NE De Heer-de Lange, Criminaliteit en Rechtshandhaving: Ontwikkelingen en Samenhangen (CBS WODC, Raad voor de Rechtspraak 2012) 131.

[562] Whilst no up-to-date data was available since 2012 on these figures there is no reason to assume mutatis mutandis. However, all that can be established in this research is the situation in 2012 and as suggested in the preceding paragraph, further research in this area is required.

service aspect of the PO in the Netherlands. In this researcher's view the associated costs and labour hours would make this significantly inefficient for the Scottish system particularly whereby personal service in Scotland in summary proceedings is generally a last resort. This research now turns to a critical examination of the three areas noted earlier. These three aspects will be discussed in more depth as following detailed examination and research on the Dutch system they represent the most promising areas for development and learning in the Scottish system.

6.2 BOS Polaris System – Case Marking in the Netherlands.

Prior to understanding the case marking system of the Netherlands, a fundamental consideration of this comparative section of this research, we must firstly understand some basic aspects of the case management process prior to the case marking system.

In the Netherlands, there are in effect two different systems of case management of prosecution in what the Scots system would call summary cases. These two systems are called the ZSM procedure and the CVOM procedure.[563] The ZSM procedure deals with the most minor matters and the CVOM procedure with more serious minor matters or complicated minor complaints. The routing of the cases is taken automatically on the basis of the selected route by the reporting police officer.[564] In the ZSM procedure the case is automatically moved to the electronic case marking process.[565] The ZSM procedure has been criticised for its speed of resolution and an underlying assumption in this system that the speed is beneficial to accused persons as shall be discussed further.[566] In the CVOM procedure the case

[563] For a full outline of the ZSM system, see – Pauline Jacobs and Petra Van Kampden, 'Dutch, ZSM Settlements, in the Face of Procedural Justice: The Sooner the Better?' (2014) 10(4) Utrecht Law Review 73.

[564] Joep Lindeman and Nina Holvast, 'New Public Management in the Dutch Criminal Justice Chain: The Effects of Stratification and Automation in Out-of-Court Proceedings' in Ed Johnston and Anna Pivaty (eds) Efficiency and Bureaucratisation of Criminal Justice: Global Trends (Routledge 2023) 53-54.

[565] Joep Lindeman and Nina Holvast, 'New Public Management in the Dutch Criminal Justice Chain: The Effects of Stratification and Automation in Out-of-Court Proceedings' in Ed Johnston and Anna Pivaty (eds) Efficiency and Bureaucratisation of Criminal Justice: Global Trends (Routledge 2023) 53-54.

[566] Pauline Jacobs & Petra Kampen, (2014). 'Dutch 'ZSM Settlements' in the Face of Procedural Justice: The Sooner the Better?'. Utrecht Law Review.

marking process does not begin until the case is examined by a qualified public prosecutor and, once this examination is completed (and any associated instructions from the prosecutor are complied with), the case is passed to the case management system.[567] Following the case marking decision in the CVOM procedure, the case is passed back to the public prosecutor appointed prior to the issuing of the case management decision.

The case marking system is the first of the three areas to be considered by this research as offering opportunities for learning for the Scottish DM system.

The system of case marking represents a significant step in the Dutch public sector seeking to increase efficiency in their institutions and it is also a significant step towards standardisation of decision making. The first step of this move for the public prosecutor was achieved in the 1990s by the Dutch public prosecution service introducing an electronic case marking system called BOS-Polaris (Polaris).[568]

Despite what is indicated above regarding the application of the legal tests in the ZSM procedure, and the natural concerns this should raise within the Dutch legal system, there is a requirement in statute to carefully consider the criminal complaint in the same way as the public prosecutor would prior to issuing a summons to court.

> Issuing a punishment order is equal to a court summoning, considered to be an act of prosecution. The main concerns are found in Section 257a, and according to paragraph one it is the prosecutor who decides if someone committed a crime and guilt has been established. This might give the impression the prosecutor only has to find a punishable offence has been committed but not whether the accused can also be held criminally liable. However, that impression is invalid as an amendment (Parliamentary Papers II 2004/05, 29 849, 9) has made it explicit that the establishment of guilt should also include

[567] Joep Lindeman and Nina Holvast, 'New Public Management in the Dutch Criminal Justice Chain: The Effects of Stratification and Automation in Out-of-Court Proceedings' in Ed Johnston and Anna Pivaty (eds) Efficiency and Bureaucratisation of Criminal Justice: Global Trends (Routledge 2023) 54.

[568] Dan McManus, 'Scotland and the Alternative Disposal: Thinking differently' (LLM(R) thesis, University of Glasgow 2021) para 4.2.

> the deliberation of whether an accused can be held criminal liable for the punishable offence. This means the prosecutor should, in theory, consider whether a statutory defense (Sic) (strafuitsluitingsgrond) is present (Kooijmans, 2012). Despite the fact that the law does not explicitly mention what evidentiary rules prosecutors should follow, prosecutors are bound to the same rules on evidence prescribed for criminal judges (as laid down in Section 339 22 CCP).[569]

The Polaris system is an automated computerised decision-making system whereby key elements of an offence are entered into the system from the crime report.[570] Each element of an offence is given a certain number of points, which dictates the action that the prosecutor will take. Tak suggests that points for each offence may be reduced or increased due to particular circumstances:

> Due to special circumstances, the number of points can be higher or lower, e.g., the use of weapons or the existence of injury of the victim lead to extra points. An attempt to commit a crime leads to a reduction of points. Recidivism makes that half of the points are added, multiple recidivism doubles the points. Finally, the points are converted into a sentence. Not all the points count fully for the sentence. A conversion method has been elaborated. Up to 180 points, every sentencing point counts. Between 181 to 540 points, each point counts as half a point, and above 541 points, each point counts as a quarter of a point.[571]

[569] ET Luining, 'The Dutch Punishment Order: Controversy, Comparison and Compromise' (Master thesis, University of Leiden 2014) 21.

[570] The requirements of a crime report to the Dutch are similar to those required within the Standard Police Report in Scotland. An outline of the full reporting procedure in the Netherlands is available here: Politie NL, 'Information for Victims of a Crime: Reporting a Crime, what Happens Next?' (2023) <www.politie.nl/binaries/content/assets/politie/onderwerpen/slachtofferzorg/vertaalde-folders/brochure_reporting-a-crime_what-happens-next.pdf> accessed 30 April 2023.

[571] Peter JP Tak, The Dutch Criminal Justice System (3rd edn, Wolf Legal Publishers 2008).

An example of the operation of the points-based system is given by Tak and is reproduced, in Table 21, below. [572]

Table 21: BOS-Polaris points.[573]

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

[572] Given the nature of using a Tak produced published table of these points and that they are able to be changed in the manner described in this research these may not be in most up to date points totals, but nothing in the argument presented turns on this fact.
[573] Peter JP Tak, The Dutch Criminal Justice System (3rd edn, Wolf Legal Publishers 2008).

Once an offence has been marked by the computerised system, any offence above 61 points requires that the accused be put before a court.[574] These automated decisions, as of 2012, took up 80% of all case marking decisions in the Netherlands.[575] The system determines the type of PO, its level and takes the decision to offer the PO or to refer the case to court. In the CVOM procedure, unlike in the ZSM procedure, whereby the case management decision is passed back to the public prosecutor, it should be noted that the decision of a prosecutor not to follow the system recommendation leaves their decision open to objection and potentially appeal as we shall come to consider in this chapter.

In addition to the points system indicated above Polaris automatically, for a person committing their second criminal offence, increases by half the number of points achieved by the new offence when the case is being marked. For accused persons with multiple previous convictions the points are automatically doubled. An example is given in Table 22 below:

Table 22: Polaris points attributed to cases involving assault to severe injury.

Offence	Points	Total Points
Assault to severe injury	35	35
Additional points with 1 PC	17.5	54.5
Assault with multiple PCs	35	70

There is one difference to note between the Polaris system and the Scottish system in respect of repeat offenders. As noted earlier, for a person committing their second criminal offence Polaris automatically increases by half the number of points achieved by the new offence when the case is being marked. Table 22 demonstrates a clear method of attempting to ensure a consistency of approach when taking into account previous convictions when the accused is charged with a new offence and

[574] Hans de Doelder, 'The Public Prosecutor Service in the Netherlands' (2000) 8 European Journal of Crime, Criminal Law and Criminal Justice 187.

[575] Henk van de Bunt and Jean-Louis van Gelder, 'The Dutch Prosecution Service' (2012) 41 Crime and Justice 117.

thus escalation of offending behaviour is automatically escalating the forum of prosecuting the accused person out of the DM system and towards the court-based prosecution system. Given that consistency in the Scottish system has been raised in previous research as an issue for the Scottish system and discussed further in this research, in chapter 4, would tend to suggest that the protection of the public may be better served by the introduction of a similar type of system.[576]

Whilst it is accepted by this research that the accused person's criminal record, if present, is considered by the public prosecutor in Scotland, it is suggested that having a methodology of ensuring consistency in approach to a prior criminal record is a better way. This may lead to an improvement in the discrepancy in Scotland where some minor prior convictions lead to an offer of a further DM and others did not.[577]

To understand further, we offer a hypothetical example. Fiona is charged with an assault on Rachel with a bladed article resulting in an injury to Rachel requiring specialist medical treatment (plastic surgery). Here is a breakdown of Fiona's Points:

- **Assault**: 12 Points
- **With Sharp Weapon**: 17 Points
- **Injury Requiring Specialist Treatment**: 21 Points
- **Total Points on basis of Offence:** 50 Points – **Outcome: Punishment Order**
- **Prior Conviction x 1:** Add ½ number of points, (25 Points)
- **Total :** 75 Points – **Outcome: court-based prosecution.**[578]

[576] Dan McManus, 'Scotland and the Alternative Disposal: Thinking Differently' (LLM(R) thesis, University of Glasgow 2021) para 74.

[577] Dan McManus, 'Scotland and the Alternative Disposal: Thinking Differently' (LLM(R) thesis, University of Glasgow 2021) para 74.

[578] It should be noted that this example is exactly that merely a points-based calculation and does not represent the researcher's views on what offences and particular aggravations would be suitable for a DM or what the correct points system in Scotland would be, if a similar system were to be adopted.

Having considered this element of the Polaris system in the Netherlands, we have come to an understanding that the Polaris system offers a methodology of automatically considering and directing prosecution based on the criminal history of the accused. This is a significant advantage in any striving for a methodology of seeking consistency in respect of escalating criminal behaviour or multiple recidivism. This potential represents a methodology of addressing the concerns of consistency in the Scottish system. In the converse, however, this system leaves little to the discretion of the prosecutor or for detailed or nuanced elements of the offence to be fully captured. The automatic inclusion of the prior convictions of the accused leaves little room for consideration that a conviction may have been a significant amount of time ago or have significant mitigating circumstances which would render it unfair, disproportionate and contrary to the principles of justice to take this into account when considering any new offending behaviour, a flexibility which is available where every case is manually marked and presently exists in the Scots system.

To understand this point a little further: Let us consider again the assault by Fiona on Rachel, discussed above in the Scottish case marking system: a fiscal manually marking the case notices that Fiona's previous conviction was from 10 years ago when she was 18 and addicted to substances; she is now 28 and never had another conviction and the officers' comments in the SPR records no involvement with illicit substances. The public prosecutor in this case decides that Fiona can be subject to a DM as the previous conviction, in their judgement, is not relevant and it would be disproportionate to prosecute Fiona's case in court. Whereas in the Dutch system above this is automatically court proceedings.

Does this mean that we should disregard this aspect of the Dutch system? The criticisms of automatically dealing with prior convictions identified above are indeed legitimate, but the afforded benefits of consistency in consideration of prior convictions are advantageous. It is surely not beyond the Scottish system to develop a rules-based system where prior convictions are accounted for and where they are not, indeed in the CVOM procedure in the Netherlands there is a process of referring the case back to the public prosecutor to check the file. For example, for Scotland it may be the case that a prior conviction is not counted in the case marking system

when it becomes spent under the Rehabilitation of Offenders Act 1974, as amended or some other reasonable methodology to ensure the system comes in line with the principles of proportionality and rehabilitation.

Prior to considering how the points system is amended and updated, we must consider the quality of information which is inputted into the automatic case marking system. In an automated case marking system, the quality of information inputted into the system becomes even more essential to ensure the system applies the pre-programmed protocols correctly to that particular criminal case. Naturally, the same criticisms made in this research of the quality and content of the SPR could be equally levelled at the Dutch system, whereby the information is required to allow the automatic processing of the case within the guidelines fed into the Polaris system. Whilst this criticism has some force, it is at least mitigated in the system of the Netherlands. As we shall come to discover, there are additional protective measures for the accused and indeed the victim of criminal proceedings whereby both are entitled to object and then subsequently appeal against the decision of the public prosecutor with one important ground being that aspects of the case were not considered by the marking system as it was missing from the police report.[579] For an accused person, there is an additional protection of having legal representation at the point of being informed of the criminal allegation and having a right to be heard prior to the imposition of the PO.

Having considered the legal tests applied, the application of the points, and the quality of the information required by an automated marking system, we can now consider how the points system is updated and amended over time. The Polaris system allows for the number of points to be quickly amended and updated to respond to public concern in respect of a pattern of criminal behaviour which requires a more stringent response from the public prosecutor.

The Polaris system makes it possible to make policy changes quickly. For example, in 2012 there was public outrage about an increase in violence against police officers, ambulance personnel, and other relief workers. After a parliamentary

[579] This aspect of representation is further explored in the representation sub section below.

debate on the subject, the minister of justice urged the Board of Public Prosecutors to toughen sentences for the perpetrators of these crimes. By adjusting the BOS-Polaris, the PPS implemented changes overnight.[580]

It may be suggested that as the ability to increase and decrease the number of points in a considered manner brings a flexibility of approach to the criminal justice system and ensures that appropriate changes are made consistently across the country and avoids discrepancy in implementation of changes, this would present a good example of a methodology of achieving, quickly, a consistency of approach.[581] There may be an issue with the number of points and a proportionate response to the offending behaviour if each offence is not categorised appropriately, and this may have a significant impact on adherence with the principles of justice if very minor offending is given too high a number of points and if more serious offending is given too low a number of points. The determination of the number of points each offence is allocated in the Netherlands is controlled by the board of public prosecutors and as discussed above it can quickly change the number of allocated points to each offence, although the exact process for change and determination of points is unclear. It would seem appropriate that the application of points amendments should be separated from the political sphere and be restricted to the board of public prosecutors via a stated and measured procedure rather than something which at least appears subject to political manipulation. Indeed, it has been suggested that the failure to separate these powers fully and ensure a distance between them is problematic, as the updating of the points system involves an aspect of what would traditionally be a function of the judiciary.[582] Given that the public prosecutor is directed by the justice minister in the Netherlands, if the public prosecutor is taking on a judicial sentencing role then this function surely should

[580] Henk van de Bunt and Jean-Louis van Gelder, 'The Dutch Prosecution Service' (2012) 41 Crime and Justice 117, 129.

[581] See Dan McManus, 'Scotland and the Alternative Disposal: Thinking differently' (LLM(R) thesis, University of Glasgow 2021) for a discussion in the varieties of application of guidance across different COPFS offices in Scotland.

[582] Den Uijl and De Graff as quoted in ET Luining, 'The Dutch Punishment Order: Controversy, Comparison and Compromise' (Master thesis, University of Leiden 2014) 42.

follow and be encompassed in the principle of the separation of powers and be without governmental interference.

There would be significant difficulties and challenges if the BOS system were to be implemented in Scotland without clear measures and accountability rules to ensure a continued separation of powers between the criminal justice system and the executive. It may be suggested that the points setting role is something which could be conducted by the Scottish Sentencing Council to ensure independence and to uphold the rule of law and the principles of justice which underpin the rule of law.[583]

As was indicated in the introduction to this sub-section, above, there is a further consideration of the Polaris system in that the computerised marking in the Netherlands is not operated by qualified legal staff but instead is operated by trained administrative staff. The lay staff input the cases onto the electronic marking system and ensure each required category is completed prior to the case being run through the electronic marking system. The cost of a non-legally qualified administrative assistant is less of a cost to the public purse of a qualified public prosecutor. Once a case has been marked there, it is a legal right of any person involved in the case to appeal the decision of the public prosecutor, whether it is generated by the case marking system or a decision taken by an individual public prosecutor.[584] As we understand from the information discovered in this research, in chapter 5, there has been an exponential rise in the number of Procurator Fiscal Depute staff in Scotland.[585] In addition, in Scotland, there remain concerns over consistency as discussed in chapter 4. As such, it could legitimately be suggested that a move to a computerised and automated system of case marking would allow for a reduction in more costly qualified staff processing cases and cost efficiency could be achieved via non-qualified legal staff processing cases.[586]

[583] For information on the current role and responsibilities of the Scottish Sentencing Council, see – Scottish Sentencing Council 'About Us: Aims and Accountability' (October 2015) <www.scottishsentencingcouncil.org.uk/about-us/> accessed 30 April 2023.

[584] See chapter 6.4 Appeals.

[585] See chapter 5 within this research.

[586] See chapter 4 within this research.

The use of non-qualified staff requires further consideration as whilst the efficiency elements present a benefit, even at a pragmatic level there have to be concerns about this. Lay staff will not have the level of legal training to ensure that the legal tests which are required to be met before continuing a prosecution in the case marking system are actually met. The use of non-legally qualified administration staff is obviously heavily leaning towards efficiency in the system, and it has been suggested that application of the criteria and case marking is effectively electronic box ticking.[587]

There are two issues in respect of this: first, the evidential sufficiency and the legal tests which should be applied; and second, how they are applied by the Polaris system and how it makes recommendations for the case disposal. The second part of this would appear non-controversial and indeed may represent a positive improvement in standardisation and efficiency.[588] Whilst it is technically not within the scope of this research, the use of non-qualified staff, in the ZSM procedure, to make legal case decisions does require at least a note of caution. It does raise doubts regarding the requirements on the public prosecutor to meet legal burdens and standards and whether sufficient checks and balances are in place through this decision-making process. Whilst it is true that there are protective and safeguarding measures in the appeals and representation systems which exist in the Netherlands, as we shall come to explore, in Scotland it remains, in an adversarial system, that the burden and discharge of the burdens of proof remain with the Crown and transfer of responsibility to the accused through his representatives to ensure the Crown has met their burden in DMs would represent a seismic shift in the jurisprudence of Scots law. This aspect of the efficiency measures contained within Polaris is not something which could be easily accepted. This does not necessarily mean that Polaris could

[587] Henk van de Bunt and Jean-Louis van Gelder, 'The Dutch Prosecution Service' (2012) 41 Crime and Justice 125.

[588] For the purposes of this research it is uncontroversial, but there is a much wider discussion to be had in respect of the use of machine based decision making and in particular any use of Artificial Intelligence and issues which may be present in these processes and how they may influence outcomes. For a wider discussion on this within a criminal justice setting see: Bruno Min and Griff Ferris (eds), 'Fair Trials: Regulating Artificial Intelligence for Use in Criminal Justice Systems in the EU' (Policy Paper, Fair Trials 2022) <www.fairtrials.org/app/uploads/2022/01/Regulating-Artificial-Intelligence-for-Use-in-Criminal-Justice-Systems-Fair-Trials.pdf> accessed 10 September 2023.

not be adopted but that further work would require to be conducted to consider the pre marking decision processes.

Whilst it would appear that Polaris and the case marking system would bring a standardisation and consistency to decision making, it can be suggested that issues of consistency and standardisation still arise in the Dutch system when the case is required to be assessed by an individual prosecutor under the CVOM procedure in the similar manner as was suggested in chapter 4.1.2 within the Scottish system. This has arisen particularly where an objection has been lodged by the accused and the public prosecutor comes to the conclusion that the case should not proceed, and the DM be withdrawn. This suggestion arises as there is no requirement for an explanation or recording of the decision.[589] Luining further suggests that post case marking decisions vary between prosecution offices. If we compare the criticisms of the consistency in the Scottish system with that just outlined above then it would appear that Polaris does not eliminate inconsistency or questionable decisions completely; it may reduce their occurrence, but the issue may still exist.

There is a further advantage of the automated case marking system in the Netherlands, which Scotland may be able to benefit from, which is increasing the use of the compensation order. This is where there is an identifiable loss to the victim entered in the complaint, and the automatic calculation of the suggested penalty ensures that the use of particular DM disposals in the form of a PO is consistently and proportionally applied. This offers a consistent approach to reparation to the victim. This may address the point made earlier that the compensation order may be an underused DM in Scotland, acknowledging of course that mechanisms to protect those who cannot afford to pay such sums would be required.[590]

In conclusion to our consideration of the Polaris system, there are two potential advantages to the Scottish criminal justice system: potential efficiency

[589] ET Luining, 'The Dutch Punishment Order: Controversy, Comparison and Compromise' (Master thesis, University of Leiden 2014) 42.

[590] Dan McManus, 'Scotland and the Alternative Disposal: Thinking Differently' (LLM(R) thesis, University of Glasgow 2021).

improvements in terms of staffing and time in case marking and second in improving the consistency of approach towards case marking. This does not mean that Scotland should adopt the system from the Netherlands without adjustment or seeking to ensure that she does not import the weaknesses in the Dutch system. There are two main matters which would require attention. First, consideration of the separation of powers between the executive and the legal system represented by the points attributed to each offence would require to be sufficiently defined to limit the ability of political interference and whimsical changes. Although this research suggests that this could be handled by the Scottish Sentencing Council, the practical operation of this system and the legal structure within which it could operate would require further consideration.

Second, the automated case marking through processing by non-qualified legal staff without the application of the legal tests by an independent public prosecutor would require significant thought and detailed processes and procedures to limit the challenges that this presents whilst still seeking the efficiency benefit.

In this sub-section we have considered the BOS Polaris case marking system in the Netherlands, we have outlined areas of criticism and areas which might be adopted to improve efficiency and fairness (in terms of consistency) in the Scottish DM system. As we can understand from the discussion of the weaknesses of the Scottish case marking system, it is this research's view that the automatic case marking system would represent a significant improvement to the criticisms made of the Scottish system in chapters 3, 4 and 5. The opportunity for learning from the case marking system is a matter which should be seriously considered. However, this recommendation is dependent on the safeguards in the Dutch system. We now turn to consider the first of these: representation.

6.3 Representation.

Prior to understanding the Dutch system of representation, it is useful for our consideration, particularly in light of the research findings in this thesis on representation and economic efficiency, to note that that the Dutch system is funded primarily via a means tested legal aid system similar to that of Scotland, with the exception that it is a contribution based system rather than the

qualification based system which generally operates in summary criminal matters in Scotland.[591]

As referred to above, the Dutch system has developed two main additional safeguards that the Scottish system does not have. These relate to the opportunity for the accused to be represented and to the opportunity to appeal. This section considers the first of these safeguards: representation of the accused.

Within the Dutch system of DMs, there are different situations whereby an accused, or their representative, must be heard and occasions on which they may be heard either via written submissions or orally.[592] For DMs which impose a community pay back order, revocation of a driving licence, or DMs which impose behaviour requirements on the accused, then the accused must be heard. In addition, for fines or compensation orders above €2000, the accused must be heard with a solicitor.[593] For all other POs, the accused may be heard either personally or through a representative. It is the understood that it is the custom and practice that the accused will be heard.[594]

In this research, we have defined representation as the accused having a voice in the proceedings. It was argued that this is important both in and of itself (respecting the autonomy of the accused) and for instrumental reasons, so that relevant information about the accused and their circumstances can be communicated. It was argued in chapter 4 that the latter will, in most cases, require a funded defence solicitor. As we can see from the preceding paragraph, the system in the Netherlands is quite different to the system in Scotland. The attitude in Scotland seems to be that if the accused happens to consult a solicitor, then *ita fiat,esto,* but as we established in chapter 4, the levels of self-motivated engagement with defence solicitors is extremely low. The potential area for learning for the Scottish system is to require, as a minimum, the engagement by the accused with COPFS prior to the

[591] For Further information on the qualification bandings in the Netherlands – see Raad voor Rechtsbijstand, 'Over Mediation & Rechtsbijstand' (2023) <www.rechtsbijstand.nl/mediation-rechtsbijstand/hoeveel-betalen/eigen-bijdrage> accessed 9th September 2023.
[592] Explanatory Memorandum, Parliamentary Papers II, 2004-2005, 29 849, 3 (Dutch Parliamentary Proceedings Papers).
[593] Code of Criminal Procedure (Netherlands) Section 257c, para 1.
[594] ET Luining, 'The Dutch Punishment Order: Controversy, Comparison and Compromise' (Master thesis, University of Leiden 2014) 24-25.

imposition of a DM, should the opt-out system remain or conversely require an opt-out from legal advice/and or the signature of a solicitor on the acceptance of the DM and restore the opt-in system.

Legitimately, it may be asked how this would secure an improvement in the confidence in the principle of accuracy of outcome. First, having the benefit of legal advice prior to the acceptance of the DM would allow the accused to communicate their position in relation to the offence and, with assistance, discuss the matter with COPFS to ensure if guilt is not in issue that the most appropriate DM from those available in Scotland was selected by the Crown to fit with the purposes of the criminal sanction.

For example: Person A seeks legal advice in relation to the offer of a DM. The defence solicitor understands, following consultation with the accused, that they cannot afford to make payment of a fine or that the fine would have significant adverse implications on the life of the accused. A request could then be made to COPFS for the DM to be a warning letter or a fiscal work order. Whilst this maintains the integrity of the independent public prosecutor making the decision, and the principle of the guilty accused receiving a sanction without the need for court proceedings, it would more closely align with the principles of justice such as proportionality and parsimony.

As a further example consider Person B: Person B is charged and reported to COPFS for a minor assault and a DM is proposed by the public prosecutor. Person B works in a job where a criminal conviction would lead to dismissal and is terrified not to accept the DM and face the possibility of receiving a criminal record. Person B, when consulting with a defence solicitor, provides evidence that they could not have possibly committed the offence and was elsewhere other than the locus of the offence, but is terrified of the possibility of COPFS taking the matter to court and being suspended from work and would like to accept the DM to avoid this. The defence solicitor by explaining the position to the accused and engaging with COPFS would be able to provide this evidence and have the matter discontinued. In the present system in Scotland, we know that this is unlikely to occur, and there is a risk that innocent accused might not object to a DM. In addition, it is obvious from the

discussion in chapter 4, that those with disabilities or lack of English would significantly benefit from legal advice prior to the DM becoming binding upon them.

In both scenarios above for Person A and Person B we can clearly see that via representation a case could be concluded in line with the principles of justice at the earliest possible stage whereby under the present system there is a real risk of an injustice occurring. In Scotland it has already been accepted that better communication between COPFS and the defence agent can lead to more swift resolution of cases and thus more efficient outcomes. Indeed we have recently seen this introduced as a formal step in the summary court procedure via the introduction of Pre-Intermediate Diet Meetings (PIDMs).[595] The summary of the PIDMs pilot clearly demonstrates that an accused with representation is far more likely to resolve a case earlier and with a plea of guilty to a relevant charge. [596] If the accused was required to be heard with their solicitor at the point of citation and prior to the case calling to court in the first place, with a widened scope of DMs, then significant levels of cases could legitimately and in line with the principles of justice be further removed from the summary court system. It may be the case that many summary cases would be resolved without the need for court at all should the accused be required to be heard via an agent prior to any service of papers. However, further analysis and consideration would be required and significantly the level of detail required to implement this would be outwith the scope of this research.

There would naturally be two challenges occurring as a result of introducing a requirement for representation into the system of DMs: time and cost. There would be an impact on the efficiency element of speed due to the introduction of representation to allow a defence agent sufficient time to consider the complaint, discuss options with the client, take instructions and book time to meet with COPFS

[595] For an outline and review of the PIDM procedures, see Scottish Courts and Tribunals Service, 'The Pre-Intermediate Diet Meeting (PIDM) Procedure: The Journey to Date, Early Impact and Way Forward' (August 2021) <www.scotcourts.gov.uk/docs/default-source/default-document-library/coronavirus-docs/report-on-pidms-(003).pdf?sfvrsn=7588646_2> accessed 30 April 2023.

[596] Scottish Courts and Tribunals Service, 'The Pre-Intermediate Diet Meeting (PIDM) Procedure: The Journey to Date, Early Impact and Way Forward' (August 2021) <www.scotcourts.gov.uk/docs/default-source/default-document-library/coronavirus-docs/report-on-pidms-(003).pdf?sfvrsn=7588646_2> accessed 30 April 2023.

staff. Whilst this would represent a slowing of the process, if it could be time bound, limited in nature and funded then there is no reason why this could not be evaluated and considered to address weaknesses in the Scottish system. On cost there would clearly be an implication. Criminal defence lawyers in Scotland are generally paid via legal aid and by introducing this system at an earlier stage of the criminal complaint this cost would be greater than it is at present. As demonstrated in chapter 4, only an insignificant number of DMs presently get legal advice and assistance, and it is not possible within the limitations of this research to consider the individual cost elements and reach a definitive conclusion on the position, especially given the criticisms that this research makes of the data held about costs in the Scottish justice system. It is accepted, though, that in the case of the DMs currently not receiving legal aid in respect of their case then this would be a new and additional burden on the public purse.

Within this sub-section, we have considered the system of representation within the Dutch DM system. We have come to understand that the system in the Netherlands affords the opportunity to hear an accused person prior to the imposition of the PO. It has been suggested that this offers an opportunity to resolve cases with an appropriate disposal at the earliest available opportunity. In the Dutch system we have seen that it is possible to implement a system of representation within a DM disposal schema. Thus, we can conclude that it is possible to implement a funded system of representation to afford protections and safeguards to accused persons. Having considered the system of representation of the accused within the Dutch system, we now move to consider the second of the two significant safeguards of the Dutch system available should the public prosecutor seek to impose the PO irrespective of the representations made by the accused. In these circumstances the Dutch system affords additional protections in the form of an appeals process which we now consider.

6.4 Appeals Processes.

The second safeguard built into the system in the Netherlands is that a victim or any person with a direct interest in the case has the right to challenge a decision of the

public prosecutor formally to the administrative court.[597] This is somewhat different to what a person with a knowledge of the Scots system would understand as an appeal. From the accused's perspective this is a form of challenge to the public prosecutor that either the BOS Polaris points have been calculated incorrectly or material information has been excluded from the points system or that the prosecutor should use their discretion not to prosecute at all or that another form of punishment order would be more suitable. From the victim's perspective, it allows a challenge to any use of discretion on the part of the public prosecutor and have this information independently reviewed and the decision checked for appropriateness. This is unlike the Scottish system whereby once the 28-day period for the DM becomes effective there is no right of appeal or mechanism for the DM to be withdrawn. Therefore, this research offers an analysis of the appeals process, and we shall consider this from the accused person's perspective.[598] As was indicated within the introduction chapter of this research, it has not been possible in this research to give detailed consider the position of the victim.[599] Whilst this would on the surface appear to bring obvious benefits of ensuring all information is taken into account and victims have the right to have their voice heard by the public prosecutor, it has only been used in 1.06% of cases whereby a DM was selected by the public prosecutor and only on 0.54% of all cases registered as criminal cases.[600] It may be, however, that given the right to legal representation, discussed below, that the number of appeals is low as representation and resolution is achieved prior to the formal process of appeals is taken. However, the combination of the appeals system and the legal representation would appear to represent a safeguard in the Dutch system.

[597] Criminal Code of the Netherlands, Article 12.

[598] For a fuller consideration of the role of the victim in the Dutch system, see- Dan McManus, 'Scotland and the Alternative Disposal: Thinking Differently' (LLM(R) thesis, University of Glasgow 2021).

[599] For a fuller consideration of the lack of involvement of the victim in the DM system in Scotland, see - Dan McManus, 'Scotland and the Alternative Disposal: Thinking Differently' (LLM(R) thesis, University of Glasgow 2021).

[600] see- Dan McManus, 'Scotland and the Alternative Disposal: Thinking Differently' (LLM(R) thesis, University of Glasgow 2021). Table 5.

Now why would an accused person simply not refuse the DM and seek to take the matter to court? This leads us to the first difficulty with this system, which is that an accused who objects to a DM is likely to be on the receiving end of a more severe punishment from the court if they are convicted. The public prosecutor makes known to the court that the accused refused a DM and that the prosecutor now seeks a higher level criminal sanction due to the accused's refusal to accept the DM or not having a valid objection in law to the DM.[601] This could be contrasted with the Scottish situation, whereby the accused who elects for court and pleads guilty is eligible to receive a discount on sentence of up to one third and only loses any form of sentence discount should they be convicted at trial.[602] The Dutch system justifies this as a punishment for inflicting inefficiency on the system when in fact the accused must have known they were guilty and as such their appeal was without merit and has cost the state in terms of time and monetary efficiency that it would have achieved had the accused not appealed.[603]

It is this researcher's view that this in and of itself flies in the face of the right to have an independent tribunal hear and judge the allegation by the state against an individual and to have a greater punishment imposed for exercising a fundamental right and protection leaves us in a scenario whereby the state could seek to justify further punishments on accused people for seeking to exercise their rights. This would require careful consideration of where the checks and balances are required. Indeed, the operation of the Dutch system in this respect, in this researcher's view, cannot be accepted and potentially represents a breach of the accused's right under Article 6(1) of the ECHR to have a criminal charge judged before an independent

[601] M Kessler and BF Keulen, De Strafbeschikking (Volume 38 of Studiepockets strafrecht, Kluwer 2008).

[602] Criminal Procedure (Scotland) Act 1995 s 196.

[603] Explanatory Memorandum, Parliamentary Papers II, 2004-2005, 29 849, 3 (Dutch Parliamentary Proceedings Papers).

tribunal.[604] This view, it is accepted, has never been tested by the European Court in a case exactly on point.[605]

Whilst not having been tested exactly in point we can draw inferences from the judgement of *Deweer*.[606] *Deweer* was a case against a state fine for selling meat in Belgium at a profit margin above the permitted amount. Mr. Deweer paid the imposed fine under reservation of his right to challenge the legality of the fine under the convention and subsequently did. His family continued proceedings to the judgement of the court after Mr Deweer's death. The court found that:

> Mr. Deweer's waiver of a fair trial attended by all the guarantees which are required in the matter by the Convention was tainted by constraint. There has accordingly been a breach of Article 6 par. 1 (art.6-1).[607]

In this case Deweer was faced by the constraint, as the judgement calls it, of paying a "friendly settlement" or shutting his shop until the matter was dealt with by a criminal court where he could face a period of imprisonment or a significant fine above the level of the friendly settlement. It is submitted that there is a similarity between an accused person faced with accepting a DM of 300 Euro who is in a perilous financial position or face a 400 Euro fine in court alongside the other negative effects on an accused person which have been discussed elsewhere in this research.[608]

The research acknowledges that the Dutch state would likely argue that this circumstance would not arise as the protections of legal representation which exist in the Dutch system would stop or mitigate the chances of such a situation arising, as a guilty accused would receive advice in this respect and an accused who was not guilty would have the guile through representation to demonstrate the grounds for

[604] It is accepted that this has never been tested before the European Court, as far at this research is aware, but it remains the researcher's view.

[605] Deweer v Belgium (1980) 2 EHRR 439; Monnell and Morris v United Kingdom (1988) 10 EHRR 205; Fayed v United Kingdom (1994) 18 EHRR 393.

[606] Deweer v Belgium (1980) 2 EHRR 439.

[607] Deweer v Belgium (1980) 2 EHRR 439, para 54.

[608] See chapter 4 on proportionality.

appeal and that it was not a frivolous appeal. This being the case, it remains that a person who refuses legal counsel and choses to act on their own behalf, as is their right, may face this potential breach of Article 6 (1). Indeed, this researcher's view finds support in Dutch academic writings. Kooijmans suggests that this is a significant difference between the transaction and the PO and the lack of consent of the accused and the imposition nature of the PO gives rise to this difficulty for the Dutch system.[609]

We can see in the right of the accused to take the matter to court that the Dutch system is seeking to comply with the accused's fundamental rights to a trial before an impartial tribunal, despite the criticism in the preceding paragraph.[610] Having considered the appeals mechanism available in the system of the Netherlands, we can understand that there is a formal mechanism for the accused to fundamentally object and instigate their right to a trial in the Netherlands. Whilst this research cannot accept the justification in the additional punishment for doing this, it can understand that in general terms the appeals mechanism and formal right to elect for court after the public prosecutor seeks to impose a criminal sanction and criminal record on an accused are a stronger adherence to the principles of justice than that which was identified in the examination of the Scottish system, being simply refusing the DM and seeing if the public prosecutor chooses to take further action. As was discussed in the consideration of the Scottish system, there is no right after 28 days to appeal against the imposition of the DM, even if the accused was unaware of its existence and indeed may only have become aware of it following an enhanced PVG group check.[611]

Having now considered the appeals system and gained the understanding that this presents for an enhancement to the system in Scotland in respect of the protections afforded to an accused person who claims innocence, subject to the criticisms above

[609] Tijs Kooijmans, 'The Extrajudicial Disposal of Criminal Cases', in Marc S Groenhuijsen & Tijs Kooijmans (eds), The Reform of the Dutch Code Criminal Procedure in Comparative Perspective, vol 81 (Nijhoff Law Specials, Brill | Nijhoff 2012) 81-106.

[610] Article 6 of the European Convention on Human Rights for the right of the accused to have a trial before an independent tribunal.

[611] See chapter 2 & 4 for discussion of this aspect of the Scottish system.

regarding a higher sentence for electing to have the case heard before the court, then we can see that the appeals system is a matter to which serious consideration should be given alongside the other aspects of the Dutch system outlined in the research. As this research has now considered the BOS-Polaris system, the representation opportunities in the Netherlands and the appeals system we can turn to consider the summary of recommendations which this research considers important for the system in Scotland.

6.5 Summary of Findings from the System in the Netherlands.

In this chapter we have introduced, albeit briefly, the Dutch criminal justice system and the system and development of the DM in the Netherlands has been outlined alongside the particular aspects of the case marking system, BOS-Polaris, the system of representation of the accused and the appeal system open to the victim and the accused. We are now in a position to provide a summary of the recommendations which this research is able to make for the Scottish system from the learning from the Dutch system. Whilst detailed conclusions and recommendations follow in the next chapter, we can summarise that which has been discovered from the exploration of the DM system in the Netherlands.

In our consideration of the case marking system, we discovered that the allocation of points to each aspect and mitigation in respect of an offence is automatically considered to produce a case outcome recommendation from the system. We further understand that the Dutch case marking system is not operated by legally qualified staff but by non-solicitors, unlike in Scotland. We discovered a mechanism of setting the points attributed to each offence and the mitigations and management of repeat offenders through this automatic system. There are elements of the case marking system rejected, mainly the ZSM process of non-solicitors processing cases without consideration of the legal tests required by a public prosecutor. However, there are elements of the case marking system which can be taken forward for consideration in Scotland and as such this forms part of the conclusions and recommendations chapter.

We then moved to consider the safeguards which have been developed and introduced in the system of the Netherlands. We first considered the system of

representation whereby the accused has a statutory right to be heard in the DM system prior to imposition of the DM and the methodology by which the accused may be heard where this is not compulsory. Having considered the representation function we moved to consider the appeals process and the ability of the accused to appeal against the imposition of the DM and appeal to the court to hear their case - a system which does not exist in Scotland. The system of representation and appeals in the Dutch system is attractive from the perspective of giving a methodology of having the voice of the accused heard in the decision-making processes and may indeed offer a way to address the lack of the accused's voice in the DM system in Scotland. This research concludes that it is not permissible and nor should it be accepted in Scotland to increase the penalty of an accused person for exercising their fundamental right to a hearing before an impartial tribunal and as such this element of the Dutch system is not taken forward into the conclusions and recommendations section of this research. Furthermore, there is widespread academic discussion about whether despite legal rhetoric, the discount/reduction in a sentence is in-fact a trial tax. Indeed, like the Dutch system, it may be suggested that the higher sentence is the risk an accused takes by rejecting the DM. Both of these points are extremely problematic in relation to the fundamental right of the presumption of innocence.[612]

Therefore, from the Dutch system this research has found that elements of the case marking system, the appeals system and the system of representation should be taken forward for consideration in Scotland. Having set out above in detail and summarised here the elements which may be taken forward to the following chapter it is important to reiterate, prior to this research reaching the conclusion and recommendations chapter, that any attempt to take one singular aspect of the Dutch system and insert it into the Scottish system should consider the interconnected nature of the Dutch safeguards and the operation of the Dutch DM system. It is essential that this research stresses the importance of considering not only the aspects of the Dutch system which might improve the Scottish system, but that these

[612] Within the limitations of this research, it is not possible to further expand on this point, however – see: Tata, Cyrus, and Jay M. Gormley, 'Sentencing and Plea Bargaining: Guilty Pleas versus Trial Verdicts', *Oxford Handbook Topics in Criminology and Criminal Justice* (2012; online edn, Oxford Academic, 2 June 2014),

have come along with additional safeguards. Any attempt to take one aspect of the Dutch system without the corresponding safeguards would further undermine the Scottish system and indeed any attempt to take one single aspect on its own without taking the recommended safeguards alongside it and associate that with this research would be to misrepresent this research and the conclusions and recommendations which it may draw.

Having now outlined the system of the Netherlands and considered the aspects which this may offer learnings for the system in Scotland, we will now move to consider our conclusions and recommendations chapter.

Chapter 7: Conclusions.

This thesis has presented a critical examination of the system of DMs in Scotland. As we have come to understand in the introduction to this research and within the methodology section, the DM is not a unique feature of the Scottish criminal justice system and indeed features widely across many legal systems. The overall aim of this thesis was to undertake a comprehensive examination of the DM system in Scotland as it presently operates. In order to do so, we identified from the McInnes report three principles of justice that the DM system should be guided by: effectiveness, fairness, and efficiency.[613]

Being mindful of this aim, the research set out with three broad objectives: first, to examine the original justification for the DM system in Scotland being based on efficiency; second, to focus on the principles of fairness and effectiveness; and third, to examine whether we could seek to improve the fairness and effectiveness of DMs without losing the efficiency benefits which they bring. It has been argued that there are discrepancies between the principles of justice and the DM system in Scotland. This research reaches the conclusion that improvements are required and as such, we now set out these recommendations corresponding to the three objectives outlined above.

7.1 Original Justifications.

The first objective of the research related to efficiency, which was the original justification for introducing DMs into the Scottish criminal justice system.[614] Specifically, DMs were introduced to ease the pressure on the system that was said to be caused by an ever-increasing caseload. However, this research established that the original reasoning for the introduction of DMs to Scotland may not be valid; from a strict interpretation of case numbers, it can be suggested that the "inordinate pressure" of case numbers in the criminal courts no longer exists.[615] This research has established that the predicted ever-increasing number of criminal complaints has failed to materialise. In addition, this research established that case numbers

[613] See chapter 2.
[614] See chapter 2.
[615] See chapter 5.

have dropped by over 200,000 cases in year from 1987 to 2022, whilst at the same time the number of public prosecutors has more than tripled and the number of Sheriffs has nearly doubled.

That being said, this research cannot simply conclude that the DM system should be removed in Scotland. This would present too many difficulties, both practical and in relation to the principles of parsimony and proportionality. First, the number of cases flooded back into a court system which is already beset with delays would be highly problematic. But as well as this, it may also lead to cases being dealt with in court which could be dealt with in a proportionate manner outwith the court system. The most significant of these issues is the potential delays to the system. This research has established that re-introducing the cases disposed of via DM back into the court system would lead to even longer delays, unless there was a significant injection of additional resources into the system, which would come at a financial cost. It is argued in this research that these delays would have unnecessary detrimental effects to accused persons, witnesses and victims, which cannot be justified.

Whilst the original justification may no longer exist, this research has established new justifications for the DM system in Scotland: without the DM system there would be significant delays in the case management system and the court system, and these would impact on victims and witnesses.

7.2 Effectiveness.

The second objective of the research was to assess the system of DMs against the other two principles of justice: effectiveness and fairness. Within this subsection we shall consider effectiveness, before moving to the following subsection on fairness. In respect of the overarching purposes of the criminal sanction being retribution, deterrence, rehabilitation, protection of the public and reparation, it has been argued in this thesis that the suite of DMs as they currently stand in Scotland achieve some of the outcomes required of a criminal sanction, but that there are also some questions that can be raised in this respect, although as has been implicitly accepted

there is not necessarily a requirement that every outcome of a criminal sanction be achieved by a particular imposed sanction.[616]

Turning to the first element, retribution: It was argued that whilst there is a retributive value in the DM system, it may be the case, as is suggested in chapter 3, that while there is some retributive effect of the DM, it does not achieve the full retributive value that a sanction imposed by a criminal court does. When the combination of measures suggested in this research are considered, then the escalation of criminal behaviour would be dealt with by an automated case marking system. It is accepted that this system will have a capital expenditure element in the short term and may reduce in a limited manner the speed as efficiency of the system, but it is suggested that this is an impact which can be accepted. A question may be legitimately said to be how does this change deter offenders? This therefore leads us to discussing the second element, deterrence.

There is little evidence that the system of DMs provides an individual deterrent effect when compared with court proceedings and in fact the court-based system may provide a better individual deterrence effect. This research has been able to establish that there is only limited evidence of a general deterrent effective on criminal behaviour. There is also limited evidence of any individual deterrent effect when compared with criminal proceedings – contrary to stated policy, DMs are being offered repeatedly to the same accused persons.[617] This researcher argues that having an automatic stricter and clearly published escalation process might provide a general deterrent effect. In addition, the individual having the knowledge that there are strict escalation processes even in minor offending may provide an individual deterrent effect, whereby an accused who commits an offence and receives a DM has the knowledge that the next criminal sanction is a likely to be court proceedings and a higher-level sanction. This being said, should one reject a methodology of dealing with repeated offending, then it may be the case that the deterrent effect in the DM system would have to be revisited and further measures

[616] See chapter 3.
[617] This also suggests that they have limited rehabilitative effect, as discussed below.

considered. It is argued that this is not necessary at this time if the combination of measures sought within this research are taken.

The third consideration is the protection of the public and this is one area which, this researcher argues, does require consideration. It is argued by this research that there are elements of public protection lacking in the DM system which could potentially and legitimately lead to a development of the system. It might be thought that the sorts of offences for which DMs are offered do not raise public protection issues – they are, after all, unlikely to be used for offences that involve significant physical harm. However, this does not mean that public protection is irrelevant – the public also deserve to be protected from the consequences of more minor offending behaviour, such as public order offences or damage to property, for example.

This development is discussed further in the recommendations section below and is perhaps controversial due to the restriction on the liberty it would place on the accused person. Having established that the elements of public protection are lacking in the DM system and acknowledging that expansion is possible then the restriction of liberty being balanced against the need for the protection of the public provides a potential solution to the challenges discovered by this research. It is argued that it is necessary and in line with the principles of proportionality and parsimony that an element of public protection be introduced as shall be discussed.

Turning now to the element of reparation: it was argued that two types of reparation are present in the DM system. The first is reparation to the State/public purse, which occurs in the form of the fiscal fine. The second is reparation to the victim of the offence and/or the community. Both of these are possible under the DM system via either the fiscal work order or the fiscal compensation order. This research has, however, established a potential underuse of both the fiscal work order and fiscal compensation schema.[618] Further investigation is required to understand the reasons for this and how it may be remedied, if indeed it should be. Whilst there are challenges acknowledged in the research to ensure the correct levels of compensation and to address the lack of required information in the SPR to ensure

[618] See chapter 3.

the suitability of a work order, taken with the other improvements suggested below it is suggested that the use of these existing DMs can be expanded to levels at which they are permitted for use.

A further issue discussed in relation to effectiveness was the rehabilitative element of DMs. It is argued that there is not a rehabilitative focus in the DM system and any rehabilitative effect is by accident rather than design and indeed may be found in the limited individual deterrent effect of fear of punishment. This being the case, there are other forms of Alternatives to Prosecution (AtPs) which are outwith the focus of this research that do cover specific rehabilitative measures such as anger management courses, treatment for identifiable conditions etc.[619] It is, therefore, argued that it is unnecessary to make any recommendations in respect of the wider rehabilitation element, although a recommendation is made specifically for a treatment order, other than to suggest that where there is an identifiable need that an AtP should be used in the first instance before perhaps escalating to DMs.

7.3 Fairness.

Moving onto the consideration of the principle of fairness, within this research this principle was sub-divided into four key components: accuracy of outcome, consistency, proportionality, and representation. Turning first to accuracy of outcome, we discovered areas of concern in relation to the lack of proper control procedures within the case marking system, lack of audit procedures and persistent issues in the recording of key information in the standard police report to COPFS.[620] In addition, concerns were discussed within this research that there is a difficulty, perhaps unsurmountable difficulty, with accused persons accepting DMs because they are fearful of the court processes and potential outcomes of court rather than due to genuine guilt. Linked to this, but also distinct, is the possibility of an accused person not having the understanding or knowledge to be able to put forward a stateable defence that is open to them. As such, it has been argued that there is a real risk in the DM system in Scotland that vulnerable accused persons can have a

[619] For further information of alternatives to prosecution in this context see: Community Justice Scotland, 'Justice System Maps: Explore the Scottish Justice System Map' (2022) <www.communityjustice.scot/scottish_justice_system> accessed 3rd November 2022

[620] See chapter 4.

DM imposed upon them when they neither have the ability nor mental capacity to understand the offer of a DM and thus an innocent accused who lacks the ability or capacity to understand a notice could have a criminal sanction imposed upon them. These concerns around accuracy of outcome are significant and perhaps at least in some way can be addressed by systematic developments in Scotland. It was further established when considering the previous literature that matters of this nature have been a persistent issue in Scotland.

The second component of fairness is consistency. This research argues that there are issues around consistency of decisions both in the decisions themselves and inconsistent decisions caused by a lack of information.[621] In chapter 4 it was argued that there may be inconsistencies between individual public prosecutor decisions, whereby two prosecutors could take vastly different decisions in the same case, and also between the various case marking hubs. Decisions are also made on the basis of Standard Police Reports (SPRs), which may not contain all of the information relevant to the circumstances and certainly do not contain full witness statements. It has been suggested in this research that these two types of inconsistencies are present, and, at the time of writing, there is no plan in place at Governmental or COPFS level, in the public domain, to seek to address them. This research argues that urgent action is required to address the issues within the SPRs and the resulting actions taken on the basis of the knowledge not presently recorded.

The third component of fairness is proportionality. Despite the challenges in the Scottish system and its relationship with the principles of justice, this research has argued that DMs are a proportionate response. They are proportionate in respect of minor offences, acknowledging the difficulty in the use of this term, but that we now have a system potentially in conflict with the principle of parsimony because accused persons against whom no action would have previously been taken are now subject to a DM.[622] In respect of the principle of parsimony, the recommendation which follows regarding the case marking system would seem to address issues of net-widening and apply stricter criteria whereby offending falls within the gambit

[621] See chapter 4.
[622] See chapter 4.

of DMs and indeed the level at which the DM should be issued. Providing this system is adopted and the setting out of the points system is structured in such a way, then the issues highlighted within chapter 4 of those who may now receive a criminal sanction and those who would not have previously received a criminal sanction can be avoided.

The final element of fairness relates to representation of the accused – the ability of the accused to have their voice heard within the DM system and have their fundamental rights protected. In chapter 4, it was argued that representation of the accused is important for both intrinsic reasons (to have a voice in the process) and instrumental reasons (to protect the rights of the accused and ensure fundamental fairness is upheld). As was discussed in chapter 4, representation of the accused person ensures that the notice is explained to the person, allegations are explained to the accused, any defences to the charge are explored and ultimately an accused who does not understand the notice, or is vulnerable, and who has a defence is more likely to be able to make an informed choice as to whether to accept the DM or not. No system of representation can ever ensure than an innocent accused does not accept a DM, but it at the very least ensures that an informed choice can be made and mitigates the risk of an inaccurate outcome, upholding the principle of fairness to the accused.

This research discovered particular issues with vulnerable accused. The lack of recording of non-English speakers and disabilities in the SPR and in the issuing of DMs means that vulnerable accused who do not understand the offer of a DM may be accepting them by default. This could be addressed through legal assistance, but this research established that very few accused persons receive legal assistance in respect of DMs and the number of those who do has significantly fallen since the McInnes reforms.[623] The flaws in the recording and the lack of representation to protect the rights of the accused person, or at least to ensure understanding and a voice in the process, suggests we can argue that this further highlights the need for a strong presumption in favour of representation of an accused person in the DM system.

[623] See chapter 4.

Given the lack of protection for vulnerable accused persons and the highlighted issues with accuracy of outcome, consistency, and effective disposals, then the need for representation for accused persons in the DM system in Scotland is, as this research argues, required.

7.4 Opt-out/Opt-in – A Debate.

One option which might address some of the criticisms outlined in the fairness section above would be to revert back to the system of opt-in that was in place until the McInnes committee recommended it to be changed. The opt-in system requires the accused to take a positive step to accept the DM by responding to the offer and indicating willingness to accept it, whereas in the opt-out system the DM automatically becomes binding after 28 days. Within Chapter 4 of this research, the various challenges to the opt out system were raised and discussed. This researcher argues that there may be issues with the ability of the accused to understand the offer of the DM. It was further argued that the content of the notices, potential language barriers, literacy issues, the failure to track and monitor notices being served on vulnerable accused persons, and a lack of legal knowledge of an accused contribute to concerns about the operation of the Scots DM system and its relationship with the principles of justice. It could be suggested that a simple approach would be to revert back to the opt in approach to DMs and remove the automatic assumed acceptance of the offer and this would address many of these issues.

As can be recalled from chapter 2.7, where the McInnes committees' objectors view on the opt-out/opt-in changes were discussed, there remains, it is argued by this researcher, an uncomfortable position whereby guilt may be determined by silence. This it may be suggested is more concerning where the person being silent is illiterate, non-understanding, or is a vulnerable accused. This should, it is suggested, be deeply concerning in a just and principled society.

This all having been argued, the most significant advantage of the opt-out system is that it avoids the unnecessary burden on the public purse placed by the accused who is guilty, who does have an ability to read and write, who has no disability and who does not lack understanding, but who nonetheless chooses to take no action when

offered a DM. In an opt-in system, for this person to receive any sanction there would need to be a (costly) prosecution. In an opt-out system, this is not necessary.

On balance, it is the view of the researcher that the opt-out system should be retained, for the efficiency benefits that it brings. The issues of fairness that are raised by the opt-out system can be addressed by the other changes that are recommended here – in particular the recommendations relating to improving the communication of vulnerabilities via the SPR and the recommendation relating to legal assistance. As such, it is argued that an accused person having a notice presented to them, in a suitable format, in a language they can understand with a requirement to explicitly refuse legal advice or take it, should have a time constraint on them to make a decision having had the benefit of that advice. It is acknowledged, however, that if a return to the opt-in system was elected for, then some of the changes proposed below are less important or perhaps are not required.

7.5 Main Developments Recommended.

Within subsections 7.1 and 7.2 we outlined and re-iterated that there is a need to address deficiencies in the system of DMs in Scotland to better establish and maintain the necessary and fundamental relationship with the principles of justice.

Prior to considering the main developments, there is one further matter which requires to be considered before the recommendations can be set out. This is whether the system of DMs in Scotland should be retained at all or whether the system should be returned to the way it operated prior to the Stewart committee recommendations. As was argued in the efficiency chapter, and earlier in this chapter, the re-introduction of all the cases currently disposed of via a DM into the court system would cause significant delays which would naturally be contrary to the interests of victims, witnesses and accused persons. We must, however, consider that if fairness is thought to be so fundamental to a criminal justice system then the taxpayer should bear the burden of providing significant further resources into the system to enable it to cope with this additional workload. This, it is argued, is unrealistic and contrary to the wider public interest. It is not realistic to think that taxpayers would be willing to bear increases in taxes for this purpose when there are significant other competing demands on the public purse such as healthcare and

education systems. It is the view of this researcher that the system of DMs can be adequately developed to improve the elements of fairness without unreasonably compromising on efficiency.

Despite these findings in respect of the principles of justice, we must be mindful that fairness, in a system, its processes and procedures is not a whimsical judgement but in the majority of cases it is the balancing of different peoples' rights, interests and ultimately a judgement call. It cannot be said that the system in Scotland is unfair, unjust or completely contrary to the principles of justice but instead the interlinked nature of the principles requires to be balanced and considered in the round. It is clear that where a change it made to one aspect of the system when seeking to develop a better relationship with the principle of justice under consideration then it has an effect on another aspect. We can see this in the history of DMs in Scotland, particularly where the opt out/opt in change occurred. Seeking to improve the efficiency of the system has been detrimental in terms accuracy of outcome and representation of the accused. Does this mean that it is impossible to have a system that complies with all the elements of the principles of justice? It is this researcher's view that it is not possible to improve fairness without effecting efficiency, but that effect in all the circumstances is necessary, just and proportionate to the matters which are being considered.

Where can we look in order to develop the Scottish system and better align with the principles of justice? This research has sought to outline areas where the system of the Netherlands can be helpful to the Scottish system in terms of process and principle. In the following sub-section, this research seeks to offer recommendations for consideration in the Scottish system to improve the weaknesses identified. As was outlined in the methodology section of this research when considering the limitations of this research, due to the nature of the PhD research it is not possible to have considered potential developments to the Scottish system to the extent whereby they would be ready for immediate implementation. Instead, what can be offered is a range of considerations that have the potential to better align the Scottish criminal justice system with the principles of justice.

With these matters in mind there are five fundamental developments which are recommended by this research which may represent improvements to the Scottish criminal justice system and in particular to the criminal sanction of the DM. The five recommendations relate to data, economic cost benefits, representation, case marking and widening the use of DMs. In the following subsections each of these developments are considered in turn.

7.5.1 Data Improvements.

Turning to the first of the five recommendations, in relation to data; the following recommendation would come as no surprise to any researcher who has attempted a deep dive into the data of the criminal justice system in Scotland. In just about every single academic study this research has considered, the lack of data and data recording is raised as a significant limitation. The quality of data, the lack of recording of data, and the lack of an ability to produce data where it is recorded represents a fundamental weakness of the system in Scotland.

There are two respects in which data improvements are required in relation to DMs. The first is in the information that is contained in the SPR, where mental health issues, disabilities, language barriers and capacity issues are not routinely recorded.[624] This raises fundamental questions about vulnerable people who are facing a criminal sanction imposed by the state and it is not possible to establish beyond a reasonable doubt that the state imposes these sanctions informed by a full consideration of the circumstances of an accused or even a consideration of whether an accused person can understand the action being taken against them.

Therefore, it is recommended that significant improvements are made in the Standard Police Report (SPR) from Police Scotland to COPFS in respect of vulnerabilities of the accused, first language of the accused and whether any interpreter was used and if so in what language. It is essential that this be checkboxes or compulsory fields which are recorded and from where information can easily be extrapolated and not simply included in an 'other comment' box which cannot be isolated and reported upon.

[624] See chapter 4.

This would allow COPFS to record and ensure that notices are issued to the accused in their native language to minimise the difficulties of misunderstanding. Second, the recording of vulnerabilities would ensure that an accused who may be incapable of understanding the offer of a DM can be dealt with by a method other than writing, or that a means of ensuring representation is sought. It is not anticipated that adding a language of the accused box to the SPR would be problematic in terms of time efficiency for Police Scotland. It is further anticipated that given the questions required to be asked of accused persons when being booked into custody that the vulnerabilities question should not be problematic.[625] This being the case, an area pilot program could be advantageous to properly understand the true benefits and impacts of this recommendation.

The second area where data improvements are required is in terms of being able to track and report on the performance of the DM system. There is a lack of recording and database systems and those which exist do not seem to be fit for purpose. It is unfair to suggest that this issue lies with a singular public body in Scotland: it lies instead with a multitude of systems and public bodies. These bodies need to work together to ensure that improvements to data and data recording are made.

7.5.2 Economic Analysis.

Turning to the second area of potential development, it is recommended that a full economic cost benefit analysis be carried out on the DM system in Scotland in addition to examining the economic basis of the summary criminal justice system disposals and the disposals available under the DM system. This is needed firstly as the pilot information discussed in this research presents three alternative figures for the average cost of a DM, but it has never been established which (if any) of them are correct now that the system is up and running. It is also needed because there is a more general need for information and costings which are up to date and more relevant – this has been a persistent issue in the Scottish criminal justice system which urgently needs to be addressed. This research has raised questions, within the limitations set out, regarding the economics of the DM system and its cost benefit

[625] For questions and detention information – see: <https://www.slab.org.uk/app/uploads/2019/05/Custody-form-A-Apprehension-Authorisation.pdf> accessed 25th February 2024.

to the criminal justice system. However, as was discussed in chapter 5, the economic analysis conducted here was not a comprehensive or perfect one. To have a full cost benefit analysis of the summary criminal justice system – to the extent that this is possible – would present an opportunity to properly consider the developments to the summary justice system which are appropriate, but also ensure that economic advantages are taken where this is appropriate and in the public interest. The lack of an ability to take decisions in the criminal justice system on a fully costed basis leaves open the possibility that what is thought to be a key benefit of the DM system is without basis and could be made worse with further developments.

7.5.3 Representation.

The third area for development is in the representation of the voice of the accused. This research has discovered issues relating to an accused's ability to understand the notice issued to them by COPFS. It is argued that there are issues in respect of the literacy of the accused person, persons with disabilities and additional needs and further issues for accused persons whereby English is not a first language. It has suggested that an accused person may be unaware of burdens of proof and defences available to them and have an inability to make clear their position in respect of the mitigation of the offence. These are issues that are not easily addressed without providing legal representation.

As such, it is recommended that improvements be made to the wording of the DM notice to the accused to urgently seek legal advice in respect of this notice, introduce a period for legal advice and active encouragement of the accused to seek legal advice. This will present an opportunity to provide protections against erroneous prosecutions, protections for vulnerable accused and provide opportunities to make representations on the circumstances of the accused person to the public prosecutor to ensure the most appropriate outcome for the case.

This, of course, will not be without a cost and it has already been identified that the limited amount of advice and assistance that there is available for DMs in Scotland is under used. In response it might be said that it clearly is possible to integrate legal representation into a DM system without significant disruption to it, as this occurs in the comparative jurisdiction of the Netherlands. The Netherlands is

able to maintain an efficient system which incorporates legal advice for an accused person, even mandating that the public prosecutor has a duty to hear from the accused person. This suggests either that (a) paying for legal assistance at this stage saves costs at a later stage or (b) that in the Netherlands it has been determined that the additional cost of doing so is worthwhile. Whichever is the case, undertaking a cost benefit analysis would be beneficial to developing a greater understanding of the implications of introducing legal assistance to the Scottish system.[626]

7.5.4 Automated Case Marking.

The fourth area for development would represent the biggest recommendation in terms of change for the Scottish criminal justice system: the introduction of an automated case marking decision system. It has been established that an alternative system of automated case marking exists in the Netherlands, where we have considered the automated marking of minor offences based on the police report, and any mitigating factors alongside the additional protections of the representation of the accused person.[627] It is recommended that given the issues of case marking consistency, and in order to resolve the long-standing issue over the definition of minor offences, that an automatic case marking decision would represent an improvement to the Scottish system in terms of improving consistency of approach to the offer of a DM.

We can recall from the consideration of the Dutch system that each offence is classified, and a particular number of points is attributed to each offence with additional points for recidivism and aggravations and deduction of points for mitigating factors. This research acknowledges that there are significant barriers at present in Scotland to introducing such a case marking automation, such as the issues with the *nomen juris* of offences identified in chapter 2. Prior to this being introduced, significant work would have to be undertaken regarding the classification of offences in Scotland, the points to be allocated to each offence, aggravation points and the scope and implementation of the system. It is

[626] See para 7.3.2.
[627] See chapter 6.

recommended that such classification work be conducted by an independent body with expertise in this area such, as the Scottish Sentencing Council.

One significant difficulty from the Dutch system was the use of unqualified case processing assistants to process the reports from the police and reporting bodies to the public prosecutor and mark for case outcomes. It is recommended that this system only be used where the case has already been considered by a qualified person and the classification as a summary case has been confirmed. Naturally this may reduce the efficiency gain from the automatic case marking system when compared to the Dutch system, however, it is argued that this is a necessary and important legal step which should only be carried out by a qualified person as it is a function which considers important legal tests. Despite this difference from the Dutch system, this researcher is of the view that the improvements to the consistency element of the approach of an automatic case marking system, the method of improving dealing with repeat offenders and requirements to ensure all information is entered into the system is more than enough to seek this development in the Scottish system and as such this research makes this recommendation. Manual case marking should remain for petition cases.

7.5.5 Widening the Available DMs.

Although there are significant areas identified throughout this research where the Scottish system of DMs requires improvement if it is to conform to the principles of justice, this does not mean that the Scots system cannot seek to expand the system of DMs in Scotland where appropriate. It is suggested that there are issues in the present system in respect of proportionality, effectiveness of deterrence and lack of public protection. It has been argued that there is only a limited general and individual deterrent effect of DMs and that no element of the DM system in Scotland presently contains a measure designed for the protection of the public.[628] It is recommended that consideration be given to widening the range of DMs available in Scotland to address the lack of public protection and issues of proportionality in respect of cases going to court and receiving like for like criminal sanction.[629] There

[628] See chapter 4.
[629] See discussion in chapter 3 on the variances between fiscal fines/Court Fines and Compensation orders.

are no explicit recommendations made in respect of deterrence, either general or individual. It is this researcher's view that in the system of DMs that any attempt to introduce significantly greater punishments with the view of imposing a deterrent effect is likely to raise issues of stigma, proportionality and reduce the advantages to the accused of accepting a DM in the first place. Any improvement to a deterrent effect by the following recommendations would, therefore, be an unintended consequence but perhaps a good one if it did indeed bring a deterrent effect.

There are three main recommendations made in respect of widening the available criminal sanctions in the system of DMs: compensation orders, treatment orders and restriction of liberty orders and work orders.

First, expansion is recommended of the use of compensation orders, which already exist within the DM system. We have seen in the use of compensation orders in the Netherlands that these are made automatically where there is an identifiable victim.[630] There may be underlying reasons why there has been a limited use of the compensation order in the DM system, be this a reluctance of the public prosecutor to use the order or knowledge that an accused person would not have the means to make good the compensation order. If the issue is the first, the reluctance of the public prosecutor to use the order, then this can be addressed by the use of the automatic case marking system. If the issue is the ability of the accused to make payments of a compensation order, then further research is required to understand the best methodology of truly understanding the financial position of the accused person and this should be done alongside the introduction of the case marking system. There may be solutions such as reducing the fiscal fine amount and putting an element of the state fine into a victim compensation order, or whereby there is limited means of the accused impose a work order as an alternative to the fine and have an element of compensation alongside the work order. A further method in this respect may be a time to pay application made on behalf of the accused to enable this to be paid over a period. With the qualifications made and the identification of further work required to enable this recommendation to be implemented then it

[630] See chapter 6.

remains this researcher's view that consideration should be given to improving the elements of reparation in the DM system in Scotland.

Second, expanding the number of hours available via the work order system in DMs should be considered. At present the number of hours has remained at 50 hours for some time, despite corresponding rises in the value of the fiscal fine. Whilst not suggesting inflationary rises apply to work orders in the same way as financial inflation, as was explored in chapter 2 there may be issues in the reluctance of the public prosecutor to use the work order where they feel the number of hours is too low, as was previously argued in relation to the fiscal fine prior to the McInnes reforms.

In addition, as was demonstrated chapter 3, the number of work orders has been dropping consistently.[631] The precise reasons for this are unclear and further examination is required. As chapter 4 argued, the work order has significant advantages over the fiscal fine and compensation order, as it ensures that there is no need to understand an accused person's financial ability to make the payment of the fine or compensation order. These examinations may begin by seeking to understand why over 25,000 work orders under 100 hours were imposed as a sanction by the summary courts between 2016/17 and 2019/20.[632] It is recommended that consideration is given to widening the number of hours available. Once said examinations are made then it may be the case that justifications for increasing the number of hours to 100 hours may be emerge as proportionate and in accordance with the principles of justice. As suggested above it may be the case that the public prosecutor may not be imposing work orders as they feel that the number of hours is too low for the offending behaviour and therefore, they need to raise court proceedings, as was discussed in relation to the level of the fiscal fine when it was introduced in 1987. It could also be suggested that increasing the available hours may be a more proportionate response to minor criminal offending and may indeed be more suitable when considering the accused's circumstances. The increasing of the number of hours available as a DM may address this issue but as is argued above

[631] See Table 5.
[632] FOI Response – Scottish Government, 23rd March 2024

further investigations would be required to support this recommendation. Whilst it is the recommendation of this research that the number of hours available in the work order system be increased, it is recommended that this be undertaken alongside the introduction of the case marking system which has been discussed above, to ensure that the number of hours offered to an accused person is proportionate to the offending behaviour.

Third, the introduction of treatment orders and restriction of liberty orders should be considered. Where an accused person is willing to accept the conditional discharge of criminal proceedings for the completion of treatment for an identifiable condition or accept a restriction of liberty where there is a pattern of offending behaviour at particular times, then it is suggested that this is a proportionate measure which responds to the need to improve the protection of the public element of the principles of justice. It is further suggested that this may also enable the voice of the accused to be heard where there is an identifiable need for treatment of a condition which the accused wants help with. It is acknowledged that the treatment element of this recommendation already exists within the Alternative to Prosecution system in Scotland, but it is recommended here that this be introduced in the DM system, so that this can be added as a combined order to fill a potential gap in the system where offending behaviour because of an identifiable condition continues to cause an issue. For example, if a treatment order was combined with a work order or a restriction of liberty order, then it may have the additional effect of offering a reparation element or protection of the public. It is this researcher's view that the work order or restriction of liberty order is without doubt a criminal sanction and thus it would be inappropriate for this to operate in a system of alternatives to prosecution. It is, however, better aligned with a DM system.

Turning to the restriction of liberty order (ROLO) recommendation, it is clear and acknowledged that this recommendation will be considered controversial by many. It may fall to be argued that the most significant criticism of this recommendation is that any restriction of liberty of an accused person and ultimately personal autonomy should only be imposed by a court. This is the same argument that was applied when the DM system was introduced in Scotland, that a criminal sanction

should only be imposed by a court, and it is an argument that persists in some quarters today.

There are three main arguments for the introduction of the ROLO as part of the DM system in Scotland which sit independently of each other. First, that the ROLO may be a preferable criminal sanction for some people and for society. If an accused person has no funds or is of limited means and cannot pay a fiscal fine, or is physically unfit and unable to carry out unpaid work, then a ROLO may fill this gap and can be used as an alternative criminal sanction. This may be more proportionate than the current alternative where the fiscal fine or fiscal work order is unsuitable, which is prosecuting the case in court or the public prosecutor simply electing to take no action. In agreement with the argument outlined by Ashworth and as discussed in chapter 4, where an accused in willing to accept a criminal sanction and in the circumstances outlined above, then it would not be proportionate or fair to refer the matter to court when there could be a legitimate alternative. It is worth clarifying, again, the need and requirement to introduce a proper system of qualified legal advice for accused persons in the DM system to reduce the risk of innocent, vulnerable or non-understanding accused persons accepting a DM.

Second, whereby the offending behaviour has a pattern element or better said a public protection requirement, then the ROLO may be appropriate. For example, in circumstances whereby an accused's behaviour takes place at night-time, then the ROLO would restrict this. As was discussed in chapter 3.2.4, the protection of the public element can be represented by giving the public a break from the behaviour by restricting the accused's ability to be in the community at those times where the offences are carried out.

Third, the use of the ROLO in the suite of DMs may show an escalation point in the criminal sanctions being offered to an accused person for example whereby in the suite of ATPs an accused person can have a conditional discharge from criminal proceedings following completion of treatment or something else where there is an identifiable need, but where it is felt that an ATP is not sufficient due to the nature of the offending behaviour then this could be dealt with under the DM system if it remains proportionate to the offending behaviour.

Whilst accepting that these three reasons for the introduction of ROLO to the DM system in Scotland sit separately of each other, acceptance of either argument would justify the inclusion of the ROLO in the DM System. It may further be suggested that there are associated costs with this system of a restriction of liberty, although these costs would exist in the court system anyway. In addition, ROLO has already been expanded to cover the additional circumstances of a bailed accused person being given electronic monitoring. These are not insurmountable issues that could not be overcome by adaptation of the current system. In conclusion to this particular recommendation of restriction of liberty further discussion and research on the periods which would be acceptable, the precise criteria and circumstances where this is appropriate would be required before it could be implemented.

Naturally, these recommendations will not be without criticism, and again it is worth stating that they should not be implemented without the improvements required to the other aspects of the principles of fairness, particularly representation. The improvements to the SPR and the consistency of case marking system would all be required before these developments could be justified and introduced without further distancing Scotland from the principles of justice with which we should be closely aligned. With careful and diligent consideration our comparative research in the Netherlands has shown that a wider range of DMs can be effective, as can conditionally discharging criminal proceedings subject to the successful completion of an imposed DM. In this respect it is recommended that an independent body be appointed to research and consider the length of such treatment orders and the length of restriction of liberty orders which are proportionate and how these should be classified in the DM system.

7.6 Summary.

This research has considered the whole DM system in Scotland alongside the principles of justice and a comparable jurisdiction's system. It has outlined the historical position of the development of DMs in Scotland and identified weaknesses within the Scottish criminal justice system which should be addressed. In offering recommendations and conclusions, this research presents the starting point of an

opportunity to improve the Scottish justice system, and it is one which this researcher earnestly hopes is taken up.

The original contribution that the research has made is multi-faceted. This research has established a set of criteria for assessing the system of DMs in Scotland, which could be used to evaluate similar systems in other jurisdictions (or indeed any criminal justice intervention). It has utilised these evaluative criteria to provide the first in-depth examination of the operation of the system of DMs and has found that there are areas of concern. It has provided valuable knowledge about another jurisdiction's system of DMs and has drawn on this to offer considered approaches to resolve or begin to resolve the challenges which exist.

It is also worth re-emphasising, in an attempt to reiterate the importance of this note of caution, that no individual recommendation of this research should be taken in isolation without firstly improving the areas highlighted in this research. To do so would likely exacerbate the deficiencies in and further distance the Scottish system of DMs from the principles of justice without justification. These developments are no doubt challenging and may initially have inefficiencies in respect of fiscal cost, but they are, in this researcher's view, necessary.

Returning, finally, to the original objectives of the research, the first was to establish whether the original justification for the DM system still existed in respect of efficiency and, if it did not, what was the current justification for retaining the system. It has been established that the original does not exist exactly as it was originally promulgated, but a new justification is offered by this research. The second was to examine how closely the Scottish system aligned with the principles of justice and here it was concluded that the alignment with the principles of justice requires development and a closer relationship to be established. The third was to identify developments that could be made to the system of DMs for the benefit of the system in Scotland and proposals were made in this regard earlier in this chapter.

It is not being suggested here that these could be instantly introduced. Some areas will require further scholarly research, and others will require consultation, design and examination prior to implementation. What this this unique research does offer

is a starting point and a set of principles against which developments can be assessed.

Sic Transit Gloria Mundi!

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Appendix A - All FOI Submitted and Responses

Date of FOI	**State Body**	**Questions Asked**	**Response**	**Reason for Refusal**
29/07/2023	SCTS	How many accused persons received assistance with translation services which engaged in criminal summary proceedings against them?	Partial	Could only provide total numbers and not split to type of criminal proceedings
		How many accused persons were identified as being a vulnerable or as having an identifiable disability whilst engaged in criminal proceedings	Refused	S 37(1) FOISA
26/10/2022	SCTS	The number of Registered Summary Cases in All Courts in Scotland for the Following Years: 1980 - 2021	Partial	1980-2001 not provided as data not held
09/12/2022	SCTS	For the Years 2014 - 2020, for summary criminal cases the average length of time from complaint registered until case outcome.	Refused	Refused as cost exceeds £600. It should be noted that this information was published by Scottish Governemnt in April 2023 with data being

				supplied by SCTS.
12/01/2021	COPFS	Since Moody and Tombs (1982) were given researcher access to COPFS, how many researchers have been given access to COPFS for the purposes of 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?	Refused	Data Not Held
	COPFS	Copies of any policy document on granting of researcher access to COPFS	Refused	Data Not Held
19/07/2022	COPFS	The number of persons who have previously received a direct measure who have subsequently been convicted during Court proceedings?	Redused	Refused as cost exceeds £600.
22/07/2022	COPFS	The Average amount of fiscal finefiscal fines from 2008 - 2020	Provided in Full	n/a
	COPFS	The average amount of the combined fiscal finefiscal fine and compensation order when used together	Provided in Full	n/a
	COPFS	The average amount of the fiscal compensation order, where used independently of any other direct measure for 2008 - 2020	Provided in Full	n/a
12/08/2022	COPFS	How many persons reported to COPFS for a criminal offence had an identifiable disability or vulnerability were offered a direct measure?	Refused	Refused due to cost
	COPFS	How many accused persons offered a direct measure had been indicated as not having English as a direct language in the SPR.	Refused	Refused due to cost
	COPFS	How many times has the letter offering a Direct Measure been issued in a non-standard (English) Format	Refused	Information not held by COPFS

	COPFS	Can you please confirm the number of Prosecutor fiscals and deputes employed by the service for the following years, 1985, 1987, 1990, 2000, 2010,2021,2022	Partial	Data from 2004 onwards given - exemption as data not held applied from prior to this date.
15/10/2020	Scottish Government	Copies of any analysis or report conducted by or for the Scottish Government into the effectiveness of Direct Measures(Alternatives to prosecution) and or expansion in the type and use of the aforesaid measures in Scotland from the year 2000 - 2020; A breakdown of Race and Offence Categories (as used in Annual Criminal Statistic Report, published by Scottish Government) for each direct measure (alternative to prosecution) given to an accused person for the years 2000-2020; and A breakdown of Offence Categories (as used in Annual Criminal Statistic Report published by Scottish Government) for each direct measure (Alternative to prosecution) given to an accused whereby the charge contained an aggravating factor.	Partial	Various documents produced where data held.
23/09/2021	Scottish Government	Since the McInnes observation in the report to ministers number 39 (attached) I would be grateful if you could provide any analysis or papers held about the cost and benefits of diversion to prosecution schemas. Please include reports, calculations and data used to reach the figures concerned	Provided in Full	All data held including some financial reports included
23/09/2021	Scottish Government	Please provide any policy documentation on disclosure of COPFS direct measures or alternatives to prosecution which states the process or procedure whereby these matters are disclosed on any PVG or disclosure Scotland certificate of any level.	Provided in Full	provided in full, although guidance was outdated considering

				the amendments in 2020/2021/2022.
23/09/2021	Scottish Government	Please provide copies of the following Documents from the McInnes committee: The Summary Justice Review committee report published in 2004.: • The first order consultation document in March 2002 and a subsequent	Provided in Full	
	Scottish Government	The Survey questions used in the research conducted by George Street Research by the committee and a copy of the methodological statement and full dataset/report.	Refused	Data not held - Original company gone into liquidation unable to trace
	Scottish Government	The questions used by and the report of Dr. Nancy Loucks provided to the committee.	Refused	Data not held - Original company gone into liquidation unable to trace
	Scottish Government	Please Provide the Workshop materials for the workshops of the above committee which took play in March 2003 in Edinburgh, Glasgow and Aberdeen.	Partial	Provided what was stored unable to confirm if this was all material - exemption applied to any missing material as not held

24/10/2022	SCTS	Total Number of substantive sheriffs in each year from 1980 - 2022	Partial	Information not held by SCTS from prior to 2016 information where held published on https://judiciary.scot/home/media-information/publications
	SCTS	Total Number of Summary Sheriffs since the post was introduced to present	Partial	Information not held by SCTS from prior to 2016 information where held published on https://judiciary.scot/home/media-information/publications
22 March 2024	Scottish Government	supply the number of times that a work order element of a CPO (community service)/unpaid work was imposed as a sentence whereby the number of hours was at Level 1, being up to 100 hours – from 2010 to 2020.	Full	