Qualitative interviews:  
Expert opinion on alternatives to custody in Scotland

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Aim of the report

This report is based on semi-structured interviews with professionals working in different sectors of the Scottish Criminal Justice System. The aim of the interviews was to solicit expert opinion on:

- the types of alternatives to custody available in Scotland in both pre-trial and post-trial phase;
- the effectiveness of such alternatives;
- the necessary conditions to implement such alternatives;
- the fundamental requirements of such alternatives.

The information in this report is based solely on the opinions of 4 experts from different parts of the Scottish criminal justice system. Their views do not represent any official position of any governmental or non-governmental organisations.

There are 32 different local authorities in Scotland. Each local authority is responsible for implementing alternative measures to custody in their own area independently of other localities. The interviewees could only talk about the locality they worked in and could not comment on the state of the matters outside their area. Thus, the opinions presented here do not necessarily represent the situation in Scotland as a whole and cannot be used to generalise about alternatives to custody in UK. In addition, interviewees were also tentative in espousing a view about matters that directly did not relate to their area of expertise. For example, a police inspector, although working in close collaboration with organisations that are responsible for implementing non-custodial measures, could not comment on the effectiveness of alternatives or how they were implemented. Similarly, the person working in the organisation that implements alternatives did not know the relevant legislative framework and had only a general idea about the exact role different actors played in the sentencing process.

Method

Four people agreed to take part in a semi-structured interview. The interviewees were recruited using the snowball sampling technique: except the first one, all other interviewees were selected using the suggestions of the previous interviewee. The first person was selected for their professional status and knowledge of and extensive experience in non-custodial measures. Interviewees were informed about the nature of the interview and were provided with an overview of the questions to be addressed in advance. They were also informed that the participation was confidential and anonymous. The interviews were about 1.5 hours in length with one interview lasting 2 hours.

Interviewee profiles

Interviewee 1: a senior staff member working for the Criminal Justice Social Work services which implement non-custodial disposals.

Interviewee 2: a senior police inspector.
**Interviewee 3:** a defence agent with over 30 years of experience working in the field.

**Interviewee 4:** a sheriff with over 30 years of experience in the court system. The person had also worked as a prosecutor in the past.

**Interviewee 5:** It was planned to recruit the fifth interviewee from the procurator fiscal’s office. As per suggestion of interviewees 3 and 4, I contacted procurator fiscal’s office in one of the Scotland’s localities. After an exchange of several emails, it became clear that they did not want to take part in the interview. Their argument was that a person from their office will not have knowledge and opinion on the value of different alternatives to custody as the subject lay outside their area of expertise.
Arguments in favour of alternatives to imprisonment

In general, greater effectiveness and lower cost were interviewees’ two main arguments in favour of non-custodial measures. Community sentences are more effective than prison sentences in terms of reducing reoffending and they are also less costly. Prison sentences are regarded as effective only in terms of managing safety risks to the society by keeping the offender locked up and thus preventing them from making any further crimes.
Pre-trial

1. Types of alternatives

The main ‘real’ alternative to detention in the pre-trial phase is bail. All of the interviewees have pointed out that bail is granted by default unless the accused person is deemed to pose a serious risk to the public or they are accused of a very serious crime which statutorily requires a prison sentence.

Depending on the nature of the circumstances of the crime and the characteristics of the accused person, bail is issued with a set of standard conditions and it can also have special conditions\(^1\). In most of the cases, bail does not require any supervision and is self-policed - there is no involvement from the police (or other institutions) unless the accused breaches bail conditions (with the exception of curfew where police might monitor compliance). If the accused violates one of the bail conditions, the breach is then treated as a separate offence which is subject to different sanctions and punishment. Although mostly self-monitored, the bail can in some cases be implemented by Criminal Justice Social Work\(^2\) (CJSW) who can provide ‘bail supervision packages’ which can consist of:

- bail with mentoring (in the locality of one interviewee, only for specific offender populations: young offenders, women and persistent offenders);
- supportive accommodation in a specific house (with various conditions: curfew, adherence to the rules and regulations of the unit);
- a combination of the above (i.e., mentoring and accommodation).

In some areas the type of bail packages that are available might be limited by the resources at the disposal of the local authority. For example, in the locality of one of the interviewees bail packages were not available for the offender population as a whole: the largest share of the budget was in that locality was used for implementing ‘community sentences, court reports and custody throughcare’ and relatively little was allocated to pre-trial services.

Although not an alternative to detention in the pre-trial phase per se, the police inspector said that the local police authority is trying to prevent people from getting into prison in the first place. The interviewee mentioned a few innovative measures that had been successfully implemented in their locality with young offenders (18 year olds and below) and low-level female offenders. Rather than bringing them to court, the police and social workers try to divert these offenders to activities that can help address the underlying causes of their offending behaviour (e.g., finance counselling for theft due to acquired debt) before getting them involved with the criminal justice system. Such a diversion approach might be adopted with adult males (18 to 25) in the future.

2. Strengths and weaknesses

\(^1\) The bail are described in the national report (p. 11).

\(^2\) Criminal Justice Social Work (CJSW) are services for offenders provided by the Scottish local authorities which implement non-custodial measures.
The majority of the interviewees agreed that bail is an effective, and in most cases, a preferable alternative to detention. All of the interviewees pointed out that bail is not a viable alternative only for repeat and violent offenders and those who are suffering from serious cases of substance misuse, as the bail conditions are likely to be not a serious enough of a deterrent from further offending for these offenders.

The strengths and weaknesses of pre-trial alternatives as identified by the interviewees are as follows:

**Strengths:**
- a less costly option than remand;
- allows for the offender to remain in the community (does not remove them from family ties and social obligations);
- does not introduce them to the prison environment where they might be exposed to ‘criminally-oriented’ social environment.

**Weaknesses:**
- risk to the victim and the public (if the accused re-offends).

### 3. Key actors

#### Target groups

In Scotland, most accused persons get granted bail unless they are:

- tried for an offence of personal violence or sexual offence and they have previously been convicted with such offences on indictment;
- tried for a drug trafficking offence and have a previous conviction on indictment for drug trafficking offence;
- believed to pose a risk to the public or witnesses.

#### Sentencing

The judge decides whether to grant bail or not. Their decision is explicitly influenced by the information about the offender and the case presented to them by the procurator fiscal and the defence agent. Interviewee 4 noted that procurator fiscal plays a significant role in terms of influencing the judge’s decision regarding bail: ‘if the Crown fiscal is not opposing bail, then the accused is getting bail.’

Both the defence agent and the judge can also, if the accused ‘is already in the system’, be influenced by a social worker report (from CJSW). The report is an assessment of the accused and normally includes information, collated from a variety of different sources, about the pattern of previous offending behaviour, accommodation status, family support, substance misuse issues, peer relationships, mental health issues and other information which is meant to help the judge to decide whether to grant bail and, if so, what special, if any, bail conditions to impose.
As to indirect influence, one interviewee mentioned that sometimes the defendant themselves can affect the decision by what they say to the judge in court. In domestic cases, another source of indirect influence on the judge’s decision can be a statement written by the spouse of the accused requesting for the detained partner to be released.

The civil society has influence on the pre-trial alternatives only insofar as they’re able to affect policy making and the legislation of bail conditions that should be imposed on the accused.

No other sources of influence were identified by the interviewees.

The following considerations are taken into account when deciding on bail:

- offending record;
- risk to the public;
- risk of flight;
- risk of reoffending during bail;
- risk to witnesses.

**Implementation**

If the bail does not require a supervision package by the CJSW, normally only police is involved in the implementation of bail, and their involvement is usually limited to enforcing breach of bail conditions. It is expected that the accused will abide by the bail conditions and police only gets involved if the conditions are breached. In some cases police involvement might be more significant: for example, if the accused has been given curfew, police might check if the person is in the place he or she is limited to.

If the bail condition requires supervision, then CJSW will organise the package which would include mentoring or accommodation, or both.

**4. Feasibility and main conditions**

The Criminal Procedure Act of Scotland 1995 is the relevant framework that governs the use of bail as a pre-trial alternative to detention and it is at a national level; the use of bail is also bound by the European Human Rights legislation. The legislation governs what conditions should be put in place as part of bail, but it does not specify how those conditions should be implemented practically; the latter is governed by the performance framework (Criminal Justice Social Work Standards3) which sets good practice standards.

Bail is the only real alternative to detention in the pre-trial phase, and it is implemented. Interviewees did not mention any other practices that are effective but are not implemented.

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In addition, interviewees did not highlight any significant legislative gaps, not in the sense where legislation was incomplete and did not cover certain situations. One interviewee said that a bail option ‘financial provision’ (a sum of money paid for the accused) is in the legislation, but is not applied almost at all as its use is discouraged nowadays. The interviewee thought that ‘financial provision’ was effective in ensuring compliance with bail conditions, but also noted that it acted as a bias against the poor who could not always afford to pay the required sum of money. Another interviewee pointed out that the recommendation of the law is not always followed entirely. The interviewee thought that the judges, to be on the safe side, sometimes do not take into account all the relevant conditions when deciding on bail. They would rely solely on the record of previous convictions and refuse bail only on the basis of that without considering other relevant factors specified in the legislation.

One interviewee thought that there was a gap between the legislation and the practice in relation to electronic tagging. The interviewee said that the technology was not at the necessary level of sophistication for implementing the surveillance at the desired level.

Interviewees stated that money and other necessary resources are needed in order to implement bail. No specific conditions were specified since there are very few conditions that can apply to every case of bail. Police supervision is a necessary condition in all of the cases since they get involved if there is breach of bail; police involvement is higher for curfew where they can be asked to monitor compliance with the curfew conditions. Beyond that, the necessary conditions vary depending on what the circumstances of the case and offender characteristics are. For example, if the accused has substance misuse problems, addictions services will have to be involved; if the accused has mental health problems, mental health services will need to be involved, and so on.

5. Suggestions to identify practices

There are no standardised programmes in the pre-trial phase that could be used as an example of a successful approach. The interviewee who is a senior member of staff of the organisation that is responsible for implementing non-custodial disposals said that the most fundamental requirement for a successful bail approach is a proper assessment of the accused: The most important thing is to identify the key risk factors and also the key need factors of the accused so that the most appropriate bail ‘package’ can be imposed.
Post-trial

1. Types of alternatives

According to the interviewees, there are three main alternatives to a prison sentence in Scotland:

1. Community Payback Order (CPO);
2. Restriction of Liberty Order (RLO);
3. Drug Treatment and Testing Order (DTTO).\(^4\)

Community payback order is the main non-custodial alternative as a community sentence. It can consist of a combination of 1 or more of a total of 9 different 'requirements':

- supervision requirement;
- compensation requirement;
- work requirement;
- programme requirement;
- residence requirement;
- mental health treatment requirement;
- drug treatment requirement;
- alcohol requirement;
- conduct requirement\(^5\).

RLO is a restriction on the person's movements and location; DTTO is applied to persons who have problems with substance misuse.

All of the alternatives are implemented in the local context and none of the interviewees could claim that any alternative was more effective than others as each of the alternatives are designed for different purposes. Some interviewees pointed out that it is hard to generalise about alternatives as a whole as there are offender groups for which alternatives to custody do not work (e.g., repeat offenders and ones that have committed serious crimes, offenders with serious substance misuse problems, or a combination of these profiles). In general, the opinion of the interviewees was that, apart from the aforementioned offender groups, the implemented alternatives are more effective than custodial disposals.

Two of the interviewees' opinion was that the DTTO was not very effective in the way it is currently implemented. The main reason cited for that was that this order is designed for the offender group

\(^4\) Some interviewees mentioned other alternatives that are available in the legislation fine, deferral of sentence (‘to be of good behaviour’), admonition and absolute discharge. However, the primary options, as identified by the interviewees, are: CPO, RLO and DTTO.

\(^5\) For a brief explanation of each requirement, and the Community Payback Order in general, please refer to the national report (p. 12).
that, according to interviewees, is so entrenched in their offending behaviour and substance misuse that they rarely follow through with the DTTO and, sooner or later, return to their old ways.

2. Strengths and weaknesses

The interviewees mentioned the following as strengths and weaknesses of alternatives to custody:

**Strengths:**

- flexibility (the order can be tailored to address the individual needs of the offender);
- cost (less expensive than imprisonment);
- allows for the offender to remain in the community (does not remove them from family ties and social obligations);
- does not introduce them to the prison environment where they might be exposed to ‘criminally-oriented’ social environment;
- reduces the likelihood of re-offending (offenders who have been on community sentences have a lower re-offending rate);
- beneficial contact with professionals (mentoring) and services that are aimed to improve offender's welfare;
- offenders receive guidance and support to deal with their problems while on non-custodial orders;
- benefits the community via the work offenders do while they’re on the order;
- offenders gain skills that they otherwise wouldn't acquire (e.g., routinely going to work, vocational training);
- allows for the offender to pay back to the community for the harm done.

**Weaknesses:**

- risk to the victim and the public from re-offending;
- offender’s engagement with the order might not always be present (which undermines the point of a CPO);
- might allow offender to remain exposed to the factors that predisposed to the offending behaviour in the first place (e.g., maintaining existing peer relationships);
- might not be effective with repeat offenders, serious offenders or those with significant substance misuse problems;
- in the current form, there is not enough leeway in the legislation/practice that allows for flexible approach when things do not work out according to the initial plan (e.g., offender gets imprisonment if he fails to comply with the CPO requirements when it might have just been a lapse or relapse - a normal part of a process of trying to change one’s ways).
3. Key actors

Target groups

There are a few offender groups for which specific programmes have been developed to address their offending behaviour as part of a community sentence - sex offenders and domestic violence offenders. As with bail, most offenders will get a community sentence unless they have committed a crime that statutorily requires a prison sentence or they pose a serious risk to the victim or the society. In general, a distinction between serious and low-level offenders is made. It’s the latter that are the main target group for community sentences and only serious offenders should receive a prison sentence. Other than that, there are no specific target groups that get issued a community sentence.

The exact nature of the sentence given is determined by the individual characteristics of the offender and the underlying causes of their offending behaviour. For example, two offenders can get completely different sentences for shoplifting because the underlying reason for the offending behaviour is different in each case. For one person it might be the need to maintain their drug addiction, for the other person it might be greed combined with lack of self-control. In the first case, the offender might get a community sentence with a requirement to attend drug addiction clinic; in the second case, the offender might be required to undergo counselling to address the lack of self-control.

Sentencing

The actors involved in the sentencing process are similar to the pre-trial phase. The judge is the one who ultimately decides what kind of sentence is imposed. Their decision will be influenced by the plea and mitigation the defence lawyer in certain cases. The procurator fiscal, in general, has a much less role to play than in the pre-trial phase (procurator fiscal can request a sexual offence prevention order, or a non-harassment order in domestic cases, - both of which are designed to prevent the offender from approaching the victim).

When deciding what kind of community payback order to impose, the judges engage in a much more in-depth assessment of the individual and their offending behaviour in order to give the most appropriate sentence possible. Their decision will be informed by an assessment of the offender that is carried out by the CJSW who will take into account a variety of sources of information about the offender regarding his family relationships, substance misuse issues, employment, offending history, among other factors. The judge might also get statements, where appropriate, from a wide variety of professionals whose expertise is relevant to the case in question: judges can get reports from social workers, clinical psychologists, psychiatrists, drug experts and almost any member of the medical profession. References from the members of the community can also be taken into account at this stage.

Victim impacts statements, a relatively novel feature of the Scottish Criminal Justice System, can also influence the judge’s sentencing decision. Victim impact statement is a document explaining the physical, emotional and/or financial impact the crime has had on the victim. None of the interviewees specified explicitly in exactly what way the sentencing decision will be influenced by
this statement. They simply noted that it’s bound to have an effect on ‘you’ (as a judge) once you have read, for example, that someone has been negatively affected by the crime to a degree that the consequences of the offence still have an impact on the victim’s life (e.g., having scars on the face from stab wounds and not being able to look at oneself in the mirror without wanting to scream). One of the interviewees said that in a case like that (i.e., where the offence has had a serious impact on the victim), if there is a doubt in judge’s mind about what sentence to give, a victim impact statement can sway the decision in favour of imprisonment as opposed to a non-custodial measure.

Interviewee 4, who is a judge of more than 30 years of experience, summarised the grounds for sentencing as follows:

“Effectively, in your brain, what you are doing is this. You are looking at the crime, you are looking at the offender and the bottom line should be: ‘what is the sentence that I could impose on this individual that is most likely to have the best effect from the point of view of the society and the best effect from the point of view of the individual as well.’ If, when you ask the first question, the answer comes: ‘society requires to be protected form this individual’, then the imprisonment is the only option. But if that is not the answer to that question, then all the other options are available as far as I’m concerned. Then it is a matter of putting together the best [CPO] package.”

The civil society, as in the case of pre-trial phase, has only an indirect influence - they’re able to affect policy making and the legislation of what the alternative measures and their conditions should be.

Implementation

The CJSW are coordinating the implementation of the CPO which normally has different aspects of it delivered by different agencies depending on the exact nature of the order which will be determined by the particular needs of the offender. For example, a community payback order with a work and mental health requirement will require involvement of an agency that focuses on employability skills and another agency that can address mental health issues. Police can also be involved in the case of breach of the order.

4. Feasibility and main conditions

The Criminal Procedure Act of Scotland 1995 is the relevant framework that governs the use of alternatives to custody, and it is at a national level. The legislation governs what conditions should be put in place as part of CPO, RLO and DTTO, but the legislation does not specify how those conditions should be implemented practically; the latter is governed by the performance framework (Criminal Justice Social Work Standards) that sets good practice standards (e.g., how quickly the offenders are meant to complete the sentence; how quickly the offender is attended to, and so on).

One of the interviewees said that there is a gap between what the legislation provides and what is actually implemented in practice. The interviewee referred to audit reports which have identified the


'patchy nature' of the CJSW services across Scotland. The services are fragmented and are not transparent in terms of what they provide and how they implement non-custodial measures. Not all community payback order packages are equally available across different localities in Scotland. Some areas might not be able to provide certain types of CPOs due to lack of resources. For example, a relatively rural locality might not have mental health services available that can deal with a type of mental illness an offender is suffering from. One interviewee's opinion was that it was a problem that needs to be solved at the level of leadership - governance that establishes the same performance framework across different authorities.

When asked about the necessary conditions, the interviewees pointed out that 'we need resources' to work with the offender. It was hard for the interviewees to specify any concrete conditions as CPOs are issued on the basis of individual circumstances of the offender. In general, a necessary condition for a successful CPO is the need for good coordination among different agencies involved in the implementation of the order: all the involved parties should be informed about the nature and the purpose of the CPO so that it can be implemented smoothly.

5. Suggestions to identify practices

The relationship between the offender and the worker who is supervising the order was mentioned by all the interviewees as the single most important aspect of a successful programme. Interviewees said that the worker/supervisor of the offender needs to have credibility in the eyes of the offender, they need to be somebody an offender can trust. A few interviewees mentioned that the most effective supervisor, in their view, was someone that, for example, had gone through a similar experience (e.g., had been convicted themselves) and could serve as an example that one can change one's life around.

The most fundamental requirements/principles of a successful offender programme, as indicated by the interviewees, are:

- correct application of principles based on 'what works' research;
- proper and accurate assessment that identifies the key risk factors and key need factors of the offender;
- a plan which appropriately targets those factors;
- a flexible approach that meets the needs of the individual and allows for monitoring, review and, if necessary, change of the order over time according to the progress of the offender;
- good offender-supervisor relationship that's based on active listening, empathy and an understanding of the offender's needs; a relationship that includes realistic assessment on the progress that can be made including lapse and relapse;
- coordinated, consistent, (sometimes assertively) proactive approach that is sensitive to time limits;
- the punishment has to be acceptable to the society as a whole and it has to be public (so that the reparation aspect of the order is visible);
- it has to have a rehabilitative effect on the offender.