



Judicial perspectives of community-based disposals

Issues paper

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INTRODUCTION

1. Recent years have seen an increase in the role of community-based interventions within the criminal justice system, with the extension of the presumption against short-term sentences and expansion of electronic monitoring, among other things, placing greater demands on the system of community justice. In the context of the Scottish Government's aims of increasing the use of community justice services and reducing the use of imprisonment, together with the pent-up pressure arising from the COVID-19 pandemic, demands on the community justice system can only be expected to increase.
2. If the Scottish Government's aims are to be achieved, and public confidence in the criminal justice system is to be maintained, a robust system of alternatives to custody is required. While the Scottish Sentencing Council's remit does not extend to the provision of community-based disposals, it has a statutory objective to assist in the development of policy in relation to sentencing. With a view to assisting policymakers and practitioners responsible for the administration and delivery of community justice services, the Council has examined the provision of services to support community based disposals and sentencing practice from the judicial perspective.
3. As well as taking into account engagement and research we have carried out in recent years¹ we have engaged directly with the judiciary to ascertain what might improve judicial confidence in community-based sentences, including whether there are any impediments to the imposition of community-based sentences or gaps in the current provision.
4. In early 2021, the Council carried out a consultative exercise with sentencers across Scotland, with a view to identifying any gaps or barriers to provision of community-based disposals and to ascertain what might improve judicial confidence in community-based interventions. There were 47 participants from the shrieval bench (including sheriffs, summary sheriffs and a part-time sheriff). Sentencers were asked questions along 6 main themes: general (covering provision and awareness of community-based resources), residence requirements, other orders and programmes, review hearings, national programmes, and additional information (including impacts of the pandemic).
5. We have attempted to capture, at a high level and as accurately as possible, the views that have been expressed to us. It is important to note that the views

¹ For example, the [Sentencing of people with mental welfare issues: report on discussion event with Scottish Sentencing Council](#), Scottish Sentencing Council (June 2019), and [Public Perceptions research into public perceptions of sentencing](#), commissioned by the Council and carried out by Ipsos MORI (September 2019).

expressed are not necessarily representative of all sentencers and not all sentencers who took part in the exercise are necessarily of the same views in respect of all the matters discussed.

6. The conclusions we have drawn from this exercise are intended to assist policy makers and service providers in further policy development and improved service provision and delivery. The findings will also be used to assist the Council in the preparation of guidelines generally.
7. This exercise was primarily aimed at uncovering challenges to the use of community-based disposals and identifying opportunities for improvement from the perspective of sentencers. The Council is aware of many examples of effective community-based interventions and is appreciative of the significant efforts that have been made to improve the delivery of community justice across the country (in the face of public spending constraints and the impact of the pandemic²). However, given the focus of the exercise, these are not discussed at length in this paper. Likewise, the Council has not carried out feasibility work on the impacts of any implementation of the recommendations made within this paper or on the suggestions received.
8. While we recognise that addressing many of the issues raised would require expenditure in a time of uncertain public resources, we do not believe this should constrain dialogue on these matters. While costs do not, and should not, factor into individual sentencing decisions we would note that in general, custody incurs significantly greater costs than a community sentence.³
9. In 2019, the statutory presumption against short sentences (PASS) was extended from periods of imprisonment of three months or less to periods of 12 months or less. This was predicated on the Scottish Government's review of the evidence which found that "[c]ommunity sentences are more effective in reducing reoffending than short-term prison sentences and may provide greater opportunity for rehabilitation" which can be explained by the fact that there may be greater opportunities for rehabilitation for those on community sentences in comparison with those on a short-term prison sentence. For example, where a short custodial sentence might remove an offender from the community for a short period, if the offender is not rehabilitated in any way the public is only protected for the duration of the prison sentence. A community sentence is often of longer duration than a custodial one, offering an opportunity for public

² We are conscious in particular of the current economic uncertainty and potential pressures on public resources as a result of the pandemic. See for example: <https://www.fiscalcommission.scot/wp-content/uploads/2021/01/Scotlands-Economic-and-Fiscal-Forecasts-January-2021-Summary.pdf>

³ Scottish Government analysis published in December 2019 showed that in 2016/17 the average prisoner place cost £37,334, while the most used community sentence, a community payback order, cost around £1,894 <https://www.gov.scot/publications/costs-of-the-criminal-justice-system-in-scotland-dataset-2016-17-published-december-2019/>.

protection by other means (such as through local authority supervision) throughout the order and beyond. Moreover, it was found that short sentences disrupt many of the things that help to reduce reoffending such as housing, employment, family relationships and access to health care and support.⁴

10. Audit Scotland recently examined the use of community-based sentences in Scotland and concluded that despite measures such as the extension of PASS, the government's aims of reducing imprisonment and increasing community sentences have not yet been achieved, with Scotland's incarceration rate remaining among the highest in Western Europe. Audit Scotland noted that of those who received either a community or custodial sentence, the proportion of people receiving community sentences was the same in 2019/20 as it was in 2016/17 and that there is geographic variation in the use of community sentences (although it acknowledged that this may be explained by factors such as the nature of the offence being sentenced).⁵
11. We understand that the Scottish Government is considering options for the further expansion and use of community justice services and is currently consulting on the proposal to create a National Care Service⁶ and seeking views whether it should incorporate social work services, including justice social work and alcohol and drugs services. While some of the issues raised in this exercise may be relevant to consideration of that proposition, nothing within this paper should be regarded as commentary on it by either the Council or sentencers. The exercise which is the focus of this paper was carried out prior to any knowledge of that proposal and the Council has given separate consideration to the government's consultation.
12. We hope that ventilating the issues that have come to our attention will assist policymakers and delivery agencies in their efforts to further improve the criminal justice system. We believe that both improved understanding of and consistency in sentencing, including community sentences, are vital to public confidence in the criminal justice system. We are therefore also considering what actions the Council can take to improve awareness of, and consistency in, community sentencing while maintaining public confidence in the sentencing system.
13. We are grateful to all sentencers who have taken their time to engage with us on these matters and share their experiences. In particular, we are grateful to Sheriff David Mackie for his assistance in developing our work in this area.

⁴See in particular, chapters 2 and 3 of [What Works to Reduce Reoffending: A Summary of the Evidence](#), Scottish Government (updated 8 May 2015)

⁵ [Report: Community justice: Sustainable alternatives to custody](#), Audit Scotland (July 2021)

⁶ [A National Care Service for Scotland: consultation](#), Scottish Government (August 2021); the [Council's response](#) was published on 28 October 2021.

SUMMARY OF JUDICIAL VIEWS

14. Community-based disposals, in appropriate cases, are commonly viewed by sentencers as providing a greater chance of rehabilitation and, in general terms, as a more cost-effective alternative to imprisonment.⁷ It is our impression that sentencers feel that the sentencing process is generally well supported by justice social workers, who they understand are often carrying out a difficult task in challenging circumstances. Nevertheless, we believe there are opportunities for improvements and a summary of the key issues we wish to highlight for attention follow.
15. Sentencers generally feel that they are aware of the programmes and services available and that they can access the necessary information to make appropriate sentencing decisions but not all feel they have a full awareness of what is available.
16. We consider that judicial awareness could be improved, and the sentencing process might therefore be expedited by: the provision of greater information in Criminal Justice Social Work Reports (CJSWRs) about available local authority and third sector initiatives; enhanced engagement with service providers; and a database of the resources available. We consider that this would be particularly valuable to practitioners and sheriffs who move across jurisdictions, as local variations in available services can affect sentencing options.
17. There is a perceived need among sentencers for greater consistency in the provision of community-based programmes and services. These should be made available for a wider range of offending and to address a wider range of issues. Sentencers have, for example, observed gaps in unpaid work opportunities for specific categories of person (for example those with mental health difficulties, women and young people) or offending (for example domestic abuse).
18. The engagement we have carried out suggests that one of the greatest challenges to judicial confidence in community-based disposals concerns limitations of resources to support their management and delivery. A more consistent approach to the development and funding of these disposals to support their more consistent provision, robust management and successful completion would enhance judicial confidence and might be expected to support an increase in the use of community-based disposals through the provision of more sentencing options.

⁷ This is not to suggest that sentencing decisions are made with any regard to resource implications: the decision as to whether to impose a community sentence as an alternative to imprisonment is made with regard to the specific circumstances of the particular case before the court and in accordance with applicable law.

19. While there is national practice guidance⁸ for those involved in the delivery of community payback orders (CPOs) which covers breach procedures, much of the legislative process for breaching orders relies on the discretion of supervising officers⁹ and local practice. Sentencers have noted that breach proceedings have the potential to take significant periods of time to conclude and some have voiced a desire for earlier reporting of breaches. While we believe there is merit in considering whether breach processes can be improved and made more consistent in this regard, we would note there is a limit to how swiftly a breach can be processed and that any move to encourage swifter reporting should be accompanied by efforts to improve the efficiency of breach processes.
20. It is our impression that sentencers generally desire greater flexibility to impose an appropriate sentence for the particular case before them and potential legislative changes to enable this should be considered. In particular, there may be a case for simplifying the legislation in relation to community sentences to enable greater flexibility in sentencing.
21. We believe there is a lack of public awareness of, and confidence in, community disposals. Research demonstrating the effectiveness of community-based sentences and their contribution to reducing reoffending would be welcome. Relevant national and local organisations should undertake activity to enhance public understanding of what community sentences involve and what they can achieve. The Council in particular has a statutory objective to promote awareness and understanding of sentencing practice and intends to undertake work in this regard as part of its future work programme.
22. The disruptions to service delivery (and to social work in particular) experienced as a result of the pandemic are seen by some sentencers as having adversely impacted upon the efficacy of community disposals and in some instances sentencing practice has been affected. The Scottish Government legislated in March 2021 to reduce unpaid work hours to assist with capacity issues. However, the backlog of unpaid work is expected to continue to add to the strains upon what is already perceived to be an under-resourced system.

⁸ [Community Payback Order Practice Guidance](#), Scottish Government (January 2019)

⁹ The legislative term in respect of CPOs is “responsible officer”, as set out in s227C of the Criminal Procedure (Scotland) Act 1995.

ISSUES FOR CONSIDERATION

23. The issues identified during this exercise are discussed in detail under the following overarching themes:

- provision of information
- consistency and capacity
- monitoring and management
- legislative barriers
- public confidence
- impacts of the Covid-19 pandemic

24. Following discussion of the various issues that have arisen during engagement with sentencers and other activity we have carried out, we offer our own observations, including those on what activity might be undertaken to address the issues identified.

Provision of information

Awareness of available resources

25. If community sentences are to be utilised, it is essential that sentencers know what community-based options are available to them. Sentencers generally feel that they are aware of the programmes and services available when sentencing but not all feel they have a full awareness of what is available.
26. Those sitting in a specific jurisdiction will have a general awareness of programmes available in their community but because of the (often changing, or short-term) range of initiatives available in any area, and the fact that court jurisdictions may span several local authority boundaries, sentencers are reliant upon information being provided to them. This will primarily be through CJSWRs, provided when a person is to be sentenced for an offence, but sentencers will also be directed by well-informed local practitioners or receive general information through engagement with (or awareness raising by) local authority or public or third sector delivery bodies, or through other avenues such as the Judicial Institute for Scotland.
27. Sheriffs who are new to an area will likely have a greater need for information than those who have been based there for some time. In addition, those sitting in larger jurisdictions may find it more difficult to keep up with developments and the range of initiatives available. Part-time sheriffs hold an all-Scotland jurisdiction. If they sit peripatetically they may not have the benefit of local knowledge or

engagement in the same way as those who sit regularly in a particular sheriff court or sheriffdom. They may therefore not have a complete awareness of what options are available to them.

28. There may be appetite among some sentencers for a database of locally and nationally available resources, and what they involve.¹⁰ It has been suggested to us that an up-to-date online resource, accessible by criminal justice social work staff, defence practitioners and sentencers, providing information about local and national specialist and voluntary sector resources should be developed. Information might include: available programmes, desistance/reoffending rates, type of unpaid work, bespoke programmes, and programmes to assist those with specific needs (such as mental welfare needs).

Criminal Justice Social Work Reports (CJSWRs)

29. CJSWRs are viewed favourably and are broadly felt to be of assistance to the making of the sentencing decision and, on the whole, to contain sufficient information about resources available. The Scottish Government has published practice guidance on the preparation of CJSWRs, including guidance on the completion of the national report template. The template is intended to support consistency in “presentation, content and style of information” for sentencers while allowing report writers sufficient flexibility to carry out interviews and prepare reports in accordance with their professional approach. While reports can vary in the level of detail provided, depending upon the author, there is some variance among sentencers’ preferences for what CJSWRs should contain and the level of detail required.¹¹
30. CJSWRs do not consistently include non-local authority resources that might be available (for example Venture Trust, the Caledonian System,¹² or other third sector programmes). In situations where a third sector programme might be considered more suitable – for instance because of the nature of the offence or circumstances of the person being sentenced – separate reports might be ordered which would further delay sentencing. Details of alcohol or drug treatment are not routinely included in CJSWRs and the addition of treatment

¹⁰ Community Justice Scotland undertook a mapping exercise of all community based programmes available in Scotland and made it available to the judiciary in 2019/20. There will likely have been developments in the programmes available since then.

¹¹ [Criminal justice social work reports and court-based services practice guidance](#), Scottish Government (January 2010). Not all sheriffs are necessarily of the opinion that the CJSWR should provide more than basic information; some prefer shorter and more succinct reports, while a small number have indicated to us that reports would benefit from greater detail specifically tailored to the circumstances of the offender and case and on what precisely will be involved, such as the context of supervision plans or how intensive a programme might be.

¹² It is understood that the Scottish Government intends to widen the availability of the Caledonian System.

requirements to a community payback order (CPO) might require supplementary reports, further delaying disposal and treatment.

31. It is our view that a more proactive approach from sentencers and practitioners at the stage of ordering the first CJSWR would assist in ensuring that early consideration is given to obtaining appropriate reports and assessments about the availability and suitability of certain sentencing options (for example, an assessment for the Caledonian System¹³ can be called for at the same time as a CJSWR). The ability to be proactive in this regard may depend of course on the level of awareness of the local resources that might be available.
32. While CJSWRs may contain information about programmes, the court might need to enquire further about their availability to and suitability for the person being sentenced.
33. Some of these points have been raised with us previously in our examination of issues relating to sentencing of persons with mental welfare issues¹⁴ and are echoed in the recent Report of the Independent Forensic Mental Health Review.¹⁵ We understand there can be delays in obtaining CJSWRs, but that these are more keenly experienced with psychiatric and, in particular, psychological reports.¹⁶
34. One suggestion we have received is that when sentencing a person who has reoffended on a previous community-based order, it would be helpful to provide greater detail in the CJSWR about that person's progress and achievements on

¹³ The Caledonian System is a programme aimed at helping men to address behaviours that lead to domestic abuse offending.

¹⁴ It was suggested to us that in relation to those with mental welfare issues, CJSWRs often do not provide sufficient information about the types of programmes that are available in the community and in prisons, what exactly is involved in such programmes, how long they will take, and if there are any waiting times, with the availability of such programmes being crucial to confidence in their successful delivery.

¹⁵ The Report of the Independent Forensic Mental Health Review discusses the issue of court reports further and has recommended the creation of "an appropriately funded national framework to ensure the timely provision of court reports by psychiatrists and psychologists for assessment and sentencing purposes." (recommendation 63) and a review of the current limitations about which disciplines can complete court reports, including whether a change in the law is required (recommendation 64); [Independent Review into the Delivery of Forensic Mental Health Service, Final Report](#) (February 2021)

¹⁶ Courts may require reports from mental health officers ("MHOs"), not just from medical professionals. Although courts have processes for liaising with medical professionals, different process apply in relation to MHOs, who might not necessarily work for the local authority within the court's jurisdiction. These issues are discussed in more detail in our report on a roundtable discussion event on the sentencing of people with mental welfare issues.

the order so that it can be clear to all involved that any fresh order is intended to build on that.¹⁷

Engagement between the courts and other bodies

35. The success of many community-based interventions requires a multi-agency approach. It can sometimes be challenging for all those involved to communicate effectively and efficiently with each other and to work together to meet the requirements of disposals. Some sentencers feel that improved engagement and regular meetings with those delivering community disposals would enhance judicial confidence in them. It is accepted that the pandemic has brought challenges in this regard.
36. Engagement between the courts, practitioners and various agencies involved in the delivery of community justice can be of assistance in identifying issues surrounding provision, improving awareness of programmes that are available and what they involve, and may support efforts to improve referrals.
37. We are aware that engagement between courts and other agencies does take place but the degree and type of engagement depends on several factors. For example, where there are specialist courts or other court-supported initiatives which focus on community-delivered sentences, such as the dedicated drug and alcohol courts or structured deferred sentence schemes, contact is frequent. In those circumstances it may, though, be limited to those sentencers who are involved in the relevant initiatives.
38. We consider that relevant local and national organisations should be encouraged to engage with defence practitioners who can also raise awareness with sentencers of sentencing options.

Conclusions

- 1) The provision of necessary information supports sentencers in determining an appropriate sentence, and provides assurance that it will be effectively implemented.**
- 2) Sentencers generally feel that they have sufficient awareness of programmes available when sentencing and that the information provided in CJSWRs is usually sufficient to support the sentencing decision. There are, however, some opportunities to improve consistency across CJSWRs and consideration should be given to**

¹⁷ The national standards on CJSWRs suggest that an individual's responses to previous sentences should inform the report writer's assessment of "what works and why and whether a community sentence is appropriate" (para. 6.22)

whether additional information (such as information about third sector initiatives and the specific availability and suitability of community-based interventions) should be included on a more routine basis.

- 3) Improved awareness of the community sentencing options available in a particular area would support a pro-active approach to the requesting of information by the courts. Where information is not provided as standard or requested pro-actively by the court, this can lead to delays in sentencing due to the need for further reports.**
- 4) There may be value in the development of a centrally maintained database of locally and nationally available resources, and what they involve. Given the breadth of programmes in existence and the changing availability of programmes, any such exercise would be likely to be resource-intensive. Consideration should therefore be given to the anticipated costs and benefits involved in advance of any such undertaking.**
- 5) Improved engagement can enhance judicial awareness of available resources and support multi-agency efforts to support the successful delivery of effective community based sentences. Where engagement is not already taking place through existing initiatives, engagement between the courts and other agencies involved in the delivery of community disposals should be considered. Engagement can take many forms and the nature and degree of communication may depend on local need and the available resources.**
- 6) Relevant local and national organisations should be encouraged to engage with defence practitioners who can also raise awareness with sentencers of sentencing options.**

Consistency and capacity

- 39. Appropriate community-based disposals are viewed as providing a greater chance of rehabilitation and, in general terms, as a more cost-effective alternative to imprisonment. Programmes and services are often perceived as facing challenges due to shortages in staffing, funding, capacity and other limitations.**
- 40. Due to community-based programmes and services being delivered primarily on a local basis, there are inevitably variations in provision of the types of programme available. While we do not suggest that provision should be uniform across the country – different localities will have different demographics and different issues and needs which may require specific local solutions – we have considered whether and how issues of consistency of provision affect practice and judicial confidence in community-based interventions.**

41. The success of community-based disposals is perceived to be largely dependent on robust delivery, effective monitoring and prompt reporting of non-compliance – all of which are hindered by what are, in some areas, seen to be overwhelmed local services. In a number of areas, resources available to criminal justice social work and NHS services (to support mental health treatment and addiction for example) are seen by some sentencers as insufficient to provide adequate monitoring for criminal justice social work to support effective disposals.
42. We have already mentioned above that sheriff court jurisdictions may span several local authority areas. Variations in provision across these boundaries are therefore particularly noticeable when sentencing in the sheriff court. It is a common observation that certain local authorities and community justice partners within the same sheriffdom have fewer available programmes and services than others. For example, programmes such as the Caledonian System, or comparable alternatives, are provided in some areas but not others. This fragmented provision can result in people residing in different local authority areas receiving different disposals even though they have been sentenced in the same court for the same offence, involving similar circumstances. The ability of a court to order a particular community-based sentence is therefore dependent on local authority or NHS Board provision.
43. While we have not attempted in this exercise to pinpoint issues specific to any particular areas we note that there is a distinct variation in judicial perceptions of the provision between rural and more geographically dispersed areas, and the more densely populated urban areas. There are more programmes and services available, and a wider range offered, in more central areas. The geography in rural areas is another factor which falls to be considered in terms of provision. We have heard, for example, of instances where people have had to travel for a number of hours by public transport to participate in unpaid work or programmes, a situation which can render orders for those living in less accessible locations more difficult to comply with. We understand this can also impact on the delivery of social work and other community justice partner services, which results in distinct complexities of resource allocation in these areas.
44. We would remark here again that consistency does not mean uniformity. We believe there is a balance to be struck between ensuring local approaches can continue to be developed and maintained (whether delivered by local authority or third sector providers) in accordance with local need and ensuring people who have offended (and the affected communities) have equality of access to non-custodial disposals which will help them to move away from offending behaviour.¹⁸

¹⁸ Although the following example no longer applies as courses can be done virtually, it illustrates the point well. A drink driving offence ordinarily attracts a minimum disqualification period of 12 months.

45. Staff shortages in social work and general lack of capacity with local resources (existing prior to, but exacerbated by, the pandemic) are perceived by sentencers in some areas as limiting the effectiveness of community based disposals. For example, the imposition of a CPO can sometimes involve a lengthy process with several challenges, including insufficient local resources and lengthy waiting times both prior to and during the currency of the order.
46. Some of the specific limitations in provisions that have been raised with us are as follows.
- limited provision for female offenders
 - limited provision for young offenders
 - lack of provision in rural areas, particularly smaller rural areas
 - inadequate psychiatric and psychological support
 - limited alcohol services
 - limited residential services
 - limited interventions available for persons who have suffered brain injury
 - lack of availability of resources to support drug treatment and testing orders (DTTOs)
 - a lack of realistic unpaid work opportunities
 - gaps in provision for offenders with mental illness or personality disorders who fall short of hospital orders, and a lack of appropriate solutions for those unable to receive intervention or comply with orders
 - underprovision for offenders with complex needs
 - domestic abuse programmes are only available following a certain level of offending, whereas earlier intervention might provide greater benefit¹⁹
 - mentoring for people who have offended, described to us as “an excellent resource”, is only available in a limited number of areas

That period can be reduced if a drink driving rehabilitation course is completed. Authority to do the course and obtain the reduction must be requested of the sentencer at the time of sentencing. If granted the course can be undertaken at a cost of £150. Previously, courses were only available in certain jurisdictions. A person convicted of a drink driving offence could therefore avoid a longer disqualification period simply by chance of having committed the offence in a local authority area where a course was available and by dint of being able to afford it.

¹⁹ We note that this is true of the Caledonian System but also that an alternative might be to impose a CPO with other requirements.

- a wider range of programmes for different types of issues and offending is required²⁰
- availability and resources have been negatively affected by the pandemic disruption.

47. As noted earlier we have not sought to identify through this exercise in which specific areas particular issues may be present and we have therefore not carried out any work to establish where, or indeed whether, lack of resource might be affecting management and delivery of community-based sentences. In addition, we would note that a perception of a lack of provision of particular services may be related to the level of awareness regarding what is available. Both of these matters may merit further investigation to establish more precisely the extent of any issues.

48. There appears to be significant support among sentencers for a more consistent national approach to the development and funding of community-based programmes.

49. One specific suggestion made to us is that national online approaches might be developed to assist with overcoming local resource issues. We note, however, that this might present challenges. Participants would need to have internet access and very careful consideration would need to be given in relation to precisely in which circumstances online programmes might be appropriate.

Accommodation

50. We explored with sentencers two particular issues in relation to accommodation: the making of residence requirements as part of a CPO, and homelessness.

51. Engagement with sentencers suggests that residence requirements are rarely imposed as part of a CPO.²¹ CJSWRs do not routinely recommend residential requirements and neither do they routinely identify a hostel or other suitable accommodation.²² Where the person being sentenced is homeless, reports will more often simply state whether the offender either has a fixed abode or is of 'no fixed abode'.

²⁰ For example, some areas observe higher rates of offending in relation to particular types of offence, such as in rural areas where there are higher rates of wildlife offences.

²¹ See s227Q of the 1995 Act.

²² The practice guidance on CJSWR preparation states that problems associated with homelessness alone are not considered an indicator that a residence requirement should be recommended. Residence requirements may be appropriate "in order to ensure a safe distance from previous victims or to place the individual in a home environment – eg with parents – which is more likely to support their efforts at desistance" ([Criminal justice social work reports and court-based services practice guidance](#), para. 6.25.6.4)

52. Where residence requirements are imposed this is more likely in sexual offence cases and sometimes domestic abuse cases. A residence requirement can provide additional protection for victims by requiring the person sentenced to reside in a place elsewhere from the victim's home. A residence requirement might also be used to encourage compliance and desistance by placing a person on an order in a supportive environment (e.g. with a relative) rather than in a setting that may encourage further offending or danger to the individual.
53. We understand that there have been occasions where residence requirements would have been made as part of a CPO but were not because no suitable accommodation had been identified.
54. Lack of a fixed address or suitable accommodation has long been cited as contributing to offending and to the number of people sentenced to imprisonment.²³
55. In a significant number of areas, sentencers have observed that there are limited or no options for the provision of supported accommodation, and in others, provision may focus on those with acute problems. Where a person is in supported accommodation, it is likely to be temporary and usually allocated as a result of homelessness or on release from custody. Therefore, in many cases, they do not always have access to stable accommodation. Hostels or similar establishments are not always conducive to the successful completion of a community-based order, as the accommodation tends to be short-term, transitory in nature and thus unstable. The offender may also be housed with other offenders or substance abusers who can hinder rehabilitation or compliance with the community-based order.

Conclusions

- 7) Appropriate community-based disposals are generally viewed by sentencers as providing a greater chance of rehabilitation and as a more cost-effective alternative to imprisonment. However, in a number of areas, resources are not seen to be sufficient to support effective community disposals and urban and more central areas have greater provision for a wider category of person or offending than rural areas.**
- 8) Programmes and services should be available for a wider range of offending and to address a wider range of issues. In particular, sentencers have observed gaps in unpaid work opportunities for people with mental health disorders and for other specific categories of person, such as women and young people.**

²³ [Preventing Homelessness and Reducing Reoffending – Insights from service users of the Supporting Prisoners: Advice Network, Scotland](#) Shelter Scotland (September 2015).

- 9) **To support the swift administration of justice, unpaid work should begin timeously and access to services should not be delayed.**
- 10) **There is a need for greater consistency in the provision of community-based disposals and a more consistent approach to the development, delivery and funding of community interventions on a national basis merits consideration. Consistency of provision is necessary to fairness, both to those who have offended and need assistance and access to treatment to move away from their offending behaviour, and to the communities affected by their offending behaviour. Consistency does not, however, equate to uniformity and there is a balance to be struck between ensuring local approaches can continue to be developed and maintained in accordance with local need and ensuring equality of access to non-custodial disposals.**
- 11) **Homelessness and a lack of suitable and stable supported accommodation remains an issue across the country and can act as an impediment to the success of community-based disposals.**

Monitoring and management

56. We understand that there are a number of practicalities and challenges involved in managing community-based sentences. This appears, from a judicial perspective, to be largely a matter of resources, limitations on which can affect the ability of programmes and services to assist offenders in a meaningful way.
57. In respect of CPOs specifically, there is a feeling among sentencers that more robust delivery and monitoring of progress, and prompt reporting of breaches, would enhance judicial confidence and that improved capacity within community justice and relevant NHS services would support the efficacy of community sentences. A more robust approach to management of sentences within the community was, in general terms, seen as involving greater communication from social work that community sentences are being complied with, timeous commencement of unpaid work, the completion of unpaid work orders within reasonable (i.e. not overlong) timeframes, and earlier reporting of breaches.
58. It has been highlighted to us that a key aspect of the effectiveness of any community disposal is the individual's behaviour and motivation regardless of the strengths and/or weaknesses of any given programme.

Review hearings

59. Among the sentencers we engaged with, the fixing of review hearings appears to be common practice when the person sentenced is considered as being at risk of non-compliance with the court order, among other things. Factors which sentencers have told us influence that decision include:

- age: when sentencing a child or young person and their lack of maturity suggests that an additional layer of monitoring and encouragement is required
- the need to provide motivation and focus
- the need to provide guidance
- for some, the need to give a sense of achievement
- to assist with compliance: there may be concerns about a person's suitability for and attitude to a CPO, for example if they have previously shown a lack of engagement in respect of previous CPOs, or if their personal circumstances, such as work commitments, may make compliance difficult
- to increase accountability for the benefit of the offender and the wider public
- the vulnerability of the person being sentenced
- record of offending including nature and frequency; for example, court monitoring may be appropriate for some domestic offences
- when there have been delays in a person starting unpaid work
- lack of space on existing suitable courses
- the person is due to be sentenced in other cases
- the person must complete existing orders so they have capacity to undertake orders for any subsequent offending or be eligible to undertake programme requirements
- an early review may also be fixed after deciding to allow an order to remain in force (as opposed to varying, revoking or discharging an order).

60. Not all sentencers fix review hearings. Some leave it to the responsible officer to return the order to court (for example for variation or in case of breach). This may be because it is deemed unnecessary or it may relate to a perception that the workload (for all) involved in such hearings is disproportionate.

61. We understand that there are differences in how courts seek to monitor progress. In some instances a less formal approach is adopted with a view to providing encouragement and engagement. This might be a more effective approach for younger people in particular.²⁴ There is, however, a lack of evidence in the

²⁴ Research into the views of younger people, which included those with experiences of the criminal justice system, suggests that they view relationships based on engagement as supportive to completion rates but that relationships based on control and compliance are less likely to work". [A](#)

Scottish context on the relationship between whether and how courts monitor progress, and how this relates to efficacy and desistance. Given the anticipated expansion of community justice services and court-based initiatives (for example specialist courts and structured deferred sentence schemes) this may merit further research.²⁵

Variation, revocation, discharge and breach processes

62. When considering CPOs returned to the court for variation, revocation or discharge, sentencers generally base their decisions on recommendations from the social work reports, progress reports and/or the responsible officer. Other factors which may be taken into account in practice are:

- the offender's attitude towards and compliance with the order, including their motivation and evidence of genuine attempts to change behaviours or attitudes
- the age of the offender
- the need to provide focus
- the need to provide guidance
- social work recommendations
- a change of circumstances
- the health of the accused
- for some, the need to provide a sense of achievement

63. We would also expect that courts would have regard to any relevant mitigation for failing to comply that would be offered to the court on behalf of the offender when admitting the breach.

64. The system of breach processes has been described to us as being potentially lengthy, with some people having been subject to breach proceedings for a

[qualitative exploration of the attitudes of young people to the sentencing of young people in Scotland](#) Scottish Sentencing Council, authored by Dr Johanne Miller and Dr Sarah Anderson of the University of the West of Scotland, para 119 (August 2021). In addition, one of the recommendations of the [Evaluation of South Lanarkshire Structured Deferred Sentencing for Young People](#) end of project report, by Dr Johanne Miller and Blane Abercrombie of the University of the West of Scotland (February 2019), was that SDS fixed courts should be run “with dedicated Sheriffs who are invested in the welfare led ethos of the approach” (p. 46-47).

²⁵ This is not to say that there is no information available; see for example the [Review of the Aberdeen Problem Solving Approach: report](#) carried out by Ipsos MORI and the University of Stirling for the Scottish Government (September 2018). However, where research is commissioned it is often relatively short-term in scope, meaning it can be difficult to make more in-depth findings and recommendations about efficacy and desistance.

number of years before these are resolved. A number of sentencers have expressed a preference for earlier reporting and faster processing of breaches.

65. While there is national practice guidance²⁶ for those involved in the delivery of community payback orders (CPOs) which covers breach procedures, much of the legislative process for breaching orders relies on the discretion of supervising officers and the process for breaching an order can be inefficient. The approach of individual social workers to non-compliance issues, and the speed and method of bringing an offender to court to answer a breach, depends on local practice.
66. Given the comments made in respect of the cumbersome nature of breach processes, we consider that any move to encourage swifter reporting of alleged breaches would be best accompanied by efforts to improve the processes for dealing with them.
67. The potential for breach procedures to frustrate the original sentence is problematic. Whilst breach proceedings are ongoing, the original order is suspended meaning that completion of the original sentence is necessarily delayed and progress being made by the person on the order is at best paused and at worst lost. It is our general understanding that minor breaches of an order would be unlikely to result in any amendment to the original sentence and therefore suspension of that sentence appears unnecessary and potentially unhelpful.
68. We would note that there is a limit to how swiftly a breach can be dealt with: the person subject to the order may dispute that there has been a breach, in which case the court must determine, based on the evidence and with due fairness, whether a breach has taken place. There may, however, be improvements to practice which could bring efficiencies to the process. For example, where failures to attend accumulate over a period of time before being reported to the court as an alleged breach, it can be difficult to establish the facts relating to the incidents. The defence lawyer requires to investigate each alleged failure to attend before the breach can either be admitted or denied, which can prove difficult if the person subject to the order cannot remember or locate evidence or any details relating to the incidents because of the passage of time. We consider that improved sharing of information between social work departments and defence agents may assist with the swifter resolution of breach processing. Additionally, we would note that the fixing of review hearings by the court may be of assistance in encouraging successful completion of an order or in expediting breach proceedings and to this end we have decided to encourage the use of

²⁶ [Community Payback Order Practice Guidance](#), Scottish Government (January 2019).

review hearings in our sentencing young people guideline as submitted to the High Court.²⁷

Evaluation

69. Some sentencers suggested that the integration of empirical evidence into the planning of programmes to show the extent to which they assist with desistance and rehabilitation would be of particular assistance. This could include incorporating research-based evidence to show the effectiveness of supervision in preventing further offending and the extent to which local authorities and community justice partners have sufficient resources to provide necessary support and supervision in all cases.
70. While we consider that evaluation of community-based sentences has significant potential to build judicial confidence in, and public support for, their use, we are conscious of the many difficulties involved in measuring the indicators of effectiveness of specific community-based interventions on an individualised basis.
71. Completion rates might be one measure of success but might not give a full picture of an intervention's contribution to desistance or rehabilitation in the medium- or longer-term. We would anticipate that gathering information on long-term rehabilitation or desistance rates for individuals who have participated in programmes or other community-based sentences would be a significant undertaking. In addition, identifying the specific contribution to desistance made by any one intervention is problematic. Many people might be subject to a number of interventions over a period and accessing multiple support services simultaneously. Any combination of these things may be supportive of rehabilitation, as may external factors (life events, such as meeting a partner and starting a family, are often cited as a contributing factor in moving away from offending behaviour).²⁸
72. In general terms, however, we consider that further research into the effectiveness of community-based sentences would be worthwhile.

²⁷ [Sentencing young people: Scottish Sentencing Council report on public consultation exercise](#) Scottish Sentencing Council (September 2021)

²⁸ See for example page 59 of *What works to Reduce Reoffending: A Summary of the evidence*, Scottish Government (May 2015)

Conclusions

- 12) Resource constraints are seen as impacting on the ability of social work to effectively monitor and manage those who have received a community disposal.**
- 13) Review hearings can be useful for the court in monitoring progress towards successful completion of a CPO and this appears to be common practice when the person concerned is considered as at risk of non-compliance, among some other factors. However, further research into court-monitored progress and how it relates to efficacy and desistance would be worthwhile.**
- 14) There is merit in considering whether improvements can be made to support more efficient breach processes, with earlier reporting and swifter processing of breaches and clearer feedback that disposals are being followed. Any move to encourage swifter reporting would be best accompanied by efforts to improve the relevant processes.**
- 15) Providers may wish to consider incorporating empirical evidence into the planning of programmes to show the extent to which they assist with desistance and rehabilitation. What constitutes effectiveness and how it should be measured requires careful consideration, however, and we appreciate there may be significant challenges in seeking to define and measure success in relation to specific interventions. We would welcome further research into the effectiveness of community-based sentences generally.**

Legislative barriers

73. While the key challenges to the use of community-based disposals appear to centre around resourcing and capacity issues, sentencers also identified some legislative barriers which, if addressed, might assist with more effective community sentencing.
74. Some sentencers view the expansion of the presumption against short sentences as enabling greater use of community sentences, noting the need to balance this with public protection considerations. However, some feel the legislation in relation to community sentences generally is more rigid than is required and that more flexibility to allow for more combinations of disposals or requirements would be of assistance.
75. There appear to be impediments to the imposition of CPOs with additional requirements. For example, a CPO with a mental health requirement can only be imposed if certain information, normally in the form of a medical report, is before the court. However, in practice these medical reports are not always available

despite there sometimes being a clear need for the accused to receive mental health support. In addition, a CPO with a drug treatment requirement can only be imposed if an institution is specified for the treatment and a specified person, who will treat (or direct the treatment of) the offender, is identified – information which is rarely specified in practice. As mentioned above, supplementary information to that in the CJSWR would usually be required to enable this, delaying treatment. The Council has a general concern that this issue, coupled with the delays in obtaining psychiatric and psychological reports highlighted by the Independent Forensic Mental Health Review (discussed at paragraph 33 and footnotes 14 and 15 above), presents a risk that mental health needs are not adequately addressed.

76. An alternative might be to impose a conduct requirement in relation to mental health and/or drug issues, but this is problematic because section 227W(4) of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) prevents the conduct requirement from including anything which could be required by imposing one of the other requirements listed in section 227A(2) (which includes a mental health treatment requirement and a drug treatment requirement).
77. If legislation were to more clearly enable conversion of these orders into part of the supervision requirements instead this would allow flexibility to the responsible officer to address these matters (such a general provision would, however, rely on the initiative of the responsible officer to target work with the offender). Perhaps in light of the rigidity of the legislation, mental health and drug or alcohol requirements are not commonly ordered. It appears to be more common, as a matter of practicability, to make mental health or addiction treatment a condition of an ordinary CPO with supervision, requiring the offender to comply with the instructions of the responsible officer to visit with their psychiatrist or other relevant health professional. In addition, for those with mental welfare difficulties, the Council heard at its roundtable discussion event that an approach similar to that for the management of DTTOs might be more effective than a community payback order with a mental health treatment requirement.²⁹ These are matters which therefore merit some further investigation.
78. A similar issue exists in relation to the imposition of programme requirements under section 227P of the 1995 Act, for which the court must specify certain matters, such as the specified place and number of days of attendance, details which are not usually available at the time of sentencing.³⁰ In practice, such requirements are sometimes imposed as part of the supervision requirement.

²⁹ Para. 16, Scottish Sentencing Council Mental Welfare Roundtable Report.

³⁰ Section 227P of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) provides that “(1) In this Act, a “programme requirement” is, in relation to an offender, a requirement that the offender must participate in a specified programme, at the specified place and on the specified number of days.”

Whether these particular details should be necessary for the imposition of a programme requirement was questioned.

79. We suggest that it may be helpful to re-examine the underlying policy intention behind the legislative provisions for mental health, alcohol, drug and programme requirements to consider whether a more purposive, as well as simplified, approach to the legislation would be appropriate.

80. We have received further suggestions for legislative changes, some of which we consider reflect a general desire among sentencers to have greater flexibility to impose appropriate sentences. Examples are listed below.

- The ability to require supervision in addition to the main sentence, in summary cases (particularly but not limited to cases where a custodial sentence has been imposed).
- Removal of the distinction between a level 1 order as an alternative to a fine and a level 2 order as an alternative to imprisonment, instead allowing the sentencer to decide whether a case merits above or below 100 hours (with the need for a social work report for the imposition of orders of above 100 hours).³¹
- Amendments in relation to breach procedures, including as to when an application to breach a CPO or restriction of liberty order (RLO) should be lodged and greater specificity around the penalties for breaching an order and the impact the breach can have on a new sentence if the order is revoked.
- Section 113(3) of the Sexual Offences Act 2003 prevents a court from imposing a CPO for breach of a sexual offences prevention order. It may be that many such cases would not be suitable for a CPO but in some circumstances it may be an appropriate option which should be available to the sentencing court.
- Various suggestions for forms of hybrid sentences have also been made to us, such as:
 - Level 1 CPOs should be able to be imposed alongside compensation
 - The ability to impose suspended sentences
 - RLOs might usefully be imposed even where the custody threshold has not been met
 - A sentence allowing a combination of CPO and imprisonment.

³¹ See section 227A of the 1995 Act

81. In respect of combined sentences, the High Court considered the specific question of extended sentences³² in the 2017 appeal of *Wood, Tennant and McLean v HMA*³³. The appeal concerned three men convicted of indecent image offences, each of whom was given an extended sentence by the court of first instance to enable attendance at the Clyde Quay Project community programme. The appellate court held that this was not a legitimate purpose of a sentence, as an extended sentence is only competent where the court considers that the period, during which the appellant would otherwise be subject to a licence, would be inadequate for the purposes of protecting the public from serious harm.³⁴ The extended elements of each sentence were quashed but the Court stated that there would be utility in a form of extended sentence being available for cases where the statutory tests are not met and that the Scottish Government or the Scottish Sentencing Council might wish to consider the matter. The Council supports the Court's view and suggests that there is merit in giving some consideration to the creation of a custodial sentence combined with a period of extended supervision thereafter for cases such as those in *Wood, Tennant and McLean*. This would ultimately be a matter for legislation and as such for the Scottish Government and parliamentarians to consider.
82. While not identified as a legislative barrier as such, some issues were observed with the use of and support for structured deferred sentences (SDS) operating differently in different areas and the lack of a statutory framework for SDS was noted. The success of SDS will often depend on the level of support provided for it by the local authority. National guidance for local authorities on the use of SDS is available and acknowledges that SDS schemes may operate differently across the country according to need. In very general terms, SDS can be used after conviction and before sentencing to allow a period of structured support with lower risk individuals to address needs and promote rehabilitation, to reduce offending behaviour and to avoid unnecessary intensive periods of supervision in the community. SDS can also be used to assess an individual's suitability for a CPO or DTTO, or to assess an individual's ability to comply with supervision. While we acknowledge that SDS is intended to operate flexibly, we would welcome further research on its use across the country.

³² A sentence used for the protection of the public whereby a custodial period is combined with a further set time of supervision in the community (this being the extension period). Extended sentences are available for those convicted of sexual or violent crimes, or abduction at solemn level. Anyone who commits an offence while under supervision will return to prison

³³ [Notes Of Appeal Against Sentence by \(First\) Kenneth Wood; \(Second\) Thomas Tennant and \(Third\) Darryl Mclean](#)

³⁴ As provided by s210 of the 1995 Act

Conclusions

- 16) Sentencers generally desire greater flexibility to impose appropriate sentences for the particular case before them and potential legislative changes to enable this should be considered. In particular, there is a case for simplifying the legislation around community-based disposals in a number of ways.**
- 17) Consideration should be given to whether the legislation around drug, alcohol and mental health requirements is unnecessarily rigid and capable of simplification. Similarly, the legislation around programme requirements could be simplified. In particular it may be helpful to consider precisely what information should be specified within reports for such requirements to be imposed.**
- 18) Consideration should be given to enabling the use of extended sentences in certain cases where the statutory tests for public protection are not met.**
- 19) Sentencers have noted that SDS is operating differently between local authority areas. While we acknowledge that SDS is intended to operate flexibly, we would welcome further research on its use across the country.**

Public confidence

83. Public perceptions and understanding of what community disposals involve appear to focus on community justice as an alternative to imprisonment, with CPOs often seen as a 'soft option'. It has been suggested to us by sheriffs that research evidencing general public confidence in community-based disposals as an effective and relevant alternative to custody would be beneficial.
84. A nationally representative survey examining public perceptions of sentencing carried out on our behalf in 2019 highlighted a lack of public knowledge of and confidence in community sentencing.³⁵ Relevant national and local organisations should undertake activity to enhance public understanding of what community sentences involve and what they can achieve.
85. The Council has a statutory objective to promote awareness and understanding of sentencing practice and policy and, subject to resources, intends to examine in detail public perceptions on this issue and carry out activity designed to improve awareness of community-based sentencing options.

³⁵ See for example pages 36 and 40 of [Public Perceptions research into public perceptions of sentencing](#), commissioned by the Council and carried out by Ipsos MORI (September 2019)

Conclusions

20) There is a lack of public awareness and confidence in community disposals. Relevant national and local organisations should undertake activity to enhance public understanding of what community sentences involve and what they can achieve.

21) The Council intends to examine in detail public perceptions on the issue of community sentencing and carry out activity designed to improve awareness of community-based sentencing options.

Impacts of the COVID-19 pandemic

86. We have concentrated in this paper on general issues relating to community disposals, but the specific experience of the pandemic cannot be ignored.
87. Sentencers have expressed a perception that a lack of unpaid work and delays in the ability to impose orders as a result of the pandemic have affected sentencing practice. The efficacy of CPOs, particularly those involving unpaid work, is perceived to have been significantly impacted by pandemic restrictions and we understand that the limitations to availability of unpaid work as a result of the pandemic has had some specific impacts upon some sentencers' practice. For example, where it has not been possible to impose a CPO because of lack of availability or unsuitability owing to the pandemic, we understand that restriction of liberty orders have on occasion been imposed instead, even though these may not have been the initially preferred option. In addition, longer timeframes for CPO completion are being specified in order to accommodate the difficulties in implementation. There is also some concern around the potential for constraints on NHS resources as a result of the pandemic to impact on the availability of services such as drug treatment and testing orders.
88. Not all areas have had the same experience but even where there has been little to no impact observed, there is a perception among sentencers that the pandemic is creating a backlog of unpaid work. In light of capacity issues within justice social work services to deliver unpaid work as a result of the introduction of physical distancing and other measures to keep staff and individuals on orders safe, and because of varying local and national restrictions, the Scottish Government introduced legislation in early 2021 to reduce the overall volume of unpaid work by reducing unpaid work or other activity requirements in existing

CPOs (with the exception of orders imposed for domestic abuse, sexual offences, or stalking) by 35%.³⁶

89. Some sentencers feel that the disruption caused by the pandemic has impacted on their awareness of local resources.³⁷ In addition, we received suggestions that judicial confidence may be reduced because of the prolonged periods over which unpaid work requires to be carried out in some instances and the fact that many aspects of community-based disposals are currently carried out remotely. This latter point in particular may merit further exploration.

Conclusions

22) The disruptions to service delivery (and social work in particular) brought about by the pandemic are generally perceived as having adversely impacted upon the efficacy of community disposals.

23) The backlog of unpaid work has had some impact on sentencing practice and is not expected to lessen the strains upon what is already perceived to be an under-resourced system.

24) There may be merit in exploring how to ensure judicial confidence if many aspects of the management of community disposals continue to take place remotely.

CONCLUSION

90. Through engagement with sentencers and having considered findings from other areas of our work, we have identified a number of issues relating to the use of, and confidence in, community-based disposals which we hope will be of assistance to policy and delivery bodies in their further efforts to develop and maintain a robust and effective system of community justice for Scotland. Key to this will be a consistent approach to the development and funding of these disposals to support their more consistent provision, robust management and successful completion.

91. Much of the activity to address the issues identified would fall to government or other bodies involved in the delivery of community justice services to undertake. We have not carried out feasibility work on the implementation of any of these

³⁶ [The Community Orders \(Coronavirus\) \(Scotland\) Regulations 2021](#) came into force on 15 March 2021 and applied only to those CPOs which were in existence on that date and not to CPOs made thereafter. We are not yet aware of the specific system impacts the regulations have had.

³⁷ We are not aware of the reasons for this. It could possibly be as a result of disrupted engagement between the courts and criminal justice social work caused by restrictions and the disruption to court business generally.

activities, or on the costs that might be involved, which would be matters for those bodies to consider. We do not, however, believe that concerns around resourcing should constrain dialogue on these matters.

92. We will highlight our findings to policymakers and those responsible for the delivery and design of community justice services and seek to work with others as appropriate to address issues which are within our remit. In particular, the Council has a statutory duty to improve awareness and understanding of sentencing and in our future work programme we intend to examine public perceptions of community sentencing and carry out activity specifically designed to improve awareness of community-based sentencing options.

Judicial perspectives of community-based
disposals
Issues paper



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