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The Scottish Government introduced the Criminal Justice and Licensing (Scotland) Bill in the Parliament on 5 March 2009. The Bill includes provision to introduce a new Community Payback Order which would replace a number of community penalties which are currently available in Scotland.

This briefing considers, in the light of the proposals in the Bill, community penalties, their current availability and costs, and recent proposals from the Scottish Prisons Commission and the Scottish Government with regard to community penalties.
EXECUTIVE SUMMARY

- Scottish criminal courts currently have the following community penalties at their disposal: probation; community service orders; supervised attendance orders; restriction of liberty orders; and drug treatment and testing orders. These options are available to all sheriff courts across the whole of Scotland. Justice of the peace courts are able to impose a more restricted range of community penalties.

- In 2006-07, the total number of convictions resulting in a community sentence was just under 17,400. The most commonly used community sentences in that year were probation orders (9,200) and community service orders (5,800). The number of custodial sentences imposed by the courts in 2006-07 was just under 18,200 – the highest figure recorded in the preceding ten years. Over 80% of all custodial sentences imposed in this period were for six months or less.

- Estimates provided by the Scottish Government on the costs of various disposals available to the courts in Scotland, for the financial year 2005-06, show that the cost of six months in prison is just under £16,000, while the average cost of a community service order is approximately £2,200.

- Respondents to a review of community penalties in Scotland carried out in 2007 expressed the view that at present, community penalties suffer from an image problem in that the public perceive them to be “soft”. The review also pointed out that public awareness of the range of community penalties is low and that this problem is exacerbated by the wide range of penalties which are currently available.

- A report published by the Scottish Prisons Commission in 2008 made a number of recommendations for changing how imprisonment is used in Scotland. It included the recommendation that judges should be provided with a range of options through which offenders can provide “payback” in the community. The Commission also recommended that paying back in the community should be the default position when dealing with less serious offenders.

- The Scottish Government’s response to the work of the Scottish Prisons Commission suggested a need for a more effective and publicly acceptable system of community sentences. The report proposed a new community sentence structure highlighting the scope for courts to use community penalties to punish offenders in a way which addresses areas of their lives which need to change. It sought to highlight the punitive nature of community sentences, rather than characterising them as a purely supportive intervention.

- The Criminal Justice and Licensing (Scotland) Bill includes provisions to introduce a new Community Payback Order which will replace the existing community penalties of probation, community service orders, and supervised attendance orders. It will also reproduce elements of community reparation orders (previously piloted in a number of areas).

- The new Community Payback Order seeks to reproduce some of the existing community sentencing options in a package tailored for the particular offender. It includes provision for unpaid work or other activity lasting from 20 to 300 hours which must be served within six months (instead of the present 12 months) or three months where the sentence is less than 100 hours. Additional requirements which seek to address those areas of an offender’s life which need to change may also be imposed as part of a Community Payback Order.
INTRODUCTION

In Scotland, the criminal courts have available to them a wide range of community penalties to deal with individuals whose offending does not, in the opinion of the court, warrant a custodial sentence and/or whose offending behaviour may be better dealt with by measures and programmes which are available in the community.

The following community penalties are currently available in Scotland:

- Probation
- Community Service Orders
- Supervised Attendance Orders
- Restriction of Liberty Orders
- Drug Treatment and Testing Orders

In 2006-07, the total number of convictions resulting in a community sentence was just under 17,400. The most commonly used community sentences in that year were probation orders (9,200) and community service (5,800). The number of custodial sentences imposed by the courts in 2006-07 was just under 18,200 – the highest figure recorded in the preceding ten years. In both 2004-05 and 2005-06 community sentences outnumbered custodial sentences. However, in 2006-07 there were more custodial sentences. Over 80% of all custodial sentences imposed in 2006-07 were for six months or less (Scottish Government 2008a).

Community penalties are administered and delivered by criminal justice social work services and are provided by local authorities throughout the country.

In 1991 the Scottish Office's Social Work Services Group published National Objectives for Social Work Services in the Criminal Justice System: Standards (National Standards). The National Standards were agreed in consultation with local authorities and other key stakeholders within the criminal justice system. They set out a framework of objectives and standards for the delivery of criminal justice social work services. They also provide guidance on how non-compliance by offenders should be handled (Scottish Government 2004).

The National Standards also set out what is expected of offenders subject to a community sentence or statutory post release supervision. This may involve making amends, through community service, and taking responsibility for what they have done. In relation to probation, it includes working to change offending behaviour and problems associated with it.

The National Standards are currently being revised. Work is ongoing to update supporting guidance to underpin the revised standards which should be rolled out later this year.

COMMUNITY JUSTICE AUTHORITIES

The Management of Offenders etc (Scotland) Act 2005 made provision for eight local Community Justice Authorities (CJAs). These authorities were established to provide a co-ordinated approach to planning and monitoring the delivery of offender services, including reporting on the performance of local authorities (or groups of local authorities) and key partner agencies such as the Scottish Prison Service (SPS). Each CJA consists of a Chief Officer,
The main purpose of probation is to work with offenders to prevent or reduce their offending behaviour by combining oversight and control with help to learn new behaviours and to deal with the specific problems associated with their offending. A Probation Order can only be imposed with the consent of the offender. It should be informed by an Action Plan in which the offender agrees to address their offending behaviour and its underlying causes. Probation Orders can be used flexibly by the courts and additional conditions may be attached, including:

- the offender undertaking unpaid work
- specifying the offender’s place of residence
- the offender being placed under a curfew (including electronic monitoring – “tagging”)
- financial recompense to the victim
- attendance by the offender at specialist programmes such as alcohol or drug treatment

Currently, the minimum length of a Probation Order is six months and the maximum is three years.

In 2007-08, a total of 8,751 Probation Orders were made (including Probation Orders with a Requirement of Unpaid Work). This represented a 4% increase compared to the level of orders made in 2006-07 (Scottish Government, 2008b). Official figures for 2007-08 indicate that 58% of Probation Orders terminated in that year had been successfully completed. However, 3,400 breach applications were also made to the courts, although this represented a 7% decrease.
Community Service Orders

An offender aged at least 16 can be given a Community Service Order (CSO) to carry out unpaid work in the community. Currently, legislation restricts the use of CSOs and they can only be made by courts as a direct alternative to a custodial sentence. Thus, they are treated as relatively high tariff sentences. When deciding upon a CSO, the court must be satisfied that the following conditions are met:

- the offender is willing to undertake the CSO
- there is provision for community service in the area where the offender lives and that arrangements can be made for an offender to perform work under the CSO
- the offender is suitable for community service

Community Service Orders are for a minimum of 80 hours, up to a maximum of 240 hours under summary procedure and 300 hours under solemn procedure. A CSO must be completed within 12 months.

A total of 6,202 CSOs (excluding Probation Orders with a Requirement of Unpaid Work) were made in 2007-08. This represented an increase of 5% from the 2006-07 total of 5,937. Of these, the number which were successfully completed increased by 5% from 3,569 in 2006-07 to 3,762 in 2007-08. A total of 2,161 breach applications were made to the Courts in respect of CSOs in 2007-08, an increase of 14% compared with the 1,892 breach applications in 2006-07.

Supervised Attendance Orders

Supervised Attendance Orders (SAOs) require an offender who has failed to pay a fine to undertake a programme of designated activities for a specified number of hours. The programme can involve activities which may be of an educational nature or which are designed to stimulate interest and encourage the constructive use of time. An SAO may also involve undertaking unpaid work in the community.

In 2004, the then Scottish Executive decided to use the powers in section 235(4) of the Criminal Procedure (Scotland) Act 1995 to remove the discretion of sentencers in two courts (Ayr Sheriff Court and Glasgow District Court) to impose custodial sentences in the event of fine default. Section 235(4) allows Ministers to direct that where a court is minded to impose a custodial sentence for a default on a fine of less than £500 a SAO should be the sole penalty. Following an evaluation of the Ayr and Glasgow pilots, section 235(4) was extended to all sheriff and district courts with effect from September 2007.

A total of 4,438 SAOs were imposed on 3,768 individual offenders in 2007-08, an increase of 46% in the number of orders compared to 2006-07. Of 2,970 SAOs which were terminated in 2007-08, 1,685 were successfully completed. 1,311 breach applications were made to the courts in respect of SAOs in 2007-08, an increase of 17% from the 2006-07 total of 1,125.

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1 Solemn procedure involves the most serious of criminal cases and may ultimately lead to a jury trial in the High Court or one of the sheriff courts. Summary procedure is used for less serious offences and may ultimately lead to a trial without a jury in a sheriff or justice of the peace court.
Restriction of Liberty Orders

Restriction of Liberty Orders (RLOs), which are sometimes referred to as “tagging” orders, have been available to the High Court, sheriff courts and the stipendiary magistrates court (in Glasgow)\(^2\) since May 2002. An RLO can be imposed for periods of up to one year, and involves restricting an individual to a specified place for up to 12 hours per day and/or from a specified place for up to 24 hours a day.

In 2006-07, a total of 1,309 RLOs were imposed compared to 1,273 in 2005-06\(^3\) (Scottish Government, 2008a).

Drug Treatment and Testing Orders

The Drug Treatment and Testing Order (DTTO) is a high tariff disposal for offenders who misuse drugs and who might otherwise receive a custodial sentence and is available to the High Court, the sheriff courts and the stipendiary magistrates court (in Glasgow). The underlying philosophy of a DTTO is that by addressing an offender’s drug misuse it is possible to make a positive impact on their related offending behaviour which in most instances will consist of acquisitive crime to fund their addiction. The DTTO contains a number of unique features, including a requirement for regular reviews by the court and a requirement that the offender consent to frequent, random drug tests throughout the lifetime of the order.

In June 2008, the Scottish Government announced details of a pilot scheme to run over two years involving the use of DTTOs for lower tariff offenders in the Lothian and Borders Community Justice Authority area. The pilot scheme is being supported by £1 million of Scottish Government funding. The pilot scheme covers both sheriff and justice of the peace courts in Edinburgh, Midlothian, East Lothian and the Scottish Borders. As part of the pilot, DTTOs will be adapted for use with lower tariff offenders and provide an option for dealing with offenders at an earlier stage of their drug use.

A total of 601 DTTOs were made in 2007-08, a decrease of 14% since 2006-07. Over a third (37%) of DTTO terminations in that year were due to successful completion. In 2007-08 there were 209 breach applications of DTTOs, a decrease of 34% on the 2006-07 figure of 318 breaches.

Pilot Exercises

Pilot exercises have been carried out in relation to: (a) Structured Deferred Sentences; and (b) Community Reparation Orders.

Structured Deferred Sentences

The Structured Deferred Sentence (SDS) is a low tariff intervention providing social work intervention for offenders post-conviction but prior to final sentencing. It is primarily aimed at

\(^2\) Stipendiary Magistrates have the same powers as sheriffs sitting summarily. Only Glasgow has a Stipendiary Magistrate’s Court.

\(^3\) Corresponding figures for 2007-08 are due to be published in June 2009.
offenders with underlying problems such as drug or alcohol dependency, mental health or learning difficulties, or unemployment. It is not used for serious, violent or sex offenders. In April 2008, following an evaluation of SDS pilots in Ayrshire (Ayr and Kilmarnock sheriff courts), Angus (Arbroath and Forfar sheriff courts) and Highland (Inverness sheriff court), Scottish Ministers announced an extension of the pilot schemes. As well as providing continued funding for the existing SDS pilot areas, the approach is to be extended to cover courts across two Community Justice Authority areas – Glasgow and Tayside. Total funding for the SDS pilots currently amounts to £667,000 per year.

Community Reparation Orders

The Antisocial Behaviour etc (Scotland) Act 2004 contained provisions to allow for a new community sentence, the Community Reparation Order (CRO). The CRO was designed to deal with offences where there was an antisocial behaviour element to the offence (eg vandalism). CROs were community based disposals which were available to both sheriff and district courts for summary cases. The orders involved offenders aged 12 and over, making amends for their crimes by completing a programme of between 10 and 100 hours of unpaid community work.

Three pilot sites were chosen in Dundee, Inverness and Greenock to measure how well CROs worked in different parts of the country. The pilots operated from spring 2005 until 2007. Following an independent evaluation of the pilots which indicated a lack of effectiveness, Scottish Ministers decided that funding for CROs should end on 31 December 2007. Responding to a parliamentary question from Nigel Don MSP, the Cabinet Secretary for Justice stated that CROs were not well understood or used. He also stated that the Government was committed to the principle of reparation and that, as part of the review of community penalties, was considering the way in which reparative sentencing options as a whole were structured.

AVAILABILITY AND COSTS OF COMMUNITY PENALTIES

Availability

A recent report by Audit Scotland ‘Managing increasing prisoner numbers in Scotland’ stated that the types of community sentence and the level of service available can vary across Scotland (Audit Scotland 2008, para 122). The report pointed out that, in addition to the five main community sentences, each council in Scotland offers a range of Probation Support Programmes according to local need. These programmes target specific offending behaviour (such as driving offences, drug misuse or sexual offending) and offer support services such as employment guidance. The report notes that although these programmes increase the range of options available to sentencers, they are not available across all council areas.

In September 2008, the Cabinet Secretary for Justice, in response to a parliamentary question from Robert Brown MSP, stated that Probation Orders, Community Service Orders, Drug Treatment and Testing Orders and Restriction of Liberty Orders were available to all sheriff courts in Scotland across all sheriffdoms. In addition, all sheriff courts have access to Supervised Attendance Orders in dealing with those who have defaulted on fines. Justice of the peace courts4 are able to impose Probation Orders and, where an offender has defaulted on a fine, a Supervised Attendance Order.

4 Justice of the Peace Courts were created by the Criminal Proceedings etc (Reform) (Scotland) Act 2007. They are replacing district courts on a phased basis.
Costs

A recent Audit Scotland report (2008, para 118) stated that between 2000-01 and 2005-06, council spending on the main community sentences (excluding RLOs) rose by 80% from £19 million to £34 million. It suggested that this increase was partly due to a continuing increase in the uses of community penalties generally, but also reflected a greater use of the relatively expensive DTTOs.

A Scottish Government report – “Costs and Equalities in the Criminal Justice System 2005/06”, published in September 2008, provides the following cost estimates for the various court disposals for the financial year 2005-06:

- cost of six months in prison: £15,964
- average cost of a Probation Order: £1,283\(^5\)
- average cost of a Community Service Order: £2,205
- average cost of a Drug Treatment and Testing Order: £11,727
- average cost of a Supervised Attendance Order: £442
- average cost of a restriction of liberty order: £9,000

On 24 October 2008, the Scottish Government announced that an extra £1 million had been allocated to allow councils to recruit more staff to improve the delivery of Community Service Orders (Scottish Government 2008c). The funding will be allocated to Community Justice Authorities in 2009. The Government has stated that this will allow councils to ensure that offenders start their Community Service Orders more quickly and for orders to be completed in a shorter time frame. The funding forms part of the ring-fenced budget provided to Community Justice Authorities for the delivery of criminal justice social work services in their areas.

RECENT DEVELOPMENTS

Review of Community Penalties

In November 2007, the Scottish Government published ‘Reforming and Revitalising: Report of the Review of Community Penalties’ (Scottish Government 2007). The report provides a summary of the issues raised by respondents during the review and outlines the Government’s action plan for community penalties. It states that the main message from the review was that the reform of community penalties should “build on the effective policies and practice which already exist – recognising positive developments in recent years rather than coming up with new ideas or penalties for the sake of something new” (para 1.6).

Respondents to the above review expressed the view that community penalties must be high quality, effective, immediate, visible, flexible and relevant. Most respondents to the review agreed that currently, community penalties had an image problem in that the public perceived them as “soft”. The review also found that public awareness of the current range of penalties

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\(^5\) The probation figure covers only “standard” orders and not those which include participation in intensive projects.
was low, a problem which was not helped by the wide range of penalties which are currently available and a perception that breaches of those penalties were not effectively acted upon. A research report ‘Community Sentencing: Public Perceptions and Attitudes’ (Scottish Government 2007a) carried out as part of the review discusses public perception of community penalties in more detail.

As a result of this perception of community penalties, respondents to the review felt that a programme of positive change would be required to demonstrate that community penalties can be tough; that they can involve more effort and punishment than imprisonment; that they are more effective in preventing re-offending than short prison sentences; and that (in the case of community service in particular) they involve “meaningful payback” to the community by the offender for the harm inflicted.

The report of the review states that 75% of people sentenced to prison for less than six months re-offend within two years and that this compares unfavourably with the figures for community penalties (e.g. only 39% of those given community service will re-offend within a two-year period). Whilst acknowledging that direct comparisons cannot be made between individual cases, the report suggests that short prison sentences are often not the most effective way to deal with offenders and that an appropriate community penalty may be more effective.

Following the review, the Scottish Government outlined plans to reform Community Service Orders. It suggested that a new approach to community service was required “to secure its respect as a high quality intervention, which balances the requirement that offenders pay back for their crimes to communities with opportunities to help them move their lives on” (Scottish Government 2008d). This view was shared by the Scottish Prisons Commission.

**Scottish Prisons Commission**


The Commission was convened in September 2007 to examine, amongst other things, how imprisonment is currently used in Scotland and how this fits with the Government’s wider strategic objectives. Its report made a total of 23 recommendations including that judges should be provided with a wide range of options through which offenders can payback in the community – where payback would involve making good to the victim and/or the community by unpaid work; engaging in rehabilitative work that benefits both victims and communities by reducing re-offending; or some combination of these and other approaches. It recommended that imprisonment should be reserved for those whose offences are so serious, and for those who pose a threat of serious harm to the public, that no other form of punishment will do. The Commission also recommended that:

“To move beyond our reliance on imprisonment as a means of punishing offenders, the commission recommends that paying back in the community should become the default position in dealing with less serious offenders.” (Scottish Prisons Commission 2008, page 3)

**Scottish Government Proposals**

In December 2008, the Scottish Government published ‘Protecting Scotland’s Communities:
Fair, Fast and Flexible Justice. The paper sought to build on the work of the Prisons Commission and the findings of the review of community penalties. With regard to community sentences and the theme of “paying back to communities”, the paper commented on two key principles which the Scottish Prisons Commission identified as being central to its proposals on sentencing:

- custody should be used only when it is needed to reflect the seriousness of the offence and for those who pose a risk of harm – community sentences should be the norm for less serious offenders
- sentences served in the community should involve payback – those who have damaged their communities should make reparation to those against whom they offended

Expressing support for these principles, the Scottish Government suggested a need for “a more effective and publicly acceptable system of community sentences”. (Scottish Government 2008d, page 10) The Government proposed to introduce a new community sentence structure which:

- highlights the scope for courts to punish offenders in a way which also addresses the areas of their lives which need to change
- underlines the fact that a community sentence is principally a punishment, and not merely a supportive intervention

The Scottish Government stated that central to this structure would be a new community payback sentence which would replace the existing Community Service Orders, Probation, Supervised Attendance Orders and Community Reparation Orders. It is intended that the new sentence will enable courts to impose one or more of a range of requirements on the offender, including unpaid work, supervision, alcohol or drug interventions or a requirement to take part in a programme to address offending behaviour.

THE CRIMINAL JUSTICE AND LICENSING (SCOTLAND) BILL

The Criminal Justice and Licensing (Scotland) Bill (“the Bill”) was introduced in the Scottish Parliament on 5 March 2009. It contains proposals to introduce a new “Community Payback Order”. As outlined above, the new order will replace the following community penalties:

- Probation
- Community Service Orders
- Supervised Attendance Orders
- Community Reparation Orders

The Policy Memorandum to the Bill points out that the Scottish Government preferred the term “community payback order” to “community supervision sentence” as suggested by the Scottish Prisons Commission, as the new order may not necessarily include a supervision requirement.

There are a number of requirements which can be included in a Community Payback Order and which the Government believes will address those areas of an offender’s life which need to change. The Policy Memorandum states that when imposing a Community Payback Order, it is intended that the court may include one or more of the following elements as part of the order:
• a supervision requirement – a requirement that an offender must attend, during the period of the order, appointments which have been made by a responsible officer or someone determined by the responsible officer, which have the purpose of promoting the offender's rehabilitation

• an unpaid work or other activity requirement – a requirement that an offender must, for the specified number of hours, undertake unpaid work or another activity, the nature of which will be determined by the responsible officer

• a programme requirement – a requirement that an offender attends a course or other planned set of activities provided to individuals or groups for the purpose of addressing offending behaviour

• a residence requirement – requires an offender to reside at a specified place for the duration of the period of the order

• a mental health treatment requirement – a requirement that an offender must submit, during the period of the order, to treatment by or under the direction of a registered medical practitioner or a chartered psychologist (or both) with a view to improving the offender's mental condition

• a drug treatment and testing requirement – a requirement that an offender must submit, during the period of the order, to treatment by or under the direction of a specified person with a view to reducing or eliminating the offender’s dependency on, or propensity to misuse, drugs

• an alcohol treatment requirement – similar to the drug treatment and testing requirement, but seeking to reduce and/or eliminate an offender’s dependency on alcohol

The Explanatory Notes to the Bill state that before making a Community Payback Order, the court must explain to the offender (in open court) the purpose and effect of the order and the consequences for the offender should he/she fail to comply with its terms. If an offender subsequently breaches the terms of a Community Payback Order, the court will be able to impose an additional requirement of electronic monitoring. This will be one of a number of options available to the courts in dealing with breach cases.

The Community Payback Order will also provide judges, where considered appropriate, with the opportunity to carry out review hearings during the course of an order. The Government has stated that provisions in the Bill to allow for “progress reviews” to be carried out in respect of the new order corresponds with the Scottish Prisons Commission’s recommendation for “progress courts” to be held as part of the management of a community sentence.

A Community Payback Order can include a requirement for the offender to carry out unpaid work or other activity lasting from 20 to 300 hours. This must be completed within six months (instead of the current 12 months for Community Service Orders), or three months where it is a sentence of 100 hours or less – unless the court decides otherwise at the point of sentence.

Justice of the peace courts will also be able to impose certain requirements under a Community Payback Order, including an unpaid work and activity requirement of between 20 and 100

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6 A local authority must appoint a responsible officer within five days of receiving a copy of the Community Payback Order from the court. The responsible officer is responsible for making any arrangements which will enable the offender to comply with the requirements of the order and to promote compliance with those requirements. The responsible officer is also responsible for taking such steps as necessary to enforce compliance with the requirements of the order or to vary or discharge any of them.
hours. (As noted above, justice of the peace courts are not currently able to impose a Community Service Order.)

The Policy Memorandum states that it is anticipated that approximately 90% of offenders, who are currently sentenced by the courts to a community disposal, will in future be made the subject of a Community Payback Order.

The Government has stated that it will not, at this stage, roll-up the high tariff Restriction of Liberty Orders and Drug Treatment and Testing Orders into the single Community Payback Order.

With regard to Restriction of Liberty Orders, the Government proposes to retain this sentence as an alternative to custody. It allows courts to impose an order which:

- requires the offender to be in a specified place (eg in the offender’s home address) for up to 12 hours per day for a period of up to 12 months
- prohibits the offender from going to a specific place (eg the home of a domestic violence victim) for up to 12 months

The Government has also stated that it would be premature to make radical changes to current sentences for drug-related offending while the Drug Treatment and Testing Orders pilot exercise aimed at low tariff offenders is ongoing. This will be reviewed when the pilot exercise ends in 2010. The Policy Memorandum to the Bill states that these two existing disposals will deal with the remaining 10% of offenders on community sentences but not on Community Payback Orders (see above).
SOURCES


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