

Paying back: 30 years of unpaid work by offenders in Scotland

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Abstract

This article considers the development and use of unpaid work as a penal sanction in Scotland, including its gradual introduction at differing points of the criminal justice process. It is argued that the community service order in Scotland – intended to serve as an alternative to imprisonment - has become a well-established sentencing option, though other penalties involving unpaid work have met with more conditional support. Community service has broadly resisted political pressures aimed at increasing its profile and punitiveness though there is a risk that contemporary policy developments that are aimed, ironically, at decreasing the Scottish prison population may, instead, result in its diversionary capacity being undermined.

Keywords: Community service – Scotland - Alternatives to custody - Penal policy

Introduction

Community service by offenders has been available nationally as a community sanction in Scotland since 1979. The disposal has changed relatively little over subsequent years in comparison, say, to other UK jurisdictions (notably England and Wales) where, by contrast, unpaid work by offenders has undergone important transformations linked to broader penal objectives and related to wider policy concerns. However, the location and role of unpaid work as a penal sanction has expanded in Scotland over the last 30 years with its introduction as an alternative to imprisonment for fine default and, more recently, as an alternative to prosecution for minor offences. Moreover, contemporary policy developments envisage a central role for unpaid work by offenders in the context of a new generic community sentence that is intended to impact upon Scotland's traditionally high reliance upon the sanction of imprisonment. Given these developments it is timely to reflect backwards on the introduction and operation of unpaid work as a community sanction in Scotland and forward on the possibilities and challenges presented by broader developments in Scottish criminal justice policy.

Background and context

Pilot community service schemes were first introduced in Scotland in 1977, some four years after the introduction of similar pilots in England and Wales. In the absence of specific legislation, orders to perform unpaid work were made as requirements of probation and were administered by local authority social work departments who, since 1969, had been responsible for the supervision of offenders and other tasks that had been undertaken by the former probation service. In 1978 legislation was introduced¹ that enabled Scottish Courts to impose 'stand alone' community service orders as well as unpaid work as a condition of probation². From 1979 – following an evaluation of the pilots – community service schemes were gradually introduced across the country, funded in part by the Scottish Office (McIvor, 1992).

Community service in Scotland was intended to fulfil a number of sentencing aims including *punishment* (through the deprivation of the offender's free time), *rehabilitation* (through the positive effects of helping others) and *reparation* (by undertaking work of benefit to usually disadvantaged sections of the community). The *reintegrative* potential of community service was to be achieved through the offender being enabled to remain in the community, retaining employment and family ties, and, through coming into contact with others while carrying out unpaid work, avoiding social isolation (Duguid, 1982). Although the policy intention was that community service should serve as a direct – and hence cheaper - alternative to a prison sentence, the enabling legislation was somewhat ambiguous in this respect. Community service orders of between 40 and 240 hours - to be completed within a period of 12 months - could be imposed subject to their consent upon offenders aged 16 years and older³ who had committed *offences that were punishable by imprisonment*: the legislation did not direct the courts to make orders only if they would have imposed a custodial sentence instead.

During the 1980s the use of community service increased steadily but so too did the use of imprisonment and it became apparent that fewer than half of the community service orders imposed – around 45 per cent - were diverting offenders from custodial sentences (McIvor, 1990). The high rate of imprisonment in Scotland and widespread unrest in Scottish prisons promoted a review of penal policy that resulted in the then Secretary of State articulating support for the increased use of alternatives to imprisonment (Rifkind, 1989). Full central government funding and national standards and objectives for community service by offenders were introduced in 1989 to encourage greater consistency of practice and to increase the courts' confidence in the administration of orders (Social Work Services Group, 1989). In April 1991 provisions from the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 were introduced, restricting the use of community service orders to offenders who would otherwise receive a sentence of imprisonment or detention in a young offenders' institution⁴. Further legislative changes were introduced by the Criminal Procedures (Scotland) Act 1995 as amended by the Community Service by Offenders (Hours of Work) (Scotland) Order 1996 which raised the minimum number of hours orderable to 80 and the maximum under solemn proceedings⁵ to 300 hours.

¹ The Community Service by Offenders (Scotland) Act 1978.

² The former were referred to as Section 1 Orders while unpaid work as a condition of probation was referred to as a Section 7 Order (referring to the relevant sections of the 1978 Act)

³ Most young people aged 16 years and older are dealt with in the adults courts.

⁴ A custodial establishment for offenders aged between 16 and 20 years.

⁵ More serious offences involving a trial by jury.

Having proved to be a popular sentencing option (Carnie, 1990) the number of community service orders has grown steadily over the last three decades with 5,593 orders made in 2007/8, representing 4 per cent of all penalties imposed upon persons with a charge proved that year⁶ (Scottish Government, 2009a). Further offending while on a community service order does not in itself constitute a breach of the order, but if an offence is committed against a placement during or within three months of completion of an order, this will be taken into account by the courts when sentencing for the new offence. Offenders on community service can, however, breach their orders for non-compliance with the requirements by failing to attend or report as instructed, failing to work to a satisfactory standard, lack of punctuality, failing to notify a change of address or failure to notify a change in employment circumstances. If a breach of community service is established in court, the court has the option of fining the offender, varying the number of hours specified in the order or revoking the order and re-sentencing the offender for the original offence.

The National Objectives and Standards have, since their initial introduction, undergone some revisions to reflect changes in legislation and policy (including, for example, explicit reference to assessing and managing the potential risks posed by offenders made subject to orders). In its most recent guidance on community service (Scottish Government, 2009b, pp.1-2) the Scottish Government identifies the main aims of community service (and unpaid work as a condition of probation) as being:

- “To provide Scottish criminal courts with a credible community based penalty, which has the potential to achieve a positive outcome in respect of the offender’s future likelihood of re-offending;
- To achieve a high degree of credibility with the Scottish public and judges 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;
- To ensure that courts have access at all times to a community disposal, which offers a credible alternative to a sentence of imprisonment or detention, by requiring the offender to undertake unpaid work for a specified number of hours for the community;
- To provide offenders with an opportunity to develop their interpersonal and vocational skills to enhance their employability prospects.”

Thus while the political and policy landscape may have changed in recent years – being characterised, for example, by a more explicit concern with public and judicial attitudes to crime and punishment – the most recent statement of the aims of community service continues to place emphasis upon rehabilitation, reparation, reintegration and diversion from prison.

Wider developments in unpaid work as a community sanction

Before turning to the practical operation of community service in Scotland it is important to recognise that unpaid work as a form of penal sanction has been extended to other parts of the criminal justice process. Not only can offenders be required to carry out work as an alternative to immediate imprisonment, but unpaid work has also been introduced – with varying degrees of success – as an option to deal with fine default, for minor offences with an ‘antisocial’ element and as an

⁶ The other main penalties imposed that year were fines (61%), custody (13%), admonitions (12%) and probation (7%).

alternative to prosecution for those accused whom it is not considered necessary to prosecute in court. Each of these developments is described briefly below.

Supervised attendance orders

Supervised attendance orders (SAOs) are a community-based alternative to imprisonment for fine default that substitutes the unpaid portion of a fine for a period of constructive activity. SAOs were first introduced in Scotland under Section 62 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and were initially piloted in three areas in 1992. Following an evaluation of the pilot schemes (Brown, 1994), they were gradually introduced throughout Scotland during the mid to late 1990s. Under the original legislation, offenders who were in default of their fine payments and who faced imprisonment as a consequence could be required instead to undertake 10-60 hours of specified activities supervised by the local authority social work department. Activities would constitute 'a fine on the offender's free time' and should be of a 'constructive' nature, including sessions on life skills or unpaid work (Social Work Services Group, 1993, para. 6.3). Orders could be imposed in respect of offenders aged over 16 years subject to their agreement and only if the court was satisfied that the other options open to it (remitting the fine, allowing further time for payment or reducing the level or frequency of instalment payments) were not appropriate. Breach of the order was punishable by imprisonment, with the maximum sentence being determined by the amount of fine outstanding when the SAO was imposed.

The original enabling legislation was subsequently amended by the Criminal Justice (Scotland) Act 1995 and the Criminal Procedure (Scotland) Act 1995. Together these Acts introduced several significant changes to the SAO legislation, including: the removal of the requirement that an offender's consent is obtained before an SAO is imposed; an increase in the custodial sentences available to the courts in the event of an order being breached; the introduction of SAOs as an alternative to custody for fine default with further time to pay (Section 237 order); and the introduction in Dundee of a pilot scheme in which an SAO could be imposed as an alternative to a fine at first sentence for 16 and 17 year olds (Section 236 order).

An evaluation of the national rollout of SAOs found that it had reduced the use of the custodial alternative for fine default, having quickly become established as a credible alternative to imprisonment for fine default in Scotland. Models of SAO varied across the country, though activities were usually educational in nature or involved offenders in carrying out unpaid work. However, the introduction on a pilot basis of Supervised Attendance Orders as an option instead of a fine (rather than following fine default) for 16 and 17 year olds had not met with success. High breach rates among this age group resulted in the rapid disillusionment of sentencers with this option, particularly in light of the limited options available to the court when an offender was breached (Levy and McIvor, 2001).

In 2007, following an evaluated pilot in two sites (Reid Howie Associates, 2006), Scottish Courts lost the discretion to impose custodial sentences for fine default involving fines of up to £500, being required instead to impose a Supervised Attendance Order. The key aim of this development – made possible by Section 235 (4) of the Criminal Procedure (Scotland) Act 1995 – was to reduce the (traditionally high) use of imprisonment for fine default in Scotland. During the two-year pilot period, more than 2000 SAOs were imposed and no offenders were sentenced directly

to imprisonment for defaulting on the payment of fines of up to £500 (Reid Howie Associates, 2006).

Community reparation orders

In 2005 a pilot programme was introduced in three Scottish sites whereby younger offenders (aged 12 years or older) and those convicted of offences with an 'antisocial component' (such as vandalism) could be required to 'make amends' for their crime. Community Reparation Orders (CROs) were made possible by provisions in the Antisocial Behaviour Etc. (Scotland) Act 2004 enabling both District Courts and Sheriff Courts dealing with summary cases⁷ to require offenders to undertake between 10 and 100 hours of unpaid activities (which might include community work).

An independent evaluation of the CRO pilots found that, in practice, the unpaid work that offenders were required to carry out offered limited opportunities for constructive reparation to the community, taking the form of work teams or individuals clearing graffiti or litter (Curren et al., 2007). More importantly, however, the number of orders imposed by the courts was much lower than anticipated - 74 orders over a 20 month period compared to a predicted 550 orders per annum - and in two of the pilot sites almost half the of the orders made were associated with an application for breach. CROs appeared to be viewed more positively by district court justices than by sheriffs. The former did not have the power to impose Community Service Orders and therefore regarded CROs as a welcome addition to the range of sanctions available to them. Sheriffs, on the other hand, tended to consider CROs to be unnecessary since they were already able to impose Community Service Orders (Curren et al., 2007). In view of the apparently limited effectiveness of the Community Reparation Orders – which were neither well understood or used - funding for the pilots was terminated in December 2007, pending a wider review of reparative sentencing options in Scotland.

Fiscal work order pilots

The most recent expansion of unpaid work as a penal sanction has been its potential imposition as an alternative to prosecution for minor offences. Following a review of summary justice by the McInnes Committee (Scottish Executive, 2004), the Scottish Government put in place a wide package of reforms to the summary justice system in Scotland (Scottish Executive, 2005, 2007a). The aim of the reforms was to make the criminal justice system more efficient and effective with respect both to the dispensing of justice and the reduction of re-offending, resulting in a summary justice system which is fair, effective, efficient and quick and simple in delivery.

The package of summary justice reforms included reforms of direct measures which extended the range of alternatives to prosecution that could be offered to an alleged offender by the police and procurators fiscal⁸ and the manner in which those alternatives could be enforced and disclosed. This included the introduction of Fiscal Work Orders (FWOs) which are being piloted in four areas for two years. The pilot provisions enable procurators fiscal to offer an alleged offender the opportunity to undertake between 10 and 50 hours of supervised unpaid work for the community (to be completed within 6 months) as an alternative to prosecution. Offers of FWOs must be proactively accepted by the alleged offender within 28 days of the offer being made. FWOs are managed by local authority social work departments, with prosecutors selecting tasks from a list of approved local community projects such as gardening, beach cleaning and work in charity shops. Offenders who accept and complete fiscal work orders avoid prosecution and do not receive a criminal record in

⁷ Summary prosecution covers less serious cases involving a trial where there is no jury.

⁸ The public prosecutors in Scotland

the usual way, but the fact that an order was accepted is kept on file indefinitely for prosecutors and can be considered when reaching a prosecution decision in the event of a further alleged offence.

FWOs are principally aimed at those accused of committing minor offences who may not have the financial resources to pay a fiscal fine (one of a range of options that are open to the procurator fiscal as an alternative to prosecution) and are therefore imposed *instead of* a fiscal fine. Female accused are one of the target groups for the scheme, reflecting wider policy concerns to reduce the numbers of women who have committed relatively minor offences appearing before Scottish courts. Since the pilot only became operational in June 2008 it is still too early to assess how successful the initiative has been, though there are early indications that it is proving popular with prosecutors.

Implementation of community service

Having considered the origins, objectives and philosophy of community service in Scotland, attention is turned to how these orders operate in practice: how they are imposed and implemented, upon whom they are imposed and the completion rate for orders.

Imposition of orders

Because community service orders are intended in Scotland to serve as a direct alternative to a custodial sentence, they have only been available as a sanction in the higher courts: the High Court, Sheriff Court and, in Glasgow only, the Stipendiary Magistrate's Court. The facility to impose CSOs was not extended to the former District Courts (now Justice of the Peace Courts)⁹ because these courts deal with the most minor offences and make relatively little use of imprisonment as a penalty. Prior to making an order, the courts must obtain a social enquiry report from the local authority social work department and must be satisfied that 1) the offender is suitable to undertake community service and 2) there is suitable work available for the offender to carry out¹⁰. Offenders are required to consent to the imposition of a community service order (or probation requirement with unpaid work) and the arrangements to perform the work should not interfere with the offender's employment or other inescapable commitments. Placements are made available in the evenings and at weekends to accommodate offenders who are employed. There is no fixed maximum number of hours per day or days per week that a person must work, though there is an expectation that offenders will work for no less than two hours in any session. The work should be of a type that would not otherwise be carried out by paid employees (to prevent community service from depriving others of employment opportunities) and once an order has been served it should normally be completed within 6 months (this was previously 12 months but has been changed recently to 'speed up' the completion of orders).

⁹ The High Court deals with the most serious offences and the Justice of the Peace Courts with the least serious. The Stipendiary Magistrates Court in Glasgow dealt with similar cases to those heard under summary procedures in the Sheriff Courts, which deal with mid-range offences and can operate under summary or solemn procedure, depending on the seriousness of the offence. Sentencing powers vary across courts reflecting differences in the seriousness of the cases dealt with.

¹⁰ In practice, suitable placements will be found for most offenders, where suitability relates to the ability to offer work that reflects the offender's 'risk' and does not conflict with religious, employment or family commitments.

Execution and management

In Scotland, responsibility for the implementation of community service orders and other forms of unpaid work by offenders rests with local authority social work departments. Since 1969 when they were created in Scotland¹¹, social work departments have had statutory responsibility for the provision of social work services to the criminal justice system. Community service staff employed by the social work department are responsible for locating work placements (through publicising community service and liaising with relevant organisations and community groups), assessing offenders' suitability for community service, allocating them to suitable work placements and monitoring their compliance with their orders. The professional background of staff employed by community service schemes has historically varied across schemes, with some employing staff with social work qualifications to undertake tasks that are performed by unqualified staff in other schemes. The most recent government guidance recommends that the scheme manager is a qualified social worker (or has a related relevant qualification) while other staff with operational responsibility – referred to as 'case managers' - will normally be unqualified (Scottish Government, 2009b).

Types of work

Although community service staff are involved in assessing offenders' suitability for community service, it is assumed that most will be suitable to undertake some kind of work through the availability of placements that are able to accommodate offenders with diverse needs and circumstances. Thereafter, a key task for community service staff involves matching offenders to work. Broadly speaking, offenders in Scotland undertake their community service in one of three types of placement setting: supervised work teams, community service workshops or individual agency placements. Offenders who complete their community service in teams or workshops are supervised by community service supervisors who are employed to carry out this task while those in agency placements have their work supervised by a member of agency staff (for example, the manager of a residential home) who records hours worked and reports on the offender's progress and compliance to the community service case manager. Team placements typically involve a range of practical work such as gardening, painting and decorating or joinery while agency placements – that may be based in voluntary or statutory (but not private) agencies, charity shops, churches or community groups - may involve either practical or personal/caring tasks depending upon the setting. Workshops tasks include practical activities such as making or repairing furniture or toys. There is an expectation that community service schemes will consult their local communities regarding the types of reparative activities to be carried out by offenders on orders.

A number of factors are taken into account when allocating offenders to work placement, including the offender's interests and skills and their availability at particular times of the day. However, placement allocation is also guided by considerations of risk, on the assumption that higher risk offenders should be allocated to more closely supervised group placements. The balance of placement types available varies from scheme to scheme, though national data on the use of different placement settings and on the types of work carried out are not available. An evaluation of community service schemes in Scotland in the late 1980s suggested that greatest use was made of supervised work teams followed by individual agency placements then workshops. Younger offenders (under 21 years of age) were more likely than older offenders to be allocated to team placements and women were more

¹¹ The legislative basis was the Social Work (Scotland) Act 1968

likely than men to be given individual agency placements (McIvor, 1991, 1992) and there is no reason to suspect that these age and gender differences no longer exist. For example, a more recent study of women on community service in Scotland revealed that most completed their orders in agency placements and that there was limited availability of women-only work teams, with a strong gender bias (towards men) in group placements (Goodwin and McIvor, 2000). Placement selection appeared often to be influenced by factors such as transport, accessibility and child care commitments which are less likely to feature as reasons for placement allocation among men.

Offenders and orders

As previously noted, 5,593 offenders convicted in Scotland were made subject to a community service order in 2007/8 (Scottish Government, 2009a), with orders averaging 145 hours (Scottish Government, 2009c) compared with just over 142 hours 20 years previously (McIvor, 1992). Information about the types of offences that result in the imposition of a community service order is not currently publicly available (CSOs are grouped with probation and other community sentences in the published statistics). In McIvor's (1992) study, orders were most often made for offences involving dishonesty (56% of offenders given orders), violence (27%), offences against public order (22%), road traffic offences (13%) and criminal justice offences (12%), however with changes in patterns of offending (e.g. more drug related offending) and in the range of community disposals available to the courts over the last 10-15 years this pattern may have changed.

In 2007/8, as in previous years, the majority of offenders given community service were male (89%) (Scottish Government, 2008a). Women were under-represented among those given orders in comparison with their relative representation among offenders convicted in court, where around 15% of those convicted in 2007/8 were women (Scottish Government, 2009a) and they tended to receive slightly shorter orders than men (Table 2). Women were, however, better represented among those given community service as a condition of probation or a supervised attendance order for fine default (Table 1).

Table 1: Community Service Orders, probation orders with unpaid work conditions and supervised attendance orders and gender, 2007-08

	Male	Female	Total
CSO	5,512 (89%)	690 (11%)	6,202 (100%)
PO & unpaid work	2,610 (86%)	433 (14%)	3,043 (100%)
SAOs	3,693 (83%)	745 (17%)	4,438 (100%)

(from Scottish Government, 2008a)

Table 2: Length of order by gender, 2007-8

	Average length of order (hours)		
	Male	Female	Total
CSO	146	141	145
PO & unpaid work	136	126	135
SAO*	-	-	40

*gender breakdown not available

(from Scottish Government, 2008a)

It has been suggested that community service orders in the UK – including Scotland - have been regarded by the courts primarily as a 'young man's punishment' (Worrall, 1996), traditionally being used disproportionately with young male offenders (Hine,

1993; McIvor, 1998a) and given to women at an earlier point in their ‘criminal careers’ (McIvor, 1998a). Concern has also been expressed that women’s apparent under-representation on orders may arise because their caring responsibilities towards children and other dependents are perceived as a barrier to the completion of unpaid work (McIvor, 2004).

The perception of community service as a young man’s punishment receives reinforcement from the data in Table 3 which indicate that the majority of those who receive orders are under 30 years of age and more than one quarter are under 21 years of age. The profile of those ordered to perform unpaid work as a condition of probation is even younger, with one third being between 16 and 20 years of age in 2007/8. By contrast, fewer offenders given supervised attendance orders fell into this youngest age group, possibly because courts are reluctant to impose a financial penalty upon younger offenders who have no¹² or limited financial means.

Table 3: Community Service Orders, probation orders with unpaid work conditions and supervised attendance orders and age, 2007-08

	Age in years				Total
	16-20	21-30	31-40	Over 40	
CSO	1,715 (28%)	2,525 (41%)	1,146 (18%)	816 (13%)	6,202 (100%)
PO & unpaid work	1,028 (34%)	1,074 (35%)	587 (19%)	364 (12%)	3,053 (100%)
SAO	761 (17%)	1,845 (42%)	1,187 (27%)	645 (14%)	4,438 (100%)

(from Scottish Government, 2008a)

Just over one third of those given community service orders in 2007/8 were in full-time employment while fewer than half (44%) were unemployed when made subject to an order (Table 4). While it is difficult to make direct comparisons between these data and earlier data due to differences in how employment status is classified, it would nonetheless appear that offenders on community service are more likely now to be in some form of employment - around three-quarters were unemployed in McIvor’s (1992) study of offenders given orders in 1987/8 – and this clearly has implications for the provision and supervision of work placements.

¹² In the UK 16 and 17 year olds who are unemployed do not receive state benefits and are not, therefore, in a position to pay a financial penalty imposed by the court.

Table 4: Community Service Orders, probation orders with unpaid work conditions and supervised attendance orders and employment status, 2007-08

	Employment status				Total
	Employed	Unemployed	Education / Training	Other*	
CSO	2,167 (35%)	2,735 (44%)	198 (3%)	1,102 (18%)	6,202 (100%)
PO & unpaid work	774 (25%)	1,600 (52%)	117 (4%)	562 (18%)	3,053 (100%)
SAO	529 (12%)	2,506 (56%)	64 (1%)	1,219 (28%)	4,438 (100%)

*Other includes retired; part time employment; not seeking employment; employment status unknown or information missing (from Scottish Government, 2008a)

Enforcement, compliance and termination

As previously indicated, offenders who fail to comply with their community service orders can be returned to court for having breached the requirements and may, as a consequence, have their orders revoked. Orders may also be revoked ‘in the interests of justice’ following a review if changes occur in offenders’ circumstances that make it unlikely that they could complete their order (for example, if they are given a length prison sentence for a different offence). As Table 5 indicates, in 2007/8 the majority of community service orders in Scotland were completed successfully, while just under a quarter were revoked as a consequence of breach. Female offenders (67 per cent) were slightly more likely to complete their orders successfully than men (64 per cent) (Scottish Government, 2008a). McIvor (1992) identified a number of factors associated with non-compliance and breach of a community service order. These included age (with those under 18 years of age more likely to be breached than those aged 18 years and older), previous criminal history, a history of statutory social work supervision as an adult or child, type of offence (with breach rates higher among those given community service for offences involving dishonesty) and a history of accommodation problems.

The current breach rate is higher than it was previously - only 11 per cent of orders were revoked due to breach in 1987/8 (McIvor, 1992) – reflecting, it is suspected, a progressive tightening up of expectations regarding enforcement practices in successive versions of the national objectives and standards. Those responsible for supervising orders are required under national objectives and standards to issue formal warnings following an unacceptable failure to comply and to initiate breach proceedings on the third unacceptable failure (Scottish Government, 2009b). They still, however, have discretion with respect to whether to deem a failure to comply acceptable or not. Moreover, not all cases that are returned to court under breach proceedings result in the order being revoked. In 2007-8 around 35 per cent of community service orders resulted in a breach application. Seventeen per cent of breach applications resulted in the original order being revoked and a custodial sentence imposed, 28 per cent of breaches resulted in the original order being revoked and some other action taken (including revocation of the order and probation or monetary penalty imposed), in 11 per cent of applications the original order was continued and no further action taken by the court and in 3 per cent of applications the

court issued a warrant for apprehension/recall (the outcome was not yet known for 26 per cent of breach applications made in 2007-08) (Scottish Government, 2008a).

Table 5: Reasons for termination or orders, 2007-08

	Reason for termination				Total
	Completed	Revoked (review)	Revoked (breach)	Other*	
CSO	3,762 (65%)	271 (5%)	1,346 (23%)	446 (8%)	5,825
SAO	1,685 (57%)	302 (10%)	797 (27%)	186 (6%)	2,970

*Other includes transfer out of area, death, non-compliance, further offence, early discharge and information unknown / missing (from Scottish Government, 2008a)

Detailed data on reasons for termination are provided for probation orders but these are not separately available for the unpaid work requirements. However data for 2007 indicates that across Scotland as a whole, 575/1,214 unpaid work requirements attached to probation orders (47%) were breached. Although many fewer women were given a probation order with a requirement for unpaid work, the breach rate (47%) was identical for men (508/1072) and women (67/142) (Scottish Government, 2008a). The higher breach rate associated with unpaid work requirements is likely to reflect differences in the characteristics of offenders given different types of orders, with those made subject to probation orders having more social and personal problems than those sentenced to other forms of unpaid work and, hence, more potential barriers to the successful completion of the order.

Defining and measuring effectiveness

Completion rates provide one indicator of the ‘success’ of community service and other forms of unpaid work insofar as they enable some assessment to be made of the extent to which the courts’ requirements that offenders undertake work for the community have been fulfilled. Other measures of effectiveness, however, include beneficiaries’ satisfaction with the work that is carried out and the whether or not reconviction rates following community service are lower than those following alternative sanctions, especially imprisonment which, in Scotland, community service orders are intended to replace.

The views of beneficiaries provide an important indication of the benefit to the community of unpaid work undertaken by offenders, though this aspect of the sanction has tended to receive relatively scant empirical attention. However, national surveys of individual and agency beneficiaries conducted in Scotland in 1990 revealed high levels of satisfaction. More than three-quarters of the 567 individual beneficiaries who were surveyed (77%) indicated that they were very happy with the standard of the work, while 82 per cent believed that it had been very well supervised, 79 per cent said they had got on very well with the offenders carrying out the work and 87 per cent said that the work had been of great benefit to them (McIvor, 1993a). Agencies offering individual placements to offenders on community service were also positive about the experience, with around two-thirds (66%) indicating that the work the offenders performed had been very useful. The majority of agencies (59%) reported that they were very happy with the standard of work and only two (out of 172) suggested that the standard of work had been poor. More than half of the agencies (58%) said that some offenders had carried on working beyond their required

hours after completing their orders and 41% reported having invited one or more offenders to continue working with them in either a voluntary or paid capacity after they had completed their community service order (McIvor, 1993b), pointing to the reintegrative potential of unpaid work.

Scottish data appear to provide evidence of lower reconviction rates following community service than following custody, with 42 per cent of offenders given community service convicted within two years compared with 62 per cent of those discharged from custody (Scottish Government, 2009c). However, broad comparisons of recidivism following community penalties and imprisonment are difficult to interpret because offenders given different sentences tend to differ in important ways that are themselves associated with a differential risk of recidivism. While it is not possible to control for all factors that might impact differentially on recidivism following different penal sanctions, Table 6 presents two-year reconviction rates for community service and custody for offenders with different criminal histories¹³. These data appear to indicate lower reconviction rates among those given community service, particularly among offenders with more extensive criminal histories. Only among male first offenders were reconviction rates higher following community service than following custody. This may reflect a deterrent effect of imprisonment or, perhaps more likely, arise from first offenders having received prison sentences for relatively serious but less likely to be repeated crimes.

Table 6: Percentage sentenced in reconvicted within 2 years by index disposal, sex and number of previous convictions

		Previous convictions			
		0	1-2	3-10	Over 10
Male	Custody (n=5,778)	22%	41%	59%	80%
	Community service (n=2,840)	30%	39%	55%	69%
Female	Custody (n=428)	n/a*	31%	54%	80%
	Community service (n=432)	13%	23%	45%	61%

*numbers too low to generate percentage
(Scottish Government, 2009c)

There is some evidence that the *quality* offenders' experiences on community service may be associated with lower levels of recidivism. Killias et al., for example, (2000) found a relationship between the perceived fairness of the sentences offenders received and reconviction, leading Rex and Gelsthorpe (2002) to suggest that experiencing a community service sentence as 'fair' makes offenders more receptive to re-integrative opportunities that may arise when they undertake unpaid work. McIvor (1992) found that reconviction rates were lower among offenders who believed community service to have been a worthwhile experience for themselves and the beneficiaries. Positive experiences of community service were associated with placements that had high levels of contact between offenders and beneficiaries, that provided opportunities for offenders to acquire new skills and that entailed work that was seen as having some intrinsic value for the recipients. Placement experiences associated with reductions in recidivism could be characterised as re-integrative and as entailing a degree of reciprocity or exchange. McIvor (1998b) has suggested that

¹³ Prior criminal history is one of the strongest predictors of recidivism.

placement experiences such as these placed offenders in a position where they could enjoy reciprocal relationships, gaining the trust, confidence and appreciation of other people and having the opportunity to give something back to them in return. This relates closely to the concept of ‘generativity’ that has recently been linked to successful desistance from crime (Barry, 2006, 2007; McNeill and Maruna, 2007.)

Contemporary developments and concerns

In Scotland, community service has remained relatively unchanged since its introduction in the late 1970s. This is despite a heightened sensitivity to the risks posed by offenders given community-based social work disposals and periodic concerns about the rigour of enforcement (e.g. Social Work Services Inspectorate, 1996) that have been reflected in subsequent versions of the National Objectives and Standards for Community Service produced by the Government (e.g. Scottish Executive 2004b). However, major changes to the nature and use of community sanctions in are currently under consideration, through provisions contained in the Criminal Justice and Licensing (Scotland) Bill that aim to encourage greater use of non-custodial disposals.

Against the backdrop of a large and growing prison population – fuelled by a heavy reliance by courts upon very short prison sentences - the Scottish Government undertook a review of community penalties in 2007. The review concluded, among other things, that a new approach to community service orders was required to enhance the credibility of the disposal both with sentencers and with the public (Scottish Government, 2007b). More specifically, it was proposed that existing sanctions involving unpaid work (or other reparative measures) should be combined into a single reparative community penalty that could be used in all levels of criminal court, that could be implemented swiftly and that would be characterised by increased community consultation regarding the nature of the tasks to be carried out by offenders undertaking unpaid work. The review also raised the possibility of activities other than unpaid work being included as part of a community service order to reduce the risk of further offending, thereby creating ‘*both a tough and a smart penalty*’ (Scottish Government, 2007b, p.4). Consideration would also be given to the possibility of combining community service with electronic monitoring to provide ‘*a penalty with a greater punitive element*’ (Scottish Government, 2007b p.4). In 2007 the Scottish Government also convened an independent Prisons Commission to consider the use of imprisonment in Scotland. The Commission concurred that there was a need for more effective and credible community sentences that would command public support and recommended the availability of a range of options through which offenders could be ordered to provide ‘payback’¹⁴, in the community while being able to access opportunities for positive personal change (Scottish Prisons Commission, 2008).

In its response the Government set out proposals for the introduction of a unified community sanction – the Community Payback Order – that would replace probation orders, community service orders, supervised attendance orders and elements of community reparation orders and that could therefore be tailored to the needs and circumstances of individual offenders (Scottish Executive 2008b). Under provisions subsequently contained in the Criminal Justice and Licensing (Scotland) Bill that was introduced by the Government in March 2009, the proposed Community Payback

¹⁴ The assumption that community sentences should involve those who have offended against their communities being required to make reparation for their offence, though this need not only take the form of unpaid work: see Scottish Prisons Commission (2008)

Order will include 20 to 300 hours of unpaid work or other activity to be completed within 6 months (or 3 months if the sentence is less than 100 hours). Other requirements that can be imposed include supervision, attendance at an offending behaviour programme, residence at a specified place and treatment for mental health problems, alcohol and drugs (with the latter including regular drug testing): in this respect, the new orders will share many similarities with Community Orders in England and Wales (see, for example, Mair et al., 2007) An additional requirement of electronic monitoring will be available to the court in the event of a Community Payback Order being breached and sentencers will be able to review the order in court periodically where this is deemed appropriate.

One of the most progressive and controversial of the Scottish prisons Commission's proposals was that courts be required in most circumstances to replace short prison sentences (of up to 6 months) with community sentences (Scottish Prisons Commission, 2008). However, Government support fell short of the *abolition* of short prison sentences that the Commission proposed, supporting instead, a *presumption against* the use of short prison sentences. Under Government proposals, community sentences will become the norm for less serious offences and sentencers will be required to provide justifications for imposing a custodial sentence of less than 6 months. This provision was included in the in Criminal Justice and Licensing (Scotland) Bill October 2009 that was introduced in March 2009.

The broad policy direction being taken by the Scottish Government is to be welcomed - in particular the clear support that is being articulated for the use of community penalties for less serious offenders and the presumption against the use of short prison sentences. However, these and other recent developments (such as the introduction of fiscal work order pilots) also raise a number of related concerns regarding penal philosophy, resources and net-widening, each of which is considered in turn.

The role of populist punitiveness?

It is evident that recent developments in penal policy in Scotland have been shaped to a significant extent by political concerns about public confidence and perceptions of justice. Whether this reflects an increase in populist punitiveness – what Bottoms (1995, p. 40) has defined as ‘the notion of politicians tapping into, and using for their own purposes, what they believe to be the public’s generally punitive stance’ – is less clear. Although there have been occasional attempts by politicians to enhance the perceived punitiveness of unpaid work through, for example, increasing offenders’ visibility by requiring them to wear distinctive uniforms (McIvor, 2007) these have tended to be short-lived. For example, guidance issued in 1996 to local authorities requiring that community service by offenders was made visible through the use of local publicity, the displaying of signs to identify projects, the clear marking of vehicles used to transport workers and materials and the marking of offenders’ protective clothing (Scottish Office, 1996) was repealed by the government the following year on the basis that it was likely to detract from rather than enhance the rehabilitation of offenders completing community service orders (Scottish Office, 1997). A more recent government-funded emphasis on visibility – which began in three areas of Scotland in 2008 - has focused on raising the profile of community service among communities through media and other promotional campaigns and increasing its reducibility among the public as an alternative to prison.

The current Scottish Government appears to be committed to a policy of penal reductionism but is equally aware of the need for public and judicial support for the

measures that it is proposing to introduce. In this respect, perceptions of public intolerance cannot be regarded as underpinning increasingly punitive policies: rather, the ‘packaging’ of reforms aimed at reducing Scotland’s high level of imprisonment – characterised in particular by its over-reliance on short custodial sentences - is intended to allay public concerns that these progressive developments are not construed as the Government being ‘soft on crime’. Proposals to name the proposed new community penalty ‘community payback’ can therefore be understood in this light, though the terminology also raises questions as to the relative emphasis being placed upon different penal aims. While relevant policy documents underline the need for community sanctions that are both reparative and enable offenders to take steps to reduce their offending behaviour, the term ‘payback’ also evokes strong connotations of vengefulness that would appear to forefront retributive aims.

Why this may be politically necessary can be understood by considering the role of the media - in particular, its relentless attempts to expose and decry apparent leniency with respect to how community sanctions are used and implemented.- and evidence of public support for tougher sentences for less serious crime (TNS System Three, 2007). Punitive public attitudes are bolstered – and perhaps even nurtured - in Scotland by a tabloid media that seems determined to unearth examples of the Government being ‘soft on crime’. For example, an article in the Sunday Mail (a Scottish Sunday tabloid) on 11 January 2009 entitled ‘*Cons on Community Service filmed boozing, smoking and using phones*’ claims to ‘*expose the sham*’ of community service in Scotland through a ‘*catalogue of shocking failures*’¹⁵. The article states – in outraged tones - that a group of offenders in Glasgow were transported by taxis, given long breaks, chatted with their supervisors, smoked, drank lager and used their mobile phones. In the article – accompanied by secretly filmed footage of offenders on community service orders – the lax supervision of offenders is decried as ‘*making a mockery of the Government’s get tough on crime policy*’ and used as a basis to question the appropriateness of its proposals to replace short prison sentences with unpaid work.

Resources

The importance of judicial and public attitudes was further highlighted in June 2009 when a sheriff in Aberdeen attracted media attention by declaring it ‘unacceptable’ that an offender given community service for drugs offences had been placed on a waiting list and completed only two and a half hours over a period of six months. The sheriff observed that ‘*It is essential for the judiciary and the public to have confidence that such orders when imposed, will be implemented*’ and requested that social work management attend court to respond to questions about the management of community service orders in the city. After a city councillor responded to the effect that the council was under-resourced to deal with the number of offenders given community sentences, the Government announced a few days later that an extra £5.5 million was being invested to ‘speed up’ community sentences, with most of this money aimed at helping local authorities to ‘clear their backlogs’ and achieve tighter turnaround times (Scottish Government, 2009d). The additional resources were over-and-above those already made available in 2008 with a view to increasing staffing levels, reducing waiting times and making sure that offenders on orders “can start paying back more quickly” (Scottish Government, 2008c).

As the Justice Minister noted when announcing the availability of increased funding for community sentences, the challenges associated with the smooth and speedy

¹⁵ <http://www.sundaymail.co.uk/news/scottish-news/2009/01/11/cons-on-community-service-filmed-boozing-smoking-and-using-phones-78057-21031384/>

implementation and enforcement of community service vary across different parts of the country. The level of staffing is only one factor that has an impact on the capacity of community service schemes to operate efficiently and effectively: this is also likely to be determined by the availability of suitable work and this is dependent upon the willingness of agencies and individuals to make work placements for offenders in an increasingly punitive climate and in the absence of incentives other than the receipt 'free' labour. Unpaid work undertaken by offenders is meant to be work that would not otherwise be undertaken, placing constraints upon the types of work that are appropriate for offenders to perform. This, in turn, places significant demands upon community service schemes to locate suitable placements for offenders on orders (whose choice of placement must also be decided with regard to the risks the offender may present). The extension of unpaid work as an alternative to imprisonment for fine default (where the supervised attendance order activity takes the form of unpaid work) has placed additional demands upon community service schemes in locating sufficient suitable placement experiences and further demands still will be created by the introduction of unpaid work as an alternative to prosecution (the FWO).

The likely resource implications of recent and proposed changes to the nature and use of community sanctions in Scotland (including unpaid work) – and, hence, the ability of community service schemes across the country to meet any increased demand – cannot easily be assessed. However, it has been estimated that Community Payback Orders will comprise 90 per cent of community sanctions under the new arrangements: *if* a majority of these orders contain requirements for unpaid work and *if* the policy intention of replacing short prison sentences with community sanctions is met to any significant extent, the resource implications will be immense.

Net-widening

A final, and related, set of considerations concerns the capacity of unpaid work by offenders to facilitate reductions in the use of imprisonment. When community service orders were introduced in Scotland they were explicitly intended to serve as alternatives to short prison sentences, though it appeared that they were often used instead of other non-custodial penalties (McIvor, 1992). Even following the introduction of legislation aimed at ensuring that community service orders were only used where a prison sentence would otherwise have been imposed, there was evidence that the courts were adopting a more flexible approach (McIvor and Tulle-Winton, 1993). Under the current Government proposals, community payback orders will be extended to the Justice of the Peace Courts – which have not had the capacity to impose community service orders and which make relatively limited use of imprisonment – with the risk that orders will often be made where an alternative non-custodial penalty, such as a fine, would previously have been imposed. In addition, it is conceivable that when community payback orders are used, they are more likely than is currently the case to involve two or more supervisory 'elements' (for example, unpaid work *and* supervision), thus effectively 'thinning the mesh' (Cohen, 1985).

Other factors that may influence the use of Community Payback Orders include sentencing guidelines issued by a proposed Scottish Sentencing Council – which may or may not encourage less use of custodial sentences for different types of crime – and the perceived capacity of those supervising offenders in the community to provide effective sentencing options. Although the current legislative proposals contain a presumption against short prison sentences, sentencers will still be able to impose short periods in custody if they believe that there is no suitable alternative available. The perceived level and quality of resources available to supervise offenders in the

community and the swiftness with which they can be implemented may, therefore, be critical in this regard.

Conclusions

In the 30 years since its introduction, community service by offenders has become a well-established and credible sentencing option in Scotland. The number of orders made grew steadily during the 1980s and has remained relatively stable since, with community service orders annually representing 4% of main penalties for persons convicted in Scottish courts. The intrinsic ‘appeal’ of unpaid work as a penalty has resulted in the option being extended – with varying degrees of success – to more groups of offenders at additional points in the criminal justice process. Contemporary Government policy envisages a central role for unpaid work in enabling offenders to ‘pay back’ to communities for their behaviour while taking appropriate steps to minimise the risk that they will continue to offend. In this respect Scottish penal policy continues to embrace penal reductivism while emphasising reparative and rehabilitative aims, though the language used suggests that aiming to secure wider popular and judicial support for anti-custodialism has necessitated the ‘repackaging’ of community sanctions in more explicitly retributivist terms.

This proposed central role for unpaid work as a penal sanction does not, however, come without potential drawbacks, not least of which is the potential for net-widening (Cohen, 1985) and the capacity of community service schemes to meet the demands for unpaid work requirements both in terms of supervisory capacity and appropriate placement provision. Ultimately, the willingness of Scottish sentencers to avoid short prison sentences will depend, among other things, on the perceived quality of the alternatives: while improvements in quality may not result in a significant reduction of custody rates, reductions in quality might bring about further penal expansion. Ironically, the more use that is made of community payback the greater the challenges that local authority social work services will face in implementing and managing orders efficiently and effectively and maintaining the credibility in the eyes of the public and the courts.

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