

POLICY NOTE

THE COMMUNITY ORDERS (CORONAVIRUS) (SCOTLAND) REGULATIONS 2021

SSI 2021/144

The above instrument was made in exercise of the powers conferred by paragraph 15(1), Schedule 4, Part 6, of the Coronavirus (Scotland) Act 2020. The instrument is subject to affirmative procedure.

Purpose of instrument. To vary the unpaid work or other activity requirements of existing Community Payback Orders (except those imposed for domestic abuse, sexual offences, or stalking) to reduce the overall volume of hours to be delivered and ensure that the community justice system can continue to operate effectively.

Policy Objectives

1. These regulations vary all unpaid work (UPW) or other activity requirements in Community Payback Orders (CPOs), reducing the number of hours imposed in each order by 35%. These regulations apply to all CPOs imposed prior to the regulations coming into force with an unpaid work or other activity requirement where hours are outstanding. The only exceptions are those CPOs imposed either entirely or partially for domestic abuse, sexual offences or stalking. The regulations are intended to reduce the pressure faced by justice social work (JSW) services within local authorities, increasing available capacity to help ensure that existing orders can be completed within timescales expected by courts and any new orders that are imposed can commence promptly.
2. The exclusion of domestic abuse, sexual offences, and stalking is intended to mitigate risks arising from the particular barriers that exist in relation to the reporting of those offences (and which are not found to the same extent with other offence types), and which the Scottish Government and other justice organisations have taken steps to reduce in recent years. These include action under Equally Safe, our national strategy to take action against all forms of violence against women and girls, ground-breaking domestic abuse legislation, investment in training and support, and campaigns. Specifically, this exclusion recognises that reducing UPW hours associated with those offences may, while only applying to existing orders, risk reducing future reporting rates. It is therefore considered appropriate to exclude orders involving domestic abuse, sexual offences and stalking to avoid any adverse effect on the reporting of those offences by victims.
3. These regulations are considered necessary in response to the effect of coronavirus on local authorities and to ensure that the justice system (in particular community justice services) can continue to operate effectively. Further background information and detail in relation to the regulations, including with regard to the exclusions mentioned, is provided below.

Policy context and scenario modelling

4. CPOs are administered by local authorities, through JSW. In particular, JSW services carry out supervision of individuals on orders; organise and oversee unpaid work; and report back to the courts on progress and any potential breaches. As a result of coronavirus, local authority JSW services have experienced significant difficulties in continuing to implement community orders. Capacity to deliver CPOs has been significantly affected by measures required to protect the health and wellbeing of staff and individuals on orders, including compliance with guidance on physical distancing and self isolation in particular. The effects of coronavirus have had a particular impact on the delivery of UPW, as this is typically delivered in groups.
5. To help alleviate the pressure on JSW services, the Coronavirus (Scotland) Act 2020 (the 2020 Act) extended all UPW and other activity requirements by 12 months, and required any new orders imposed by the courts to last for at least that long. This enabled JSW services to suspend all UPW programmes during the first national lockdown without this resulting in any orders being inadvertently breached as a result.
6. This immediate step of extending all UPW and other activity requirements was successful in ensuring that JSW could continue to function effectively in the short to medium term. However, capacity within JSW services to deliver UPW has remained substantively reduced, primarily due to physical distancing measures and other measures to keep individuals on orders and staff safe as well as varying local and national restrictions. In addition, there was an increase in court business and new community order disposals from summer (as restrictions began to ease) to January 2021, when the majority of summary court business was adjourned and UPW programmes were largely suspended again due to the increased level of public health risk associated with coronavirus and to align with national restrictions.
7. It is anticipated that the volume of outstanding UPW will grow significantly once the current national restrictions are eased (made up of existing orders; untried cases accruing in the court system since the start of the pandemic; and new cases arising from recent or future offences). This will increase pressure on JSW services and result in an inability to deliver relevant orders within reasonable timescales. This also creates a higher likelihood of orders being breached inadvertently which creates further pressure on the justice system.
8. The risk that JSW services becomes overwhelmed has been examined and highlighted by Social Work Scotland (SWS), the professional leadership body for social work and social care professions. Its concerns are set out in a position paper, 'Reducing the backlog of Unpaid Work hours: Coronavirus (Scotland) Act 2020'¹, which was published on 15 July 2020. SWS estimated that 700,000 hours of UPW were outstanding at that time and called for 450,000 hours to be removed due to concerns that orders could not be delivered. Similar concerns about the deliverability of hours have been outlined by Community Justice Scotland. Additionally, the Scottish Association of Social Work,

¹ [Reducing the backlog of Unpaid Work hours: Coronavirus \(Scotland\) Act 2020 - Social Work Scotland](#)

in correspondence to the Cabinet Secretary for Justice on 19 November 2020, called for action to be taken to reduce outstanding UPW hours.

9. Despite most local authorities having re-started UPW during the summer, estimates from SWS have shown that as UPW resumed, the ratio of UPW supervisors to individuals was in some cases reduced to one supervisor supervising one individual (prior to the pandemic, one supervisor could supervise up to five individuals). Before the most recent lockdown, areas were still primarily operating around a 1:2 or 1:3 supervisor ratio (based on information provided by local authorities to Social Work Scotland) with significant barriers preventing areas operating at full capacity. This was due to a combination of practical issues impacting on capacity (such as travel, facilities, and safety measures to keep staff and individuals on orders safe) and concerns from individuals regarding the risks of contracting coronavirus associated with travelling and working with others. In addition, constraints have been placed on the number of individual work placements available as providers restructure spaces to be COVID-19 compliant.
10. SWS's view is that taking no action will result in JSW services becoming overwhelmed, as individual orders will likely not be completed within court-imposed timescales and the overall number of outstanding hours will continue to accumulate, once national restrictions are eased. Difficulties will become particularly acute if capacity for court business outstrips JSW capacity, as new orders will not be able to commence promptly. This could potentially undermine both public and judicial confidence in the credibility of community orders, should individuals be required to wait for significant periods of time before commencing their sentence.
11. While there are limits to the data available and considerable uncertainty around how the situation will develop as the pandemic progresses, some analysis has been carried out to illustrate the likely scale of the issue. In April 2020, the size of the backlog was estimated to be 690,000 hours² and by November 2020, the overall backlog had reached 740,000 hours. While the increase was relatively small over this period, this will have been influenced by reduced capacity within courts and the nature of court business which could be dealt with.
12. The table below looks at three different scenarios for growth once court business resumes. In the absence of other quantitative evidence and the uncertainty of what lockdown will do to court capacity and JSW capacity, the analysis uses the number of hours outstanding in November as an estimate for the size of the backlog at the end of March 2021. In the absence of being able to predict when and how lockdown restrictions will ease, it then assumes that courts re-open at this point, with some illustrative scenarios for court and JSW capacity to produce an estimate of backlog growth through four months while JSW remain constrained (given the likelihood that at least some physical distancing and other restrictions will remain in place for some time, resulting

² It should be noted that there are always outstanding hours within the system, as orders are carried out over a considerable length of time, and the April 2020 figure is likely to represent the approximate level under normal circumstances.

in a disparity between court capacity and JSW capacity). The bottom row shows the results of this analysis: outstanding backlogs with and without a reduction applied:

	Scenario 0: No growth	Scenario 1: Lower growth	Scenario 2: Central Growth	Scenario 3: Higher growth
Hours outstanding at March 2021 ¹	740,000			
Estimated hours removed by a 35% reduction ² (DA/SC/stalking crimes not eligible)	290,000			
Hours outstanding after 35% reduction	450,000			
Court capacity: UPW hours imposed from Mar-21, relative to 2019-2020 average	Under the “no growth” scenario, the rate at which courts issue new orders matches JSW capacity to deliver orders (as should be the case ordinarily)	86%	100%	145%
JSW capacity to deliver UPW: UPW hours delivered from Mar-21, relative to 2019-2020 average ³		50%	35%	30%
Estimated Hours Outstanding – July 2021	450,000 (740,000 in absence of reduction)	630,000 (920,000 in absence of reduction)	780,000 (1,070,000 in absence of reduction)	1,030,000 (1,360,000 in absence of reduction)

¹ Based on estimate as at November 2020, in absence of data, and likely lack of activity in months where strict lockdown measures are in place.

² It should be noted that the proposed reduction is to the number of hours imposed in orders, not the number of hours outstanding, so the reduction in the latter is slightly more than 35%.

³ For this estimate it was assumed that hours delivered had kept pace with hours imposed in 2019-2020.

13. While the scenarios above are illustrative and intended to demonstrate the potential effects of a disparity between court capacity and JSW capacity to deliver UPW, it may be useful to note that immediately prior to the national lockdown imposed in January 2021, the volume of CPOs being imposed was close to normal levels. If the amount of hours being issued on these CPOs is also at typical levels, and JSW capacity to deliver hours remains constrained (which available local data suggests is the case), this could lead to significant growth of the backlog.
14. In relation to concerns around the length of time to complete UPW orders (rather than the size of the backlog alone), in the period from April to November 2020 around 2,000 UPW orders were completed, with an initial 8,700 orders outstanding in April 2020. This represents around 300 orders completed each month, compared to the 2018-19 average of 690 orders each month. This slow rate of delivering orders means that the time for completion will be high for UPW orders currently outstanding and any UPW orders imposed while social work capacity remains suppressed.
15. While the recent announcement of a COVID-19 vaccine rollout is a welcome development, this will not solve the capacity issues in delivering the backlog of outstanding UPW hours, nor remove the need for these regulations. The vaccine rollout will take place in a gradual way and some restrictions are likely to be in place until all population groups have received this. More importantly, the backlog of UPW will continue to grow as scope to deliver hours will remain limited while restrictions are in place and there is significant volume of court cases pending which will add to the existing number of hours outstanding. This means that taking no action in the hope that the system will soon return to normal is not a viable option; even if this were the case, a significant and unmanageable backlog would still remain.
16. Similarly, simply increasing funding to JSW services or increasing staffing levels will not solve the immediate problem of the accumulated outstanding hours which are currently undeliverable, given the most recent national restrictions. In addition, even setting aside the cost implications – which would be challenging in the current financial situation - increasing staffing is not a quick or simple solution. Recruiting UPW staff typically takes around 4 months and any new staff would then require induction and training, further complicated in the current environment. As some of these contracts may, by necessity, need to be short-term, this would impact on the ease with which new staff can be hired and the quality of appointments.
17. Taking all of this into account, it is considered necessary to take action to prevent the system being overwhelmed. Specifically, a reduction in the overall volume of outstanding UPW hours is considered to be a proportionate and appropriate response. While this will not address the underlying issues caused by physical distancing and other measures, it does create additional capacity within the system, allowing more time for the easing of restrictions, for alternative means of delivery to be developed if possible, and for the usual modes of UPW delivery to resume in due course.
18. Assessing exactly what reduction is necessary in order to alleviate pressure on JSW services requires careful judgement, taking account of existing demand and capacity, anticipated increases in demand, and the potential effect on confidence in the community justice system (in general, and with particular regard to certain offence types). The

Scottish Government's intention is to achieve an appropriate balance in preserving the integrity of the original sentence imposed while creating sufficient additional capacity for JSW services.

19. In its position paper, SWS requested that UPW hours be reduced by 450,000 (out of the 700,000 total, which was the approximate total number of outstanding UPW hours in June 2020) in order to alleviate the pressure on JSW services, based on its assessment of likely capacity and demand over the coming months. In order to achieve this, the Scottish Government estimates that all relevant requirements imposed in existing CPOs would need to be reduced by around 50%.
20. While SWS's expertise and experience is recognised and its proposal has been given careful consideration, such a large reduction in sentences imposed is considered likely to have an adverse effect on public and judicial confidence in community sentencing.
21. Therefore, the Scottish Government is proposing to reduce the amount of UPW hours originally imposed by 35%. Noting the caveats outlined earlier regarding forecasting difficulties at this time of uncertainty, it is estimated that this reduction would result in approximately 290,000 hours being removed from the system when the regulations come into force. It is estimated, based on unit level data from April 2020, that up to 15% of outstanding orders will be automatically completed once the proposed regulations come into force.

Proposed approach and applicability

22. A reduction of 35% (with exclusions for domestic abuse, sexual offending, and stalking) is considered to strike an appropriate balance between removing enough hours to assist JSW services in the short to medium term, and ensuring that individuals complete the majority of their UPW hours, thus maintaining confidence in the community justice system. This approach also reflects the fact that these are extraordinary powers, intended to be used only as absolutely necessary, and given the effect on sentences imposed by the courts the Scottish Government wishes to ensure that any action is as limited, but effective and proportionate, as possible.
23. This approach is considered to be reasonable and proportionate drawing on available data and modelling, and taking account of views sought from justice partners (including victim organisations in considering exclusions). As mentioned above, notwithstanding the prospect of the impact of coronavirus easing as the proposed vaccination programme commences, significant uncertainty remains and it is anticipated that capacity in the justice system will be impacted for a considerable time. Significant work is taking place as part of the Recover, Renew, Transform programme to help ensure the justice system can operate effectively and sustainably and the proposed use of this power compliments that work.
24. In relation to applicability, the reduction in UPW hours imposed will be applied to all existing CPOs, except in circumstances where the CPO was imposed for domestic abuse, sexual offences, or stalking. Research shows that there are particular barriers to reporting

of domestic abuse and sexual offences. For example, the Whole Lives Survivor Survey³ from Safe Lives found that, on average, survivors experienced four years of domestic abuse before telling someone. A wide range of action has been taken to help remove those barriers and increase protection from abuse, including through the Domestic Abuse (Scotland) Act 2018, investment in training and support, campaigns including 16 Days of Activism against Gender-Based Violence and other measures such as the Domestic Abuse Protection (Scotland) Bill.

25. Taking into consideration the particular barriers to reporting which exist for these offence types that may not be found with other offences, it is considered that reducing UPW hours may have an effect on the current or future victims of domestic abuse, sexual offences, and stalking which is not replicated in other offence types. These offences are therefore being excluded from the proposed variation to UPW requirements to mitigate the risk of exacerbating existing issues around low levels of reporting of these offences.
26. This risk to reporting may also be relevant in the context of the Scottish Government's positive obligations under Articles 3 and 8 ECHR and under the Istanbul Convention⁴, to maintain an effective system for the investigation and prosecution of gender based crime.
27. The exclusion of these offences is also set in the context of an increase in reports of domestic abuse during the lockdown imposed as a result of the pandemic. While UPW does not have a direct function in risk management or public protection, excluding these offences will have an additional effect of sending a strong message of societal condemnation about those offences and the particularly serious, lasting impact on victims and others that they can have. Excluding such offences demonstrates that the full set of requirements imposed by the court is expected to be served in relation to domestic abuse, sexual offences and stalking despite the impact of coronavirus.
28. Taking all this into account, the Scottish Government considers that targeted exclusion of domestic abuse, sexual offences, and stalking from these regulations is an appropriate and effective way of addressing existing issues around under-reporting of these offences. The exclusion of these offences has been informed by engagement with Police Scotland and victims organisations with specialist knowledge and insight on barriers to reporting of crime in relation to particular offences.
29. In addition to the overall approach and percentage reduction to be applied to UPW and other activity requirements, a number of aspects of the regulations should be noted, particularly in relation to their applicability; provision to ensure compliance with the statutory minimum number of UPW hours; completion of certain orders as soon as the regulations come into force; interaction with statutory requirements around 'other activity'; and provision to avoid interference with ongoing breach proceedings.

³ [Whole Lives Survivor Survey.pdf \(safelives.org.uk\)](https://safelives.org.uk/wp-content/uploads/2019/04/Whole-Lives-Survivor-Survey.pdf)

⁴ Council of Europe Convention on preventing and combating violence against women and domestic violence; CETS No. 210.

30. In order to ensure compliance with the minimum number of UPW hours specified in section 227I(4)(a) of the Criminal Procedure (Scotland) Act 1995, where the reduction in hours specified in the original requirement would result in an individual's hours dropping below 20, the number of hours will be reduced to 20 only (for example, an individual who originally received 23 hours UPW and still has these hours outstanding will only receive a reduction of 3 hours).
31. Where the reduction in the number of hours specified in the relevant UPW requirement would result in the individual having no more hours of UPW to complete, the requirement is taken to be completed when the regulations come into force.
32. Under section 227K(2) of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) 'other activity' may comprise 30% of the hours specified in the UPW requirement (or 30 hours – whichever is lower). These regulations specify that in circumstances where the reduction in hours results in an individual exceeding the limit on other activity hours already allocated, the responsible officer must reduce the number of hours allocated to other activity and allocate instead to UPW. Where the number of other activity hours already undertaken by an individual before the regulations come into force mean that the responsible officer cannot comply with the statutory limit on other activity then the statutory limit is disapplied and all hours yet to be completed by the individual must be allocated to unpaid work.
33. In circumstances where the percentage reduction applied to UPW and other activity requirements would result in the immediate completion of that requirement (i.e. as a result of the individual in question already having completed 65% or more of the hours specified), provision is made specifically for those CPOs where breach proceedings have been initiated, with a citation or warrant having been issued by the court under s227ZC of the 1995 Act. In these circumstances the reduction in hours would not apply on the day the regulations come into force. Instead the court would consider the potential breach in the usual way and, following the court's determination, the percentage reduction would be applied, if an unpaid work or other activity requirement remains part of the existing CPO (which may have been varied). If the court imposes a new CPO with UPW requirements (which is one of the possible outcomes following breach proceedings) the reduction in outstanding hours would not apply to the new order. This provision avoids any uncertainty should breach proceedings be underway when the regulations come into force, and ensures that the reduction in hours only takes place once the court has concluded its consideration of any potential breach.

Consultation

In developing these proposals, informal consultation and engagement took place with a number of key stakeholders including Social Work Scotland (SWS), Community Justice Scotland (CJS), COSLA, the Scottish Courts and Tribunals Service, the Scottish Sentencing Council secretariat, and victims organisations.

34. Regular contact has been maintained with SWS which has kept the Scottish Government informed of challenges and capacity levels from the outset of the pandemic through the different phases of the easing of restrictions. In a submission to the Justice Committee

in June, SWS expressed concerns that completion of the outstanding hours of UPW, in addition to new orders would prove extremely challenging. Subsequently, in written correspondence to the Cabinet Secretary for Justice and in a position paper published on 16 July, SWS requested that the Scottish Government consider invoking the powers in the Coronavirus (Scotland) Act 2020 to vary the requirement on orders with UPW requirements so that the overall volume of outstanding hours be reduced by 450,000. This position has remained unchanged.

35. Engagement with Police Scotland and victims organisations including Victim Support Scotland, Scottish Women's Aid, Rape Crisis Scotland and ASSIST informed consideration of the risk of reduced reporting of offences around particular offences and potential exceptions to the regulations.

Impact Assessments

36. An Equality Impact Assessment (EQIA), a Child Rights and Wellbeing Impact Assessment (CRWIA) and an Islands Communities Impact Assessment have been completed for this SSI. After careful consideration, it was decided that some of the impact assessments were not required for these proposals. These are: A Fairer Scotland Duty assessment; a Strategic Environmental Assessment (SEA); and a Data Protection Impact Assessment (DPIA).
37. The Fairer Scotland Duty is intended to reduce the inequalities of outcome caused by socioeconomic disadvantage. Varying the amount of outstanding UPW hours that have been given as part of a CPO does not have a direct effect on those living on a low income or those who have little or no accumulated wealth, and will not have any impact on material or area deprivation. In addition, it is advised that if a policy is not strategic, there is no formal requirement for a Fairer Scotland assessment. The SSI proposes a short term intervention to avoid the potential for justice social work services to be overwhelmed post-crisis, rather than outlining a long term, strategic objective. It was therefore decided that a Fairer Scotland Duty assessment was not required.
38. A SEA is normally undertaken when a policy is likely to have significant environmental effects, with the primary aim of the assessment being to offer greater protection to the environment by ensuring public bodies and those organisations consider and address these effects. This assessment is also necessary when there is a risk of the policy decision causing significant environmental damage, such as; flooding; impacts on landscape or loss of important habitat. Varying the number of hours imposed on a CPO does not have any obvious environmental impacts as described above and therefore does not warrant a SEA being carried out.
39. The provisions being taken forward in this legislation will have no impact to the processing of data for the individuals who will be affected by the policy changes involved. If an individual's UPW hours were varied, this would be processed on local information systems by business services or UPW staff in the same way that has already been established for data processing. As this is no different to how information is normally processed, it was concluded that a DPIA was not required.

Financial Effects

40. A Business and Regulatory Impact Assessment (BRIA) has been completed for this SSI. No significant costs are expected and, in reducing UPW or other activity requirements, this eases financial pressure on local authorities who deliver CPOs. However, there will be some marginal administration costs for local authorities in fulfilling notification requirements associated with the regulations. The Scottish Government will not be reducing existing funding of local authorities as a result of these regulations.

Scottish Government
Directorate for Justice
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