

Community Payback and the new National Standards for Criminal Justice Social Work

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This briefing paper begins by tracing the development of the Community Payback Order in Scotland, paying particular attention to how the concept has been defined and conceptualised. The paper offers an interpretation of how Community Payback can, and even should, be understood, and then explores some of the challenges around delivering this vision of Community Payback.

Background

At the same time as the consultation process around the new National Standards for Criminal Justice Social Work was ongoing, the Scottish Government was determining its response to the report of the Scottish Prisons Commission (2008) – ‘Scotland’s Choice’ – and subsequently working through the legislative process that led to the recent passage of the Criminal Justice and Licensing Act 2010. Amongst many other provisions, the 2010 Act introduces the Community Payback Order (CPO) which effectively replaces probation orders, community service orders and supervised attendance orders. Although these two developments (the standards and the 2010 Act) proceeded on parallel tracks, it now becomes necessary to clarify their relationships to one another. The Government is working to produce clear guidance on the CPO; the purpose of this short paper is to offer some clarification of how the concept of ‘payback’ can and should be understood, since this is key not just to the implementation of the standards but to the future of criminal justice social work (and even of sentencing itself).

Payback in ‘Scotland’s Choice’ and in the 2010 Act

The key conclusion and central recommendations of the Prison Commission were these:

‘The evidence that we have reviewed leads us to the conclusion that to use imprisonment wisely is to target it where it can be most effective - in punishing serious crime and protecting the public.

1. To better target imprisonment and make it more effective, the Commission recommends that imprisonment should be reserved for people whose offences are so serious that no other form of punishment will do and for those who pose a significant threat of serious harm to the public.
2. 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: 3, emphasis added).

The idea that we should pursue a parsimonious approach to imprisonment in particular and punishment in general is not novel; indeed, it is similar to the 'minimum necessary intervention' principles often applied in social work with children and families. However, the Commission's remedy for Scotland's over-consumption of imprisonment is innovative in some respects. Specifically, the Commission proposed a range of measures that it considered necessary to enact their second recommendation and make 'paying back in the community' the 'default position' for less serious offenders. Although Scotland's penal history should lead us to question the extent to which the development of sentencing *options* changes sentencing *practices*, many of these measures speak directly to the nature, forms and functions of community sanctions.

The Commission's report seeks to recast both court services and community sanctions around the concept of 'payback', and allows for several ways of paying back – through restorative justice practices, through financial penalties, through unpaid work, through restriction of liberty (meaning in this context electronically monitored curfews) and through 'paying back by working at change'. Working at change in turn is linked to engagement in a wide range of familiar activities that might seem likely to address the issues underlying offending behaviour (work on drug and alcohol issues, money or housing problems, peer group and attitudinal issues, family difficulties, mental health problems and so on). The report also recognises the need for offenders to *opt-in* to rehabilitative modes of reparation; their consent is required for both practical and ethical reasons.

In setting out a process for paying back, the Commission's report suggests a three-stage approach to sentencing. In stage one, the judge makes a judgement about the level of penalty required by the offence with information from the prosecutor and the defence agent. By implication, this is no business of social workers; rather, it is a legal judgement about the appropriate level of penalty required by the offence and with regard to the offender's record. But stage two considers what kind of payback, what form of reparation, is appropriate and this requires a dialogue not just between the judge and the court social worker, but one that actively engages the offender too. Stage three involves checking up on the progress of paying back; here, the report proposes the establishment of a particular kind of court, a progress court, where specially trained judges who understand issues around compliance and around desistance from crime would have mechanisms at their disposal for handling setbacks and lapses without undue recourse to custody. In this model, the progress court would also have the power to reward compliance and positive progress through early discharge or the lightening of restrictions. Clearly this model owes much to the development of problem solving courts in many jurisdictions (see McIvor, 2009).

Though the Scottish Government accepted most of the recommendations contained in 'Scotland's Choice', the Criminal Justice and Licensing Act 2010 is perhaps less radical than the Commission's report. That said, it does include provisions to establish a presumption against short-term prison sentences (of less than 3 months), a Scottish Sentencing Council (to promote consistency, develop policy and improve public understanding of sentencing),

and to introduce new Community Payback Orders (CPOs). The Act did not introduce the 3 stage approach to sentencing discussed above, although it did legislate to allow sentencers to require review hearings in relation to CPOs.

CPOs effectively replace a range of community sanctions (including probation and community service) with a single order, in respect of which judges can choose from a range of conditions relating to supervision, residence, compensation, programmes, unpaid work, drug treatment, alcohol treatment, mental health treatment and conduct requirements. Though this menu is similar to that which applies to community orders and suspended sentence orders in England and Wales, in the title of the order itself the Scottish Government seems to have signalled its acceptance of paying back as the *defining purpose* of community sanctions. Though there is no definition of 'payback' in the Act itself, the operational definition seems to be that suggested in 'Scotland's Choice':

In essence, payback means finding constructive ways to compensate or repair harms caused by crime. It involves making good to the victim and/or the community. This might be through financial payment, unpaid work, engaging in rehabilitative work or some combination of these and other approaches. Ultimately, one of the best ways for offenders to pay back is by turning their lives around (Scottish Prisons Commission, 2008: para 3.28).

Defining and Conceptualising Payback

The definition of 'payback' is clearly an important issue. Around the time of the publication of 'Scotland's Choice', the UK Cabinet Office published a report on 'Engaging Communities in Fighting Crime', which sought solutions to perceived problems of public confidence in criminal justice in general and community penalties in particular (Casey, 2008). Casey proposed the re-branding of community service (already re-branded as 'unpaid work' in England & Wales), this time as 'community payback'. Yet Casey's 'payback' is quite different from the Scottish Prisons Commission's; it centres on making community service more visible and more demanding. She suggests that it should not be something the general public would chose to do themselves (it should be painful or punishing) and that offenders doing payback should wear high visibility vests identifying them as such (it should be shaming). In a recent paper exploring the available research evidence about public attitudes to probation in the light of Casey's recommendations, Maruna and King come to the following conclusion:

'Casey is absolutely right to utilise emotive appeals to the public in order to increase public confidence in the criminal justice system. [. . .] However, if Casey's purpose was to increase confidence in community interventions, then she drew on the exact wrong emotions. Desires for revenge and retribution, anger, bitterness and moral indignation are powerful emotive forces, but they do not raise confidence in probation work -- just the opposite. To do that, one would want to tap in to other, equally cherished, emotive values, such as the widely shared belief in redemption, the need for second chances, and beliefs that all people can change'

(Maruna and King, 2008: 347)

In a recent book entitled 'Payback' (most of which is concerned not with criminal justice but with debt and wealth), Margaret Atwood (2008) begins with an essay on justice in the broadest sense. In it, she deals with the evolutionary origins of our sense of fairness, and argues that our many forms and systems of debt and credit reflect the extent to which human development has relied on cooperation and reciprocities within social groups. In essence, we are offended by offending precisely because it involves cheating on these implicit deals – and gives the cheat an unfair advantage. The offender takes the benefits but avoids the costs of cooperation and reciprocity. In such circumstances, the demand of the victim or of the wider community is a demand for the restoration of balance; the offender needs to pay back for the advantage they have stolen.

But there are two ways to think about paying back – and they are captured to some extent in the differences between the Scottish and Anglo-Welsh versions of the concept. Atwood asks in what sense an imprisoned offender is 'paying his debt to society' when this form of payment yields no obvious return for (and indeed imposes considerable fiscal burdens on) that society. She argues that 'the kind of payment actually meant by "paying for your crimes" usually amounts to vengeance' (p125), linking this to the idea of debts of honour. Intriguingly, she notices that the root of the Latin for revenge ('revindicare') is 'vindicare', which means to justify or rescue or liberate or emancipate. In this sense, she speculates that revenge is intended to free the wronged person from their hurt; to release their vengefulness and 'settle the score'.

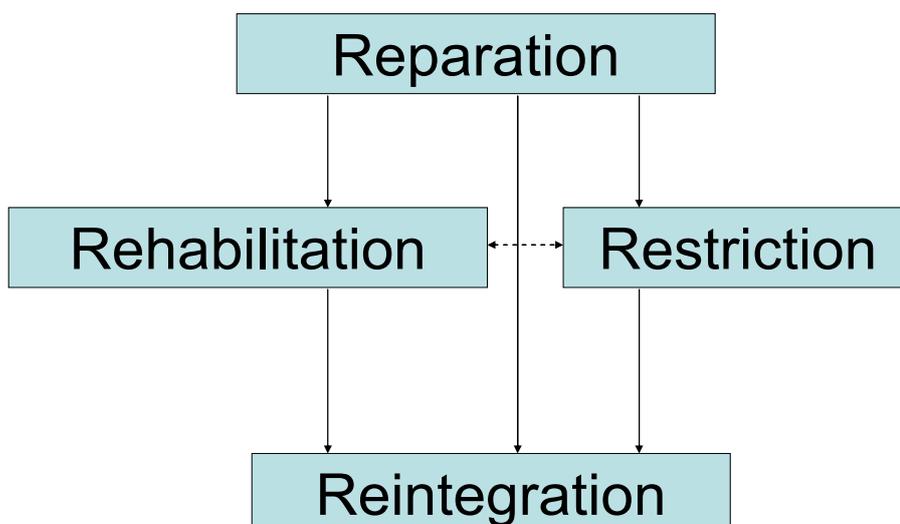
Both here, and in its more common usage, vengeance implies that the debt must be paid in pain – that the advantage must be offset by the offender suffering a disadvantage of some sort – and one that makes us (as victims or as members of the community) *feel* better. But the implication of the Prison Commission's definition of payback is that being paid back in pain is neither the only nor the best way to *feel* better and to restore the balance upset by the offence. Instead, the implication of reparative payback is that the offender must do something constructive either for the victim or for the community; their payback should be through contributing something to the social wellbeing, rather than being compelled to suffer some personal harm. In her brief discussion of imprisonment, Atwood makes the obvious point that: 'Education is a better and cheaper deterrent, community service a better and cheaper moral improver' (p125). The evidence about the usefulness and effectiveness of various forms of sanctioning tends to support her view – as a means of reducing crime, imposing harms on people just doesn't seem to work very well. Requiring people to make a positive contribution on the other hand does seem to offer at least some promise of a better return for society; it is much cheaper to administer as well as yielding better effects; and it might also (given the right circumstances) satisfy the need for 'us' to feel better too.

That said, the difference between retributive (or punitive) payback and reparative payback might seem paper thin to some (including some offenders) because making reparation – even positive reparation -- *does* hurt. Everyone can understand the pain involved in making a sincere apology for a wrong done to a loved one; everyone can understand that the effort involved in work is painful; everyone can understand that making changes to one's life typically involves painful effort too. But it does seem important to recognise the difference between punitive and reparative, or negative and positive payback. It is at least possible to

argue that the latter is (ultimately) good for the offender as well as the victim and the community – and that it respects him or her as a moral agent and human subject who can and should repay a debt and restore their status and position in the community. A deeper and more serious problem perhaps rests in the fact that the persistence of social injustice, and its criminogenic role, begs certain important questions about whether the community, society or state does not also owe something to the offender whose limited life chances have played at least some part in the genesis of his or her offending. If the underlying social contract – the reciprocities and cooperation to which Atwood refers – never really worked for the offender, if they never really were socially integrated or included, then their stake in making reparation (and the moral case for compelling them to do so) is affected.

Payback and the Four ‘R’s

The new National Standards have been crafted around four ‘R’s – Reparation, Rehabilitation, Restriction and Reintegration. Although most of the focus of criminal justice social work (both recently and historically) has been on rehabilitation (more recently cast as a means of reducing the risk of reoffending and protecting the public), the 2010 Act places reparation centre stage. This is not to say that there should be any less clarity about or focus on the pursuit of community safety – but, in theory at least, it does conceptually reframe both sentencing decisions and the implementation of CPOs. By implication, it should mean that the success or failure of CPOs is judged principally in terms of the amounts, types and qualities of the payback delivered by offenders and not in terms of reconviction rates. Reconviction rates ‘sell’ community sanctions on the basis of their role in reducing crime; a focus on reparation ‘sells’ community sanction in terms of delivering justice, as discussed above. Showing that justice has been done – that debts have been settled – should be the measure of reparative sanctions. If this reasoning is sound, then it might imply the following relationship between the four ‘R’s:



Here, the primary purpose is to make reparation – and doing so is a pre-requisite of reintegration and restoration as a citizen or a member of the community. For some people, the most appropriate form of reparation might include rehabilitative activities – ‘paying back by working at change’ – and indeed those activities might also be necessary where criminogenic or social needs represent barriers to reintegration. In some cases, some measure of restriction might also be required. Though this is not reparative in itself, it might be a necessary part of allowing for reparation to take place safely in the community. Equally, in some cases, neither rehabilitation nor restriction will be required – here the reparation might be through apology (though this is not addressed in the Act, it could be a part of creative, restorative practice; for example, within deferred sentences), through financial compensation or through unpaid work.

This shift in thinking – from the rehabilitative to the reparative – will represent a challenge for criminal justice social work, but the line of argument presented above does not seem to be inconsistent with social work values or traditions (so long as the point about the problems created by social injustice is not ignored). Indeed, the emphasis on doing justice – to offenders, victims and communities – and of setting this within a context of proportionality and parsimony – seems highly congruent with those values and traditions. While the infliction of pain on offenders for ‘merely punitive’ (Duff, 2003) purposes is at odds with social work values, the kind of constructive payback outlined above respects the autonomy of the individual and recognises both their capacity to make good and the fact that they may need help in doing so.

That said, a greater challenge may be presented by the work that will be required to ensure that both judges and the wider public recognise and engage with the shift in thinking recommended by the Commission and (it seems to me) enshrined in the 2010 Act. The Commission made some useful recommendations about communication between those passing sentences and those administering them, and about the need for respecting the right of the public to know that paying back was being made a reality within the community. The implementation of the CPO – and of the new standards, may require almost as much work with these constituencies as it does with offenders themselves.

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