SENTENCING ACADEMY

COMMUNITY ORDERS

A review of the sanction, its use and operation and research evidence

Dr Eoin Guilfoyle
Teaching Associate in Law, University of Bristol

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EXECUTIVE SUMMARY

- The Community Order (CO) is one of the non-custodial sentencing options available to magistrates and judges in England and Wales. It allows magistrates and judges to choose between 15 requirements, combining them if needs be, when sentencing a person. The CO can fulfil any of the purposes of sentencing. It was designed to be flexible and capable of being tailored to the individual needs of the person being sentenced.

- The use of the CO has decreased significantly in recent years. The number of COs imposed each year has almost halved (down 46%) over the past decade. When considering the proportionate use of the four main sanctions for more serious offences (fines, COs, Suspended Sentence Orders and immediate custody), it is COs that have experienced, by far, the greatest decline.

- Research studies and reports have identified a range of potential issues and problems with the CO and how it operates and have provided some insight into why the use of the sanction is declining. These include a lack of confidence in COs amongst magistrates and judges, a decline in the use of pre-sentence reports, a lack of information about available services and how they operate, limited availability of some requirements and issues with breach procedures.

- The 'Transforming Rehabilitation' (TR) reforms introduced in 2014, which split the delivery of COs between the National Probation Service (NPS) and Community Rehabilitation Companies (CRCs), have also been criticised in a number of reports. It has recently been announced that the public/private split will be abolished with the NPS to be given responsibility for both the management of offenders and the delivery of unpaid work and accredited programmes. While reports suggest that the TR reforms may have exacerbated some of the issues and problems noted above and therefore may have contributed to the decline in the use of the CO, it is unlikely that they are the sole and root cause of the decline. The decline in the use of the CO and many of the issues and problems identified predate the introduction of the reforms and therefore will likely continue to be a concern after the revised plan has been implemented.

- There are many aspects of the CO that would benefit from additional research. While the research discussed in this paper highlight some potential causes of the reduction in the use of the CO, we still do not have a complete understanding as to why the use of the sanction is declining. Additional research on the factors contributing to the decline and ways to overcome them would be beneficial. Research focusing on identifying different measurements of effectiveness for the CO other than reconviction would also be welcomed. It would also be useful to conduct more research into public knowledge of, and attitudes towards, the community order.

CONTENTS

1. INTRODUCTION

Magistrates and judges have a range of custodial and non-custodial options to choose from when sentencing an individual convicted of an offence in England and Wales. The custodial options are either various forms of immediate imprisonment or a Suspended Sentence Order (technically a custodial sentence served in the community on the condition that the sentenced person complies with any requirements attached to the order and commits no further offences during the period of suspension). The main non-custodial options are a Community Order, a fine or a discharge. This paper considers the use of Community Orders, reviews the recent research evidence relating to their use and identifies gaps in knowledge that require further exploration.

2. A BRIEF HISTORY OF THE COMMUNITY ORDER

The Community Order was introduced by the Criminal Justice Act 2003 and became operational in 2005. The previous 15 years had seen numerous developments and changes to the range of community sanctions available, many of which had been made in a haphazard fashion (Mair and Mills 2009, p. 5). By 2002, there were four main community sanctions available in England and Wales. The Community Rehabilitation Order (with 15 possible requirements that judges could choose from when imposing the sanction); the Community Punishment Order (unpaid work); the Community Punishment and Rehabilitation Order (unpaid work with the option to attach any of the 15 requirements of a Community Rehabilitation Order); and the Drug Treatment and Testing Order. Curfew Orders and Attendance Centre Orders were also available for offenders over the age of 21.

The Criminal Justice Act 2003 sought to increase the 'credibility' of community sentences and make them more appealing to magistrates and judges. It replaced the orders listed above with a single non-custodial sanction called the Community Order (CO). The credibility of community sentences was to be increased by making the new sanction more punitive and more demanding and also by simplifying and rationalising the 'confused array of community penalties that had existed before it' (Mair 2011, p. 222). The legislation also sought to provide magistrates and judges with additional flexibility to better tailor community sentences to individual offenders. The CO allows sentencers to select from a wide range of requirements when sentencing an offender, combining two or more if appropriate, depending on the nature of the offence committed, the need for punishment and the underlying issues that need to be addressed to prevent re-offending. The Criminal Justice Act 2003 also introduced the Suspended Sentence Order (SSO). An SSO is a custodial sentence, but it is served in the community (it is not therefore a non-custodial sentence), and it allows sentencers to impose the same requirements as the CO. A custodial sentence is first imposed and then suspended on

condition that the offender complies with the requirements attached and does not commit another offence during the operational period of the sanction. If abided by, the entire sentence will be served in the community.

More changes were made in 2013 in an effort to further increase the punitiveness of the CO. The Crime and Courts Act 2013 required sentencers when imposing a CO to include at least one requirement for the purpose of punishment, to impose a fine in addition to a CO or to do both, unless there are exceptional circumstances which relate to the offence or the offender that would make it unjust in all the circumstances to do so. Finally, the Offender Rehabilitation Act 2014 replaced the supervision and the specific activity requirements that could have been included as part of a CO with a new requirement called the Rehabilitation Activity Requirement (RAR). It was introduced to allow for greater flexibility in the types of rehabilitative interventions that an offender could engage in and for the precise activity to be determined following a more in-depth assessment after the sentence has been imposed.[1] The Offender Rehabilitation Act 2014 also made major changes to the management and operation of COs by implementing the 'Transforming Rehabilitation' proposals (discussed below).

Over the past 30 years there have been many changes to the range of community sanctions available in England and Wales. Bottoms summarises these changes and the overall policy trend as a move towards: '(i) the introduction of some more 'punitive' orders; (ii) a significantly greater variety in the content of community penalties, and (iii) especially since 2005, a greatly increased scope for mixing different requirements within a single order' (Bottoms 2017, p. 570).

3. THE COMMUNITY ORDER IN 2021

The CO can only be imposed where a person has committed an imprisonable offence.[2] This does not mean that it can only be used as a direct alternative to prison as there are many imprisonable offences that rarely result in a person being given a custodial sentence (for example, low level theft or low level criminal damage). Therefore, the CO can be used in cases where a person has committed an imprisonable offence that does not warrant a custodial sentence (has not passed the custody threshold). It may also be imposed when the offence warrants a custodial sentence (has passed the custody threshold) but the court is of the view that it would be more appropriate to impose a CO. In cases where a custodial sentence is not warranted, the court must only impose a CO where it is satisfied that the offence is serious enough to warrant a CO.[3] If it is not serious enough, then the court should impose a fine or a conditional discharge. In broad terms then, this situates the CO above a fine and below a SSO on the hierarchy of sanctions.

1 For a review of the RAR see HM Inspectorate of Probation (2017).

2 Section 202 of the Sentencing Code.

3 Section 204 of the Sentencing Code.

A CO is made up of one or more of the following requirements:[4]

- *unpaid work requirement (40 – 300 hours to be completed within 12 months)*
- *rehabilitation activity requirement (The court does not prescribe the activities to be included but will specify the maximum number of activity days the offender must complete).*
- *programme requirement*
- *prohibited activity requirement (must refrain from participating in specified activities for up to 3 years)*
- *curfew requirement (2 – 16 hours in any 24 hours; maximum term 12 months)*
- *exclusion requirement (from a specified place/places; maximum period 2 years: may be continuous or only during specified periods)*
- *residence requirement (to reside at a place specified or as directed by the responsible officer)*
- *foreign travel prohibition requirement (not to exceed 12 months)*
- *mental health treatment requirement (may be residential/non-residential; must be by/under the direction of a registered medical practitioner or chartered psychologist and the offender must have expressed willingness to comply).*
- *drug rehabilitation requirement (treatment can be residential or non-residential, reviews must be attended by the offender at intervals of not less than a month (discretionary on requirements of up to 12 months, mandatory on requirements of over 12 months) and offender's consent is required)*
- *alcohol treatment requirement (residential or non-residential; offender's consent is required)*
- *alcohol abstinence and monitoring requirement (up to 120 days)*
- *attendance centre requirement (12 – 36 hours. Only available for offenders under 25).*
- *electronic compliance monitoring requirement*
- *electronic whereabouts monitoring requirement*

A CO must include at least one of the above requirements for the purpose of punishment or a fine must be imposed in addition to the CO or the court can do both. It is a matter for the court to decide which requirements amount to a punishment in each case (Sentencing Council 2017). Before imposing a CO or a custodial sentence, the court is required to request a pre-sentence report (PSR) unless it is of the opinion that a report is unnecessary in all the circumstances of the case (for example, where legislation requires the court to impose a custodial sentence or where the court intends to impose a lengthy custodial sentence).[5] A PSR is prepared by the National Probation Service and can be delivered in writing or orally. It provides information about the offender, their offence and the likelihood of reconviction. It is intended to assist sentencers in deciding whether to impose a CO and, if so, which requirements would be most suitable.

Once a person has been sentenced to a CO they must comply with/complete all of the attached requirements. If they do so, then the CO will be deemed completed and will end. If, however, a

4 Section 201 of the Sentencing Code. See also Sentencing Council (2017).

5 Sections 30-37 of the Sentencing Code. See also Sentencing Council (2017).

person fails to comply with any of the requirements or commits a further offence while serving a CO, breach proceedings may be initiated. If a court finds that a person has failed to comply with a requirement without reasonable excuse it may make amendments to the CO (add additional requirements), impose a fine or revoke the CO and resentence the person for the original offence. If convicted of another offence while serving a CO, then the court can revoke the CO or revoke the CO and resentence the person and impose a sentence for the new offence.[6]

Transforming Rehabilitation

'Transforming Rehabilitation' (TR) is the name given to a series of reforms that were put forward in a consultation document in 2013 (Ministry of Justice 2013a) and which were introduced in the Rehabilitation of Offenders Act 2014. The reforms made significant changes to the management and operation of COs. Prior to the Act, COs were delivered by 35 self-governing Probation Trusts, operating under the direction of the National Offender Management Service (NOMS). The Offender Rehabilitation Act 2014 changed this by dividing up the delivery of COs. The Act created a new public body called the National Probation Service (NPS) and gave it responsibility for advising the courts (risk assessments and pre-sentence reports) and responsibility for managing offenders who 'pose the greatest risk of serious harm to the public' (Ministry of Justice 2013b, p. 4). The Act also provided for the creation of Community Rehabilitation Companies (CRCs) - private and/or third sector organisations - and assigned them responsibility for delivering COs for medium and low risk offenders. A payment incentive scheme was set up for CRCs that was heavily focused on reducing reoffending. The aim was to give 'providers flexibility to do what works and freedom from bureaucracy, but only paying them in full for real reductions in reoffending' (Ministry of Justice 2013b, p. 6).[7]

Following the roll out of the TR reforms, a number of reports were critical of the changes and of how COs and other probation services were being delivered (National Audit Office 2016; HM Inspectorate of Probation 2016; House of Commons Committee of Public Accounts 2016; House of Commons Justice Committee 2018; National Audit Office 2019; HM Inspectorate of Probation 2019; House of Commons Committee of Public Accounts 2019). Concerns were raised about the effectiveness of the reforms in bringing about the 'rehabilitation revolution' that was promised and in 2018 the House of Commons Justice Committee recommended that the Ministry of Justice should initiate a review into the long-term future and sustainability of delivering probation services under the models introduced by the TR reforms (2018, p. 74).

On 16 May 2019, the then Justice Secretary David Gauke announced the TR model would undergo major changes and the public/private split would be significantly altered. The new proposed model would see the NPS take responsibility for all offender management. Each NPS region would then have an 'Innovation Partner' (from either the private or voluntary sector) which would be responsible for the direct provision of unpaid work and accredited programmes.

6 See Schedule 10 to the Sentencing Code.

7 See also House of Commons Justice Committee (2018), pp. 16-17.

Further changes were announced in June 2020. Under the revised plans, the competitive process for probation delivery partners would end with current Justice Secretary Robert Buckland stating: 'The delivery of unpaid work and behavioural change programmes will instead be brought under the control of the NPS alongside offender supervision when the current CRC contracts end in June next year' (HC Deb 11 June 2020). In essence, the public/private split would be abolished and the NPS will be given responsibility for both the management of offenders and the delivery of unpaid work and accredited programmes. The revised plan does still provide opportunities, under a new 'Dynamic Framework', for specialist and voluntary third party providers to tender for and deliver a range of services and programmes needed by the probation system. It would appear that the 'Dynamic Framework' will be used to procure specialist services and programmes in response to local needs (HM Prison and Probation Service 2020, p. 8) but will be done under the management of the NPS.

Recent years have seen considerable changes to the probation system in England and Wales and to the management and delivery of COs and these changes have been heavily criticised. More changes are due to take place over the next 18 months, some of which reverse previous reforms (the public/private split). Whether or not these changes will achieve their intended outcome of reversing the negative effects of the TR reforms and further enhancing the CO remains to be seen. Much will depend on how the current proposed plans are implemented.

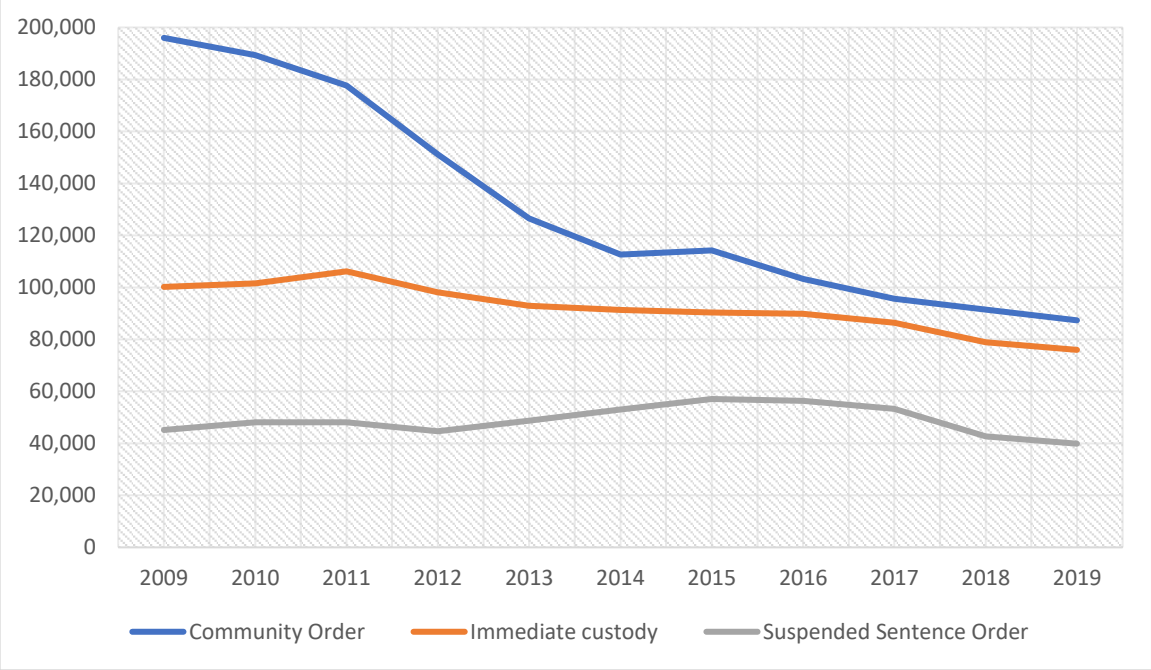
4. TRENDS IN THE USE AND OPERATION OF THE COMMUNITY ORDER

Use of the CO

The most significant trend to note is that the number of COs imposed each year has almost halved (down 46%) over the past decade (Ministry of Justice 2020a). During this same period, SSOs have declined by 11% and the use of immediate custody has decreased by just over 20% (Ministry of Justice 2020a).[8] These changes have occurred during a period (2009-2019) when the overall number of sentences imposed on adults has fallen by nearly 12% (Ministry of Justice 2020a).

8 These figures were obtained by using the Sentencing Tool, available at: https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2019. During this time, fines have remained relatively stable.

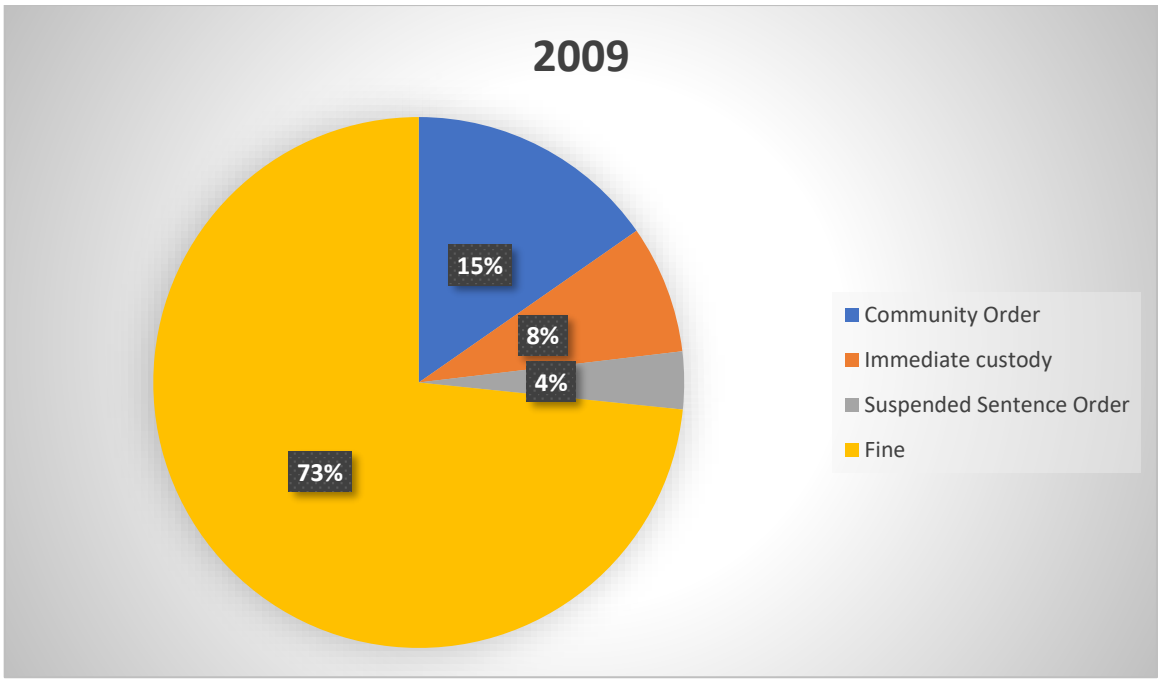
Figure 1: The use of Community Orders, immediate custody and Suspended Sentence Orders, 2009-19[9]

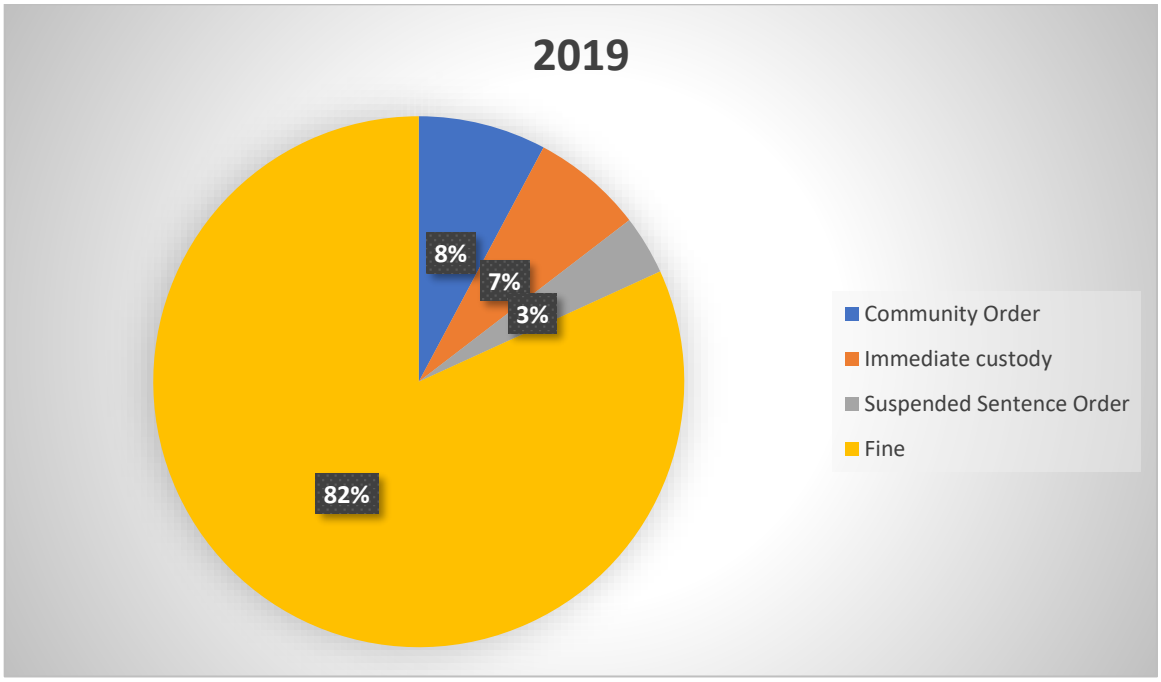


As is demonstrated by Figure 2 below, when considering the proportionate use of the four main sanctions for more serious offences (fines, COs, SSOs and immediate custody), it is COs that, in particular, have declined in recent years. Whilst the proportionate use of SSOs and immediate custody remained roughly constant between 2009 and 2019, the proportionate use of COs has approximately halved with the use of fines appearing to increase at the expense of COs.

9 Ministry of Justice (2020) *Criminal justice system statistics quarterly: December 2019*, Overview Table Q5.3.

Figure 2: The proportionate use of Community Orders, immediate custody, Suspended Sentence Orders and fines, 2009 and 2019[10]



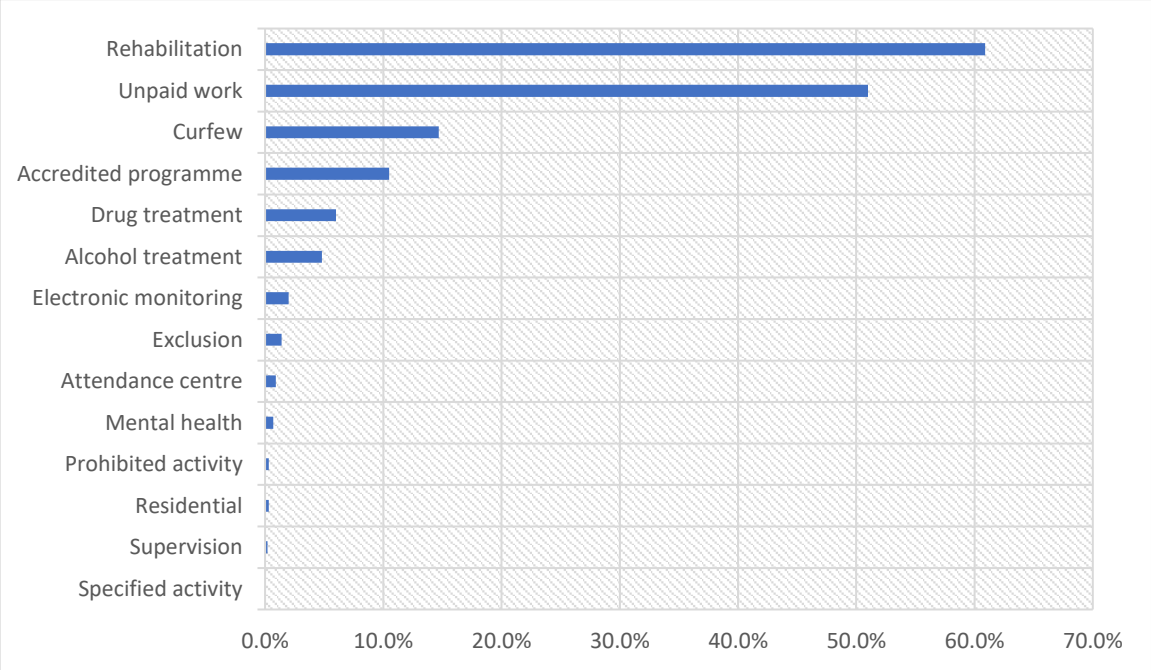


10 Ministry of Justice (2020) *Criminal justice system statistics quarterly: December 2019*, Overview Table Q5.3. Excludes discharges, compensation and 'otherwise dealt with'.

Requirements attached to a CO

The average (mean) number of requirements attached to a CO has dropped slightly from 1.7 in 2009 to 1.6 in 2019 (Ministry of Justice 2020b). As seen in Figure 3 below, the most common requirement attached to a CO in 2019 was the RAR. It was attached to 61% of COs that commenced during the year. Unpaid work was the second most common requirement at 51%. Curfews have increased in use by 3% since 2010. They were attached to 14.7% of COs that commenced in 2019. The use of accredited programmes has reduced from 15% in 2010 to 10% in 2019. Drug treatment was attached to 6% of the orders in 2019, down from 8% in 2010. Alcohol treatment has remained at close to 4% throughout the last decade (Ministry of Justice 2020b). The mental health requirement was used in just 0.7% of CO in 2019, up slightly from 0.6% in 2010.[11]

Figure 3: Relative frequency of requirements, 2019[12]



Pre-sentence reports

The Centre for Justice Innovation conducted a study on the use of pre-sentence reports (PSR) in 2018. Two findings, in particular, are worth noting here. The first is that the number of PSRs produced declined by a third between 2012/13 and 2017/18 (Centre for Justice Innovation 2018, p. 7). The decline in the production of PSRs continued in 2019 (Ministry of Justice 2020b). The second is that the method of delivering PSRs has changed significantly (Centre for Justice Innovation 2018, p. 7). There has been a move towards more 'fast delivery' reports, in particular oral PSRs. The use of standard delivery pre-sentence reports fell by 93% between 2013 and 2019 (Ministry of Justice 2020b). In 2019, 53.3% of PSRs were oral fast delivery reports, 43.4% were written fast delivery reports and 3.2% were standard delivery reports (Ministry of Justice 2020b).

11 For full breakdown see Ministry of Justice (2020) *Offender management statistics quarterly: October to December 2019, Probation: 2019*, Table A4.9.

12 Ministry of Justice (2020) *Offender management statistics quarterly: October to December 2019, Probation: 2019*, Table A4.9.

Commencement of COs

A study by the Ministry of Justice found that delays in starting requirements were uncommon but were an issue for some requirements in particular (Cattell et al. 2014, p. 3). The vast majority of supervision sessions (97%), unpaid work attendances (84%) and drug rehabilitation requirements (80%) started within one month of the commencement of the CO. However, for accredited programmes, only 4% started within a month and 36% started 6 months after the CO had been imposed. Overall, the report noted that one-fifth of offenders surveyed said that they were waiting for an element of their CO to start four months after their sentence had commenced (Cattell et al. 2014, p. 19). Another study conducted by the Centre for Social Justice found that starting times varied substantially between regions (2014, p. 25). Both studies were conducted prior to the TR reforms.

Completion and termination of COs

In 2019, 69% of COs were successfully completed (63% ran their course; 6% were terminated early for good progress). This figure is up from 64% in 2009. Furthermore, 15% of orders were terminated for failing to comply with a requirement in 2019, 12% were terminated due to the person being convicted of a further offence during the operating period of a CO and 4% were terminated for some other reason (Ministry for Justice 2020b).

5. KEY ISSUES

Research reports have identified a range of issues and problems with the CO and provide insight into why some of the trends described above are occurring. This section will highlight and discuss some of the key issues identified in these studies.

Significant decline in the use of the CO

As noted above, the use of the CO has nearly halved over the last decade. A significantly lower proportion of the people who were sentenced in 2019 received a CO than those sentenced in 2009. The decline in the use of the CO has been highlighted as a concern in a number of reports (Crest 2017; Centre for Justice Innovation 2018, House of Commons Justice Committee 2018). In April 2018, the then Chairman of the Sentencing Council, Lord Justice Treacy, wrote to sentencers to express concerns that SSOs may have become viewed as being a more severe form of community sentence and to caution against inappropriately using SSOs as an alternative to COs.[13]

One of the primary reasons for concern at the declining use of COs is that the CO, as well as being a sanction in its own right, is also one of the main alternative sanctions to prison. If the use of COs is

13 Available here: https://www.sentencingcouncil.org.uk/news/item/chairmans-letter-to-sentencers-on-imposition-of-community-and-custodial-sentences/.

declining, then so too is its ability to divert people away from short-term prison sentences.[14] COs are generally less disruptive and have a greater potential to address offenders' criminogenic needs and reduce the likelihood of reoffending. It has consistently been shown that rates of reoffending are lower for those sentenced to a community sentence than they are for those sentenced to a short-term prison sentence (Ministry of Justice 2013c; Mews et al 2015; Hamilton 2021). Recent figures put the reoffending rate for community sentences[15] at 32.5% while the rate for those who were sentenced to a custodial sentence of six months or less is 64.8% (Ministry of Justice 2020c, p. 10).[16] COs are also far cheaper than prison sentences (House of Commons Justice Committee 2018, p. 48).

Up-tariffing

While concern has been raised about the sharp decline in the use of the CO it would be an oversimplification to simply say that the use of the sanction needs to increase. Whenever there is an effort to increase the use of a non-custodial sanction there is a risk that up-tariffing will occur and it is possible that a greater use of COs would come at the expense of fines (i.e. a lesser disposal) rather than as an alternative to imprisonment.

There is evidence to suggest that up-tariffing has occurred in the past (Hough et al. 2003; Mair 1997; 2004; Mair and Mills 2009; Mair et al. 2011; Mills 2011; Morgan 2003; Salomon and Silvestri 2008). While some of these studies are now dated, there is no reason to think that up-tariffing will no longer be an issue. If the Government's proposed plans achieve one of their intended outcomes and the use of the CO increases, it would be important that the increase does not come about as a result of lower-level offenders receiving a CO (i.e. those who are currently receiving a fine or a discharge).

Lack of confidence in the CO

One of the reasons highlighted for the reduction in the use of the CO is a possible lack of magisterial confidence in the sanction. A recent survey found that over a third of magistrates (37%) were not confident that community sentences are an effective alternative to custody, two-thirds (65%) were not confident that community sentences reduce crime and 45% were not confident that community sentences effectively rehabilitate offenders (Crest 2017, pp. 42-55). The report suggests that the lack of confidence is as a result of long-term structural issues that were exacerbated by the TR reforms (Crest 2017, p. 42). Some of the factors contributing to the lack of confidence identified in the report include: a lack of information provided to magistrates about provisions available in their area and how they operate; the reduced quality of advice in PSRs; the inflexibility of the TR model to tailor provision to local needs; and problems relating to the enforcement of breaches.

A lack of confidence amongst magistrates and judges in community sanctions is not new. In the past, however, efforts to address this have focused on making community sanctions more punitive. Bottoms (2017) however, has highlighted that the most recent efforts to make COs more punitive have largely been resisted by magistrates and judges. He notes that the use of requirements that

14 Almost half (46%) of sentence admissions during 2019 were for short sentences of six months or less (Ministry of Justice 2020b, p. 4).

15 Defined here as Community Orders and Suspended Sentence Orders, notwithstanding that SSOs are technically a custodial sentence.

16 Caution should be exercised when comparing reconviction rates between sanctions. These figures do not control for many important variables.

are generally regarded as being 'punitive' have not changed significantly since the introduction of legislation requiring courts when sentencing a defendant to a CO to include at least one requirement imposed for the purpose of punishment, or impose a fine in addition to the CO, or to do both. This would appear to support the findings in the Crest report that the solution to addressing confidence in the CO amongst magistrates and judges is not to continue to make it more punitive but rather to address the structural issues relating to the operation of the CO.

The declining use of pre-sentence reports

As noted above, the use of pre-sentence reports has decreased significantly and the method of delivering reports has also changed. The changing method of delivery is a result of a policy decision. A review of Efficiency in Criminal Proceedings by Sir Brian Leveson concluded: 'that time and resources are frequently being wasted as a consequence of the practice of adjourning the sentencing hearing so that the Probation Service can prepare a pre-sentence report ('PSR') for cases that do not require a PSR or when an oral report would suffice' (2015, p. 43).

The National Probation Service, in its Operating Model, set a target to have 90% of reports delivered orally on the same day or fast delivery written reports and the remaining 10% to be standard delivery reports, written and delivered within 14 days (National Probation Service 2016, p. 9). In 2019, only 3.2% were standard delivery reports.[17] A report by the Centre for Justice Innovation suggests that the changing method of delivery of reports could be contributing to the overall reduction in the use of PSRs:

'Some sentencers suggested that PSRs were less useful than had previously been the case either due to the increased number of reports being written by less qualified Probation Service Officers (PSOs) or the move to less comprehensive oral reports (though overall sentencers welcomed oral reports). While they were not certain this would mean that sentencers would proceed with the case without a PSR, they could not discount the idea.' (Centre for Justice Innovation 2018, p. 9)

The report also cautiously concludes that reduced use of PSRs seems to be a driver of the declining use of community sentences.

The Crest study (2017) having conducted interviews with probation staff suggests the move to fast delivery reports, combined with the TR reforms and the lack of resources, are affecting the quality of reports which may in turn affect how and when the CO is used:

'Many [probation staff] held the view that the changing nature of PSRs meant that they now lack detail, which could mean that requirements being handed out as a result of report recommendations are not always appropriately tailored to the individual offender. Some participants felt that these effects had been exacerbated by TR, with NPS staff lacking the time/resources to draft PSRs of the requisite quality and detail. As a result, offenders were increasingly being handed a community sentence that would not address the root causes of their behaviour, would not allow probation to effectively do their job, and result in the offender coming back in front of the courts. Whilst efficiency

17 Ministry of Justice (2020) *Offender management statistics quarterly: October to December 2019*, Probation Table 4.10.

and speed are to be sought after in the delivery of justice, it is not evident that the appropriate balance with quality has been struck.' (Crest 2017, p. 48)

The provision of information

A lack of information about available services and how they operate has been highlighted as an issue in a number of reports and studies. Under the TR reforms, CRCs were responsible for commissioning most of the services and were then to provide information about the services to NPS court staff via a rate card.[18] The Centre of Justice Innovation found that the NPS court staff who participated in their research had widely divergent knowledge of the interventions available:

'Some had received specifically adapted rate cards which provided information about the nature of services available for a range of needs and how to access them. Others had never seen a rate card and had no direct knowledge of CRC services. This meant that those officers felt that they were making recommendations to the court blind to the actual detail and quality of the supervision the offender will be required to undertake. A lack of information about programming undermines the capacity of NPS court staff to be specific about the content of proposed requirements within an order, leaving sentencers without a clear picture of what an order will look like in practice.' (Centre for Justice Innovation 2018, p. 11)

If NPS staff are not fully aware of programmes and services in their area and how they operate then neither will sentencers. A survey of magistrates conducted as part of the Crest study found that 47% of participants felt they did not have sufficient information about requirements operating in their area (2017, p. 44). As noted by Heard (2017) the ability of sentencers to impose an individualised sentence depends greatly on the information provided to them and this includes information on available services and treatments in their area.

Even where sentencers do not have a role in deciding the specific activity (for example, under a RAR), a lack of information about what services/activities will form part of the requirement and how they will operate can negatively impact sentencers' confidence in the requirement and in the CO generally. A survey conducted by the Magistrates Association found that almost three-quarters of magistrates that responded said 'they did not receive enough information about what offenders will do when serving a RAR' (cited in HM Inspectorate of Probation, 2017, p. 21). The impact of this information deficit can be seen from another response in the same survey: 29% of magistrates highlighted a lack of information about the content of orders as a cause of declining confidence in community sentences (cited in Centre for Justice Innovation 2018, p. 11).

Low use of some requirements

In 2019, four requirements (RARs, unpaid work, curfews and accredited programmes) made up 89% of the requirements used as part of a CO (Ministry of Justice 2020b, Probation Table 4.4). The other nine requirements are rarely used. The low use of some requirements, in particular drug, alcohol and mental health treatment, have been highlighted as a concern for many years (Mair et al. 2007; National Audit Office 2008; Mair 2011; Centre for Social Justice 2014; Heard 2015; Centre for Justice

18 The rate card lists the available services in each area, along with the criteria for accessing each service and the cost.

innovation 2018). Mair identified some possible reasons for this pattern, such as a lack of availability of treatment services, a lack of knowledge on the part of the sentencer, a lack of knowledge on the part of the PSR writer, a desire of probation staff to work within their comfort zone, confusion on the part of sentencers and probation officers as a result of the potential duplication of some requirements, uncertainty about how some requirements are monitored, problems in assessment and specific organisational problems relating to some requirements (2011, pp. 225-226).

The Centre for Justice Innovation suggested that a likely driver of the trend is the lack of availability of services due in part to insufficient funding for drug, alcohol and mental health treatment in England and Wales (2018, p. 12). There is some supporting evidence for this suggestion in a report by Independent Advisory Panel on Deaths in Custody and the Magistrates Association (2019, p. 18). As part of the study, magistrates were asked if they had specific mental health services they could use as part of a sentence in the community. Out of the 28 respondents, 12 said 'no' and 11 said that they did not know. A previous report by the National Audit Office had found that the availability of treatment requirements varied substantially between probation areas (2008, p. 5).

An explanation for the recent decline in treatment requirements can be found in a review conducted by HM Inspectorate of Probation, which concluded that treatment requirements were being displaced by the RAR:

'The increasing proportion of cases assessed and sentenced on the day coupled with workload pressures meant that staff did not always have time for the more detailed assessments necessary for some other requirements. As a result there may have been a tendency to propose RARs in preference.' (HM Inspectorate of Probation 2017, p. 9)

The report by the Centre for Justice Innovation also noted that some of the recent decline may be as a result of displacement by the RAR, however, it highlighted that there may be some positives to the RAR being used in this way (2018, p. 12). While the RAR is not meant to be used in place of treatment, some of the National Probation Service stakeholders interviewed as part of the study suggested that for the drug treatment requirement in particular, there 'were some cases where drug treatment delivered through a RAR could be preferable. A RAR, it was noted, allowed drug treatment to be integrated into a flexible and evolving package of support' (Centre for Justice Innovation 2018, p. 13). HM Inspectorate of Probation also noted that using the RAR in this way does not inevitably lead to a less appropriate or effective intervention; however, they went on to state:

'This presumes, however, that the number of activity days ordered is sufficient, and moreover that a CRC can provide the programme and is willing to do so at the fee for RAR placements, which is substantially lower than the fee for accredited programmes. We saw little evidence of this in practice.' (HM Inspectorate of Probation 2017, p. 21)

It is natural that some requirements will be used more than others. What is important, however, is that all of the requirements are available to sentencers. COs were introduced to provide flexibility,

to allow magistrates and judges to choose from a wide range of requirements in order to provide them with an ability to tailor sentences to individuals and their needs. If some requirements are not available or sentencers are not made aware of them, then the CO loses many of its key benefits: its flexibility, its ability to be tailored to the individual being sentenced and its potential ability to address the root causes of a person's offending behaviour.

Enforcement/breach procedures

Getting the enforcement/breach procedures right is hugely important. The procedures need to be robust enough so that sentencers have confidence that the sanction will be carried out and enforced as intended. However, if they are too strictly enforced it can undermine confidence in the sanction due to a high number of individuals being returned to court. This would also go against one of the regularly stated goals of the CO: reducing prison admissions. This is particularly true if up-tariffing has occurred. Hearnden and Millie have further argued that 'vigorous enforcement is not necessarily synonymous with effective enforcement' (2004, p. 48). The goal should be effective enforcement.

In recent years, HM Inspectorate of Probation has identified a number of issues with enforcement/breach procedures, primarily in CRCs. In 2016, they reported that a number of officers working in CRCs had said that they had been told not to recommend 'revoke and resentence', because it would lead to a financial penalty for the CRC (HM Inspectorate of Probation 2016, p. 20). In a report on the implementation and delivery of RARs, the Inspectorate found that one third of those who had not complied with their order were not returned to court for breach or violation of the order when they should have been (HM Inspectorate of Probation 2017, p. 41). The report also highlighted some dissatisfaction and concern amongst magistrates and judges about an apparent reduction in the number of breaches appearing before the court (HM Inspectorate of Probation 2017, p. 42). In 2018 the Inspectorate published a Thematic Inspection of enforcement and recalls. In the report it found enforcement decisions in CRCs 'tended to be formulaic rather than properly considered' (HM Inspectorate of Probation 2018, p. 20). It stated that 'CRCs did not sufficiently explore the causes of non-compliance when considering enforcement action. They did not consider alternative means of securing compliance in enough cases and rarely considered or undertook home visits' (2018, p. 20). In the same report the Inspectorate found enforcement decision-making in the NPS to be 'good' (2018, p. 25).

Summary

The research indicates that the TR reforms have contributed to many of the problems that have been highlighted in this section. With the Government's plan to reverse many of the reforms there may be some improvements in some of the areas discussed above. However, it is also clear from the research that the TR reforms are not the root cause of all of the issues. There were issues and concerning trends prior to the reforms. In order to enhance the use and operation of the CO, rather than just returning it to the way it was, it is likely that these issues would need to be examined in more detail and specific action taken to address them.

6. RESEARCH PRIORITIES

Many aspects of the CO would benefit from additional research. While the research discussed above highlights some potential reasons for the reduction in the use of the CO, we still do not have a complete understanding of why the use of the sanction is declining. Of course, it is most likely that it is not just one or two factors causing the decline but rather a wide range of factors, some of which are likely to be interconnected. Additional research identifying and analysing these factors and finding ways to address them would be beneficial. Another area of interest is whether and to what extent there are variances in the use (and experience) of the sanction between urban and rural areas and, if variances do exist, to gain insight into the reasons for this and how they can be overcome.

Research should focus on identifying different measurements of effectiveness for the CO other than reconviction rates and to evaluate the CO using these new measurements. This includes, in particular, an examination of each requirement that may be attached to a CO to determine the effectiveness of the individual options (and combinations of options) open to sentencers. When discussing the effectiveness of COs, the focus tends to be solely on reconviction rates and possibly also noting that it is cheaper than prison. However, reconviction rates do not capture all of the potential benefits of COs. The limitations of using reconviction rates as a measurement of effectiveness are succinctly summarised by Heard:

'looking at effectiveness purely on the basis of reconvictions omits much of the positive impact that good supervision (and the effective use of alternatives to custody more broadly) can have for individuals, families and wider society. It fails to recognise the distance often travelled by individuals who have been involved in the criminal justice system and have benefited from an intervention that does not involve prison. Such benefits can include better employment prospects and improved health. Measures that focus only on reconviction rates fail to reflect the fact that some offenders may offend far less frequently, or commit far less serious offences, than if they had been sentenced to immediate custody.' (2015, p. 40).

Having a broader and more comprehensive range of measurements would allow for a much greater understanding (amongst sentencers, policy makers and the public) of the CO and its outcomes.

Finally, it would be useful to conduct more research into public knowledge of, and attitudes towards, the CO. The flexibility of the CO and the wide range of potential requirements may make it a difficult sanction for the public to locate on a scale of severity. Research has demonstrated that the public tend to underestimate the severity of current sentencing practice,[19] and it is possible that people assume most COs carry minimal requirements. If COs are perceived to be a lenient sentencing option, public support for their use may be undermined. Since there has been little recent research examining public attitudes to COs, this is a research priority. Researchers should explore the

19 See Chapter 5 in Roberts and Hough (2005) for a discussion of relevant research.

accuracy of public knowledge of COs, and the level of support for using the CO more frequently as an alternative to short prison sentences.

7. CONCLUSION

The CO is one of the principal non-custodial options available to sentencers. It can be imposed in cases where a custodial sentence is not warranted as well as in cases where the custody threshold has been passed, but due to the circumstances of the case the court is of the view that it would be more appropriate to impose a CO. It was designed to be flexible and capable of being tailored to the individual being sentenced. In recent times, however, the use of the sanction has declined significantly. This paper reviewed recent research studies and reports and highlighted some issues and problems with the sanction that have been identified in these studies and reports which may be contributing to the decline. These included the lack of confidence in the sanction amongst sentencers, the reduction and changing nature of PSRs, the provision of information, the low use and availability of some requirements and issues with enforcement/breach procedures. It also highlighted some areas where additional research would be beneficial, in particular identifying new measurements of effectiveness for the CO other than reconviction rates and conducting more research into public knowledge of, and attitudes towards, the CO.

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