

Problem Solving Judicial Practice in Alloa Sheriff Court

Sheriff David N Mackie

This short paper starts from the premise that the merits of a problem solving approach in appropriate cases are understood and accepted. The recommendation of the **Angiolini Commission on Women Offenders**¹ in this regard and its acceptance by the Scottish Government provide a sufficient reference point for the present discussion.

The purpose of this note is to demonstrate how, within the present criminal justice structures in Scotland, it is possible to adopt an effective problem solving approach in individual cases without the need for significant capital investment and without any material resource implications, at least for the Courts.

The Legislature has created a receptive environment for the application of problem solving techniques by the creation of the Community Payback Order ('CPO')². Part of the thinking behind the policy of restructuring community based court disposals was that they should be relevant, that is to say, the penalties should be ones which "take opportunities to rehabilitate offenders by addressing underlying issues and helping them to move towards a crime-free lifestyle".

Community Payback Order

The CPO is a single order or disposal available to the Court where a person has been convicted of an offence punishable by imprisonment; it is expressly an alternative to custody³. The order may contain one or more requirements selected from a menu of nine possible components, namely⁴:

¹ <http://www.scotland.gov.uk/Resource/0039/00391828.pdf> The Part 6 discussion on Sentencing goes beyond gender issues affecting women offenders and provides a commendably aspirational model for a constructive community based system of criminal justice.

² **Criminal Procedure (Scotland) Act 1995 ss. 227A – 227ZN**; See the Scottish Government's 2007 report **Reforming and Revitalising: Review of Community Penalties** which recommended a single community sentence to replace the existing probation orders, community service orders, supervised attendance orders and community reparation orders.

³ **1995 Act s.227A(1)**

⁴ **1995 Act s.227A(2)(a) – (i)**

- an offender supervision requirement;
- a compensation requirement;
- an unpaid work or other activity requirement;
- a programme requirement;
- a residence requirement;
- a mental health treatment requirement;
- a drug treatment requirement;
- an alcohol treatment requirement;
- a conduct requirement.

The order may be used *in tandem* with a restriction of liberty order ('RLO')⁵.

The scope and extent of a CPO is limited only by the statutory requirements, the imagination of the Criminal Justice Social Workers and Sheriff, and the resources available for use within the order through the local Criminal Justice Social Work Department or local Third Sector organisations. Thus, for example, it is possible to devise an incentivising, reducing RLO, combined with a CPO containing an element of unpaid work and Sheriff reviews. This would comprise:

- a RLO with a curfew of say 8:00 p.m. to 5:00 a.m. every night in the first month, the same hours Thursday to Sunday the second month and 10:00 p.m. to 5:00 a.m. Friday and Saturday only the third month;
- a Supervision Requirement for say 18 months;
- unpaid work of say 100 hours within three months; and
- regular reviews by the Sheriff.

The recipient of such an order 'walking free from the Court' would probably defy any suggestion that it was a soft sentence compared to custody but if that person wanted to make changes in their life to take them away from offending they would stand a very good chance of achieving that through a CPO and certainly a better chance than would be likely through a short custodial sentence. A residence requirement, treatment requirement for drugs, alcohol or mental health or programme requirement e.g. for domestic violence or sexual offending

⁵ 1995 Act s.245D

might be added depending upon the nature of the offending and the availability of resources within the area of the Court. If the offence was associated with the offender's attendance at a particular property such as his former partner's, a shop or licensed premises the RLO could be adapted to include an exclusion from those places as the technology associated with remote monitoring of offenders lends itself to such variations.

Drug Treatment and Testing Orders

The problem solving approach to crime was first exemplified with the introduction 15 years ago of the drug treatment and testing order ('DTTO') in September 1998⁶. The underlying proposition was that if a person's offending was directly linked to a problem of drug addiction then by addressing the drug problem the crime would also be addressed. A key element to such orders which typically last two years is the regular, commonly monthly, review by the Sheriff. The research and practice, mainly in the USA, which preceded the introduction of DTTO's in Scotland disclosed that the direct contact between the offender and the sentencing judge contributed significantly to the offenders' commitment and adherence to the order and a reduction in the likelihood of recidivism. Some Sheriffs and Judges balk at the notion of a relationship between the sentencing judge and the offender but the consequence of regular reviews before the same Sheriff over a two year period is the formation of a relationship with feelings of responsibility and accountability in the offender, a desire not to let the Sheriff down. Another important by-product is the discipline for the supervising Social Worker and Drug Workers to produce regular reports for the Court and a matching desire to report progress.

Progress Reviews

The experience of DTTO's and the importance of Sheriff reviews in their success led practitioners and policy makers to consider that similar reviews within community based orders other than DTTO's would be likely to have a similarly beneficial effect. This notion was verified by the experience of the Youth Court pilots in Hamilton and Airdrie Sheriff Courts⁷. The legislators and those advising them on policy had the foresight to take the opportunity in the drafting of the **Criminal Justice and Licensing (Scotland) act 2010** to

⁶**1995 Act s.234B** introduced by the **Crime and Disorder Act 1998 s.89** with effect from 30 September 1998.

⁷See [Youth Court Evaluation 2006](#) led by Gill McIvor . The loss in 2005 of the ability to arrange review hearings was a matter of regret among Sheriffs and Criminal Justice Social Workers although this was later addressed by the insertion of **s.229A** in the **Criminal Procedure (Scotland) Act 1995** by **s.12** of the **Management of Offenders (Scotland) Act 2005 (asp 14)** with effect from 8/2/06

empower Sheriffs to include periodic progress reviews of CPO's. The review process has proved to be an important feature in the operation of these orders. The **Angiolini Commission** reported that it heard from Sheriffs who saw the review process as a necessary and effective tool in appropriate cases⁸. The importance of the continuity of contact with the same sentencing Sheriff has also been recognised so that in some larger Courts the business is managed to ensure that happens.

It is provided by **section 227X** of the **Criminal Procedure (Scotland) Act 1995** that;

“(4) A progress review is to be carried out in such manner as the court carrying out the review may determine.”

Whether by accident or design the Sheriff has been given the widest possible scope to exercise his discretion and imagination in relation to the conduct of review hearings in CPO's.

The practice in Alloa Sheriff Court

The Sheriff Court in Alloa has the advantage of having a single resident Sheriff although other Sheriffs regularly sit there. In matters of sentencing there is a strong likelihood that an individual offender will be sentenced consistently by the same Sheriff. In relation to DTTO's and CPO's where reviews have been set there is a greater facility to ensure the all important element of continuity by having these call before the same Sheriff.

No prosecutor present

It is often the case that individuals who are subject to a DTTO or CPO have other deferred sentence matters in progress. The early stages of a DTTO during which an offender is being assessed for alternative medication and titrated to the optimum dose can see a continuity of offending until stability has been achieved. This can result in sentences being deferred in order to monitor progress on the order. In some courts this can lead to the calling of deferred sentences at the same time as the review hearings. The practice in Alloa is different. Here an attempt is made to isolate the review hearings, whether for DTTO's or CPO's from other proceedings. There are two practical benefits from this small but important procedural

⁸ See the **Angiolini Report para. 171**

practice. The first is that as the only matter calling is in relation to sentencing the Procurator Fiscal has no *locus* and need not be in attendance. This benefits the depute concerned and frees him or her to attend to other business. It benefits the offender in respect that he or she is likely to feel more able to express him/herself freely and openly without the prosecutor present.

Private and informal

The review hearings are held in the Jury room with parties seated around the Jury table, not in open court. The Sheriff dresses down and discards wig and gown. Those present are the offender, the Criminal Justice Social Worker, the offender's solicitor and the Sheriff Clerk. There remains a degree of formality in respect that the case is called by the Sheriff Clerk and the Sheriff oversees the hearing. He has a brief report before him from the Responsible Officer. The hearing closes with the Sheriff making an order for further progress and that is formally recorded by the Sheriff Clerk. There is nonetheless an environment within which the Sheriff is able to converse with the offender and to address him / her directly in a conversational manner. Most importantly it enables the offender to converse with the Sheriff and to respond in a similar manner. The solicitor generally plays a very small part. This format, it is suggested, is more likely to result in an inclusive, discursive hearing at which questions of reviewing or amending the order can still be considered.

The most common review decisions relate to extension of periods of supervision if, for example, there has been time lost through a remand or breach. Sometimes the offender feels the need for the continued support received through the order. In one or two cases the offender has been doing so well that it has not been felt necessary to continue with reviews or indeed an early termination of the order has been appropriate and justified. If an offender fails to attend a review hearing a warrant is rarely taken upon the basis that if the order is failing it will come before the Court as a breach or the offender will appear for some other reason. Individuals are sometimes reluctant to attend at court for fear of who they might meet or because they think a warrant is outstanding. In the latter case the Court police officers are very constructive and helpful in their approach by making appropriate arrangements with offenders short of execution of the warrants.

The successful completion of an order will often be marked by the Sheriff congratulating the offender and shaking his or her hand. The resident Sheriff stops short of hugs. Some

consideration might be given to a more formal 'graduation ceremony' and the presentation of a certificate but that has not entered the process yet.

One is aware of the notion that review hearings heard in open court offer the opportunity to celebrate the progress of an offender who has done well or to reinforce a rebuke if the compliance has been poor. Experience in this Court suggests that private hearings are of greater effect since the aspects of an individual's life which are being challenged and which require to change if that individual is to move on from an offending lifestyle are often quite private and not matters which an individual would wish to discuss in public. There is a greater likelihood that an individual will open up during a private review hearing to disclose either an underlying issue which has become a barrier to progress on the order or to discuss aspects of their life which have contributed to their offending and which they are now addressing.

If deferred sentence matters are set down to call in open Court on a date close to and shortly after the review hearing the Court is presented then with an opportunity to make some declaration in open Court of praise for good progress or criticism for poor compliance. Praise might be reflected in an admonition for one or more of the deferred matters. Criticism might be reflected in a further deferral of sentence and the possibility of a future more punitive outcome. The risk of public praise, an element of the 'tall poppy syndrome' and a degree of hostility towards authority of any kind was reflected in one case in which an individual who had done particularly well on a DTTO was praised in Court and admonished on his few remaining deferred sentences. As he left Court another person, a regular awaiting his case, muttered menacingly and *sotto voce*, "Aye, it pays tae be a f...ing junkie"!

Multi-agency

There is no specific authority to the Sheriff to require the attendance of others at a review hearing but in this Court the Criminal Justice Social Workers are encouraged to give consideration to whether there are any other agencies working with an offender who might wish to be present or who could contribute to the hearing. And so, occasionally, there have been in attendance at review hearings a Housing Officer, a Drug Worker and the unpaid work Supervising Officer. This has proved quite beneficial. In one case the individual concerned had a particularly close bond with the drug worker and with her present was able to discuss material issues more freely and with greater confidence.

In relation to unpaid work the review can take on a highly pragmatic tone. In one case the individual was failing to attend for fear of encountering enemies. This seemed to be something of an excuse for non attendance but with patient persistence over two reviews it became possible to tie the individual to committing to attend in another neighbouring area, Stirling, to carry out the work. Within the context of the review with the Sheriff overseeing the discussion a pragmatic solution was found which withdrew from the offender any possible excuse for non attendance. His own participation in the discussion was an important factor which rendered it an inclusive experience but represented an investment which cemented his ultimate commitment to completion.

It is respectfully considered that measures which would facilitate the attendance of other agencies would significantly enhance the effectiveness of review hearings and thereby the outcomes of CPO's.

Family and Friends

It is sometimes the case that the individual subject to a CPO is dependent to one degree or another upon another adult, relative or friend and it is appropriate for such a person to be in attendance. There have accordingly been in attendance at CPO review hearings a parent of a young person with learning difficulties or other needs.

It is suggested that there is considerable scope for expanding the range of other people and supporters who might be invited to attend a review hearing. It is often the case that a partner is a source of important support or the opposite, a challenge to the success of the order by reason of their own difficulties such as drug or alcohol addiction. It could be beneficial to include them in discussions regarding their partner's order. The individual subject to the order would derive a greater sense of inclusion and support. One such invitation nearly resulted in an inebriated CPO offender arriving with his best mate straight from the pub and the possible limitations of this approach thus became apparent. Currently there are the cases of two individuals both on CPO's, both subject to reviews who have become partners and are about to become parents. For the first time consideration is being given to their mutual attendance at each other's reviews.

Impact on the Court timetable and resources

The review hearings for DTTO's are generally conducted on Wednesdays at 2:00 p.m. The number of cases is small, perhaps 3 or 4 and the reviews can be completed within about half an hour.

The number of requests from CJ Social Workers for reviews with CPO's is increasing and appears to be a reflection of the perceived success and benefit of this procedure. The CPO reviews are conducted each Friday at 2:00 p.m. except during a Jury sitting. The volume of reviews recently became such that they were having an adverse impact on other court business. The Sheriff Clerk has accordingly been directed to allocate no more than 5 review hearings at a time. This number of reviews can be expected to take no more than about half an hour. It will be apparent from these observations that the hearings are not long. Like GP appointments they tend to last only a few minutes, some longer than others. It seems that it is the fact of the direct engagement with the Sheriff that matters more than the duration. It can mean a great deal to an offender to receive praise when it is deserved upon a report of good progress but few offenders want or benefit from a prolonged hearing. Most appear to appreciate and value the Sheriff's interest.

Some cases demand more time and patience, for example if the individual concerned has learning difficulties or is affected by being on the autistic spectrum. Others are withdrawn by reason of low mood or suspicion and in all these cases careful use of open questions and non-challenging subject matter can help towards a meaningful discussion.

In their current form and on current practice the review system appears not to make additional demands upon court resources and can be absorbed with minimal impact on the business of the Court. The real demand for resources lies outwith the Court with the Criminal Justice Social Work Department and the Third Sector organisations which might offer appropriate facilities.

Potential developments around the review hearings

The use of the review hearing in CPO's is a relatively new feature within the Scottish criminal justice landscape. Through practice and experience the potential use and benefits of the hearing are becoming increasingly apparent. The effectiveness of a CPO is most apparent with offenders who themselves have a desire to effect change in their lives in order to move away from an offending lifestyle. The redemptive qualities of such people, especially young

people, are considerable. The attendance at the review hearings of other agencies working with the offender and other adults who form part of his / her support network would appear to have the effect of reinforcing an offender's commitment to effect change and to instil greater confidence in those individuals to believe that they can achieve effective change.

A review hearing with a multi agency presence and a family member along with the Criminal Justice Social Worker begins to resemble something in the nature of a family group conference. This introduces the notion that in certain cases there may be scope for a restorative approach by including the participation of the victim of the offence. Such a development could only properly be explored by those who are appropriately trained and experienced. Scotland has much to learn from the New Zealand experience. The NZ Justice web-site description of FCG's contains the following, illuminating passage:

“...there are no other legislative, or formal or informal prescriptions for FCG plans. The established processes merely provide the platform from which creative and individualised resolutions are formulated. There are consequently no limitations on the imagination and ideas that flow from the group of people who wish to produce constructive solutions to the problems of the young person's behaviour.

This is, in many ways, the strength of the system. The plan designed by the offender, victim and community, is likely to be realistic and reflect the resources and support available to those parties.”⁹

It may be that through the medium of the CPO review similar aspirations can be allowed.

“...or other activity”

The requirement of unpaid work in a CPO or Level 1 CPO, the latter available in the event of a fine default, can be a highly effective element of retribution. There are, however, limitations to its scope and effectiveness. A significant proportion of offenders are unfit or unsuitable for unpaid work. This can be because of health or fitness issues often associated with drug or alcohol addiction problems. It can arise through a reluctance of the offender to participate for

⁹ [NZ Justice - FGC's](#)

fear of encountering enemies. Sometimes it is undesirable to expose an individual to contact with other offenders even though that person's own offence calls for an element of retribution or punishment in their sentence.

The section in the **Criminal Procedure (Scotland) Act 1995** which provides for unpaid work also provides for an alternative of "...other activity".¹⁰ It appears to be envisaged that the other activity will be undertaken in addition to and not wholly as an alternative to work. The responsible officer has a considerable discretion to determine whether the offender should undertake other activity and the nature of the activity which might be regarded as 'other activity'. This is one area of apparent deficit in the area of Alloa Sheriff Court. It might be thought that a considerable opportunity arises under this head to explore the provision of suitable forms of other activity through the Criminal Justice Social Work Department, Third Sector organisations in the area and possibly local businesses, especially those already engaged in offering work experience opportunities to offenders and ex-offenders. Conversations with offenders at CPO review hearings have revealed interests in music, literature, creative writing and sport. The notion of offenders helping each other or at least devising and participating in group activities based on their interests arises.

Co-location and efficiency of criminal justice services

Alloa benefits from the fact that it has been possible to retain the Sheriff Court building in the town centre within a 2–300 radius of the main criminal justice services. Thus the Crown and the Citizens Advice Bureau are housed in the same building as the Court. The Criminal Justice Social Work Department is a short walk away next door to the Jobcentre. The police station is a matter of yards away. There is, consequently, a high level of regular and easy communication among the agencies involved in working with offenders. A benefit of regular CPO and DTTO reviews is that the resident Sheriff and other Sheriffs attending Alloa can develop an acquaintance with the Criminal Justice Social Workers engaged in writing reports and working with individuals. The opportunity arises between and around hearings for useful conversation, exchanging information and ideas. The Court police officers engage in the process and have developed informal practices which reassure offenders that they can attend for review hearings without the fear of being apprehended on outstanding warrants. Many of the benefits are present here as might be expected to be found in a purpose built justice centre

¹⁰ 1995 Act s.227I

such as Livingston or based on the Liverpool model. It is a matter of some pride in Alloa that an individual placed on a CPO will be seen very quickly by the Responsible Officer and for those with a work requirement there is the expectation that they will be at work within a week.

Breaches

Discussions around community based disposals often take on a slightly idealistic tone and disregard the reality that a not insignificant proportion of orders are breached. The subject of breaches and their management calls for a separate paper and is a substantial subject in its own right, often underestimated. The subject merits mention here partly so that it is not forgotten but also for consideration of the proposition that offenders are less likely to breach their orders if they can engage in 'other activities' which hold their interest.

Conclusion

The key elements of practice in Alloa Sheriff Court are threefold. Firstly, CPO and DTTO reviews are conducted outwith the presence of the prosecutor by the simple procedural expedient of isolating them from other matters such as deferred sentences affecting the individual. Secondly, the hearings are private usually with parties seated around a table in the Jury room. The Sheriff dresses down and so the format is less formal than in open court but the formalities of a court hearing are observed. Thirdly, a multi-agency approach is encouraged along with attendance of a family member or other adult forming part of the offender's support network.

The number of review hearings at any one time are restricted so that they do not impact adversely on the other business of the Court. There are no resource implications for the Court and that is a reflection of the notion that a problem solving approach to criminal justice is more a state of mind than an issue of investment in infrastructure. The necessary services and facilities already exist. The practice is a matter of information, learning, training and will.

Resource implications arise outwith the Court environment in the sense of making provision for activities and programmes for offenders. It would be good to have supported accommodation available for the use of offenders in conjunction with intensive supervision. There is a dearth of other activities which might take the place of unpaid work. The scope for developing community links with organisations and employers is limitless. The notion of

including offenders past and present and other members of the community in the design and formation of activities forming part of a CPO is worth exploring. The New York experience at the Red Hook Community Justice Center / Center for Court Innovation has proved that and support in implementing such ideas is already available through the London base of the Center for Court Innovation.

The quality of problem solving justice in Alloa would benefit from measures which would facilitate a multi agency presence and the attendance of a family member or other important adult in the life of the offender. The real resource implications lie outwith the Court in the provision of support services, supported accommodation, residential drug addiction services, activities for offenders and routes to employment and training.

A problem solving approach is not appropriate in all cases but in those cases where it is appropriate there is much to support it within the Scottish criminal justice regime.

Sheriff David N Mackie

Alloa,

19/11/13