

# FINAL BUSINESS AND REGULATORY IMPACT ASSESSMENT

## The Community Orders (Coronavirus) (Scotland) Regulations 2021, SSI No. xxx

### Purpose and intended effect

#### Background

1. As a result of COVID-19, justice social work (JSW) services have experienced difficulties in continuing to implement CPOs, particularly in delivering unpaid work (UPW) or other activity<sup>1</sup> requirements, which are often carried out in groups. The Coronavirus (Scotland) Act 2020 (the 2020 Act) extended all UPW requirements by 12 months (and required all new orders to be at least that long) in order to help resolve the immediate issues arising from the crisis, allowing JSW services to safely suspend UPW programmes during the first national lockdown without any orders being inadvertently breached as a result.
2. While this immediate step was successful in ensuring that JSW could continue to function effectively in the short to medium term, Social Work Scotland (SWS) has raised significant concerns about the deliverability of outstanding UPW requirements. Capacity within JSW to deliver UPW has remained substantially reduced primarily due to measures designed to keep individuals on orders and staff safe (e.g. physical distancing) as well as varying national and local restrictions, affecting some areas more than others. In addition, there was also 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 due to the increased level of public health risk associated with coronavirus and to align with national restrictions.
3. The 2020 Act introduced further powers for Scottish Ministers to vary or revoke requirements in CPOs and Drug Treatment and Testing Orders (DTTOs), and these were intended to be used should the situation worsen significantly, and/or to assist during the recovery phase should it become clear that orders are not deliverable. In order to address the concerns raised by SWS and to alleviate the pressure on JSW services, regulations are being brought forward using these powers to vary, on a proportionate and limited basis, UPW or other activity requirements in CPOs.
4. Subject to agreement by the Scottish Parliament, the regulations will 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. This will result in approximately 290,000 hours being removed from the system. It is estimated, based on unit level data from April 2020,

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<sup>1</sup> Unpaid work or other activity is a single requirement. The number of hours imposed by the court can be allocated between the two different aspects by the responsible officer within the relevant local authority, though other activity cannot constitute more than 30 hours or 30% of the total number of hours imposed, whichever is lower.

that up to 15% of outstanding orders will be automatically completed once the proposed regulations come into force.

5. 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. Specifically, this exclusion recognises that reducing UPW hours associated with those offences may undermine the confidence of victims of those particular crimes and, while only applying to existing orders, may 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.
6. The regulations will take effect once approved by Parliament and they will apply a proportionate reduction to the hours of UPW originally imposed by the court and as such will maintain a connection with the original sentence in order to avoid introducing any new differential effects.

### **Rationale for Government Intervention**

7. CPOs are community sentences which contain one or more of nine possible requirements, including that of UPW or other activity. They are issued by the court and are implemented by local authorities through JSW services who carry out the supervision of those on relevant orders, organise and oversee UPW, and report back to the courts on progress and any potential breaches. In terms of scale, in 2018/19, 16,400 CPOs were imposed, of which 73% had an UPW requirement.
8. Data provided by local authorities indicates that around 740,000 hours of UPW were outstanding across Scotland as of November 2020, increasing from around 700,000 before summer. While such levels may not be significantly greater than local authorities ordinarily manage at any one time, capacity to deliver hours is significantly lower than normal due to the pandemic and associated restrictions. It should also be noted that in light of increased national restrictions in January 2021, face-to-face UPW has largely been temporarily suspended again across most local authorities.
9. As a result, it will not be feasible in the short/medium term to deliver the volume of hours previously possible. There also remains potential for a significant increase in the volume of hours to be delivered once court business resumes, which creates significant risk that JSW services will be overwhelmed. Although a COVID-19 vaccination is now being rolled out, this will not solve the capacity issues in delivering the backlog of outstanding UPW hours and restrictions are likely to still be in place over a number of months.
10. Community orders must be completed within timescales required in line with legislation and decisions by the courts, and if JSW is operating at a reduced capacity for a significant period of time, it is unlikely to be able to service both new

orders (when court business resumes) and outstanding UPW hours which remain as a result of the pandemic restrictions. Changes are proposed on a limited and proportionate basis, seeking to ensure the justice system can operate effectively and confidence is retained in community orders.

11. Further detailed information on the regulations can be found in the policy note.

## **Consultation**

### **Within Government**

12. A number of internal colleagues were consulted in the development of these regulations including: the Office of the Chief Social Work Adviser in the Directorate of Children and Families, Directorate for Legal Services, colleagues in the Criminal Justice Directorate, and Justice Analytical Services.

### **Public Consultation**

13. 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.

### **Business**

14. There is expected to be no direct impact on businesses or consumers as a result of these regulations so no consultation was considered necessary.

## **Options**

15. As mentioned above, the Coronavirus (Scotland) Act introduced powers for the Scottish Ministers to postpone or vary requirements in CPOs or DTTOs under certain circumstances.

16. A number of options for reducing the amount of outstanding UPW hours were considered and we concluded that legislative action was necessary.

17. Taking no action under these circumstances risks JSW becoming overwhelmed and may affect confidence in the justice system. SWS have also indicated that if the outstanding UPW hours are not reduced, it will increase the likelihood of system failure.

## **Sectors and groups affected**

18. A number of sectors and groups will be affected as the SSI will alter existing community orders being served by individuals across Scotland. These include, but are not restricted to:

Local Authority Criminal Justice Social Work Departments

Scottish Courts and Tribunals Service  
Solicitors and counsel  
Third sector organisations that support local authorities to deliver CPO unpaid work requirements

### **Benefits**

19. The measures within the regulations aim to ensure the continued effective functioning of the community justice system throughout this pandemic and once it has passed, whilst ensuring that criminal justice services are not overwhelmed and adhering to the principles aligned to combating the spread of COVID-19.

### **Costs**

20. 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 Firms Impact Test**

21. As already noted, there is not considered to be an impact on Scottish business or consumers as a result of these regulations.

### **Competition Assessment**

22. This instrument will not have any impact on competition. It will not limit the number or range of suppliers, limit the ability of stakeholders to compete, limit suppliers' incentives to compete vigorously or limit the choices and information available to consumers.

### **Consumer Assessment**

23. This instrument will have no direct impact on consumers.

### **Test run of business forms**

24. There is no need for the test run of business forms.

### **Digital Impact Test**

25. The instrument's measures do not give rise to any immediate or direct impact on technology or technological advances.

### **Legal Aid Impact Test**

26. Varying unpaid work or other activity requirements is not expected to impact in any significant way on legal aid. The regulations may marginally ease pressure on legal aid as a proportion of orders will become complete and not subject to further review.

### **Enforcement, sanctions and monitoring**

27. The Scottish Government will monitor the impact of the measures drawing on evidence and insight from Social Work Scotland and local authority justice social work services. JSW services are primarily funded through a Section 27 grant from the Scottish Government. A funding formula is agreed with COSLA on allocation of funding, which takes account of workload and socio-economic factors. Future funding decisions will be informed by the impact of COVID-19 and its impact on community justice.

### **Implementation and delivery plan**

28. It is intended that these measures will be implemented once the regulations are scrutinised and approved by Parliament. It is anticipated that they would come into force in March 2021 and the legislative changes conveyed to stakeholders by email and the wider public sphere through the Scottish Government's website.

29. The implementation of the measures within this instrument will be overseen by the Scottish Government and key stakeholders within the justice system.

### **Post-implementation review**

30. The powers in the Coronavirus (Scotland) Act 2020 are kept under review, as required by statute. The impact of the regulations will inform this review.

### **Summary and recommendation**

31. The purpose of the SSI is to allow Scottish Ministers to respond to the consequences of the COVID-19 pandemic in relation to JSW.

32. The overall costs associated with the instrument are expected to be minimal, and the regulations are necessary in order to ensure JSW services do not become overwhelmed and that they can continue to deliver UPW.

### **Declaration and publication**

#### **• Sign-off for Final BRIAs:**

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of relevant representative organisations in Scotland. Wider consultation with businesses has not been possible in the current circumstances.

**Signed: Humza Yousaf**

**Date: 27 January 2021**

**Humza Yousaf , Cabinet Secretary for Justice  
Scottish Government contact point: David Doris**