Non-compliance and Breach Processes in Ireland: A Pilot Study

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Summary: The purpose of this paper is to contribute to the literature on non-compliance and breach processes by presenting some of the findings from a recent pilot study on the nature of the breach process that follows non-compliance with a community service order in Ireland. The Irish pilot study emerged from a broader comparative study of breach processes undertaken by a group of international scholars as part of the COST Action SI 1106 on Offender Supervision in Europe.[1] The paper begins by examining the literature on non-compliance in the field of offender supervision and then introduces the comparative study on breach processes before providing a detailed description of the Irish pilot study. The remaining sections examine the relevance of the findings from both a national and a comparative perspective.

Keywords: Breach, non-compliance, supervision, punishment, reintegration, community service, enforcement, courts, probation.

Background

Over the past decade, there has been a growing realisation that what happens during the enforcement of punishment – a phase that some refer to as the 'back door' of the system – can have important implications for human rights and the experience of punishment, desistance

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[1] Offender Supervision in Europe was COST Action 1106 (European Cooperation in Science and Technology) that ran from 2012 to 2016. Its main aim was to explore the emergence of the relatively under-examined phenomenon of 'mass supervision' by facilitating co-operation between individuals and institutions already researching offender supervision, and to attract new early-stage researchers to the field. As a European forum for research on offender supervision, its members reviewed and synthesised existing knowledge in the field and also engaged in new interdisciplinary and comparative work. For more information see http://www.offendersupervision.eu/

and reintegration, and in some countries, for the growth of the prison population. Padfield and Maruna (2006) were among the first commentators to highlight the 'extraordinary' growth in the numbers of people recalled to prison in England and Wales and the need to pay greater attention to the 'back door' sentencing practices of release, supervision and recall. They argued that too much emphasis was placed on 'front end' sentencing practices and not enough attention was paid to 'back door' practices which are at least as influential in terms of sentence length and prison populations.

Noting a significant increase in recalls in recent years, they drew attention for the first time to the many theoretical, legal and practical issues raised by recalls. They noted that certain legislative changes that amended release arrangements for prisoners made an increase in recalls to prison inevitable (Padfield and Maruna, 2006). These changes resulted in more prisoners than ever before being subject to post-sentence supervision and to more stringent conditions, both of which increased the likelihood of recall. Stricter enforcement of conditions brought about by the introduction of National Standards and an increasing emphasis on risk assessment and public protection have been identified as key factors in the growing numbers of recalls to prison (Robinson and McNeill, 2008; Padfield, 2012b; Weaver *et al.*, 2012).

The impact of recall on prison populations has undoubtedly received the most research attention to date, with a special edition of *European Journal of Probation* dedicated to the topic in 2012 (see the editorial by Padfield, 2012a). The growth in revocations of community sanctions and measures has received much less attention. Understanding the nature, impact and circumstances in which revocations of supervisory measures are occurring may present a more pressing concern than previously realised, given findings from a recent study that show that most European countries have experienced a growth in *both* their prison and supervisory populations over the past two decades (Aebi *et al.*, 2015). The growth in supervisory populations in Europe raises the prospect that more people will eventually become subject to breach proceedings for non-compliance with the conditions attached to such measures.

However, interest in the enforcement processes, at the back end of the system, arises not simply because of the expanding population subject to supervision. It also stems from an understanding that these processes involve decisions about the conditions under which people

experience the 'lessening or tightening of punishment' and thus involve key 'moments in which the extent and character of punishment are decided' (Weaver *et al.*, 2012). Breach processes deserve greater attention precisely because they may have unintended and/or damaging consequences including additional punishment, increases in recidivism and prison overcrowding, all of which undermine rehabilitative efforts (Weaver *et al.*, 2012; Boone and Maguire, 2018a).

The existing body of research on offender supervision and community sanctions is relatively underdeveloped (McNeill and Beyens, 2013; Carr *et al.*, 2013). Within this field, research on compliance with supervisory sanctions is still in its infancy (Boone and Herzog-Evans 2013; Boone and Maguire, 2018a). Similarly, with some notable exceptions including Walsh and Sexton (1999) and Seymour (2013), compliance with community sanctions has elicited very little research attention in Ireland. One reason for this may be the difficulty of defining compliance and non-compliance. A growing body of mainly theoretical literature now exists on the nature of compliance (see for example Bottoms, 2001; Braithwaite, 2013; Digard, 2010; Robinson and McNeill, 2008, 2010).

While an exploration of this literature is beyond the scope of this paper, compliance as understood in this context refers to when a person adheres to the conditions of a supervisory order, obeys all the directions given to them by their supervisor and successfully completes the order. Non-compliance involves the failure to adhere to the conditions of the supervisory order or the directions given to them by their supervisor, or the failure to complete the order. Non-compliance may be minor or quite serious, and different consequences generally follow this distinction. Breach proceedings may not always be initiated in every case where issues of non-compliance emerge, as less formal methods may be considered sufficient, especially in relation to minor violations. A certain proportion of those who successfully complete supervisory orders will have violated conditions of their order at some point during the period of order. Providing appropriate statistics on non-compliance can thus be more complex than first imagined.

Nevertheless, attempts to understand compliance are often hampered by the lack of relevant statistical data. The pilot study reported in this paper examined breach processes that follow allegations of non-compliance with community service orders (CSOs) in Ireland. However, statistical information on levels of compliance with CSOs is not yet

publicly available in Ireland. The 2017 annual report from the Irish Probation Service records that 2200 CSOs were made in that year. No information, however, is available on the number of CSOs completed each year nor on the number of prosecutions for non-compliance with the conditions of CSOs dealt with by the courts on an annual basis. Insights from previous research suggest that completion rates are between 80% and 85%. Walsh and Sexton's (1999) examination of 269 CSO case files found that completion certificates had been issued in 81% of cases whereas 17% of CSOs had been revoked. A more recent review of the operation of CSOs in Ireland suggested a figure of between 81% and 85% (Petrus Consulting, 2009). Walsh and Sexton (1999) noted that in at least 40% of the orders successfully completed, Probation Officers (POs) expended considerable energy persuading participants to complete their orders. In at least 2% of the successfully completed orders, participants had been prosecuted for non-compliance and had a formal breach registered against them, but the court had decided to provide a further opportunity to complete the order. Similarly, Seymour's (2013) study of compliance with CSOs in Ireland found that supervisors utilised a variety of strategies to encourage and promote compliance among young offenders who did not perceive the formal breach process or custody as a deterrent.

As they currently stand, compliance rates of between 80% and 85% are reasonably high when compared with other countries. For example, in England and Wales, in 2015 69% of community orders (not directly equivalent to a CSO but the closest comparator) were successfully completed (Hucklesby *et al.*, 2018). In Belgium, between 2010 and 2014 the rate of successful completions of work penalty orders ranged from 76% to 81% (Beyens and Scheirs, 2018). In other countries, links between the credibility of community sanctions, enforcement practices and rates of compliance have been politicised and have led to pressure to make breach processes tougher and to reduce the discretion of POs supervising CSOs and similar sanctions (see Robinson and McNeill (2008) and Hucklesby *et al.* (2018) for accounts of how this has occurred in England and Wales, and Boone and Beckmann (2018) in relation to The Netherlands). In Ireland, while policy-makers have acknowledged the importance of the credibility of community sanctions and of ensuring robust enforcement mechanisms (Department of Justice and Equality, 2014; Irish Probation Service, 2014), breach processes remain relatively invisible outside of the organisation. No political pressure has yet

been exerted to adopt tougher enforcement practices to enhance the credibility of community sanctions (Maguire, 2018).

However, this favourable situation could potentially change, especially considering recent policy attempts to expand the use of the CSO to reduce the prison population in Ireland. It has been a long-standing policy aim of the Irish Probation Service to increase the uptake of CSO by the courts (McCarthy, 2014). With the implementation of the Fines (Payment and Recovery) Act 2014 in 2016, judges may now impose a CSO as a means of enforcing the payment of a court ordered fine instead of relying on imprisonment. Under this legislation the Circuit Court can make an order for a minimum of 40 and a maximum of 240 hours. In the District Court, the maximum is 100 and the minimum is 30 hours. Recent prison statistics confirm that the implementation of the 2014 Act resulted in a significant reduction of 73.2% in the numbers of persons committed to prison for non-payment of court fines in 2017 (Irish Probation Service, 2017). It is likely that much of this decrease is related to the implementation of payment of fines by instalments. It is possible that the CSO will increasingly be used as a means to deal with non-payment of fines, and thus non-compliance with the conditions of CSOs, and the enforcement mechanisms in place to deal with non-compliance, may become increasingly salient.

Methodology for comparative research

In addition to limited research on breach processes at a national level, a review of penal decision-making in Europe, conducted by Boone and Herzog-Evans (2013) as part of the COST Action on Offender Supervision in Europe, concluded that little comparative knowledge existed about the nature and impact of breach processes in Europe. Arising from this, members of the Working Group on Decision-Making and Supervision of the same COST Action decided to focus our research attention on expanding our understanding of breach processes in a comparative context.[2] We designed a comparative methodology that would allow us to study breach processes across a number of European jurisdictions. Before we could settle on the methodology, we needed to clarify our definition of breach processes and what exactly we wanted to understand and know more about.

[2] The COST Action had four Working Groups: Practising Supervision; Experiencing Supervision; European Norms, Policy and Practice; and Decision-Making and Supervision. The research reported here was undertaken by the Working Group on Decision-Making and Supervision.

Given that we had contributors from 10 different European jurisdictions, arriving at a single definition of what we meant by the terms 'breach' and 'breach process' was not an easy task. Did we mean the decision by the supervisor to report non-compliance or the initial interpretation of behaviour by the supervisor as involving some level of non-compliance? Alternatively, by using the term 'breach' did we mean to refer to the act of non-compliance itself? Confusing as this was, it led us to an important starting point: breach is not necessarily an objective act but is instead something that is actively constructed, negotiated and renegotiated depending on the circumstances of a particular case. Based on this constructive interpretation of what breach involves, we defined breach processes as involving many different interdependent stages and interrelated actors, and we thus decided to take a processual approach towards understanding decision-making in breach processes. A processual approach not only would facilitate an understanding of the final decision in a breach process (whether to recall or revoke) but also, importantly, would provide insight into how this final decision would be influenced by all of the preceding decisions and decision-makers.

We decided that a qualitative methodological approach would best serve our aim of capturing an account of breach *as a process* involving a series of decisions and decision-makers from the very start of the process right up until the final decision. We chose the vignette method supplemented by semi-structured interviews as the best way to capture the viewpoints and orientations of all the actors involved at various stages of the breach process. A detailed account of the vignette method and of how we chose and designed the comparative vignette instruments is provided elsewhere (Maguire *et al*., 2015). Here, I will briefly outline some of the main considerations and decisions that informed the design of the comparative vignettes and semi-structured interviews.

A vignette can be regarded as a description of an event, situation or incident that is presented to informants in order to elicit their reactions, opinions or views (Schoenberg and Ravdal, 2000). Vignettes are used to study beliefs, attitudes and perceptions (Hughes, 1998). They are usually accompanied by questions prompting informants to respond to the scenario by giving their opinion, by explaining what they would do in response to the situation or describing the course of action that would normally follow the event (Hughes, 1998; Schoenberg and Ravdal, 2000). However, before we could design a vignette that would capture the process of breach including the various different actors and stages,

we needed to understand more about the diversity of breach processes across the 10 European jurisdictions.

To accomplish this, we asked members of our Working Group to map the breach procedures and processes in their jurisdictions by highlighting the key decision points as well as the key decision-makers in their system. We decided to examine breach decision-making processes at both the sentencing phase and the release phase. This meant that contributors were asked to provide details of two different types of breach processes. For the sentencing phase we asked contributors to describe the process and procedures that follow an allegation of non-compliance made against a person serving a community sentence imposed by a court after conviction. More specifically, we decided that we would focus on the CSO, but, as we discovered, this distinct order did not exist in all jurisdictions. For the release phase, we asked contributors to focus on the process and procedures that follow an allegation of non-compliance with one or more conditions of their early release from prison.

Based on these descriptions we designed two vignettes, one for the breach process associated with the CSO (or other similar order) and another to capture the breach process related to non-compliance with conditions of early release from prison. Each vignette was designed to capture all stages of the process within each phase. The vignette and accompanying questions were designed to capture at least three actors/stages in the decision-making process. Brief details were provided about the nature of the non-compliance and about the previous actors' responses to the non-compliance. Once the generic vignettes were designed, we asked our Working Group members to adapt the vignettes so that they made sense in their jurisdiction. A key challenge involved ensuring that the vignettes were not changed to the extent that they no longer measured reactions to a common scenario.

The vignettes were piloted in each country. The results were used to inform in-depth descriptions and analysis of how breach processes (both early release and community service) are regulated and practised in 10 countries. These included Belgium; England and Wales; Germany; Greece; Italy; Ireland; Lithuania; The Netherlands; Spain; and Sweden. This work formed the basis of a book (Boone and Maguire, 2018b), comprising both country chapters and thematic chapters. Contributors from 10 jurisdictions wrote up their descriptions and analysis informed by the pilot study. These were then used as a basis to inform our comparative analyses of breach processes. This analysis focused on four

key themes: European law, ethics and norms; parties, roles and responsibilities; discretion and professionalism; and legitimacy, fairness and due process.

The following sections of this paper describe the Irish pilot study and present some of the findings on the nature of the breach process that follows non-compliance with a CSO in Ireland. For more information about the nature of breach processes associated with early release from prison in Ireland, see Maguire (2018).

Community service in Ireland

The CSO was introduced in the 1980s in Ireland with the primary policy aim of providing an alternative to imprisonment (Rogan, 2011). A judge may impose a CSO of between 40 and 240 hours of unpaid work, which must usually be completed within one year, as a direct alternative to a sentence of imprisonment or as a means to enforce an unpaid court-ordered fine. When imposing a CSO, a judge must ensure that certain conditions are met: a prison sentence is appropriate in the circumstances of the case; the person is over 16 years, consents to the order and is a suitable candidate; and an appropriate work place is available. Persons serving a CSO are assigned to a work site and are supervised on site by a community service supervisor (CSS) who reports directly to the supervising PO. Although there are three distinct decision-making parties involved in the CSO breach process in Ireland – the CSS, the supervising PO and the judge – as we shall see, the law officially recognises only the roles of the PO and the judge.

A combination of legislation, legal regulations and District Court rules currently govern the review and enforcement of CSOs (Maguire, 2018). Sections 7 to 12 of the Criminal Justice (Community Service) Act 1983 provide POs with the power to prosecute for non-compliance with the conditions attached to a CSO and also provide for the revocation, variation and extension of CSOs. The conditions that a participant on CSO must comply with are set out in Section 7 in fairly broad terms: participants must (1) report to the relevant officer as directed; (2) satisfactorily perform all the hours in the order as directed; and (3) notify the officer if there is a change of address. Additionally, the Criminal Justice (Community Service) Regulations 1984 provide that persons subject to a CSO must 'obey all instructions given to him under the Act by or on behalf of a relevant officer'. Section 7 further provides

that any person who does not comply with these conditions 'without a reasonable excuse' shall be guilty of an offence, and if convicted, may be liable to a fine not exceeding €300.

The 1983 Act provides judges with a number of options besides convicting, fining and revoking the CSO. Under Section 8 a judge may re-sentence the person to another penalty that would have been available at the time of the original sentencing hearing, and Section 9 allows the court to extend the completion period beyond one year. Independently of enforcement action, Section 11 provides the court with the power to revoke, extend or vary the CSO where there has been a change of circumstances, and either the person or the PO may make an application under this provision.

This brief overview of the legal criteria governing the enforcement of non-compliance raises a number of issues. First, non-compliance with the conditions of a CSO is an offence in itself, a situation that, as we will see later, contravenes existing European standards and recommendations on best-practice guidelines for community sanctions and measures (Morgenstern *et al.*, 2018). Second, as noted earlier, the legal regulations do not officially recognise the role of the CSS, who is the only layperson involved in the breach process apart from the person subject to breach. Third, the law is relatively silent regarding the exact nature of behaviour that constitutes non-compliance, leaving much discretion in the hands of practitioners in terms of how this is defined.

In 2009 the Probation Service developed a very detailed set of guidelines for the enforcement and supervision of CSOs called the *Probation Service Manual for Community Service* (Irish Probation Service, 2014). This manual provides very thorough guidance on all stages of the supervision and enforcement of CSOs, from induction processes right up to and including the steps that should be taken prior to initiating a prosecution for non-compliance. It provides a list of examples of what are acceptable and unacceptable excuses for non-attendance and advises that the supervisee should give advance warning before the absence and written verification of the reason for the absence. The manual also provides examples of serious misconduct that may lead to the immediate suspension of the CSO and return to court as well as behaviour that falls short of the expected level of co-operation and requires investigation by the PO. The level of detail provided by the manual and the legal regulations provide very useful insight into the nature of the CSO breach processes in Ireland.

The Irish pilot study

The Irish pilot study focused on the breach process that follows an allegation of non-compliance with conditions of a CSO.[3] The vignette therefore had to be adapted so that it would make sense in an Irish context. As the Irish CSO breach process has three stages, each involving three distinct decision points, the only adaptation that the generic vignette needed was in the description of the sentence. This had to reflect the fact that in Ireland CSOs are only imposed as alternatives to a prison sentence:

> John is a 22-year-old unemployed man who has been convicted of assault (mid-level) of another man outside a nightclub at 2 a.m. The victim was taken to the hospital but was discharged a few hours later. John has three previous convictions but has never been sentenced to prison. John was sentenced to six months in prison, and in lieu of this, the judge imposed a community service order of 120 hours to be completed within one year.

The three official decision-makers involved in the CSO breach process in Ireland are typically the CSS, the supervising PO and the judge who imposed the sentence. The same vignette scenario was presented to each of these actors but adjusted slightly to take account of where in the process the actor would come into contact with the person alleged to have violated the conditions of their CSO. As the CSS would always be the first point of contact in terms of responding to any alleged non-compliance, the CSS interviewed was presented with the types of violations and asked to respond to the scenario based on all three examples of non-compliance, as follows.

1. John is one quarter the way through his order when he fails to show up one day.
2. John is one quarter the way through his order when he turns up late one morning. This is the second time in a row that John has been late. He had an emergency at home and had to bring his mother to the hospital.
3. John turns up for work but he doesn't do the work as instructed. He spends more time talking, laughing and smoking, and generally being disruptive, than engaging in the task.

[3] For further information on and analysis of breach processes related to early release in Ireland, see Maguire (2018)

For the next actor in the process, the supervising PO, the same scenario was presented but with an additional line explaining that the immediate supervisor has referred the case to you with a recommendation for breach. A similar line was added to the vignette that the judge responded to, but it mentioned that both the CSS and the PO recommended breaching the offender. Each actor was asked a number of questions about the vignette, aimed at eliciting their views about: the types of violations, the number of chances that should be given, their decision and what formal and informal options may be open to them, how they would communicate their decision to the next decision-maker or what kind of information they would expect from a previous decision-maker.

Having received ethical approval and permission to contact practitioners from the Irish Probation Service, three practitioners were interviewed for the Irish pilot study including a CSS, a PO with experience of taking prosecutions for non-compliance and a District Court judge. Each practitioner was asked to respond to the vignette guided by the questions described above, and interviews were recorded and transcribed. As this research was undertaken as a pilot study aimed at testing the validity of the research instruments, only three research participants were recruited. As a result the findings are limited and not generalisable, and should only be considered preliminary insights into the nature of the breach process in Ireland.

Insights from the pilot

As noted above, three main actors are involved in the CSO breach process in Ireland: the CSS, the supervising PO and the court. The immediate supervisor arguably plays a vital role, as they alert the supervising PO that a particular person has violated a requirement. It is part of the CSS's responsibility to keep track of attendance on site and report to the PO on a daily basis. The guidance manual requires CSSs to respond to and report non-attendance (Irish Probation Service, 2014). It describes a system of texting participants who fail to turn up to let them know that their absence will be reported to the supervising PO. The guidance also suggests that CSSs may wish to text participants in advance to remind them to attend their site in compliance with the order. Insights from the pilot study show that the practice of sending texts is not popular among all CSSs. Some CSSs may regard this practice as falling outside of their job role. Of course, the generalisability of this insight awaits further, more substantive research.

The extent to which non-attendance or other behaviour falling below the level of co-operation expected is tolerated by CSSs is crucially important. Although CSSs are not officially recognised by the law, they play a crucial role in deciding when to alert the PO to behaviour that is potentially unacceptable. The legal regulations recognise the PO as the decision-maker in terms of officially deciding whether or not there has been a violation. However, in practice the CSS and the PO often make this decision jointly.

The PO cannot make an informed decision without the information supplied by the CSS, and so the CSS potentially has some power and discretion to influence the decision of the PO. The role of the CSS can be easily overlooked in terms of understanding how breach processes work in practice. The relationship and level of co-operation between the CSS and the PO can also be important in terms of determining how efficiently or otherwise the enforcement process works. Good relations between the PO and the CCS may lead to high levels of co-operation and communication and ensure a swift response to violations, whereas a breakdown in relationships might lead to slower response. Information gathered by the CSS will often be included in the PO's report to the court where a decision is made to initiate a prosecution.

Once a violation (non-attendance or other non-cooperative behaviour) has been reported to the PO, he or she must fully investigate the allegation by gathering evidence and interviewing all parties before making a decision. If the PO decides that the violation has occurred the participant will be issued with a warning letter. This letter may be cancelled if the participant provides proof of an acceptable excuse. Once three warnings letters have been issued a meeting is arranged with the participant to discuss the situation. The CSS and/or a Senior PO (SPO) may also be present at this meeting.

Depending on how this meeting goes, the PO decides either to prosecute or to give the participant one more chance to complete. If a decision to prosecute is taken, the PO will write to the participant to notify them. The Notification of Breach Proceedings letter notifies the participant but also invites them to meet with the PO. The PO must then prepare a report to submit to the court that provides evidence of the type and nature of the breach under Section 7(1) of the 1983 Act and must also set out how this violation amounts to an offence under Section 7(4). The attendance records and information provided by the CSS are used to support the main allegation of non-compliance. The prosecuting

PO usually attends court to provide oral evidence and to answer any questions the judge may have. Insights from the pilot interviews suggest that prosecuting POs would usually be highly aware of the importance of providing sufficient evidence to support the application.

The final two actors are the defendant and the judge. The participant/defendant will normally be present at the court hearing and is entitled to legal representation as the application may potentially lead to imprisonment. The defendant rarely has an opportunity to speak in court. However, at every stage in the breach process prior to the court hearing the participant is given numerous opportunities to engage, to be heard and to engage with the decision-making PO. If a defence lawyer is present for the court hearing they may try to negotiate with the prosecuting PO in advance of the hearing to present a resolution to the judge. The role of the defence lawyer often involves requesting the court to allow his or her client another opportunity to complete the order. Occasionally, if there has been a change of circumstances, the defence lawyer may request revocation and re-sentencing.

The practitioners interviewed articulated a number of viewpoints regarding the underlying aims of the breach process. While the PO stressed the importance of engaging with the participant all the way along the process, to encourage completion and to avoid a prison sentence, a perception of a judicial reluctance to revoke a CSO was also highlighted. The PO interviewed explained that judges, in three-quarters of cases, generally give the defendant another chance to complete. Bearing this in mind, from the perspective of the PO, the decision to proceed with a prosecution is taken only if the PO feels that everything possible has been done to help the defendant engage with and complete their order. In many cases a prosecution represents the last resort.

However, it was also acknowledged that in a minority of cases a prosecution might be taken as a way to reinforce with the defendant the fact that a prison sentence will have to be served if the order is not completed. The PO explained that in a small number of cases the court will be told that the Probation Service is unwilling to engage further with the defendant. The interview with the judge confirmed that sometimes a prosecution is an opportunity for a 'short, sharp, shock' to remind the defendant of the seriousness of their non-compliance:

> You might find from the presentation of the Probation Officer that they are looking for a short, sharp shock and therefore they are

> bringing the breach back. Therefore you tend to play the game, a little bit of concern not to say annoyance and a few direct comments to the solicitor representing, indicating that this gentleman is on a slippery slope.

In this quotation, the judge is showing a willingness to respond to the lead provided by the PO. However, this judge also acknowledged that the decision to impose a CSO in lieu of a prison sentence is not taken lightly and therefore the decision to revoke a CSO is not made lightly either. An important factor for the judge interviewed was ascertaining the attitude of the offender, particularly in relation to whether the non-compliance was related to a chaotic lifestyle or to wilful non-compliance. Indeed, the attitude of the offender was mentioned as an important decision-making factor for the CCS, the PO and the judge.

Comparative insights

This section presents some of the major thematic insights from the broader comparative study and uses them to enhance our comparative understanding of the Irish breach process.

Parties, roles and responsibilities

The Irish CSO breach process is fairly similar to the breach processes of many of the other jurisdictions that participated in the comparative study. Blay *et al.* (2018) examined the roles and responsibilities of the various parties typically involved in the breach decision-making process relating to community sentences across the 10 jurisdictions of the study. They concluded that direct supervisors, POs and judges are the typical parties involved.

Although final decision-makers tend to be judicial, the presumption that the decision-making power lies with the final decision-maker did not hold up. Instead, Blay *et al.* (2018) found that the type of decision-making involved in these processes resembled what Hawkins (2003) has termed 'serial decision-making'. This concept acknowledges that decision-making is often a collective rather than an individual enterprise, particularly when it is based on information contributed from a number of different parties. According to Hawkins (2003), decision-making is often anticipatory, in that the probable actions to be taken by the next layer of decision-makers are regularly taken into account.

Early actors in breach processes often adjust their decisions in order to anticipate, and thus control, the decisions of parties further along in the process (Blay *et al.*, 2018). Thus, early stage actors may have a greater impact than later stage parties on the decision-making of parties who legally may be considered more powerful decision-makers. Blay *et al.* (2018) found that decisions are often influenced by the nature of the relationships between the various actors in the process. The serial decision-making analysis of breach processes makes sense in the Irish context. The CSS, although not legally acknowledged as a decision-maker in the process, plays a crucial role in deciding when to blow the whistle on participants' behaviour. Similarly, a PO's report has the potential to influence how a judge perceives the defendant's behaviour. Moreover, as discussed earlier, decision-making, at least at the early stage of the breach process in Ireland, is usually a collective enterprise involving the CSS, the PO and the SPO.

The layperson emerges as a surprisingly important decision-making party in breach processes across all jurisdictions (Blay *et al.*, 2018). Hitherto, comparative criminal justice research paid scant attention to the role of the layperson, preferring to analyse the role and cultural habitus of judges, prosecutors, lawyers, POs and police officers. Beyens and Persson (2018: 71) define laypersons in this context as those who 'are not clad in the proverbial finer metals offered by a professional training, profession-specific knowledge and the support of the employing organisation and peers'. Despite the growing importance of laypersons as actors in breach process and thus in supervisory sanctions and measures, their role and decision-making powers tend not to be reflected in official guidelines or laws governing the breach process. Their lack of visibility belies the important role they play in the early stages of breach processes in terms of constructing the behaviour of supervisees as non-compliant and thus worthy of a report to a more a senior decision-maker. Toleration of non-compliance among laypersons and the knock-on impacts for how non-compliance is dealt with are a topic worthy of greater research.

Ireland is a good example of a country in which the role of the layperson in the criminal justice system has become increasingly important. As described earlier, CSSs, who technically may not be considered part of the penal apparatus as they are not professionally trained and do not possess the specific knowledge of criminal justice professionals, play an important role at the early stage of the Irish breach

process in terms of their construction of behaviour as non-compliant and the reporting of non-compliant behaviour to POs. The official guidelines in Ireland do recognise their role but, despite the extensive contact they have with CSO participants as front-line staff, most CSSs receive relatively little specific training in rehabilitative skills (McGagh, 2007; Carr *et al.*, 2013). Anecdotal evidence suggests that the involvement of laypersons may be set to increase across a range of European jurisdictions, which may change the nature of supervisory practices (Maguire and Boone, 2018: 112).

Discretion

The degree of discretion available to decision-makers in the breach process is a key theme examined by Beyens and Persson (2018). In their comparative analysis of levels of discretion, they found marked variations in discretion available both between countries and between actors in the same breach process. However, they also found that even in countries where discretion is limited, practitioners still exercise some discretion in terms of interpreting what constitutes compliant or non-compliant behaviour. They note that attempts to restrict discretion in order to enhance the perception of credibility have not necessarily been successful. They highlight the tensions between the exercise of discretion and the need to ensure oversight to avoid discrimination and abuse of power in order to maintain the credibility of the breach process (particularly in the eyes of external stakeholders). Despite these seemingly contradictory aims, Beyens and Persson (2018) conclude that in many countries examined in the study most practitioners routinely use their discretion to give more chances to offenders than they are formally required to.

As noted previously in the description of how the Irish breach process works in practice, the law provides Irish practitioners with considerable discretion in terms of how they define what constitutes non-compliance. While the guidance manual describes a 'three strikes' policy before prosecution is initiated, the pilot interviews showed that in some instances more chances might be given to participants if their non-compliance was out of their control or not due to a deliberate desire to violate conditions. A similarly tolerant approach to non-compliance was evident across a number of other jurisdictions. Indeed, the importance of discerning the attitude of the participant before deciding how to respond to an alleged incident of non-compliance was a common theme

running through most practitioner accounts across jurisdictions (Beyens and Persson, 2018). The degree of discretion available to Irish practitioners in comparison with other countries was reasonably generous and, importantly, Irish completion rates ranked among the highest of the 10 countries examined in the study.

Legitimacy and due process in the breach process

The extent to which persons subject to breach processes are treated fairly and perceive their treatment as legitimate is important. Dealing firstly with legitimacy, Hucklesby *et al.* (2018), drawing on Tyler's (1990, 2013) work on procedural justice and compliance, explain that legitimacy not only speaks to the credibility of a particular system, it is also fundamentally related to the nature of authority and the extent to which it should be obeyed. As Tyler's work has demonstrated in the context of police–citizen contacts, perceptions of fair treatment – what he refers to as procedural justice – have been shown to be as important to members of the public as final outcomes, particularly in terms of future compliance with the law. Persons who perceived their treatment by the police to be fair were more likely to comply with the law. Procedural justice in turn consists of four elements: voice, respect, neutrality and trust (Tyler, 2013).

Work on the nature of compliance by Robinson and McNeill (2008, 2010) has shown that compliance is often dynamic in nature and changes in response to the type of enforcement practices employed. They argue that responsive enforcement practices that allow sufficient discretion for supervisors to respond in a flexible manner to non-compliance are more likely to be perceived as legitimate and thus more likely to encourage future compliance. Hucklesby *et al.* (2018) draw on this work and, applying it to breach processes, argue that breach processes must both respect due process rights and be responsive if they are to be considered legitimate. They then explore the degree of responsiveness and the extent to which due process rights are protected in the breach processes of the 10 countries included in the study. They conclude by proposing a new overarching framework for assessing the legitimacy of breach processes, combining responsiveness and due process rights, which they refer to as a responsive rights-based breach process model (Hucklesby *et al.*, 2018: 98).

Hucklesby *et al.* (2018) identified a continuum of responsiveness when comparing the 10 European jurisdictions. The Irish community service breach process was one of the most responsive of the 10

jurisdictions for the following reasons: it provides informal and formal opportunities for offenders to participate in the decision-making process; it has a culture of tolerance of low-level non-compliance; practitioners can give participants additional opportunities to comply over and above formal guidelines; it is supportive of supervisory relationships; and practitioners typically distinguish between unwillingness to comply and genuine difficulty in complying when assessing the attitude of the participant towards compliance. The CSO enforcement process also scored highly in terms of the protection of due process rights. However, this is largely due to the fact that in Ireland allegations of non-compliance with the conditions of a CSO are prosecuted as criminal charges in the courts: an approach that, as we will see in the next section, is out of keeping with other European jurisdictions and with best European standards.

Breach processes and European law, ethics and norms

An important consideration in the comparative analysis of breach processes in Europe is the extent to which they comply with European norms, values and ethics. Morgenstern *et al.* (2018) highlight how persons subject to allegations of non-compliance with conditions during the enforcement stage of punishment are much less protected than during the initial trial phase. The typical protections afforded to persons charged with criminal offences by Articles 5 (the right to liberty) and Article 6 (the right to a fair procedure) of the European Convention of Human Rights (ECHR) have been found by the European Court of Human Rights (ECtHR) not to apply, for the most part, to the implementation phase of punishment. From their analysis of the 1992 European Rules on Community Sanctions and Measures (ERCSM)[4] as well as the European Probation Rules 2010, Morgenstern *et al.* summarise a number of the key features that breach processes in Europe should observe, and the Irish breach process examined here fulfils many of the best practice standards they identify.

A key point they highlight is the need for final decision-makers to be sufficiently impartial and independent of those implementing punishment. In most cases they identify judges as the most appropriate final

[4] These rules were recently updated and are now contained in Recommendation CM/Rec (2017) 3 on the European Rules on community sanctions and measures. They can be accessed at https://rm.coe.int/168070c09b

decision-makers, as they are typically independent of the executive branch of government responsible for sentence enforcement. Although decision-making in the initial stages is carried out by the POs in terms of deciding whether to take a prosecution or not, the final decision-maker in terms of the criminal adjudication of the charge of non-compliance in Ireland is a judicial authority and thus independent of the executive. Morgenstern *et al.* (2018) identify proportionality of response to non-compliance as an important principle that should govern breach processes and that involves treating minor and more serious forms of non-compliance differently.

Proportionality is a relevant aspect of the Irish system too. Evidence from the pilot study carried out in Ireland suggests that practitioners at the early stage of the process regularly differentiate between minor and significant transgressions, and indeed the very detailed practice guidance (Irish Probation Service, 2014) includes strategies for distinguishing between and responding differently to the two. In particular, the Service Manual encourages practitioners to distinguish between unwillingness to comply and disorganised lifestyle or confusion about what is required in order to comply.

The 1992 rules (and the recent update of those rules) prohibit automatic conversions of community sanctions and measures to imprisonment as a response to non-compliance (Morgenstern *et al.*, 2018). In Ireland, a judge may re-sentence any person to any sentence that may have been available to the court at the initial time of sentencing. This allows for a proportionate judicial response to non-compliance and suggests that automatic imprisonment is not a feature of our system. However, the Irish process conflicts with Rule 84 of the 1992 European Rules on Sanctions and Measures in that it makes non-compliance in itself a criminal offence. This rule has been carried forward into the new updated rules, and it appears that Ireland is one of only a handful of countries that still criminalise people for non-compliance with conditions of community sentences. This should be amended at the earliest available opportunity.

A related issue is the extent to which sanctions are used to motivate compliance to the exclusion of other, more supportive measures. Article 85 of the European Probation Rules 2010 advances the notion that POs develop proactive measures to help offenders avoid non-compliance. Walsh and Sexton's (1999) study acknowledged that the relatively high rate of completion of CSOs in Ireland was in part due to the proactive

work done by POs in encouraging offenders towards completion. Some evidence of this appeared in the Irish pilot, but an interesting question arises regarding the extent of consistency of approach around the country. Do certain practitioners exercise a more forgiving approach than others in terms of tolerating higher levels of non-compliance? The new Integrated Community Service introduced on a pilot basis by the Irish Probation Service in 2017 (for more information see Irish Probation Service (2017)) directly addresses the concerns of Article 85 by providing that up to one-third of CSO hours may be spent on attending programmes and accessing services aimed at enhancing rehabilitation and reintegration. This is a very welcome move. The initiative is now being piloted on a national basis and its uptake and impact will be reviewed in 2019.

Conclusion

The aim of this paper was to contribute to the literature on non-compliance and breach processes in Ireland. The findings of the pilot study are by their very nature limited, and further studies that would provide a more substantial and comprehensive insight are well overdue. However, together with the comparative insights, they provide an interesting preliminary examination of how the process works in Ireland.

The Irish breach process that follows an allegation of non-compliance with CSOs is arguably a very sophisticated one. It respects proportionality and impartiality and provides sufficient discretion to practitioners to enable them to encourage and motivate sometimes reluctant participants towards completion. It provides numerous opportunities for CSO participants who violate the terms of their conditions to participate in decision-making and have their say. Compared with other European countries, it can be considered to possess ingredients favourable to a high level of legitimacy as it combines high levels of due process protection with a highly responsive approach to enforcement that prioritises the participant–supervisor relationship above strict enforcement protocols that have been found wanting elsewhere.

Of course, confirmation of these preliminary findings on legitimacy must await more substantive research that incorporates the perspectives of those subject to breach processes. However, this relatively enlightened approach conflicts with the continued criminalisation of non-compliance in Ireland. That approach not only is out of sync with the European Rules

on Sanctions and Measures but also stands in stark contrast to most other countries in the EU, where criminalisation has long been removed.

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