



## Governing Body

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Institutional Section

INS

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FIFTEENTH ITEM ON THE AGENDA

### Report of the Director-General

#### **Eighth Supplementary Report: Report of the Committee set up to examine the representation alleging non-observance by the United Kingdom of the Forced Labour Convention, 1930 (No. 29), made under article 24 of the ILO Constitution by the trade unions UNISON, GMB and Napo**

#### Introduction

1. By a communication dated 10 February 2014, the trade unions UNISON, GMB and Napo made a representation under article 24 of the Constitution of the International Labour Organization, alleging non-observance by the United Kingdom of the Forced Labour Convention, 1930 (No. 29).
2. Convention No. 29 was ratified in 1931 by the United Kingdom and is currently in force.
3. The following provisions of the ILO Constitution relate to representations:

#### *Article 24*

In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the Government against which it is made, and may invite that Government to make such statement on the subject as it may think fit.

*Article 25*

If no statement is received within a reasonable time from the Government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it.

4. In accordance with article 1 of the Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the ILO Constitution, as revised by the Governing Body at its 291st Session (November 2004), the Director-General acknowledged receipt of the representation, informed the Government of the United Kingdom and brought it before the Officers of the Governing Body.
5. At its 320th Session (March 2014), the Governing Body decided that the representation was receivable. At its 321st Session, the Governing Body appointed a committee for the examination of the representation composed of Mr Jan Terstegen (Government member, Netherlands), Mr Peter Woolford (Employer member, Canada) and Ms Catelene Passchier (Worker member, Netherlands).
6. The Committee held its first meeting on 24 March 2015.
7. The Government of the United Kingdom submitted its written observations in a communication dated 30 April 2015.
8. The Committee met on 6 November 2015 to examine the case and adopt its report.

## **Examination of the representation**

### **A. Allegations made by the complainant organizations**

9. In their communication of 10 February 2014, the complainant organizations allege the failure by the United Kingdom to secure the effective observance of the Forced Labour Convention, 1930 (No. 29), through the recent outsourcing to private sector bodies of the supervision, monitoring and delivery of the execution of the “unpaid work requirement”. According to the complainant organizations, an “unpaid work requirement” is a form of sentence whereby a person convicted of a criminal offence is required to perform unpaid work for a specific period of time.
10. The complainant organizations state that the work performed under an unpaid work requirement constitutes forced labour within the meaning of Article 2(1) of the Convention as the work is exacted from a person under the menace of penalty and is work for which the person has not offered himself voluntarily. Furthermore, unpaid work requirements do not fall under the only relevant exemption in Article 2(2)(c) of the Convention. Although the work is exacted as a consequence of a conviction in a court of law, it is not carried out under the supervision and control of a public authority. Since contracts for managing and running unpaid work requirements sentences are awarded to private sector companies, persons subject to this sentence are now hired by or placed at the disposal of private enterprises.

## **Legislation and practice governing unpaid work requirements**

11. The complainant organizations indicate that unpaid work requirements may be imposed on offenders aged 18 or over, under section 177 of the Criminal Justice Act 2003 (CJA), as well as on offenders aged 16–17 as a form of “youth rehabilitation order”, under section 1 of the Criminal Justice and Immigration Act 2008 (CJIA). In 2010–11, approximately 100,000 offenders were sentenced to unpaid work requirements.
12. The complainant organizations refer to the provisions of the CJA regulating unpaid work requirements for adult offenders. According to sections 197–200, the number of hours to be worked must be specified in the order (between 40 and 300 hours); the offenders must perform such work at such times as they may be instructed by the responsible officer; and the work must be performed during a period of 12 months. The responsible officer is an officer of a local probation board or a provider of a probation service and has the duty to promote the offender’s compliance with the order and, where appropriate, to enforce its requirements. The enforcement powers include giving the offender a warning, if the offender has failed, without reasonable excuse, to comply with any of the requirements of the order, and laying information before a justice of the peace in case of a further breach. The complainant organizations emphasize that there is no requirement for an offender to give any form of consent to the imposition of an unpaid work requirement.

## **The outsourcing of unpaid work requirements**

13. The complainant organizations stress that the Offender Management Act 2007 (OMA) abolished public sector probation boards and gave the Secretary of State power to establish Probation Trusts, which led to the establishment of the existing 35 public sector trusts. The OMA enables the Secretary of State to commission probation services from private as well as public bodies. These bodies are “providers of probation services” and may be authorized to appoint officers. In 2011, pursuant to the OMA, the Government began a process of outsourcing unpaid work requirements to private sector providers as well as to the Probation Trusts.
14. The complainant organizations provide documents setting out the details of how the Ministry of Justice was to contract for the provision of unpaid work requirements, referred to as “Community Payback”.<sup>1</sup> The proposed contracts were to be offered in “lots” (across England and Wales) but to date the only lot awarded has been for London. According to the Framework Agreement Terms and Conditions, the contract between the Ministry of Justice and the relevant provider is to be for a period of four years and will require the provision of a number of “core services”, including suitable placements organized; the Community Payback Scheme is monitored, managed and enforced; offender prepared for Community Payback; and offender undertakes Community Payback. Schedule A to the Framework Agreement requires the contractor to supply the services in accordance with the specification set out in Schedule C. According to this schedule, the National Offender Management Service (NOMS), an executive agency of the Ministry of Justice, retains strategic ownership of community payback and will monitor the performance of providers. However, the actual supervision and enforcement of unpaid work requirements is the responsibility of the provider which is responsible for oversight of offenders on work projects, for project assessments and management, for offender assessment, for sentence planning, and for enforcement and breach proceedings. The specification sets out how providers will handle these tasks. The complainant organizations stress that only the

<sup>1</sup> Ministry of Justice document *Competition to Provide Community Payback Service for London Lot 1, Invitation to Participate in Dialogue*, June 2011 (ITPD).

presentation of breaches in court is to remain the responsibility of the Probation Trust; all other aspects of unpaid work requirements which are not imposed with another sentence are to be undertaken by the provider. Furthermore, the authority requires providers to maximise opportunities to generate income to contribute towards the cost of delivering the sentence.

### ***Recent consultations***

15. The complainant organizations refer to a number of documents from the Ministry of Justice on the reform of community orders and probation services according to which the Government intends to introduce a widespread programme of competition, and invites providers from the private and voluntary sectors to bid to deliver the majority of current probation services, including community orders and among them unpaid work requirements. Although London remains the only Probation Trust Area in which Community Payback has been privatized, it is anticipated by the Ministry of Justice that, by 2015, contracts to run Community Payback will have been let in all 21 of the proposed contract areas.

### ***The Serco contract in London***

16. The complainant organizations indicate that, on 13 July 2012, a contract to run unpaid work requirements was awarded to Serco, with London Probation Trust (LPT) as a sub-contractor, for four years. It was the first time a major area of probation work has been opened up to the private sector. With the exception of case managers, all staff working on unpaid work requirements was transferred from the LPT to Serco, thus becoming employed by a private sector body. In this regard, the complainant organizations explain the very limited role taken by the LPT in the practical arrangements of unpaid work requirements. The LPT court staff interviews the offender and, taking into account risk factors, may recommend or not an unpaid work requirement as part of a community sentence. Within three days of sentencing, the offender attends a meeting with the LPT case manager. The LPT case manager will undertake a risk assessment and require the offender to sign the “community compact” setting out what is expected from the offender while on an unpaid work requirement. He will also complete a form which seeks to identify individual factors which affect the kinds of placement for which the offender may be suitable or not and any other information relevant to a placement. The LPT case manager will contact the Serco Control Centre, staffed solely by Serco staff, to request an unpaid work placement. Based on the information provided by the LPT case manager regarding the offender, the Serco placement staff will find the most appropriate unpaid work project for the offender. If the LPT case manager agrees with the project, he or she will instruct the offender to attend.
17. There are two distinct types of placement, known as “level one” and “level two” placements. Level one placements are suitable for most offenders and will normally comprise work groups undertaking manual labour tasks. Level two placements are available for offenders with extenuating circumstances who can be allocated individual placements. Most offenders begin at level one with a potential to progress to level two placements. Level one placements are carried out exclusively under the supervision of Serco employees, without any involvement of LPT employees. The offender must report to the site supervisor (a Serco employee), remain with him throughout the working day, and follow all instructions given. The supervisor may exclude an offender from a project if he/she has broken the rules, as set out in the daily instruction. Such exclusions or any concerns over an offender’s compliance with their Unpaid Work Order is reported by the Serco supervisor and to the appropriate LPT case manager who is the only person entitled to change hours of work for an offender or initiate breach proceedings. Level two

placements are normally carried out under the supervision of other agencies such as local authorities or charities. Charities which are not public sector bodies may provide individual placements to single offenders. The charity will be responsible for supervision in these cases. They will contact the LPT case manager if there are problems with offenders on particular projects.

### ***The Forced Labour Convention, 1930 (No. 29)***

- 18.** The complainant organizations refer to Article 1 of Convention No. 29 which lays down the obligation of ratifying members to suppress the use of forced or compulsory labour in all its forms, as well as to Article 2 which defines forced labour and its exceptions. They contend that the provision of unpaid work requirements by non-public sector bodies, such as Serco, is in violation of Convention No. 29 and that there will be further breaches if and when the Government awards other contracts to private sector bodies, for the following reasons:
- (a) Work is exacted under the menace of penalty and the person has not offered himself voluntarily
- 19.** The complainant organizations consider that the two elements contained in the definition of forced labour provided for in Article 2(1) apply to unpaid work requirements. First, the work performed by offenders is exacted under the menace of a penalty since the only alternative to the imposition of the order is another criminal penalty. The same applies if the offender fails without reasonable excuse to comply with any of the terms of the order. Second, there is no consent to the imposition of an unpaid work requirement so the offender does not offer himself or herself voluntarily for such work. In addition, given the alternative of punishment and the absence of any payment of wages for the work done, the conditions of work are not comparable with a free labour relationship, so that any consent cannot be freely given. In this regard, the complainant organizations quote the Committee of Experts on the Application of Conventions and Recommendations (CEACR) which considered, in its 2007 General Survey, that so as not to be regarded as a form of forced labour, labour exacted as community work must comply with the two conditions set out in Article 2(2)(c) of the Convention. According to this provision, forced labour shall not include “any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations”.<sup>2</sup>
- (b) Work carried out under the supervision and control of a public authority
- 20.** Referring to the 2007 General Survey, the complainant organizations observe that by requiring that a public authority actually controls and supervises the work carried out by the offenders, the Convention aims at preventing that the conditions under which prisoners’ work be determined otherwise than by public authorities. According to the UK Government’s proposal, offenders sentenced to unpaid work requirements will undertake such work under the supervision and control of private bodies selected as providers and not under the control of a public body. This is the case with the contract awarded to Serco for London under which the initial allocation to a placement, the induction in the work as well as the day-to-day supervision and control of the work is carried out by Serco in the case of

<sup>2</sup> *Eradication of Forced labour*, General Survey of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 96th Session, 2007, para. 125.

level one placements. It is therefore for Serco employees to determine whether or not there has been a failure to comply with the order. The role of LPT's employees on the London contract is in effect restricted to the initial community placement assessment and taking action in the event that Serco refers the offender for breach action.

- 21.** In this regard, the complainant organizations point out that the role of the courts is limited to specifying the number of hours to be worked and to resentencing the offender in the event of a breach. The courts do not specify the nature of the work to be performed nor supervise the conditions of the work itself. The courts' role cannot conceivably amount to "supervision and control". The situation is the same with regard to the NOMS whose role is restricted to contact Serco's management and not to supervise and control the carrying out of the work by offenders sentenced to unpaid work requirements. While the NOMS retains the power to monitor the performance of the contract by the provider, this monitoring does not amount to supervision and control of the work done by offenders.
- (c) **Person hired to or placed at the disposal of private individuals, companies or associations**
- 22.** The complainant organizations consider that when a private sector provider, such as Serco, carries out the work in relation to unpaid work requirements, offenders will be "placed at the disposal of private individuals, companies or associations" within the meaning of Article 2(2)(c) of the Convention, which constitutes a further reason why the exemption in Article 2(2)(c) is inapplicable. The complainant organizations refer to paragraphs 125–126 of the 2007 General Survey in which the Committee of Experts considered sentences of community work in the light of the exception provided for under Article 2(2)(c), of the Convention. When the legislation under which community work is imposed allows the work to be performed for a body other than a public institution, the Committee of Experts "seeks assurance with regard to two aspects: first, that the person sentenced formally consents to doing the community work; and secondly, that the circumstances in which the work is performed are adequately structured and monitored to ensure that the work done really is in the general interest, and that the entity for which the work is performed is non-profit-making." It also seeks assurances that the work "is genuinely in the general interest", having regard to whether the work is done for a non-profit making organization, the practical arrangements for the work and judicial supervision of the work. The complainant organizations observe in this regard that, in addition to the contract price to be paid by the NOMS for the contract itself, the private sector bodies may also generate income from the work performed by offenders under unpaid work requirements. As a consequence, the complainant organizations are of the view that in circumstances in which a private sector provider, such as Serco in London, is appointed to manage and supervise unpaid work requirements, this would not fall within the exception to forced labour provided for in Article 2(2)(c) of the Convention. There is clearly no consent to the work; the assurances which the Committee of Experts seeks in respect of community work for private bodies are also absent; there is no requirement that the work is in the general interest; and the entity for which the work is performed is, in the case of the private sector providers, a profit making company. For all these reasons, it follows that an offender performing an unpaid work requirement for a private sector provider will be placed at the disposal of a private company within the meaning of Article 2(2)(c).
- 23.** In conclusion, the complainant organizations request that the ILO holds that the United Kingdom has violated Convention No. 29 by the transfer of the supervision and control of unpaid work requirements to private sector providers (in particular to Serco in the London area).

## **B. The Government's response**

24. In its reply dated 30 April 2015, the Government indicates that the sentence of unpaid work requirement is intended to be both penal and rehabilitative. It aims at restoring justice by requiring the offenders to carry out work for the benefit of the community where they live. Typical projects include work removing graffiti and litter, assisting the work of homelessness and health charities and painting community centres. The sentence of unpaid work requirement is also meant at rehabilitating the offenders by teaching work skills and self-discipline. According to the Government, many former offenders find work as a result of experience and skills they have gained whilst carrying out an unpaid requirement. The day-to-day operation of probation services has been outsourced under an EU law competitive tendering process. The reforms were implemented to reduce reoffending, make communities safer and offer taxpayers better value for money. The contracts incentivize providers to reduce reoffending, as a proportion of the payment they will receive will be at risk and dependent on their performance in reducing reoffending via payment by results. Each year the Courts in England and Wales impose around 7 million hours of unpaid work requirements. It is thus essential that work starts promptly and that the requirements are well managed.
25. The Government refers to the arguments presented by the complainant organizations which conclude that the new arrangements are in breach of Convention No. 29, and considers that the representation should be dismissed for the following reasons. While unpaid work requirements are prima facie forced labour, the exception for criminal sentences provided for under Article 2(2)(c) applies: (i) the contractor is a public authority; (ii) the work of the contractor and unpaid work requirements are subject to detailed public supervision and control; and (iii) no individual is hired by or placed at the disposal of private individuals, companies or associations.
26. The Government observes that the complainant organizations do not allege that offenders have been treated unfairly as a result of the competitive tendering process. Furthermore, they do not represent offenders subject to forced labour but are using the ILO representation procedure as a means to oppose any private sector involvement in the provision of probation services.

### ***The Convention***

27. Referring to Article 1 of the Convention which contains the obligation to suppress forced labour in all its forms, the Government indicates that the Convention, adopted in 1930, was designed to ensure that individuals retained the ability to choose where to offer their labour and to generate wages from their own effort. The Government also refers to the definition of forced labour provided for in Article 2(1) as well as to the five types of compulsory labour that are excluded from this definition. In relation to the work imposed on convicted persons – exception laid down in Article 2(2)(c) – the Government observes that the Convention recognized that it is an important part of criminal sentencing policy to be able to require an offender to carry out work for the benefit of the community. The Convention nevertheless establishes two conditions in order to prevent abuses. According to the Government, the Convention does not prohibit the use of private sector entities in the day-to-day operation of unpaid work requirements but requires “supervision and control by a public authority” and that the person is not “hired or placed at the disposal of private individuals, companies or associations”.

## **National legislation**

28. Under the Criminal Justice Act 2003, unpaid work requirements may be imposed on persons over 18 years of age who may be required to work between 20 and 300 hours within a period of 12 months. Where an unpaid work requirement is imposed, it is the duty of the responsible officer to make any arrangements that are necessary in connection with the requirements imposed and to promote the offender's compliance with those requirements. The responsible officer must be an officer of a provider of probation services.<sup>3</sup> According to the Offender Management Act 2007 (OMA), probation purposes include the supervision and rehabilitation of persons charged with or convicted of offences. The Secretary of State is allowed to make contractual arrangements with any other person for the making of the probation provision. Nevertheless, when the probation provision relates to "the giving of assistance to any court in determining the appropriate sentence to pass", the contractual arrangements may only be made with a probation trust or other public body. The Secretary of State retains a level of control over who is appointed to be a responsible officer even when those staff is employed by the contractor because he must either directly or indirectly authorise their appointment.

## **Current arrangements**

29. Noting that, in their representation, the complainant organizations focused on a pilot contract in London carried out by Serco, the Government points out that this pilot project no longer exists, given the implementation of the wider reforms mentioned above. The Government considers that it was not necessary to set out the Serco contracting arrangements in detail since they are not materially different from the current arrangements in place in England and Wales which are as follows:

- the delivery of unpaid work requirements is carried out under contract with a number of Community Rehabilitation Companies (CRCs) which, in addition to delivering unpaid work requirements, supervise other types of community sentence;
- CRCs may be privately owned but they carry out public functions and are therefore subject to public and administrative law, as well as their contractual obligations to the Secretary of State;
- the contracts provide that CRCs must deliver unpaid work requirements; that work must be both demanding and rehabilitative, assisting the offender to reintegrate into society; that offenders must be treated and managed fairly and decently with a view to make positive changes in their life; that CRCs are exercising public functions and therefore must comply with the Human Rights Act 1998 and the public sector obligations under the Equality Act 2010; and that audits and remedies for breach of contracts must be ensured.

## ***Is an unpaid work requirement forced labour as defined in Article 2(1)?***

30. The Government acknowledges that unpaid work requirements entail work that is not voluntary and which, if not completed, may lead to a penalty. However, the nature of the work is entirely different from the nature of forced labour contemplated in the Convention. The offender retains full and free access to the labour market. An unpaid work arrangement is designed to be compatible with full-time employment and to ensure that it

<sup>3</sup> Sections 177, 190, 197 and 198 of the CJA.



does not interfere with any paid work. The offender is not used as a captive labour force. An unpaid work requirement is only imposed if the court is satisfied that the offender is a suitable person to perform such work, taking into account the offender's circumstances and on advice from a public sector enforcement officer. As an alternative to imprisonment, unpaid work requirement is a less expensive penalty that is more effective in rehabilitating the offender and reducing offending behaviours by instilling a work ethic, providing work experience and skills, and enabling the offender to repay the community the harm caused by his or her criminal conduct.

***Does an unpaid work requirement fall within the scope of the exemption provided for in Article 2(2)(c)?***

- 31.** The Government points out that the three cumulative requirements contained in Article 2(2)(c) are met. First, unpaid work requirements can only be imposed as a consequence of a conviction by a court of law. Second, the CRCs exercise public functions and, to the extent they are managing offenders, they are public authorities. Furthermore, the work remains under the supervision and control of the Secretary of State and the courts. Third, offenders are not hired to or placed at the disposal of private entities.
- (a) Conviction in a Court of law
- 32.** The Government states that this requirement is not disputed by the complainant organizations.
- (b) Public authorities
- 33.** According to the Government, the purpose of the public authority requirement in Article 2(2)(c) of the Convention is to ensure that working conditions are acceptable and that a public authority can be held accountable for the prisoners' treatment by judicial or parliamentary means. CRCs are public authorities where they are supervising offenders. They carry out public functions on behalf of the State and, as such, they are recognized and treated as a public authority by the law and subject to the judicial review jurisdiction of the courts. The courts will review the conduct of the CRCs to ensure that their conduct is reasonable, lawful and fair. As a consequence, an offender who is being treated inappropriately would be able to bring a claim against the CRC directly and obtain relief from the administrative courts to end any mistreatment. Offenders may also complain to the ombudsman and obtain redress or apply to the sentencing criminal court to vary or even revoke the order.
- 34.** CRCs are also subject to regular inspection by Her Majesty's Inspectorate of Probation (HMIP) which monitors the provision of probation services by the National Probation Service and contracted probation providers. Inspection findings are published and scrutinized by the parliament in the form of the Justice Select Committee, ensuring Ministers are held to account for contracted out probation services delivered on their account. Like any other public authority involved in the delivery of criminal offences, CRCs are subject to the full oversight of the Secretary of State, the courts, the ombudsmen and HMIP. The Convention seeks to ensure that forced labour is organized by public authorities to ensure that there is legal control and effective complaints handling. These requirements have been satisfied with the CRCs.
- (c) Supervision and control
- 35.** The Government refers to the guidance provided by the Committee of Experts in paragraph 53 of its 2007 General Survey as to the meaning and application of "supervision and control" in Article 2(2)(c). Based on this guidance, the Government explains that the

duties and obligations of the CRCs are set out in a very prescriptive and detailed contract specification by the Secretary of State who exercises strict control over them. A schedule to the contract sets out the precise tasks that must be carried out by the CRC whenever an unpaid work requirement is imposed. These specifications cover every aspect of the unpaid work requirements, including: a face-to-face interview with the offender; the preparation of a sentence plan that is reasonable and proportionate; assessment of the vulnerability of the offender; allocation of work that is to the benefit of the community; and a deadline for the commencement of the work. The CRCs' role is thus extremely circumscribed. They must provide detailed information to the Secretary of State on a regular basis to ensure that the requirements are being complied with. If any material non-compliance is discovered, the Secretary of State may require a remedial plan. Unremedied or serious breaches may lead to termination of the contract.

(d) **Hired to or placed at the disposal of private individuals, companies or associations**

**36.** The Government notes that while the Committee of Experts has applied a strict approach when applying this clause to private prisons, it has adopted a different approach in cases involving community service, partly because offenders are not imprisoned. They retain full access to the employment of their choice. According to the Government, the purpose of the "hired to or placed at the disposal of" requirement is designed to ensure that the benefit of the labour is not given to a private entity, for the purpose of private profit. If the private entity is enjoying private benefits from the unpaid work, then the worker has been placed at their disposal. If the work is on proper analysis a benefit to the community and not done for private profit, then the worker has not in truth been hired to or placed at the disposal of a private entity.

**37.** All work carried out under an unpaid work requirement is carefully managed to ensure it is in the public interest and is not carried out for private profit. The contract contains a number of safeguards to ensure, inter alia, that work carried out adds value to local communities, by working on tasks which would not otherwise be undertaken, for example, by additional graffiti removal or the clearance of litter and overgrown areas. Moreover, income is reinvested in the provision of the service and the Secretary of State is given full disclosure of the income generated. Accordingly, CRCs may profit from the overall contract to supervise offenders, but the contract explicitly makes it clear that they should make no benefit from the unpaid work element. Strict safeguards are in place to ensure that these requirements are complied with in full.

## **Conclusion**

**38.** The Government emphasises that the United Kingdom's approach to unpaid work requirements has been designed to comply with the Convention. In this way, CRCs perform public functions and are public bodies. The work carried out by CRCs is limited, controlled and subject to intensive supervision arrangements. Furthermore, there is no private profit derived from carrying out unpaid work requirements since proceeds from unpaid work are reinvested into the delivery of the service, rather than private benefit. The Government points out that the dispute with the complainant organizations is about the desirability of private sector involvement in the operation of community sentences. It considers that the Convention does not prevent outsourcing of day-to-day delivery of community sentences to a private company, subject to strict oversight and control, and where no private profit is made from unpaid work. Consequently, the Government considers that the representation is unfounded.

## Conclusions of the Committee

39. The Committee observes that the complainant organizations referred to the Serco contracting arrangements but the Government does not provide information in this regard since this pilot project no longer exists.
40. The Committee notes that the complainant organizations consider the outsourcing to private sector bodies of the supervision, monitoring and delivery of the “unpaid work requirement” is in breach of Convention No. 29. They state that the work exacted under such sentences constitutes forced labour within the meaning of Article 2(1) of the Convention as the work is exacted from a person under the menace of a penalty and is work for which the person has not offered himself voluntarily. Furthermore, unpaid work requirements do not fall under the only relevant exception in Article 2(2)(c) of the Convention. Although the work is exacted as a consequence of a conviction in a court of law, it is not carried out under the supervision and control of a public authority and persons subject to this sentence are now hired by or placed at the disposal of private enterprises. In turn, the Government considers that, while unpaid work requirements, *prima facie*, constitute forced labour as defined in Article 2(1) of the Convention, the exception for criminal sentences provided for under Article 2(2)(c) applies: the contractor carries out public functions on behalf of the state and, as such, it is treated as a public authority by the law; the work of the contractor and unpaid work requirements are subject to detailed public supervision and control; and no individual is hired or placed at the disposal of private individuals, companies or associations.
41. The Committee observes that the Committee of Experts has examined the bearing that sentences of community work may have on the application of Convention No. 29 in paragraphs 123–128 of its 2007 General Survey.<sup>4</sup>

<sup>4</sup> Paras 125–128 read as follows:

125. The relevance of community work to the application of the Convention must be considered in the light of the exception provided for under Article 2, paragraph 2(c), of the Convention. Under the terms of that provision, the term “forced labour” is not deemed to include “any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations”. Accordingly, so as not to be regarded as a form of forced labour, labour exacted as community work must comply with the two conditions set out in this provision of the Convention. The first condition does not generally pose any difficulty, since under the national laws which the Committee has been able to examine community work is a penal sanction which can be imposed only by a court. The second condition set out in Article 2, paragraph 2(c), is also met where the work in question is performed for the State or its various divisions (administrations, regions, public services and establishments, etc.). Where these two conditions are met, a sentence of community work comes under the terms of the exception provided for by the Convention and does not call for any comment by the Committee.

126. This is not the case where the legislation under which community work is imposed allows the work to be performed for a body other than a public institution. In the great majority of the legislation examined, community work may be performed for private institutions such as charitable bodies. In such cases, the Committee seeks assurance with regard to two aspects: first, that the person sentenced formally consents to doing the community work; and secondly, that the circumstances in which the work is performed are adequately structured and monitored to ensure that the work done really is in the general interest, and that the entity for which the work is performed is non-profit-making.

127. The legislation normally requires persons sentenced to do community work to give their consent. Community work allows courts to punish certain offenders by imposing a sanction which does not involve imprisonment, but consists of performance of work intended to some extent to make amends for the harm done to society by the offence. Given the purpose of the sanction, it has generally been considered desirable for offenders to formally consent to doing work of this kind. For example, the legislation that has been examined requires the persons sentenced to be present when the sentence is

42. The Committee observes that the work imposed on offenders under unpaid work requirements falls within the general definition of forced labour as set out in Article 2(1) of the Convention in so far as offenders undertake this unpaid work under the menace of a penalty and without having offered themselves voluntarily for such work. Both the complainant organizations and the Government agree on this point. It is therefore necessary to consider whether this work constitutes an exception to forced labour within the meaning of the Convention.
43. Both the complainant organizations and the Government have considered that the relevance of unpaid work requirements to the application of the Convention must be examined in the light of the exception provided for under Article 2(2)(c), of the Convention. Under the terms of that provision, the term “forced labour” is not deemed to include “any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations”. Accordingly, so as not to be regarded as a form of forced labour, labour exacted as an unpaid work requirement must comply with the three conditions set out in this provision of the Convention. These conditions and safeguards concern both the basis for an obligation to work – a conviction in a court of law – and the modalities governing the use of compulsory labour.
44. The first condition provided for in Article 2(2)(c) relates to “a conviction in a court of law”. The Committee notes in this regard that both the complainant organizations and the Government refer to section 177 of the Criminal Justice Act, 2003. Under this provision, after having decided that a person is convicted of an offence, the court may make an order imposing on the offender an unpaid work requirement. As a consequence, the Committee observes that an unpaid work requirement constitutes a penal sanction that is imposed by a court when the person concerned is found guilty of an offence.
45. According to the second condition provided for in Article 2(2)(c), the work imposed must be carried out under the supervision and control of a public authority. In this regard, the Committee observes that the complainant organizations state that, in the framework of the process of outsourcing probation services to private sector providers, the actual supervision and enforcement of the execution of the sentence is the responsibility of the provider, which is responsible for oversight on work projects, for project assessments and management, for offender assessment, for sentence planning, and for enforcement and breach proceedings. The complainant organizations consider that the Probation Trust (a public entity) now plays a very limited role in the practical arrangements of unpaid work requirements, intervening only for community placement assessments and in the event that

handed down, their consent to be obtained, and establishes that they have the right to request an alternative sanction or to refuse it. Only in rare cases has the Committee been prompted to ask governments to indicate whether or not persons thus sentenced have consented to the sanction or to indicate exactly how that consent was obtained.

128. As indicated above, legislation more often than not allows community work to be performed for private bodies – charitable associations or institutions – as well as for the State and public institutions. In such cases, the Committee seeks assurance that work done for such private institutions is genuinely in the general interest. This involves determining whether the work is of real benefit to the community and whether or not the body for which the work is done is a non-profit-making organization. Legislation may stipulate explicitly that the association for which the work is done should not be profitmaking, or that the work should not serve the purpose of economic gain. A number of elements exist to prevent the basic purpose of the work from being subverted. These include: the practical arrangements for the work; judicial supervision of the conditions in which the sentence is carried out; and the criteria adopted by the courts to allow associations to provide work for persons sentenced to community work. In the interests of a more complete examination of the situation in a country, the Committee may also ask governments to provide a list of authorized associations or institutions and to give examples of the type of work involved in community work.

the provider refers the offender for breach action. The same occurs with the NOMS, the role of which is restricted to monitoring the performance of the contract by the provider, and does not include supervising and controlling the carrying out of the work by offenders. The Government for its part considers that while CRCs may be privately owned, they carry out public functions on behalf of the State and, as such, they are recognized as a public authority by the law and subject to judicial review by the courts as well as complaints made to the ombudsman by offenders. The role of providers is extremely circumscribed: duties and tasks are set out in a very prescriptive and detailed contract specification by the Secretary of State, who exercises control over them. These specifications cover all aspects of an unpaid work requirement, for example: a face-to-face interview with the offender; the preparation of a sentence plan; the assessment of the vulnerability of the offender; and the allocation of work and setting a deadline for the commencement of the work.

46. The Committee notes that the current arrangements allow the Secretary of State to make contractual arrangements with privately owned community rehabilitation centres for the execution of unpaid work requirements. The Committee observes, from the information provided, that under these arrangements, private providers are directly involved in all the practical arrangements concerning the allocation, management, assessment and supervision of the compulsory work of offenders. Accordingly, the day-to-day work carried out by offenders is directly supervised by private entities. The Committee notes nonetheless that the Government has put in place a number of safeguards in relation to the role and functioning of the private providers. Their duties are defined in a detailed manner: the Secretary of State exercises control over them and they are governed by public law and subject to public courts. The Committee observes that while offenders carrying out unpaid work requirements are no longer under the direct supervision of public entities under the new arrangements, public authorities, through the Secretary of State and the courts, monitor and exercise control over these entities, in law and in practice. The Committee recognizes that these private entities carry out public functions on behalf of the State and, as such, they are recognized as a public authority by the law and are subject to judicial review by the Courts. *The Committee recommends in this regard that the Government continues to ensure that such control and supervision is exercised adequately and carefully by the public authorities and, as indicated by the Government, that offenders can access public complaint mechanisms effectively.*
47. The last condition provided for in Article 2(2)(c) requires that offenders are “not hired to or placed at the disposal of private individuals, companies or associations”. The complainant organizations consider that when a private sector provider is appointed to manage and supervise the work in relation to unpaid work requirements, offenders are “placed at the disposal of private individuals, companies or associations”. Private providers are not non-profit bodies and they are incentivized to generate income from the work performed by offenders under unpaid work requirements. In turn, the Government considers that, while private providers may profit from the overall contract to supervise offenders, the contract explicitly makes it clear that they should make no benefit from the unpaid work element. The Government points out that the work carried out under an unpaid work requirement is managed to ensure that it is in the public interest and is not carried out for private profit. Accordingly, the Government emphasizes that the worker is not really hired to or placed at the disposal of a private entity.
48. While observing that the new arrangements allow private providers to be directly involved in the delivery of unpaid work requirements, the Committee recognizes that the offenders are not directly hired by the private providers; however, they are placed with the provider to perform activities; and the providers are not the beneficiaries of the product of the work carried out by offenders. Nevertheless, considering the involvement of private entities in the process, the Committee is of the view that there needs to be safeguards in place in terms of monitoring the circumstances in which the work is performed so as to ensure that

the work that is actually performed is in the general interest, and that the entity for which the work is performed should not serve the purpose of economic gain.

49. With regard to work performed in the general interest, the Committee recalls that, referring to the ILO memorandum on prison labour, the Committee of Experts pointed out in its 2007 General Survey that the benefits of exempting prison labour under the Convention were in the interest of society in general. This interest may be direct when the work performed is deployed in public activities, or indirect when it is aimed at the rehabilitation of the offenders.<sup>5</sup> Furthermore, referring specifically to community work, the Committee of Experts also recalled that:

... legislation, more often than not, allows community work to be performed for private bodies – charitable associations or institutions – as well as for the State and public institutions. In such cases, the Committee seeks assurance that work done for such private institutions is genuinely in the general interest. This involves determining whether the work is of real benefit to the community and whether or not the body for which the work is done is a non-profit-making organization. Legislation may stipulate explicitly that the association for which the work is done should not be profitmaking, or that the work should not serve the purpose of economic gain.<sup>6</sup>

In this regard, the Committee notes the Government's indication that in relation to every unpaid work placement, the contract requires that the work does not directly replace paid employment with proposed work projects but shall add value to local communities by working on tasks which would otherwise not be undertaken. In addition, the Committee notes that unpaid work requirement is aimed at rehabilitating the offenders by teaching work skills and that offenders have found work as a result of experience and skills whilst carrying out unpaid work placement. The Committee observes that according to the information provided, the work undertaken by offenders under unpaid work requirements is carried out in the general interest of the community. ***The Committee accordingly encourages the Government to continue to ensure that all the necessary safeguards in place guarantee that work undertaken under unpaid work requirements is genuinely in the general interest and does not serve the purpose of economic gain.***

50. The Committee also notes that available information does not allow the Committee to conclude that the entities that benefit from this work are profit-making entities. However, the Committee observes that private providers (CRCs) are encouraged to generate income and that the contract requires that all income must be reinvested in the provision of the services and improvements in the provision of such services. ***Therefore, the Committee is of the view that the Government should continue to monitor carefully the functioning of the system to ensure that private providers are paid solely in accordance with the financial terms of the contract that they have concluded and that they make no benefit from the unpaid work undertaken by offenders, as the value generated from work imposed on convicted persons should revert to the community.***
51. Finally, the Committee recalls that the Committee of Experts has indicated in its General Survey of 2007 that when the two conditions provided for in Article 2(2)(c) are met, “a sentence of community work comes under the terms of the exception provided for by the Convention and does not call for any comment by the Committee. This is not the case where legislation under which community work is imposed allows the work to be performed for a body other than a public institution”. In such a situation, “the Committee seeks assurances with regard to two aspects: first, that the person sentenced formally

<sup>5</sup> 2007 General Survey, para. 49.

<sup>6</sup> *ibid*, para. 128

consents to doing the community work; and secondly, that the circumstances in which the work is performed are adequately structured and monitored to ensure that the work done is really in the general interest, and that the entity for which the work is performed is non-profit-making".<sup>7</sup> The Committee observes that, under the Criminal Justice Act 2003, unpaid work requirements may be imposed without offenders giving their consent to such sentences. *It is therefore essential that the arrangements in place concerning the role of private providers in the delivery of sentences of unpaid work requirement do not result in the private provider placing offenders in compulsory work for profit-making entities for economic gain.*

## Recommendations of the Committee

**52. In light of the conclusions set out in paragraphs 39–51 above concerning the issues raised in the representation, the Committee recommends that the Governing Body:**

- (a) approves the present report;*
- (b) requests the Government, in order to continue to ensure that work imposed on persons sentenced to unpaid work requirements remains within the limits of the exception to forced labour provided for in Article 2(2)(c), to take into account the action requested in paragraphs 46, 49, 50 and 51;*
- (c) invites the Government to provide information concerning the recommendations of this Committee for examination by the Committee of Experts on the Application of Conventions and Recommendations at its November–December 2016 session, when a report on the application of the Convention is next due; and*
- (d) makes this report publicly available and close the procedure initiated by the representation.*

Geneva, 10 November 2015

*(Signed)* Jan Terstegen

Peter Woolford

Catelene Passchier

*Point for decision:* Paragraph 52

<sup>7</sup> *ibid*, paras 125–127.