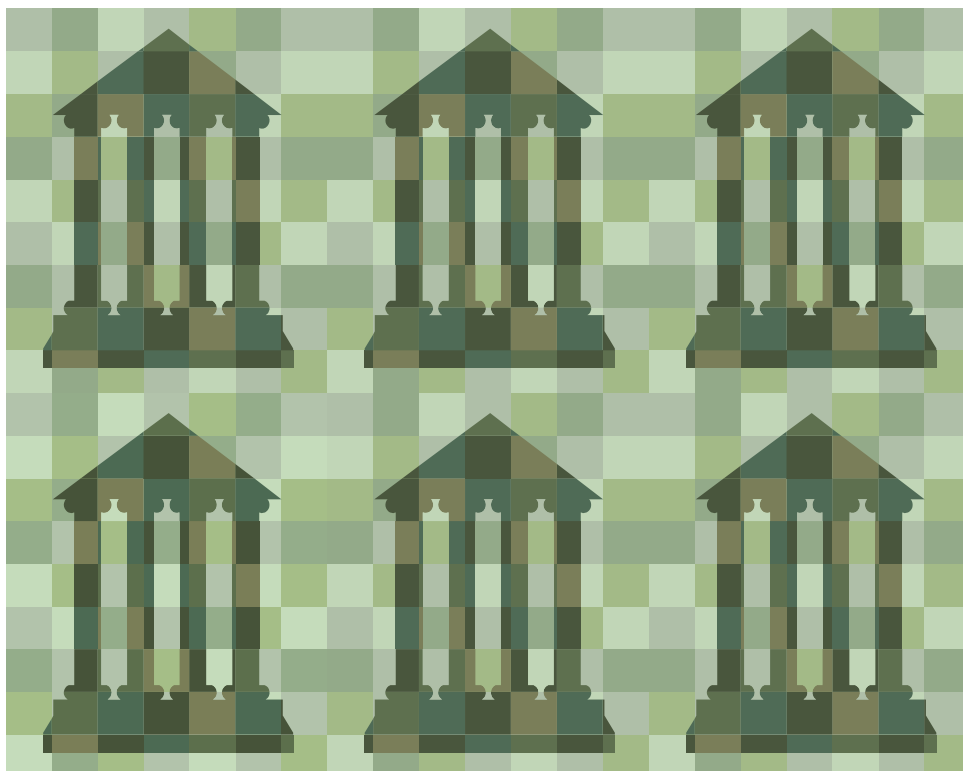


WHITE PAPER ON CRIME

Discussion Document No. 2

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Criminal Sanctions



Department of Justice, Equality and Law Reform
An Roinn Dlí agus Cirt, Comhionannais agus Athchóirithe Dlí

ABOUT THE WHITE PAPER PROCESS - ROLE OF DISCUSSION DOCUMENTS

A White Paper provides a high level statement of Government policy, its rationale and the strategies to give effect to that policy. Development of the White Paper on Crime involves an end-to-end examination of the prevention, intervention and enforcement strategies to combat crime.

A series of discussion documents on key issues will provide structure for consultation during this process. This is the second of these documents. The first dealt with Crime Prevention and Community Safety. More information about that document and the outcome of public consultations to date can be found on the Department's website (www.justice.ie).

Each document will include a general, non-specialist overview of the issue in question, together with a number of questions to assist in shaping discussion and feedback.

Comments need not be limited to these specific questions and can be submitted by post or email to:

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Submissions on this document should be made **before the end of May, 2010.**

If making a submission, please state if the views expressed are personal or are being made on behalf of an organisation. If views of an organisation are being submitted, it should be made clear which organisation is represented.

Submissions may be subject to the provisions of the Freedom of Information Acts and may be published. Please indicate if you would prefer your submission to remain confidential or if you do not wish your name to be included in the list of contributors.

Contents

INTRODUCTION	6
THE PURPOSE OF CRIMINAL SANCTIONS	7
NON-CUSTODIAL SANCTIONS	12
IMPRISONMENT	19
CRIMINAL SENTENCING POLICY AND PRACTICE	28
CONCLUSION	35
APPENDIX A	36
APPENDIX B	39
REFERENCES	44

Introduction

Organised societies have always imposed sanctions: that is, types of punishment on individuals who breach the norms and laws in place within those societies. The nature of the sanctions applied has evolved considerably over time. Many types of punishment which were once commonplace such as banishment, forced labour, transportation and corporal punishment are no longer acceptable. In Ireland and in many other developed nations capital punishment was progressively removed as a form of punishment over the last century, leaving imprisonment as the most severe sanction available.

At any time the sanctions in place reflect the prevailing philosophy of the society that operates them, as well as the way in which that society is governed. Modern legal systems typically restrict the authority to impose sanctions to the State and aim to ensure that punishment is not arbitrary or inhumane. Beyond this, however, there is some considerable variety in the application and severity of sanctions.

The purpose of this paper is to set out the current range of sanctions applied in Ireland and to ask:

- **What role should sanctions play as part of an overall response to crime?**
- **How well is the existing approach to sanctions and sentencing working to prevent and reduce crime?**
- **How should policy in this area best be developed and implemented?**

The Purpose of Criminal Sanctions

Debate on Sanctions in Ireland

From time to time, the level of the penalties applied in individual cases attracts public attention. The emphasis tends to be on the perceived leniency of the penalty, often in connection with sexual assault and other violent crime. At the same time, numerous observers have emphasised that imprisonment needs to be a sanction of last resort and to be used with restraint. This view was clearly expressed in the Whitaker Report (1984) and reflected in the principles underpinning the Department of Justice, Equality and Law Reform's policy and strategy statement *The Management of Offenders* (1994). Although imprisonment is the sanction applied in a minority of all cases, the extent of its use continues to be criticised, as has the inadequacy of information on sentencing practice (O'Mahony, 2002).

While not always explicitly expressed, these debates are often underpinned by competing views as to the purpose of sanctions and the role they play in the criminal justice system. It is useful to begin, therefore, by setting out the most commonly cited purposes of imposing a sanction on someone convicted of an offence.

The Purpose of Sanctions

Punishment – to inflict some kind of loss on the offender and give formal public expression to the unacceptability of the behaviour to the community.

Incapacitation - to restrain the offender so as to limit their opportunities to commit further crime.

Deterrence – to impose a penalty to either deter the individual from committing further crimes or to deter others from imitating the criminal behaviour.

Rehabilitation – designed to include measures which might contribute to the person desisting from future offences and to assist in their reintegration into society.

Reparation – penalties can involve direct or indirect compensation for the harm caused to victims by the crime.

Significance of Human Rights Principles and Protections

Another key factor in the debate on sanctions and one which has influenced how sanctions have evolved over time has been the development of human rights principles and protections, with the result that sanctions which were once quite commonplace in our society are now rightly regarded as barbaric and inhumane. These principles are given formal expression in a wide range of national, regional and international legal instruments, including the Irish Constitution and domestic legislation, the European Convention on Human Rights (ECHR), the International Convention on Civil and Political Rights as well as UN and Council of Europe Conventions dealing with the Elimination of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Issues specific to children are also addressed in the UN Convention on the Rights of the Child. More detailed principles again exist in the Council of Europe's European Prison Rules and the European Rules of Community Sanctions and Measures.

These standards set out a range of protections designed to ensure that persons charged with offences are dealt with justly and fairly while also limiting the types of sanction or punishment that may be imposed and requiring that the selection of penalty not be disproportionate in the circumstances.

How these principles are enforced varies, with only the protections offered by the Constitution and the ECHR having direct effect in Irish law. Non-direct enforcement involves monitoring by expert international committees and provides some avenues of complaint for individuals who believe that their rights have been infringed.

These principles also have a more general impact in that much of the debate concerning the use of sanctions centres on the extent to which certain approaches are in keeping with these and other human rights principles. Discussion often centres on the principles which should govern the use of sanctions and tensions which can sometimes exist between those principles and the intended purpose of imposing the sanction.

The Role of Sanctions in Crime Reduction and Public Protection

The function of sanctions as punishment need not necessarily give rise to any broader crime control or public protection function. To some extent punishments are imposed on offenders because it is widely regarded as simply being the right thing to do. It is appropriate that offenders experience some sort of loss or burden, in recognition of the community's disapproval of their actions.

However, sanctions are also generally justified by reference to the other functions listed on the previous page. An important overarching objective is the provision of public protection, i.e. the reduction as much as possible of re-offending in the community and the prevention of further victimisation. While the empirical data and analysis insofar as Ireland is concerned is limited, some of the research which has been undertaken in other jurisdictions is relevant to this discussion.

The first discussion document in this series ('Crime Prevention and Community Safety') considered the many factors which contribute to crime and its prevention. Sanctions can affect the level of crime in a number of ways, principally through the mechanisms of incapacitation, deterrence, or rehabilitation.

Sanctions and Incapacitation

Some sanctions, principally imprisonment, can reduce crime through incapacitation. For many, this is the main common-sense role of imprisonment. Incapacitation forms an essential public protection role and for the most serious and serial offenders it has particular relevance. While incapacitation is primarily associated with imprisonment, court ordered behavioural restrictions, such as not participating in certain activities or frequenting certain places, especially those associated with a high risk of re-offending, can also protect the public from further offending.

Various attempts have been made to measure the incapacitative impact of imprisonment. The Halliday report in the UK concluded that a 15% increase in prison population would be required to achieve a reduction in crime of 1% (2001). A considerable amount of research and debate on this subject exists in the US, where the prison population has grown substantially since the 1960s. That research also links expansion in prison population with decreased crime, although the studies vary considerably in estimating this. However, some of the research also records diminishing returns and a degree of negative feedback arising from the long-term damage done to those communities with high rates of imprisonment (Bottoms, 2004).

One issue on which there is general consensus, however, is the significant financial cost of imprisonment. Accordingly, while expenditure on additional imprisonment might achieve reductions in crime, and in some circumstances produce sufficient benefits to outweigh the expenditure incurred, it undoubtedly requires considerable resources and may not always be the most cost-effective way of achieving the same public protection outcome (Donohue, 2007).

Sanctions as Deterrents

Closely related to the communication of society's censure of the offence is the desire to send a message to act as a deterrent either to the offender in question or to others contemplating similar criminal behaviour. Most would agree that without criminal sanctions more people would risk committing a crime. Furthermore, any perception that crime goes unpunished threatens to undermine community morale and crime prevention efforts.

What is not as clear, however, is whether marginal increases in penalties will lead to increased deterrence. One major UK review of international research on this topic concluded that there was no basis for making a strong causal connection between variations in sentence severity and deterrent effects (Von Hirsch *et al.*, 1999). There are a number of likely reasons for this, including the possibility that many offenders will simply be unaware of variations in the law, or will dismiss the prospects of being detected or convicted, or may be willing to take the risk anyway because of

impulsiveness, desperation or for psychological reasons. The same research review has, however, found stronger deterrent effects arising from a higher expectation of detection and conviction. Speed and certainty of penalty seems to have a greater bearing on criminal behaviour than the possible range of penalty (Kleiman, 2009).

Sanctions and Rehabilitation

A further strand which has been examined is the rehabilitative impact of sanctions. Since most offenders will be released at some point and cease to be incapacitated, the question arises as to whether the impact of a penalty can be designed to have a positive impact on the person, or at least offset the negative impacts of that penalty for reintegration and non-offending. There is a wide range of interventions which can be incorporated into sanctions, with varied outcomes. These can be delivered by a number of means, including through structured intervention programmes in the community, tailored to the individual's circumstances and implemented under supervision (usually by court order). Alternatively, such interventions can be made during the course of a person's incarceration, although within short-term sentences there is little scope for focused rehabilitative interventions. The first discussion document in this series includes an overview of the measures of this type in place in Ireland.

The breadth of interventions is such that it is not possible to briefly summarise what does or does not work and to what extent. In very general terms, however, the research on interventions with offenders is now more promising than it was in the 1970s when the view that 'nothing works' prevailed in some jurisdictions. One comprehensive overview of evaluation studies identified gains in the region of 9-10%, in terms of reduction in re-conviction rates (McGuire, 2002).

Sanctions and Reparation

A further aim of sentencing can be to repair the harm that has been caused by the crime. This can take the form of financial compensation but it can also involve a far broader 'restorative justice' approach involving victims, offenders, families and community members in responding to crime. Restorative justice models and their application in Ireland are considered further at page 16 of this document, along with the recommendations of the National Commission on Restorative Justice.

Sanctions in Ireland

There is limited analysis available of the extent to which sanctions applied in Ireland meet the various objectives set out above. One study of burglary rates between 1952 and 1998 found that a 1% increase in the numbers of custody reduced the level of burglary by 0.9%, while a similar increase in detection rates reduced it by 3% (Denny & Harmon 2004). An examination of crime rates between 1995 and 1999 concluded that prison appeared to have the greatest impact on property crime and theft but little discernible impact on the most serious personal violent crime (O'Sullivan & O'Donnell, 2003).

These questions are considered further in the course of the document but to set the scene, it makes sense to begin with an overview of the types of sanctions available to the Courts and applied by them in practice. This overview will begin by looking at the most commonly applied non-custodial sanctions.

Non-Custodial Sanctions

The penalties most commonly applied by the Irish Courts involve non-custodial sanctions (Appendix A, Table 1). It is possible to distinguish between non-custodial penalties which can involve supervision by the Probation Service and those which normally do not. Further detail on each of the options listed below is set out in Appendix B.

Non-Custodial Sanctions - No Probation Service Supervision

<p>Fines</p>	<p>Most common penalty. Majority for road traffic and public order offences.</p> <p>Addressing non-payment and subsequent possibility of imprisonment is a concern. The Fines Bill 2009 proposes new mechanisms to calculate and adjust levels of fines and to collect fines, and non-custodial options for non-payment such as community service.</p>
<p>Dismissed, Probation of Offenders Act</p>	<p>Although an offender's guilt has been proven to the Court's satisfaction the Court may, under the 1907 Probation of Offenders Act, dismiss the charge without conditions, either because of the trivial nature of the offence or extenuating circumstance.</p>
<p>Compensation Orders</p>	<p>The Court can order an offender to pay compensation to a victim either under the Criminal Justice Act, 1993 or informally. In practice, there will often be situations where the offender has limited means and such an order will not be practical.</p>
<p>Court Poor Box</p>	<p>Mechanism whereby the Court although satisfied of the offender's guilt does not proceed to conviction but dismisses the charge under the 1907 Act on condition that the offender accepts responsibility and makes a donation to charity. The donation and charity is at the discretion of the judge who has made the order. Law Reform Commission recommended (2005) restructuring on a formal basis.</p>
<p>Binding to the Peace</p>	<p>Court may order that an offender enter in a bond to keep the peace and be of good behaviour. This involves signing an undertaking to observe specified conditions for a set period of time. In the event of re-offending that bond may be forfeited or the Court may order the person's committal.</p>

Penalties Involving Probation Service Supervision

These measures usually involve the Court imposing behavioural requirements on the offender, which can involve supervision in the community for a specified period by the Probation Service, with the condition that an offender who fails to comply with the requirements set may be returned to court.

<p>Probation Order</p>	<p>As well as dismissal, the 1907 Act permits a court to discharge an offender subject to observance of conditions over a specified period of time, one of which can be supervision by a Probation Officer. Typical conditions ordered by the Court include participation in training, residence in a hostel or attendance at a treatment programme. The Probation Service engages with a wide range of community-based facilities in order to deliver these services. In most cases the Court will have requested a report from the Probation Service on the suitability of the offender for this approach.</p>
<p>Community Service Orders</p>	<p>Introduced in 1984 to provide a direct substitute for custodial sentences in the form of unpaid supervised work in the Community that is overseen by the Probation Service.</p> <p>Reviews of the CSO scheme have found considerable variation in use made at different court locations. Capacity exists for increasing their use and steps are being taken by the Probation Service to substantially increase the numbers on CSOs.</p>
<p>Suspended Sentence</p>	<p>Long-standing practice, now subject to specific statutory framework (Criminal Justice Act 2006). Sentence may be suspended in full or in part. Offender gives an undertaking to comply with certain conditions. This can include supervision by the Probation Service. Full sentence can come into effect if breached.</p>

Pre-sanction reports

Where an offence has been proven and before deciding on what sentence to impose, the Judge may request a pre-sanction report, also known as a 'probation report' from the Probation Service. Each year, the Probation Service undertakes around 5,000 assessments on offenders which assist judges in making decisions in criminal cases.

In preparing pre-sanction reports Probation Officers undertake an assessment of the risk posed to the public by an offender. This involves an assessment of the likelihood that the offender will re-offend. In line with international best practice, the Irish Probation Service uses an assessment tool, the Level Service Inventory-Revised (LSI-R) to assist in making assessments of the likelihood that an adult offender will re-offend. This tool has been developed from an extensive body of international research and provides a consistent measure of the approximate likelihood of re-offending. A version of the assessment tool has been designed specifically for use with young offenders and is known as the YLS/CMI (Youth Level Service/Case

Management Inventory). The result of the LSI-R test helps Probation Officers to advise the court on whether an offender is at low, moderate, high or very high risk of re-offending.

Other Options

As can be seen from the above, a range of non-custodial options are available and are applied in many instances. There has, however, been some criticism that the options available at sentencing are limited relative to other jurisdictions, and that greater use should be made of the existing options (Seymour, 2006). The supervisory role of the Probation Service is primarily governed by the Probation of Offenders Act 1907 and while the range of options available has been extended in recent years, a planned restatement and modernisation of that Act is intended to assist the courts in making more effective use of the options available. In particular, this could provide a 'menu' of non-custodial options from which to choose. Such an approach is consistent with that taken in recent years in relation to the options introduced specifically to respond to children.

The Youth Justice System

The Children Act 2001, as amended, is the primary statutory framework for the youth justice system. The Act places particular emphasis on community sanctions and provides a wide range of options to maximise the potential to successfully deal with the complexity of issues that contribute to young people offending.

These include the Garda Diversion Programme which aims to divert young people who have accepted responsibility for criminal behaviour away from court and criminal activity through the use of cautions and restorative cautioning and by offering guidance and support to juveniles and their families. The young person has to accept responsibility for the offending action before being admitted to the Juvenile Diversion Programme.

In addition, a separate Children's Court deals with cases under procedures specific to the needs of children. Where a child is found guilty the Court has a wide range of measures available to it so that detention is only relied upon as a last resort. These include orders requiring the young person to attend training, to remain under supervision, including in a residential centre, and restrictions on movements. The Probation Service oversees the implementation of these measures, working in partnership with communities, local services and voluntary organisations. The Children Act also provides for restorative justice conferences in which the victim may be present and give their views directly to the offender.

Other Recent Developments

In recent years a number of new measures have been introduced which complement the existing options when dealing with offences or anti-social behaviour. Some of these are summarised in the following table. Many of these are not penalties as such

but part of public protection arrangements generally. Table 2 in Appendix A contains information on further options available to the courts.

<p>Notification requirement for sex offenders and registers for those convicted of drug trafficking offences (Pt.2, Sex Offenders Act 2001 and Pt.9 Criminal Justice Act 2006)</p>	<p>These are not penalties but are part of public protection arrangements following the release of the person and completion of their sentence.</p>
<p>Restriction on Movement Order (s.101, Criminal Justice Act 2006 and ss.133-137, Children Act 2001)</p>	<p>A court may impose a restriction on movement order as an alternative to imprisonment. This applies to a range of public order offences and non-fatal assaults. Failure to comply with an order may result in imprisonment.</p>
<p>Electronic monitoring (s.102, Criminal Justice Act 2006)</p>	<p>This mechanism is intended to enhance public protection without the need for detention and permit the convicted person to attend training or employment in the community. An Electronic Monitoring Project Board is currently looking at how this might be implemented in this jurisdiction.</p>
<p>Behaviour Warnings, Behaviour Orders, Civil Orders (more commonly known as Anti-Social Behaviour Orders) for both adults and children. (Pts.11 and 13, Criminal Justice Act 2006)</p>	<p>These represent a means of dealing with anti-social behaviour which could include intimidation, abusive or threatening behaviour or vandalism. Under these arrangements, the Gardaí may issue a behaviour warning to the person. Where a person fails to observe this warning, the Gardaí may apply to the court for a behaviour order to be made. It is an offence not to comply with such an order. In the case of children the Gardaí may also refer the young person to the Juvenile Diversion Programme.</p>
<p>Adult Cautioning Scheme</p>	<p>Provides an alternative to bringing before the District Court persons against whom there is evidence of the commission of offences of a less serious nature, and where the prosecution of such an offence is not required by the public interest. The Scheme allows less serious offenders, who are considered unlikely to offend, to have their cases dealt with expeditiously. Most of the offences covered by the Scheme are public order and anti-social behaviour offences.</p>
<p>Confiscation of intoxicating liquor (ss.14 and 19, Intoxicating Liquor Act 2008)</p>	<p>The Gardaí can confiscate intoxicating liquor found in the possession of minors in public places. They can also confiscate intoxicating liquor in the possession of persons over the age of 18 years of age in order to prevent public disorder or damage to property.</p>

Innovations in Court Practice

Many jurisdictions have begun to incorporate innovations in how offenders are dealt with by the courts, with a specific emphasis on enhancing the 'problem solving' role of the court. Models include 'community courts', drug courts and restorative programmes. These vary in character but often incorporate a combination of sanction for the crime, assistance in rehabilitation and reparation to either the victim or the community in which the offence took place, all in a more focused and intensive manner than is possible for busy mainstream District Courts.

The scale of such initiatives in Ireland is modest. A Drug Treatment Court operates on a limited basis in the north inner city of Dublin (Dublin 1, 7 and parts of Dublin 3). The Court uses a multi-disciplinary approach and operates with the assistance of a team comprising a probation officer, an addiction nurse, a Garda liaison officer. A review of the operation of the Court is underway and will report in the coming months.

Restorative Justice

There are currently two structured restorative justice projects operating in Ireland: the Nenagh Community Reparation Project and the Restorative Justice Services Tallaght. The model adopted by these projects seeks to address some types of behaviour within the community with a particular focus on:

- involvement of the victim and meeting the victim's needs
- a managed encounter between victim and offender to promote communication and explore reconciliation
- the offender making recompense (not necessarily financial) for the harm or injury suffered.

Offenders are referred to the project by the local District Court. A contract requiring the offender to address issues contributing to the offending behaviour and to make reparation to the community is drawn up. The Court finalises the case depending on how the contract has been honoured.

The Report of the Commission on Restorative Justice which was published in December, 2009 makes a wide range of recommendations concerning the possible future further use of restorative justice. Its report identified scope for greater use of restorative justice solutions in place of custodial sentences and addresses issues such as eligibility and suitability, the role of the courts, benefits to victims and participants, costs and a possible implementation programme. The Commission considers that restorative justice, where applied in suitable cases, offers an effective option for responding to and combating crime in Irish society. The Commission recommends that early consideration be given to establishing a statutory basis for the provision of restorative justice for adults and that, in the meantime, additional venues for implementing restorative justice services be introduced.

There are, of course, challenges inherent in adopting restorative justice as a more regular feature of the criminal justice system. These include: gaining acceptance of what may be perceived to be a 'soft' approach to crime, encouraging victims and offenders to engage in the restorative process and obtaining and sustaining funding for the necessary support services.

Benefits and Challenges of Non-Custodial Sanctions

A key consideration in weighing up the benefits of the non-custodial options available is the extent to which they achieve some or all of the objectives of sanctions set out earlier in this document.

One of the most commonly cited benefits of non-custodial sanctions is that by keeping offenders who have committed less serious crimes out of prison they promote integration and rehabilitation. Non-custodial sanctions also have the capacity to engage communities with the criminal justice system and to increase public satisfaction with the system. For example, sanctions which include restorative elements give more explicit recognition to the place of victims in the criminal justice system than do custodial sanctions. Community service involving unpaid work can benefit the community and promote stronger links between communities and the criminal justice system.

An undoubted further benefit is that they are generally less costly than sanctions involving imprisonment and less likely to result in long term harm to the individual or their family. Issues surrounding imprisonment are considered in the next section of this discussion document. While the cost of sanctions should not outweigh other considerations in determining their application, resources released from the high costs of detention can be channelled into more productive activities.

In order to realise the full potential of non-custodial sanctions a number of challenges need to be addressed, however. Since they generally do not incapacitate, they will usually not be suitable for very serious or highly persistent offenders, or at least will only be justifiable where the prospects for rehabilitation are clear. A key consideration is whether non-custodial programmes can be put in place which successfully manage offenders in the community and which achieve better long-term results.

For many minor offences, a fine or one of the other non-custodial penalties will be sufficiently punitive and deterrent. For these options to fulfill these roles, however, the measure needs to be effectively monitored and credible. There needs to be consequences for non-payment of fines, for example, or for non-compliance with the Court's orders or with the terms of the suspended sentence. The legitimacy of these measures can also be undermined if, for example, the unpaid work being done in compliance with a community service order is not seen as suitably meaningful or worthwhile in the community. One recurring problem is how to effectively respond to non-compliance with non-custodial sanctions and whether it is possible to design meaningful sanctions for non-compliance other than custody.

A related complication is the risk that innovative types of non-custodial sanctions, although designed as an alternative to custody, might instead supplant existing and perfectly adequate responses, such as a fine or a suspended sentence. A further concern is that some non-custodial measures might draw people further into the criminal justice system, especially if non-compliance with the measure results in imprisonment or other more serious penalty. Perversely, this could result in more incarceration rather than less.

Finally, because the success of many non-custodial sanctions is dependent to some extent on interaction between the community and the offender, communication on these sanctions, their benefits and crime control potential presents a further challenge for the criminal justice system.

Questions for Consideration

- To what extent do non-custodial penalties meet the objectives of sanctions (see box on page 7) and, in particular, contribute to crime reduction and public protection?
- What improvements can be made to increase the effectiveness of the existing non-custodial penalties?
- Could greater use be made of the existing non-custodial penalties? If so, in what circumstances?
- How can non-custodial sanctions which do not automatically lead to a custodial sanction in the event of non-compliance be developed?
- What can be done to ensure that non-custodial sanctions address offending behaviour?
- Could non-custodial sanctions be used to make up for any shortfalls in public service provision? If so, how?
- Should all non-custodial sanctions require a statutory basis?
- What kind of role should communities have in the operation of Community Service Orders?
- What types of non-custodial sanctions might be appropriate for less serious but prolific offenders?
- What type of non-custodial sanctions do you think are the most cost-effective?

Imprisonment

Deprivation of liberty represents the most punitive of the sentencing options in Ireland and, while it continues to be used in only a minority of instances, the average daily number of persons in custody as well as the number of committals under sentence has grown since the 1980s ¹.

Imprisonment - Past 30 Years			
	Average Daily Number of Prisoners in Custody	Total Committals	Committals Under Sentence
1980	1,215	6,421	3,060
1990	2,108	7,759	4,372
2001	3,112	12,127	5,160
2008	3,544	13,557	8,043

Although the chosen penalty in a minority of all convictions, much of the debate around criminal sanctions relates to the use of imprisonment. Many agree that it should be the penalty of last resort and used sparingly, particularly in light of its consequences, as well as the limitations on prison capacity and the costs of imprisonment. What this means in practice is difficult to agree.

Relative to Ireland's population, the percentage of the population in prison is lower than in many other jurisdictions. Table 3 in Appendix 1 gives comparative prison population rates (per 100,000 of national population) from the early 1990s to 2009. The Irish imprisonment rate is rising in absolute terms and relative to population but remains in the low to medium range comparatively, with a number of Scandinavian countries displaying lower rates of imprisonment, while others (e.g. US, New Zealand, Australia and the UK) are significantly higher.

Some commentators have suggested that a more meaningful assessment would be to look at imprisonment as a percentage of recorded serious crime, that is, the frequency

¹ The bulk of sentences under committal are sentences to imprisonment but there are still some penal servitude sentences in the system and sentences of detention (aged 16 and upward) also come within the general heading. Figures cited are from Irish Prison Service Reports and National Crime Council. A breakdown of figures for committals is not available for the year 2000.

of imprisonment as the chosen sanction relative to the amount of crime committed. Here, Ireland appears to have a higher tendency to imprison (NESF, 2002). As with all comparative analysis relying on recorded crime figures, however, some caution should be exercised in drawing strong conclusions.

Composition of Prison Population

The Irish prison population on any given day comprises a wide range of sentenced offenders, as well as those held on remand and on immigration matters.

The prison population is predominantly male with males making up 88.8% of all committals in 2008. Of the total prison population on 5 December 2008, roughly 80% of prisoners were under the age of 40.

Insofar as sentenced persons are concerned the following is a snapshot of sentence length and type.

Sentence profile of persons in custody under sentence on 5 December 2008

Duration of Sentence		Type of Offence	
Life Sentence	264	Murder	251
10+ years	241	Manslaughter	72
5-10 years	684	Sexual Offences	275
3-5 years	592	Other offences against person	433
2-3 years	329	Property with violence	96
1-2 years	377	Property without violence	749
3-12 months	407		
<3 months	50	Drug offences	567
		Road Traffic	184
		Other	317

It is also worth studying the numbers of committals, which give a clearer picture of the flow of persons entering prison and the typical range of sentences handed down by the Courts. More than three quarters of all sentences are for 12 months and less and more than 40% are for less than 3 months.

Committals (under sentence) to Prison 2008

Life sentence	20
10+ years	65
5-10 years	219
3-5 years	346
2-3 years	359
1-2 years	610
6-12 months	1,404
3-6 months	1,494
<3 months	3,526
Total	8,043

Temporary Release

At any time, in addition to the number of sentenced persons in prison, there are also a number of convicted persons on temporary release, a feature of prison systems worldwide. In Ireland, the temporary release of prisoners is provided for in the Criminal Justice Act, 1960 as amended by the Criminal Justice (Temporary Release of Prisoners) Act, 2003. Those on temporary release include persons released for short periods for humanitarian reasons or as part of a structured programme to prepare for re-integration into society, but it also includes offenders presenting low risk to the public who are released in order to maintain prison occupancy at safe levels.

The overriding concern when decisions are being made in individual cases is the safety of the public. When temporary release is granted it is always subject to the condition that the person released must be of good behaviour. Various other conditions may also apply. If any conditions are breached the individual concerned can be immediately returned to custody without the need for fresh proceedings.²

In order to get a full picture of the number of sentenced persons 'in the system' it therefore makes sense to take into account the numbers on temporary release at any point in time as changes in the latter can alter the picture conveyed by the figure for the average number actually in custody at that time. Attention has been drawn, for example, to the extent to which greater use of temporary release in the early 1990s as opposed to ten years later (when additional prison accommodation had been built) means that an apparent increase in numbers in custody over that time may be overstating actual increases in the level of imprisonment (O'Donnell, 2005). At end December 2009, 575 persons were on temporary release, in addition to the 3,911 in custody.

² Supreme Court in the State (Murphy)-v-Kielt (1984) I.R. 458, held that some form of inquiry was required to establish the facts, and that prisoners could not be treated as convicted again simply on an allegation of failure to comply.

Recommendations are also made to the Minister by the Parole Board in relation to the management of life and other longer-term sentenced prisoners, including recommendations concerning temporary release for such prisoners. A number of commentators have argued that this review function should be put on a statutory basis and that the recommendations of the Board should be binding. In particular, it has been argued that release in such instances should be determined by a court or 'court-like body' and not the executive, taking into account European Court of Human Rights cases relating to other jurisdictions (McCutcheon, J. Paul & Coffey, G./Irish Human Rights Commission, 2006). It should be noted, however, that the cases in question do not relate to the Irish system. If such an approach was taken, decisions would have to be made as to what guidelines and accountability mechanisms should apply and how it might be made compatible with powers of temporary release and the constitutional provision for pardon and remission.

Remand in Custody

A substantial proportion (roughly 20%) of those imprisoned are on remand awaiting trial. Remand in custody arises where an accused person is denied bail by the courts. The refusal of bail is not a criminal sanction, since the person in question has not been convicted and is presumed innocent. Remand in custody cannot be viewed therefore in the same way as imprisonment - the right to liberty enshrined in the Constitution and in the European Convention on Human Rights underpins this important distinction.

Prior to 1997, Irish law held that an accused could only be refused bail if the court was satisfied that to do so was necessary to ensure that he or she stood trial, or to prevent the accused interfering with the process by intimidating witnesses or interfering with evidence. Refusal of bail to protect the public was not at the time a constitutionally acceptable feature of Irish law. This changed in 1996 when in light of concerns at the incidence of offences committed by persons on bail, a Constitutional referendum was held to provide that a person charged with a serious offence could be refused bail where necessary to prevent the commission of a serious offence. The referendum was passed and the Bail Act 1997 gave effect to the Constitutional amendment.

Since then the numbers held on remand have increased (from 109 at end 1994 to 617 in December 2008) and this is one of the factors which has increased the numbers in custody over the past 10 years.

Accordingly, any discussion on prison capacity and its use in protecting the public against crime cannot be completely divorced from the debate on bail. That debate must also take account of the international instruments governing fundamental rights which limit the restrictions which can be placed on liberty and which lay down the limits of bail law in Ireland and in all other modern democratic jurisdictions.

However, given the fact that offences, mostly minor but also some serious offences, continue to be committed by persons on bail, the debate remains of the utmost importance. The Minister for Justice, Equality and Law Reform considers that bail law must be kept under continuing review to ensure that it is as effective as possible

in protecting the public against crime and has obtained Government approval to commence preparation of a new bail bill to provide legislation to consolidate and update bail law.

The Minister considers that in addition to the need for modern consolidated legislation there is also a need to examine the inclusion of provisions to give greater guidance to the courts on the need to protect the public. In this regard the Minister must operate within the constraints of the Constitution and the European Convention on Human Rights. The Minister intends to examine the extent to which, within such legal constraints, further guidance could be given to the courts on the need to have regard to public safety in deciding on bail applications as well as guidance on identifying those who present unacceptable risks of committing serious offences if granted bail.

Growth in Prison Population

It is extremely difficult to unpick all of the factors which might have contributed to the growth in prison numbers since the 1980s, over and above any growth which has come from the general increase in population.

In addition to the increase in numbers held on remand, the most commonly cited explanations include the growth in committals under life imprisonment and for the most serious crimes. For example, the number of persons serving sentences of 10 years or over more than doubled in 2007 and rose again in 2008. In December 2008, 251 people were serving sentences for murder as opposed to 104 in June 2000. Longer sentences mean greater numbers at any given time and have a disproportionate impact on the number in prison because of their cumulative effect over many years.

The percentage of all offenders committed for periods of two years or more has increased from 6% in 1980 to 10% in 2001 and 12.5% in 2008. It is not possible to say to what extent this reflects an increase in the number and gravity of the offences coming before the Courts as opposed to a tendency to imprison for longer for any given offence. Comparing some of the broad categories of offence between 2001 and 2008, the proportion of sentences of over two years in duration has developed as set out below.

	2001	2008
	% > 2 years	% > 2 years
Sexual Offences	51%	90%
Offences against the Person	14%	70%
Drug Offences	38%	89%
Against Property with Violence	42%	85%
Against Property Without Violence	7%	60%

However, since these broad offence descriptions capture a wide range of different types of crime, caution should be exercised in coming to any specific conclusions as to whether sentences are more or less punitive than in the past. It is, however, possible to point to changes in legislation concerning sentencing for drug trafficking offences and other serious crimes (see page 28), as acting as a driver for longer sentences for some of the offences in question.

While the number of longer sentences may be driving the increase in prison numbers, the total number of all committals under sentence is also now increasing. This figure has fluctuated to quite a degree over the past 30 years and was, for example, higher in 1996 (6,866) than it was for the first half of this decade. In more recent years, however, it has risen dramatically (up from 5,088 in 2005 to 8,043 in 2008). Police activity is almost certainly a key factor in this trend, as increased Garda numbers, additional court sittings and more judges have combined to increase the number of cases of all types coming through the system.

The net effect of these trends is that the numbers imprisoned have continued to grow over the last number of years. For example prison numbers stood at 2,334 on 6 February 1997 and at 4,181 on 10 February 2010. Despite the provision of 1,670 additional spaces since 1997, numbers in prison now regularly exceed bed capacity. As things stand there is no reason to believe the prison population will level off in the short term, although over the medium to long term demographic factors, and especially the number of young men in the population, are likely to have a bearing on the numbers imprisoned.

The lack of appropriate capacity is being addressed by the prisons' building programme. In the short term this includes a new block at Wheatfield and a block to be built in the Midlands. In 2010, another 250 new spaces will be provided. In addition, work is expected to begin in 2010 on a new 300 space block in the Midlands/ Portlaoise. In the medium to long term the Thornton Hall and Kilworth elements of the building programme will (a) replace 1271 spaces (based on bed capacity of Mountjoy, Dóchas, St. Patrick's, the Training Unit and Cork) of substandard accommodation in the Mountjoy complex and Cork prison with new cells with in-cell sanitation (doing away with 'slopping out') and other much improved facilities and (b) provide increased capacity to ensure that for the foreseeable future the prison system can operate in an efficient and humane way without the problems associated with overcrowding. In the case of Thornton Hall, the new facility will provide accommodation for 1,400 prisoners with operational flexibility to accommodate up to 2,200 prisoners in a range of security settings. In the case of Kilworth, the Irish Prison Service estimate that the capacity of the new prison will be in the region of 450 spaces, 400 male and 50 female. These figures will be reviewed as the project progresses to detailed design stage and in light of prisoner population surveys.

Function of Imprisonment

Imprisonment meets, to a greater or lesser extent, a number of the purposes of criminal sanctions cited at the start of this document, including incapacitation/public protection, deterrence, punishment and rehabilitation. In particular, imprisonment provides for incapacitation and provides a punitive 'bite' that might not apply in the case of other sanctions. Earlier in this document, some of the international research concerning the incapacitative effect of imprisonment was noted.

Recidivism or more strictly, re-imprisonment, is sometimes studied as a combined indicator of the rehabilitative and deterrent impact of a prison sentence on the

individual, although the fact a person desists from future crime may be influenced by many other personal and environmental factors.

There is relatively little study of this in an Irish context but one recent examination found that more than one quarter of prisoners were re-imprisoned within one year, just over 45% within three years and almost half (49.2%) were re-imprisoned within four years, at which point the rate of increase appeared to be levelling off. The researchers concluded, tentatively, that re-imprisonment rates in Ireland seemed broadly in line with overall results in other countries where similar research has been carried out (O'Donnell, Baumer & Hughes, 2008). Those convicted of property offences or for fine defaulting were the most likely to be re-imprisoned, as were those sentenced to periods of less than 3 months.

When is Imprisonment Appropriate?

Most would agree that serious violent crimes, except in very unusual circumstances, should lead to a custodial sentence. Similarly, for less serious offences, most would support alternatives to prison. Imprisonment is the outcome in only 13% of all District Courts cases not dismissed in 2008 and 34% of all convictions in the more serious cases before the Circuit Court attracted non-custodial sentences. These preferences are broadly speaking reflected in the practice of the Courts and are supported in the conclusions of a study recently completed at the UCD Institute of Criminology which looked at newspaper reports of criminal cases relating almost exclusively to the district court³.

Where it is more difficult to reach agreement is with respect to those offences in between the two extremes, perhaps those receiving sentences of up to one year imprisonment. These represent in the region of 16% of the persons in prison at end 2008, but more than three quarters of all committals annually. Some commentators have argued that more of these offenders should be sanctioned using non-custodial methods, particularly where the offence was a non-violent property crime (Seymour, 2006), and taking into account the impact that remission will have on sentence length and the possibility that the person may benefit from further temporary release. It is also suggested that short sentences provide very limited opportunity for any structured training or rehabilitation programme. As against this, it is arguable that whatever deterrent effect is achieved through sentencing is as likely to be achieved by a short sentence than a slightly longer one.

One challenge relates to the question of repeat offenders and the phenomenon of 'penal escalation', whereby an offender is initially sentenced under non-custodial methods but for subsequent similar offences receives a custodial penalty. One view is that specific controls are required to prevent a person's prior record having an undue influence on sentencing with the consequent pressure this causes for prison populations (Roberts, 2005). As against this, there are understandable reasons why prolific but minor offenders will receive a custodial penalty. The offence may appear to be a comparatively minor one but the repeat offending could justify a progressive

³ O'Donnell, I. 'An insight into judicial decision-making in district courts'. Irish Times, 8 February, 2010.

loss of whatever mitigation a first time offender might expect to benefit from. The net result will be that a court imposes a custodial penalty where it might have opted for an alternative had the person been a first time offender. There will very naturally be an expectation on the part of victims, whether individuals or businesses, that a repeat offender will be imprisoned if they continue to offend, if only to provide for their temporary incapacitation or to reinforce norms within the community and promote confidence in the criminal justice system. If such offenders are to not be imprisoned, a key issue for consideration, then, is whether non-custodial programmes can be designed, with greater safeguards, for application in such circumstances.

Critics of imprisonment point to its very high costs relative to other forms of sanction and its brutalising impact, and argue that non-custodial sanctions offer improved prospects of rehabilitation. The average cost of providing a prison space in 2008 was €2,717. A comparison of the average cost per Community Service Order using 2007 figures contrasted the costs per Order of approximately €4,295 per offender with a cost of €7,478 should the offender have been sent to prison for the same length of time as the Order (Department of Justice, Equality and Law Reform, 2009).

Particular concern is regularly expressed that persons are imprisoned for non-payment of fines, or arising from failure to comply with a court order concerning a civil debt. At any given time the numbers in both categories are quite small (32 or 0.86% of the total in December 2008) but the numbers committed annually are not insignificant (2,520 committed in 2008 for non-payment of fines). The Fines Bill 2009 introduces a number of measures to provide non-custodial alternatives to the courts for dealing with persons who default on the payment of a fine. These include providing for the recovery of a fine as a civil debt by the making of a recovery order and by appointing a receiver as well as allowing the courts to impose a community service order rather than a custodial sentence for non-payment of a fine.

The Enforcement of Court Orders (Amendment) Act 2009 introduces additional protections in respect of a person who is the subject of debt enforcement proceedings, including a requirement that the debtor be present before the court before a committal order can be issued, that they have access to legal aid and that the burden of proof is on a creditor to establish that a debtor has means and is refusing to pay. It also provides the court with a number of options as alternatives to imprisonment, including making a variation order to lessen the terms of an instalment order which the debtor has breached or requiring the parties to participate in mediation.

Questions for Consideration

- To what extent does imprisonment meet the objectives of sanctions (see box on page 7) and, in particular, contribute to crime reduction and public protection?
- How much use should be made of imprisonment? Should specific measures be introduced to either reduce or increase the prison population?
- Is there sufficient awareness that there are on-going effects from a criminal sanction (e.g. on access to certain employment, travel, contracts, adoption), even after the sanction has been complied with? If not, how might such awareness be increased?
- Should mechanisms be put in place to curtail the number of short prison sentences? If so, what mechanisms?
- Is imprisonment the only realistic option when dealing with prolific but minor offenders?
- How can temporary release arrangements be integrated with supervision and reintegration assistance while also addressing the needs of the victims of and/or witnesses to the particular crime?
- How might a cost-effective prison policy best be achieved?

Criminal Sentencing Policy and Practice

In addition to considering the various options available, a key question is how policy and practice governing the application of those options is determined.

In Irish law, the Constitution provides for the independence of the judiciary in the exercise of its functions, subject to the provisions of the Constitution and the law. Within this overall framework, the selection of the penalty to be applied in individual circumstances is largely a matter for judicial discretion. Determination of penalty is also governed by the decisions in appealed cases and by the principles of constitutional and natural justice. In general, the Irish appellate courts have not set benchmark standards for deciding which penalty to apply.

Range of Penalties Available

Irish criminal law generally provides for maximum penalties, whether in the form of imprisonment or as a fine or both. There is also a wide discretion allowing for the use of the non-custodial options summarised earlier in this document. Many offences carry the option of a fine either as an alternative or an addition to a sentence of imprisonment and the courts also have a wide discretion to make use of Probation Orders or Community Service Orders for offences which could otherwise result in a term of imprisonment.

Conviction for murder, where the penalty is a mandatory life sentence is, however, a long-standing exception to judicial discretion in sentencing. In the case of a number of other offences, presumptive minimum sentences have been set, subject to certain criteria being applied. A decision to depart from the presumptive minimum sentence must be based on the presence of exceptional and specific circumstances relating to the offence or the offender which would make it unjust in all the circumstances to impose such a sentence. The best known instance of these is in respect of certain drug offences which carry a term of at least 10 years unless certain exceptional factors apply (Criminal Justice Act 1999) and are mandatory in any case involving a second offence of the same nature (Criminal Justice Act 2006). The Criminal Justice Act 2007 (s.25) extended presumptive minimum sentencing to certain repeat offenders convicted of another offence from a list of scheduled offences within a certain period. The scheduled offences are those considered to arise in the context of organised crime. These innovations have been viewed critically by some commentators as eroding the discretion of courts to deal with the individual circumstances of the offence and the offender in each case (Murphy, 2007).

More generally, however, in most modern Irish legislation the maximum sanctions set allow for a wide discretion on the part of the courts to take into account the circumstances of the offence and all the relevant mitigating factors. For example, assault causing harm can result in a sentence of up to 5 years, whereas assault causing serious harm has a sentence range of up to life imprisonment (Non-Fatal Offences against the Person Act 1997).

The question of mandatory sentencing policy has been the subject of public debate and, recently, the Attorney General made a formal request under the Law Reform Commission Act 1975 (s.4) to the Law Reform Commission for an examination of the issue of mandatory sentencing.

Sentence Remission

An important consideration in sentence duration is that under the rules governing prisons, all prisoners are entitled to a reduction of one-quarter for good behaviour. Under changes in the rules in 2005, up to one-third may be granted if the prisoner has engaged in authorised structured activity and the Minister is satisfied that the prisoner is therefore less likely to re-offend.

The Role of the Prosecutor

The Director of Public Prosecutions (DPP) independently prosecutes the criminal law in the courts on behalf of the people of Ireland. To this end he directs and supervises public prosecutions on indictment in the courts and gives general direction and advice to the Garda Síochána in relation to summary cases and specific direction in cases where requested.

On the basis of the evidence collected in the criminal investigation, the DPP decides whether to charge people with criminal offences, and what the charges should be. Since the range of penalty will differ according to the offence selected, that determination ultimately has a bearing on the nature of the sanction which could apply if the person is convicted. Many offences may now either be tried summarily or on indictment, with a higher sentence range applying for indicted cases. In effect then where the prosecution decides to proceed summarily it is predetermining the upper limit of the punishment which can apply. Furthermore, under the Criminal Justice Act 1993 (s.2), the DPP may apply to the Court of Criminal Appeal to review a sentence from the Circuit Court if it appears to the DPP that a sentence imposed by a court on conviction of a person on indictment was of undue leniency.

'Plea bargaining' is not formally a feature of the Irish prosecution system and sentencing in any individual case is for the court to determine and not for negotiation. Nevertheless, where a person agrees to plead guilty to a particular offence, where more than one charge could in theory be brought (for example murder or manslaughter), the potential range of the sentence is influenced accordingly. Equally, the courts have found that credit should generally be given for a guilty plea and this in turn has a bearing on the sanction.

The prosecutor plays an increasingly important role in relation to the sentencing process. The duties of the prosecutor in relation to sentencing are set out in Chapter 8 of the Director of Public Prosecutions' Guideline for Prosecutors (www.dppireland.ie) and can be summarised as below.

When appearing at a hearing in relation to sentence the prosecutor has the following duties:

- (a) to ensure that the court has before it all available evidence relevant to sentencing, whether or not evidence is favourable to an accused person;
- (b) in particular, to ensure that the court has before it all available relevant evidence and appropriate submissions concerning the impact of the offence on its victim, in accordance with the provisions of section 5 of the Criminal Justice Act 1993, in respect of offences to which that section applies;
- (c) in addition, to ensure that the court has before it all relevant evidence available to the prosecution concerning the accuser's circumstances, background, history, and previous convictions, if any, as well as any available evidence relevant to the circumstances in which the offence was committed which is likely to assist the court in determining the appropriate sentence;
- (d) to ensure that the court is aware of the range of sentencing options available to it;
- (e) to refer the court to any relevant authority or legislation that may assist in determining the appropriate sentence;
- (f) to assist the court to avoid making any appealable error, and to draw the court's attention to an error of fact or law which the court may make when passing sentence.

In addition, it should be noted that it is now the almost invariable practice in the Central Criminal Court for the judge prior to imposing any sentence to inquire from counsel as to the Director of Public Prosecution's view on the seriousness of the case on the basis of the aggravating and mitigating factors of the case. This will involve detailed submissions by the prosecutor to the court on its sentencing options based on previous decisions of the Central Criminal Court and the Court of Criminal Appeal. However, the Director will not be asked to suggest a particular sentence in the case.

Sentencing Policy

Taken together, these arrangements amount to what has been described as a 'largely unstructured sentencing system', when compared with other Western countries (O'Malley, 2006). This leaves the system open to the criticism that it lacks consistency or coherence.

Whether this is actually the case is difficult to establish definitively, given the relative lack of data on sentencing practice. At the level of the most serious offences heard in the Central Criminal Court (homicide and most serious sexual assaults) it is easier to track sentencing practice, given the relatively small number of cases. However, for more common offences, including the less serious offences against the person, burglary and so on, this is simply not practical without a structured information resource.

A key question of considerable complexity is how to rank offences falling within the same overall statutory definition and how to fix where any one particular crime fits on a scale of seriousness. In Ireland this is not subject to any formal structure.

The extent to which sentencing structure is applied in other jurisdictions varies considerably. In many US States this involves a Sentencing Commission which sets out quite detailed and strict matrices of offence and criminal history, which when cross-referenced indicate the applicable range of penalty. This system now exists in many States and at Federal level and is often criticised as being over rigid and inadequate in how it takes into account varying levels of culpability. Other systems offer more flexible guidelines, sometimes with a statutory basis. For example, the UK now has in place a Sentencing Advisory Panel and a Sentencing Guidelines Council which produce sentencing guidelines on a range of types of offence, following consultation, which courts are required to take into account in sentencing. Typically, the guidelines are detailed (the 2008 guideline on assaults against the person is 32 pages long) and cover such questions as culpability, as well as mitigating and aggravating factors.

The Law Reform Commission in its report on sentencing recommended the introduction of non-statutory guidelines aimed at formulating a coherent sentencing policy (1996). An important precursor for this would be satisfactory information concerning actual sentencing practice. Such a system has been developed in Scotland, for example, and found to be of value in structuring the discretion available to the courts.

In Ireland, the judiciary has been developing a project to plan for and provide information on sentencing decisions. To support this initiative, a computerised system has been developed to provide information on sentences and other penalties imposed for offences in criminal proceedings which may inform judges when considering the sentence to be imposed in an individual case.

A number of pilot projects have been run in several court jurisdictions, including Dublin, Cork and Limerick Circuit Criminal Courts; the Dublin District Court and the Court of Criminal Appeal. The outcomes will be reviewed and assessed by judges prior to final evaluation and 'go-live' of the website. It is envisaged that, in addition to the case content, which is being compiled following consultation with the Data Protection Commissioner, the website will contain references to leading cases on sentencing, summaries and links to significant judgments on sentencing law, some statistical data and academic material on sentencing.

Court of Appeal Report

Also of relevance to the question of sentencing, particularly given the relatively limited degree to which benchmark judgements are set down on appeal is the recently published report of the Working Group on a Court of Appeal, chaired by Judge Susan Denham. This report recommended the establishment of a general Court of Appeal, to encompass the remit of the present Court of Criminal Appeal which currently operates with judges drawn on a part time basis from the Supreme and High Courts. The report notes that the establishment of a

"new Court of Appeal with a permanent cadre of judges would lead to a more cohesive development of criminal law jurisdiction with reserved judgments in the longer term. A dedicated panel of judges would approach criminal law

issues with the specialised expertise which prolonged exposure to this area would allow."

The measures necessary for the establishment of a Court of Appeal are being examined with a view to minimising the cost and ensuring that there is one appeal only from decisions of the High Court.

Sentencing Principles

What principles should be used to govern a more cohesive approach to sentencing? A majority of the Law Reform Commission, in its examination of the subject (1996), favoured a 'proportionate' or 'just deserts' approach to sentencing. This means the punishment should be proportionate to the gravity of the offence in terms of the harm caused and the circumstances of the offender. A strict view of this would mean that considerations of deterrence, or rehabilitation should not result in a sentence more or less punitive than would be proportionate to the crime actually committed. Proportionality has been endorsed in general terms by the Irish courts and the Law Reform Commission recommended the introduction of non-statutory guidelines to give effect to the principle but this has not taken place. Some jurisdictions have put the principle on a statutory basis. The UK sought to do so in the Criminal Justice Act 1991 but subsequently replaced this with a mixed set of principles in the Criminal Justice Act 2003 including deterrence, rehabilitation and protection of the public.

The feasibility or desirability of the application of any sole principle is debatable. Although not necessarily explicitly stated, the reality might be that the Irish Courts operate within an overall framework of proportionality while taking into account rehabilitative and other considerations (O'Malley, 2003). The precise mix of these considerations is difficult to legislate for, if the individual circumstances of each offence are to receive proper consideration. Many judges will understandably look to the prospects of reducing further offending in selecting a sanction, as well as the nature of the offence committed in the particular instance.

Victims and Sentencing

While the nature of the harm or impact on the victim has always been a key consideration in judging the seriousness of an offence, victim impact statements are relatively recent phenomena and their role in practice in the sentencing process (s. 5 Criminal Evidence Act 1992) has not been without controversy. They are intended to afford victims of crime the opportunity to express to the court the impact and the severity of the harm inflicted by the defendant's criminal conduct.

Advocates argue that victim impact statements provide a mechanism by which victims may more fully participate in the judicial process generally, and the sentencing decision process specifically thereby creating a link between the victim and the criminal justice system. Their contribution can be complemented by an objective victim impact report, which may be requested from the Probation Service or a victims' group, although such reports do not have any statutory standing.

The Criminal Procedures Bill 2009 proposes to amend the present law regarding victim impact statements along the lines recommended by the Balance in the Criminal Law Review Group. It expands the range of persons who may make a victim impact statement to the court. In particular, it ensures that family members of victims who are deceased or incapacitated as a result of the crime are entitled to make a victim impact statement, and may also do so in cases where the victim is a child or is suffering from a mental disorder. Provision is also made to allow a child or person suffering with a mental disorder or other vulnerable victim to make a victim impact statement to the court through a television link.

Public Opinion and Sentencing Policy

Determining public opinion on sentencing and sanctions is not straightforward. Certainly, a great deal of negative attention focuses on sentences in specific cases, and there can sometimes appear to be a gulf between the practice of the courts, at least in individual cases, and popular opinion. Obviously, reporting in the media has a key role to play in shaping public opinion.

The Garda Public Attitudes Survey (2008) found that 79% of respondents felt the criminal justice system treated offenders too leniently, with only 2% stating it was too harsh. It also found, however, that 60% of all people felt alternatives to prison should be used for all but the most serious crimes and a majority also favoured dealing with juvenile crime and drug abuse using rehabilitation and/or counselling. Similar complex findings have been found in studies in the UK, which have also pointed to the relatively limited awareness on the part of the public of actual sentencing practice and the options available (Maruna & King, 2004).

As noted earlier, the empirical information available on Irish sentencing practice, relative to the circumstances of the offence and the offender is very limited, even for those working in the criminal justice system, which must inhibit public appreciation of the issue generally. More comprehensive quantitative and qualitative data might assist public discussion of the issues surrounding sentencing practice and assist in formulating future policy.

Questions for Consideration

- Does Irish sentencing policy require greater structuring and how should this be achieved?
- What principles should underpin sentencing policy?
- What value, if any, would sentencing guidelines provide?
- Is the role of victims in the sentencing process adequate?
- How could popular understanding of the principles and processes involved in sentencing be promoted? Which body/bodies would be the most appropriate to pursue this objective?

Conclusion

The purpose of this paper has been to set out the current range of sanctions applied in Ireland, to seek views as to their role as part of an overall response to crime and ask how the policy and practice of imposing sanctions should best be determined.

The subject is a complex one on a number of levels. Each of the sanctions referred to gives rise to its own set of detailed questions, many of which have been the subject of careful study by expert groups and others. Furthermore, the principles underpinning the application of sanctions can prompt complex ideological or philosophical debate as to the purpose and nature of punishment. It should also not be forgotten that these debates are not unique to Ireland. Many comparable jurisdictions wrestle with the same competing public policy considerations. Insight can be obtained from the experience of other countries but there is no unambiguously successful model to follow.

The intention of this discussion document has not been to try to comprehensively address this very broad range of issues but instead to set the scene for input and to provide general background information for those not necessarily familiar with the part played by sanctions in the criminal justice system.

This discussion should be seen in the context of the broader examination taking place as part of the White Paper process, which will address every aspect of how our society faces up to crime, including prevention, enforcement as well as community impact and involvement.

Questions for Consideration - General

- What benefit, if any, can be derived from adding to the existing range of sanctions?
- How can sanctions contribute further to crime prevention and public safety?
- Should there be a wider range of information on sentencing practice available to practitioners and the wider public? If so, how do you think this information can be most effectively organised and disseminated?

Appendix A

Table 1

Outcome of cases before the Courts in 2008	
<u>District Court (summary & indictable)</u>	
Cases disposed of	550,694
Sentences (Offences)	476,115
Imprisonment/ detention	18,440
Fine	99,718
Probation/ Community Service/ Dismissal under Probation of Offenders	
Act	25,581
Struck Out	176,952
Dismiss	16,066
Taken Into Consideration*	75,994
Peace Bond	4,002
Other	59,362
<u>Circuit Criminal Court</u>	
Cases disposed of (Defendants)	2,993
Sentences (Total)	3,534
Fine	96
Suspended Sentence	856
Community Service	98
Imprisonment	2484
<u>Central Criminal Court</u>	
Cases disposed of	107
Convicted	70
<i>* The Criminal Justice Act, 1951 section 8 provides that where a person, on being convicted of an offence, admits himself guilty of any other offence and asks to have it taken into consideration in awarding punishment, the Court may take it into consideration accordingly. If the Court takes an offence into consideration, a note of that fact is made and filed with the record of the sentence, and the accused cannot be prosecuted for that offence, unless the conviction is reversed in an appeal.</i>	
Source: Courts Service Annual Report 2008	

Table 2

Orders which may be imposed on persons/premises on conviction of criminal offences	
Closure order	Intoxicating Liquor Act 1988
Closure order	Criminal Justice (Public Order) Act 2003
Disqualification order	Companies Act 1990
Disqualification order	Road Traffic Acts 1961-2006
Endorsements and penalty points	Road Traffic Acts 1961-2006
Exclusion orders	Criminal Justice (Public Order) Act 2003
Forfeiture	Criminal Justice Act 1994
Monitoring order	Criminal Justice Act 2007
Protection of persons order	Criminal Justice Act 2007
Restitution	Criminal Justice (Theft & Fraud Offences) Act 2001

Table 3**Recent prison population rate (per 100,000 of national population)**

(Extracts from World Prison Brief Online(2009): International Centre
for Prison Studies, Kings College, London)

World Prison Population List

Country	2009	2008	2007	2004	2001	1998	1995	1992
Ireland	85 ⁴	81	75	76	78	71	57	61
Australia	134 ⁴	129	129	120	116	107	96	89
Austria	99 ⁵	95	107	110	86	87	78	87
Belgium	94 ⁶	93	93	88	85	81	75	71
Canada			116 ⁷	108 ⁸	117 ⁹	126 ¹⁰	131 ¹¹	123 ¹²
Denmark	66 ⁴	63	62	70	59	64	66	66
Finland	67 ⁴	64	-	66	59	50	59	65
France		96	-	92	75	86	89	84
Germany	88 ¹³	89	92	98	98	96	81	71
Netherlands		100	110	123	95	85	66	49
New Zealand	197 ¹⁴	185	188	160	152	143	128	119
Norway	70 ⁵	69	70	65	59	57	55	58
Sweden		74	74	81	68	60	65	63
UK (England & Wales)	154 ¹⁵	153 ¹⁶	148	141	127	126	99	88
UK (N. Ireland)	81 ¹⁵	88 ¹⁶	82	76	52	91	105	112
UK (Scotland)	149 ¹⁷	152 ¹⁶	144	136	122	120	111	105
US	735 ¹⁸	760	756	723	685	669	600	505

⁴ Based on data at June 2009.

⁵ Based on data at May 2009.

⁶ Based on data at March 2009.

⁷ 2007-08

⁸ 2003-04

⁹ 2000-01

¹⁰ 1997-98

¹¹ 1994-95

¹² 1991-92

¹³ Based on data at end of 2009.

¹⁴ Based on data at October 2009.

¹⁵ Based on data at November 2009.

¹⁶ Based on data at end of November 2008.

¹⁷ Based on data at December 2009.

¹⁸ Based on data at end of 2008.

Appendix B

Non-Custodial Sanctions - Not subject to Supervision by Probation Service

Fines

The penalty most commonly applied by the Courts is a fine. Of these, the majority are for road traffic and public order offences. In theory, however, nearly all offences, except the most serious, can be punishable with a fine, either on its own, or with a prison sentence. For some offences, the maximum fine is set in legislation, for others it is at the Court's discretion.

There are very few written rules about the circumstances in which a fine is the most appropriate sanction. The rules of the District Court require that the means of the offender be taken into account in setting the level of fine.

One difficulty which arises with the imposition of a fine is what to do if the convicted person refuses to pay. Imprisonment cannot be ruled out completely but non-custodial options (e.g. payment by instalments or attachment of earnings) are more in keeping with the original objective. At any given time the number in prison for non-payment of fines is quite small (e.g. 7 prisoners in custody on 30 October 2009 out of a total prison population of 3,981 (0.17% of the then prisoner population)) but the number committed annually remains high at 2,520 in 2008 and 1,897 for the first six months of 2009.

The Fines Bill 2009 gives the courts three alternatives to imprisonment where a person defaults on a fine: the appointment of a receiver, the making of a recovery order or the making of a community service order.

The Law Reform Commission has produced two reports on the indexation of fines and the 2009 Bill includes a mechanism which groups fines into defined bands so that they can be adjusted over time and remain effective. The Bill also enables the Courts to inquire into the financial circumstances of a person and take into account their impact on the person or on his or her dependants before determining the amount of a fine. The Bill introduces instalment payments for offenders to allow the courts to grant payment of a fine by instalments where the circumstances of the offender warrant it. This provision is intended to further ease the impact of fines on persons of modest means without compromising the integrity of the fines system.

Dismissed, Probation of Offenders Act

Although an offender's guilt has been proven to the court's satisfaction, the court may dismiss the charge under the Probation of Offenders Act 1907, without conditions either because of the minor nature of the offence or extenuating circumstances. There are no continuing obligations or requirements to be met, but the matter may have been

adjourned previously to allow for the completion of some undertaking. This option is widely used in the District Court with first-time and/or minor offenders.

Compensation Orders

The Criminal Justice Act 1993 established a system enabling the Courts to make orders requiring offenders to pay compensation to identified victims, which in the case of the District Court can be made up to €6,350. In examining this issue, the Law Reform Commission also noted that orders for compensation are sometimes made on an informal basis without reference to the above Act. In practice, there will often be situations where the offender has limited means and such an order would not be practical.

The Court Poor Box and Dismissal

One further option exercised in, for the most part, less serious cases and most commonly in connection with public order offences, has developed over time without a statutory authority and is known as the 'Court Poor Box'. This involves an arrangement whereby the court, although satisfied as to the offender's guilt, does not proceed to conviction but instead dismisses the charge under the Probation of Offenders Act 1907 on condition that the offender accepts responsibility for the offence and makes a donation to a nominated charity. The amount of the donation and the nominated charity are at the discretion of the presiding Judge. In recent years both the number and amount of these payments has grown. For example, the payments total from the Poor Box for 2008 amounted to €1,786,181.

The practice has attracted some criticism and was studied by the Law Reform Commission whose 2005 report recommended that the system be reformed and replaced with a statutory scheme based on the 1907 Act so that the conditions for ordering such payments would be subject to formal guidelines and paid into a 'Reparation Fund'. It also recommended that the Fund be ring-fenced from general Exchequer Funds and used to assist programmes aimed at preventing offending behaviour and for the purpose of assisting victims of crime.

Binding to the Peace

The Court may order that an offender enter into a bond to keep the peace and be of good behaviour. This involves undertaking to observe specified conditions for a period of time determined by the Court. If an offender gets into further trouble within that time, a sum of money must be paid or the Court may order the person's committal to custody.

In 2008 this sanction was applied in 1% of all District Court cases which were not dismissed.

Non-Custodial Sanctions - Supervised

This group of court orders, also known as community sanctions, normally involve supervision in the community by a Probation Officer, with provisions for returning to court in cases of non-compliance. Performance of obligations is monitored throughout to further the aims of reducing re-offending and improving social functioning.

Probation Orders

As well as dismissal, the 1907 Act enables the court to make a Probation Order permitting the court to discharge an offender subject to the observance of conditions over a specified period, one of which normally includes supervision by a Probation Officer. In most instances the Court will have requested a Report from the Probation Service which outlines the attitude to and circumstances of the offence, a programme of intervention to address the criminogenic issues and the offender's likely response. Probation Orders have merit where the offence is too serious to be dismissed and effective intervention can be organised for the offender, who would benefit from it and is likely to participate.

Additional conditions can be ordered by the Court, including participation in training, residence in a hostel or attendance at a treatment programme. The Probation Service works with the offender to identify the cause of the offending behaviour and seeks to avoid its recurrence. In order to deliver on this aspect of its role, the Probation Service engages with and funds a wide range of community-based facilities.

Courts sometimes hesitate to make a final order on receipt of a Probation Report and defer the determination of penalty to a later hearing, to review progress made by the offender in addressing the identified issues while under probation supervision in the community. At the resumed hearing, either a custodial or non-custodial option may be ordered or the matter may be further deferred.

Following a number of reviews including by the Comptroller & Auditor General, the Probation Service has been through a process of change to enable it to make a more significant contribution to addressing offending behaviour. There is now a stronger focus on what community projects aim to achieve by way of outputs. Overall, the intention is to make sure that the efforts of the Probation Service are contributing to positive changes in the behaviours of offenders and their reintegration into the community.

The Expert Group on the Probation and Welfare Service, the Law Reform Commission and others have recommended that a wider range of orders, such as counselling orders, exclusion orders, mediation orders be available to expand the use of non-custodial sanctions. In practice, such orders are sometimes made by the Courts but without any uniformity. Courts sometimes insert such obligations as requirements of probation supervision, so they are implemented as part of the specific programme of interventions constructed for the individual.

Community Service Orders

Community Service Orders (CSOs) were introduced in Ireland under the Criminal Justice (Community Service) Act 1983 to provide the Courts with a substitute for custodial sentences. The Act does not apply where the sentence is mandatory (e.g. for murder) or the offender is before the Special Criminal Court. The offender must be over 16 years of age when the order is made.

CSOs involve supervised, unpaid work in the community that is overseen by the Probation Service. The number of hours worked cannot be less than 40 and not more than 240 hours. The Court must also specify the length of sentence that would otherwise have to be served and which may be imposed if the order is not complied with. In 2008, 1,413 orders were made which is down somewhat on the number made in 2007 although provisional figures for 2009 indicate an increase in their use.

The CSO provides an alternative to custody, with some element of pay-back to the community. The cost for each offender is low in comparison with the cost of imprisonment (Department of Justice, Equality and Law Reform, 2009) but a CSO does not of course provide for full-time confinement. It does not incorporate any structured rehabilitation, other than any that might arise indirectly from the work carried out.

Various issues have arisen concerning the operation of the scheme. Many of these have been raised in either or both of the major reviews of the scheme (Walsh & Sexton 1999) and (Value for Money Review, 2009).

Considerable variation has been found in the use of CSOs made at different Court locations. These variations relate to the duration of the orders, as well as to the duration of default sentences. A small number of courts are responsible for the majority of the orders made. In the 2009 review the existing schemes were found to have the capacity for a substantial increase in numbers particularly in some parts of the country, to the extent of allowing a further 1,000 orders to be made each year. The review also identified a number of strategies for increasing use, including increased promotion and awareness raising for Judges and ensuring that projects and sites selected are suitable. The Probation Service is leading the drive to implement the recommendations of the review with a view to substantially increasing the number on CSOs. The Fines Bill 2009 provides that a CSO can be made as an alternative to a fine.

One concern raised about CSOs and some other non-custodial sanctions is whether they are sometimes applied where the alternative would in fact be a warning or a fine and not a prison sentence. This is described as 'net widening', especially if failure to comply with the CSO would be more likely to result in subsequent imprisonment than would be the case with the other alternatives available. Neither of the two studies cited above identified this as a particular concern in the operation of the Irish scheme.

Suspended Sentence

A further option available in sentencing is to suspend the sentence of imprisonment. This has been well established in Irish law and was placed on a statutory footing under the Criminal Justice Act 2006 which allows the court to suspend, in whole or in part, a custodial sentence (Section 99). Both varieties may be subject to general conditions, such as not committing further offences, but there are additional specific conditions to which a part-suspended sentence may be made subject. These explicitly include supervision by the Probation Service, participation in a treatment programme etc. However, because of the generality of the power given to courts to include conditions they consider appropriate to prevent further crime, it can happen that a court will add Probation supervision as a condition of a fully suspended sentence.

Where a person breaches a suspension order, the Court that made the original order may revoke the suspension order so that the entire original sentence must be served, or as much of it as the Court considers just in the circumstances. The suspended sentence option can be suitable for offences of moderate gravity where the prospect of rehabilitation appears feasible, particularly when combined with the threat that the full sentence could otherwise be activated.

References

- An Garda Síochána (2008) 'Garda Public Attitudes Survey 2008', Research Report No.1/08, Garda Research Unit
- Bottoms, A (2004) 'Empirical Research Relevant to Sentencing Frameworks' in Bottoms, A & Rex, S & Robinson, G (ed) 'Alternatives to Prison : Options for an Insecure Society', Willan Publishing
- Denny, K& Harmon, C & Lydon, R (2004) 'An Econometric Analysis of Burglary in Ireland', Centre for Economic Research UCD Working Papers Series
- Department of Justice, Equality and Law Reform (2009) 'Value for Money and Policy Review of the Community Service Scheme
- Donohue, John J. (2007) 'Economic Models of Crime and Punishment', Social Research, Vol. 74 No.2 : Summer 2007
- Expert Group on the Probation and Welfare Service (1999), 'Final Report'. Dublin: Stationery Office
- Grolimund, M.T. & Durac, L (2009) 'Counting the Cost: Stiffer Irish Bail Laws and the Sacrificing of the Principle of Liberty', Irish Criminal Law Journal, 19(2), pp51-56
- Halliday, J (2001) 'Making Punishments Work – Report of a Review of the Sentencing Framework for England and Wales'. London: The Home Office
- Heylin, G. (2001) 'Evaluating Prisons, Prisoners and Others'. Dublin: The Policy Institute, Trinity College, in association with the Department of Justice, Equality and Law Reform
- Irish Penal Reform Trust and the Katherine Howard Foundation (2007) 'The Whitaker Committee Report 20 Years On: Lessons Learned or Lessons Forgotten. Dublin: The Katherine Howard Foundation
- Joint Committee on Justice, Equality, Defence and Women's Rights (2000) 'Report of the Sub-Committee on Crime and Punishment on Alternatives to Fines and the Use of Prison'
- Kleinman, Mark A.R. (2009) 'When Brute Force Fails', Princeton, Princeton University Press
- Law Reform Commission (1996) 'Report on Sentencing'. Dublin: Law Reform Commission
- Law Reform Commission (2003) 'Report on Penalties for Minor Offences'. Dublin: Law Reform Commission

Law Reform Commission (2005) 'The Court Poor Box : Probation of Offenders'.
Dublin: Law Reform Commission

Law Reform Commission (2007) 'Spent Convictions'. Dublin: Law Reform
Commission

McCutcheon, J. Paul & Coffey, G (2006) 'Report into Determination of Life
Sentences', Irish Human Rights Commission

McGuire J (2002) 'Integrating Findings from Research Reviews' in J.McGuire (ed.)
Offender Rehabilitation and Treatment: Effective Programmes and Policies to Reduce
Re-offending. Chichester: Wiley

Maruna, S & King, A (2004) 'Public Opinion and Community Penalties' in Bottoms,
A & Rex, S & Robinson, G (ed) 'Alternatives to Prison : Options for an Insecure
Society', Willan Publishing

Murphy, G (2007) 'An Analysis of Sentencing Provisions in the Criminal Justice Act,
2006', Judicial Studies Institute Journal, Volume (1)

National Commission on Restorative Justice (2009) Final Report, Dublin: Stationery
Office

National Economic and Social Forum (2002) 'Re-Integration of Prisoners', Report
No.22. Dublin: Stationery Office.

Norton, S (2007) 'The Place of Victims in the Criminal Justice System', Irish
Probation Journal, 4(1), pp63-75.

O'Donnell, I (2005) 'Putting Prison in its Place', Irish Association for the Study of
Delinquency 8th Annual Conference, 2005.

O'Donnell, I & Baumer, E & Hughes, N (2008) 'Recidivism in the Republic of
Ireland' in Criminology and Criminal Justice 2008 (8)

O'Donnell, I (2008) 'The Harms of Prison', Studies: An Irish Quarterly Review 2008,
97(388), pp379-386.

O'Mahony, P (ed) (2002) 'Criminal Justice in Ireland. Dublin: Institute of Public
Administration

O'Malley, T (2006) 'Sentencing Law and Practice – 2nd Edition', Thomson Round
Hall

O'Sullivan, E & O'Donnell, I (2003) 'Imprisonment and the Crime Rate in Ireland',
The Economic and Social Review, Vol. 34, No. 1, Spring, 2003

Roberts, J (2005) 'Reducing the Use of Custody as a Sanction: A Review of Recent
International Experiences', Judicial Studies Institute Journal, Volume 5(2)

Seymour, M (2006) 'Alternatives to Custody in Ireland', Jesuit Centre for Faith and Justice Working Notes (downloaded May, 2009)

Seymour, M. (2006) 'Alternatives to Custody in Ireland', Dublin: Business in the Community and the Irish Penal Reform Trust.

Von Hirsch, A. Bottoms, A, Burney, E. & Wilkstrom, P-O (1999) 'Criminal Deterrence and Sentence Severity: An analysis of recent research, Oxford

Walsh, D & Sexton, P (1999) 'An Empirical Study of Community Service Orders in Ireland', Government Publications Office

Whitaker, T.K. (Chairman) (1985), 'Report of the Committee of Inquiry into the Penal System', Dublin: Stationery Office.

Working Group on a Court of Appeal (2009), 'Report of the Working Group on a Court of Appeal', Dublin: Stationery Office.