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DEPARTMENT OF JUSTICE AND LAW REFORM

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White Paper on Crime

Report of Proceedings of

Open Forum Consultation Meeting on

Criminal Sanctions

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SUMMARY

The format for this consultation meeting was designed to facilitate dialogue between panellists and audience members on topics raised in the White Paper on Crime Discussion Document No.2, '*Criminal Sanctions'.* (Meeting agenda at Appendix 1.)

There were some 80 participants present on the day including representatives from community and voluntary organisations, members of Joint Policing Committees, public representatives, criminal justice system personnel, and legal academics and practitioners.

The meeting opened with presentations by two key-note speakers, Judge Michael Reilly, Inspector of Prisons and Mr. Tom O'Malley, School of Law, NUI Galway (Appendix 2).

These presentations were followed by an open forum which was chaired by Dr. Barry Vaughan, NESC. Four panellists were invited to comment on a number of key questions which were then opened to audience members for further discussion.

The three key questions which were considered were:

(1) In sentencing and sanctioning offenders, what are we trying to achieve and how well is this being done?
(2) How effective are the current range of non-custodial sanctions and should any changes be introduced?
(3) How appropriate or effective is the current use of imprisonment?

The four panellists were:

(1) Cllr. Gerry Breen - Chairman, City of Dublin Joint Policing Committee
(2) Mrs. Sally Hanlon - Director, Support After Crime Services
(3) Mr. Vivian Geiran - Director of Operations, The Probation Service
(4) Mr. Liam Herrick - Director, Irish Penal Reform Trust

Question 1 - What are we trying to achieve by sentencing offenders?

Cllr. Breen noted the need for someone to drive restorative justice. Ms Hanlon on the other hand approached the question from a very personal perspective addressing the victim's perception of the process noting that if victims are encouraged to participate in the process, this affects the impact on offenders and it may be a way of ensuring they don't re-offend.

In considering question 1, a wide range of topics were addressed by the audience, including responses of the criminal justice system to offending, sentencing practice and policy, restorative justice and non-custodial sentences. Contributions reflected the work and professional experiences of audience members.

One speaker said that it was important that serious offenders, such as drug dealers, be prosecuted quickly. The need for early intervention for young people, particularly those at risk of offending was discussed. It was suggested that the effects of crime on victims and their families, as well as the impacts of prison on offenders and their families, should be highlighted to 2nd level students, perhaps as part of a transition year programme.

Contributions concerning restorative justice addressed issues noted, *inter alia*, the importance of community support for restorative justice; victims' advocacy groups should be consulted on the types of offences appropriate for restorative justice; a possible role for joint policing committees in the expansion of restorative justice; and the need for the judiciary to be strongly on board for change to be effected.

A number of speakers supported the introduction of sentencing guidelines. Arguments made in relation to sentencing were: the need to link sentence remission to good behaviour and not to have it as an automatic right; conditions such as treatment and reparation to the community should be introduced into suspended sentences in order to achieve rehabilitation; consistency in sentencing would be advanced with the appointment of permanent judges to the Court of Criminal Appeals; sentencing by the media can be an obstacle to the re-integration of former prisoners in the community.

Contributors speaking about prisons said that: vulnerable people end up in prison because other services have failed them e.g. health and education; prisons are not suitable for persons with mental health problems but the courts have no other sentencing options when a person continues to re-offend; in prison some good is done and society has an obligation to ensure that prison will serve the people in it; the number of training unit places should be increased as the prison population increases.

Points made in relation to non-custodial sanctions included: the apparent reluctance of the courts to use Community Service Orders (CSOs); increase the current 240 hours maximum for CSOs; and some young offenders view non-custodial sanctions as being harsher than custodial sanction.

Question 2 - How effective are the current range of non-custodial sanctions and should any changes be introduced?

Mr Geiran was asked for his views in respect of this question from the perspective of the Probation Service which deals with offenders on a first-hand basis. He noted that **'**knee jerk reactions and immediate hard-line responses are not effective if rehabilitation is the goal'. Mr. Geiran also noted that historically the view was that probation was only appropriate for low level crimes but evidence shows that for medium to high level offences it is more effective. 'To focus Probation Service resources on predominantly low level crime is to waste valuable resources'.

Contributions on issues relating to question 2 ranged from broader policy questions to a focus on specific sanctions. Some of the views expressed included that: the White Paper on Crime process gives an opportunity to look at crime policy as a whole and to look at crime policy in the context of wider social policy; and in the past 15 years there has been a huge emphasis on punishment and a great deal of money on extra prisons and guards but not enough on drugs prevention, for example.

On the question of a criminal record, speakers said that: the damage to a person especially with minor offences should be considered as they remain on a person's record for the rest of their lives; while the Probation Act allows for a discharge, it was suggested that Gardaí record it and retain it on the PULSE system as a conviction so that it will appear on a Garda vetting certificate.

Community Service Orders (CSOs) were the subject of a number of comments: are under-utilised (see Department of Justice, Equality and Law Reform 2009 Value for Money report), perhaps because they are tied to a custodial sentence; the longer the gap between sentencing and the commencement of a CSO, the lower the rate of compliance and the less effective the CSO becomes; CSOs should be more visible because people want to see justice happening on the ground e.g. removal of graffiti and litter.

It was proposed that the adult caution system introduced to keep offenders out of the criminal justice system should be used by Gardaí in a consistent manner and that consideration should be given to include minor drugs offences to be covered by the adult caution scheme.

It was also proposed that focus should be kept on local justice with a community emphasis as manifested in, for example, the localised use of the Court Poor Box.

Question 3 - How appropriate or effective is the current use of imprisonment?

At the outset, Mr. Herrick provided an appraisal of the Irish prison system and the limits and constraints that exist therein. He noted that the rate of imprisonment has increased considerably in the last 10 years (65%) with economic and social consequences and said that there was a need for a national discussion on where prison policy is going. He welcomed the Fines Act 2010 and its focus on community based sanctions. He referred to the considerable increase in prison population which had taken place in the last 10 years and said that 'we're at a crisis point / a turning point now and it's in nobody's interest to continue as we are going'.

Issues addressed under this question included the increased numbers in prison, the conditions of Irish prisons, alternatives to imprisonment and systems in other jurisdictions.

A number of speakers attributed the increased prison rate to an increased number of short sentences along with the introduction of mandatory sentences. The Children Act was cited as providing a good template for reducing the numbers in detention and it was proposed that judges should be required to explain their decision to use custodial sentences.

Reference was made by some speakers to the conditions of Irish prisons. It was stated that 60% of prisoners have to share cells - a situation compounded by high lock-up times which worsens the impact of prison on people. Reference was made to UK research showing the benefits of small prisons. One speaker noted that ⅓ of Nordic prisons are open prisons costing half the price of closed prisons, a situation compared with Ireland which has fewer than 6% of the prison population in open prisons. A representative from the Irish Prison Service said that bad prison conditions are directly attributable to the numbers in custody and the age of the facilities; and while not ideal, that position will remain until more prison spaces are built. He cautioned against making direct comparisons between the Irish and the Nordic systems as the social, cultural and economic systems were not similar: the long-standing wealth of Norway had ensured the establishment and development of support structures which are not matched in Ireland.

One speaker described the UK 'Persistent and Prolific Offenders Programme' which now has 10,000 participants. It uses other state agencies such as accommodation/ education/medical services to address the problems such people face when they are trying to re-integrate into society. In its 2 year run, there has been a 26% decrease in those offenders re-offending. They are being given the opportunity and help to change. Another speaker said that the behaviour of young people should be addressed at an early stage through

interagency collaboration using programmes such as the Young People at Risk and the Strengthen Family programme.

In relation to alternatives to prison, it was noted that such alternatives are available and viable but that there has to be public consensus and trust in those alternatives for them to work and public education and information measures on alternatives to achieve consensus and trust.

Note: The text which follows is a more detailed record of the open forum debate. Only the key- note speakers and the panellists are identified by name.

OPEN FORUM DEBATE

Q1 - In sentencing and sanctioning offenders, what are we trying to achieve and how well is this being done?

Cllr. Gerry Breen [Panel member]

- The Dept have presented a very understandable document. I'm mindful that the situation isn't as bad as the Joe Duffy and the Red Tops would make out.

- I would take issue with work practices not just in the legal profession but in prison services. Sometimes your impressions are correct; it's a heavily unionised, heavily institutionalised system. Prison warders have a sick rota in which they decide every week whose turn it is to go on sick leave. Warders get only 3 weeks training. I know there's a new qualification now but we should be mindful that prison is a Petri dish where you grow criminality.

- In terms of restorative justice we need someone to drive it. When you look at the €92,000 to keep someone in prison, can we look at providing 2 tutors instead? It's limited to certain crimes and I wonder if something like case management of offenders would be more useful.

- In respect of fines and compensation, we entrust the state to implement these. Are we going to allow income to be assessed in imposing these?

- From reading the report, there appears to be a lack of drive to get things over the line, most things are not that complicated. We should approach what we so with compassion.

Ms. Sally Hanlon [Panel member]

- I represent victims and witnesses of crime and the question here is should crime be punished. I have 34 years experience comprising 20 years Garda experience and also now 14 years with victims. Over that time I've noted small changes.

- I have seen crime and the effects of crime from both sides. I have seen some very good changes coming in over the years and I've seen the attitude of the courts changing. How do we represent victims and how are victims heard in the Criminal Justice System (CJS)? They enter the CJS not by choice.

- In Court and at the hearing, the judge and lawyers all have the information with them, especially when it's a guilty plea. But the victim is simply told they're not needed so they don't know what's going on. How can judges see the true impact of crime, if the victim has no voice?

- If victims are encouraged to participate, this affects the impact on offenders and it may be a way of ensuring they don't re-offend. Information on the process is vital for the victims so they know what role they play in the case. Our role is not in coaching victims in what to say, it is just supporting and providing information on what to expect during the process and after. This is lacking in the broader system; we assume victims know the system because we work in it, but they don't.

- I'm a great believer in restorative justice, especially with young offenders. There should be wider use of it across the spectrum of crime. Working together in how to repair the impact of the crime. The use of victim impact statements (VIS) is an acknowledgment in court and offers great healing.

- Serious crimes committed on bail should be met with more use of consecutive sentencing e.g. a family I deal with, the 4 year old girl has lost her mother and the offender committed the offence while on bail.

- There is confusion in respect of sentences because of inconsistency among the judiciary, so Tom O'Malley's suggestion of an information unit is a very good one.

- Timeframe from when crime happens to actual court hearing, there is a lot of confusion about why that takes so long. However, some victims glad to have some kind of timeframe to get over the emotion impact and be able to take evidence in

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COMMENTS FROM THE FLOOR

- Gerry is right that restorative justice (RJ) isn't suitable for all offences. Also voluntary participation is required so you couldn't just have a list of offences.

- In answer to the question, 'who is driving', restorative justice? - the Partnership in Tallaght along with the one in Nenagh is funded by the probation services so they are the driving force. The Probation Service has been funding it for 10 years and has been driving it. Finances are a big issue and the report acknowledges that more funding should be made available.

- A lot of concerns about RJ and its application, it needs to be a considered and comprehensive approach but needs support of the community. There's a lot of potential for addressing the needs of victims in the RJ process. Victim advocate groups should be consulted in relation to the types of offences that restorative justice would be used for.

- We know the statistics show prisoners are from very specific areas. I look at the money put into the new Criminal Courts of Justice (CCJ) building and have to ask why we don't fund the environment around it where the crime is coming from.

- The time frame for victims is valuable for them to come to terms with the offence, but for drug dealers who are on the streets dealing, they need to be brought in and prosecuted immediately.

- The final sentence is all that matters to the prisoner. As a probation officer, I found people unwilling to discuss the offence saying 'I did my time that's that'. Restorative justice on the other hand requires the person to acknowledge the offence and take responsibility for it.

- In the legal system, the perpetrator is protected by their barrister or solicitor. Whereas, RJ involves offenders taking responsibility for their crime and includes the victim in the process. It can be very powerful when the offender has to speak about what they did and the victim can express their feelings.

- In terms of who is driving RJ? - in Nenagh the answer is the Gardaí. Adult cautions do not deal with understanding the reason for the criminal behaviour so you haven't fixed the problem.

- The crucial point seems to be if you pick them up early you can change the outcome. (Early intervention with youth).

- You need to start at 2nd level schools and have a transition year programme that highlights the effects crimes have on victims and their families. The consequences of prison need to be highlighted in how they affect everyone around the offender, not just them. It includes the extended family and all who experience pain and suffering.

- Relationships between Gardaí and local communities have improved due to the Local Garda initiative.

- Media sentencing is an obstacle to prisoners being reintegrated. We need to get through to the community how people need to be reintegrated: e.g. early release but on condition that they go into a community employment service and if they fail to work within it, they go back and serve the rest of the sentence. We need to be mindful of putting money into Community Employment Agencies to support meaningful employment.

- I support sentencing guidelines. The automatic remission of ¼ from the sentence should be linked to good behaviour not just an automatic right.

- In terms of the time limit for victims to come to terms with the thing, victims of rape are satisfied when they know how long it will take. It's the uncertainty and not knowing that's the worst part. It should be noted that Ireland has the highest drop- out rate for conviction of rape cases.

- Acknowledged the good presentations and the well crafted document.

- Big question we have to ask is 'why are 80% of the prison population, male and under 40'? Need to address this and develop a strategy to deal with this.

- Need greater interaction between state agencies; e.g. FÁS could get involved in the process of rehabilitation.

- €92,000 is the cost mentioned per prisoner per year but we need to consider looking at investing this money in the prisoner from day one in there.

- I work with women's prison and there is room for development of research in this area. A very short 9 month study should take place on the purpose and what to do with the small number of women who come into contact with the CJS. These are very vulnerable women we deal with. The reality is the reason these people end up in prison is because other services have failed them e.g. health and education.

- The training unit needs to actually be utilised as a training unit and at the moment it appears that about 76 people are on mattresses rather than beds. As the unit expands, the services have to expand with it. Look at Wheatfield Prison which has seen an increase in beds but no increase in school places.

- Sanctions need to be very clear, specific and time limited.

- When you're dealing with young people, you have to take on board what their needs are. It doesn't necessarily have to be a punitive sanction for it to impact the young offender. From talking with young offenders they often say they would prefer a custodial sentence because they non-custodial options are a lot harder.

- Consistency of sentencing is important, sentencing guidelines should be developed but also it's important to consider the philosophy behind the sentencing. A common aim should be to maximise opportunities for offender to address their behaviour and reform. That should be considered by a judge before custodial options are invoked.

- In terms of who should roll out restorative justice: can I suggest that statutory joint policing committees are already in existence and would be a good forum for RJ as they can incorporate the programmes and offer multi-disciplinary background?

- The offender comes out of prison worse than when they came in. Drugs are a massive issue and in my experience when a person goes in with a minor drug habit they leave with a much stronger one. This suggests that the system has failed.

- I suggest adding conditions into suspended sentencing which would include treatment and reparation to the community. There is only one judge who does this at the moment because there is a question over the legality of imposing conditions on a suspended sentence but it's a good way of achieving rehabilitation.

- Victims want to see punishment and reparation but I think Community Service Orders (CSO) are not used enough, perhaps the max 240 hours could be increased. Also Courts are unwilling to grant a CSO where the offender has an addiction problem. They are deemed as unsafe to be put out into the community so the Courts won't grant the order.[1] [Vivian Geiran challenged this later – see below].

- In terms of the delay in the system, some of it is due to the Courts but a large part is the time it takes to get a certificate of analysis from the state lab and the Director of Public Prosecutions won't consider the matter until they have the certificate so the case drags on for months.

- Mental health issues are a consideration for the Court, the question is whether when helping and deterring a person should they be incapacitated with hospital orders. Often the reason for offending is that the person has mental health issues but the judge cannot do anything except sentence the person. Prisons are not suitable for persons with mental health problem but the Courts have no other sentencing options when a person continues to re-offend.

- I think there needs to be a permanent composition of the Court of Criminal Appeal. This was suggested by Denham J's report and it addresses the inconsistency in rulings when you have new judges each time.

- As a judge you want to avoid sending a person to jail but there are political problems. What are we to do to prevent media jihads? Media constantly call for a person to be hung drawn and quartered and then this has a political effect. How do politicians respond without being influenced by the media pressure?

- There's not enough funding for voluntary groups e.g. GAA and rugby clubs, which are the supports that take the youth off the streets. They youths put their energy into that sport or whatever activity it is and that keeps them off the streets and away from crime.

1 Mr. V. Geiran, Probation Service disputed this point and indicated that a significant proportion of the clients of the Probation Service, including those on community service, currently have or have had a serious drug addiction in the past. Speaker from the floor replied that in his experience judges would refuse community service where the client was a drug addict at the time of sentencing.

Chair

- I think what we can draw from all the comments is a sense of responsibility that needs to be instilled in offenders and which implementing sanctions will not necessarily do.

Judge Michael Reilly [Key-note speaker]

- When I started in 1982 some court houses were appalling so the CCJ new building marks a progression and it's easier for everyone who has to work there, including victims coming to court so it's not a bad thing.

- Restorative justice and innovative sanctions are two different things. If the judiciary are not strongly on board, then changes may fail. Everyone needs to be involved.

- I am concerned about inflammatory statements which are presented as fact; there are a number of them here today. In prison some good is done and society has an obligation to ensure that prison will serve the people in it.

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Q2 – How effective are the current range of non-custodial sanctions and should any changes be introduced

Mr. Vivian Geiran [Panel member]

- Commended both speakers and the discussion paper.

- Crimes and offenders are not all the same and there are multiple goals in terms of sanctions. Supervised community sanctions can be very effective but at the end of the day people want their pound of flesh and equally for the person to change their ways.

- Rehabilitation and reparation and restoration are more to the fore in the kinds of work we do. Probation intervention involves a wide range of goals and reparation is an important one of those goals.

- Crime is everyone's responsibility including state agencies and wider society. Rehabilitation is the underlying point of probation but crime is not a disease and can't be 'cured'. It cannot be administered like a medical intervention. Offenders have choices to make and the evidence shows

that people change, not as a result of treatment whether they like it or not, but because of a willingness and motivation to change.

- Hard-line approaches to try to change offenders' behaviour, such as 'boot camps' do not work (especially if rehabilitation is the goal). We know a lot now about what works and what does not work in offender rehabilitation. We know we need to do more of what works and the information and evidence about that is growing all the time

- Prison, while necessary for a proportion of offenders, is the sanction of last resort.

- Historically the view was that probation was only appropriate for low level crimes but evidence shows that for medium to high level offences and offenders at medium to higher levels of risk of offending, it is in fact, more effective and should be targeted at this group. To focus resources on predominately low level crime is to waste valuable resources.

- The fact that the majority of offenders are male over fifteen and under forty years of age has a bearing on perceptions of and the responses to crime generally.

- The Probation Service is not primarily about assessment although we have come to be seen as an assessment service. But really the important part of what we do is what comes after assessment, i.e. supervision of offenders and helping them to change and avoid re-offending. We are supervising (community service, on probation, post prison) or assessing over 8000 offenders on any day of which around 900 are less than 18 years of age.

- We've always tried to involve local communities in our work. Each community is different: a very important part of that community is victims/survivors of crime and the voice of victims needs to be heard in responses to crime.

COMMENTS FROM THE FLOOR

- We need to unpick this whole idea of non-custodial sentence in terms of it being an alternative to custodial sentence or lying below the custodial sentence. Is community service the only alternative to the custodial

sentence? Suspended sentences haven't been discussed today and they are used wholesale as an alternative to custody.

- Community Service Orders (CSO) are under utilised – noted in the 2009 Value for Money (VFM) report. As a judge, I find when I try to increase the use of this sanction, it takes longer to get a report and my experience is that the bigger the interval between sentencing and the CSO commencing, the lower the compliance and is therefore less effective.

- In terms of fines, the Bill the Minister discussed will be the first significant break from the 1983 policy that CSOs should only be used as an alternative to custody. I think CSOs are so under utilised because they are tied to a custodial sentence in keeping with that original policy.

- The collateral damage of a criminal record is something that should be considered, especially with minor offences as they will remain on a person's record for the rest of their lives.

- The Probation Act allows for a discharge but in my experience Gardaí record it and retain it on the Pulse system as a conviction so it will appear on any garda vetting certificate.

- The adult caution system was introduced to keep young offenders out of the criminal justice system but its application is patchy. I would urge Gardaí to take up this scheme again in a consistent manner.

- I'd also ask the Department to reconsider reintroducing minor drugs offences to be covered within the adult caution scheme. It was to be included and then at the last minute it was removed.

- I'd ask the Minister to make a realistic effort to introduce clean slate legislation where a person's record in their youth can be wiped after 3 years or so.

- The paper should not be about sending people to prison. We should be focusing on preventing crime.

- CSOs should be more visible because people want to see justice happening on the ground e.g. removal of graffiti and litter.

- People's Court is a great idea and we should have more 'Judge Judy' types.

- Imposition of fines just encourages people to steal more.

- It's important that we retain what's good about our system when we go about changing what's bad. An American professor came over to UCD to study the various Irish remedies and criminal sanctions and was particularly taken with the idea of the Poor Box. She spent the morning in the District Court and saw it being used in respect of 2 youths who had called Gardaí 'sheep shaggers'. This was a particularly Irish response to an Irish problem so the Poor Box represents local justice with a community emphasis that we should keep focused on.

Mr. Liam Herrick [Panel member]

- Recent review of policy in the UK has recommended going back to just one community sanction rather than creating a wide variety of different options.

- The value of this process is looking at crime policy as a whole and how all elements interplay together. In the past 15 years there has been a huge emphasis on punishment. This is a useful way of stepping back from that.

- The incapacitating effect of prison is overstated and not well founded; it can be argued that they're not being taking out of criminal involvement when one considers the high rates of recidivism displayed by released prisoners and the high levels of crime committed within prison.

- There is also an issue of looking at crime policy in isolation from wider social policy. We've spent a great deal of money on extra prisons and gardaí but we're not putting enough into drugs prevention for example. In relation to effective crime prevention measures, we know what works and doesn't work; there is a great deal of common purpose, but leadership is needed to shift policy away from detection and punishment towards prevention.

- All the points made here today have been made before in other fora. The Minister needs to take this away and actually follow through on this. We need real drive from him. While his presence here today is welcome, based on past experience of similar review processes, we don't have confidence that this will happen.

Mr. Vivian Geiran [Panel member]

- I think the value of Section 1(1) of the 1907 Probation Act needs to be emphasised, particularly the difference between the unconditional

discharge and the conditional discharge. There is a need to highlight the difference and separate these clearly from each other.

Q3 – How appropriate or effective is the current use of imprisonment?

Liam Herrick [Panel member]

- What is lacking is how the elements of the criminal justice system interact. We've low numbers of prison inmates but that rate has increased massively in the last 10 years (65%). The wider context is the economic and social consequences that flow from prison population being that size and we need national discussion on where prison policy is going. This has only been looked at in isolation rather than the wider context.

- The size of prison population is not a natural phenomenon as it is controlled by decision makers in the system amid a political context. It is a political feature including sentencing options. At one point 2,500 was mentioned as the number of prisoners that we should have but we're almost at 5,000.

- The Minister in introducing the Fines Bill is making a step in the right direction. We hope this process would look at the wider process and wider goal to reducing prison population. We have a prison system creaking at the seams in terms of overcrowding and human rights violations. The Fines Bill has community based sanctions that achieve the right goal but we need policy and plans to expand these community based sanctions.

- We're at a crisis point / a turning point now and it's in nobody's interest to continue how we're going.

COMMENTS FROM THE FLOOR

- The numbers in prison, quoted at 95/100,000, are abstract as they fluctuate on a daily basis when you include persons on remand.

- The Children Act provides good examples of provisions to decrease the numbers of children being detained. We should look to that Act for the procedures used.

- We should ask judges to explain in their decision why they are using custodial sentences, especially given that the highest rise in intake over the last decade has been in persons serving 6 months or less. This shows prison is not being used as a last resort.

- Do we need prisoners to keep us in employment? Without them would we have anything to say?

- Some prisoners are treated worse than animals in Dublin Zoo. Things could change if society wanted it to change. If people really cared we wouldn't have as many criminals in the inner city as we have.

- Many criminals in Mountjoy are from the same family. If proper money was spent in areas like the south city we wouldn't have such a high rate of family recidivism.

- I spent some time studying the Nordic prison services and their approach to incarceration. In Finland they say good social policy is best criminal policy. The figure of €92,000 is a myth, it's more than that because the prison services changed the way they calculate the figures to decrease the price by approx 14%. It's more like €105k per person per year which adds to the point that it's bad value.

- What is lacking in the report is a focus on the prison system. There is no awareness of the reality of prison. 60% or prisoners have to now share cells in breach of European conventions, even in our new prison spaces e.g. Clover Hill, Wheatfield. This is compounded by high lock-up times. Prisoners must carry out toilet functions in view of others which is undignified. We have more persons under 21 in prison than we do in St. Patrick's Institute. When there is sharing of cells it leads to harassment, drug use and worsens the impact of prison on people.

- There is an assumption in the report that we need larger prisons but 300 and over is the current size. There are huge benefits of small prisons (UK research) and the cost is much lower because when security is geared toward high risk inmates, security over all inmates is increased. In Norway which has fewer people in prison than us, the average prison size is 70.

- A third of Nordic prisons are open prisons and they cost half the price of closed prisons. We have less than 6% in open prisons. We have the same types of offenders as they do.

- We do need to have prisons but as a last resort. However, we do it very poorly and very expensively.

- We need to act on these comments and we should start with young people. They get a negative confidence from being involved in criminality and prison. There are some programmes e.g. Young People at Risk and Strengthening Families Programme which deal on an interagency basis and address behaviour at early stage.

- We need to address the bureaucracy because it's too hard to share information between agencies so there's no consistency. Workers on the ground find it hard to work cohesively. Barrier to information sharing for workers at the coal face

- Crime is not evenly distributed, 25% of offenders commit 75% of the crime. So, in reality you have a small group of people in the system which shows there is no rehabilitation in the system.

- I was involved in the UK programme called 'Persistent and Prolific Offenders Programme' which now has 10,000 people in it. It uses other state agencies such as accommodation/education/medical services because these are the problems such people face when they are trying to re-integrate into society. In its 2 year run, there has been a 26% decrease in those offenders re-offending. They are being given the opportunity to change and helped to do so.

- There is evidence that if a family member is in prison, the statistics are higher for a child to end up there also. This is something that needs to be addressed.

Chair

I think to give the discussion the appropriate balance, I am going to allow the prison services to comment on some of these points.

- As a member of prison service I'd be delighted to see reduction in numbers in custody. We have only 2 choices – hold them or release them. Would be happy to discuss prison conditions with the Councillor who spoke and comments made earlier

- The biggest difficulty facing the prison services is that we have to take everyone who is committed. Mental health issues are present and there is a diversion programme in remand prisons where a team from the Central Mental Hospital assesses them and again the issue can be raised in the District Court.

- In terms of CSOs as an alternative to custody, in Scotland, they are seeing the opposite effect on impact of use. They find that CSOs actually lead to an increase in persons in custody because offenders are being given a CSO for something instead of a custodial sentence. If they breach the CSO, they end up in prison when they may not have received a custodial sentence at the original sanctioning.

- We get hammered by people saying we don't need more prison spaces but the same people also criticise us for being overcrowded. We have no control over the numbers of people who are coming in.

- The Nordic countries referred to are not comparable to the Irish situation for historical and cultural reasons. Between the 2nd World War and the early 90's Norway was the 3rd richest country in the world and with that comes massive support structures. Ireland was slower to catch up with that wealth and so realistically we're 50 years behind Norway for support structures. In that sense you can't compare them both because of the background behind them.

- In terms of the bad prison conditions, this is directly attributable to the numbers we have in custody and the fact that they are old facilities. Until more prison space is built this is what we have to do. It's not ideal but there it is.

- The amount of time spent in lock down is a lot but we endeavour to provide rehabilitation regimes.

- Recidivism rates look high but are on the lower end comparing to EU average

- I reject a lot of the criticism of prison services given the parameters we work within. We do a very difficult job in very difficult circumstances.

Mr. Tom O'Malley [Key-note speaker]

- There are three things that affect the prison population (i) the people who are sent there (ii) the length of time for which they are sent there and (iii) the length of time they are kept there.

- We have to ask what caused the increase in inmates and the answer seems to be short term sentences along with the introduction of mandatory sentences.

- The question of parole and early release is something that could be a seminar in itself and wasn't touched on today.

- The fact is there are people who are being needlessly held in prison. Alternatives are available and viable but for them to work there has to be public consensus and trust in those alternatives. We are an enlightened bunch here today but society at large is conflicted as to how they feel on these alternatives. If you ask the man on the street what he thinks he'll say he agrees with alternatives in general as long as they don't apply to people we don't like.

- If alternatives are to work we need to educate the public and inform them on what it means. The tag line for today should be information, information, information. You cannot have a rational debate and contradict the Joe Duffys of this world until we have the proper information.

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APPENDIX 1

DEPARTMENT OF JUSTICE, EQUALITY AND LAW REFORM
AN ROINN DLÍ AGUS CIRT, COMHIONANNAIS AGUS ATHCHÓIRITHE DLÍ

WHITE PAPER ON CRIME CONSULTATION SEMINAR

'Criminal Sanctions'
28th May 2010
Coach House, Dublin Castle

AGENDA

9:00 to 9:30	Registration & Coffee
9:30 to 9:45	Welcome by Minister for Justice, Equality and Law Reform, Mr. Dermot Ahern, T.D.
9:45 to 10:30	Guest Speakers: Judge Michael Reilly, Inspector of Prisons Mr. Tom O'Malley, School of Law, NUI Galway
10:30 to 11:00	Coffee
11:00 to 12:45	Open Forum facilitated by Dr. Barry Vaughan, NESC. Panellists: ▪ Councillor Gerry Breen, Chair of Dublin City Joint Policing Committee. ▪ Mr. Vivian Geiran, Director of Operations, The Probation Service. ▪ Ms Sally Hanlon, Director, Support after Crime Services. ▪ Mr. Liam Herrick, Director, Irish Penal Reform Trust.
12:45 to 13:00	Concluding Remarks

APPENDIX 2

Speech by Judge Michael Reilly, Inspector of Prisons at the White Paper on Crime Consultation Seminar 'Criminal Sanctions' on 28th May 2010 - Coach House, Dublin Castle

It's not often that I get an opportunity to give vent to some of my thoughts on the Criminal Justice System. I hope you will not consider me presumptive when I suggest that I am possibly unique in this gathering in that over the last 45 years I have had an opportunity to see the Criminal Justice System from three sides - as a Solicitor defending people in conflict with the system, as a Judge for 26 years and now as Inspector of Prisons for Ireland having an insight into how persons in conflict with authority are treated by this same system when they end up in prison.

Over the last 45 years major changes have occurred in the Criminal Justice System. These changes have been brought about by the enlightened thinking of not only our law makers and jurists but also by the many people and organizations who over the years have taken time and interest to help formulate new processes and systems which are for the benefit of all. This must always be an ongoing process and a reason why gatherings such as this are essential as no criminal justice system can stand still.

It is for these reasons Mr. Chairman that I was privileged to accept the kind invitation to be part of this ongoing process. The Minister for Justice, Equality and Law Reform and his Department have held many discussions with and have received many submissions from a great cross section of informed opinion which has led to the drafting of your White Paper on Crime and the various discussion documents.

I am aware that time is limited and so I decided prior to referring to certain sanctions to refer briefly to my view of the present state of the criminal justice system and in that regard to ask a number of questions some of which I will answer and the rest I will leave for you to ponder on.

The first question that I would like to ask is this - Are our criminal laws adequate and robust enough to protect our society and our communities and are the sanctions that are provided by these laws appropriate to deal those that infringe such laws? I would argue that

we have in this country robust criminal legislation which if implemented would be adequate to ensure a reasonably safe society for almost all of our citizens. I would also suggest that the sanctions provided in our legislation, while appropriate to deal with those that infringe our laws, may not, in some instances, take into account innovative thinking of the 21st century. Our laws are continually updated and new laws are being enacted as necessary to deal with new and complex illegality.

If you leave aside for the moment the question of new sanctions and if you accept my thesis that our laws are neither antiquated nor inadequate and that present sanctions are adequate you might question why our criminal justice system comes in for considerable criticism. The first question that must be asked is - is the criticism valid? I think it is. Why could this be, should we try to change the system, if so how and finally who should take a lead in driving change in order that our criminal justice system continues to be robust, is fair and reflects the most enlightened thinking available in 2010.

Why is the system criticised and by whom? In trying to answer this question one would have to ask - what is the Criminal Justice System trying to achieve, who is it serving and how can people have confidence in it? If you were to ask the ordinary man or woman in the street what they expect from the criminal justice system you would probably find that their initial response is that anyone who commits a crime should be locked up and that the sanctions are not nearly tough enough. I suggest it is this initial view that is articulated by sections of the press. Another view might be that there is little consistence in sentencing. There are many other examples of criticisms of the system. I am, however, firmly of the view that a criticism of the present system should not *per se* be a reason for change. I am equally firmly of the view that in updating policy, laws and sanctions account must be paid to public opinion. I must also point out that the judiciary must always be independent in carrying out their responsibilities.

I asked earlier - should we change the system? One should never change a system just for the sake of change. I do, however, feel that certain work practices in our criminal justice system should be looked at with an open mind. The greatest obstacle to progress is vested interest and an unwillingness to change. I can understand this as we are all in our own way frightened of change and are more comfortable to continue as we have always done.

Just because Courts always sat at 10.30 in the morning; probation reports took a number of weeks or months to prepare; the prosecution of certain offences took an inordinate time to get to the courts; the procedure in courts considered laborious and complicated and the ultimate sanction handed down months or years after the offence has been committed should not lead to the conclusion that this should be the norm for ever more.

Could our Courts be used more efficiently or in fact should courts be created that would better address low level crime in our society? Should certain work practices of professionals such as the Probation Service change? Should reports in certain circumstances be prepared on the day and be given verbally? Can there be a more streamlined approach to the detection and ultimate prosecution of low level crime? Would lawyers be prepared to adapt their practices to a changing situation? These are but a number of questions that might be addressed in the greater debate. In addressing them one would always have to bear in mind the Constitutional position of our courts and the professional standards expected of our professionals especially our lawyers who must always be assured of their independence to enable them vindicate the rights of their clients.

Another thought on this aspect of possible change is that everyone must always bear in mind that those who work in the system must never allow themselves be lulled into the view that the system should facilitate them - rather they - the Judges, the courts staff, the professionals who work in the system be they lawyers, probation officers, other professionals who contribute to the system, members of An Garda Síochána or the prison service or the persons or agencies who provide back up to the system should always realise that they are there to operate the system within the law and for the benefit of the persons who come in contact with the criminal justice system be they victims or defendants.

Where else might change be necessary? There could be greater consistence in sentencing. More guidelines could be given to the judiciary which would not, in my opinion, compromise their independence. Innovative sanctions which I will deal with later could form part of the sentencing options available to our courts.

It is of course accepted beyond doubt that persons who commit serious crimes must expect a prison sentence. A prison sentence must

also be available as a sanction for crimes in the mid serious category and even for low level criminality. As one descends the ladder from serious to low level crime the emphasis on prison as a sanction must change to more innovative sanctions where prison would at the low level be considered a sanction of last resort. At this juncture I should observe that prisons should not be the sole preserve of the poor, the disadvantaged or persons with anti social tendencies or mental problems.

In practical terms what does prison achieve? In answering this one must take on the views of the ordinary man or woman in the street. I suggest that the major advantage of prison as far as the ordinary man in the street is concerned is that the offender will be taken out of circulation for a short defined period and during this time he/she will not be a nuisance to society. By and large society, expressing an initial view, will be happy that a person goes to prison, some of the popular press will write positively and lawmakers could be forgiven for thinking that sanctions which result in people being locked up are for the better good. It is important that this perception does not colour political decision making on issues such as the extension of mandatory sentencing or like issues.

I suggest however that if you were to ask many victims of low level crime such as a person who is kept awake at night by disorderly conduct on the street, a lady whose handbag is stolen while walking on Main Street, a person whose wall is smeared with graffiti, a person whose windscreen wipers are broken by a drunken youth what they really wanted the criminal justice system to do for them you would find that what they really wanted was that the activity would cease and that they could sleep at night, be reasonably certain that their handbag would be safe, that their wall would not be decorated and that their car would be equipped with wipers in the morning. They would of course all be pleased to hear that the wrongdoer had been apprehended by the Gardaí. They would take a passing interest in any subsequent court case and would in certain cases take some pleasure in the fact that the wrongdoer had been sent to prison but would then be disappointed if the offending behaviour restarted when the wrongdoer was released from prison. This is where innovative new sanctions might be relevant. They could only be relevant if work practices were to change and if there was public confidence in such sanctions.

Before I refer to criminal sanctions I must come back to my last point and that is - who should take a lead in driving change in order that our criminal justice system continues to be robust, is fair and reflects the most enlightened thinking available in 2010? I do not wish to be prescriptive in this regard. I would say, however, that it is difficult to impose change on people. If people like judges and lawyers are foremost in the van they will then be part owners of the change, if professionals and others who work in the system are involved at the outset and see merit in change they will embrace it but these are not the only ones who should have an input. One thing I will say and that is that if additional sanctions of a non custodial nature are to be contemplated it is essential that the public at large are on board.

What I have already said will I hope place in context my following words on criminal sanctions. I am aware that numerous questions have already been raised in the latest discussion document already circulated. I initially intended in this paper addressing all of the topics referred to in this document but then decided against this for three reasons - as I am speaking first today I felt that it would be unfair to other contributors, secondly there is the obvious time factor and finally I trust I will be able to engage during the morning in what I anticipate will be a most interesting discussion.

Before I deal with criminal sanctions I would like to share the following quotation with you - **"In order that any punishment should not be an act of violence committed by one person or many against a private citizen, it is essential that it should be public, prompt, necessary, the minimum possible under the circumstances, proportionate to the crimes and established by law"**. You may be interested to hear that these words were written as long ago as 1764 by Cesare Beccaria when addressing the question of Crimes and Punishment. I think you will agree that they are as relevant today as they were in 1764.

When dealing with criminal sanctions one must differentiate between custodial sanctions and non custodial sanctions. Apart from three general comments I do not intend discussing the various options open to the courts regarding custodial sanctions - (a) there should be guidance for the judiciary in the field of sentencing policy to ensure some uniformity, (b) in cases of long sentences being imposed consideration should be given to post release supervision with an element of restorative justice and (c) the question of the review by the sentencing court of sentences should be looked at again. I am of

course aware that the Supreme Court struck down this particular practice some time ago but that should not stifle discussion.

Turning to non custodial sanctions I would like to make some general points at the outset and conclude with my views on Restorative Justice and the concept of Problem Solving Justice which would be a new, worthwhile, cost saving and radical approach to some of the problems that beset our society.

The present range and operation of non custodial sanctions is very well documented in Discussion Document No. 2. I suggest that non custodial sanctions should be examined with two objectives in mind, namely, an examination of the sanctions *per se* and as a method of reducing the prison population. I am aware that this could be controversial; therefore, no one should propose non custodial sanctions which only address the issue of overcrowding. Such sanctions should also bear scrutiny in their own right.

I have always felt that when non custodial sanctions are utilized that their effect in certain cases is lost because of the delay between the offence and the imposition of the sanction. I am not of course referring to sanctions such as fines for road traffic offences. It is in this context that I will refer later in this paper to the advantages, as I see them, of Problem Solving Justice initiatives such as Community Courts, Drug Courts etc.

Apart from a brief reference to Community Service Orders I do not intend referring to the structured non custodial sanctions already in operation but will refer to possible new initiatives and my reasons for suggesting that they would be worthwhile and cost effective. At present a Community Service Order is the only non custodial sanction that can be imposed which is an alternative to a prison sentence. This as you are aware is where a Judge has decided that the appropriate penalty should be a prison sentence.

That is the first determination. The Judge then goes on and makes a further determination that in the particular case a Community Service Order could be substituted for the prison sentence. I sometimes feel that in certain cases these orders are utilised as another sentencing option and not as a substitute for a prison sentence.

If one were to contemplate additional non custodial sanctions it would be most important that these orders did not become extra sentencing options for the Courts. If this happened it would defeat the whole rationale.

Why would you contemplate additional non custodial sanctions? For three reasons I suggest - (1) if they would have one of the effects of prison namely protecting society from the perpetrator of crime, (2) if they reduced the recidivism rate, and (3) if they reduced the prison population.

I am sure that there are very many models that could be utilised to achieve these three aims. The Tallaght Restorative Justice Services and the Nenagh Community Reparation Project are two structured restorative justice projects. These projects operate to a degree in different ways but achieve the same objectives.

In 1998 I saw restorative justice in operation in a place called Timaru in New Zealand. I spoke to the main players connected to the project including the local judge (whose brainchild it was), the local police chief, the members of the probation service, the Deputy Mayor and a cross section of the members of the public. They all spoke in favour of the scheme. In short the project entailed the management of the offender in the community under the supervision of the probation service but always under the direction of the court. It had the effect in that locality of dramatically reducing crime against a national yearly increase across New Zealand.

On my return from New Zealand I wondered if such a scheme would work in this country. I decided it could and that I would give it a try in Nenagh where I was the local Judge.

I consulted widely. I talked to the Probation Service, to An Garda Síochána, to the Courts Service, to organisations such as the Lions Club and the Chamber of Commerce and to a number of individuals and explained my ideas. This led to a public meeting in Nenagh attended by approximately 80 people representing all shades of opinion. I addressed the meeting and outlined my ideas and asked them to consider the establishment of such a project in their area. As a result a committee was formed, officers were elected an application for funding from the Probation Service was successful and the first referrals were made to the project in June 1999.

Approximately 25 people are put into the Nenagh Project each year. The present funding is €40,000 per annum. The present average cost of keeping a person in prison is €92,717 per annum. The project has been evaluated on a yearly basis and the recidivism rate is low. The incidence of participants re-offending during the currency of the contract of reparation is almost nil. There is a large element of reparation in the scheme. All participants must confront their offending behaviour. The people of Nenagh consider it a success.

I would like to give you a small insight into one case that I referred to the project which gives a flavour of the benefits of the scheme. It involves a young man with a bad criminal record who had been imprisoned on a number of occasions and faced further imprisonment. I referred him to the scheme. He was deemed suitable and a contract covering 15 weeks was drawn up. He did not offend during the currency of his contract. He made reparation in a significant way. He confronted his problems and prior to the completion of his contract had found a job - the first he ever had. Had he gone to prison for those 15 weeks he would have cost the tax payer £14,262. He would of course have been out of circulation thus ensuring he did not re-offend for this period but this result was achieved in any case while he was on the scheme with the added bonus that he did reparation, bettered himself and found some dignity for himself in society and society from a cost point of view was also a winner.

The reason that I have referred in some detail to the Nenagh Project is to show that the three aims of non custodial sentencing can be achieved but more importantly that it is essential that if initiatives such as this are to be contemplated the communities that will be expected to help manage the offenders must be part of the process from the beginning. The success of such schemes depends not alone on the work of the state agencies such as the Probation Service but on the voluntary input of the local agencies and people in the community.

My colleague Judge Martin and her committee on Restorative Justice has examined the broad and interesting subject of Restorative Justice in detail. Therefore, I will not dwell on the subject further.

I have already said that any proposed non custodial sentence options should not be simply an additional option for the Courts. Therefore, I feel that like Community Service Orders they should only operate as an

alternative to imprisonment. They should, in my opinion, be substituted for short sentences for low level crime. They would also have the effect of reducing the numbers in custody quite considerably.

I have already said that such sanctions should have three objectives, - (1) have one of the effects as prison namely protecting society from the perpetrator of crime, (2) a reduced in the recidivism rate, and (3) and a reduction in the prison population. Even if only the first and third were achievable and the recidivism rates were to remain as they are in the general prison population from a cost point of view this would still be a winner.

Overcrowding in our prisons is a major problem. As the Director General of the Prison Service has said on numerous occasions the prisons must take in all comers. They cannot put up the 'no vacancies' sign. The prison population is ever increasing. On the 21st May of this year it stood at 4,276 whereas on the 2nd January 2008 when I took up my position as Inspector of Prisons the prison population was 3,197 an increase of 1,097 or 34%. There are two simple solutions to the overcrowding issue - construct more prison places or reduce the prison population. Since 2nd January 2008 420 new prison places have come on stream.

I have just said that one of the solutions is to construct additional prison spaces. I suggest that this should only be done if there is an actual need for additional spaces and if other options are exhausted. Earlier in this paper I have suggested that the man or woman in the street might clamour for harsher sentences and harsher regimes and that this attitude may well be reflected in certain portions of the press. It might be politically popular to go along with this view without taking into consideration other options. I do not want this remark to be interpreted as a view of mine that further prisons or prison spaces should not be provided, rather, it should be interpreted as an invitation to not only our political masters but others to examine the alternatives with an open mind.

Everything that I have said up to this is relevant to and would be accommodated within the recognised criminal justice system as we know it. What about looking at a new approach, a new approach as far as Ireland is concerned but an approach which is gathering favour in different parts of the world. I am referring to the concept of Problem Solving Justice. I am of course aware that there is a Drug Treatment

Court operating in Dublin. I will refer later in this paper to the place that I see such a court operating in the hierarchy of courts. After all isn't this what the victim of low level crime wants. Why should a person who because of mental health issues, drug addiction, poverty, personality disorder or other deficiency necessarily have to wait until they are in the criminal justice system as we know it to get help? They may or may not get the help they require but one thing is almost certain and that is that they will also end with a criminal conviction and a possible prison sentence with all the negativity that that brings with it.
The concept of Problem Solving Justice is what it says. It is using the main players of the existing criminal justice system to address the underlying problems that have led to low levels of criminality.

Problem Solving Justice can come in many forms. Community Courts, Drug Courts, Domestic Violence Courts, Mental Health Courts are but four examples of those which can come under the umbrella of Problem Solving Justice. I have seen at first hand a number of these courts in operation in the United States and in England. They are all judge led and because the emphasis is on problem solving they bear no relation to our criminal courts. They are non adversarial. They do not by and large lead to convictions. All evaluations of such courts point to a marked decrease in low level crime in the areas covered by such courts. Large numbers of people can be processed through such courts.

Problem solving courts by their nature must operate outside the specialist court context as we know it. They can of course operate side by side with such courts but must remain separate. Problem Solving Courts would never replace the existing courts as we know them. They would compliment such courts. As these courts are problem solving the emphasis is on immediate intervention. Therefore the courts and those that operate in them do not operate to the same time table or work practices as pertains in the ordinary courts. If these type of courts were to be introduced into this country it would require a sea change in practice by judges, lawyers, members of An Garda Síochána, probation officers, the social services, the addiction services, the educational services and many others who would provide services to such courts. These changes would require a re-alignment of services and practices and would lead to a reduction in crime but with the added bonus of being cost saving. The only people that these changes could frighten are those who are resistant to change, who feel bound by old practices and who are for one reason or another

unable to see that the effective administrative of justice is an evolving process.

I am a great believer in the concept of Problem Solving Justice. I would like to refer to just one example - the Community Court. This would address quality of life offences. The concept of Community Courts was brought to the attention of the National Crime Council. I chaired the Criminal Justice System Subgroup of the National Crime Council. This subgroup was charged with looking at the feasibility of introducing community courts into this Country. The report of the National Crime Council entitled *"The Case for Community Courts in Ireland"* was published in 2007. As this is a public document I do not intend referring to the reasoning behind our recommendations except to say that they are probably more relevant today than they were when the report was published. It will be seen from this report that the local community is the back bone of the Community Court.

Experience from other jurisdictions would suggest that if a Community Court such as suggested in the report of the National Crime Council was to be established approximately 40 new cases per day could be dealt with by the Court in addition to the regular review of many cases and the multitude of other issues that would arise. I do not wish to give the impression that all defendants who would appear before a Community Court would necessarily face a prison sentence if they appeared in the structured courts that we all know. If in many cases the offending problem is solved it follows that a certain coterie of would be wrongdoers would be diverted from crime - thus leading to a reduction in crime and a reduction in the numbers going to prison which if the experience of other jurisdictions is anything to go by will be a source of pride to the local community as they will have had a large input into the workings and success of the local Community Court.

I am satisfied that a Community Court could operate as a stand alone court. I feel that other Problem Solving Courts such as a Drugs Court, a Domestic Violence Court or a Mental Health Court while operating in the same general way as a Community Court should nonetheless operate under the general umbrella of a Community Court and not under the umbrella of the court system as we know it.

I am strongly of the view that the question of Community Courts should be re-visited.

Finally, I would like to say that I am confident, looking at the broad cross section of opinion here today, that there is a desire for constructive dialogue which may lead to a better and a more understood criminal justice system in our country. I can only reiterate what Edmund Burke said over 200 years ago when he gave this warning *"All that it takes for evil to thrive is that good people stand by and do nothing".*

Thank you all very much for your patience. I look forward to the rest of the conference.

COMMENTS ON WHITE PAPER ON CRIME: "CRIMINAL SANCTIONS" DISCUSSION DOCUMENT

Mr. Tom O'Malley
NUI Galway

I welcome the publication of the discussion paper on criminal sanctions, which is a balanced and thoughtful document. It raises many important questions and all I can do in the time available is to touch on a few central issues in relation to sentencing policy and sentencing decision-making in the hope that they may provide a basis for further discussion both here today and into the future.

THE IMPORTANCE OF SENTENCING WITHIN THE SYSTEM

Although we have a significant and ever expanding corpus of substantive and procedural criminal, we must not forget that for the vast majority of those charged with criminal offences, sentence is all that matters, simply because they plead guilty. In 2008, for example, almost 3,000 defendants were convicted in the Circuit Court. Of these, 2,500 pleaded guilty, representing a guilty plea rate of 83 per cent. For drug offences, there was a guilty plea rate of 94 per cent.[2] A similar pattern is found in other common-law jurisdictions. This has a number of implications at various levels, including policy-making level. In this connection, it is worth recalling that Ireland now remains virtually unique in the common-law world as a country which has not engaged in any sustained examination of its sentencing policy and sentencing practices. Such an examination is a necessary precursor to any reform effort. There would, of course, be little appetite in this country for American-style guidelines and personally I do not think that the introduction of such guidelines would be a good idea in this country. But there is much to be done in terms of examining the profile of offenders who are actually sent to prison, in terms of the offences for which they are sentenced and the backgrounds and characteristics of the offenders themselves. A thorough examination of such issues might point to the need for more formal consensus on custody thresholds in the District Court (and that court is responsible for a substantial proportion of prison committals in any one year) and a review of mandatory and presumptive sentencing arrangements for drug and firearms offences which also contribute significantly to the long-term prison population.

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2 Courts Service, *Annual Report 2008*.

SENTENCING WITHIN THE CRIMINAL JUSTICE SYSTEM

The criminal justice system may be analysed in both institutional and systemic terms. At one level, it consists of a set of institutions including police, prosecution service, courts, probation service, prison service, parole authority and so forth. It differs, however, in one crucial respect from, say, a large private corporation which may also have several different units but all of which ultimately report to a single governing authority such as a board of directors. Moreover, the corporation and all its constituent units have a clear overarching goal which is the success of the business and the maximisation of profit. Criminal justice institutions, by contrast, operate largely independently of one another, though not entirely so. There is nothing equivalent to a board of directors to direct the others in the discharge of their duties. Some might see the courts as exercising this function, but the court's supervisory role is confined to ensuring that all public bodies remain within the limits of their legal powers and that they observe the principles of legality and fairness in the discharge of their functions. The functional independence accorded to criminal justice institutions is, for the most part, a good thing; it allows for a certain amount of checks and balances. But it also illustrates the point that the courts are not the only institution to influence sentence. A court imposes sentence; the implementation is usually in the hands of another institution such as a parole authority of some other executive body. As for the presence of an overriding institutional goal, one could argue that there is such a goal, namely the creation of a safer society, though this, in turn, must be tempered by other important social values such as observance of the rule of law.

From a systemic perspective, the criminal process may be viewed as a continuum beginning with the political decision to classify a certain kind of conduct as a criminal offence and ending when a convicted offender has finally served a judicially-imposed sentence, though in many individual cases it will end much earlier where the offender has been acquitted or where no prosecution has been taken. That continuum may be viewed, for the sake of convenience, as a straight line punctuated by certain key decisional points most of which call for the exercise of discretion.

Even when we zone in on the point at which sentence is imposed, we can see that several actors other than the judge influence the

sentencing outcome. Nowadays, sentencing decisions are often based, partly at least, on various pre-sentence reports, including probation reports, victim impact reports and the results of drug testing. In guilty plea cases, the facts of the case will be put before the court by the police, and some degree of horse trading may take place between the defence and the prosecution as to how precisely those facts are to be presented. It would be naïve to proceed on the assumption that all reports put before the court are rigorously objective and accurate, with the ultimate judicial decision being the only discretionary one. Anyone who is charged with the establishment and interpretation of facts is likely to bring certain subjective assumptions and beliefs to bear upon them.[3] When engaging on research on sentencing practice, we must abandon our present preoccupation with judicial decisions which merely reflect sentencing outcomes and reorient our attention towards the sentencing process by examining more carefully the true determinants of sentence – and there are many others besides those I have just mentioned – in order to get a more complete understanding of how decisions are actually reached. Empirical sentencing research must therefore concentrate at least as much on the raw material which influences outcomes as on the outcomes themselves.

PENALTIES AND SANCTIONS

The discussion paper is entitled "Criminal Sanctions". The choice of title is probably appropriate because "sanctions" encompass more than "sentences" and "penalties" in the conventional sense of those terms. From an offender's perspective, the adverse consequences of a criminal conviction are potentially fivefold:

(1) a primary penalty, such as a fine or term of imprisonment
(2) a secondary penalty, such as disqualification from driving
(3) an ancillary order of disputed penal character, such as a sex offender notification order;
(4) a collateral consequence arising by operation of law, such as automatic disqualification from holding certain offices or disqualification from jury service (in cases where a certain term of imprisonment is imposed);
(5) a collateral consequence arising as a matter of fact, such as loss of employment. (This can often be the most serious

[3] Hudson, "Assessing the 'Other'" (2005) 45 Brit J. Criminol. 721,

consequence of a conviction; one reason why s. 1 of the Probation Act should stay as it is)[4].

Another possibility which arises mainly in relation to revenue offences is that the same underlying conduct may leave a person liable to civil or administrative penalties as well as criminal penalties. One feature of penal policy internationally in recent times has been the intensification of criminal punishment. Conviction nowadays often entails not just one but several of the consequences just mentioned. One important question which arises as a result is whether ancillary and collateral orders are sufficiently punitive that their impact should be taken into account when deciding on the primary punishment. The general view is that any kind of restrictive order flowing from conviction, while it may not necessarily qualify as a "penalty" for all purposes, may have a punitive impact and should therefore be considered as part of the overall punishment.[5] Obviously, much depends on the nature and consequences of the ancillary order involved. The fact that such an order should be treated as part of the overall punishment does not necessarily means that it should count for very much. Sometimes, the order might merely direct a person to refrain from doing something which they have no right to do in any event.

IMPRISONMENT

Debate about sentencing tends to revolve around imprisonment, a tendency which some regard as unfortunate because it reinforces the centrality of imprisonment in our collective thinking about state punishment. Yet, it is also understandable because imprisonment is the most severe penalty which a court may impose in this and most other countries. It is also a penalty which may continue to exercise a strong and detrimental impact on the offender's life long after the term of imprisonment has been served. Every prison sentence is, to some extent, a life sentence. This, in turn, explains the common belief that imprisonment should be reserved as a penalty of last resort, and should be used only when a non-custodial measure is, for one reason or another, clearly inadequate or inappropriate.

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[4] Section 1 of the Probation of Offenders Act 1907 permits the District Court to adjudge a person responsible for an offence, without entering a formal conviction. This means that the accused does not end up with a criminal record in respect of the matter on which he/she was charged.

[5] *CC v Ireland* [2006] 4 I.R. 66 (re sex offender notification orders). See also views of United States Supreme Court in *Padilla v Kentucky* (decided March 31, 2010) re risk of deportation.

Imprisonment rates are usually presented in terms of the number of prisoners per 100,000 of the population. While this is regarded as one reasonably reliable method of evaluating imprisonment rates, it also calls for some qualifications.[6] First, cross-national evaluations of sentencing practices must always be sensitive to definitional and computational differences. Some countries may treat various forms of juvenile detention as imprisonment for statistical purposes; others may not. Some may count prisoners using a so-called pinpoint census which counts the number of prisoners in custody on a given day whereas others may apply the average daily population approach. Where the total prison population is covered, as it Ireland, it will obviously include a significant number of remand as well sentenced prisoners which means that it is as much a reflection of prevailing bail laws as of sentencing practices.

The website hosted by the International Centre for Prison Studies at King's College London is a tremendous source of current data on prison populations and imprisonment rates worldwide. Because of constant fluctuations in both general and prison populations, one can never be sure that any such data is always entirely accurate down to the last digit, but for present purposes we may assume that it reflects existing levels of imprisonment reasonably accurately.

One problem attending any debate on imprisonment rates is that there does not appear to be any internationally-accepted optimal level of imprisonment against which the performance of individual countries can be measured. As Professor Michael Tonry has written: "There is no value-free or scientific way to determine optimal levels of imprisonment in any country…"[7]

Just by way of illustrating the absence of consensus of optimal levels of imprisonment, let us consider the present situations in Ireland and New Zealand. These two countries have much in common – almost the exact same general population, a shared common law tradition, and broadly similar criminal justice and judicial systems. The general principles of sentencing applicable in both jurisdictions also have much in common. Yet, New Zealand has more than twice as many prisoners as Ireland and consequently and imprisonment rate more than double

[6] Indyk and Donnelly, *Full-time Imprisonment in New South Wales* (Judicial Commission of New South Wales, 2001), p. 7.
[7] Tonry, "Controlling Prison Population Size" (1996) 4:3 *European Journal on Criminal Policy and Research* 26.

that of Ireland.[8] So, we might ask, which country has got it right? In the absence of any agreed yardstick against which to measure imprisonment rates it is impossible to say.
According to the King's College website, in June 2009, Ireland had an imprisonment rate of 85 per 100,000 of the general population which was estimated at 4.58 million. The rate may be somewhat higher now, because of changes in both populations. But assuming that the figure is somewhere between 85 and 90, it is still relatively low by European standards. Apart from a few, mainly Scandinavian, countries that have lower figures, our imprisonment rate, which is about the same as Germany's, is considerably lower than many other EU and Council of Europe member states. The figure for England and Wales, for example, is 154, for Scotland 149 and for Northern Ireland 79. The Irish figures are, of course, rapidly changing and by all accounts the present prison population is somewhere in the region of 4,500 which would mean an imprisonment rate in excess of 90 per 100,000 of the population. This represents a very significant increase over the past two years or so and it points to the need for an urgent examination as to what precisely is driving this increase. In particular, it should motivate us to examine sentencing patterns for non-violent offences, including some drug trafficking offences, which may well be attracting higher sentences than are strictly necessary at the present time.

Let us look at our present prison population from an historical perspective. Quite famously in 1958, our average daily prison population reached an all-time low of 369. However, it would be a mistake to treat this as something of a Golden Age or to regard it as a time "when the condition of the human race was most happy and prosperous", as Gibbon characterised the second century AD. Our prison population may have grown more than tenfold over the past 50 years but a number of other factors must also be borne in mind. First, the number of reported serious offences has grown by about the same amount over the same period. Secondly, we are now experiencing forms of crime, mainly drug related, which were virtually unknown in the 1950s and 1960s. Thirdly, the imprisonment level in that era was probably too low in one respect because we now know that there was a great deal of hidden crime, principally in the form of child sexual abuse, which has only come to light in the recent past. In fact, this present generation is now picking up the tab, literally and metaphorically, left behind by previous generations through their

[8] As of April 2010, New Zealand had a prison population of 8,532 representing a rate of 196 per 100,000 of the population.

failure to address the problem as it was occurring. This has had a considerable impact on our court and prison systems because the number of delayed prosecutions has not been insignificant, and the prison sentences imposed on those convicted have often been quite lengthy. Finally, it bears remarking that the greatest social change in this era has been not so much the increase in imprisonment but the decline in overall levels of state custody. In 1961, for example, when the prison population was still less than 500, there were 21,000 patients in psychiatric hospitals and approximately 4,500 children in industrial schools and reformatory schools.

I do not say any of this in order to create a sense of complacency about our present sentencing practices. While our rate of imprisonment may not be excessive by international standards, it does not follow that we are making wise and proper use of imprisonment as a sentencing option. For instance, in referring to the decline in the population of psychiatric hospitals and juvenile institutions, I do not for a moment intend to imply that many of those who might formerly have been detained in such institutions are now caught up in the criminal justice system. That is patently not the case. But what is true is that the criminal justice system in general and the prison system in particular often find themselves coping with persons who have a mental illness or disability of some kind, and that is a function which, for the most part, they are ill-equipped to address. One priority in reforming the sentencing system should be to develop appropriate measures and facilities for this category of offender.

The most fundamental deficiency in the present system is absence of anything remotely approximating to a consensus on who should be sent to prison and why they should be sent there. According to the Prison Service Report for 2008, there were just over 8,000 committals under sentence in 2008. Of these, 3,500 were for periods of less than three months and 1,500 were for periods of three to six months. This means that over 60 per cent of committals were for six months of less. About 80 per cent of committals were for a year of less. However, to put the matter in perspective, the same report shows that on 5 December 2008, only about 6 per cent of those in custody on that day were serving sentences of six months or less.

The prevalence of short sentences clearly demands considerable thought, and it is certainly not a problem confined to Ireland. Some continental European countries try to address the problem either by

imposing strict conditions for the imposition of a short sentence or by proceeding on an assumption that such a sentence, if imposed, will not be executed. The German Criminal Code, for instance, provides (s. 47):

> "The court shall not impose a term of imprisonment of less than six months unless special circumstances exist, either in the offence or the person of the offender that strictly require the imposition of imprisonment either for the purpose of reform of the offender or for reasons of general deterrence."

Some other, common-law, countries have had statutory provisions to the effect that a court shall not impose a short sentence, less than three or six months, without providing written reasons for doing so.

Critics of short sentences in this country are sometimes inclined to point a finger at the District Court. However, it must be recalled that the District Court in this country has a very wide criminal jurisdiction. Secondly, many offences which are formally classified as summary, including some road traffic offences, can actually be quite serious in nature. Thirdly, many offenders sentenced by the District Court will have been simultaneously convicted of several offences and may well have previous convictions, matters which are seldom apparent from official statistics. The stories lying behind statistics are often far more complex than that statistics themselves could ever realistically reveal.

Imprisonment, we are told, should be a sanction of last resort. This is accepted to be a common law principle and in recent times has been written into the statute law of a number of common law countries including England and Wales, Canada and Australia (although all three of these jurisdictions have imprisonment rates vastly in excess of ours). We need therefore to move well beyond the bare formal assertion of the last resort principle and try to work out some more specific criteria for custodial sanctions. Such efforts have occasionally been made. The current version of the American Bar Association Criminal Justice Standards provides:

> "(a) A sentencing court should prefer sanctions not involving total confinement in the absence of affirmative reasons to the contrary. A court may select a sanction of total confinement in a particular case if the court determines that:
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> (i) the offender caused or threatened serious bodily harm in the commission of the offence,

(ii) other types of sanctions imposed upon the offender for prior offences were ineffective to induce the offender to avoid serious criminal conduct,

(iii) the offender was convicted of an offence for which the sanction of total confinement is necessary so as not to depreciate unduly the seriousness of the offense and thereby foster disrespect for the law, or

(iv) confinement for a very brief period is necessary to impress upon the offender that the conduct underlying the offence of conviction is unlawful and could have resulted in a longer term of total confinement.

(b) A sentencing court should not select a sanction of total confinement because of community hostility to the offender or because of the offender's apparent need for rehabilitation or treatment."[9]

This is a difficult area. Suppose, for example, that the principles set out in the ABA Criminal Justice Standards were formally applied in this country, would they lead to any fewer prison sentences being imposed? This difficulty should not, however, deflect us from giving close consideration to what is nowadays called Cusp sentencing – namely the sentencing of those cases which are on the borderline between a custodial and non-custodial sanction. It goes without saying that the success of any efforts to reduce reliance on short-term custody will strongly depend on the available of a wide of viable and publicly acceptable community-based options, as well as general judicial consensus as to when the custodial threshold has been reached.

SOME RECOMMENDATIONS FOR REFORM

Criminal Law Reform as Memorial

The first recommendation is negative in nature in that it concerns something which we must avoid doing, and that is to use criminal law reform as memorial. By that I mean the following. We have seen many instances in recent times here and elsewhere of relatives and friends of

[9] ABA, *Criminal Justice Standards: Sentencing* Standard 18-6.4 (1994), available at www.abanet.org/crimjust/standards/home.html. On the origin and influence of the *Standards,* see Marcus, "The Making of the ABA Criminal Justice Standards: Forty Years of Excellence" (2009) 21:4 *Criminal Justice*

persons who have died as a result of violent acts embarking on immediate campaigns to have certain changes made to the criminal law. This phenomenon has become particularly prevalent in the United States where the better known examples include Megan's Law and the Adam

Smith Act.[10] In this country in recent times we have seen a few examples of people who have suffered the loss of a close relative through a criminal law act agitating for certain changes in the law, including at times the introduction of mandatory penalties. Their actions are entirely understandable in view of the great personal tragedies which they have suffered. But we must always remain rigorously committed to the principle that the criminal law is enacted on behalf of the entire community for the benefit of the entire community. Sometimes, indeed, the changes being advocated are misconceived to the extent that they fail to reflect the real problem. I can think of a number of recent media interviews by a person advocating mandatory sentences for a particular crime in light of the tragic death of a close family member. Yet, to the best of my knowledge, the problem in that particular case is not the absence of a sentence but rather the absence of an arrest.

Furthermore, the campaigns to which I am referring are often carried out in an information vacuum, and this is particularly true of sentencing. Indeed, this holds true, not only of public campaigns for legal change but also of political initiatives. Rarely if ever do those advocating mandatory sentences or other structural change take the trouble to acquaint themselves with existing sentencing practice. If they did, they might well discover that the sentences imposed are considerably higher than they imagine and perhaps even higher than they themselves would recommend.

It is, of course, true that the commission of a criminal act or the subsequent process of investigation or prosecution may bring to light legal problems or deficiencies which need to be addressed. But, if so, reform should be made after careful deliberation of the problem in general rather than as a kind of homage to the victim. Certainly, the worst possible time at which to consider law reform is in the immediate aftermath of the crime itself at which point it will usually be impossible to predict how the investigation or subsequent legal proceedings will

[10] Karmen, *Crime Victims: An Introduction to Victimology* 7th ed (Wadsworth Publishing Co., 2009).

unfold. To be more specific, the problem is that while there is often great enthusiasm for reform in the aftermath of the crime, once that crime fades out of the news it is largely forgotten about.

Reforming Sentencing: Policies, Principles and Decisions

The sentencing policies and practices most appropriate in any given jurisdiction necessarily depend on certain variables including the size of the population, the extent of the crime problem, the nature of the more prevalent recorded crimes, the constitutional framework and values within which the sentencing system operates and the broader legal culture. Bearing these factors in mind, it may safely be concluded that this country does not need a very elaborate scheme of sentencing guidelines of the kind that now exist in some American jurisdictions.

Policy making

It is now trite wisdom that we suffer from a serious deficit of empirical information on the operation of the criminal justice system in this country, and our policy-making has often been much the poorer for it. We need a centralised Criminal Policy and Research Unit, something equivalent to the ESRI but on a much smaller scale, which would act as a clearing house for the coordination and analysis of criminal statistics and which would undertake research on criminal justice law reform. General law reform bodies are seldom well equipped to engage in this kind of research as there is far too much knowledge out there and good quality research requires at least as much attention to the findings of social science research as to traditional legal sources. This body should be charged with monitoring the impact of recently enacted laws as well as being tasked with examining the need for further legislation or administrative changes. Above all, this Policy and Research Unit should be operationally independent of government departments, prosecution, police, prisons, courts and other criminal justice agencies, though all of these bodies should be legally required to cooperate with it in the discharge of its functions.

Principle making

The Court of Criminal Appeal, as it now operates, is ill-equipped to act as a forum of principle. The number of cases coming before the Court has grown enormously in recent years. On Monday 19, May 2010, for

example, the Court sat, as it does periodically, in order to assign dates to appeals that are due for hearing over the coming months. Almost 120 cases were listed in all. It is completely unrealistic to expect that all of the sentencing cases listed might result in important judgments setting out authoritative principles. According to official statistics, that court disposed of 267 cases, including 240 sentence appeals, in 2007. In 2008 it disposed of 305 cases including 264 sentence appeals.[11] Only about ten per cent of these resulted in approved judgments. The Courts Service website carried 27 Court of Criminal Appeal judgments for 2007 (three of which resulted from the same appeal) and 24 for 2008 (two of which resulted from the same appeal).

Appellate review (or, more properly appeal court judgments) is probably the best way of structuring judicial discretion in this country. But for the delivery of effective guidance, we need what I would call assisted appellate review. This would entail the establishment of a sentence information unit within the courts system which would assist the appeal courts in the discharge of their functions by maintaining statistical data bases on existing sentencing practices as well as preparing detailed working papers on general sentencing issues (including first and foremost the establishment of custody thresholds) and on the sentencing of specific offences. All of this information would, of course, be publicly available through its website and therefore available to trial judges and to lawyers and litigants appearing in criminal cases. The reason why such a service is needed is that every individual appeal is, of necessity, fact specific and the precedent value of a decision will be very much contingent on the facts. If a court is to perform effectively as a forum of principle, it needs to have before it more general information and data than would be necessary for the disposal of the case before it. An appeal court could flag certain cases in advance as ones which might be appropriate for the delivery of a headline judgment, so that the parties could make appropriate submissions. Again, I emphasise that all of the data and documentation produced by the sentence information unit would be available to the parties, and to everyone else well ahead of the hearing, so that it can be the subject of submissions (and disagreement) by parties arguing the case.

Decision-making

I can deal with this very briefly. Decision-making, in the sense of determining the sentence appropriate in any specific case, must be

11 Figures drawn from Court Service Annual Reports for 2007 and 2008.

left to the courts, as now. This is demanded by the Constitution, save in the case of mandatory sentences, and is also demanded by the interests of justice. The structures I have just recommended are intended to assist principled decision-making, not to replace it.