IRISH ASSOCIATION FOR THE STUDY OF DELINQUENCY LTD
How effective is the management of offenders - community sanctions versus imprisonment

Conference 2005

How effective is the management of offenders - **community sanctions** versus **imprisonment**

Eighth Annual Conference, Newpark Hotel, Kilkenny, 4th, 5th and 6th November 2005

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Opening Address

Maura Butler, IASD Company Secretary

Good afternoon Ladies and Gentlemen. As Company Secretary it is my privilege to welcome you all to the eighth Annual Conference of the Irish Association for the Study of Delinquency. The response to invitations to this conference has been encouraging and virtually all the key national and regional stakeholder organisations are present. IASD seeks to promote a wider public understanding of the administration of criminal justice, the treatment of offenders and the causes and preventative measures related to crime. The theme of the Eight Annual Conference is: *'How Effective is the Management of Offenders – Community Sanctions versus Imprisonment'*. This is a topic of considerable significance to the work of IASD. One of our main objectives is to promote rational, just and humane policies with regard to the treatment of offenders. In discussing this theme at length over the course of the weekend, it is our hope that we can achieve a greater understanding of the possibilities offered by community sanctions.

We are particularly honoured to have Mrs. Justice Catherine McGuinness to open proceedings. We are also pleased to welcome several other members of the judiciary, including Judge Yvonne Murphy and Judge David Smyth from Northern Ireland who are among our distinguished speakers. We are delighted to welcome leading academics in the field of criminology in Ireland, Professor Dermot Walsh from the University of Limerick and Dr. Ian O'Donnell from University College Dublin. A particularly warm welcome to our speakers who travelled from across the water, Dr. Julian Roberts from the University of Oxford and Cedric Fullwood, Chair of the Cheshire Probation Board.

This year, for the second time, it has been possible to offer a number of bursaries to both postgraduate students and those from non-governmental organisations working with offenders and ex-offenders. This was made possible through the generosity of the following organisations: the Irish Prison Service; the Probation and Welfare Service; the Office of the Director of Public Prosecutions; the Special Residential Services Board; the Law Society of Ireland and the Association itself. We look forward to the contribution that will be made by the recipients of these bursaries as they engage in rapporteur duties by bringing a resumé of the conclusions of various workshops back to the main conference discussions.

Workshops are an integral part of any conference and provide an important mechanism for the open exchange of ideas. This year we are fortunate to have five workshops on relevant and topical issues. I would like to thank the workshop co-ordinators, chairpersons and rapporteurs for their involvement in this process.

As most of you know, our Chairperson Martin Tansey has made a vital contribution to the establishment and development of our Association over the years. Unfortunately he is unable to attend this year's event. The onus is therefore on me, as Company Secretary, to take the role of chairperson for the duration of the conference. On behalf of the Council and staff of IASD, and all attending the conference I extend our best wishes to Martin and look forward to his return. As many conference participants have said to me, Martin's name is synonymous with IASD. I know I have large shoes to fill this weekend!

Our patron Mr. Justice Michael Moriarty is also, unfortunately, unable to attend due to prior commitments.

May I take this opportunity to acknowledge Judge David Riordan's gracious acceptance of our invitation to deliver the after dinner speech at the Gala Dinner.

It is not the intention of this conference to arrive at decisions or resolutions of any kind or strict consensus around any issues. This would not be in keeping with the mandate of IASD which is to function as an independent body and provide a forum for independent, considered and informed expert advice within the criminal justice family.

IASD is committed to listening seriously and to engaging around the issues that will be raised in this forum. It is also committed to giving determined consideration to the ideas and views expressed at this conference and to incorporating these into its own future deliberations and, if needs be, its initiatives and activities.

There are many people who believe the solution is to lock criminals up and throw away the key. This conference is our chance to show them that there are other options available.

Keynote Speaker

Mrs Justice Catherine McGuinness, Supreme Court & President of the Law Reform Commission

I would like to begin by thanking the Irish Association for the Study of Delinquency for their invitation to give the opening address at this annual conference. In doing so I stress the importance of the subject today – the choice between custodial and non-custodial sanctions – and the importance of groups such as yours, which both hold up our penal system to informed scrutiny and also make sound recommendations for reform.

I must emphasise that in any views that I may express here today I am speaking personally. While I will refer to the work carried out in this field by the Law Reform Commission I am not speaking on behalf of the Commission; still less am I speaking on behalf of the judiciary.

One of the major difficulties in the study of delinquency in general, and of the effectiveness of criminal sanctions, is lack of detailed statistical information. As the Courts Service sets up full information technology structures this lack is gradually being remedied as far as the courts themselves are concerned, but in many related fields there is still a distinct lack of the information on which rational reforms need to be built. As regards penal policy, also, one sometimes has the impression of contradictory policies – that the left hand is not too clear about what the right hand is doing. Some policies, and some changes in the law itself, appear to be driven by research, by knowledge and by experience while others seem to be media-driven or driven by perceived electoral advantage.

In 1996 the Law Reform Commission published a Report on Sentencing. As is customary this followed after a Consultation Paper on the same subject. Among the recommendations made by the Law Reform Commission were the following:

- A sentence of imprisonment should be regarded as a sanction of last resort.
- Mandatory and minimum sentences of imprisonment for indictable offences should be abolished.
- Community service orders should be made to the greatest extent possible.
- The probation service should be the primary target for additional resources in the area of sentencing.

It is notable that many of the views of the Law Reform Commission were shared to a large extent by the National Crime Forum in their reports. However it is clear that the Commission's recommendation in regard to mandatory and minimum sentences of imprisonment has not met with political favour.

In September 2005 the Law Reform Commission again reflected on some aspects of the management of offenders in its report on the Court Poor Box: Probation of Offenders. At page 25 of that report, the Commission stated:

> *'The Commission is of the view that reform of the Probation of Offenders Act 1907 should involve the introduction of a wide range of non-custodial sanctions consistent with the policy of imposing a sentence of imprisonment as a sanction of last resort. The Commission also considers that the restructuring of the probation and welfare service envisaged by the Expert Group on the probation and welfare service will facilitate the successful operation of a new sentencing structure as well as establishing greater integration and co-ordination between the various agencies within the criminal justice system. Non-custodial sanctions should come in line with an approach that is broadly consistent with the principles of Restorative Justice, address both offending behaviour and the underlying causes of criminal behaviour as well as targeting offenders who present a higher risk of recidivism.'*

In the report, the Law Reform Commission also surveyed a number of Restorative Justice projects in this jurisdiction, for example that in Nenagh and that in Tallaght. I myself have heard papers on Restorative Justice projects at a recent conference on youth and crime in Dublin and I was most impressed with what was said by Mr. Peter Keeley, Director of Restorative Justice Services, and by Mr. Kieran O'Dwyer, Head of Research, Garda Research Unit, on that subject. This conference will be hearing about the developments of Restorative Justice in Northern Ireland from Judge David Smyth at tomorrow's session.

There has been comparatively little academic study of sentencing policy and the management of offenders in this country; again this is difficult on account of the lack of reliable statistics. The main work in the field of sentencing is of course Mr. Tom O'Malley's *'Sentencing Law and Practice'*. Mr. O'Malley has remarked that Ireland has *'the most unstructured and outdated sentencing system in the western world'*.

He also points out that *'prisons, which involve the complete segregation of the offender from society, are costly to run, difficult to manage, and must often cope with problems with which they are ill equipped to deal such as substance abuse and mental disorder'*. In common with other commentators, and particularly in common with Mr. John Lonergan, Governor of Mountjoy Prison, Mr. O'Malley stresses the background from which the majority of prisoners come. In Mountjoy Prison, the vast majority of prisoners come from the deprived areas of inner-city Dublin and West Dublin. A very large number of them are serving short sentences of in or about six months. This length of sentence, again as pointed out by Mr. Lonergan, does not provide an opportunity for any form of effective rehabilitation or education. The prisoner is simply released at the end of his sentence into the same deprived background from which he came.

Paul O'Mahony, the penologist, states in a recent article on recent penal policy in the Irish Law Times: *'The central fact about the vast majority of Irish offenders, whom we imprison, is that there is no pristine motivational state, no foundation of personal achievement, and no secure, congenial place in mainstream society to which to bring them back. There is only lifelong history of failure and of being failed in areas that link to economic success and social acceptance.'*

When sentencing a convicted offender, the court has a limited range of non-custodial sanctions – Community Service Orders, the Probation Act, or a contribution to the Poor Box covers practically the whole range. There is general agreement among those practising in this area, such as those who are present at this conference today, that there is great value in the use of suitable community-based sanctions. This is also reflected in the growing movement for Restorative Justice. The National Crime Forum in its report in 1998 (page 40) stated: *'The strong belief that community-based sanctions are to be preferred and custody regarded as a last resort is also reflected in international thinking under the auspices of both the United Nations and European Institutions. Council of Europe rules adopted in 1992 for example stated: "The implementation of penal sanctions within the community itself rather than in isolation from it may well offer in the long term better protection for society including, of course, safeguarding the interests of the victim".'*

From a practical point of view the cost of imprisonment is very much larger than that for almost any community-based sanction. It is pointed out in the Prison Service Annual Report of 2003 that the average cost of maintaining a prisoner per annum is €87,950. The Comptroller and Auditor General, however, in his Value for Money Report of January 2005 stated: *'The nature, intensity and average duration of the different types of supervision varies and has different cost implications.*

Based on spending in 2001, implementing an order for supervision costs an estimated average of €1,500 for each Community Service Order; €4,100 for supervision of an offender during deferment of penalty; and €6,100 for supervision of an offender subject to a probation order.' Yet despite the general views of practitioners and of these striking cost implications, we see on the whole an increasing tendency towards custodial sentencing and this is encouraged in recent legislation. Dr. Ian O'Donnell of the Institute of Criminology in University College Dublin, who will also be speaking to this conference tomorrow, has written of this trend in an interesting article in today's Irish Times (4 Nov 2005). Dr. O'Donnell draws attention to the fact that some of the increase in the prison population reflects the fact that more prisoners are held on remand and that a disproportionate number of immigrants are imprisoned. There is also the factor of the increasing population of this country. It is widely acknowledged that short terms of imprisonment are a particularly fruitless form of imprisonment, placing a huge strain on penal resources yet with minimal deterrent or rehabilitative effect. However, it appears that at a Government level our plans are to increase the number of prison places very considerably.

Why is this so? At least some attention should be drawn to the role of certain sections of the media in encouraging popular hysteria about the levels of crime in this country. Comparative figures in Europe and other areas of the world would not encourage a view that there is an exceptionally high level of crime in Ireland. Nor would it encourage the view that increasing the number of custodial sanctions or the length of sentences is likely to reduce crime figures. There are very many other social and economic factors feeding into rising or decreasing levels of crime in our society. There is also the factor that there is a type of competition between political parties about being *'tough on crime'* or heavily in favour of law and order. This attitude is perceived as being electorally popular, perhaps because to an extent what is said to politicians on the doorstep reflects what ordinary people have read in certain sections of the media. Thus we have a type of circle from the media to the population to the politicians and back to the policies which are put into effect. This is not necessarily related to the effectiveness of these policies.

Popular anxiety about levels of crime has its ups and downs, but it is rarely based on rational considerations. Irish society has experienced bouts of anxiety about insecurity and disorder. Such a phenomenon is facilitated and shaped by the progressively politicised nature of discussion of law and order and the employment of sound-bite criminal disorder reporting. The outcome of such dynamics has been a series of increases - in the strength of public attitudes to crime, in the use of imprisonment, in the length of sentence for certain crimes, in the imposition of mandatory sentencing or the pressure to impose such sentences, and in the commitment to prison expansionism.

But do we ask ourselves – does this work? What is it achieving? How do we measure any such achievement? And above all what, if anything, are we doing for the communities from which the majority of offenders and/or prisoners come? We speak of being tough on crime and tough on the causes of crime, but do we concentrate solely on the first and neglect the second?

The Principle Deficit In Non-Custodial Sanctions

Professor Dermot Walsh, School of Law, University of Limerick

Introduction

There is a broad trend from brutal to more enlightened penal policies in these islands over the past few centuries. In the eighteenth century the death penalty and extreme forms of corporal punishment were still the norm. In the latter part of that century deportation emerged as a 'less severe' alternative to the death penalty with the opening up of the penal colonies in Australia and Tasmania. The nineteenth century ushered in new and more progressive thinking on punishment, with the realisation that imprisonment could and should be used not just as a form of retributive punishment, but also as an opportunity to reform and rehabilitate the offender. This is reflected in the development of new prison regimes. The twentieth century carried this progress a step further with the realisation that retribution, reform and rehabilitation did not have to be pursued solely within the confines of the prison. They could be pursued effectively in the community; thus the rise of non-custodial sanctions such as probation and, much later, community service orders.

It would appear, however, that the progressive march from brutal to enlightened penal policies stalled in the twentieth century, at least as far as Ireland is concerned. Our embrace of non-custodial sanctions as a means of dealing with serious offences or repeat offenders has been sporadic, uncertain, half-hearted and lacking in any clear and cohesive policy. We have not yet accepted the basic principle that imprisonment is only necessary and should only be used where the incarceration of the offender is necessary to protect the public or as a last resort. This can be seen as both a cause and a consequence of the fact that our non-custodial sanctions have developed little beyond what they were a century ago. A contributory factor, and one that I want to focus on in this paper, is our failure to develop policies and principles governing the use of non-custodial sanctions.

Principles

The choice of punishment to impose in an individual case is clearly of huge import for the rights of the offender and for the victim and community at large. In a democracy based on the rule of law it would be reasonable to suppose that the principles governing the choice of sentence would, at a minimum, include:

- transparency;
- accountability;
- inclusiveness;
- coherence; and
- fairness.

The first four relate to the form that the principles take and the medium through which they are promulgated. So, for example, they include the requirement that the principles themselves should be publicly promulgated in an accessible form by a democratically accountable legislature and executive. The fifth, fairness, relates to the substance of the principles and includes the manner in which a sentence is selected in individual cases. So, for example, it includes issues such as: the objectives of punishment; criteria governing the use of individual sanction types; proportionality; treating like cases alike and taking account of differences between cases; and fair procedures in the application of a sentence. This last element encompasses requirements such as: sentences to be imposed in a transparent and equitable manner by an independent judiciary; the right of the accused and, where appropriate, the victim to be heard; and the promulgation of reasons for the choice of sentence in individual cases. Transparency is also important here not just in the selection of sentence in an individual case but in what that sentence entails.

The current position in Ireland

I would argue that the record in Ireland to date shows that we have a long way to go to achieve these goals, at least with respect to non-custodial sanctions. Even more disturbing is the fact that our poor record relates not just to the substance of the principles but to the much more basic issue of how these principles are formulated and promulgated.

We do not have codes setting out general sentencing principles or principles applicable to specific sanctions. We do not even have a single statute dealing specifically with sentencing principles. For the most part the legislature has confined itself to providing for a range of sentencing options and the specification of maximum and minimum tariffs. With one possible exception in the case of children, it has avoided a declaration of anything that can reasonably be described as general sentencing principles. In only a very few situations has it specified principles or procedures applicable to particular offences. In the absence of primary legislation in the area there is very little scope for the executive to adopt further, more detailed, implementing rules.

This legislative and executive deficit is left to be filled by the judiciary. The judiciary, however, are not the most appropriate body for this task. Their role is to administer justice within the framework of the law. They lack the information, resources, methods and democratic mandate necessary to formulate and promulgate State policy on penal sanctions. Nevertheless, they have responded in the only way they can to the challenge foisted upon them. They have developed a body of sentencing principles over a period of time on a case by case basis. These, however, are not and can never be interpreted as a comprehensive and coherent set of principles governing all aspects of penal sanctions. For the most part they are confined to matters such as: the general objectives of punishment, the need for proportionality between the offence and the sanction imposed and the aggravating and mitigating factors that may be taken into account on the facts of individual cases. Moreover, the case law is concerned primarily with custodial sentences. The principles governing resort to non-custodial sentences, including factors such as the choice of sentence and the form that any particular sentence should take, have attracted relatively little direct attention.

The courts are also hamstrung in the discharge of the sentencing function that is appropriately theirs; namely equity in the application of sentencing principles to the facts of individual cases. The nub of the problem here is that there is no body of published guidelines on the type or level of sentence that is appropriate to particular sets of facts, nor is there a database of sentencing decisions which any judge can access to see what sort of sentence is typically being handed down in similar cases by his or her colleagues around the country. This situation is felt acutely at District Court level where the use of non-custodial sanctions is most frequent.

I will focus on two major non-custodial sanctions, fines and community service orders, in order to sketch out the contours of this principle deficit. Before doing so it is worth emphasising the general lack of legislative and executive guidelines on when it is appropriate to resort to custodial or non-custodial sentences. Contrast that with the UK, for example, where there are clear legislative criteria on the approach that the courts should take when choosing from the range of options open to them. In addition they have the benefit of a Sentencing Advisory Panel which offers updated and more detailed guidance on sentencing for individual offences.

Fines

A fine is probably the most common punishment handed down by the criminal courts, and especially

by the District Court. It also happens to be the sanction which suffers most from a principle deficit.

A combination of statute and common law provides authority for courts to impose a fine on conviction for any criminal offence, subject to very limited exceptions. Frequently legislation prescribes the maximum amounts that can be imposed for particular offences and makes provision for the possibility of combining a fine with other punishments. Apart from that, however, the legislature has generally refrained from laying down policy on the use of fines. Similarly, there is a distinct lack of case law on when a fine is an appropriate punishment and on what levels of fine are appropriate to particular sets of facts. This relative silence means that judges, particularly District Court judges, have little concrete guidance on whether to impose a fine in an individual case and, if so, what level of fine to impose. That, in turn, is a recipe for serious inequity.

An obvious legislative intervention that seems long overdue in this context is a facility for linking the level of a fine to an offender's ability to pay. It is easy to see, for example, that a €100 fine imposed on the head of a single income household earning the minimum wage is of a totally different magnitude to a €100 fine imposed on an executive director with an annual income in seven figures.

Legislation was enacted in 1991 in England and Wales to equate the level of fines to ability to pay. Initially, it appeared to be operating effectively. It was very quickly abandoned, however, in the face of intense opposition from affluent interests spearheaded by a particularly vicious campaign by certain sections of the tabloid press. Their cause célèbre was an unemployed man on welfare benefits who was fined the maximum amount of £1,000 for dropping chewing gum paper. They quietly ignored the fact that this was the result of the offender failing to inform the court of his economic status. It was clear that all that was needed was some slight tuning to the procedure to avoid such anomalies. It buckled, however, under the weight of the tabloid campaign and lack of support from the government.

In Ireland, the District Court Rules require the judge to take the means of the offender into account when assessing the amount of a penalty. That, however, is not quite the same thing as providing the judge with detailed guidelines on how to relate the level of a penalty to means. Moreover, the judge does not have access to a database of fines handed down in similar cases to similar defendants by his or her colleagues around the country. It would hardly be surprising, therefore, if penalties handed down continued to discriminate much more heavily against low income offenders and differed significantly in similar cases around the country.

It is important to point out that this whole issue has not been totally ignored in this jurisdiction. In 2003 the Law Reform Commission published a report on fines for minor offences. It recommended, *inter alia*, the adjustment of fines to reflect the financial means of offenders. It also offers some very valuable discussion on how such a system can be put into effect.

Closely associated with the subject of fines are donations to the Court poor box. This refers to the situation where the offender's guilt is accepted and the Court (usually the District Court) holds out the prospect of not recording a conviction if the offender makes a suitable donation to the Court poor box. The proceeds of the poor box are donated to charities. This is a '*disposal option*' which is not provided for in law, is not regulated by legislative, executive or judicial guidelines and is, in my view, a very serious blot on our system of justice. It flies in the face of legality, transparency and equity. Almost inevitably, it will operate disproportionately in favour of the more affluent offenders.

The general impression conveyed by reports in the newspapers is that it is used most frequently

to deal with less serious public order or property offences committed by offenders from a commercial, professional, administrative or student background. This conveys the impression, whether accurate or not, that money and status can earn the offender not just lenient treatment in sentencing matters, but also a diversion from the criminal justice system altogether. From this perspective the *'real'* criminal justice system is reserved for offenders from the wrong side of town.

I am not suggesting that there is no role for a Court poor box type system. The current practice has resulted from the judges attempting to deal with serious inadequacies in our law which should have been addressed by the executive and legislature long ago. The problem is that our law has no express facility for dealing with individuals who have committed criminal offences which are normally deserving of punishment, but where the circumstances of the offender are such that the mere fact of conviction will carry grave consequences which are out of all proportion to the harm caused. The poor box facility is being used to remedy this deficit. It is being used, however, on an ad hoc basis and without any clearly prescribed and transparent principles. While there will be constitutional implications to be addressed in any substitute statutory scheme, these are hardly insuperable. In any event, it is submitted that no scheme would be preferable to the current arrangement.

The Law Reform Commission recently published a report on the use of the Court poor box. It identified the major pitfalls in the current practice and proposed major reforms which would retain aspects of that process but place them on a statutory basis, in the context of a revised Probation of Offenders Act 1907.

Community service orders

Ireland was relatively late in coming to community service orders. The necessary legislation was enacted in 1983 and came into force in December 1984. (Criminal Justice (Community Service) Act 1983; Criminal Justice (Community Service) Regulations 1984; Criminal Justice (Community Service) Act, 1983 (Commencement) Order 1984). The first CSO was issued 20 years ago in February 1985. The CSO concept opens up a whole new generation of non-custodial sanctions, with its potential to fashion a sanction which responds to the individual circumstances of the offender as well as the needs of the victim and the community.

The CSO benefits from a degree of legislative and executive regulation that is unparalleled in any other criminal justice sanction in Ireland. The legislation stipulates, *inter alia*, that it can be used only in respect of an offender who is least 16 years of age, who has been convicted of a criminal offence and who has consented to the making of the order. Moreover, the order can be made in any individual case only as an alternative to imprisonment and where the court, having considered a community service report, is satisfied of the offender's suitability for community service and the availability of a suitable community service project. Any order imposed must be for at least 40 hours and not more than 240 hours of community service which must normally be completed within a continuous period of 12 months. All of this is stated expressly in the legislation. The regulations add some detail (albeit very sparse) on the work projects.

The legislature's and executive's prescription of this level of principle for CSOs is a welcome contrast to their approach to other sanctions. It offers the courts a framework within which to fashion punishments which are more likely to be transparent and equitable. Nevertheless, it is submitted that at one level the prescription is too restrictive and on another level it is not sufficiently detailed. I will start with the former.

The legislation offers only one type of CSO; and that is tied expressly to a substitute for imprisonment.

It is available, therefore, only where the judge is otherwise disposed to imposing a prison sentence. It cannot be used in a case where a prison sentence is not appropriate, but where a particular form of community service might be particularly suitable on the facts of the case for the purposes of reparation and rehabilitation. Equally, there is no provision for the conversion of other sanctions such as a fine, suspended sentence, disqualification, etc. into community service.

It is also likely, but by no means certain, that a CSO cannot be combined with some other form of punishment such as a fine, a suspended sentence or a requirement to undergo an alcohol or drug rehabilitation programme. There is no provision for a suspended CSO or a reduction in the length of a CSO for exemplary performance of the community service.

The limits on the length of a CSO are restrictive. It is easy to see why there must be a minimum length - and 40 hours is not at all unreasonable in this context. But why is the maximum set at 240 hours? If there is an inbuilt assumption that 240 hours CSO equates to x months imprisonment, then the CSO will not be available for an offender who might be sentenced to a term in excess of *x*, even though in the circumstances of the case he or she would be a suitable subject for community service. If it is assumed that it would be unreasonable to require an offender to do more than 8 hours community service per week, it would be feasible for an offender to work off a total of about 400 hours over a year. So why is the maximum total not at least 400 hours? At least that would have the merit of making community service available for offenders who would otherwise be locked up needlessly for very long periods of time.

Closely related to the restrictions on CSOs is the issue of lack of choice in community based sanctions generally. Basically, there is only one type of CSO, and that generally takes the form of unpaid manual work for a charity, a retirement home, a youth club, a sporting organisation, a community project or environmental work in the local community. This conveys a very limited and unimaginative approach to the use of community based sanctions as a tool of reparation and rehabilitation. A huge untapped potential could be released if the scheme was extended to include the possibility of individuals and companies using their knowledge, skills, expertise and resources for the benefit of community groups. Equally, if the State was to provide the necessary insurance cover there could be a significant growth in the number and range of suitable community service projects. Such expansion would, of course, demand a commensurate increase in the number of probation officers engaged in community service. In other words the State would have to divert some of its investment away from prisons and towards community based sanctions.

Another aspect of the lack of choice is our failure to make more formal provision for self-improvement sanctions, not unlike that associated with the Drug Court idea. In addition to the detoxification programmes, these would include options such as: anger-management programmes; relationship skills; parenting skills; etc.

The extension of CSOs and community based sanctions along these lines will require a substantial increase in legislative and/or regulatory prescription in order to ensure equity and transparency in their application. Even as things stand, however, there is surely a lack of detailed prescription. This is most noticeable in the equivalence between CSO hours and months of imprisonment and in the comparability of work projects.

The legislation gives no indication of what a 40 hour CSO (or a 240 hour CSO) is equivalent to in terms of months of imprisonment. It is likely, therefore, that different judges sitting in different parts of the country will be using CSOs differently.

Some will be using CSOs in situations where others would not; some will hand down long CSOs for relatively short prison sentences; and others will do the reverse. When it is considered that there is no database of decisions which each judge can tap into before handing down a sentence, it can be expected that there will be gross disparities across the country.

Research carried out in 1999 confirmed such disparities. Limerick, for example, was a relatively heavy user of CSOs for larceny and public order offences; Cork was a relatively heavy user for less serious assaults; and Wexford used it almost exclusively for driving offences. Judges sitting in rural area were more inclined to hand down CSOs for public order violations and driving offences than their urban counterparts.

Such differences were even more pronounced with respect to average length of CSOs and equivalences between CSO length and term of imprisonment. Courts in rural areas tended to hand down shorter CSOs than their urban counterparts (127 hours as against 147 hours). Only 3 out of 20 District Court areas had the same CSO equivalent for a prison term (i.e. 28 hours equivalent to 1 month of prison). The others ranged from a high of 63 hours to a low of 11 hours.

These disparities can be attributed to a combination of factors. One of these, of course, is a lack of principled guidance in the legislation on the use of CSOs. It is not enough simply to state that they are to be used as a substitute for prison terms. Judges need more detailed guidance on when a CSO is appropriate, how long a CSO should be and what form it should take.

Closely related to this is the relative lack of community based options. It seems that some judges may be responding to this deficit by resorting to CSOs in situations where they would not otherwise have imposed a prison sentence. There is an urgent need for the development not just of a whole new range of CSOs, but also of community sanctions generally. Such a development will also need to be accompanied with detailed guidance on the appropriate application of each.

Another contributing factor is the absence of a database of decisions which can be accessed by a judge on a case by case basis to ensure that his or her decision in that case is in line with general practice throughout the country. The need for this resource is surely self evident and urgent.

Finally, it must be acknowledged that the judges themselves have a role to play in this. There has been a tendency, particularly at District Court level, to pass sentence without explaining fully the reasons why that particular sentence has been chosen as opposed to some alternative. Not only does a failure to give reasons fly in the face of fairness, but it also fuels the perception that our sentencing policies and practices are lacking in principle. To move meaningfully in this direction will require more judicial resources.

Conclusion

The conclusion can be stated quite succinctly. Our record in formulating and promulgating policies on sentencing is woefully inadequate relative to the standards that can reasonably be expected in a mature and wealthy democracy based on respect for the rule of law and human rights. This record is particularly poor in the area of non-custodial sanctions. The inevitable consequence is to undermine public confidence in the administration of justice and, indeed, to bring the administration of justice into disrepute.

Putting Prison in its Place

Dr. Ian O'Donnell, Institute of Criminology, University College Dublin

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.

Cesare Beccaria, On Crimes and Punishment, 1764

My opening quotation captures the essence of Enlightenment thought on the administration of justice. It remains as important a guiding principle today as when it was written 240 years ago. When we narrow the focus to the most severe sanction available to the state, namely imprisonment, the imperatives of necessity, parsimony and proportionality take on even greater urgency. This means that there must be unambiguous and overwhelming arguments in favour of any expansion of a country's prison system.

It is difficult to be precise about the number of additional spaces that are planned. The November 2004 *Implementation and Progress Report* for the Department of Justice, Equality and Law Reform states that up to "800 additional new places" will be provided through the replacement of Mountjoy Prison in Dublin and Spike Island in Cork. This would potentially bring the total number of prisoners to around 4,000. However a more widely reported estimate is that a future with 4,500 prisoners is envisaged. This would include new cell blocks at other sites.

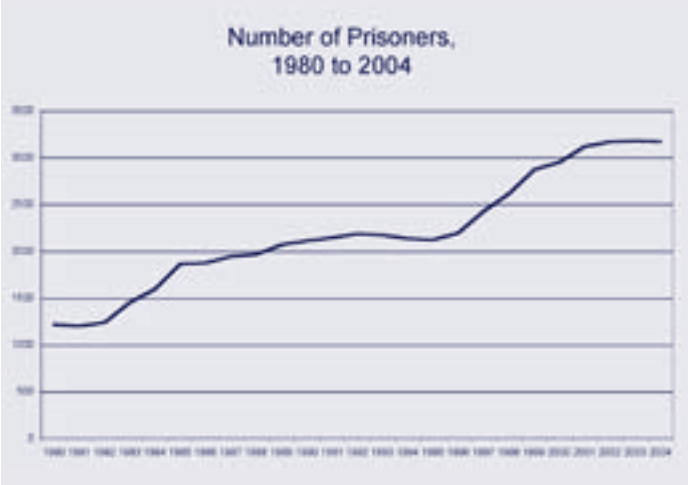
Despite some inconsistency in the estimates, what is not in dispute is that significant expansion is thought necessary. This is one of the driving forces behind the decision to establish a large new prison at Thornton Hall. I will return briefly towards the end of this talk to the vexed question of the Thornton Hall prison plan.

In the time allocated to me I would hope to achieve the following:

- Examine how the number of people serving prison sentences has changed over the past decade.
- Investigate whether more people are being sent to prison now than previously.
- Suggest a range of alternatives to prison building.
- Identify some implications for the design of Thornton Hall.
- Show how to link the building programme with penal contraction. I have a proposal to make about how we can build new prisons while at the same time slimming down the overall number of prisoners.

Are more people serving prison sentences?

The first question to be addressed is how much do we use prison and has our tolerance for it grown? That the average daily number of prisoners has increased is beyond dispute. The graph shows that in broad terms the numbers in prison increased by 1,000 between 1981 and 1991 and by another 1,000 between 1991 and 2001, since when the line has flattened out.



But what does this trend mean? The most obvious answer is that it reflects an increase in the number of people sentenced to terms of imprisonment. Surprising as it may seem this does not appear to be the case.

A major gap becomes immediately apparent when one begins a more detailed analysis. This is the period 1995 to 2000 where no detailed prison statistics were published. This was an interesting time in Irish criminal justice history because it marked an increase in the prison population that coincided with a steep fall in recorded indictable crime.

On the question of data deficits it must be said that the Department of Justice, Equality and Law Reform took a major step two years ago by commissioning the UCD Institute of Criminology to compile a sourcebook of all available data on crime and punishment since the foundation of the state. This will be published shortly by the Institute of Public Administration and marks a significant step forward. It was generously supported by the Secretary General, Seán Aylward, who is a strong supporter of research. Also my experience with the Irish Prison Service has been that there is great willingness to share data if it exists or can be reasonably obtained. Mr Jim Mitchell has been particularly helpful in this regard over the past several years.

Accepting that a comprehensive overview will not be possible let us look initially at the number of men, women and children in custody on any given day over the past three years compared with a decade earlier. Even this picture is pieced together from fragments. Some data are from published reports, others from internal Department of Justice documents, others again resulted from specific enquiries. This is far from ideal but it is the best that can be done and is enough to sketch a broad outline with a fair degree of confidence. This confirms the pattern shown in the graph of a seemingly relentless rise. In 2004 there were around 50% more prisoners than in 1994.

Table 1: Total number of prisoners 1992-1994 and 2002-2004

1992	2,185
1993	2,171
1994	2,133
2002	3,165
2003	3,176
2004	3,169

The expansion plans seem to be premised on the notion that if this growth rate continues we will require 50% more spaces over the next 10 years, bringing the total population to 4,500. This seems almost self-evident. However, as I will show, a simple linear extrapolation of this kind is fraught with danger.

Not all of those in prison were serving sentences. Some were remanded in custody awaiting trial or sentence. This group has particular requirements and its size is influenced by different factors to those that determine the numbers behind bars serving sentences. Prisoners on remand should be held apart from sentenced prisoners and, at the very least, enumerated independently of them. Indeed many are innocent and their detention is an administrative measure rather than a punishment. So we need to take them away. This narrows the gap between the two time periods.

Table 2: Take away those on remand

	In Prison	On Remand	Total
1992	2,185	-101	2,084
1993	2,171	-108	2,063
1994	2,133	-138	1,995
2002	3,165	-559	2,606
2003	3,176	-488	2,688
2004	3,169	-522	2,647

There were a lot more remands in custody between 2002 and 2004 than there had been a decade earlier. Two things permitted this: the law was changed to widen the grounds on which bail could

be denied following a referendum to amend the Constitution in 1996; and a large new institution (Cloverhill) was opened in 2000. The ostensible reason for tightening the bail laws was to reduce the harm caused by *'bail bandits'*, offenders who were thought to be taking advantage of a period at liberty before almost certain incarceration to offend frequently. It would be interesting to know if there is any evidence that the desired result has been achieved. Has the crime rate fallen due to accurate selective incapacitation? This is a piece of research that I would commend to the Department of Justice, Equality and Law Reform.

In recent years immigration-related cases have become a feature of the Irish penal system. These are not convicted criminals and should not be held in prison so we need to subtract them too. They tell us nothing about sentencing practice and how it might be changing. Of course there are some non-nationals in custody because they have offended against the criminal law. They are excluded from this analysis.

Table 3: Take away those on immigration warrants

	In prison	On remand	Immigration	Total
1992	2,185	-101	0	2,084
1993	2,171	-108	0	2,063
1994	2,133	-138	0	1,995
2002	3,165	-559	-40	2,566
2003	3,176	-488	-18	2,670
2004	3,169	-522	-18	2,629

In the early 1990s many sentenced prisoners were granted temporary release (TR) and as such were excluded from official counts of the prison population. TR meant that prisoners were discharged before their sentence had expired, usually without supervision, to make space for new arrivals. In the 1970s, full TR was rarely resorted to; in the 1980s, it was granted, on average, less than 1,500 times per annum; but by the early 1990s, it was being granted on over 3,500 occasions each year. There was a poor relationship between the penalty imposed by the court and the time actually served, and there was considerable judicial and public frustration with what became known as the 'revolving door' syndrome. This problem has largely dissipated over the time frame that we are examining, in large part due to the first phases of the prison building programme.

Persons on TR need to be factored back in because although at liberty, legally speaking they are still serving prisoners. It can be seen that when they are taken into account the gap between the number of sentenced prisoners today and a decade ago shrinks even more. The raw figures show a difference of 1,000 between 1994 and 2004. This falls to 300 when the necessary adjustments are made.

Table 4: Add those on TR

	In prison	On remand	Immigration	TR	Total
1992	2,185	-101	0	+470	2,554
1993	2,171	-108	0	+565	2,628
1994	2,133	-138	0	+570	2,565
2002	3,165	-559	-40	+205	2,771
2003	3,176	-488	-18	+293	2,963
2004	3,169	-522	-18	+249	2,878

There is one further modification. The country's population has grown substantially over the time period we are considering so we need to take account of this. It would probably be more appropriate to express the number of prisoners per 1,000 crimes. Unfortunately the introduction of the PULSE computer system and the new way of presenting crime data that it ushered in make such a computation highly problematic. In any case the national population is usually used as a baseline to allow international comparisons so for our purposes it can be considered a valid measure.

Table 5: Express number of sentenced prisoners per 100,000 population

	In prison	On remand	Immigration	TR	Total	Rate
1992	2,185	-101	0	+470	2,554	71.9
1993	2,171	-108	0	+565	2,628	73.5
1994	2,133	-138	0	+570	2,565	71.5
2002	3,165	-559	-40	+205	2,771	70.7
2003	3,176	-488	-18	+293	2,963	74.5
2004	3,169	-522	-18	+249	2,878	71.2

When this final refinement is made it can be seen that last year's imprisonment rate of 71.2 is virtually identical to the rate in 1994, which stood at 71.5. This is a startling finding. It demonstrates that the pressure to expand does not appear to be coming from within the criminal justice system. In other words it is not the case that the volume of sentenced prisoners is such that a reconsideration of the adequacy of current levels of accommodation is required.

Are we sending more people to prison?

I have described as *'startling'* the finding that the population of sentenced prisoners has hardly changed. But this is not the end of the matter. The next table shows the total number of committals and the committal rate per 100,000 population. It can be seen at a glance that there has been a sharp fall in the number of individuals committed to prison under sentence.

Table 6: Committals to prison under sentence

	Number	Rate
1992	5,857	164.8
1993	6,585	184.2
1994	6,866	191.5
2002	5,036	128.6
2003	5,314	133.6
2004	n/a	n/a

It is not immediately clear why there has been such a dramatic change in the number of committals: down by around one third between 1994 and 2002.

It may be that this is due in part to a reduction in the number of fine defaulters. Perhaps the improved economic situation has made it easier for offenders to pay up? Unfortunately the data are not available to examine this as we do not know how many fine defaulters were jailed between 2002 and 2004. However we do know a little about sentence lengths, and the proportion of prisoners who received less than three months was 38% in 2003 compared with 48% in 1994. This would include virtually all fine defaulters.

The fact that committals have fallen while the average prison population remains stable indicates that the average time served is rising. This is most likely a combination of the reduction in TR, an increase in sentence lengths and a rise in the number of serious offences coming before the courts.

Another possibility is that the reduction in committals reflects an increased share of minor offenders, who would otherwise receive short prison sentences, being managed in the community by the Probation and Welfare Service; that it is evidence of effective diversion. This idea is impossible to test as the probation statistics are mostly of historical interest. The most up to date annual report that I have been able to obtain relates to 1999.

However for the time where figures are available for both prison and probation (1980 to 1999) there was never a year when probation measures (including community service) were used more frequently. It does not seem likely in other words that the decline in prison sentences has come about due to a surge of interest in probation among judges.

A final possibility is that the statistics are compiled differently and that the committal figures for recent years are not directly comparable with earlier years. This seems unlikely as new technology is normally accompanied by more complete recording and if anything would be expected to show an increase where we have seen a fall.

Are we planning for a crisis that has passed?

I have noted that the pressure for expansion cannot be coming from within. This is confirmed by the fact that the decision over the past two years to close institutions (e.g. Shanganah Castle) and mothball others (e.g. Curragh, Fort Mitchel), did not have major consequences. A system with capacity problems could not have dared to make such a move. It is a curious situation when the number of prison places seems to be coming under pressure to expand and contract simultaneously!

There is a further matter to consider. In 1994 recorded crime was heading for a peak and the prisons were crowded. However Department of Justice policy was to strive for an upper limit of between 2,200 and 2,300 on the number of offenders in custody. Today there is talk of designing a system for over 4,000. In the absence of detailed cost-benefit analyses this apparent enthusiasm to incarcerate is difficult to understand.

Part of the explanation must be that restraint in earlier years was motivated by an acute awareness of the financial implications of penal planning. These are substantial: to keep a dozen men in custody costs €1m each year. It is likely that a more buoyant economy has diminished the significance of such considerations.

It is important to stress at this point that no one would deny the need for humane conditions and to provide them will require a programme of modernisation. It is unacceptable that during long periods of lock-up some prisoners have no choice but to urinate and defecate into buckets. However, the emphasis should be on replacing, rather than supplementing, the number of available cells. The key question is what might be considered suitable alternative approaches to dealing with a combination of a modest crime problem and some overcrowded and unsanitary prisons?

What to do, if anything?

The level of imprisonment in Ireland is low by international standards. Rather than planning for expansion there are grounds for believing that it could be reduced without jeopardising public safety. We have seen that the number of committals is falling. This trend could be accelerated if the following initiatives were taken seriously:

1. Community penalties should be viewed as the norm with prison as an occasional alternative. This will require a radical shift in perspective and a significant transfer of funding. It is time to return to the final report of the Expert Group on the Probation and Welfare Service and implement its recommendations.

2. Require judges to consider and rule out all other options before imposing a prison sentence and to give a written reason justifying prison when it is imposed. Such an approach has been recommended by the Law Reform Commission in the case of minor offences.

Reducing the stock of sentenced prisoners is probably easier than cutting off the flow into prisons. There are lots of ways to stabilise and

then reduce the numbers behind bars. In essence this involves keeping prisoners in custody no longer than is necessary to satisfy the need for retribution and deterrence. This could involve measures such as:

- Increasing the standard rate of remission from 25 per cent to 33 per cent for all offenders serving fixed sentences.
- Introducing a structured system of parole with defined eligibility periods. For example: automatic release after serving half of the sentence for first-time offenders who do not pose a demonstrable risk. Giving the Parole Board the power to order release save for exceptional circumstances.
- Weekend and evening prison so that suitable offenders can remain in employment, compensate their victims and retain responsibility for their families.
- Waiting lists for offenders who do not pose an immediate threat.
- Early release with electronic monitoring.
- Periodic amnesties.
- Separate accommodation for persons on remand and immigration-related cases.

These are pragmatic and reasonable suggestions. Each of them has a precedent in one or more Western countries.

The final ingredient is to make a return to prison less likely. The entire sentence should be seen as an opportunity to prepare the individual for release. This will necessitate meaningful sentence management and adequate treatment during the period of custody. The report from the National Economic and Social Forum on prisoner reintegration was a step in the right direction in this regard.

An approach along the lines I have outlined would fit neatly with the Council of Europe's recommendation on what it terms "prison population inflation". This spells out clearly the need for restraint in the use of custody. The principles behind this recommendation are that:

- Deprivation of liberty should be regarded as a sanction of last resort and should therefore be provided for only where the seriousness of the offence would make any other response clearly inadequate.
- The extension of the prison estate should be an exceptional measure, as it is generally unlikely to offer a lasting solution to the problem of overcrowding. Countries whose prison capacity may be sufficient in overall terms but poorly adapted to local needs should try to achieve a more rational distribution of prison capacity.
- Provision should be made for an appropriate array of community sanctions and measures, possibly graded in terms of relative severity; judges should be prompted to use them as widely as possible.
- In order to devise a coherent strategy against prison overcrowding and prison population inflation a detailed analysis of the main contributing factors should be carried out, addressing in particular such matters as the types of offence which carry long prison sentences, priorities in crime control, public attitudes and concerns and existing sentencing practices.

It is difficult to argue with any of these four propositions. If taken seriously they have major implications for the scale of any prison building programme. They point towards the conclusion that rather than aiming for a prison population of between 4,000 and 4,500 it would seem reasonable to push the current level downwards.

What has the above to contribute to the current focus of controversy, namely the prison proposed for Thornton Hall? The excitement about the price paid per acre has deflected attention from some more fundamental issues.

Justifying Thornton Hall

If my analysis is correct it raises questions about the need for any new prison on expansionist grounds. As I have already indicated no one would deny the need for humane conditions. There are a number of additional concerns.

Generally speaking prisons work best if they are small. A site as large as the one proposed – which could hold more than one in four of the state's prisoners – will not satisfy this key requirement. It has not yet been decided how many buildings will be constructed on the site or how many prisoners will be accommodated there, but the minimum estimate is 1,000. In a recent book, *The Future of Imprisonment*, Michael Tonry recommended a maximum prison size of 300; this even applied to the US with over two million prisoners.

Large prisons need to be highly regimented and life within them has an assembly line quality. Individual needs can quickly become lost in the drive to meet institutional priorities. These are dehumanising places where security and order are difficult to maintain, vulnerable prisoners become isolated, and the slim chance of reform is further attenuated. To minimise the harms of confinement prisons must be modest in size.

Prisons work best if they are located close to prisoners' homes. While 10 miles is no great distance if one owns a car it is another world for prisoners' families used to walking or catching a bus to the North Circular Road. There will be few families within easy reach of the new site and it will be awkward to access using public transport, at least in the short term. This is not good news for the maintenance of family and community ties. It is at odds with the government's stated intention to prevent further depletion of social capital.

It is too ambitious. Men, women and children, serving sentences and on remand, and posing a wide range of risks of violence, self-harm and escape; all will be held on a single site. It has even been suggested that the Central Mental Hospital should be relocated to the same campus. This diversity may militate against effective sentence management. It is important to be clear about the likely composition of the population in the new prison. Different architectural and regime design features will be required for groups such as life sentence prisoners, young offenders, drug users, the mentally ill and those who attract the opprobrium of their peers because of their offence or their inability to cope. Clarity around such matters should precede any building work. When Mountjoy opened in 1850 the buildings were the physical expression of a clear philosophy of punishment. Similarly a clear vision of imprisonment should precede the first block being put in place in any new development.

Furthermore – and to sound a pessimistic, if realistic note – it is almost certain not to succeed any more than what it replaces; except perhaps with regard to hygiene standards.

In a nutshell then the balance of the evidence would suggest that the new prison is at odds with the requirements of necessity, parsimony and proportionality that I outlined in my opening comments. In addition it reinforces the idea of prison as the centre of the penal system rather than challenging this view on the basis of economy, efficiency and effectiveness.

This is a lost opportunity. If as much time, energy, expertise and money went into designing crime prevention strategies and community-based punishments the criminal justice landscape would look completely different. Prison needs to be shifted from centre stage so that the potential of alternative approaches can be established.

Finally, given the long-running controversy about prison costs it is not self-evident that there will be any economies of scale.

Conclusion

So where do we go from here? It would be worthwhile considering the following five points as elements of any rational strategy:

1. Estimating the demand for additional prison places will require a careful examination of the operation of different elements of the criminal justice system, in particular trends in crime, prosecutions and sentencing. At present this is not possible.

2. Demographic shifts are important too. Given that offenders tend to be young and that the population is ageing it may be that just as universities expect to see enrolment fall over the coming years so too will prison populations drop. Such a possibility should be incorporated into any attempt to project future trends.

3. If predictive studies show that based on current practice the number of sentenced prisoners is likely to grow there are two options: expand the number of prison places or review current practice. The latter would involve cutting off the flow of individuals into custody as well as reducing the duration of their stay. It goes without saying that any such initiatives must not be allowed to compromise public safety.

4. It will be difficult to anticipate the demand for prison accommodation, and in particular the required size of the replacement institution for Mountjoy, until a full array of community sanctions and measures is in place and being utilised by the courts. Such a scenario is some way distant.

5. While necessary in some cases imprisonment is hugely expensive and inherently harmful. This creates a pressing need to demonstrate why expansion should take place and on what scale.

I have one proposal to make that might strike an effective balance between the desire to expand and the need to contract. It can be described simply. Surely it would be worthwhile considering the option that for every three new prison cells constructed four old ones would be taken entirely out of commission. This would serve the important purpose of establishing a firm link between new buildings and an overall policy of minimising the use of custody. The emphasis would be on fewer, but better, cells. This is a low-risk approach as if it proved demonstrably unsuccessful it would be easy to revise. In the meantime the financial savings could be put to good use in our hospitals and schools. Such a strategy would certainly put prison in its place.

References

Further information regarding crime and justice in Ireland can be found in the following books:

O'Donnell, I., O'Sullivan, E. and Healy, D. (2005) *Crime and Punishment in Ireland 1922-2003: A Statistical Sourcebook*. Dublin: Institute of Public Administration.

Kilcommins, S., O'Donnell, I., O'Sullivan, E. and Vaughan, B. (2004) *Crime, Punishment and the Search for Order in Ireland*. Dublin: Institute of Public Administration.

O'Donnell, I. and McAuley, F. (eds.) (2003) *Criminal Justice History: Themes and Controversies from Pre-Independence Ireland*. Dublin: Four Courts Press.

O'Donnell, I. and O'Sullivan, E. (2001) *Crime Control in Ireland: The Politics of Intolerance*. Cork University Press.

Current Developments In Youth Conferencing and Restorative Justice in Northern Ireland

His Hon. Judge David Smyth Q.C.

Note: references in text are shown at the conclusion of the paper.

I hope to give you a brief idea of what I want to try to achieve in the next 30 minutes or so and I also trust that time will be left for questions. First, questions are much more likely to throw up aspects of this which interest you and which will result in more interesting answers. Second, although we live on the same island, I have little idea of either what you know about restorative justice (which may well be a lot more than I do) or about what we are trying to achieve in Northern Ireland. I also hope those of you who know a lot about the concept of restorative justice, its history and its different applications will forgive me if you find what I have to say about the origins of restorative justice is either too basic or too trite.

I hope to outline:

- the basic concept;
- its history in Northern Ireland;
- the current youth conferencing scheme in Northern Ireland; and
- some criticisms I have of it.

As I said, I am sure this will be a bit simplistic for those of you familiar with the concept. Before I attempt this could I tell you that I am, by no means, an evangelist. Both by my experience and by my nature I react against theories that are sold by their advocates as being panaceas for all our ills and in respect of which claims are made that they will be so much better than what went before.

Was it Benjamin Franklin who said, *"In this world nothing can be said to be certain, but death and taxes"*? In my view crime could be added. The fact that the number of burglaries has reduced in the UK and, possibly, in Northern Ireland, may be more due to the reducing value of portable electrical goods such as DVDs and to fuller employment than to any impact made by policing or to restorative justice initiatives.

Recently, I listened to an Oxford academic who had done research into the cautioning plus system developed by Thames Valley. His analysis, fetchingly called *"How Green was Thames Valley"*, appraised the evaluation and statistics that had been put forward. All was not, perhaps, as clear as it seemed or as had been claimed. This is a technical area in which judges (as in many other areas on which they tread) can claim no expertise but he made a clear case for the need for re-appraisal of the statistical evaluations and, in particular, the extent to which the new system had affected recidivism.

Well, let me give you a simple definition:

> Restorative justice seeks to balance the concerns of the victim and the community with the need to re-integrate the offender into society. It seeks to assist the recovery of the victim and enable all parties with a stake in the justice process to participate usefully in it.

Well, who could really disagree with that?

Let me give you a more complicated definition that comes from New Zealand.

> Restorative justice is a generic term for all those approaches to wrongdoing that seek to move beyond condemnation and punishment to address both the causes and the consequences (personal, relational and societal) of offending in ways that promote accountability, healing and justice. Restorative justice is a collaborative and peacemaking approach to conflict resolution, and can be applied in a variety of settings (home, business, school, the judicial system, prison). It can also use several different fronts to achieve its goals, including victim/offender dialogue, community or family group conferences, sentencing circles, community panels and so on.[1]

Four examples of these, respectively, are Northern Ireland, New Zealand, Canada and the States of Jersey. What has led up to this could be said to be a questioning of traditional concepts of criminal justice, greater recognition of the harm done to victims and a perceived need to consider their interests. This all had an impact on the idea that a crime is a wrong against society that should be prosecuted by the State.[2]

There are terms not greatly popular with judges:

- marginalising of victims;
- democratisation of the process;
- empowerment of communities; and
- holistic approaches should include spiritual and emotional values.

We instinctively react against these words and these concepts. Sometimes, we take an approach like that of Wellington, who was supposed to have said about the advocacy for the Great Reform Act, *"Reform? Reform? Are things not bad enough as they are?"*

The reality is however that the concept of restorative justice has moved us towards a greater emphasis on producing outcomes that are both fair and also closer to meeting the needs of society. There has been a shift from the emphasis on procedural justice towards a more substantive justice in which judges have to realise that justice is not just about following fair procedures like due process and rules of natural justice but also about achieving a fair and lasting result that will work to the community's benefit. Five years ago Dr Nigel Bigger of Oriel College summed up this dilemma when he said in an essay entitled *"Can we reconcile peace with justice?"*. He said: *"Justice is primarily not about the punishment of the perpetrator but rather about the vindication of the victim"*.

Northern Ireland might not have seemed the most fruitful place for the application, let alone the development, of this concept. A fractured community with deep political, religious and cultural divisions would be bound to throw up some obstacles for restorative justice. Indeed that has happened but this would only be one part of an otherwise successful scheme, certainly from what we can see at this stage.

I do not intend to shy away from these problems, essentially the problems of applying community restorative justice schemes in Northern Ireland, but I will go into the history of the concept in Northern Ireland first.

In 1994 the Ulster Quaker Public Service Committee hosted a conference at Porballentrae on restorative justice. This was chaired by Mary McAleese, who then headed the Institute of Legal Professional Studies at Queen's. It was attended by persons from a wide range of statutory and community groupings who were perceived to be interested in developing this concept.

This was followed by the UQPSC setting up the Restorative Justice Working Group. Initially the Group attracted membership from the statutory sector (such as the judiciary, probation, DPP and the police), from NGOs such as Extern and NIACRO and also representatives of incipient community projects such as the loyalist Greater Shankill Alternatives and the republican Community Restorative Justice (Ireland).

Very quickly the attendance of the representatives of the local community groups fell away. In part this was due to a feeling that the RJWG was too "*establishment*" orientated to be useful to community groups. Partly it was because of intense political pressure and worries on the part of all concerned and partly because of perceived worries about human and private rights. Despite the efforts of the Mediation Network to address these

difficulties nothing happened that really brought the community representatives back. Informal contact was however maintained with both.

This, essentially ad hoc, group met regularly and attempted to promote the concept in Northern Ireland. Meanwhile the community groups were also developing their local schemes. The RJWG sponsored talks and visits and attempted to interest those responsible for criminal justice.

Persons whose names some of you might recognise were Professor Harry Mika and Howard Zehr. The Group published a paper entitled *"Proposals for Restorative Justice in Northern Ireland"* which concluded that properly targeted restorative justice initiatives had an important role to play alongside the existing criminal justice system and that these would bring benefits to victims, offenders and to the community. After a visit to the RJWG by Murray Power of the Criminal Justice Policy Division of the Northern Ireland Office, the NIO set up a restorative justice steering group to develop practical proposals through the development of existing laws and by piloting appropriate projects.

By this stage I think I could safely say we had separate and parallel development, the statutory side and the community side.

In 1997 the NIO promoted a Criminal Justice Conference one of whose themes was restorative justice. The RUC commenced a pilot project in East Belfast using the concept of *"caution plus"* and that attempted to involve victims. In certain areas the community projects were also going full steam ahead and seemed to represent a community based attempt to replace more barbaric responses to alleged wrong doing. The lack of contact, however, with the police and the scale of ignorance which resulted made it difficult for others to know to what extent these projects were accountable, transparent and respected individual rights, both of offender and of victim.

The NIO produced a positioning paper on restorative justice[3] and, when it was published in 2000, the Criminal Justice Review[4] made a number of significant recommendations relating to restorative justice. It would not be an over estimate to say that the concept of restorative justice, at least as regards youth justice, was to become centre stage.

Whether understandably or not, the authors of the CJR were very cautious about official endorsement of community projects. What was proposed was a system very closely modelled on that of New Zealand but without the scope for community involvement that that scheme in New Zealand permitted and even envisaged as fundamental.

In particular they recommended a system of youth conferencing. This was to be court based and to be ordered for offenders aged between 10 and 16 who admitted their guilt. There was to be no, or very little, discretion. Courts would have to order such a conference though not necessarily endorse the result. Although they envisaged later development of diversionary conferences by both police and the PPS they did not propose these and were also cautious about community projects.

They saw such projects as having a role only if they received referrals from a criminal justice agency (such as the police), they were accredited, monitored and inspected and they had no role in determining guilt or innocence.

The conference sought to mediate a *"safe"* meeting between the victim and the offender, the dual purpose of which was to be to enable the victim to receive reparation for the harm caused and to tackle the young person's offending behaviour, the reasons for it as well as censoring it.

At its heart was to be the concept of acceptance of responsibility by the offender and the involvement of the victim was considered vital. This, court based, proposal was to centre on the idea of the conference which required approval of prosecutor,

offender and the court. It was intended to be proportionate, re-integrative rather than retributive and to assist in repairing damage and restoring relationships. The plan, if agreed, would come back to the court for approval.

More recent developments

The NIO accepted the proposals for a Youth Justice Board for Northern Ireland and 2002[5] saw the establishment of the Youth Conference Service and a statutory system that effectively incorporates restorative justice practices into criminal justice in Northern Ireland.

Instead of being purely court based the Act allows two gateways to the youth conference, diversionary via the new Public Prosecution Service and also via the court. Referral is dependant on admission or finding of guilt and upon consent. Dr Bill Lockhart (formerly of Extern), whom many of you will know, heads the Youth Justice Board and Alice Chapman the new Youth Conferencing Service. Both are based in new offices in Belfast.

The new schemes launched as pilots in Greater Belfast in December 2003. Fermanagh and Tyrone followed in April 2004 and recently these have been rolled out in Armagh and South Down. Over half the population and about half the land area of Northern Ireland is now covered. To date, to 21st October 2005, 458 conferences have been ordered, 134 by the PPS and 324 by courts. Acceptance of plans by the courts has varied greatly, 34% in Belfast and 90% in other youth courts.

What are the time scales for conferences? PPS conferences have to be ordered within 30 days and court ordered conferences within 4 weeks. The courts do not have discretion. They, with very few exceptions, **must** order a conference. I had been opposed to this but I think I may have been wrong.

Evaluation has been made a central requisite of the whole scheme and a preliminary evaluation was published last January[6]. These figures, however, that I am going to give you are informed by a recent evaluation the results of which are to be published in January 2006. They are really quite encouraging. For these details credit must be given to David O'Mahony, Professor Jackson and their team at the Institute of Criminology and Criminal Justice at Queens University.

The range of offences covered in conferences is interesting. The proportion of minor to intermediate to serious offences against persons and property is 21%, 53% and 23%.

The most remarkable fact is that the level of victim participation is very high at 69%. The YCS believes this is the highest ratio achieved in any Restorative Project. Such participation is by victims' representatives or by victims, 87% and, where there is no individual victim, by representatives in 13% of cases.

Astonishingly, 3 out of 4 victims attending said they did so because they wished to help the offender though clearly many victims did not wish a face-to-face meeting. The level of parental involvement is high. The level of both victim and offender expressed satisfaction was extremely high with both victims and offenders indicating that they would recommend others to undergo it.

The Youth Conference Service believes that the high incidence of shame recorded and felt by offenders and the marked contrast between a formal court where the offender says little and the conference where the offender has to personally account for his behaviour has been registered as a considerable feature.

I am also told that delivery of a conference within the fairly strict time limits has been achieved in the vast majority of cases. This has been achieved despite the obvious effort required to secure victim participation. Preparation time for a conference takes about 10 hours and the conference lasts, on

average, 70 minutes. Youth conference co-ordinators are skilled and receive specific training with a university course at the University of Ulster now directed specifically at this.

Conference Plans

At the present I do not have sufficient information to be able to assess the outcome of plans accepted by the court. Clearly there is a need for the *"creative imagining"* that is necessary for these plans to work and to both have impact and to earn public confidence. Current evaluation strongly suggests good levels of victim participation at the conference and the benefits of this. There is also a clear indication that issues such as substance abuse, parental and social difficulties are addressed in the conference. Less clear is the way in which this is addressed in the actual plan that is agreed by the conference and which may be accepted by the court.

The need for plans to be proportionate, consistent and effective goes without saying. Monitoring of performance, as well as outcome evaluation, will be absolutely essential to the success of the scheme. The allocation and the availability of sufficient resources to permit not only the timely holding of conferences, but also the kind of creative imagining in the performance of plans mentioned above, will be equally essential.

This leaves a number of questions:

Does it all work?

It is too early to say. The litmus test as they say is the impact on re-offending rates. Clearly it is too early to say much about Northern Ireland. Some research suggests that recidivism rates reduce. In a useful compendium[7] of research by David Bowes there appears to be clear evidence of a significant reduction in both juvenile and in adult re-offending when compared with control samples. This is both in numbers and in seriousness of re-offending.

A notable exception was that of seven surveys carried out by David Miers[8] of Cardiff, for the Home Office. The exception he found was in one scheme where, notably, victim participation was routinely involved, whether direct or indirect. Another cautionary note was struck by those who assessed Thames Valley's initiative[9]. It seems likely that those schemes most likely to have some impact on reducing recidivism rates are those that routinely involve the participation of victims.

What is the likely impact of the inclusion of 17 year olds?

These have just been included in our youth courts. The impact on conferences, as yet, is minimal but it is estimated to increase conference work by 40%. This age group is going to bring problems, not just in the increase in numbers but also in how the conference system is going to respond to the greater incidence of road traffic offences and sexual assault offences that will inevitably arrive.

What is the effect on morale (of all involved) of repeat offenders and repeated conferences?

This was the single most frequent concern expressed by all involved in New Zealand. It can frustrate victims, co-ordinators, police, the public and, not least, the offender.

What is going to happen to the Community Projects in Northern Ireland?

This is our peculiarly intense local problem.

In his third Report[10] the Justice Oversight Commissioner, Lord Clyde said:

> "The implementation of this recommendation remains one of unacceptable delay. Reference should be made to the comments made in the second Report. Discussion and negotiation on the draft guidelines will be the next important step forward.

It is unfortunate that the name "restorative justice" is liable to be misunderstood. It is certainly desirable that efforts be made to achieve a greater understanding on the part of the public about the substance and the advantages of restorative justice and in particular community restorative justice. But that is only one element behind the difficulties that presently exist. Among other factors the political situation and an element of mistrust may also be contributing to the slow rate of progress. The problem may require to be resolved at all levels. All those involved may need to be flexible in their approach and ready to move forward.

The schemes provide an opportunity for engagement with the community and should not be seen as a threat but a possible advantage for the whole system. It would be unfortunate if the present opportunity for dialogue was missed and the whole range of possible methods for dealing with problems at a community level in a manner which is consistent with human rights and which supplements the work of the statutory agencies was lost to Northern Ireland".

Six months later he said[11]:

All those concerned in the progressing of this recommendation are to be congratulated on the positive steps that they have been taking and in particular the readiness of all of them to engage in discussion. All that gives room for hope. Now that the opportunities have been grasped for serious discussion both in principle and in detail, the momentum should not be lost. But all parties must recognise the sensitivities in this area and the necessity for flexibility. However, in the progressing of this recommendation, points of difference may be open to resolution as matters of practice rather than principle.

The difference that six months makes is obvious. One can only hope that this will continue. There are signs in both a forward and backward direction but I feel, that as a judge, this is an area into which I cannot and should not stray.

What scope is there for extension?

Take the position of drivers who by their driving cause death or serious injury. This, apart from cases of rape and sexual assault, is what I spend most of my time doing. Very frequently I meet the comment expressed, either in court or by relatives in the press after court, *"he never said sorry"*. This has not been the way in our courts and is not easy to do in an adversarial system.

I should not talk about individual cases but, when practising at the Bar, I have had personal experience of the difficulties involved where a motorist wished to make contact, apologise and attend the funeral. I felt I had to advise against. The charges of causing death by dangerous driving were later reduced to careless driving. I think the driver made contact many years later. If UK Government proposals are introduced, this driver would be likely to face a charge of causing death by driving without due care and attention, with the maximum sentence being five years imprisonment.

What is the position as regards those less serious sexual assaults that have often riven families apart and where the age and unequal positions of adults and children are involved? The YCS has one such case and naturally this is being very carefully handled. There will be more of these difficult cases and the unequal position of victim and offender presents particularly difficult problems. Yet, even here, there is some scope. In one New Zealand case two girls confronted their student assailant, who came from the same school, in a family conference. All concerned felt that more was achieved than would have been in court. A suspended sentence was ultimately imposed by the youth judge.

What is the position about adults generally?

The peculiar problems presented by the very unequal imbalance of power in cases of sexual assault have to be very clearly recognised. As have those presented by cases involving domestic violence. So many of the former do not come to court (perhaps as many as 90%); so many of the latter come to court but do not proceed.

In R v C[12] the New Zealand Court of Appeal refused to alter an 18 month long supervision order on a 14 year old who admitted seriously sexually assaulting his 4 year old cousin. The Court was influenced by the victim's mother's wishes and the result of a conference. Likewise in D v New Zealand Police[13] a sentence of imprisonment was reduced in a case of adult rape where a combination of admission, victim's wishes and a successful conference came together.

I also can give you some details of cases where deferral has been used in Northern Ireland to allow the application of Restorative Justice principles[14] . Since these have not been the result of reported cases, I will disguise the details. One involved a non-jury trial. In this particular case the charge was one of arson against a Catholic maintained school and a parish hall. The experience for the young men concerned was salutary and contact has been maintained between the priest, who facilitated this throughout, and one of the offenders. An apology, considerable voluntary work and restitution of damage were all involved and permitted suspending of the sentence.

In another case, two offenders who had damaged cars whilst on a drunken rampage not only met their victims but also repaid the not inconsiderable damage that they caused. The cars involved were expensive marques but the average damage (about £500) might well have been below the amount likely to result in a claim being made to an insurance company. The police facilitated some 18 meetings. In one they said they had what they described as *"the mother of all victims"*. The application of restorative principles permitted apology, restitution and, ultimately, the suspension of sentence. This in turn allowed these young adults to remain in their employment.

I have little doubt that in some cases there is a place for applying restorative justice. I firmly believe that it is worth taking the risk with juveniles across the board. I, however, also believe that this has its limits and these limits should be recognised. Human nature is such that the power of redemption should never be shut out but we should also recognise the capacity of humans to both manipulate trust and also to abuse systems. I, therefore, am entirely resistant to those who proselytise for restorative justice to be extended to all crimes and all age groups. In this area we should proceed slowly after careful evaluation.

The one thing I would say is that what we appear to be seeing are the thin shoots of a successful harvest and both my own and my colleagues' collective experience suggests that remarkable fruits can result. What is required is careful selection to identify those cases where such principles might work.

References

1 Restorative Justice Network, New Zealand June 2003, Dr C Marshall.

2 Here I gratefully acknowledge the assistance I have had from Judge Fred McElrea of New Zealand, a long time proponent of the application of principles of restorative justice by and outside courts.

3 Belfast 1997.

4 *Review of the Criminal Justice System in Northern Ireland*, Belfast March 2000.

5 *Justice (Northern Ireland) Act*, 2002

6 O'Mahoney and others, *Interim Evaluation of the Youth Conference Service*. NIO, Belfast January 2005.

7 David Bowes, *Restorative Justice: The Evidence*. Justice of the Peace 168, 13th November 2004.

8 Miers D et al. *An Exploratory Evaluation of Restorative Justice Schemes*, London Home Office, Research Series Paper 9, 2001.

9 Hoyle, Young and Hill, Proceed with Caution: *An Evaluation of Thames Valley Police in Restorative Cautioning*, Joseph Rowntree Foundation 2002.

10 *Third Report of the Justice Oversight Commissioner*, Belfast, December 2004

11 *Fourth Report*, Belfast, June 2005.

12 R v C (CA332/95)

13 NZ, AP161/99, February 2000, Nicholson J.

14 NILQ, 51/1, 2000, Deferral of Sentence: Principles, Practice and Proposals.

Reducing the Use of Custody: Strategies to Promote the Use of Alternatives to Imprisonment

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Introduction

Many western nations are confronted with the problem of high or rising numbers of prisoners. In England and Wales for example, the prison population recently attained a record level. As of 31 October 2005, 78,284 people were in custody, an increase of 4% over the previous year (Home Office, 2005). Efforts to constrain the use of custody as a sanction appear to have failed in that jurisdiction, although it remains to be seen whether the provisions of the Criminal Justice Act 2003, only some of which have been proclaimed into force, will change this state of affairs.

The use of custody varies considerably across jurisdictions, and appears to bear little relationship to crime rates. This suggests that countries with a high use of custody may be able to reduce the volume of admissions. Table 1 reveals considerable variation in the proportionate use of custody as a sanction, even between jurisdictions with comparable crime rates. This cross-jurisdictional variation is significant because it suggests that the use of imprisonment reflects attitudes to punishment as much as a direct response to the severity of the crime problem. In other words, if residents of Finland can accept a relatively low custody rate, there is hope for other countries where custody is more frequently imposed.

Table 1: Proportionate use of custody, selected jurisdictions, 2001/01

Jurisdiction	% of Dispositions Involving Immediate Custody
Canada	35%
New Zealand	28%
England and Wales	7%
Finland	13%
New South Wales (local courts only)	7%
United States (state courts, felony convictions)	61%

Source: Roberts (2004)

A second table of international sentencing statistics also points towards the solution to high prison populations. Table 2 reveals that in a number of representative western countries many prison sentences are relatively short, usually less than six months in duration. Moreover, a significant proportion of these sentences will be served in the community as a result of conditional release programs. These offenders do not, for the most part, represent a threat to the community, and the length of the prison terms signifies that they have not been convicted of the most serious crimes. This is certainly true in England and Wales and Canada, and research demonstrates that it is also true in South Africa as well (Dissel and Mnyani, 1995). In short, these offenders are prime candidates for community-based punishments. Since these offenders are '*prison bound*', however, the substitute sanction must carry sufficient penal '*bite*' to accomplish the objectives of sentencing, and to ensure community support.

Table 2: Percentage of custodial sentences < six months

Denmark	91%
Canada	85%
Sweden	64%
France	61%
Scotland	57%
England and Wales	39%
Northern Ireland	30%

Source: Roberts (2004)

How then can governments constrain courts from imposing custodial sanctions? In most common law jurisdictions judges enjoy a wide degree of discretion at sentencing – with the exception of mandatory sentencing laws that apply to a small number of offenders. The exception to this pattern is the United States, which employs sentencing guideline systems that usually prescribe the nature of the sanction (custody or an alternative) as well as a specific duration of imprisonment in the event that a custodial term is imposed. In jurisdictions employing guideline systems such as these, it is relatively easy to reduce the volume of admissions to prison. This can be achieved either by changing the presumptive sentence from prison to one of the alternative dispositions, or by reducing the length of custody mandated by the guidelines.

Outside the United States, directing courts to use alternatives to custody is a task usually left to the appellate courts. Regardless of its effectiveness as a mechanism for correcting specific sentences, however, appellate guidance has generally been ineffective in achieving broad changes in sentencing policy,. In this brief paper, I review some of the strategies that have emerged to direct courts to employ alternative sanctions to a greater degree. To anticipate the conclusion, I shall argue that effecting significant reductions in the prison population can only be achieved through a multiplicity of approaches. In addition, the solution is not to be found exclusively within the sentencing process. Promoting the use of alternative dispositions also requires an outreach initiative: the community must be brought along, and convinced of the merits of alternatives to imprisonment.

1. Placing the principle of restraint on a statutory footing

Perhaps the most obvious first step is to codify or place the principle of restraint with respect to imprisonment on a statutory footing. Judges - and indeed all criminal justice professionals - need to be reminded that due to its adverse effects on the offender and his or her family (as well as its expense, relative to other sanctions), prison needs to be used only as a sanction of last resort; imprisonment should be imposed only when no other disposition will achieve the goals of sentencing. Most western nations have now adopted this reform. A typical example is the sentencing statute in Canada, S. 718.2(e) of which directs judges that: *'An offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances'*. Other jurisdictions such as New Zealand have also recently placed the principle of restraint on a statutory footing (see Roberts, 2003). The language used in the New Zealand statute is particularly directive. Section 16(1) of the Sentencing Act 2002 instructs courts that:

'When considering the imposition of a sentence of imprisonment for any particular offence, the court must have regard to the desirability of keeping offenders in the community as far as that is practicable and consonant with the safety of the community.' And further:

The court must not impose a sentence of imprisonment unless it is satisfied that:

- *a sentence is being imposed for all or any of the [statutory] purposes [of sentencing] and*
- *those purposes cannot be achieved by a sentence other than imprisonment; and*
- *no other sentence would be consistent with the application of the principles [of sentencing].'*

Even a jurisdiction with a relatively punitive sentencing system like the state of Florida promotes the principle of restraint. The Criminal Punishment Code in Florida establishes the legislative framework for sentencing. According to s. 921.002 (b), *"The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment"*. However, an additional principle directs judges to reserve custody for *"offenders convicted of serious offences and certain offenders who have long prior records, in order to maximize the finite capacities of state and correctional facilities"*.

Thus codifying a general direction to sentencers regarding the parsimonious use of custody represents the most popular strategy to curb the size of the prison population. The principle of restraint is clear enough, but this step alone will prove insufficient, otherwise the problem of rising custody rates would be easily solved. Indeed, the experience in England and Wales illustrates this point well. The proportionality-based restraint provision was introduced in the 1991 Criminal Justice Act. However, between 1991 and 2001, the custody rate in that jurisdiction rose significantly, as did the size of the custodial population (see Hough, Jacobson and Millie., 2003).

2. Specify criteria that must be fulfilled before a term of custody may be imposed

In England and Wales, the Criminal Justice 2003 reaffirms a custody threshold that must be met before an offender may be imprisoned. Specifically, S. 152(2) states that: *'The court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine nor a community sentence can be justified for the offence.'* While this certainly discourages the imposition of a custodial term unless the offence is relatively serious, it nevertheless leaves much to judicial discretion.

A more forceful way of constraining the number of cases sent to prison involves creation of specific criteria that must be fulfilled before a term of custody may be imposed. In Canada, the recent youth justice statute does exactly this. According to section 39, of the Youth Criminal Justice Act, a youth court may send a young offender to prison only if one or more of four criteria are met:

A youth justice court shall not commit a young offender to custody unless the young offender has:

- *committed a violent offence; or*
- *failed to comply with previous non-custodial sentences; or*
- *committed an offence for which an adult is liable for a term of imprisonment greater than 2 years and who has a history that indicates a pattern of findings of guilt; or*
- *'in exceptional circumstances', the young offender has committed an indictable offence, the circumstances of which mean that the imposition of a non-custodial sanction would be inconsistent with the purpose and principles of sentencing.*

The youth justice reforms were introduced in Canada in 2003 (see Roberts and Bala, 2003). Since then there has been a significant decline in the volume of young persons admitted to custody. Although these criteria apply only to young offenders, there is no reason why criteria could not be created to restrict the imprisonment of adult offenders in a similar fashion.

A weaker approach to creating specific criteria that must be fulfilled before an offender can be committed to custody consists of requiring judges to provide reasons for sentence. Many countries have created a statutory obligation on judges to provide reasons for the sentences that they impose. Such a requirement facilitates appellate review and is clearly in the interests of the administration of justice. However, requiring judges to justify a

term of custody may also help to lower the proportionate use of custody; judges may be less likely to impose a sentence that requires specific justification. Once again the Youth Criminal Justice Act in Canada provides a useful illustration. Section s. 39(9) of the Act creates a duty for youth court judges who impose a term of custody to provide reasons why *"it has determined that a non-custodial sentence is not adequate"* to achieve the purpose of sentencing ascribed to the youth court system.

3. Restraining Penal Escalation

Many judges follow what might be termed a sentencing strategy of *'penal escalation'*. If an offender receives a non-custodial sanction and is subsequently re-convicted, judges tend to gravitate towards a more severe disposition on the second or subsequent occasion. The judicial logic underlying the strategy is that if a community based sanction did not *'work'* on the first occasion (as evidenced by the offender's re-appearance before the court), perhaps custody is the answer on the second. Restricting this tendency by courts represents a way of containing the number of prison sentences imposed.

A provision in the Youth Criminal Justice Act in Canada is intended to discourage judges from escalating the severity of the sentence in response to subsequent offending. Having imposed an alternative to custody for one offence, some judges shift to custody if a youth re-appears before the court, reasoning that the first sentence was insufficient to discourage the offender. Section 39(4) addresses this judicial reasoning, providing: *'The previous imposition of a particular non-custodial sentence on a young person does not preclude a youth justice court from imposing the same or any other non-custodial sentence for another offence.'* While s. 39(4) does not prohibit judges from following the *'step principle'* logic at sentencing, the provision makes it clear that the same alternative may be imposed on separate occasions. There is no reason why a similar provision should not apply to the sentencing of adult offenders.

4. Create a community-based sentence of custody

Courts are often reluctant to impose a non-custodial sentence on offenders convicted of more serious crimes. One reason for this is that community-based sanctions are perceived to lack sufficient penal value; their impact on the life of the offender is perceived to be an insufficient response to many forms of offending. One solution to this problem is to create a community-based sanction that carries at least some of the characteristics of imprisonment, and which may therefore be used for crimes of intermediate seriousness, for which prison may seem harsh and community penalties too lenient.

A number of jurisdictions have created a community-based form of imprisonment. The offender is sentenced to a term of custody of, say six months, and is then permitted to discharge the sentence at home. The difference between this sanction and a suspended sentence is that the offender is required, or should be required, to comply with a number of onerous conditions. Central to this sanction is the concept of home confinement. Indeed, in some countries it is known by this name. The offender's movements are restricted by means of house arrest or a strict curfew, and his whereabouts are often verified by electronic monitoring. The court authorizes the offender to leave home only for specific activities that should promote rehabilitation. These include employment, schooling or specific family activities.

Jurisdictions as diverse as Florida, New Zealand and Canada have recently introduced such a sanction. When appropriately constructed, this version of imprisonment has clear potential to divert to the community offenders who otherwise would be committed to custody. Research in several countries has demonstrated significant reductions in the

use of imprisonment following the introduction of this sanction (see Roberts, 2004). Pre-post implementation analyses of prison admission statistics in Canada demonstrate that within three years, a 13% reduction in admissions was directly attributable to the new sanction. This represents about 55,000 offenders who served their sentences of imprisonment at home, rather than in a correctional facility. In addition, the success rate – the proportion of orders completed without a violation of conditions – appears relatively high. As can be seen in Table 3, approximately four orders out of five in the period studied terminated without violation. Successful completion rates such as these are likely to reassure a public that might otherwise be apprehensive about the prospect of offenders sentenced to prison spending the time in the community.

Table 3: Percentage of successfully completed community custody orders, Canada

	1997/ 1998	1998/ 1999	1999/ 2000	2000/ 2001
Ontario	88%	90%	89%	89%
Manitoba	78%	79%	71%	63%
Saskatchewan	87%	85%	80%	78%

Source: Roberts (2004)

5. Engage the Community

Reforms on the statutory level alone will be insufficient to effect significant increases in the use of community sentences. Judges will always be wary of imposing a community sentence if they are apprehensive of community opposition. For this reason a concerted effort must be made to generate public support for the greater use of non-custodial sanctions. The by now vast literature on public opinion and sentencing has clearly demonstrated public support for alternatives to custody *when the nature and benefits of these sanctions are made clear* (see Roberts and Hough, 2005 for a discussion). The difficulty is two-fold. First, surveys of public knowledge reveal that most people know little about the alternative dispositions available to sentencing courts. It is important therefore to educate the public to the wide range of available alternatives. Second, some community sanctions still suffer from an image problem; the public regard them as a poor substitute for imprisonment, and therefore inappropriate as a response to crimes of intermediate seriousness.

The explanation for this is that community sanctions have often been represented by the news media and some politicians as lenient sentencing options. The Lord Chief Justice in England and Wales noted the influence of the media when he wrote that: *"the use of custody has increased very sharply, in response to certain highly publicized cases, legislation, ministerial speeches and intense media pressure"* (see R. v. Brewster [1998] 1 Criminal App R 184). This image problem has long plagued alternative sanctions in several countries. Michael Tonry, among others, has described the perceived leniency of intermediate sanctions as *"the most difficult obstacle"* to greater implementation of these sanctions (Tonry, 1996, page 128). This view is sustained by the results of numerous polls. For example, in 1996 a poll revealed that over half the American public agreed with the statement that: *"community corrections are evidence of leniency in the criminal justice system"* (Flanagan, 1996).

Conclusion

Reducing the use of custody as a sanction is far from straightforward. In jurisdictions that lack formal sentencing guidelines, it requires a number of inter-related approaches at the level of statutory reform. More than this is required however. The public must also be educated about the benefits to society of punishing offenders in the community rather than in prison.

References

Dissel, A. and Mnyani, M. (1995) *Sentencing Options in South Africa*. Occasional Paper Series 2-95. Capetown: University of Capetown, Institute of Criminology.

Flanagan, T. (1996). *Community Corrections in the Public Mind*. Federal Probation, 60: 3-9.

Home Office (2005) *Population in Custody. Monthly Tables*. London: Home Office.

Hough, M., Jacobson, J., and Millie, A. (2003). *The Decision to Imprison. Sentencing and the Prison Population*. London: The Prison Reform Trust.

Roberts, J.V. (2003) *An Analysis of the Statutory Statement of the Purposes and Principles of Sentencing in New Zealand*. Australia and New Zealand Journal of Criminology, 36: 249-271.

Roberts, J.V. (2004) *The Virtual Prison. Community Custody and the Evolution of Imprisonment*. Cambridge: Cambridge University Press.

Roberts, J.V. and Hough, M. (2005) *Understanding Public Attitudes to Criminal Justice*. Maidenhead: Open University Press.

Roberts, J.V. and Bala, N. (2003) *Understanding Sentencing under the Youth Criminal Justice Act*. Alberta Law Review, 41(2): 395-423.

Tonry, M. (1996) *Sentencing Matters*. Oxford: Oxford University Press.

Crime, Courts And Confidence – The Challenge To Change

Cedric Fullwood, Chair, Cheshire Probation Board

"Everybody thinks our system is becoming soft and wimpish. In point of fact it's one of the most punitive systems in the world." Lord Bingham, Lord Chief Justice, England and Wales, May, 2002.

The first part of the title of this paper is taken from Lord Coulsfield's Report (published in November, 2004) of the Independent Inquiry into Alternatives to Prison, an Inquiry for which I was one of six Commissioners. The second part of my title – *"the challenge of change"* – allows me to reflect a little on the wider policy and practice context. Whilst I intend to give you a flavour of our report and its conclusion, I thought that IASD might be interested in the process of our work and our sponsors, almost as a case study, should you wish to replicate any elements of it. It is always difficult to make connections between different jurisdictions. However one common theme is attempting to answer the questions: who is responsible for the sentencing framework, who is responsible for its interpretation, and what is the nature of the communication between the two?

We have to start with an organisation by the name of the Esmee Fairbairn Foundation, one of the largest grant-making foundations in the UK. It makes grants and loans in four programme areas: Arts and Heritage, Education, Environment, and Social Development. It has, over the years, funded work in the criminal justice field. In 2001 the Foundation decided to set up an initiative which it entitled *"Rethinking Crime and Punishment"* and focussed on prison and other forms of punishment. It was set up as its final report explains: "in response to widespread concern about the UK's growing reliance on imprisonment." It explained that despite its financial, social and human costs, prison enjoyed (if that is the right word) a growing appeal as a response to crime in many countries. In England and Wales we have seen the custodial population grow from 40,000 in 1980 to 64,600 in 2000, with projections that it could reach 93,000 by 2010. I have been supplied the figures for imprisonment, especially short periods of custody under 6 months and under 3 months. The vexed question for me is that time after time politicians, policy makers and sentencers stress that one should only use prison when it is absolutely necessary. I noted your own Committee of Inquiry into the Penal System, chaired by Dr Whittaker in 1985 – twenty years ago! – stating *"The 'principle' should be that sentences of imprisonment are imposed only if the offence is such that no other form of penalty is appropriate."* However this principle is more honoured in the breach.

The aims and objectives of the Rethinking Crime and Punishment project were to:

- increase and spread knowledge among the public about the most productive use of prison and the effectiveness of alternative punishments such as Restorative Justice and other community penalties;
- establish good models of practice for actively involving the public in the criminal justice and penal system by stimulating new relationships and activity at local level between civil society groups on the one hand and the prison/criminal justice sector on the other;
- contribute a body of fresh policy ideas about crime and punishment, in particular rethinking alternatives to prison.

It wanted to give particular attention to children and young people who are subjected to criminal punishment at a much earlier stage in the UK than most other developed countries; those addicted to drugs who account for a high proportion of the prison population; women, whose rate of imprisonment has grown even more dramatically than men and whose offending profile seems much less serious; and the mentally ill, whose detention in penal establishments is widely agreed to be unacceptable in a civilised society.

Before describing the work of the project in general and the Coulsfield Inquiry in particular, it may be of interest if I set the wider policy context which applied in England and Wales from 2001-04. In July 2001, the Halliday Report was published – this had been set up by the government to review the sentencing framework in England and Wales. It identified a number of deficiencies in the system which applied at that time. These included: an unclear and inconsistent approach to persistent offenders; the pointlessness of short prison sentences; the scope to make much more of effective rehabilitation in practice; and the lack of public confidence. The report's recommendations, its author estimated, might result in a decrease in the prison population of 1,500, or an increase of 9,500! The reason for this remarkable variation depended on both how the new non-custodial measures were used and the prevailing climate of opinion. The Halliday Report's recommendations, in part, were inserted in the Criminal Justice Act, 2003, currently being implemented.

The second major policy development was the Correctional Services Review whose first stage was completed in 2002 and the second stage (what became known as the Carter Report) completed at the end of 2003. This led in 2004 to the establishment of the National Offender Management Service, as well as the Sentencing Guidelines Council chaired by the Lord Chief Justice. A third major policy review was the Social Exclusion Unit's report which led to a Reducing Reoffending Action Plan targeted at improving the prospects of offenders leaving prison. This Action Plan concentrates on seven 'pathways': housing and accommodation, employment and education, physical and mental health, drugs and alcohol, finance benefit and debt, family ties and offender attitudes. Of note as well is the equivalent activity in Scotland covering the prison estate, alternatives to custody, and the Children's' Hearings, resulting in a Reducing Reoffending Consultation document last year.

Let me now return to the Rethinking Crime and Punishment. In the four years 2001-05 it spent £3 million on 57 projects, six publications (apart from the Coulsfield Report and companion research volume), and nine short briefing papers. Obviously I cannot do justice to the scope of so many initiatives but if I were to draw your attention to any the list would include seven items:

- the report by Professor Mike Hough and colleagues - *"The Decision to Imprison – sentencing and the prison population"*;
- the report by Kate Akestar for Justice on Restorative Justice, its effectiveness based on overseas experience, and the potential for extending it within the criminal justice system;
- a clutch of studies on the media and communications, from Strathclyde University's Centre for Social Marketing's report on how to bring about change in attitudes, policy and practice to prison and non-custodial sentences, through Mori surveys on attitudes to prison, to a project in Staffordshire which aimed at training ex-offenders to respond to media requests for case studies (based on the offenders' own experiences);
- the Fawcett Society Commission on Women and the Criminal Justice System;
- a major study by the Institute for the Study of Civil Society (CIVITAS) into evidence in the UK and US regarding the most effective and efficient use of custody and alternatives;
- a project entitled *"Local Crime – Community Sentences"*, whereby, under the auspices of the Magistrates Association, Magistrates and probation officers were trained to deliver presentations to local groups about how sentencing decisions are reached and what happens when an offender is placed on a community order.

The seventh would of course be Lord Coulsfield's Report of the Independent Inquiry into Alternatives to Prison, and it is that which I now wish to turn to in a little more detail. In addition to Lord Coulsfield (an eminent Scottish judge) the other five Commissioners included an experienced magistrate, someone from the private sector and another from the voluntary sector (with experience of the Social Exclusion Unit), a person with a long career in the media (including radio and broadsheet), and myself who had experience of probation and the youth justice system. We held four public meetings (London, Nottingham, Cardiff, Edinburgh) with facilitators and proponents of different positions. We asked for written submissions and received 120, from an individual judge in the Court of Appeal, a permanent secretary at the Home Office, both statutory and voluntary agencies. Some of the submissions were letters, whilst others were voluminous, well researched and powerfully argued.

Ministers and senior officials in the Home Office, Northern Ireland Office, Scottish Executive, and Welsh Assembly were amongst those we met, together with judges, magistrates, and representatives of the probation and prison services. We held meetings with detectives in the Strathclyde, Metropolitan and provincial police forces, offenders on intensive community programmes, prisoners in Wandsworth prison, a group of business people, and a variety of statutory and innovative projects from hostels for abused women to restorative justice meetings. The senior person establishing the Sentencing Guidelines Council, and the MORI lead on public opinion and the criminal justice system, gave detailed presentations to us.

We commissioned Professor Bottoms from Cambridge University Institute of Criminology to put together a volume of articles by the leading experts in various fields connected to our Inquiry. The resulting book '*Alternatives to Prison: Options for an Insecure Society*' was published along with our report. The Commissioners held a two day seminar with the authors, and I consider the book to be as up-to-date study as currently exists on the subject.

Chapter 15 of the Bottoms book reports a year long ethno-methodological study of public attitudes to crime, offenders and what disposals they should receive. We were keen on this because when penal reformers speak to Ministers about offenders or crime they are told something along the lines of: *'It is all right you recommending more liberal approaches but you should come to our surgeries and hear the views of our constituents.'* This part of our work tiptoed into this area. The field work took place in two distinct communities in Sheffield: one a traditional but socially deprived working class area (where criminal damage and vehicle crime were higher), and another a city centre area with a more transient and mixed population (where drugs, violence and some gun crime were higher). Over the year a researcher living in the area explored residents' levels of punitiveness, their support for community sanctions, and views on the scope for rehabilitating offenders. The results of the study showed high levels of support in both areas, in principle, for rehabilitation and community reparation. In one area the experience of lower levels of disorder seemed to lead to a more punitive approach, whereas a perception in the other area of initiatives to enhance social control led to a greater willingness to contemplate an increased use of community penalties. Interestingly the probation service was seen as invisible in both areas, a state of affairs which in my view and that of the authors needs urgent remedy.

Our report made 39 recommendations: 19 were for government departments, 12 were for the probation service (or the emerging National Offender Management Service as it is now), 7 were for courts, with one each for the Sentencing Guidelines Council and local authorities. (This adds up to 40, but one of the recommendations was a joint one.)

There is not time for me to outline all of them. I would like to summarise our main findings and then highlight some of the specific recommendations. Firstly the key findings:

- There has been an increase in the length and severity of all sentences as a result of public perception that crime rates are increasing and the political desire to be seen to be tough on crime (most clearly evidenced by Michael Howard's '*Prison Works*' stance.)
- Short custodial sentences fail either to reduce crime or rehabilitate offenders.
- Increasing confidence in community sentences is central to delivering crime reduction.
- It makes sense for the community which has been affected by a crime to benefit from the punishment of the person found guilty of that crime. Therefore members of the community should play a key part in deciding how to use the eight million hours of work that offenders will undertake as part of community punishment orders (your community service orders.)
- Judges and magistrates should be required regularly to visit the various programmes and projects in their areas and get feedback on their effectiveness. More use should be made of review hearings.
- Community sentences or a fine should be the first option for most non-violent offences. In fact we said that there should be a sentencing framework which restricts the imposition of custody and which embraces alternatives whenever possible. RCP in their own report went further and recommended *"the setting of custody reduction targets and a public commitment from Government to reduce the role of custody."* (p.68)

Our report promoted a variety of projects that we visited or had detailed information about. Case vignettes are used to give a flavour of their distinctive features. I want to mention one that is currently being developed here in Ireland under the auspices of Youth Advocate Programmes, Ireland. In 2002 the Northern Area Health Board and the Western Health Board both introduced a new programme that promoted a mentoring based form of intervention to tackle the needs of *'out-of-control'* young people who had become well known to their services and to the Gardaí and the Probation Service. It involves a mix of individualised in-home and community-based services developed around each young person and their family. At the core of the service is the matching of a locally recruited adult advocate who will advise and guide the young person away from anti-social behaviour and into a positive life style. It differs from most other services in that it offers 24-hour intervention, seven days a week – the advocate always being available to the young person when needed. They have plans for expansion next year. They are in the process of establishing a board of directors to oversee an independent YAP Ireland Ltd. If you are not already involved, I would recommend that links between them and members of IASD are pursued.

With regard to sentencing we recommended a new system of unit fines (which is currently being pursued). We tackled the vexed issue of sentencing guidelines but, whilst endorsing them in principle, we issued a note of concern that in other jurisdictions they had led to upward pressure on the sentences given – and were particularly critical of the Magistrates' Association Guidelines. We saw that preventing this from occurring in England and Wales was a major challenge to the new Sentencing Guidelines Council. We emphasised the leadership role of Government in both not giving mixed messages to the public and courts about sentencing, and often failing to take account of the research evidence that the government itself had sponsored. There was consistent evidence presented to us that the public were far less punitive than

the politicians and the media were apt to portray. One can only be dismayed at the lack of Ministerial support when the Lord Chief Justice promulgated the SGC Guidance on burglary – the tabloid press rounded on him and one could not see the Home Secretary or his Ministers for dust!

Many of our recommendations centred on the challenge to increase confidence in the criminal justice system. Some of the points that we made are as follows:

- there is confusion about the true length of custodial sentences and we suggested ways of making them more transparent;
- we felt that since the introduction of the National Probation Service in 2001 some community orders had become very bureaucratic, with targets and performance indicators which prevented a real match between interventions and the complexity of offenders' lives in troubled communities;
- we suggested that measures of effectiveness should be more sophisticated, not the simplistic commission of a further offence, but rather measures of reductions in frequency, seriousness as well as the acquisition of skills and reparative work undertaken in and for the community.
- We stressed that we all (politicians, members of the criminal justice system and the media) should be more honest about what could be achieved by imprisonment and community interventions, and use information and data in a more readily understandable form;
- The demanding aspects and positive benefits of community orders should be emphasised.

We stressed the need for prevention of crime and the reduction of re-offending not to be left entirely to the courts, the police, prisons and probation, because: *"It also requires the cooperation of local authorities, mainstream services such as health and education, voluntary organisations and the active interest and participation of members of the public generally."*

Many reports, well meant and carefully worded, often are praised in the short term and gather dust in the longer term. Esmee Fairbairn Foundation has committed itself to follow up work to try and implement at least some of the Report's recommendations. Three elements have been chosen. A large scale pilot project is to involve the public in choosing what forms of unpaid work should be available for offenders, and helping to form the nature of the reparative or community work to be undertaken. A second project will target increasing sentencers' knowledge of and involvement in community sentences. Thirdly, there will be an awards programme to recognise, encourage, and publicise best practice in community work with offenders.

I started by saying that I wanted to begin and end with a quotation from a Lord Chief Justice. At the beginning I quoted Lord Bingham on how punitive our system actually was despite the common view that it was '*wimpish*'. Lord Woolf, in introducing the final report of RCP's work, said that it had "*provided a salutary reminder that public attitudes are complex and inconsistent but certainly not as uniformly punitive as is often supposed.*" He commended the practical work that had been done "*to explain to the public what community sentences actually involve, the demands they make on offenders and the benefits they can produce for victims and local neighbourhoods.*" He concluded his remarks by hoping very much that the Government, politicians of all parties, and sentencers would take notice:

"*that we must restrict the use of imprisonment to cases where there is genuinely no alternative.*"

Back to your Committee of Inquiry into the Penal System twenty years ago! But this wish will not come to pass unless a coherent strategy is put into place which consistently implements the many

and diverse elements of the Coulsfield Report. I hope the work of the Coulsfield Inquiry will help us in small but important ways to bring this restriction in the use of custody to pass, and I hope my description of our endeavours is of some interest to you.

References

Bingham, Lord, The Spectator, 25th May, 2002.

Coulsfield Lord, Crime, *Courts and Confidence – Report of an Independent Inquiry into Alternatives* to Prison, Esmee Fairbairn Foundation, London, 2004.

Rethinking Crime and Punishment, The Report, 2004, Esmee Fairbairn Foundation, London.

Botttoms, T. Rex, S. Robinson, G. "*Alternatives to Prison: Options for an Insecure Society.*" Willan Publishing, 2004.

N.B. The other references in this paper can be accessed from the references in Lord Coulsfield's report pages 118-123.

Plenary Session

Chairperson: Maura Butler

DURING THE PLENARY SESSIONS, THE FOLLOWING ISSUES WERE DEBATED, WITH CONTRIBUTIONS FROM MANY PARTICIPANTS:

1. Why are there no set principles or codes of practice for judges with regard to sentencing?

- In Ireland, Judges retain significant discretion with regard to sentencing. This enables them to consider not only the seriousness of the offence, but also the personal circumstances and background of the offender. Thus it may be quite appropriate that two people who commit similar offences end up having radically different sanctions imposed by a Judge who takes their individual circumstances and history into account.
- Mandatory sentences for certain offences can be unjust, as they take no account of the offender's background, motivation or prospects for rehabilitation.
- Judicial discretion may also lead to individual Judges developing their own sentencing guidelines, which may differ significantly from those of other judges hearing the same type of cases. For example, one District Judge may be inclined to impose a term of imprisonment for all drink driving offences, whereas another may be more inclined to impose a non-custodial sentence for a first offence. This can lead to perceptions of unfairness and lack of balance in the system.
- The lack of a statistical database of decisions means that Judges have little information as to the type of sanctions which their fellow Judges are imposing.
- The lack of data on sanctions imposed also makes meaningful research more difficult.
- The Law Reform Commission has made a number of recommendations in relation to sentencing guidelines. However, very little progress has been made in relation to implementing these guidelines. Political initiative is required to drive change.

2. Why is there so little research on criminal justice in Ireland?

- In Ireland, there are significant gaps in research and understanding of criminal justice issues. The lack of certain statistics in relation to Gardaí, Courts, Probation and Prison services has made such research difficult.
- The agencies involved have improved their own statistics, but there is still no common identifier which could be used to track an individual through the system. This would be a first step in establishing an adequate statistical database, which could be operated by an independent statutory agency such as the Central Statistics Office which could guarantee anonymity and data protection of individual files.

3. Are the results of research findings reaching practitioners in the criminal justice system?

- As noted already, there is a lack of research in Ireland. The number of researchers in the criminal justice area is small, and they are hampered by a lack of baseline data.
- In many countries, communication between the research community and the judiciary can be difficult. Judges can have a perception that academics and other interested groups are 'soft on crime' and not living in the real world.
- Many Judges are open to new ideas, but mechanisms for information sharing are often not in place. Personal contacts can be very useful in conveying information to the judiciary and promoting dialogue. In England and Wales, Probation Officers held consultations with the judiciary in an attempt to facilitate communication of research findings.

4. What constitutes an acceptable balance between imprisonment and community sanctions?

- The balance between custodial and community sanctions is not fixed. The Canadian approach was to aspire to a 50:50 balance, but this was interpreted by many as merely leading to the release of offenders from prison on early parole.
- The existence of a fixed ratio between custodial and community sanctions could be counter-productive. However, it should be possible to improve on the current ratios in Ireland and the UK.
- In England, the prison figures rose from 40,000 in 1980 to 65,000 in 2000 and are expected to rise to 93,000 by 2010. This is in spite of the fact that the crime rate has gone down over this period.
- There is a lack of data on sanctions in the Irish courts system. However, Ireland is unusual in that, in any given year, more people are sentenced to prison than receive non-custodial sanctions.

5. Are prison sentences in Ireland unduly long?

- It is impossible to answer accurately, as there is a lack of statistics in relation to sentencing. However, sentencing in England and Wales is thought to be severe by European standards. It would seem likely that the situation in Ireland is most similar to England and Wales.

6. Is there a need for increased prison capacity in Ireland?

- Irish figures presented by Dr. Ian O'Donnell show that the rate of imprisonment per capita has not increased significantly since the 1990s, when factors such as the number of prisoners on remand, people held on immigration warrants and the numbers on temporary release are taken into account.
- The Department of Justice, Equality and Law Reform is embarking on a costly prison building programme which would increase the capacity of Irish prisons to over 4,000.
- It is generally agreed that conditions in many existing Irish prisons are unhealthy and far below modern standards. However, the fact that existing prisons need to be replaced does not in itself justify increasing prison capacity.
- This money might be better spent on a) providing adequate accommodation for the existing prison population and b) investing in supervision and community sanctions, which have a greater chance of reducing recidivism.

7. Should tackling the underlying issues of poverty, educational disadvantage and family dysfunction be seen as a social imperative rather than as crime prevention strategy?

- The English experience, driven by the Labour Government's policy of being '*tough on crime, tough on the causes of crime*' took shape in the 1998 Crime and Disorder Act. The Act placed an obligation on parliament to design crime and disorder strategy. This included a social policy element.
- The US project Re-inventing Justice identified that the enormous expenditure on prisons was not working, and re-invested some of the budget into community building projects.
- In Ireland, there is a national office for Social Inclusion, which was established to fulfil our obligations under the terms of the Lisbon Agenda. The National Anti Poverty Strategy (NAPS) includes strategies aimed at tackling social exclusion and poverty.
- Anti-poverty initiatives and community-based projects aimed at supporting families and maintaining children in education bring significant social and economic benefits, as well as contributing to reducing offending behaviour.

Workshop A: Recidivism – Can It Be Reduced?

Co-ordinator: Seán Lowry Chair: Sinéad McPhillips, Rapporteur: Deirdre McCarthy

What precisely is recidivism?

- Recidivism can be difficult to define – does it mean any offending behaviour by the individual or re-conviction in court? If the subsequent offences are less serious or less frequent than the original offences, can that be regarded as progress by the individual?
- Re-offenders are individuals who have learned to behave in a certain way – their family background, environment, education and socio-economic status are all significant factors.

What is the rate of recidivism in Ireland?

- There is a serious lack of statistics on crime in general, and recidivism in particular, in Ireland. UCD are currently carrying out a major study on recidivism, but very little information has been available up to now.
- Irish agencies have no common identifier which would enable an individual's progress to be tracked through the courts, probation and prisons systems. Lack of a centralised database containing information on individuals in the criminal justice system means that data on recidivism and many other issues cannot be compiled on a systematic basis. There are obviously data protection issues involved, but presumably these could be dealt with in order to provide much needed statistical information. Lack of statistics may reflect a lack of real co-ordination between the various agencies involved.
- In Northern Ireland, the key agencies have signed a protocol agreeing their own responsibilities and the areas which require inter-agency co-operation. This process was driven by an independent commissioner appointed under the Belfast Agreement.
- Data on re-offending needs to be interpreted carefully, taking account of the seriousness and frequency of the offences.

What can be done to reduce recidivism?

- It is crucial to break the cycle that re-offenders find themselves in.
- Early intervention for young people is crucial – welfare interventions with the family or education interventions aimed at young people at risk of early school leaving. The Garda diversion system can be very successful for some young people, but young people with the greatest difficulties tend to be excluded from diversion because they are repeat offenders.
- Continuing contacts with their own community can help prisoners to re-integrate into society on release. Organisations such as the BOND and BRIDGE projects are engaged in very productive work in liaising and working with offenders in prison and on release.
- The current trend towards shorter sentences may reduce the ability of the offender to engage in rehabilitation while in prison. There is a need for offenders to access training and education particularly towards the end of their sentences.
- Restorative justice offers an opportunity for social rehabilitation for offenders in their own communities.
- Supervision of offenders on release from prison is needed to reduce recidivism. According to figures from the Probation Board Northern Ireland, in the two years following release 74% of young people who were not supervised had re-offended. In comparison, 43% of young people who were supervised had re-offended.

Workshop B: Innovations in Crime Prevention:

Co-ordinator: Barry Vaughan, Chair: Vicky Conway, Rapporteur: Mary Rogan

Current Status of Crime Prevention

- Under our current system, intervention starts much too late. Our responses to crime concentrate on offending behaviour after it has already manifested itself to the Gardaí or the Courts.
- The use of detention as a form of prevention is at best, futile, at worst, damaging.
- These mechanisms are not only unsuccessful but also do not have the value of economy to recommend them. We should be investing in primary interventions – social, educational, psychological etc., at the pre-offending stage, or secondary interventions – the manipulation of the physical environment as a means of crime prevention.

What are the reasons for lack of innovation?

- Resources should not be an excuse for lack of innovation, given the huge amounts of money currently spent on detention.
- Reluctance to interfere with the family unit was discussed and in particular the Constitutional protection afforded to the family.
- The many statutory and community agencies need to work together in order to provide effective interventions. The presence of three departments and a multitude of agencies which do not always coordinate effectively is a major obstacle. England and Wales place a statutory obligation on agencies to work together.
- Another impediment to innovation comes from the lack of political capital to be made from backing such initiatives.

Are there current innovations which are relevant?

- An Garda Síochána Act of 2005 provides for a formal link between local authorities, communities, voluntary organisations and the Gardaí.
- Local Policing Committees, set up to review patterns of crime and disorder in an area and advise on their reduction, are welcome.
- Innovations in Northern Ireland involve civil society in community policing at a primary level.
- Judicial innovation is apparent. The Nenagh Restorative Justice project was praised as being a project having huge long-term social and economic savings.
- Anti-Social Behaviour Orders could be effective if targeted well and used sparingly. This appeared to be the case in Northern Ireland.

Future plans for innovations in crime prevention?

- For crime prevention to work, there needs to be a broader response. This will demand changes in structure and funding for such activity.
- Greater coordination is needed between the Departments of Justice, Health and Education.
- There is a significant need to refocus our services so that the Gardaí, the courts and the prison services are not left to pick up the pieces after the absence or failure of prior interventions.

Workshop C: Role of Media – Is it Constructive?

Co-ordinator: Ross Golden Bannon, Chair: Maura Butler, Rapporteur: Anna Eriksson

What is the impact of the media on the criminal justice system?

- The media tend not to make any moral judgements about the information they publish, their main concern is to sell newspapers. The media can have a negative impact on the perception of crime and delinquency, on prison and punishments, and on perceptions of vulnerable groups in society.
- In Ireland and the UK there is a strong link between crime and politics. This politicises debates about crime and punishment, and hence the media is more likely to focus on issues in this regard than they would be in other countries (e.g. Scandinavian countries). Therefore discussions about 'being tough on crime' and ASBO type legislation are extremely politicised.
- The media can have a very detrimental effect in influencing perceptions of certain categories of offender, e.g. sex offenders or young offenders from deprived areas.

What can be done to influence media coverage?

- To minimise the negative impact that the media can potentially have, it is important that practitioners and academics in the field of criminal justice receive appropriate training in dealing with the media, i.e. how to get them to report the issues which we find important. Part of this is to understand how the media works and as a consequence, try to avoid dry statistics and instead attempt to humanise the story. For example, a story about how someone's life has been improved because of decreasing levels of crime is much more likely to be printed than a graph presenting the crime figures.
- Personal contacts with the editor of a local newspaper helps to ensure good working relations and increases the likelihood of influencing reporting.
- To try to create a more positive media focus on criminal justice issues, an annual media-friendly report on innovative approaches could be published. This should preferably be done at a time when newspapers have little to write about, such as when the courts are in recess.

Workshop D: Legal Profession – Does It Respond Meaningfully?

Co-ordinator: Moirin Moynihan, Chair: Emer Meehan, Rapporteur: Hannah O'Neill

Should the restorative justice model introduced in the Children Act 2001 be extended to adult offenders?

- It would be beneficial to adult offenders if they were encouraged to foster and develop an understanding and sense of responsibility of the effect of their crime on their victims and the victims' families but also on their own lives.
- This can and is being done through victim/offender mediation. This is highly effective but must be assessed on a case by case basis.

Is the legal profession overly restricted in its ability to respond meaningfully to certain categories of offenders?

- Offenders with intellectual disabilities, chronic addicts and the victims of sexual abuse were particularly discussed in this regard.
- Offenders suffering from such disabilities often end up in the criminal justice system as a result of failure or lack of intervention at an earlier stage. The legal profession is not equipped nor trained to provide solutions to such problems.
- Properly managed and supervised community based sanctions would be the most constructive and effective method in which to deal with this category of offender. New and innovative community sanctions would be more effective than the existing options.
- These deficits in the justice system could be partially addressed by a pro-active sharing of information and resources between the various different agencies and services that are involved with these offenders.

Section 258 of the Children Act 2001 allows for the non-disclosure of certain findings of guilt. Is this a legislative change which we would welcome for adult offenders?

- While this would be suitable for some offenders, it would not be appropriate in terms of a general application. The legislation introduced would have to dictate that such a measure should be applied in particular circumstances, on a case by case basis, where justice requires it.

Would our response be more meaningful if a caution scheme was available to deal with minor public order offences?

- It was agreed that such a scheme would be a welcome introduction but it, too, would be best dealt with on an individual basis.

Workshop E: Young and Vulnerable People in the Penal System

Co-ordinator: Kathleen McMahon, Chair: Geraldine Comerford, Rapporteur: Edel Gilligan

What are the needs of young people in the penal system?

- A complete assessment of the whole young person, body, mind and soul is necessary in order to ensure that an adequate care plan can be put in place. The assessment needs to be done in a co-ordinated manner in order to ensure that all relevant issues are identified: e.g. health issues, family problems, drug or alcohol addictions.
- The young person needs a link person in their own community. This person should be aware of the young person's background and environment. This link person can assess the options available in the community, e.g. youth projects, training and education opportunities, and can facilitate the young person's re-integration into their community on release from detention.
- The young person needs one co-ordinator to oversee the care plan. Such a person would work on a one-to-one basis with the offender. S/he would identify the needs of the young person and then identify the steps required to fulfil those needs. The co-ordinator would facilitate the sharing of information in relation to the young person between relevant agencies, in a confidential manner. The co-ordinator could ensure that the young person has access to the right services, e.g. attending a GP, but also attending a psychologist or addiction counsellor if that is what is required.
- Young people need to learn to take responsibility and ownership for their own actions.
- There is a need to encourage communities and families to participate in the care plan for the individual. Families need support in order to support the young person.

How can the criminal justice system improve its response to vulnerable young people?

- Judges need to be made aware of innovative non-custodial approaches. A document listing community and other options available could be compiled and updated regularly.
- Short sentences for minor offences should be replaced with community sanctions where possible. Putting vulnerable young people in detention often exposes them to more serious offenders and increases their risk of re-offending.
- The system should provide incentives to encourage young people to avail of the programmes available while in detention. Education and training opportunities in prison and places of detention need to be developed further.
- Healthcare for young people in detention should be a priority. There is a need to ensure continuity and consistency of care when the young person is release.
- Agencies need to recognise the stigma attached to imprisonment for the young people and their families.

List of Delegates

Deirdre Bigley	Copping On
Eileen Brennan	Courts Service
Veronica Brooks	Probation and Welfare Service
Mary Burke	Department of Justice, Equality & Law Reform
Maura Butler	Law Society of Ireland
Brendan Callaghan	National Crime Council
Helen Casey	Department of Justice, Equality & Law Reform
Patricia Casey	Courts Service
Supt. Michael Coleman	An Garda Síochána
Annette Collins	Village Project
Ingrid Colvin	BOND
Geraldine Comerford	IASD Ltd
Shane Conneely	Trinity College Dublin
Vicky Conway	Queens University Belfast
Mary Delahunty	Courts Service
Emma Donoghue	Village Project
Paul Doran	Probation Board Northern Ireland
Úna Doyle	BRIDGE Project
Lorraine Edwards	Health Service Executive
Anna Eriksson	Queens University Belfast
Cathal Flynn	Special Residential Services Board
Cedric Fullwood	Cheshire Probation Board
Maria Gibbons	Probation and Welfare Service
Edel Gilligan	University College Cork
Ross Golden Bannon	Consultant
Séamus Hanrahan	Irish Prison Service
Frank Hutchinson	Solicitor
Deirdre Kenneally	National Crime Council
Mr. Justice Dermot Kinlen	Inspector of Prisons & Places of Detention
Martin Koren	University College Cork
Noreen Landers	Office of the Director of Public Prosecutions
Seán Lowry	National Crime Council
Nuala Mackel	Probation and Welfare Service
Niamh Maguire	Waterford Institute of Technology
Jack Marrinan	National Crime Council
Jimmy Martin	Department of Justice, Equality & Law Reform
Deirdre McCarthy	Law Society of Ireland
Frank McCarthy	Parole Board
Garda Paul McGettigan	An Garda Síochána
Lillian McGovern	Parole Board

Mrs. Justice Catherine McGuinness	Law Reform Commission
James McGuirk	Special Residential Services Board
Kathleen McMahon	Dóchas Centre
Gráinne McMorrow	National Crime Council
Sinéad McPhillips	IASD Ltd
Emer Meehan	IASD Ltd
Jimmy Moore	Probation Board Northern Ireland
Moirin Moynihan	Solicitor
Judge Yvonne Murphy	Circuit Court
Denis Murray	Health Service Executive
Tony Murray	Society of St. Vincent de Paul
Gerry Nugent	Courts Service
Margaret O'Doherty	National Crime Council
Dr. Ian O'Donnell	University College Dublin
Tim O'Donoghue	Parole Board
David O'Donovan	Probation and Welfare Service
Charamye V Often	University College Cork
Anne O'Gorman	National Crime Council
Finbarr O'Leary	Special Residential Services Board
Hannah O'Neill	Law Society of Ireland
Daisy O'Reilly	Parole Board
Mary O'Sullivan	Probation and Welfare Service
Sara Parsons	National Crime Council
Brian Purcell	Irish Prison Service
Anne Reade	Probation and Welfare Service
Judge Michael Reilly	National Crime Council
Judge David Riordan	District Court
Dr. Julian Roberts	University of Oxford
Mary Rogan	Trinity College Dublin
Brian Rowntree	Housing Executive, Northern Ireland
Judge David Smyth	County Court Judge, Northern Ireland
Rose Sweeney	Special Residential Services Board
Barry Vaughan	Institute of Public Administration
Prof. Dermot Walsh	University of Limerick
David Williamson	Protect N&S

How effective is the management of offenders - **community sanctions** versus **imprisonment**