Association for Criminal Justice Research and Development (ACJRD)

Submission to:

The Department of Justice and Equality

Criminal Justice System Strategy

ACJRD seeks to promote reform, development and effective operation of the Criminal Justice System

1. Introduction

1.1 The Association for Criminal Justice Research and Development (ACJRD) is a non-governmental, voluntary organisation which seeks to promote reform, development, and effective operation of the criminal justice system. It does so mainly by providing a forum where experienced personnel can discuss ways of working in an informal setting, by promoting study and research in the field of criminal justice and by promoting the highest standards of practice by professionals associated with criminal justice. ACJRD informs the development of policy and practice in justice.

1.2 The ACJRD's membership is varied but is largely comprised of individuals who have experience working within the criminal justice system and who have a strong interest in criminological matters. These include legal practitioners, academics, Criminal Justice Agencies and NGOs.

1.3 The ACJRD's approach and expertise is therefore informed by the 'hands on' expertise of practitioners, academics and agencies who deal with various aspects of the criminal justice system enhanced by the contribution of people with diverse experiences, understandings and practices.

1.4 However, the views expressed in this submission are those of ACJRD in its independent capacity and are not those of individual ACJRD members or member organisations or agencies or their employees.

1.5 The purpose of this submission is to provide an overview of the principles the ACJRD believes must be included in the Department of Justice Strategy for the Criminal Justice System and review the Background Document in light of those principles. Any suggestions made by the ACJRD in respect of issues to be clarified or additions to be made to the strategy are made in light of what the ACJRD believes are essential factors in any criminal justice system that has the ultimate aim of resolving offending behaviour in a constructive manner, reducing reoffending, and ensuring that the interaction of offenders with the criminal justice system is positive and rehabilitative, and that of victims is supportive, protective, and restorative.

1.6 This submission will reflect on the stages of the Criminal Justice System from Early Intervention and Prevention – Sentencing and Detention and Post Detention. It will set out the ACJRD's view on important issues arising in those areas and make recommendations about what should be included in the Strategy.

2. Working Collaboratively

The ACJRD welcomes the commitment to collaborative working outlined in the Background Document; however, it is notable that there is no representation on the committee specifically for victims, persons charged with a criminal offence or practitioners working in criminal defence. The ACJRD submits that for there to be true collaborative working, these stakeholders must also be represented.

Further, the ACJRD submits that any Criminal Justice System which strives for effective operation, vindication of individual rights, and reduced recidivism, requires a multi-disciplinary approach – from the preventative/diversionary stage, which may entail an assessment of the individuals, and especially young people, who are most likely to come into contact with the CJS, and drawing on the services of schools and communities, Tusla, and An Garda Síochána; to the sentencing/detention and post-detention stage, where alternative models and agencies of justice may be invoked to supplement the CJS, and existing agencies, like the Parole Board, bolstered. The ACJRD will elaborate on these submissions in Sections 4 and 5 of this document, and also refers back to the contention in its Draft Youth Justice Strategy 2020 that the effectiveness of multidisciplinary approaches needs to be underpinned by a recognition of 'reciprocity' which recognises the role of service users in achieving and sustaining outcomes.[1]

3. Efficiency and Effectiveness

The ACJRD has identified a number of areas in the criminal justice system where efficiency can be improved;

(i) The Legal Caution

The current caution reads; *"You are not obliged to say anything unless you wish to do so, but anything you do say will be taken down in writing and may be given in evidence"* The inclusion in the caution of the words *"will be taken down in writing"* means in practice that when a person is being interview by An Garda Síochána, having been administered the caution, every question put to them and every answer made by them is handwritten by a member of An Garda Síochána. This requirement is also reflected at Rule 9 of the Judges Rules which states that, where possible, a statement provided to gardai after caution should be "taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish."[2] This adds significant time to Garda interviews which are already recorded on video and audio.

[1] Reciprocity as a principle of co-production between service users and providers essentially refers to the need for both parties to feel valued and needed, and to receive something in return for contributing something. Weaver, B, Lightowler, C and Moodie, K. (2019) Inclusive Justice Co-producing Change. A practical guide to service user involvement in community justice. University of Strathclyde Glasgow and SCIE (2013) Coproduction in Social Care: What it is and how to do it. https://www.scie.org.uk/publications/guides/guide51/

[2] Balance in The Criminal Law Review Group, The Right to Silence Interim Report 31st January 2007, 34. It should be noted that the Judges Rules are not enforceable law and therefore Judges have discretion when deciding whether to admit evidence collected in contravention of the Rules.

While it is clearly of the utmost importance to both An Garda Síochána and the accused that the Garda interview is accurately recorded, the ACJRD submits that, given advancements in technology, a more efficient manner of transcribing the interview must be available. Indeed Section 57 Criminal Justice Act 2007 provides for the admission in evidence of recording of questioning of accused by An Garda Siochana, notwithstanding the fact that it was not taken down in writing at the time it was made or the statement is not in writing and signed by the person who made it[3]. The ACJRD suggests that the legal caution and Judges Rules should be amended by removing the words "*and taken down in writing*" which would remove the requirement for a contemporaneous handwritten account of the garda interview. This is not to suggest that there should be no handwritten record of the garda interview, which records the fact of the interview having taken place, the fulfilment of requirements under Regulation 12 (11) (a) Custody Regulations[4] and a summary of the questions asked and answers given. It can provide important sources of information for both the prosecution and defence legal teams and an additional resource, should the technology fail.

However, those handwritten notes should not be the primary source of transcription of the garda interview. A digital system, which provides an instantaneous written record of interviews, would allow interviews and therefore detentions to be concluded in a shorter period of time, thereby benefitting An Garda Síochána and the accused person whose right to liberty is restricted.

(ii) <u>Inference Legislation</u>

The drawing of a negative inference from an accused's failure to answer a question put to them by An Garda Síochána during interview when being questioned about an arrestable offence, can only be done when An Garda Síochána have invoked inference provisions provided for in the Criminal Justice Act 1984 as amended by Part 4 of the Criminal Justice Act 2007. These provisions allow a negative inference to be drawn from an accused's failure or refusal to account for an object, mark etc on their person, their clothing or footwear, in their possession or in any place that the accused is at the time of their arrest[5], from an accused's failure to account for their presence at a particular place[6] and from an accused's failure to mention a particular fact[7].

Separate to these 'general' inference provisions the provision for the invocation of inferences under the Offences Against the State Act.[8] Section 2 provides for the drawing of inferences in a prosecution under Section 21 Offences Against the State Act which

[3] Section 57 Criminal Justice Act 2007
[4] S.I. No. 119/1987 - Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987, Section 12 (11) (a) "A record shall be made of each interview either by the member conducting it or by another member who is present. It shall include the particulars of the time the interview began and ended, any breaks in it, the place of the interview and the names and ranks of the members present.".
[5] Section 18 Criminal Justice Act 1984 as amended by Section 28 Criminal Justice Act 2007
[6] Section 19 Criminal Justice Act 1984 as amended by Section 29 Criminal Justice Act 2007
[7] Section 19A Criminal Justice Act 1984 as inserted by Section 30 Criminal Justice Act 2007
[8] Offences Against the State (Amendment) Act, 1998

prohibits membership of an illegal organisation. Section 5 of the Act allows inferences to be drawn from an accused's failure mention a fact. The inference provisions in Section 2 are broader than those provided for the 1984 Act as they relate to a failure to answer "any question material to the investigation of the offence"[9].

These inference provisions are an obvious restriction on an accused right to silence and as such, the European Courts have found that any interview conducted under the inferences legislation can only be admitted as evidence to corroborate existing evidence and further, only where the accused had been given sufficient warning about the inferences provisions and understood such warnings.[10] In practice, the manner in which inferences are explained by Gardaí to a suspect is unnecessarily complicated and confusing with a considerable part of the interview taken up by the explanation. This is unsatisfactory given the significant infringement on the right to silence impose by inference legislation.

The Supreme Court, recognising this significant infringement of the right to silence, have narrowly interpreted the inferences legislation to protect the rights of an accused. For example in *DPP v Wilson*, the Court held that "the inference provisions can only be relied upon at trial where the offence charged is the same as that in relation to which the accused was questioned when the section was invoked"[11] and in *DPP v A Mc D* the Court found that Section 19 was not properly invoked in circumstances where the accused had given an account of his presence at the scene in the first interview.[12]

(iii) <u>Court Lists</u>

Until the COVID emergency, all persons bailed or summonsed to attend Court were required to appear for the start of the Court list at 10.30am, in most Courts. As a result, courtrooms across the country were packed, often well past capacity, from the beginning of the list until after 1pm. Courts tended to be less busy after lunchtime. As Court rooms were so busy in the morning, the Court Sergeant was under increased pressure to deal with queries from practitioners, many cases went to second call, later in the morning, because they were not ready to proceed, lengthy applications were heard before shorter matters and service users became frustrated at delays. Furthermore, persons charged with more serious offences to be tried on indictment in the Circuit or Central Criminal Courts, had their case delayed in the District Court because DPP directions or the Book of Evidence were not available. This resulted in accused persons attending Court unnecessarily.

[9] ibid at Section 2(1)
[10] *John Murray v United Kingdom* [1996] 22E.H.R.R.29
[11] DPP v Wilson [2017] IESC 53 para 55
[12] DPP v A McD [2016] IESC 71

Prior to the current pandemic, the ACJRD had decided to recommend that Court lists be staggered so that cases are listed at different times throughout the day, as is the practice in other countries such as Germany. We had also decided to recommend that more of the work currently done in the Courtroom on remand dates, which require the presence of the accused, should be done administratively between court appearances, which should be less frequent. In fact, the COVID pandemic has precipitated and hastened some of those changes and it is anticipated by some stakeholders that those changes will be maintained post-pandemic. Accused persons on bail are not currently required to appear at 10:30am on each remand date. Remands in absence for procedural Court hearings are commonplace and lists are staggered to improve efficiency and facilitate social distancing in many Courts nationwide. It is suggested that some of the COVID emergency response measures taken by the Courts Services and the Judiciary should be developed to enhance the agility and sustainability of the Justice System beyond the current crisis, into the future.

The requirement to socially distance is the greatest immediate challenge facing the justice system generally and the criminal justice system in particular, to keep the numbers of people in Courthouses to a minimum while ensuring continued access to justice. Technology provides a solution, which is not without risk particularly for vulnerable accused persons and vulnerable victims.

The Civil and Criminal Law Miscellaneous Provisions Bill 2020 aims is to facilitate greater use of technology within the justice system to ensure that the system remains functional during the COVID pandemic. The Bill was passed by the Oireachtas very quickly, although it has not yet been commenced. There is still some uncertainty about how it's provisions will be implemented practically, requiring engagement with all stakeholders to include prosecution, defence, the judiciary and the Courts Service.

In order to preserve the efficient functioning of the Justice System in these unprecedented times and beyond, the ACJRD recommends that an integrated digital development strategy be developed for the entire justice system with the objective of proportionally balancing the rights of individuals with the interest of society in the administration of justice and prosecution of crime. An integrated digital development strategy will help ensure the agility and sustainability of the justice system through the COVID pandemic and beyond.

4. Sentencing

The ACJRD submits that as part of the Criminal Justice Strategy, the Department of Justice must conduct a review of sentencing provisions and the effectiveness of custodial sentences.

On 5th August 2020 the Central Statistics Office published figures showing that 55.2% of people released from prison in 2014 re-offended within three years. Nearly 80% of those aged under 21 when they were committed to prison re-offended within three years of being released, and 75% of people imprisoned for public order offences re-offended within three years. Any effective criminal justice system must have at its core the aim of reducing offending and recidivism, the recent figures published by the CSO suggest that Ireland needs to redouble its efforts. The ACJRD submits that it is in the interests of victims, society as a whole and offenders that custodial sentences only be viewed as a sentencing option of last resort. Research shows the use of non-custodial sentencing options such as Restorative Justice, suspended sentences, community sanctions and probation bonds are more effective at preventing recidivism. However, such measures are largely inaccessible and often unavailable to both offenders and victims in Ireland, and the ACJRD outlines below a proposal for their effective integration.

A. <u>The Probation Service</u>

The ACJRD notes and approves of the commitment of the Probation Service to restorative principles in working to rehabilitate offenders and facilitate the making of reparations on their behalf.[13] The prioritisation of these values has seen no reoffending from 54% of offenders on Probation Supervision within a three-year period, and this check on recidivism corresponds with the Background Document's "commitment to preventing crime and reducing harm."

In this vein, the ACJRD would point to such analyses as the University of Sheffield's evaluation of three Restorative Justice Schemes between 2001 and 2008, which showed a 14% reduction in reoffending, and resultant savings of £8 for every £1 spent on these schemes. Restorative Justice is clearly aligned with these guiding principles of the Background Document, and so the ACJRD commends the programmes already in place for its promotion and *re*commends their expansion.

However, while the ACJRD welcomes the use of Restorative Justice, in its current form, by the Probation Service – especially the victim and community-centric approach which prioritises offender reparations and Victim-Offender Mediation – it also notes that Restorative Justice is primarily used in the context of Young Offenders and in Family Conference settings, and that the Probation Service advises that Restorative Justice "should be seen as complementing rather than replacing existing sanctions/interventions."[14]

The ACJRD offers a twofold recommendation, with reference to practices in other jurisdictions, and the National Commission on Restorative Justice's vision of wider implementation.[15]

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[13] The Probation Service, 'Restorative Justice,' <http://www.probation.ie/en/PB/Pages/WP16000044> accessed 07 August 2020.
[14] ibid
[15] National Commission on Restorative Justice, *Final Report* June 2009.

Firstly, that Restorative Justice Schemes be considered a legitimate diversion or alternative to sentencing. Further, they should apply to cases involving adult offenders, and even cases in which the offender is ultimately imprisoned, where appropriate. This leads to the second part of the recommendation, which is that even in cases involving serious offences and imprisonment, Restorative Justice Schemes should be used at the sentencing stage to supplement Criminal Justice proceedings and even mitigate sentences, again where appropriate.

B. Legislation – The European Example and Other Jurisdictions

The general trend in juvenile justice is to refrain from imposing a custodial sentence – in fact custodial sentences account for only 1-2% of all formally and informally sanctioned 14-20-year-old offenders across the EU. Simultaneously, "the proportion of community sanctions has been increasing steadily. To date, roughly 70% of juvenile cases are diverted (at the pre-sentence stage). Community sanctions – special reformatory measures, and community service as a disciplinary measure – have come to play a major role in juvenile court sentencing. 41% of all convicted young offenders in 2012 received a community service order."[16] More recently, there is ostensibly a consensus emerging amongst EU Member States that Restorative Justice "can be a desirable alternative or addition to ordinary criminal justice approaches to resolving conflicts."[17]

This trend, in effect, is followed in Ireland as far as youth justice is concerned, but the ACJRD submits that the general availability of Restorative Justice in this jurisdiction falls short of the European standard, and the aforementioned vision of the National Commission on Restorative Justice. The ACJRD points to Council of Europe Recommendation CM/Rec (2018)8 on Restorative Justice, which "describes how the proactive use of restorative principles and processes outside of the criminal procedure can help underpin a broader cultural change in criminal justice systems,"[18] and the strategies objectives and potential actions outlined in the Irish submission to the cross-European project 'Restorative Justice: Strategies for Change.'

The ACJRD points to the Crime and Courts Act 2013 of England and Wales, which, like the Children Act 2001, permits the adjournment of sentencing in order for Restorative Justice to take place. However, the guidance issued by the Ministry of Justice was that such pre-sentence Restorative Justice measures should fit in with a wider framework

[16] Frieder Dünkel, Philip Horsfield, and Andrea Păroşanu (eds), *European Research on Restorative Juvenile Justice – Volume I: Research and Selection of the Most Effective Juvenile Restorative Justice Practices in Europe: Snapshots from 28 EU Member States* (European Council for Juvenile Justice, 2015) 78.
[17] ibid at 3.
[18] Ian D. Marder, 'Developing Restorative Justice in Law, Policy, and Practice: Learning from around the World,' (Penal Reform International, 10 January 2019)
< https://www.penalreform.org/blog/developing-restorative-justice-in-law-policy-and-practice/> accessed 04 August 2020.

which allows access to Restorative Justice at all stages of the criminal justice system. The ACJRD also highlights jurisdictions like Belgium, where prosecutors are *required* to consider a "restorative diversion from prosecution in response to most youth offending,"[19] a matter Ireland's Children Act 2001 leaves to the discretion of the Court, or South Korea, where Victim-Offender Mediation (VOM) "was used to divert around 111,000 cases from Court in 2016."[20] Additionally, Norway's Municipal Mediation Service Act 1991 "established a National Mediation Service that receives referrals for both civil and criminal mediation from any agency, any offence and at any stage of the process."[21]

Most pertinent, however, is the jurisprudence of New Zealand, in which Restorative Justice Principles are deeply embedded. Legislation has progressively expanded the use of Restorative Justice so that it presently applies to cases involving adult offenders (indeed, the Sentencing Amendment Act 2014 requires the adjournment of proceedings so that Restorative Justice can take place), and is incorporated into an array of serious offences, including "cases where the offender is ultimately imprisoned."[22] The Ministry of Justice releases annual research reports on the use of Restorative Justice, which indicate high victim satisfaction and reduced recidivism – the 2009 Report showed, for example, that offenders who received a Restorative Justice conference had a 20% lower reoffending rate and a 23% lower frequency of reoffending over the following 12 months than offenders who did not receive a conference.

The ACJRD acknowledges that a number of European countries have put in place similar legislation on Restorative Justice, but "lack a stable, national service provision, limiting its accessibility in practice."[23]

C. <u>Accessibility</u>

Specialist services in Dublin and Tipperary – Restorative Justice Services, and Restorative Justice in the Community, respectively – offer Restorative Justice to adult offenders, in conjunction with Probation Service, An Garda Síochána, victim advocate organisations and the community sector, and are funded by the Probation Service. The ACJRD recommends their expansion, or adoption of similar services nationwide.

This would mirror the common practice in New Zealand, which is the provision of "comprehensive Restorative Justice Services… by community-based groups… funded and regulated by the Ministry of Justice."[24] It is also something of a European standard

[19] ibid
[20] ibid
[21] ibid
[22] ibid
[23] ibid
[24] ibid

as regards youth offenders – "[a] recent survey on the implementation of mediation showed that the majority of facilities offering victim-offender mediation were fully or partly specialised (64%). Case selection was predominantly in the hands of public prosecutors, followed by judges, the juvenile court aid and the police." [25]

The ACJRD also draws attention to the views expressed in the Irish submission to 'Restorative Justice – Strategies for Change,' in particular Objective (a) outlining the need for "services with enough practitioners who are trained, skilled and enabled to support victims and offenders to determine whether restorative justice is right for them, and to facilitate its delivery whenever this would be of benefit to the parties,"[26] and more generally Objectives (a) through (e).
Alternately, it may be illuminating to look to the Restorative Justice Services available in England and Wales, chief among them the position of Police and Crime Commissioner, which exists in each of 43 regional police forces and denotes an "elected official responsible for commissioning victims' services locally – including Restorative Justice – using Ministry of Justice funding."[27] Restorative Justice Schemes often form a basis for resolving low-level offences informally, and Youth Offending Teams provide such services for youth offenders. The crucial aspect of this, however, is accessibility, and hence state funding, and the ACJRD recommends that a clear commitment be made in this arena. The Finnish Mediation Act 2006, for example, actually mandates state funding of mediation services in a bid to facilitate equal access.

Further, accessibility is still largely prohibited by such factors as the age of the offender, the nature of the offence, and the area where the victim lives, and this may contribute the arguable dearth of Irish participation in Restorative Justice Schemes.

The ACJRD finally draws attention to the United Nations Standard Minimum Rules for Non-Custodial Measures 1990[28]and UN Economic and Social Council Resolution 2002/12: Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters[29] along with the ACJRD's submission to the Law Reform Commission on Suspended Sentences, October 2017.

[25] Kerner, H.-J., Weitekamp, E, 'Praxis des Täter-Opfer-Ausgleichs in Deutschland. Ergebnisse einer Erhebung zu Einrichtungen sowie zu Vermittlerinnen und Vermittlern,' (2013) *Forum Verlag Godesberg* 31.
[26] 'Restorative Justice: Strategies for Change – A Collective Strategy for Ireland, 2019-2023.'
[27] Ian D. Marder, 'Developing Restorative Justice in Law, Policy, and Practice: Learning from around the World,' (Penal Reform International, 10 January 2019)
< https://www.penalreform.org/blog/developing-restorative-justice-in-law-policy-and-practice/>
accessed 04 August 2020.
[28] UN General Assembly, *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) : resolution / adopted by the General Assembly*, 2 April 1991, A/RES/45/110, available at: https://www.refworld.org/docid/3b00f22117.html [accessed 7 August 2020]
[29] UN Economic and Social Council (ECOSOC), *UN Economic and Social Council Resolution 2002/12: Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, 24 July 2002, E/RES/2002/12, available at: https://www.refworld.org/docid/46c455820.html [accessed 7 August 2020]

D. <u>Future Proofing the successful delivery of the Juvenile Diversion Programme – An Independent Body?</u>

In the context of Government Policy towards a multi-agency approach, the ACJRD suggests that consideration should be given to transferring that structure to the Diversion Programme to an independent unit. Such a body would require targeted investment and long-term strategic planning for children who come to the attention of the Criminal Justice System, thereby permanently securing it.

The Juvenile Diversion Programme as it currently operates does great work, but issues can arise in the context of a Juvenile Liaison Officer (JLO) discussing diversion options with a child. If that child then opts for a caution from that JLO, issues may arise under The Judges Rules as to what may have been said to the child in advance of that decision. There is the potential therefore for there to be a conflict of interest between the role of the JLO advising the child and subsequently acting as an agent of the Criminal Justice System who is cautioning the child. It is possible that, with appropriate training, youth workers could advise on the options prior to the JLO administering the caution.

Policy considerations that prioritise 'the voice of the child' could be encapsulated in such a standalone independent body. It could bring agencies together from various sectors to include An Garda Síochána, and specialist child-centred agencies and NGOs with expertise in education, health, victim's rights (to include adverse childhood experiences of alleged offenders) youth work and others, within a restorative justice framework.

5. <u>Parole</u>

The ACJRD submits that the current Ad Hoc system of Parole in Ireland is unsatisfactory and calls for the urgent commencement of the Parole Act 2019.

Unlike the United Kingdom and many other European countries, Ireland does not have a clearly statutorily defined Parole System. In fact, what we refer to as 'parole' is something of a misnomer. Parole in our understanding of the word is actually Temporary Release provided for by section 1(2) of the Criminal Justice (Temporary Release of Prisoners) Act 2003 which replaced s2(1) of the Criminal Justice Act 1960. This section simply provided; *"The Minister [for Justice] may make rules providing for the temporary release, subject to such conditions (if any) as may be imposed in each particular case, of persons serving a sentence of penal servitude or imprisonment, or of detention in St. Patrick's Institution."*

Section 1(2) of the 2003 Act gives the Minister broad discretion to release a prisoner on TR where, inter alia, they are

"*of the opinion that the person has been rehabilitated and would, upon being released, be capable of reintegrating into society."*

This legislative provision was intended to provide temporary release to prisoners. It was not intended as a basis for full release from custody and in fact there is no reference to "parole" within the statute, rather it has evolved through policy and practice.[30]

The commencement of the Parole Act 2019 would address concerns about the current parole system in Ireland, including concerns about a lack of fair procedures, representation and delays.

Further, it would bring the Irish jurisprudence in line with European norms. Article 5(4) of the European Convention on Human Rights provides that *"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful,"*[31] and case law of the European Court of Human Rights has established that 'court-like bodies' should adjudicate on the release of life-sentence prisoners.[32] Such bodies should be independent of both the executive and the parties to the case,[33] and capable of making decisions on the lawfulness of detention and ordering release, as opposed to having a merely advisory function.[34]

The Irish practice of granting the executive a discretionary power as regards temporary release – and here the ACJRD makes note of Dr. Griffin's research into the release and recall of life sentence prisoners, and the comments provided to him by members of the Parole Board indicating the control exercised by the Minister for Justice over such board – has been justified on the basis of the punitive character of life sentences in Ireland, as opposed to life sentences in other jurisdictions such as the UK, which might contain both punitive and preventative elements.[35] However, given that one of the major themes of this submission is the ineffectuality of purely punitive measures, the ACJRD would suggest that the Parole Board be given a statutory footing as an independent body, as is the case in, for example, Scotland and Northern Ireland, and as then Minister for Justice Frances Fitzgerald proposed in 2015.[36]

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[30] Griffin, Diarmuid, The Release and Recall of Life Sentence Prisoners: Policy, Practice and Politics. (January 15, 2015). P. 3. Irish Jurist (April 2015). Available at SSRN: http://ssrn.com/abstract=2550388

[31] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html [accessed 2 November 2015]

[32] *Thynne, Wilson and Gunnell v United Kingdom* [1990] 13 EHRR 666

[33] McNicholl, Aoife, 'Prisoner Parole – Representation Required? The Reality of Practice and Need for Reform,' Sheehan and Partners Solicitors (2015)

[34] *Weeks v United Kingdom* [1988] 10 EHRR 293 at para. 61.

[35] *Lynch & Whelan v Ireland*, no. 70495/10 and 74565/10, ECHR 2014

[36] Dail Éireann 14 January 2015, P.Q.415, [49699/14]

6. Social Issues Impacting on Crime

It is reported that 83% of young people in detention are reported to have at least one psychiatric disorder and have significant deficits in emotional intelligence and cognitive ability[37] and that 40% of young people were either in care or had significant involvement with Tusla prior to detention, and 72% of young people were considered to have substance misuse problems, with 49% not engaged in education prior to detention (Oberstown Children's Detention Campus 2018). With similar statistics within adult prison population,[38] and with some communities more represented than other among prison population it is incumbent on the Justice System to be aware of individual circumstances and issues relating to social deprivation.

Poverty figures published by Central Statistics Office (2017) taken from Survey on Income and Living Conditions (SILC) in Ireland, indicate that in 2016 eleven point one per cent of children live in consistent poverty which equates to approximately one hundred and forty thousand children. A study into adverse childhood experiences (ACE) provides insight into the impact of early adverse experiences on children's health and developmental outcomes.[39] The study found that 87% of respondents who had been exposed to one type of adversity reported being exposed to at least one other type and that exposure to multiple adversities is more likely to have a negative impact on children as they grow up. The incidence of poverty, homelessness or accommodation instability increases the likelihood of children, and young people experiencing stress and lack of enriching environment which may adversely affect their development on many levels, including attention, memory, cognition, executive functioning and language development.[40] As a result children, young people and adults face poor social, emotional, educational and behavioural outcomes and neurobiological research highlights that poverty negatively impacts brain development.[41]

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[37] Hayes, JM, and O' Reilly, G, 'Emotional Intelligence, Mental Health and Juvenile Delinquency,' Cork: Juvenile Mental Health Matters, <https://www.drugsandalcohol.ie/6264/> accessed: 29thJuly 2020.

[38] Kennedy, H.G., Monks, S., Curtin, K., Wright, B., Linehan, S., Duffy, D., Teljer, C and Kelly A. (2005) Psychiatric Morbidity in Sentenced, Remanded and Newly Committed Prisoners, National Forensic Mental Health Service, Central Mental Hospital, Dundrum
< http://www.drugsandalcohol.ie/6393/1/4338_Kennedy_Mental_illness_in_Irish_prisoners.pdf > accessed 29thJuly 2020.

[39] Felitti, Vincent J, et al. 'Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study,' (1998) 11(4) *American Journal of Preventive Medicine* 245-258.

[40] Lipina, S.J. & Colombo, J.A., 'Poverty and Brain Development during Childhood: An Approach from Cognitive Psychology and Neuroscience,' (2009) 13 *American Psychological Association* 51-74
< https://doi.org/10.1037/11879-000> accessed 6th September 2019.

[41] Lipina, S.J. & Posner, M.I., 'The impact of poverty on the development of brain networks,' (2012) 6 *Frontiers in Human Neuroscience* 1-12
<https://www.scienceopen.com/document_file/96176283-b087-4bf6-8658-b32e12c4730d/PubMedCentral/96176283-b087-4bf6-8658-b32e12c4730d.pdf>
accessed 28th March 2018.

Given the circumstances as outlined above it is important that the Justice System give consideration to social issues impacting on crime while also being cognisant of the impact of crime on victims and the wider community. As such there is a need to strengthen community policing to ensure that communities are safe and to work in collaboration with other agencies/services and the wider community to ensure that there are opportunities for people to be diverted from crime and to participate in meaningful activity in order to disrupt criminal networks and to increase supervision at all levels through community engagement and robust/enhanced Youth Diversion Programmes and Bail Supervision in conjunction with mental health, addiction and other social supports.

The ACJRD reaffirms its endorsement of the Planet Youth model developed by the Icelandic Centre for Social Research and Analysis (ICSRA) at Reykjavik University as outlined in its Draft Youth Justice Strategy 2020, in terms of investment in a collaborative, community-based approach to reducing the social factors contributing to adolescent substance abuse. [42]

Further, interactions with the courts and the Criminal Justice System, and repeat interactions, are higher amongst individuals diagnosed with a mental illness, on an international level, and this has led jurisdictions like the United States, Canada, Australia, and the United Kingdom to implement "several operational mental health diversion programs into the local courts."[43] These programs are centred around the idea of therapeutic jurisprudence, extolling the law's "healing potential to increase wellbeing,"[44] and this in turn is closely aligned with Background Document's objective of tackling criminal justice with a collaborative approach that ensures the use of "[t]he right resource in the right place at the right time," as these programs aim to prevent the courts from becoming "revolving doors for the mentally ill."[45] Thus, they would not only be of material benefit to offenders diagnosed with a mental illness, but would seek, over time, to reduce unnecessary burdens on the courts, which should assist with speedier processing and reduced delays.

The ACJRD recognises and lauds such programs as they exist in other jurisdictions and recommends their adoption.

[42] Jon Sigfusson, ICSRA, Evidence Based Primary Prevention The Icelandic Model <https://www.regionh.dk/forebyggelseslaboratoriet/møder/Documents/Planet%20Youth%20Copenhagen%20November%202018%20FIN.pdf > accessed 08 August 2020

[43] Chesser, Brianna, & Smith, Kenneth, 'The Assessment and Referral Court List Program in the Magistrates Court of Victoria: An Australian Study of Recidivism,' (2016) 45 *International Journal of Law, Crime, and Justice* 141.

[44] ibid

[45] ibid

7. Juvenile Justice

The ACJRD draws attention to its submissions to the Department of Justice and Equality on the Draft Youth Justice Strategy 2020 and submits that the Criminal Justice Strategy must prioritise and effectively implement a positive and effective youth justice strategy that diverts young people from criminal behaviour and prevents recidivism.

8. Arrest and Detention

Article 40 4 1° of The Constitution of Ireland states that *No citizen shall be deprived of his personal liberty save in accordance with law*. Gardaí have been empowered in certain circumstances and for certain specified offences to detain suspected persons in their custody for prescribed periods to facilitate the proper investigation of the alleged offences.

(i) Detention of Vulnerable Persons

There is special provision made in The Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987[46] at s.3. (1) stating: *In carrying out their functions under these Regulations members shall act with due respect for the personal rights of persons in custody and their dignity as human persons, and shall have regard for the special needs of any of them who may be under a physical or mental disability, while complying with the obligation to prevent escapes from custody and continuing to act with diligence and determination in the investigation of crime and the protection and vindication of the personal rights of other persons.*

The ACJRD submits that the provisions contained in the Custody Regulations relating to children[47] (including the presence of a responsible adult) and in the Children Act 2001 providing for the detention of child suspects should be extended to include vulnerable adults. It is further submitted that consideration be given to how those people are identified and defined as vulnerable. At a minimum, the definition should include any adult with an intellectual or learning disability.

(ii) Pre-Interview Disclosure

There are no specific statutory guidelines in Ireland with respect to a protocol for disclosure to a solicitor attending a client in a Garda Station. The EU Directive on the Right

[46] Section 3(1) Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987.
[47] ibid at Section 13.

to Information in Criminal Proceedings[48] required transposition into Irish law by June 2014. The Department of Justice and Equality has "advised the Law Society that it has informed the European Commission of pre-existing provisions of Irish law, including statutes, constitutional law and the jurisprudence of the superior courts which give effect to the Directive in the criminal justice system."[49]

Article 6 of the Directive requires information be provided to an accused about the accusation and that such information be provided promptly "and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence." Article 7 goes further than this and requires "Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers."

The Department of Justice & Equality have provided assurances that pre-existing provisions of the Irish law are sufficient to give effect to the Directive, the Garda Code of Practice states that "An Garda Síochána is not obliged to disclose any information that could prejudice an investigation" and "There is no legal requirement to have a meeting with a suspect's solicitor, or to provide information prior to interview."[50] That guide does however advise Gardaí to be as accommodating as possible, without compromising the integrity of the investigation, in order to decrease the occurrence of a 'no comment' interview or multiple requests for consultations throughout the interview at the behest of the detained person or their solicitor. It also envisages a pre-interview briefing between the investigating Garda and the solicitor when inference-drawing provisions are invoked.

The Law Society Guidance suggests that where an investigating Garda is unwilling to make disclosures, solicitors might let them know that in the absence of full and proper disclosure, clients cannot receive comprehensive legal advice".[51]

However, as defence lawyers and academic experts have raised concerns about disclosure practices at the investigation stages of proceedings in this jurisdiction, the ACJRD submits that the Department of Justice and Equality establishes a multidisciplinary cross-agency working group to review disclosure practice and Irish jurisprudence to ensure compliance with Ireland's compliance with our obligations under European Law.

[48] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.
[49] Law Society of Ireland, 'Guidance for Solicitors Providing Legal Services in Garda Stations' (Law Society of Ireland 2015) 9 - 10
[50] An Garda Siochana, 'Code of Practice on Access to a Solicitor by Persons in Garda Custody' (An Garda Siochana 2015), 5
[51] Law Society of Ireland, 'Guidance for Solicitors Providing Legal Services in Garda Stations' (Law Society of Ireland 2015) 9 – 10, para 5.6.

(iii) The Role of the Solicitor in the Garda Station

In a string of cases beginning with Salduz v Turkey which was upheld and expanded upon in, *inter alia*, Dayanan v Turkey[52], Pishchalnikov v Russia[53], Brusco v France[54], Borg v Malta[55], AT v Luxembourg[56]and Aras v Turkey No. 2[57]the European Court of Human Rights established the right of a suspect of have a lawyer attend at a police interview and further, a right to legal assistance at that interview, which, the Court found in Aras, required that lawyer to intervene to ensure respect for the applicant's rights.[58]

Ireland has an 'opt into' EU Directives in the Justice and Home Affairs division. It has not opted into The Directive on the Right of Access to a Lawyer[59] issued as part of the Stockholm Programme[60]. Ireland did establish a working group to advise regarding a system for the provision of legal representation during Garda Interviews, in the wake of *Salduz*. Some practical recommendations on the implementation of the Directive did emanate from this group[61]

Until DPP v Gormley & White[62] Irish solicitors attended Garda Stations solely for the purpose of giving legal advice, but not to attend during the Garda interview. After that case the interrogation of the suspect could not commence until that suspect received legal advice. A subsequent Direction from the DPP to Garda Stations that year resulted in the admission of such solicitors to be with the suspect during interrogation. The Garda *Code of Practice on Access to a Solicitor by persons in Garda Custody* of April 2015[63] and The Law Society of Ireland *Guidance for Solicitors Providing Legal Services in Garda Stations* of December 2015[64] referred to above, endeavoured to interpret a compliant implementation of the new status quo.

In common with Garda and solicitor views on disclosure in their respective professional guidance documents, there are differing views held with respect to the solicitor role during the Garda interview, giving rise to some contentious exchanges between them. Differing interpretations also ensued after the Supreme Court judgement in DPP v

[52] *Dayanan v Turkey* [2009] ECHR 2278
[53] *Pishchalnikov v Russia* [2009] ECHR 1357
[54] *Brusco v France* [2020] ECHR 1621
[55] *Borg v Malta* [2016] ECHR 53
[56] *AT v Luxembourg* [2015] ECHR 367
[57] *Aras v Turkey No. 2* App no 15065/07 9ECtHR, 18 November 2014)
[58] Ibid para 40.
[59] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in the European Arrest Warrant proceedings.
[60] The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C 115/01. http://eujusticia.net/images/uploads/pdf/the_stockholm_programme.pdf accessed 11 August 2020
[61] http://www.justice.ie/en/JELR/Report%20Final%2015%20July.pdf/Files/Report%20Final%2015%20July.pdf
[62] *DPP v Gormley & White* [2014] 2 IR 591
[63] An Garda Siochana, 'Code of Practice on Access to a Solicitor by Persons in Garda Custody' (An Garda Siochana 2015) (n47)
[64] Law Society of Ireland, 'Guidance for Solicitors Providing Legal Services in Garda Stations' (Law Society of Ireland 2015) 9 – 10 (n46)

Doyle[65]. The Court declined to recognise a constitutional right for the suspect to have a solicitor attend the interview but indicated that it could foresee such a right being operative at a future date. Judge O'Donnell held in that case that the function of a solicitor in a Garda Station is to give "legal advice". [66] In the subsequent Doyle v Ireland[67] ECtHR (Doyle v Ireland), May 2019[68], the court applied Beuze v Belgium[69] that the overall fairness of proceedings in Doyle during the Garda interview had not been prejudiced by the absence of the lawyer. The court did however emphasise the importance of the right to legal advice, stating that Art 6(3) encompasses a suspect's right to have a lawyer physically present during police interviews[70].

The interview process is an integral part of the criminal investigation and any prosecution that arises thereafter. The Gardaí have an Interview model called the 'Garda Siochána Interviewing Model' (GSIM), which has been well received by the Department of Justice and Equality Steering Committee to oversee matters relating to interviewing of detained persons detained in Garda Stations[71] In practice, when tensions arise between Gardaí and solicitors it is due to a lack of clarity on the role of a solicitor in the Garda station.
It is suggested that there is a need for greater clarity in relation to the role of the solicitor in at the investigative stage of criminal proceedings. In particular, the distinction between legal advice, referred to in Irish legislation and legal assistance referenced in European law and jurisprudence requires greater clarity.

A person, suspected of a criminal offence, detained in a Garda station for the purposes of interview who has had their liberty is denied, is a vulnerable person. Conway and Daly have found that defence solicitors "perform seven functions during the police interview: provide legal advice; protect the detainee's rights; protect the right to silence; prevent miscarriages of justice; provide support; achieve equality of arms; and ensure an active defence."[72] The ACJRD agrees, in principle, with Conway and Daly who call for the regulation of the solicitor's role in the Garda station and suggests that such regulation should codify the seven functions identified by them and outlined above and also the main areas identified as requiring regulation or reform.[73]

Finally, the ACJRD suggests that a "solicitors' room", similar to that provided in Courts, should be provided for solicitors attending at Garda stations who are frequently there for

[65] *DPP v Doyle* [2017] IESC 1
[66] ibid at (n69) [12]
[67] *Doyle v Ireland* [2019] ECHR 377
[68] *Doyle v Ireland* Application No 51979/17; 23 May 2019
[69] *Beuze v Belgium* (Application No. 71409/10) ECtHR 9 November 2018
[70] Para 74
[71] Geraldine Noone, 'An Garda Síochána Model of Investigative Interviewing of Witnesses and Suspects' in John Pearse (ed), Investigating Terrorism: Current Political, Legal and Psychological Issues (Wiley-Blackwell 2015) at page 100

[72] Conway, V and Daly, Y 'From Legal Advice to Legal Assistance: Recognising the Changing Role of the Solicitor in the Garda Station' [2019] Irish Judicial Studies Journal Vol 3, 103
[73] ibid at 123

long periods and, in practice, find themselves waiting in their cars, sometimes late at night, between interviews.

(iv) C72 Form

As outlined above at paragraph 8(i), Ireland has opted into The Directive on The Right to Information[74], which has direct effect. The C72 Form provided to suspects detained in a Garda Station which informs them of their rights while so detained contains information that is unnecessary and language that is complicated. However, the form does not inform a suspect of their right to silence, the possibility of challenging their arrest, the amount of time they can be detained prior to being brought before a judge or information on interpretation and translation. The C72 form should be amended to include those rights and should be written in language that is easily understandable.

(v) Training and collaborative working

The SUPRALAT training program offered by Conway and Daly[75]provides training for criminal defence solicitors representing clients in Garda stations. On occasion, members of An Garda Síochána have participated in this training and Conway and Daly have contributed to the Senior Investigating Officer course in Templemore, "outlining the aim and nature of the SUPRALAT training so that they have a sense of how solicitors are learning to approach the interview."[76]This encourages an understanding of each party's point of view which should in turn lead to the professional resolution of issues that arise during detention which is to the benefit of all parties. The ACJRD recommends the Department of Justice and Equality includes in their strategy a commitment to facilitating formal collaborative training. Consideration should also be given to the training of Judges in this area, who may have to rule on issues arising from Garda detentions during criminal trials.

9. The Criminal Legal Aid System:

The ACJRD submits that sustained investment in Criminal Legal Aid (CLA) is a vital aspect of any properly resourced Criminal Justice System, and draws attention to the Law Library's caution against schemes designed to introduce means testing and alter the grounds on which criminal legal aid is given, specifically the idea that 'it is likely that the costs of administering such a scheme would very significantly outweigh the reduction in

[74] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0013&from=EN>
[75] Funded by the Justice Programme of the European Union.
[76] ibid (n26) page 122.

cost,'[77] and that 'restricting access could drive up incidences of defendants representing themselves, resulting in "lengthy and difficult proceedings, ultimately increasing costs to the State and causing consequent distress to witnesses and victims of crime."'[78] The ACJRD further references the Department of Justice and Equality IGEES unit's 2018 spending review and general overview of the current CLA system, which found that "[i]t is important to consider that many of the benefits in other aspects of the justice system will likely have knock on positive impacts on the CLA system. For example, consideration of further 'alternatives to prosecution' may reduce demand on the courts/CLA and may speed up the length of trials for a more efficient system."[79] This recommendation feeds into the theme of Restorative Justice and diversionary measures, and satisfies the Background Document's prioritisation of '[m]ore efficient use of resources across the criminal justice sector.'

This is not to suggest that CLA is not a crucial resource in itself, however, and the ACJRD notes that the heavy demand on legal aid has been accompanied by reduced fees. Following the banking crisis, for example, there were several cuts to legal aid, totalling approximately 40% by 2010, and these have never been restored. The 2018 spending review corroborates this with its finding that expenditure on CLA decreased during the 'austerity years' in the form of reduced fees for legal representation, while the subsequent increase in spending as the economy strengthened did not denote a restoration of such fees, but instead could be predicated on a number of factors, such as 'higher rates of crime detection, more severe crimes being committed and cases that are more complicated that prolong the length of trials.'[80] The ACJRD references the Law Society in acknowledging that '[t]he resilience and integrity of the criminal legal aid system is being threatened due to long-standing and continued reductions in rates.'[81] There is a notable discrepancy between such findings and that of the 2018 spending review that the CLA system was "cost effective and robust, facilitating a high standard but low cost representation of defendants through skilled advocates engaged by the State."[82]

The ACJRD also makes reference to the Buchanan Final Report of 2002, and its recommendations regarding compensation of solicitors under the legal aid scheme. In particular, the findings by the Committee that "the work performed by solicitors in criminal cases differs from that carried out by barristers and that solicitors should be paid fees for cases under the Criminal Legal Aid Scheme which reflect the work they do,"[83] and

[77] Horgan-Jones, Jack, 'Surge in Fees Paid to Lawyers Under Criminal Legal Aid System,' *The Irish Times* (Dublin, 11 February 2019).
[78] ibid
[79] ibid
[80] Department of Justice and Equality IGEES Unit, 'Spending Review 2018 Criminal Legal Aid: Overview of Current System and Potential Lessons from an International Comparison,' July 2018.
[81] Horgan-Jones, Jack, 'Surge in Fees Paid to Lawyers Under Criminal Legal Aid System,' *The Irish Times* (Dublin, 11 February 2019).
[82] Department of Justice and Equality IGEES Unit, 'Spending Review 2018 Criminal Legal Aid: Overview of Current System and Potential Lessons from an International Comparison,' July 2018.
[83] Criminal Legal Aid Review Committee, 'Final Report,' February 2002.

that "there are circumstances where solicitors are not paid a fee due to the non-appearance of prosecution and defence barristers and such situations should be also be addressed" are emphasised. The ACJRD notes that many of the Buchanan Report's recommendations were never implemented, and notes that, at present, solicitors undertake a significant amount of work for which they are not paid, for example: consultations in district court cases, new mentions in Court 5, any more than one consultation in a circuit court/central court case (regardless of the complexity or duration of the case). The current legal aid scheme places a daily limit on the fees payable to solicitors for new cases, for example the full fee of €201.50 will only be paid for the first two new cases, regardless of how many new cases a solicitor is assigned to that day. Where an accused appears in Court charged with two new offences, the initial fee of €201.50 will only be payable in respect of one new offence, regardless of whether the two offences are entirely separate and distinct from one another. The ACJRD thus endorses the findings and overall sentiment of the Buchanan Report, and recommends, as the Committee does at Conclusion 8.6 – regarding the 'parity' framework governing the payment of fees to solicitors under the Criminal Legal Aid Scheme – that "it would be possible for the Department of Justice, Equality and Law Reform to renegotiate, with the Law Society, the terms of the existing relationship solicitors have with counsel within the 'parity' framework while, at the same time, retaining the 'parity' framework… strik[ing] a reasonable balance between providing the Law Society with a mechanism for pursuing its legitimate entitlement to being paid fees which reflect the work it's members carry out under the Scheme whilst at the same time allowing the State authorities to retain the framework governing the payment of fees under the Scheme."[84]

The ACJRD suggests that one of the priorities of this Strategy is a thorough review of the legal aid scheme with a view to restoring the cuts, following the sentiment of the Buchanan report and involving a consultation with all of the stakeholders. This suggestion is made in lieu of recommending more iron-clad reform, as the ACJRD acknowledges the finding in the 2018 spending review that the costs of substantive reform of the CLA system, for example the introduction of a contribution scheme, may be greater than the extra revenue generated – and that, in the case of contribution schemes, there arises the potential of difficulty as to collecting an individual's contribution, as has been argued in respect of the Scottish scheme. Further, it is more a case of restoring a properly funded legal aid system, lending itself to efficient prosecution and the effective administration of justice, than introducing large-scale reform of unproven efficacy.

The ACJRD notes that the immense demand on the CLA system indicates that it is a vital resource in need of investment, and also that the recommendation of the ACJRD regarding Restorative Justice Schemes and other diversions to prosecution lends itself to reducing the demand on the CLA system, and promoting efficient use of resources.

[84] ibid

10. Victims

The ACJRD notes that while reference is made to victims of crime in the guiding principles of the Background Document, no reference is made to the rights of victims in the priority objectives. The ACJRD submits that any Criminal Justice Strategy must engage with the Victims' Rights Directive and provide for the rights of victims. The ACJRD suggests this should be done at all stages of the Criminal Justice System. At the prevention and diversion stage by educating young persons on the effects of crime on victims, perhaps as part of a program, similar to the Restorative Justice program in that victims of crime engage directly with young persons in the community. At the sentencing stage, victims should be at the centre of any Restorative Justice or community sanctions.

The ACJRD acknowledges the additional protection offered to victims under the Criminal Justice (Victims of Crime) Act 2017, and in particular its commitment to "restorative justice schemes"[85] in Sections 7 and 26, and suggests that such commitment be reflected in the Draft Strategy, and indeed enunciated as a guiding principle, and that practical measures, as aforementioned, be adopted to increase the accessibility of such schemes, such as a national service provision.

Further the ACJRD commends the O'Malley Working Group's *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences*, in particular its endorsement of greater access to legal advice and representation for complainants, and extension of the right to anonymity to defendants in trials for all sexual assault offences,[86] as this reinforces the twin notions of victims' rights as central to the judicial process, and the inadvisability of purely punitive measures.

The ACJRD recognises Minister for Justice Helen McEntee's commitment to developing "an implementation plan in conjunction with NGOs and other stakeholders, to be brought to the cabinet by mid-October,"[87] and stresses the importance of the fulfilment of this pledge.

11. Data Analytics

A robust data analytics structure that provides reliable empirical evidence to support policy making is essential to an effective and responsive criminal justice system. The

[85] Criminal Justice (Victims of Crime) Act 2017, s 7(1)(m).
[86] Irish Legal News, 'O'Malley Review Backs Anonymity for More Defendants and Greater Support for Complainants'
< https://irishlegal.com/article/o-malley-review-backs-anonymity-for-more-defendants-and-greater-support-for-complainants> accessed 11 August 2020.
[87] ibid

ACJRD notes the Department of Justice Data & Research Strategy 2018 – 2020 and welcomes the acknowledgment of the vital importance of data and commitment to improving access to and use of data, information and research leading to more effective policy making.[88] In particular, the ACJRD commends the aim of said Strategy to '[e]stablish a Data Evaluation Research and Analytics Unit working in the Corporate area with partnerships around the Justice and Equality Sector, the Central Statistics Office and other stakeholders, e.g. Open Data, National Data Infrastructure (NDI).'[89] The ACJRD recommends a centralised data hub that collects data from all stakeholders and monitors both the effectiveness of criminal justice policies, for example recidivism rates and prison population and also the practical functioning of the criminal justice system, for example; how often a solicitor attends a garda interview and a breakdown of the reasons for district court adjournments. The collection of this data will inform future policy and highlight areas of inefficiency within the criminal justice system that require reform.

12. Recommendations

1. The ACJRD recommends that the Strategy contains clarity on the following issues:

- **(i)** Who will be responsible for oversight of a more joined-up Criminal Justice System?
- **(ii)** Who will oversee the co-ordination of the manifold agencies involved?
- **(iii)** What are the precise aims of the Criminal Justice Strategy and how will the success of the Strategy be evaluated?

2. The ACJRD recommends that victims, individuals charged with a criminal offence, and criminal defence practitioners be represented as stakeholders in this Strategy going forward.

3. The ACJRD outlines a number of proposals for improving the efficient operation of the current Criminal Justice System:

3.1. The ACJRD recommends that the current caution be amended to remove the words *"will be taken down in writing"* so as to allow for the transcription of Garda interviews by electronic means and that the relevant investment and resources be provided.

3.2. The ACJRD submits that consideration should be given to both reviewing the language used by Gardaí in the explanation of inferences to an accused and, if necessary, amending the legislation to provide for this. Specifically, the ACJRD suggests that the legislation be amended to reflect the interpretation of the Supreme Court in *Wilson* and

[88] Department of Justice & Equality, Data & Research Strategy 2018 – 2020 "Supporting delivery of "A safe, fair and inclusive Ireland." July 2018

[89] Department of Justice and Equality, 'Data & Research Strategy 2018-2020: Supporting Delivery of "A Safe, Fair, and Inclusive Ireland,' July 2018.

A Mc D, so as to avoid potential infringements of an accused's right to silence, and unnecessary complications in admitting such inferences as evidence.

3.3. The ACJRD submits that the standard practice of compelling all persons summonsed or bailed to appear in Court for the start of the Court list is inefficient, leading to overcrowding of courtrooms, excessive demand on the Court Sergeant, frustration of cases, and delays. The ACJRD recommends some of the practices developed to manage the pandemic in the Criminal Justice system should be maintained and developed; such as the listing of shorter matters at the beginning of the list, the adoption of the German practice of staggered times, to ensure that an accused must only be present at the time that his or her case is called, a reduction in the number of remand dates on which accused persons on bail a required to attend court and a greater emphasis on work which can be done administratively without the need for a Court appearance.

3.4 The ACJRD supports a greater, but proportionate, use of technology to ensure that the general interest of society in the prosecution of crime is balanced against the rights of individual citizens, particularly vulnerable victims and accused persons to ensure that we maintain a fair and rational justice system during the pandemic and into the future.

3.5 The ACJRD recommends that an integrated digital development strategy be drawn up for the entire Justice System to ensure efficient use of resources across all areas, agility and sustainability of the system beyond the current crisis. The strategy should be process driven and developed collaboratively with input from all stakeholder organisations.

4. The ACJRD points to statistics recently released by the CSO which indicate that custodial sentences are often ineffectual in terms of reducing offending and recidivism and submits that alternative sentencing options be reviewed, and their accessibility augmented. In particular, the ACJRD advocates for the expansion of Restorative Justice schemes nationwide.

4.1. The ACJRD notes and approves of the commitment of the Probation Service to restorative principles in working to rehabilitate offenders and facilitate the making of reparations on their behalf. The ACJRD further points to the positive impact of such measures on recidivism rates.

4.2. However, the ACJRD notes the use of Restorative Justice within the Probation Service primarily applies to young offenders in Family Conference settings.

4.3. The ACJRD refers to the University of Sheffield's analysis of Restorative Justice Schemes between 2001 and 2008, which indicated reductions in both costs and reoffending as compared to punitive justice.

4.4. The ACJRD recommends the use of Restorative Justice Schemes as a diversionary measure of alternative to sentencing for both young and adult offenders where

appropriate, and also at the sentencing stage to supplement criminal justice proceedings and even mitigate sentences, again where appropriate.

4.5. Here the ACJRD makes note of the vision of the National Commission on Restorative Justice in recommending the nationwide implementation of Restorative Justice in 2009, Council of Europe Recommendation CM/Rec (2018)8 on Restorative Justice, and the cross-European project 'Restorative Justice: Strategies for Change,' in particular the Irish submission.

4.6. The ACJRD recommends the amendment of the Children's Act 2001 in order to make consideration of Restorative Justice Measures by prosecutors a requirement rather than a discretionary measure. This would reflect the position in other European jurisdictions like Belgium and would ideally apply to adult offenders as well as young offenders.

4.7. The ACJRD further recommends the adoption of legislation similar to that of New Zealand with regard to adult offenders having access to Restorative Justice, and points to the New Zealand Ministry of Justice's annual research reports on Restorative Justice, which indicate its favourable effect on recidivism.

4.8. The ACJRD recommends the expansion of the specialist Restorative Justice services in Dublin and Tipperary in order to increase access to Restorative Justice in Ireland.

4.9. The ACJRD refers to the Finnish Mediation Act 2006 and proposes state funding of Restorative Justice/Mediation Schemes in order to give effect to the proposed legislative changes.

4.10. The ACJRD draws attention to the United Nations Standard Minimum Rules for Non-Custodial Measures 1990 and UN Economic and Social Council Resolution 2002/12: Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters[90] along with the ACJRD's submission to the Law Reform Commission on Suspended Sentences, October 2017.

4.11. The ACJRD recognises the work of the Juvenile Diversion Programme, but identifies the potential for a conflict of interest between the JLO in their role of advising a child on juvenile diversion options, and subsequently in their role as an agent of the CJS who is cautioning the child. The ACJRD suggests that, in the context of Government Policy towards a multi-agency approach, consideration should be given to transferring that structure to the Diversion Programme to an independent unit. Such a body would require targeted investment and long-term strategic planning for children who come to the attention of the Criminal Justice System, thereby permanently securing it.

[90] UN Economic and Social Council (ECOSOC), *UN Economic and Social Council Resolution 2002/12: Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, 24 July 2002, E/RES/2002/12, available at: https://www.refworld.org/docid/46c455820.html [accessed 7 August 2020]

5. The ACJRD submits that the current Ad Hoc system of Parole in Ireland is unsatisfactory and calls for the urgent commencement of the Parole Act 2019.

5.1. In this regard, the ACJRD makes note of Article 5(4) of the European Convention on Human Rights, and European Court of Human Rights case law which, though held not to apply to Irish prisoners directly, requires independent, 'court-like' bodies to adjudicate on the release of life-sentence prisoners, and should be considered in the interest of fairness.

6. The ACJRD advocates that the Justice System give consideration to social and mental health issues impacting on crime while also being cognisant of the impact of crime on victims and the wider community. It stresses the need to strengthen community policing to ensure that communities are safe while also promoting a collaborative approach involving other agencies/services and the wider community to ensure that there are opportunities for people to be diverted from crime and to participate in meaningful activity in order to disrupt criminal networks and to increase supervision at all levels through community engagement and robust/enhanced Youth Diversion Programmes and Bail Supervision in conjunction with mental health, addiction and other social supports.

6.1. Here the ACJRD makes reference to a number of surveys indicating the overrepresentation in detention of young people with recognised psychiatric disorders and significant deficits in emotional intelligence and cognitive ability, young people who were either in care or had significant interaction with Tusla prior to detention, young people with substance misuse problems, and young people who were not engaged in education prior to detention. The ACJRD also points out that these statistics are similar within adult prison populations.

6.2. The ACJRD also invokes a study into adverse child experiences suggesting that poverty, homelessness, accommodation instability, and a variety of social adversities negatively impact cognitive development.

6.3. The ACJRD reaffirms its endorsement of the Planet Youth model developed by the Icelandic Centre for Social Research and Analysis (ICSRA) at Reykjavik University as outlined in its Draft Youth Justice Strategy 2020, in terms of investment in a collaborative, community-based approach to reducing the social factors contributing to adolescent substance abuse.

6.4. The ACJRD also points to the integration of operational mental health diversion programs into local courts in jurisdictions such as the UK, the US, Canada, and Australia as an effective alternative to repeated detention of individuals suffering from mental illness or recognised psychiatric disorders.

7. The ACJRD draws attention to its submissions to the Department of Justice and Equality on the Draft Youth Justice Strategy 2020 and submits that the Criminal Justice Strategy must

prioritise and effectively implement a positive and effective youth justice strategy that diverts young people from criminal behaviour and prevents recidivism.

8. The ACJRD notes the Constitutional right to liberty, legislation relating to powers of detention and The Custody Regulations[91].

8.1. ACJRD submits that the provisions contained in the Custody Regulations[92] relating to children (including the presence of a responsible adult) should be extended to include vulnerable adults and that consideration be given to how those people are identified and the definition of vulnerable. At a minimum, the definition should include any adult with an intellectual or learning disability.

8.2. Despite a belief by some that pre-existing provisions of the Irish law are sufficient to give effect to the Directive 2012/13/EU on the right to information in criminal proceedings[93] divergent interpretations have arisen in practice between investigating Gardaí and defence lawyers with respect to disclosure practices at the investigation stages of proceedings, as mirrored in the Garda Code of Practice[94] and The Law Society Guidance for Solicitors Providing Legal Services in Garda Stations[95]. As defence lawyers and academic experts have raised concerns about such practice matters and interpretation, the ACJRD submits that the Department of Justice and Equality establishes a multidisciplinary cross-agency working group to review disclosure practice and Irish jurisprudence to ensure compliance with Ireland's obligations under European Law and in particular Directive 2012/13/EU[96].

8.3. The ACJRD acknowledges Ireland's right to opt in or out of the EU Directive on the Right of Access to a Lawyer, and indeed all EU Directives in the Justice and Home Affairs Division, but posits that reconsideration of the current policy in this area may be appropriate. In particular, the ACJRD points to the advice of the working group established by the Department of Justice, in the wake of *Salduz*, to advise on a system for the provision of legal representation during Garda interviews, which made several practical recommendations on the implementation of said Directive.

8.4. The ACJRD suggests that a "solicitors' room", similar to that provided in Courts, should be provided for solicitors attending at Garda stations who are frequently there for long periods and, in practice, find themselves waiting in their cars, sometimes late at night, between interviews.

[91] ibid at 4.
[92] ibid.
[93] ibid at 47.
[94] An Garda Siochana, 'Code of Practice on Access to a Solicitor by Persons in Garda Custody' (An Garda Siochana 2015), 5
[95] Law Society of Ireland 2015
[96] ibid.

8.5 The ACJRD recommends that the C72 form should be amended to include the suspect's right to silence the possibility of challenging their arrest, the amount of time they can be detained prior to being brought before a judge or information on interpretation and translation and should be written in language that is easily understandable.

8.6 As tensions have arisen between Gardaí and Defence Solicitor practitioners due to a lack of clarity as is evidenced in their respective Code and Guidance documentation it is suggested that there is a need for greater clarity in relation to the role of the solicitor at the investigative stage of criminal proceeding. The ACJRD recommends consideration be given to drafting legislation codifying the right of access to a lawyer in garda stations and the extent of this right is defined as legal 'advice' or legal 'assistance'. In this regard the ACJRD notes the findings of the Department of Justice Working Group to Advise on a System Providing for the Presence of a Legal Representative During Garda Interviews Report July 2013[97]

8.7. The ACJRD further calls for greater clarity and possibly, regulation of the solicitor's role in the Garda station for interview with suspects and suggests that such regulation should codify the seven functions identified by Conway and Daly, and also the main areas identified as requiring regulation or reform.

8.8 The ACJRD recommends the Department of Justice and Equality includes in their strategy a commitment to facilitating formal collaborative training for members of An Garda Síochána and criminal defence solicitors. Consideration should also be given to the training of Judges in this area, who may have to rule on issues arising from Garda detentions during criminal trials.

9. The ACJRD calls for sustained investment in the Criminal Legal Aid system, and consideration of alternatives to prosecution in order to reduce demand on said system and the courts, and to contribute to a more efficient Criminal Justice System overall.

9.1 In this vein, the ACJRD makes note of the cuts to legal aid and solicitors' fees following the banking crisis and during the 'austerity years,' and of the fact that the latter was never restored. The ACJRD further references the Buchanan Final Report of 2002, many of the recommendations of which were never implemented, but the sentiment of which should be reflected in any Criminal Justice Strategy supporting efficient prosecution and the effective administration of justice.

10. The ACJRD submits that any Criminal Justice Strategy must engage with the Victims' Rights Directive and provide for the rights of victims. The ACJRD suggests this should be done at all stages of the Criminal Justice System.

[97] ibid at 70

10.1. The ACJRD commends the O'Malley Working Group's *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences*, and recognises Minister for Justice Helen McEntee's commitment to developing an implementation plan for its recommendations in conjunction with NGOs and other stakeholders, to be brought to the cabinet by mid-October. The ACJRD further stresses the importance of the fulfilment of this pledge.

11. The ACJRD recommends the Department of Justice extends the Data & Research Strategy 2018 – 2020 and includes in the strategy a commitment to a robust data analytics structure that will provide the basis for criminal justice policy and reform.

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