

Criminal Justice Policy - Review of Policy Options for Prison and Penal Reform 2022-2024 Summary Paper.

Executive Summary

Introduction

The Programme for Government 2020: 'Our Shared future' contains a broad range of policies and proposals that represent a coherent approach to enhancing and sustaining a more just and safe society. In September 2020, the Department of Justice established a working group including the Head of Criminal Justice Policy, the Director-General of the Irish Prison Service and the Director of the Probation Service to take forward the Government's commitment to review policy options for prison and penal reform. The review considered commitments and ongoing developments across the justice sector and beyond, including those outlined in a number of relevant strategies¹.

Guiding Principles

The review identifies a number of guiding principles as underpinning penal policy and practice which should guide priorities going forward. These guiding principles include that:

- There should be a sparing approach to the use of imprisonment. Acknowledging judicial discretion, imprisonment should be used as a sanction of last resort for those who commit the most serious of offences, typically those which justify a sentence of 12 months or longer, or individuals who the Courts determine cannot be managed safely in the community.
- All criminal sanctions should uphold human rights and respect the dignity of those affected – the victim and those affected by harm, offenders and wider society.
- Punishment within criminal sanctions should, as far as reasonably feasible, be subject to the principle of proportionality and assist in the offenders' rehabilitation and reintegration.
- Where possible, potential for the offender to make good and repair the harm caused by offending should be facilitated and realised.
- A range of relevant services must be available to support rehabilitation and reintegration of offenders, as citizens. Collaboration, co-operation and co-ordination across the justice sector, as well as the involvement of the non-criminal justice sector in addressing offending and assisting offenders in maintaining crime free lifestyles is key.
- Community sanctions, operating both with and without supervision, provide an effective response to offending and their value, at all stages in the system, and ought to be fully recognised, while also recognising the value of victims in the Criminal Justice system by increasing supports and services in compliance with the EU Victims' Rights Directive.
- Accountability for decisions at all stages of practice.
- Penal policy and practice that is evidence informed and data driven is necessary for the support and confidence of victims, offenders and the wider community.

¹ These included; Youth Justice Strategy 2021 - 2027, the Probation Service Strategy 2018-2020, the Irish Prison Service Strategic Plan 2019-2022, the Joint Irish Prison Service and Probation Service Strategic Plan 2018-2020, the Joint Action Plan on the Management of Offenders 2019-2021 and the Social Enterprise and Employment Strategy 2021 – 2023. The on-going work in relation to the Criminal Justice Sectoral Strategy and work on developing a Community Safety Policy

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These principles should inform all aspects of penal policy from diversion through to sentencing, serving a sanction, rehabilitation and exit from sanction.

Policy Context

The review took into consideration the work of the Penal Policy Review Group which published a Strategic Review of Penal Policy in 2014, as well as the work of the Implementation Oversight Group tasked with overseeing implementation of the 43 recommendations set out in the 2014 review². It also looked at the 2018 report of the Joint Oireachtas Committee on Penal Reform and Sentencing and had regard to the ongoing work of the Inter-Agency Group for Co-operation for a Fairer and Safer Ireland.

Review of Policy Options for Prison and Penal Reform

Policy Objectives

The review asserts that while punishment for those who commit crime is a central element of our justice system, the rehabilitation and reintegration of offenders is at the core of our penal system. Criminal sanctions are recognised as representing a viable punishment for crimes committed against individuals and society with sanctions imposed, whether custodial or community based.

That said, the review acknowledges that punishment alone does not prevent offending or make everyone safer and that interventions and services to promote better social behaviour, rehabilitation and end offending are necessary to drive and sustain real change.

Non-custodial sanctions

Non-custodial sanctions particularly those that are supervised in the community are noted as playing a significant role in addressing criminality, reducing reoffending and providing protection to the public. Holding the individual accountable, they provide a path back to social inclusion and a pro-social lifestyle. This in turn reduces the damage to victims and the families of offenders and also allows for restorative justice interventions.

Community sanctions and measures are defined in the European Rules on Community Sanctions as ‘sanctions and measures which maintain suspects or offenders in the community and involve some restrictions on their liberty through the imposition of conditions and/ or obligations’.

Prison as a Sanction

With the dual role of removing those who cannot be managed safely in the community and providing rehabilitative interventions, the review notes research and evidence that prison can contribute to reoffending. While necessary as a sanction of last resort, less expensive, non-incarceration approaches should be explored. In considering this, the cost of staffed prison spaces are considered as is the potential for the rising cost of these provisions and of alternative measures. The relatively low rate of imprisonment (74.4 per 100,000) in Ireland by international standards is also noted. Of the 47 countries surveyed, only 16 countries have a lower imprisonment rate. The review emphasises that the concept of prison as a last resort should not to be misunderstood as not holding people to account for the harm they

² This includes the 2019 report of the Implementation Oversight Group which proposed a reprioritisation and reassessment of the recommendations in light of developments occurring over the 6 year period since the review was published.

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have done to individuals and communities. In this regard, the review notes that it is important to ensure the judiciary retain the discretion to hand down proportionate sentences in cases of serious crimes, and to recognise that prisons remain an appropriate sanction in such instances.

The impact of Covid-19 on the Criminal Justice System

The review considers the impact of the pandemic on volumes within the Criminal Justice System, including rising case numbers, the increasing numbers in prison and on probation supervision.

Short Prison Sentences

The review notes that very short sentences have a negative impact on the lives of the individuals involved, as well as the impact on the administrative overheads of running a prison and the orderly management of prison services - including access to rehabilitative interventions. Noting that the arguments for moving away from the use of short sentences include wider policy and rehabilitation concerns, and not just the potential to reduce crowding in prisons, the review notes that finding alternatives to short prison sentences, particularly those of less than three months, is a more effective pathway to explore. Core to the review is an approach that seeks to reduce the number of short term sentences and provide the Courts with effective and sustainable alternatives.

Alternative Sanctions and Measures

The review acknowledges that in recent years there has been a growing understanding of how social, educational, health and other policies can contribute to the prevention of crime and reoffending, and how the diversion of people at the earliest possible stage has immense value in supporting a pro-social lifestyle. The impact of restorative justice is also considered and it is noted that it is now widely accepted as being compatible with the traditional criminal justice systems of both common and civil law jurisdictions.

The Future

The review looks at the Programme for Government commitment to work with all criminal justice agencies to build capacity to deliver restorative justice safely and effectively. It highlights that an appropriate service delivery model is required to promote, support and oversee high quality restorative justice practice at all stages of the criminal justice process, including prevention and diversion. Consideration is also given to the European Rules on Community Sanctions and Measures, and the European Prison Rules.

To reduce offending and reoffending and better support and consider victims, families and communities the review identifies measures to:

- Expand community based sanctions that reflect the needs of Ireland's diverse society;
- Drive rehabilitative interventions that sustain desistance from offending, reduce the reliance on prison as a sanction and mitigate overcrowding in prisons;
- Embed collaborative, innovative approaches to the complex causes of offending at all stages of the criminal justice system, and
- Drive greater availability and use of research, evaluation and data.

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How this will be delivered

Central to the overall approach is the establishment of appropriate mechanisms for raising awareness and understanding of the complex, social context of offending behaviour and that this work is more than a question of resource allocation.

The review provides a policy framework to co-design and implement effective, evidence based responses such as education and training, health services to address mental health and addiction issues and the provision of accommodation including the use of step down facilities to support and drive the safe reintegration of offenders into communities.

It also acknowledges that this work requires a cross sectoral approach that addresses the actions in a co-ordinated way and that there are mechanisms and structures in place in the Criminal Justice Policy function of the Department of Justice to ensure that all related actions across the various strategies are being viewed holistically and to avoid any duplication of oversight.

It sets out an action plan for prison and penal reform for the period 2022 – 2024 including timeframes and responsibility for delivery. It is proposed that this is incorporated into relevant Justice Action Plans during this period and into the Implementation Oversight Group’s regular reporting on progress to the Minister.

Priority Policy Interventions

Actions 1 – 6 are priority policy interventions identified to reduce reoffending, support desistance from offending, avoid overcrowding in prisons, and reduce reliance on custodial sentences as the primary criminal sanction except where determined necessary and proportionate to the suffering of the victim, particularly in relation to serious crimes which may result in life sentences. These form the substance of the review and are set out in the Priority Action Plan for 2022 – 2024.

The review notes that many other complementary policy approaches contained in other related strategies and action plans are of direct relevance to the process of penal reform and are therefore referenced. These are set out in a separate Action Plan for 2022-2024.

Actions 7 – 11 focus on collaborative interagency working, reviews of current legislation and also the Programme for Government commitment in relation to restorative justice approaches. **Actions 12 – 17** are focused on meeting international obligations and improving standards in our penal system. **Actions 18 – 21** are focused on improving outcomes for young people who offend.

A brief overview of the 5 Priority Actions is set out here with actions 6 through 20 listed below. Further detail of what is recommended under actions 6 through 20 is contained in Appendix 1.

Actions

Priority Action 1 – To consider the incorporation of prison as a sanction of last resort in statute, in relation to people who do not pose a risk of serious harm, to reduce reoffending and overcrowding in prisons

In examining this option the review looked at stakeholder views (which were in accord that prisons should be a measure of last resort) and looked at international and national research

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on reoffending and the impact of sanctions and supports. The review recognises the potential for increased use of community sanctions, the benefit of supervision and access to supports and services in the community, and the benefit of employment opportunities. The key findings of research undertaken by Prof. O'Donnell concluded that suspended sentences or community service, planned and structured early parole and perceptions of fairness can all contribute to reducing reoffending rates. In addition to this, the review looked at increases in prison numbers, including the increase in numbers held on remand and being held for longer periods. This includes increased numbers of female committals and the continued use of short committals for periods of 12 months or less.

Acknowledging the comprehensive range of priorities and ambitious plans for delivery of initiatives already in train, which represent a coherent approach to tackling reoffending, (including the work to deliver on initiatives such as the Youth Justice Strategy, the Task Force on Mental Health and Working to Change) the review group recommends that in order to achieve the objectives of this priority action, policy consideration should be given to -

- establishing the principle of prison as a sanction of last resort in statute
- examination of the presumption against the imposition of short custodial sentences for individuals who do not pose a risk of harm to the public and of options to promote targeted based alternatives to imprisonment which should include a policy review of the Criminal Justice (Community Sanctions) Bill 2014
- Commission research on the impact of the Criminal Justice (Community Service) (Amendment) Act 2011. The research should include a focus on the custodial sentences of less than 12 months including the incidence of females on remand.
- Develop a coordinated, effective effort to reduce the number of persons, who do not pose a serious risk of harm, being committed to prison for sentences under 12 months.
- Examine matters surrounding remand, its impact, and alternative options.

Priority Action 2 – To develop and expand the range of community based sanctions including alternatives to imprisonment to reduce re-offending and overcrowding in prisons

Non-custodial penalties, particularly supervised community sanctions, play a significant and vital role in addressing criminality, reducing reoffending and providing a degree of protection to the public. This is supported by the Central Statistics Office (CSO) statistics on reoffending.

Use of community orders are also seen as offering economic savings. The average cost of an “available, staffed prison space” in 2020 was €80,445. Probation Supervision in 200 is estimated to cost approximately €5,712 per year.

The review notes that to be in line with the ‘European Rules on community sanctions and measures’, effective community sanctions should promote social inclusion. There should also be a wide range of community based sanctions available, both for pre and post-trial situations and they should be proportionate and available to all offenders without direct or indirect discrimination.

While the Criminal Justice (Community Service)(Amendment) Act 2011 requires a Court to consider community sanctions as an alternative for sentences of less than 12 months, the use of short sentences remains prevalent. In particular there has been an increase in female

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committals with the vast majority sentenced to 12 months or less. These prisoners generally pose a low risk to society but have high levels of need in terms of addiction with a number having previously been homeless. Numbers subject to post-release supervision requirements under the Probation Service are low.

The use of supervised bail, the need to improve and strengthen the Probation Service engagement with mainstream primary care and forensic community mental health service providers (including through the development of joined up strategies) and the promotion of the opportunity to have supervision measures recognised in another EU Member State were also considered.

Based on the above, the group noted the complex personal and social issues that can lead to offending and the need for a whole of Government approach to address this. As such the review group recommends that to deliver on this priority action the following be explored and progressed -

- Further develop and expand the range of community sanctions including the development of diversity sensitive approaches to offenders including the Traveller community and other marginalised groups.
- Explore the efficacy and value of a Bail Supervision Scheme for female, young adult and other marginalised persons
- Build on the joint Prison Service/Probation Service strategy “An effective Response to Women Who Offend” and incorporate the recently developed “Best Practice Approach”
- Explore the feasibility of providing a structured rehabilitative response for women
- Consider the introduction of weekend non-custodial sentences
- Engage with CSO on further research to enhance understanding of the impact on reoffending of homelessness, addiction and/or mental health challenges and the availability of social and familial supports.
- Promote awareness and knowledge of the mutual recognition and possibility of transfer of community sanctions and measures between jurisdictions in the EU.

Priority Action 3 – To take forward the implementation plan of the taskforce established to consider the mental health and addiction challenges of those imprisoned and primary care support on release

The Programme for Government committed to establishing a taskforce to consider the mental health and addiction challenges of those imprisoned, and the required primary care support on release. The taskforce has been established and an interim report was produced in Q4 2021 with a high level implementation plan to relevant Ministers expected in Q3 2022.

In light of the above the review group had no further recommendations to make to deliver on this priority action except to propose a monitoring role on the progress made on the eventual implementation plan.

Priority Action 4 – To ensure that all criminal justice policy decisions are pre-assessed to determine, as far as possible, their impact across the criminal justice sector

This was a recommendation of the Penal Policy Review Group in 2014. While the review acknowledges that some work has been completed on this in the intervening years, the review group is of the view that the development of a Criminal Justice Sectoral Strategy for a coherent approach to the criminal justice system provides the ideal opportunity to widen

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the scope of the work undertaken to all aspects of the criminal justice system. To implement this, protocols will be developed to ensure all future policy decisions are pre-assessed to determine impacts on caseload and capacity at each stage of the system. The review group notes that this will be developed within the lifetime of the Criminal Justice Sectoral Strategy which runs from 2022 to 2024.

Priority Action 5 – To establish a Penal Policy Consultative Council

The establishment of a Consultative Council was one of the Penal Policy Reform Group's 2014 recommendations. This was recommended so that future penal policy would benefit from additional oversight and consultation could be more consistent, more focused on rehabilitation and reintegration of offenders and on reducing imprisonment. The Programme for Government 2020 includes a commitment to "Establish a Penal Policy Consultative Council to advise on penal policy."

In looking at this the review group acknowledged the value of progressive and aligned penal policy and noted that a paper setting out recommendations for terms of reference and the operation of the Council have been developed. Based on the above the review group recommends that the Council's role should be to offer independent advice to the Minister, be non-political in nature and not act unilaterally. It is also proposed an independent Chair of the Council should be able to initiate, with the agreement of the Minister, the Council's consideration of additional topics and themes that it believes are central to effective penal policy and outcomes. It is envisaged the Council will include representatives from academia, the legal profession, forensic science, victim's groups and the IPRT. A cross-border representative is also proposed.

Priority Action 6 – To introduce judicial discretion to set minimum tariffs for life sentences and examine the effectiveness of use of mandatory minimum sentences for certain crimes

In setting out certain key principles in relation to penal reform and the use of prison as a sanction of last resort, the review recognises that prison should be used as a sanction for those who commit serious crimes, and that particularly heinous offences which cause considerable harm and distress to victims, up to and including murder, should be dealt with in a proportionate manner reflecting the impact on victims and their family.

There are currently a number of legislative enactments which seek to address such concerns by obliging the Courts to sentence offenders to mandatory minimum periods of imprisonment. In some instances the judiciary can take account of exceptional circumstances and lower the sentence below the mandatory minimum, while other enactments provide no such scope, such as that of the life sentence for murder. Other enactments namely capital murder and treason, provide a minimum tariff, or period of imprisonment that must be served without chance of parole.

Under the Judicial Council Act 2019, the Minister for Justice is obliged to complete a review of enactments which provide for mandatory minimum sentences, with a view to determining if these enactments remain appropriate, and to lay a report of this review before the Houses of the Oireachtas in December 2022. This review has been commenced with a view to meeting this statutory obligation, and its report will have an impact on the use of such sentences, including in relation to murder, going forward.

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Separately, but related to the mandatory minimum sentences, the Department of Justice's Justice Plan 2022 contains a commitment to bring forward proposals to make changes to the law relating to life sentences.

At present, under the Parole Act 2019, a prisoner sentenced to life is eligible to go before the Parole Board having served 12 years. A review of life sentences may consider providing the judiciary, at the time of sentencing, having considered any aggravating and mitigating factors, with the discretion to set a minimum tariff for individuals to remain in prison for a specific period of time during which they will be ineligible for parole. This could increase the period a person must serve before they can be considered for parole from 12 years to a longer period of time, such as 20 or 30 years, at the discretion of the judiciary.

While a form of precedent has been set for this in relation to capital murder and treason, which both place a minimum tariff of forty years, this review will consider other life sentences, including those where there is not a mandatory life sentence but the maximum penalty applicable is life. This includes offences such as rape, assault causing serious harm and aggravated burglary.

As this work progresses, the Minister will be consulting with the Attorney General and other Government colleagues and the recommendation from the Law Reform Commission's 2013 report on Mandatory Sentences will inform this process.

Action 7 – To review the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 to broaden the range of convictions that are considered spent

Action 8 – Work with all criminal justice agencies to build capacity to deliver restorative justice safely and effectively

Action 9 – To review remission and temporary release to improve rehabilitation and reduce reoffending and overcrowding in prisons

Action 10 – To review the impact of the Fines (Payment and Recovery) Act 2014 in particular with regard to the impact of short custodial sentences

Action 11 – To improve inter-agency working through the development and implementation of a Criminal Justice Sectoral Strategy and Community Safety Policy.

Action 12 – Take a comprehensive approach to the development of the Irish Prison Service's next Capital Strategy, ensuring the availability of modern detention facilities with adequate capacity

Action 13 – To review the Prison Rules 2007 in light of recent changes to the European Prison Rules

Action 14 – To review the existing functions, powers, appointment procedures and reporting processes for prison visiting committees

Action 15 – Post - implementation of the Parole Act 2019, examine the introduction of the Regulations necessary to determine eligibility for parole, including those serving long-term fixed sentences, under the new Statutory Board

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Action 16 – Ratify the Optional Protocol to the UN Convention Against Torture

Action 17 – Review the policy of holding immigration detainees in prisons

Action 18 – Implement a new Youth Justice Strategy emphasising prevention, early intervention and inter-agency collaboration

Action 19 – Introduce a diversion approach for young adults of 18 to 24 years old, for certain offences, building on the experience of the Youth Diversion Programme, the adult caution and the pilot Health Diversion Programme in relation to possession of drugs for personal use

Action 20 – Create the offence of grooming children to commit crimes

Action 21 – Extend the pilot schemes of the Youth Joint Agency Response to Crime to more areas to target prolific repeat and vulnerable offenders