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Association of Criminal Justice Research and Development

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The Association of Criminal Justice Research and Development (ACJRD) is an independent organisation that exists to promote reform, development and effective operation of the criminal justice system.

ALTERNATIVES TO CUSTODY

Executive Summary:

The aim of this research paper is to illustrate current alternatives to custody within the criminal justice system in Ireland for men, women and juveniles. This paper begins with established and current legislative alternatives to custody used throughout the court system from a Probation Order to the recent Community Return Scheme and discusses the consequences of the Fines Amendment Bill 2012.

Restorative justice, its principles and how it is implemented in Ireland are discussed. Two adult programs in Tallaght and Nenagh District Courts are outlined, as is the Garda diversion programme for juveniles and the recent initiative to use Restorative Justice principles within the Irish Prison Service, in Wheatfield Prison and the Dochas Centre respectively.

Mental health and alternatives to custody in Ireland are discussed. The paper outlines the high levels of mental illness amongst prisoners in Ireland both in adult prisoners and juveniles who have been detained in detention centres. The paper outlines recommendations for reform, including the need for more than one “designated centre”, currently; the only centre is the Central Mental Hospital in Dublin. The Irish system is also compared to that of England and Wales and recommendations have been illustrated by both Amnesty International and the ACJRD.

Recommendations:

- The use of imprisonment should be removed as an option in cases relating to debt and non-payment of court ordered fines.
- Increase the use of Restorative Justice principles for adult offenders in the Court system.
- Increase the education of both legal practitioners and the judiciary on the implementation and principles of Restorative Justice.
- Develop secondary “designated centres” for mentally ill offenders, as currently, the only centre is the Central Mental Hospital in Dublin.
- Implement a national network of high support residences for mentally ill patients.

Introduction

The average number of prisoners in custody in Ireland has increased in the last 5 years, from 3,321 during 2007 to 4,389 during 2011, an increase of over 32%. The total number of committals to prison has also risen sharply during the same period, from 11,934 in 2007 to 17,318 in 2011 – an increase of over 45%¹. For example, the numbers of prisoners in 2011 serving sentences of less than 12 months² imprisonment was 526³. Furthermore, the number of committals to prison as a consequence of the non-payment of a court ordered fine during 2011 increased by 12.4% on the 2010 figure, i.e., from 6,683 in 2010 to 7,514 in 2011⁴. Sentencing a person to prison for such a short period of time and for non-payment of fine increases an already over populated Prison Service. Given that the majority of non-payment of fines and sentences for less than one year are very minor and as O'Malley⁵ notes *“the speed with which short term prisoners progress through the system, especially when further accelerated by temporary release, raises serious questions about the wisdom of imposing very short custodial sentences in the first place”*. O'Malley gives an example of an assessment of a Scottish Working group⁶ on short term prison sentences and ranked them in accordance with their capacity to achieve conventional penal goals. Short sentences were ranked high as punishment but low when it came to incapacitation, deterrence, rehabilitation and reparation. FLAC⁷ conducted a report into the Debtor's experience of Instalment and Committal Orders in 2009⁸ and highlighted that *“in many cases, those imprisoned because of debt were simply unable as opposed to unwilling to meet their financial obligations”*⁹. The report suggested a number of recommendations, notably the removal of imprisonment as an option in debt cases and improving access to information for debtors in legal proceedings. The introduction of the Fines Act 2010, and the proposed Fines Amendment Bill 2012, can be viewed as a positive step to reduce imprisonment numbers for non-payment of fines. Once the Bill is enacted, every person on whom a fine is imposed will be able to opt to pay the fine by instalments over 12 months. Where a person fails to pay a fine in full, including by instalments, he or she will be brought back before the court where depending on their circumstances, the court will make either an attachment of earnings order (directing the person's employer to deduct the fine from the person's earnings), a recovery order (appointing a receiver to recover assets to the value of the fine) or a community service order¹⁰.

¹ Irish Prison Service, Three Year Strategic Plan 2012-2015 pg11

² IPS Annual Report 2011, pg22

³ Under 3 months 43, 3-6 months 142, 6-12 months 341

⁴ IPS Annual Report 2011, pg28

⁵ O'Malley (2011) Sentencing, Towards a Coherent System, Round Hall, pg200

⁶ Short Term Prison Sentences: Report to the Criminal Justice Forum (Edinburgh: Scottish Executive)

⁷ Free Legal Aid Centre

⁸ “To No One's Credit? A Study of the Debtor's experience of Instalment and Committal Orders in the Irish Legal System

⁹ *Ibid* at 11

¹⁰ Department of Justice and Equality, cited on www.justice.ie

There are a number of alternatives to custody which can reduce the prisoner population, rehabilitate an offender through working and paying back his community and be cost effective for the State. Sentencing an offender to a number of alternatives to custody, which will be discussed below, reduces prison numbers. The average cost of an available, staffed prison space during the calendar year 2011 was €65,359¹¹ yet imposing, for example, a community order is 2,200 euro¹² or imposing a probation order is 5000 euro¹³.

Established Alternatives to Custody:

Probation Order:

An offender may be made the subject of a Probation Order under the Probation of Offenders Act 1907 for a period of up to three years. The purpose of the order is to rehabilitate the offender, protect the public and prevent re-offending by providing supervision, community service, offending behaviour programs and specialist support services to both adult and young offenders.¹⁴ There can be specific requirements laid down by the court such as residence requirements, treatment conditions and reporting requirements¹⁵. The order is not applicable to drink driving, revenue related crimes or particular offences under the Road Traffic Act 1994.

Compensation Order:

A compensation order requires the offender to recompense the victim in acknowledgement of the harm caused by the offence. The compensation order may be used in a number of ways including being imposed of itself, in combination with a fine, as part of a conditional discharge, as a condition of a suspended sentence or as part of a sentence adjournment.¹⁶

Dismissal and Conditional Discharge:

An offender may be dismissed under the amended Probation of Offenders Act 1907 where s/he is charged and the court thinks the charge is proved, but either the trivial nature of the offence or personal or extenuating circumstances deem a dismissal to be the most appropriate response¹⁷. A number of conditions may be attached to a conditional discharge including supervision, payment of compensation to the victim, residency and/or treatment requirements. Under the Act a

¹¹ IPS Annual Report 2011, pg41

¹² Probation Service Annual Report 2011, pg27

¹³ *Ibid*

¹⁴ www.probation.ie

¹⁵ Alternatives to Custody Dr. Mairead Seymour, commissioned by Business in the Community Ireland and produced in partnership with IPRT in 2006 , pg7

¹⁶ *Ibid*

¹⁷ Section 1(1)

dismissal or discharge can be granted in the District Court without conviction, however, in the higher courts the option of dismissing the charge does not exist¹⁸.

Fines:

A majority of offences are punishable by a fine. The *Fines Act 2010* was signed into law on 2nd June 2010. Section 15, which allows for the payment by instalment of a fine over a 12-month period (and, exceptionally, over a 2 year period) has not yet been commenced. The Courts Service ICT system has been cited as the reason¹⁹. In issuing a fine, consideration of the offender's means and proportionality regarding the gravity of the offence are factors in deciding the amount of the fine. Fines are generally payable within 14 days of the order being made. If an offender does not pay within the stipulated period a warrant is issued automatically by the court and executed by the Gardaí for committal to prison for a period up to 90 days²⁰.

Default periods in prison for not paying fines[1]	
Amount of Fine	Imprisonment in default
Less than €64	5 days
Between €64 and €318	15 days
Between €318 and €635	45 days
Greater than €635	90 days

Community Service Order:

The Community Service Order (CSO) was introduced under the Criminal Justice (Community Service) Act 1983 and subsequently amended in the *Criminal Justice (Community Service)(Amendment)(No. 2) Act 2011*, and requires the courts to consider imposing a community service order for those offences where it would otherwise be appropriate to sentence the offender to imprisonment for a period of up to twelve months. The 2011 Act came into force

¹⁸ Alternatives to Custody Dr. Mairead Seymour, commissioned by Business in the Community Ireland and produced in partnership with IPRT in 2006 , pg7

¹⁹ IPRT Media Publication 15/08/2012 cited at iprt.ie/contents/2403

²⁰ Alternatives to Custody Dr. Mairead Seymour, commissioned by Business in the Community Ireland and produced in partnership with IPRT in 2006 ,pg7

on 1st October 2011²¹. It is intended as an alternative to custody for offenders aged 16 years and over, where in the opinion of the court the offence merits a custodial sentence. A number of pre-requisites must be met before an order is made. The court must find that the offender would otherwise have received a term of imprisonment. An offender is required to perform unpaid work for a specified number of hours – the minimum is 40 hours and the maximum 240 hours. The aim of Community Service is to get offenders to pay back to the community in a positive way for the damage caused by offending²². There was a 48% increase in the number of Community Service Orders made in 2011, with over 420,000 hours of meaningful community work being completed in lieu of custodial sentences. 1,035 years would otherwise have been served in prison²³.

Suspended Sentence:

There is no statutory basis for the suspended sentence in Irish law. The sentence involves the imposition of a custodial sentence with suspension on condition that the offender does not re-offend within a specified period. A number of requirements including treatment, exclusion or curfew may be attached to the sentence²⁴

Drug Treatment Court:

The Drug Treatment Court was established to be an alternative to custody for offenders who were addicted to substances and whose crimes were as a direct result of their addiction. This recent innovation provides a multi-agency programme of rehabilitation, education and training for offenders under the control of the court to address their offending behaviour and drug dependency. The Drug treatment court was originally piloted only for people living in addresses in Dublin 1, 3 and 7 but has expanded to include “(a) people residing in all areas of Dublin county north of the river Liffey and (b) people receiving treatment in the Castle Street Drug Treatment Centre which provides services to people with addresses in Dublin 2, 4, 6 and 8”²⁵.

Community Return Scheme:

The Community Return scheme was introduced under the recommendations of the Thornton Hall Project Review Group. It is an incentivized scheme where offenders who pose no risk to society are released on temporary release to complete supervised community service. This scheme, incorporated into the IPS Strategic Plan 2012-2014 will release 400 prisoners each year for the three consecutive years outlined.

²¹ IPRT Media Publication 15/08/2012 cited at iprt.ie/contents/2403

²² Probation.ie

²³ IPRT Media Publication 15/08/2012 cited at iprt.ie/contents/2403

²⁴ Alternatives to Custody Dr. Mairead Seymour, commissioned by Business in the Community Ireland and produced in partnership with IPRT in 2006, pg8

²⁵ Courts.ie Press Release 20/07/2011

Restorative Justice:

Restorative Justice is used for both adult and juvenile offenders as an alternative to custody. This report analyses the adult RJ scheme which is pilot run in two District Court settings, the Garda Diversion Programme for juveniles and also the recent pilot project in Wheatfield Prison in Dublin which has incorporated RJ techniques to resolve issues of misconduct within the prison.

The National Commission on RJ established in 2007 defines RJ as “ a victim sensitive response to criminal offending, which through engagement with those affected by crime, aims to make amends for the harm that has been caused to victims and communities and which facilitates offender rehabilitation into society”²⁶ . Daly²⁷ notes that RJ encompasses a variety of practices at different stages of the criminal process, including *diversion* from court prosecution, actions taken *in parallel* with court decisions and meetings between victims and offenders *at any stage* of the criminal process. RJ principles currently operate in both Nenagh and Tallaght District Courts. One of the principal aims of RJ is to empower victims to face the offender, highlight the hurt and injury the offender’s behaviour has caused and seek answers. This is in contrast to the general criminal justice system, where it is usual for the victim to have little or no role in the process²⁸ , as Christie²⁹ famously exclaimed that the modern criminal justice system had “stolen” the conflict from victims. The process may include an apology, which many victims greatly value, or it may allow the victim to receive some form of material and psychological reparation. A recent English study by Wright³⁰ found that 89% of the victims who participated in a RJ programme received an apology, compared to only 19% of the victims whose cases were dealt with in Court. Victims whose cases were dealt with under the RJ scheme were also found to be much more likely to feel that the apology was sincere³¹. A study by McCarthy³² in the Irish Probation Journal on legal professionals’ understandings and concepts of RJ highlighted that it is still not fully entrenched as a real alternative to custody and the principles of Restorative Justice are not fully understood and more importantly not respected.

²⁶ Department of Justice Equality and Law Reform Commission 2009 *National Commission on Restorative Justice Final Report*, Dublin: DJELR

²⁷ Daly, K (2002) “Restorative Justice: the real story” *Punishment and Society*, Vol 4(1) 55-79

²⁸ McCarthy (2011) *Perceptions of Restorative Justice in Ireland: The Challenges of the way forward*, Irish Probation Journal 2011 , pg189

²⁹ Christie, N (1977) “Conflicts as property” ,*British Journal of Criminology*, 17(1): 1-15

³⁰ Wright, M. (2010), *Towards a Restorative Society: A Problem Solving Response to Harm*, London: Make Justice Work cited in McCarthy (2011) *Perceptions of Restorative Justice in Ireland: The Challenges of the way forward*, Irish Probation Journal

³¹ *Ibid* at pg27

³² *Perceptions of Restorative Justice in Ireland: The Challenges of the way forward*, Irish Probation Journal 2011

Nenagh Community Reparation Project

Established in 1999, the programme deals with drug and alcohol abuse, assaults, criminal damage and neighbourhood disputes which resulted in a violent altercation. An evaluation was carried out in 2004, and had very positive feedback, 84% who had attended as first time offenders had not reoffended³³. McCarthy found that of the 105 cases dealt with by the Nenagh Community Reparation Programme between 1999 and 2007, contracts of reparation were completed in 86% of cases. Only one in four of these offenders were found to have reoffended in a review of PULSE records by Gardaí in 2009³⁴.

RJ Tallaght District Court

RJ in Tallaght operates within two models, Victim-Offender mediation programme and the Reparation Panel. In the period from 2004 to 2007, RJS received 51 Victim-Offender Mediation (VOM) referrals, of which two-thirds were progressed to a substantial level of engagement, resulting mostly in an agreed outcome³⁵. The RJS reparation panel dealt with 89 cases in 2007, with 75 processed to completion. Two-thirds of offenders were between 18 and 25 years of age, and alcohol consumption was a notable factor in many cases. Over 95% of those referred were male.

RJ in Wheatfield Prison (Pilot)

As part of the Irish Prison Service strategic plan 2012-2015, a Restorative Justice pilot programme was introduced into Wheatfield, closed medium security prison and The Dochas Centre, female closed medium security prison, respectively. The programme was launched in April 2012. There was a multi-disciplinary approach incorporating the Governor, Assistant Governor, psychology department, the probation service and the chaplaincy. Although, it is not a direct “alternative to custody”, the programme helps offenders learn conflict awareness/resolution and may involve community reparation. The pilot was set up in 3 wings in Wheatfield, 5G, 10F and 10G, each housing 30 inmates respectively. When the offenders are released, they will be equipped with different mechanisms on how to resolve conflict through the everyday use of RJ.

³³ McCarthy (2011) Perceptions of Restorative Justice in Ireland: The Challenges of the way forward, Irish Probation Journal, pg195

³⁴ Department of Justice, Equality and Law Reform (2009a), *National Commission on Restorative Justice Final Report*, Dublin: DJELR, pg46

³⁵ McCarthy (2011) Perceptions of Restorative Justice in Ireland: The Challenges of the way forward, Irish Probation Journal, pg195

Garda Diversion Programme

The current restorative model developed from a programme established by the Garda Síochána. The Juvenile Liaison Scheme was first initiated by the Garda Síochána on a limited basis in 1963 and was put on a national footing in the 1980s. A Juvenile Liaison Officer (JLO) is responsible for the “informal monitoring of and contact with young people at risk³⁶”.

The Children Act 2001 placed the Juvenile Liaison Scheme on a statutory basis, renaming it the Garda Diversion Programme. The programme incorporates a RJ approach to crime control. Specifically, Pt 4 of the Act established two forms of RJ initiatives, namely restorative formal cautions and family group conferences (FGCs). Both initiatives involve the bringing together of those connected with the offending behaviour, in particular the victim and offender, to negotiate an outcome³⁷. The total number of referrals received in 2010 amounted to 27,257. This is an increase of 3,305 (13.80%) on the figure of 23,952 referrals received in 2009³⁸. For three consecutive (2008, 2009 & 2010) years informal sanctioning has been the most prominent way of dealing with young offenders³⁹.

Mental Health

Amnesty International quotes “*the rationale of diversion of offenders with mental health problems from the criminal justice system is that they are connected with services and supports in the community and in so doing address the underlying problems that are resulting in contact with the criminal justice system*⁴⁰”. It is well established internationally that the prevalence of mental health problems is disproportionately high in the prison population when compared to the general population.⁴¹ A study carried out in 2005 by Duffy et al⁴² found alarmingly high prevalence rates of mental illness for both men and women in Irish Prisons. Statistics from the study displayed that for all mental illnesses combined, prevalence rates ranged from 16% for male committals to 27% for sentenced men, while for women committed to prison, the rate was 41%, with 60% of sentenced women having some type of mental illness⁴³. The research also found higher prevalence rates of psychosis in life sentenced prisoners (6.1%) compared to fixed sentenced prisoners (1.8 percent). A total of 31.2 percent of remand prisoners had a lifetime

³⁶ Griffin (2005) Restorative Justice, A Real Alternative? Irish Criminal Law Journal , Vol 15(4) :2-11, pg 3

³⁷ *Ibid*

³⁸ Garda Diversion Programme Annual Report 2010

³⁹ Garda Diversion Programme Annual Report 2010, pg9

⁴⁰ Amnesty International (2012) :Submission to the ‘Interdepartmental Group to examine the issue of people with mental illness coming into contact with the Criminal Justice System, pg2

⁴¹ *Ibid*

⁴² Duffy et al (2005) Mental health in Irish prisoners. Psychiatric morbidity in sentenced, remanded and newly committed prisoners. National Forensic Mental Health Service, Dublin.

⁴³ IPRT Submission on Mental Health 27/4/2012

history of mental illness. A study conducted by Hayes and O'Reilly⁴⁴ discovered high levels of psychological difficulties amongst young persons housed in juvenile detention centres in Ireland. The average age of the boys was 14.9 years and the research found that 82.76% of the young people detained met diagnostic criteria for at least one psychological disorder. Almost two thirds of those surveyed met diagnostic criteria for conduct disorder. Thus through both studies, on adults and juveniles respectively, there are high levels of psychiatric illness attached to persons who are detained in state institutions and as the Inspector of Prisons, Judge Michael Reilly notes "*The mental health of prisoners is a complex matter. Evidence from mental health experts, those working in the prisons, anecdotal evidence and my observations suggest that there are many prisoners who suffer from mental illness, many of which are vulnerable and should not be accommodated in our prisons*"⁴⁵.

There is no official government policy in Ireland on the diversion of offenders with mental health problems from the criminal justice system. For example, there are limited legislative provisions providing for the diversion of persons with mental health problems from the criminal justice system. Section 15 of the *Criminal Law (Insanity) Act 2006* provides for the transfer of a person with a mental health problem from prison to a "designated centre". The only other relevant provisions relate to detention of persons with a mental health problem in a "designated centre" and fitness to be tried under the 2006 Act and conditional release of persons detained under the 2006 Act by section 8 of the *Criminal Law (Insanity) Act 2010*⁴⁶. The ACJRD⁴⁷ in its submission to the Department for Justice and Equality stated that the fact that the Central Mental Hospital (CMH) is the only Designated Centre under the Act is clearly in need of review and pointed to the lack of provision of outpatient treatment by such a Designated Centre. Family members of mentally ill offenders, who do not reside in the Dublin region, will have to travel significant distances to visit their relatives. This places unnecessary hardship onto family members and further removes offenders from their own communities, adding to an already difficult situation.

There are also difficulties in assessing beds for prisoners in the CMH, as referred to by the Inspector of Prisons' report⁴⁸ on prisoner health. The ACJRD has also commented in its report on a "Vision for Change"⁴⁹ that in order to accommodate those suffering from mental illness

⁴⁴ Hayes, J. M. and O'Reilly, G. (2007) *Emotional Intelligence, Mental Health and Juvenile Delinquency*, Cork, Juvenile Health Matters

⁴⁵ Inspector of Prisons (2011) *Guidance on Physical Healthcare in a Prison Context*, p.6

⁴⁶ *Ibid* at pg12

⁴⁷ Submission to the Department of Justice and Equality on the Criminal Law (Insanity) Act 2006 and the Criminal Law Insanity Act 2010, March 2012

⁴⁸ 2011

⁴⁹ "Vision for Change, A Report by the Expert Group on Mental Health Policy, 2006

there must be strong relationships with catchment area mental health teams. Protocols for appropriate working relationships with other specialist teams are essential. These protocols should address liaison, referral, discharge and use of shared facilities. While the majority of referrals will come from the general adult mental health services there will need to be a particularly effective relationship with forensic services, addiction services and mental health services for the homeless. The ACJRD stresses that “A national network of high-support intensive care residences, providing in the region of 80 beds nationally, is required for this group of service users. These units should have joint inputs from rehabilitation teams and forensic teams⁵⁰”.

A comparative analysis of the provisions allowing for the diversion of offenders with mental health problems from the criminal justice system highlights Ireland’s underdeveloped policy when mentally ill persons are involved in crime. For example, in England and Wales, diversion, or alternatives to custody, can occur at arrest, at the police station, when deciding to prosecute, at the initial court proceedings or after conviction at the sentencing stage. Diversion can occur through section 136 of the *Mental Health Act 1983*, whereby the police might decide not to take action against a suspect and instead refer them to health services as an alternative. Diversion may also occur where a person while still being prosecuted is permitted to get treatment as an alternative to being held on remand pending court proceedings.

Furthermore, The *Mental Health Act 1983* for England and Wales, unlike its Irish counterpart the *Mental Health Act 2001*, contains provisions that judges can use when sentencing an offender who has a mental health problem. Ireland’s White Paper on the *Mental Health Act 2001* did anticipate that there would be provisions relating to offenders with mental health problems; however, these provisions were omitted from the Bill that led to the 2001 Act. The *Mental Health Act 1983* in England and Wales provides for a range of orders that a judge can use in cases involving defendants with mental health problems. They can order a person to be remanded to hospital or issue an interim hospital order, guardianship order, restriction order or a hybrid order. There is also provision in the *Criminal Justice Act 2003* to use community orders. By contrast there are no corresponding provisions in the *Mental Health Act 2001*⁵¹. In criminal legislation however, there are provisions in the Criminal Law (Insanity) Act 2006, for the detention of persons who suffer from mental disorders, which include processes dealing with

⁵⁰ *Ibid* at pg110

⁵¹ Amnesty International (2012) :Submission to the ‘Interdepartmental Group to examine the issue of people with mental illness coming into contact with the Criminal Justice System, pg 14

‘fitness to plead’, verdicts of ‘not guilty by reason of insanity’, trial processes, detention and reviewing of detention processes.

Developing alternatives to custody for mentally ill patients is beneficial both to the Criminal Justice System, notably the Prison Service and to the offender, as the Prison Service does not have the adequate facilities to deal with mentally ill patients in a safe and secure manner.

Conclusion

In conclusion, this research paper has outlined different alternatives to custody for men, women and young offenders. Established mechanisms for diverting offenders from custody and new interventions can only be welcomed. Restorative Justice still plays a minor role in the criminal justice system for adult offenders. This report has highlighted the lack of awareness of restorative justice principles amongst legal professionals and this should be rectified by holding training seminars for both practitioners and the judiciary. Utilising several different alternatives to imprisonment has also shown to be cost effective for the State and benefits offenders too. Mentally ill offenders do not belong in the criminal justice system. The submission by Amnesty International and previous submissions by the ACJRD has highlighted the deficiency in the current Irish system. Diversion and alternatives to custody must be introduced as the Irish Prison Service does not have the adequate resources to deal with prisoners who suffer from mental illness nor is it justified to hold any person suffering from an illness in a prison setting when a different form of institution would be more effective.

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