An Roinn Dlí agus Cirt
Department of Justice

Community or Custody?

A Review of Evidence and Sentencers' Perspectives on Community Service orders and Short-Term Prison Sentences.

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1. Introduction

1.1 Background

This research project was commissioned by the Department of Justice and examines the impact of the *Criminal Justice (Community Service) (Amendment) Act 2011* (henceforth referred to as the 2011 Act) introduced over a decade ago with the expressed intention of encouraging greater use of community service orders (CSOs) for people convicted of minor crimes for which a sentence of imprisonment is deemed appropriate.

Ireland introduced the Community Service Order (CSO), which is a sentence of unpaid work in the community, in 1983 through the *Criminal Justice (Community Service) Act 1983*. However, in recent years the use of CSOs by the courts has declined. The most recent data shows that in 2012 2569 CSOs were imposed by the Courts, while by 2022 this number had fallen to 1288 orders (Probation Service, 2013, 2022). This decline in use of CSOs is more marked, as the amending legislation referred to above expanded the scope under which judges can impose a CSO. The *2011 Act* imposed a new duty on judges to consider imposing a CSO as an alternative to a prison sentence of 12 months or less.

At the same time, the use of imprisonment in Ireland continues to rise. The numbers of people committed to custody has risen in recent years. This includes for short-term prison sentences, that is for sentences of less than 12 months.

Through analysis of the existing literature and judicial perspectives on the matter this research aims to provide insight into the causes for the continued over-use of short prison sentences of less than 12 months and the possible underutilisation of CSOs, as well as to shed light on any barriers to the increased use of CSOs and potential options for increasing uptake of CSOs.

1.2 Research Objectives

The primary aim of this research is to identify the impact of the 2011 Act in terms of the relative use of short prison sentences and community services. A multi-method approach was adopted to address the research aim and questions. This comprised a systematic literature review and semi-structured interviews with members of the judiciary sitting in District Courts across Ireland. The literature review sought to explore the existing evidence base in respect of:

- The impact of the use of short custodial sentences (12 months or less) on offender management and recidivism.

- The impact of the use of community service orders on offender management and recidivism.
- What learning can be taken from other jurisdictions on the use of community service as an alternative to short custodial sentences for people convicted of minor offences?

Research interviews with members of the judiciary explored the following areas:

- The perceived benefits and limitations of short custodial sentences.
- The perceived benefits and limitations of community service.
- The impact of the 2011 Act on the daily work of the judiciary, and what changes, if any, have been made to their approaches to sentencing, in practical terms or in terms of their general approach.
- What, if anything, would lead the judiciary to opt for community service over short custodial sentences on a more regular basis?
- The perspectives of the judiciary on public opinion of the sentencing patterns for first-time offenders and repeat offenders convicted of minor crimes meriting custodial sentences of 12 months or less, or of community service.
- The familiarity of the judiciary with information or research relating to offender management, levels of recidivism, and the impact of the community service or short custodial sentences on offender behaviour.

Further information on the research methodology

1.3 Methodology

- As noted above, the research deployed two main methods: a review of international literature and semi-structured interviews with members of the judiciary. Further detail regarding these methods is outlined below.

Research approach to the Review of International Literature

This element of the research sought to identify, collect, and analyse peer-reviewed journal articles addressing the research questions (impacts of short prison sentences and comparative impact of community sentences). The review addressed the impacts of imprisonment (short sentences) and community sentences (in particular community service orders) on the key relevant domains of interest (i.e., recidivism) but also broader domains such as education, employment, rehabilitation, and desistance. The literature review also contains a specific focus on policy analysis where policies have been introduced to promote the use of Community Service Orders (CSOs) in preference to short prison sentences. This includes a focus on neighbouring jurisdictions (e.g., Scotland) as well as wider international contexts.

The following ten major electronic databases were searched, using the search terms below:

1. Academic Search Complete (EBSCO)
2. Scopus
3. Criminal Justice Journals (Hein)
4. Legal Journals (Heinonline)
5. Social Science Full Text (H.W. Wilson)

6. NCJRS Abstracts
7. Applied Social Sciences Index and Abstracts
8. JSTOR
9. Science Direct
10. Web of Science

Search terms: community service order; unpaid work order; short prison sentences; alternatives to prison; community sanctions and measures; recidivism AND community sentences; recidivism AND community service orders; recidivism AND short prison sentences; desistance AND community sentences; desistance AND community service orders; desistance AND short prison sentences. The search terms were entered into the title, key word, abstract and paper fields, and when the number of articles generated prove too voluminous, they were entered into the title field only.

As well as the above we conducted a search for *grey literature* in countries where policy has been introduced to promote the use of community sanctions and measures in preference to the use of short custodial sentences. This included a specific focus on neighbouring jurisdictions. The purpose of this additional search is to provide any salient policy insights into barriers and enablers of reform in this area.

Research approach to Judicial Interviews

Interviews with District Court judges were carried out using a semi-structured interview schedule, and sentencing vignettes. In-depth semi-structured interviews were designed to elicit judicial perspectives on the main research questions relevant to understanding judicial views on the use of short prison sentences and community service orders in the sentencing of minor criminal matters in the District Court[1]. The interviews were designed to last no longer than one hour and were supplemented by the use of three short sentencing vignettes. Sentencing vignettes are short case summaries which provide situated contexts in which to explore judicial approaches to sentencing. In this study we used them as an additional aide for understanding the types of scenarios in which judges might impose CSOs in lieu of short prison sentences. The vignettes were completely fictitious and not based on real cases observed or related in any way to the interviewee.

To achieve the research sample, we extended invitations to participate in the research to all District Court judges currently in office in Ireland (n=71). Through this approach 13 judges participated in the research. The research sample comprises of judges with a wide range of experience and who have sat/are sitting in both metropolitan as well as provincial districts. The sample also includes moveable judges. Interviews were held in-person or online and lasted one hour on average. The interviews took place between April and September 2023. Once transcribed the interviews were coded and analysed thematically using NVivo and guided by Braun and Clarke's (2006) approach to thematic analysis.

[1] The scope of the research specifically focussed on sentencing at the District Court level. District Courts in Ireland deal with the largest volume of sentences, and given their sentencing powers are more likely to be dealing with cases that fall within the remit of the scope of the study (i.e., sentencing practices in relation to short-term prison sentences and community service orders).

1.4 Ethical Approval

All elements of the empirical research project were subject to a full and independent ethical review by the South East Technological University Ethics Committee. Several ethical considerations were highlighted as key and were addressed in the study's Consent and Participant Information Sheet which all interviewees received (See Appendix A). All study participants received accurate information about:

- the nature and purpose of the project;
- that their participation in the project is voluntary and that there would be no adverse consequences if they decided not to participate in the study;
- that a secure, GDPR compliant data management system was be adopted to guarantee participant confidentiality throughout the project and;
- that no identifying information (including descriptions of court districts) will be used in any publicly disseminated material.

The research team submitted an application to the Legal Research and Library Services Committee (LRLS) which reviews applications for research in the courts and received its approval.

1.5 Structure of Report

Chapter 2 of this reports sets out the research context by exploring the sentencing and legal framework relevant to the use of CSOs and short prison sentences in Ireland. It then explores recent trends in the use of CSOs and short prison sentences and examines recent and relevant developments in Irish penal policy.

Chapter 3 reports on the key findings from the rapid review of international literature. It includes findings from research on the impacts of short-term imprisonment and research on the relative effectiveness of community sanctions. Research literature exploring the use and effectiveness of community service is specifically explored. This also includes coverage of key issues raised in studies, such as the accessibility of community service orders for diverse groups, and insights from other jurisdictions where policies have been adopted to promote the use of community service orders. This chapter also details findings from research exploring judicial attitudes towards community service and sentencing practices. **Chapter 4** sets out judicial perspectives and approaches to the sentencing of short prison sentences and CSOs. It explores how judges approach the question of suitability for a CSO in lieu of a prison sentence from a sentencing perspective and their understanding of the types of personal circumstances that typically exclude offenders from consideration based on ability to complete a CSO. It then explores judicial experiences of community service suitability reports, judicial knowledge of CSO projects, recidivism, and their views on how the public perceive the relative use of CSOs and short prison sentences. It highlights the key changes that judges consider might increase the uptake in CSOs in lieu of short prison sentences.

Chapter 5 presents initial conclusions and points for discussion with stakeholders. It represents the key high-level insights and recommendations for future actions that may increase the uptake of CSOs in lieu of short prison sentences in Ireland.

2. SETTING THE IRISH CONTEXT

2.1 Introduction

This chapter provides an overview of the context relating to the use of Community Service Orders and short-term prison sentences in Ireland. It begins with an overview of sentencing law and policy in Ireland and how this has impacted the practices of the District Court, which is the focus for this study. Prior Irish research on the use of Community Service Orders and some of the common themes raised in this are highlighted. Statistics on the current use of sentences of short-term imprisonment and CSOs are provided. The chapter concludes with an overview of recent developments to promote the use of CSOs.

2.2 Sentencing Law in Ireland

The Irish sentencing system is regarded as less structured when compared with other sentencing systems as it does not have an overarching legislative sentencing framework, nor does it have statutory sentencing guidelines, although legislation does set out the maximum and, in some cases, the minimum sentence that may be imposed (O'Malley, 2016). The Supreme Court recently confirmed the centrality of judicial sentencing discretion in Irish sentencing law.[2] Since the foundation of the State, the legislature has not proactively sought a role in the formulation of sentencing policy in deference to judicial independence in the field of sentencing (Maguire, 2016). The Irish judiciary has taken up the challenge by developing sentencing principles to guide the imposition of punishment (O'Malley, 2016), and in more recent times, the development of guideline judgements by the Court of Criminal Appeal (now Court of Appeal) to structure sentencing discretion (O'Malley, 2014). As such, the Irish judiciary has played an instrumental role in both developing sentencing policy and as the main source of structuring influence on the sentencing discretion of Irish judges. They have done this through developing the jurisprudence of the principles of sentencing, particularly the principle of proportionality, and through the issuing of guideline judgements setting out indicative sentencing ranges for a variety of offences. The role of the judiciary in formulating sentencing policy will be further advanced by the Judicial Council, which was established in 2019, and is also tasked with the introduction of sentencing guidelines (Cahillane, 2020).

Irish sentencing law performs a major structuring influence on how judges approach their sentencing practice in the District Court and on the choices they make between custodial and non-custodial penalties. The next section examines the basic tenets of Irish sentencing law and their impact on the sentencing practices of District Court judges.

[2] Ellis v Minister for Justice and Equality [2019] IESC 30

2.3 Sentencing Law and Policy in the District Court

While the development of a body of sentencing jurisprudence both in terms of principles and guideline judgements has provided much needed guidance to judges exercising their sentencing discretion in most courts, it has been less effective in terms of the provision of guidance in the District Court. There are several reasons for this. First, while the principle of proportionality applies to sentencing in all courts in the State, sentencing hearings in the District Court, in common with lower criminal courts in many other countries (Hunter et al., 2016), are characterised by speed and informality (Carr and Maguire, 2017). Second, the District Court has jurisdiction to sentence *minor offences* only whereas sentencing guidance from the higher courts typically arises through consideration of sentence imposed in *non-minor indictable offences* reviewed by the Court of Appeal. Third, most of the sentencing guidance currently available relates to imprisonment, reflecting the more serious nature of the indictable offences dealt with in Circuit, Criminal and Special Criminal Courts, whereas in the District Court there are many other disposals such a bond, a probation order or a deferred sentence that are used more frequently but do not form the subject of guideline judgments. Lastly, sentencing appeals from the District Court cannot be heard in the Court of Appeal and must be heard in the Circuit Court de novo without any formal feedback mechanism so that the opportunity for a structuring effect is lost.

Even though the sentencing guidance that currently exists has not been specifically adapted to the District Court and the types of cases typically sentenced there, Irish sentencing law still has a major structuring influence on how judges in the District Court sentence as they are bound to follow sentencing law and the principle of proportionality. One of the key sentencing challenges that needs to be addressed in the context of the District Court is the application of the principle of proportionality when sentencing a person for a minor, nonviolent offence in circumstances where that person has a large number of previous convictions. The principle of proportionality provides that previous convictions aggravate the seriousness of the offence, an approach that is referred to as *cumulative sentencing*, and provides that the severity of the sentence may be enhanced in response.[3] When applied in the District Court this allows, even requires, judges to increase the severity of the penalty for mere repetition of the same offence. Existing jurisprudence on the principle of proportionality provides that serious offences and persistent offending can appropriately be met with severe penalties including imprisonment.

District Court judges following the principle of proportionality are thus legally mandated to increase punishment levels when they come across repeat offending. There is not yet any Irish jurisprudence that provides an alternative approach to imprisoning a person for persistent, but minor, offending. The jurisprudence of the superior courts thus not only structures and guides sentencing discretion but also perhaps somewhat inadvertently, sets sentencing policy through its approach to the sentencing of persistence in that it

[3] DPP v K [2008] IECCA 110

provides that the appropriate approach to the sanctioning of persistent offenders is greater severity which may include the use of short prison sentences.

2.4 Irish Sentencing Principles

The principle of proportionality

The principle of proportionality was developed as common law by the superior courts and is now universally regarded as the key guiding principle for judges approaching sentencing in Ireland (LRC, 2020:69). Irish judges are required to exercise their sentencing discretion in accordance with principles of sentencing law which are firmly established in the jurisprudence of the Irish criminal law. The principle of proportionality is the most prominent of these principles and it provides that judges must impose sentences that are proportionate to *both the circumstances of the offence and the personal circumstances of the offender.* One of the first authoritative formulations of the proportionality principle was set out by Denham J in the Supreme Court *The People (DPP) v M*[4]:

> *Sentences should be proportionate. Firstly, they should be proportionate to the crime. Thus, a grave offence is reflected by a severe sentence…However, sentences must also be proportionate to the personal circumstances of the appellant…Thus have assessed what is the appropriate sentence for a particular crime it is the duty of the court to consider then the particular circumstances of the convicted person. It is within this ambit that mitigating factors fall to be considered.*

The Supreme Court in *Lynch and Whelan*[5] confirmed the constitutional nature of the proportionality principle and the requirement on judges to exercise their sentencing discretion in accordance with this principle.

The application of the principle in practice

In terms of how the principle is to be applied when sentencing Kearns J. in the Supreme Court in *The People (Director of Public Prosecutions) v. R.McC*.[6] succinctly summarised the preferred approach:

> *This requires that any sentencing court should conduct a systematic analysis of the facts of the case, assess the gravity of the offence, the point on the spectrum at which the particular offence or offences may lie, the circumstances and character of the offender and the mitigating factors to be taken into account – all with a view to arriving at a sentence which is both fair and proportionate.*

Hamilton J in the *People (DPP) v Kelly*[7] when discussing the application of the principle in practice refers to a two-step approach 'one looks first at the range of penalties and locates where on the range the particular case should lie and one then applies the mitigating factors after having performed that exercise'. Arriving at a proportionate

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[44] [1994] 2 IR 306 306, at 316-318.
[5] [2010] IESC 34
[6] [2007] IESC 47, [2008] 2 I.R. 92, at 104
[7] [2005] ILRM 19 at 22,

sentence is widely accepted as involving a two (or more) step process (LRC, 2020: 70). The staged approach to sentencing was recently endorsed by the Law Reform Commission for its legitimacy-enhancing effect because it ensures the offender and the public that all relevant factors have been considered (LRC, 2020: 75).

The first step involves choosing the applicable penalty, also referred to as the headline sentence. It is at this point that the Court of Appeal guidance on the application of the principle of proportionality becomes less useful to District Court judges. This is because the appeal cases it hears are of much higher level of seriousness than the offences sentenced by the District Court and the choice of penalty guideline judgments usually refer to prison sentences of various lengths and are not applicable to the range of penalties that are available in the District Court. Depending on the particular offence being sentenced, these may begin with a dismissal under s.1.1 of the *Probation of Offenders Act 1907* and range all the way up to a 12-month prison sentence for most offences. The intervening penalties include, inter alia, fines, compensation orders, probation orders, deferral of sentences or adjourned supervision. There are no guideline judgments that set out starting ranges for minor offences nor are there any guideline judgments on the hierarchy of the available penalties applicable to minor offences.

In the absence of specific guidelines, District Court judges must follow the general guidance on how to arrive at the headline offence. The key considerations here are:

1. Deciding where on the scale of gravity the particular offence lies (lower end, middle or upper end of the scale); and
2. Deciding how grave the offence is with reference to the harm caused and the culpability of offender.

Judges may then have regard to the established jurisprudence on factors that aggravate and mitigate the gravity of the offence (LRC, 2020: para 3.2).[8] Once the judge has decided where on the scale the seriousness of the offence lies, they may then examine the range of penalties applicable to the offence and choose a penalty. The penalty chosen at this stage is referred to as the headline sentence.

Factors that aggravate and mitigate the gravity of the offence-previous convictions and social deprivation

When assessing the gravity of the offence the court must have regard to the harm caused and the moral culpability of the offender. As mentioned above there is an established jurisprudence on the types of factors that aggravate and mitigate the gravity of the offence. Here we will consider two key factors that are of particular relevance to an assessment of the gravity of the offence in the District Court: previous convictions and social deprivation.

Whereas the lack of previous convictions in Irish sentencing law acts as an important factor that mitigates sentence severity, it is well established that the presence of

[8] See *The People (DPP) v Shaun Kelly* [2016] IECA 204 at para 37 for examples of factors that tend to reduce an offenders moral culpability and para 39 for factors which aggravate an offenders moral culpability.

previous convictions increases the gravity of the offence. A minor offence coupled with a large volume of previous convictions can aggravate the gravity of the offence resulting in the minor offence being considered to be at the upper end of the scale and resulting in the application of a more severe penalty. This is particularly important in the District Court because judges in this court are commonly called upon to sentence minor offences where the person has many previous convictions. There is currently no jurisprudence on whether the practice of imposing a prison sentence on a person who commits a petty theft, a relatively common practice in the District Court, is consistent with or contradictory to the principle of proportionality. However, there appears to be no penal policy provision for persistent petty offenders who continue to offend as a result of an addiction.

The second important factor, the offender's "dysfunctional background"[9] has recently been identified as potentially reducing the offender's moral culpability for the offence. A reduction in moral culpability for the offence reduces the seriousness of the offence and thus the severity of the penalty that is warranted. Traditionally, the offender's "dysfunctional background" has been considered by the courts as relevant to their personal circumstances and thus relevant as a factor that mitigates the severity of the headline sentence (as part of the second step) (Dempsey, 2020). But in two recent cases the Court of Appeal held that that an offender's "dysfunctional background" is relevant to their actual moral culpability and could serve to reduce the gravity of the offence.[10] This development is particularly relevant to the District Court because it might provide a sentencing rationale for reconsidering the current practice of using short prison sentences for petty persistent offenders as the only option (Maguire, 2010, 2014).[11]

Factors that may mitigate the severity of the sentence

Once the headline offence has been chosen, judges may then move to the second stage of the process and examine the personal circumstances of the defendant to ascertain if there are any personal mitigating factors that might justify a reduction in the headline sentence. Factors that mitigate the severity of the headline offence are personal factors considered in the second stage and are distinct from factors that mitigate the offence seriousness.[12] Again, there is some jurisprudence on the range of factors that might be considered as mitigating the severity of the penalty these include: a guilty plea; cooperation with the police in apprehending others involved in crime; successful attempts at rehabilitation, genuine remorse and credit for previous good character (LRC, 1996: para.3.17).Indeed a consistent thread throughout the

[9] The People (DPP) v Fitzgibbon [2014] IECCA 12 at para 9.5

[10] In the People (DPP) v Leon Byrne [2018] IECA 120 the Court of Appeal held that the defendant's difficult upbringing which included violence, neglect, homelessness and criminality as a factor mitigating his actual moral culpability for the offence. In a similar vein, in The People (DPP) v Stephen Comey [2018] IECA, the Court of Appeal identified the defendant's chronic addiction as a factor mitigating his moral culpability.

[11] Maguire (2010, 2014) found that District Court judges regard prison as the only appropriate option for persistent petty offenders even those whose offences are very minor.

[12] This distinction was highlighted by the Court of Appeal in The People (DPP) v Molloy [2016] IECA 239.

jurisprudence is the emphasis on responding to personal circumstances of the offender as well as those of the offence.

While courts are generally required to consider and give due weight to circumstances that might justifiably mitigate sentence severity, in exceptional circumstances it may exercise its discretion not to give a reduction.[13] Notwithstanding these exceptions, the obligation to consider and give due weight to factors that mitigate the sentence is an important feature of Irish sentencing law (Maguire, 2016). In this regard, two factors related to the personal circumstances of the offender that have been recognised as mitigating the severity of sentence are of particular relevance to this study. The first relates to the absence of prior convictions. It is by now well-established that the absence of previous convictions is a significant factor mitigating the severity of the sentence.[14] The second relates to specific personal circumstances such as family circumstances where a woman is pregnant or has dependent children. Both the Law Reform Commission[15] and the Court of Appeal[16] case law confirm that the hardship that imprisonment would impose on the family of the defendant can be considered a factor mitigating the severity of sentence.

Sentencing Aims Recognised in Irish Sentencing Law

While the principle of proportionality is very well established and has been consistently applied for many years, it allows considerable room for judges to adopt legitimately different sentences in similar cases, thus sometimes leading to inconsistent sentencing outcomes due to the co-existence of multiple sentencing aims (Maguire, 2010). One sentencing aim that is considered to be inconsistent with the Irish constitution and thus not part of Irish sentencing law is incapacitation. An incapacitative sentence aims to prevent a person from committing further offences. In *The People (Attorney General) v O'Callaghan*[17] preventative detention on the grounds that a person will reoffend in the future was deemed inconsistent with the Irish constitution in the context of sentencing on the basis it infringed the right to liberty and the presumption of innocence. This remains valid today (O'Malley, 2016).

The Court of Appeal recently indicated in *The People (DPP) v WD*[18] that the three main aims of sentencing are *retribution*, *rehabilitation* and *deterrence* (general and specific) and that there is no hierarchy of sentencing aims in Irish law: instead, it is the job of individual judges exercising their sentencing discretion to decide in each case based on the individual facts of that case where the proper balance lies. According to Walsh J in

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[13] Section 29(2) of the Criminal Justice Act 1999 provides that a court may, in exceptional circumstances, still impose a maximum sentence even when mitigation is present if they are satisfied that exceptional circumstances that warrant the maximum sentence. The Supreme Court further clarified in *People (DPP) v MC and D*[13] that although a court has an obligation to consider and give due weight to mitigating factors, that it may exercise its discretion not to give a reduction in exceptional circumstances.
[14] The People (DPP) v Perry [2009] IECCA 161.
[15] LRC, Report on Sentencing (LRC 53-1996) at para 3.17.
[16] The *People (DPP) v Lawlor* [2018] IECA 243
[17] [1966] IR 5001, at 508-509
[18] [2018] IECA 143

The People (Attorney General) v Poyning,[19] when deciding which sentencing aim applies in a particular case, judges may have regard to the convicted person's background, character and antecedents when determining which aim to pursue:

> *It follows that when two persons are convicted together of a crime or of a series of crimes in which they have been acting in concert, it may be (and very often is) right to discriminate between the two and to be lenient to the one and not the other. The background, antecedents and character of the one and his whole bearing in court may indicate a chance of reform if leniency is extended; whereas it may seem that only a severe sentence is likely to serve the public interest in the case of the other, having regard both to the deterring effect and the inducement to turn from a criminal to an honest life.*[20]

Although sentencing aims provide moral authority for the State's authority to punish those who break the criminal law (O'Malley, 2016), deterrence, retribution and rehabilitation when examined a little bit closer do not necessarily provide this moral authority unproblematically.

Deterrence

In terms of deterrence, while general deterrence is more problematic than specific deterrence, research evidence is decidedly unconvincing about the efficacy of deterrence (Ashworth, 2015).[21] Deterrence rests upon the basic assumption that all offenders are rational actors capable of weighing up the costs and benefits of engaging in crime. However, evidence from our own criminal justice system suggests that a large majority of people who are sentenced by the courts to a term of imprisonment may be experiencing a range of mental health problems and addiction (Duffy et al, 2006; Curtin et al, 2009) and that people who have experienced multiple childhood adversity are more likely to come into contact with the criminal justice system than the general population (Dermody et al, 2020). The above notwithstanding, deterrence is one of the recognised aims of sentencing in Ireland. Prior research on sentencers' perspectives notes that some judges foreground deterrence in their approaches to specific types of offending (Maguire, 2010). This research, which explored consistency in sentencing practices, also noted that certain sentences (specifically imprisonment and suspended sentences of imprisonment) were more associated with this sentencing aim (Maguire, 2010).

Rehabilitation

Rehabilitation has always been an important part of Irish sentencing law[22] and recent evidence suggests that the rate of recidivism is lower in relation to sanctions that involve a more rehabilitative approach or involve an element of 'help' aimed at supporting the offender to desist from crime. Research on reconviction rates for people sentenced to

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[19] [1972] IR 402
[20] At 408
[21] Andrew Ashworth, Sentencing and Criminal Justice 6th ed. (Cambridge University Press 2015) at pages 83 – 88
[22] The People (Attorney General) v O'Driscoll [1972] 1 Frewen 351 at page 16; The People (DPP) v WD [2018] IECA 143 at para 78.

imprisonment is typically higher than those sentenced to community sanctions (evidence from Ireland is discussed below and further in following chapters). A review of recent research on recidivism shows much lower rates of recidivism following the imposition of suspended sentence and community service orders than short prison sentences (O'Donnell, 2020).

Retribution

Retribution is a cornerstone of Irish sentencing system,[23] although the Irish principle of proportionality does not adhere to the 'just deserts' model.

While retribution incorporates both punishment for and condemnation of the criminal behaviour, it necessarily involves imposing an element of suffering on the offender although 'just deserts' proponents argue that the extent of that suffering should be proportionate to the wrongdoing (Ashworth and von Hirsch, 2005).

Other important sentencing principles: the last chance principle and the principle of last resort

In Irish sentencing law there is some jurisprudential support for prioritising rehabilitation over punishment and deterrence, even when the defendant has a long record. For example, Walsh J. in in *The People (Attorney General) v. O'Driscoll*[24] argued that a just and appropriate sentence may properly take account of and respond to offender rehabilitation:

> *"The objects of passing sentence are not merely to deter the particular criminal from committing a crime again but to induce him in so far as possible to turn from a criminal to an honest life and indeed the public interest would be best served if the criminal could be induced to take the latter course. It is therefore the duty of the courts to pass what are the appropriate sentences in each case having regard to the particular circumstances of that case – not only in regard to the particular crime but in regard to the particular criminal".*

The 'last chance' principle is particularly relevant to the District Court and was affirmed recently by the Court of Appeal and by the Supreme Court in *Ellis*[25], drawing upon O'Flaherty J's statement of the principle in *People (DPP) v Jennings*[26]. O'Flaherty J reduced the sentence of the applicant based on the 'last chance' principle even though the person had a lengthy criminal record:

> "*But there comes a time in everyone's life and it is a principle of sentencing as well, where the court detects that it may be make or break time. If he is given this last chance perhaps, he will hopefully take it and rehabilitate himself, get employment and become a useful member of society".*[27]

[23] Law Reform Commission, Report on Suspended Sentences, para 3.13. page 46
[24] (1972) 1 Frewen 351, at 359.
[25] Ellis v Minister for Justice [2019] IESC
[26] Ex tempore, Court of Criminal Appeal 15th February, 1999.
[27] Ex tempore, Court of Criminal Appeal 15th February, 1999, at 25.

As we will examine later, one of the key justifications for imposing a prison sentence on persons convicted of minor offences in the District Court is the offender's long record (Maguire, 2014).

The principle of last resort is another important sentencing principle recognised by the Irish courts, although it has received much less attention in Irish courts than the principle of proportionality.[28] The *Committee of Inquiry in to the Penal System* (1985) in its report, (known more commonly as the *Whitaker Report*), observed almost four decades ago that there appeared to be an over-reliance on imprisonment in Ireland and recommended that prison should only be used as a last resort to be "imposed only if the offence was such that no other form of penalty is appropriate".[29] Since then, numerous reports and recommendations have reiterated this recommendation including the Law Reform Commission's *Report on Sentencing* (1996).[30] More importantly, the Commission recommended that the current range of statutory maximum sentences be re-examined as they appeared to be out of date with modern perspectives on crime seriousness, made no mention of community sanctions and were more likely to promote reliance on imprisonment than encourage its use as a last resort.[31] The Commission recently reiterated its support for the principle that prison should be used as a last resort in its *Report on Suspended Sentences* (2020).[32]

The Last Resort principle in Irish Penal Policy

The principle that imprisonment should be a last resort also reflects current penal policy. The Penal Policy Review Group (PPRG) in its 2014 Report (PPRG, 2014) recommended that the last resort principle should be incorporated in statute. More recently, while acknowledging judicial discretion, the Department of Justice adopted as one of the key principles guiding its penal policy objectives outlined in Criminal Justice Policy-Review of Policy Options for Prison and Penal Reform 2022-2024, the principle that imprisonment should be used as a sanction of last resort, typically for those who commit the most serious offences, for whom a sentence in excess of 12 months is required and/or for those who cannot be contained safely in the community (DoJ 2022). While the last resort principle has not been pronounced on by the superior courts, O'Malley (2016) argues that it is most likely a corollary of the principle of proportionality in sentencing. Previous legislative attempts to reduce reliance on imprisonment as a method of enforcement of fine defaulting have been successful. The Fines (Payment and Recovery) Act 2014 which aimed to reduce the use of prison for fine defaulters has almost eliminated the imprisonment of fine defaulters, but issues remain including a high level of unpaid fines and low levels of imposition of alternative sanctions on defaulters (DOJ 2022).

[28] LRC, *Report on Suspended Sentences*, para 4.23
[29] Committee of Inquiry Into the Prison System, Report (Whitaker Committee) (Dublin: Stationary Office, 1985), p.45
[30] Law Reform Commission, *Report on Sentencing*, (1996), p.12; LRC, *Report on Mandatory Sentences,* (2013)
[31] Ibid, 302.
[32] LRC, *Report on Suspended Sentences*, para 4.31

2.5 Legal basis for the community service order

The Community Service Order (CSO) is a sentence of unpaid work in the community that a court may order as an alternative to a term of imprisonment (Maguire and Carr, 2017). When it was originally introduced by the *Criminal Justice (Community Service) Act 1983*, it was conceptualised as an alternative to imprisonment. This is set out in section 2 of the 1983 Act as follows:

> *'this Act applies to a person (in this Act referred to as an "offender") who is of or over the age of 16 years and is convicted of an offence for which, in the opinion of the court, the appropriate sentence would but for this Act be one of penal servitude, of imprisonment or detention…"*

Thus, when originally introduced the legislative intention was to set the CSO as a direct alternative to a prison sentence. This required that a judge could only impose a CSO as an alternative for a prison sentence *if they had already decided that a prison sentence was appropriate in the circumstances and thus, they could not impose a CSO unless it was in lieu of a prison sentence*. S. 3(2) provides that such an order may require that an offender is obliged to complete between 40 and 240 hours of unpaid work and must report to the relevant officer. Despite its positioning as an alternative to prison, in Ireland at least, the CSO was not specifically designed as a rehabilitative sentence (Guilfoyle, 2017). There are additional conditions that must be met before a judge may impose a CSO and these are contained in s. 4 of the 1983 Act (later substituted by section 4 (a) of the 2011 Act). Before formalising the imposition of a CSO the court must be satisfied that the following conditions have been met:

- That the offender is suitable to perform community service (having considered his or her circumstances and a probation report about them);
- That appropriate work is available in the community;
- That the offender consents to the order.

The 1983 legislation made the imposition of a CSO conditional upon the consideration of a report about the offender and provided in s.5 that CSOs could be imposed concurrently or in addition to other CSOs if sentencing more than one offence or a CSO was already in place.

Updating legislation was introduced in 2011 in an attempt to expand the use made by the courts of CSOs as an alternative to short prison sentences (Carr 2016). The *Criminal Justice (Community Service) (Amendment) Act 2011* introduced a new duty on judges to consider the imposition of a CSO as an alternative to a prison sentence of 12 months or less. The 2011 Act strengthened the already existing requirement on the court to obtain an assessment report from the Probation Service where it considers it appropriate to make a CSO. While the intention behind the new legislation was to encourage judges to use CSOs instead of short prison sentences, some commentators regarded this as a largely symbolic piece of legislation because *it did not require the imposition of a CSO as an alternative but merely required judges to consider imposing this* (Maguire, 2014, 2016; Guilfoyle, 2017). In addition, s.7 of the *Fines (Payment and Recovery) Act 2014*, provides that a court may make one of three orders: 1) a recovery order; 2) an

attachment order or 3) a community service order when a person fails to pay a court ordered fine by the due date. The usual provision of between 40 and 240 hours can be imposed for the non-payment of fines imposed in relation to indictable offences whereas for a summary offence the court is confined to imposing between 30 and 100 hours of CSO.

Previous Irish Research on Community Service Orders

Walsh and Sexton (1999) examined a national sample of CSO probation files (n=649), interviewed probation officers and observed court sittings in which CSOs featured. They concluded that although CSOs are used widely in the District Court throughout the State, it appeared that they are infrequently applied in some areas by some judges and are rarely used outside of the District Court. They observed that CSO matters are dealt with very quickly in court (in a matter of minutes), and that the issue of informed consent on the part of the offender was not always clear. Walsh and Sexton's (1999) court observations found variability between Districts regarding length of orders and alternative prison sentences, and they conclude that the average length of a CSO was longer in urban Districts than in rural Districts.

In Walsh and Sexton's (1999) research the standard recipient of a CSO in Ireland at that time was a young, unemployed, single male who was poorly educated and still living with their parents. Over half had a criminal record but 40% of these could be described as minor, while a significant proportion had already served a prison sentence (Walsh and Sexton, 1999). This study also found that judges imposed CSOs most frequently in relation to property offences (41%), offences against the person (23%) and road traffic and vehicle offences (24%). Walsh and Sexton (1999) concluded that there was some evidence to suggest that CSOs were being used in some cases for offences which might not have attracted a custodial sentence if the option of a CSO as an alternative was not available. They also found examples of cases in which judges were creatively combining CSOs with other penalties, and at least one case where a CSO below the statutory minimum had been imposed.

Walsh and Sexton (1999) recorded that the national average number of CSO hours for one month of imprisonment was 27 hours. However, there was substantial variation between different districts thus suggesting considerable uncertainty regarding the number of CSO hours that should be imposed relative to the length of a prison term. They speculated that the variations may have been exaggerated by a tendency to resort to CSOs in cases where a prison term would not normally have been imposed if a CSO were not available. They found high completion levels and speculated that potential reasons for non-completion might be the boredom with the work, which was mostly manual work involving painting, decorating, gardening and helping out at old people's homes. In approximately one third of the cases in their sample the commencement of the CSO was delayed for at least two months after it was imposed.

In one of the few studies exploring judicial attitudes to CSOs, Riordan (2009) found that some judges were reluctant to substitute a custodial sentence with a CSO particularly for indictable offences. In this research some judges expressed concerns regarding the monitoring and enforcement of orders by the Probation Service. Riordan (2009) further observed that some judges prefer the certainty involved in a prison sentence over the

relative uncertainty of what can be achieved in a CSO. He concluded that there was support for a CSO as a standalone sentence (i.e., not necessarily as a direct alternative to imprisonment) that is more suitable for 'lower end offences', as many of the respondents in his sample did not consider the CSO to be equivalent with a prison sentence.

In 2009 the Department of Justice, Equality and Law Reform (DJEL, 2009) published the results of an evaluation of how the CSO operates in Ireland. Similarly, to Walsh and Sexton (1999), the evaluation noted that a small number of courts accounted for the majority of CSOs imposed and that there were large areas in the country where CSOs were not used by courts at all. While this report found a high level of support from the judiciary for CSOs, it concluded that some judges were reluctant to use CSOs. Echoing some of Riordan's (2009) findings it found judges were highly supportive of using CSOs as a standalone sentence and for increasing the maximum number of hours that can be imposed (i.e. beyond the existing 240 hour maximum).

Maguire's research (2010) found considerable variation between different District Court judges in their views about the suitability of various sanctions when asked to pass sentence on the same case. Judges agreed most about the circumstances in which prison should be used and the consensus was that a prison sentence was most appropriate for serious offences and for persistent offenders who are unwilling or unable to change (Maguire, 2010). Judges disagreed most about the circumstances in which non-custodial sanctions were appropriate. Most judges were very supportive of CSOs and the work of the Probation Service. However, there were mixed views about the suitability of CSOs for persons who had addictions. Most judges who participated in the research considered that CSOs were generally not suitable for offenders with addictions (Maguire, 2010:48-49). Maguire (2014) also examined judicial perspectives on the principle of last resort and found that while judges generally approve of the principle in theory, in practice they often depart from the spirit of the principle to deal with what they believe to be the exigencies of the case, one of the most important of which is persistence. A majority of judges interviewed identified three sets of circumstances in which they would start from the assumption that prison was the appropriate sanction, rather than the last resort. These included: (1) for serious offences, (2) for persistent offenders, and (3) when no other penalties were appropriate. A common justification was that previous non-custodial sanctions had not worked and were no longer suitable, leaving imprisonment as the only available option.

Using administrative data, O'Hara and Rogan (2015) conducted a statistical comparative analysis of all cases sentenced to a short prison sentence and a CSO between 2011 and 2012. They found a strong variation in the use of CSOs and short prison sentences across all District Courts and reported a slightly higher chance of receiving a CSO rather than a short prison sentence in rural than in urban courts. They noted that in some court districts the odds of receiving a short prison sentence over a CSO were much greater and only eight districts imposed more CSOs than short prison sentences. Their analysis showed that public order offences, road traffic offences, and theft, accounted for the majority of CSOs and that there was a considerable similarity with offence types that accounted for short prison sentences (O'Hara and Rogan, 2015:40). For almost all

categories of crimes, the average alternative prison sentence for which the CSO was imposed in lieu of, was longer than the prison sentences imposed on the comparator group (O'Hara and Rogan, 2015:34). The authors speculate that this might be a way for judges to increase the deterrent effect of the CSO.

In summary, a key theme emerging from the limited previous research conducted in Ireland on CSOs suggests that there is considerable variation in practice between different court districts and this is illustrated by fact that only a small number of courts account for the majority of CSOs imposed each year. A reluctance to use CSOs amongst some judges appears alongside a view that CSOs are more suitable for offences at the lower end of the scale and not necessarily suitable for people with many previous convictions, who commit serious offences or for people with substance misuse issues. The following section of this chapter presents data on current use of imprisonment in Ireland (specifically sentences of short-term imprisonment) and trends in the use of CSOs in Ireland over time.

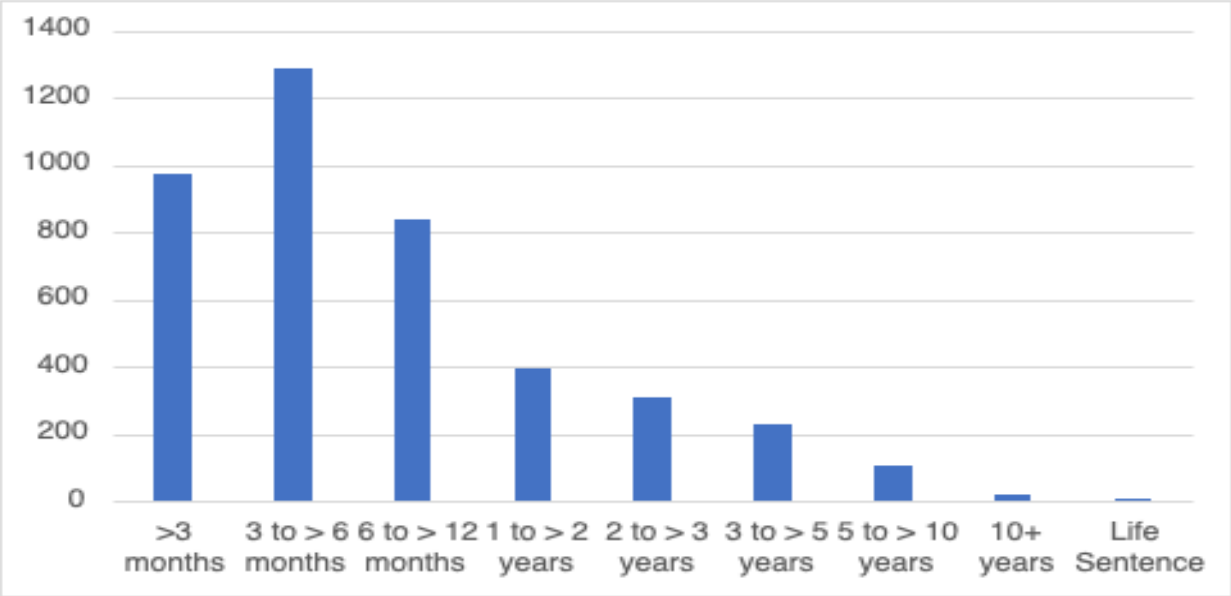
2.6 Prison Use in Ireland

The rate of imprisonment in Ireland has risen in recent years from 80 persons detained per 100,000 of the population in 2018 to 89 per 100,000 in 2023. In terms of the composition of the prison population, the latest available data shows that of a total population of 4,731 prisoners on 30.11.2023 females account for less than 5% of the overall population (4.9%), while Foreign Nationals comprise 15.4% of the prison population. Just over a fifth of the population are remanded (20.2%), and this proportion has risen in recent years.

The numbers of people moving through the system (the population churn) in any given year is much higher than the average daily population. The latest available data published by the Irish Prison Service (2023) [33], reports that there were 7,043 committals to prison in 2022, an increase of 14.8% on the previous year.[34] **Figure 1** below provides an overall breakdown of committals by sentence lengths and shows that the vast majority of people (74%) sentenced to prison in 2022 received short prison sentences (i.e., sentences of less than 12 months). With most (31%) receiving sentences of 3-6 months.[35]

[33] Recognising the possible impact of COVID and public health restrictions on the prison population, it is also helpful to look at prison population data prior to the pandemic. Data from the prison service shows that 7,170 people were sent to prison in 2019 an increase of 10% from the previous year. The numbers of people committed under sentence had increased from the previous year and committals across all prison sentence lengths had increased (IPS, 2019)
[34] 205 people were committed to prison for fine defaults in 2023.
[35] Note: This breakdown excludes people committed to prison for fine defaults.

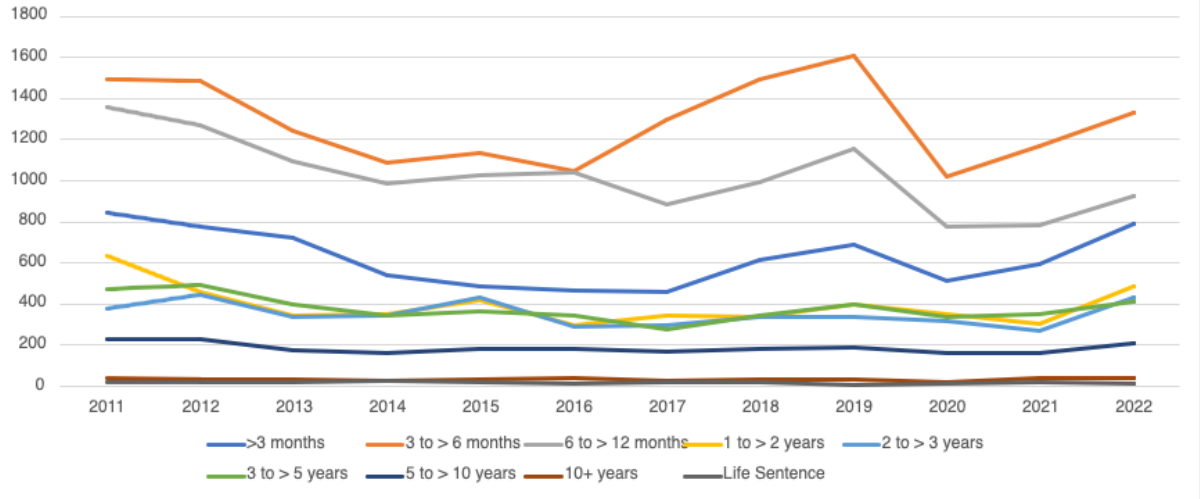
Figure 1: Prison Committals by Sentence Length



Source data: Irish Prison Service Annual Report 2022

Figure 2 below provides an overview of overall trends in the lengths of prison sentences over the past 11 years. It illustrates that the number of short-prison sentences have increased both in real terms and as a proportion of the overall prison population. The use of short-term prison sentences therefore accounts for a significant proportion of the growth in the Irish prison population in recent years. This is further compounded by an expansion in the stock figure (i.e., the number of people held in prison over time) as, at the other end of the spectrum, the amount of people serving longer prison sentences has increased. For instance, there were 367 people in custody serving life sentences on 30th November 2022 (10.7%) of the sentenced population and another 272 (7.9%) people serving determinate sentences of 10 years or more.

Figure 2: Trends in Prison Sentence Lengths (2011-2022)



Source data: Irish Prison Service Annual Report 2022

Offences

When broken down by offence, Theft and Related offences account for the highest proportion of prison sentences (18.6%) in 2022, followed by Attempts/Threat to Murder, Assaults, Harassment and Related Offences (13.45%), Offences against Government, Justice Procedures and Organisation of Crime (12.44%) and Road and Traffic Offences (10.03%)[36]. Theft and Related Offences account for the largest proportion of people serving short prison sentences (i.e., sentences of less than 12 months) in 2022 (IPS, 2023).

The economic cost of imprisonment in Ireland, in common with other countries, far exceeds the cost of community sanctions. The average annual cost of a prison place in Ireland is **€84,067**[37] while the average cost per year of probation supervision is **€5,712** (Crowe, 2023). Underscoring the value for money differential, in a recent *Operational Review of Community Service,* the following cost/benefit analysis is provided:

> *In addition to the cost saving for the Exchequer, the Community Service Scheme provides more than €2 million worth of unpaid work for the benefit of communities nationwide, through 203,306 hours of community service work in lieu of 713 years in prison. Based on the costing figures outlined above, we looked at the overall cost saving of the scheme based on hours worked in lieu of prison. According to the Probation Service Annual Report, 1,360 CSOs were performed in lieu of prison in 2021, which would equate to a cost to the Exchequer of just under €7.77 million. When considering the 713 years of prison that would have occurred and utilising the average cost of an available staffed prison space, we found that this would have equated to around €57,357,285. A comparison of these figures shows a saving of just over 86%, equalling €49,588,965. (Crowe, 2023:5)*

2.8 Use of Community Sanctions and Measures in Ireland

The Probation Service supervises a range of community sanctions and measures, including community sentences imposed by the Court and post-custodial supervision requirements. As noted earlier in this report, Community Service Orders were introduced under the *Criminal Justice (Community Service Act) 1983*. Under the provisions of this legislation, a person over the age of 16 can be sentenced to a minimum of 40 hours and up to a maximum of 240 hours of unpaid work in the community. At the point that they

[36] The remainder of offence categories accounted for less than 10% of the total and include homicide (0.85%), Sexual Offences (5.31%) and Burglary and Related offences (5.64%). Full data is supplied in the Irish Prison Service's Annual Report (IPS, 2023).

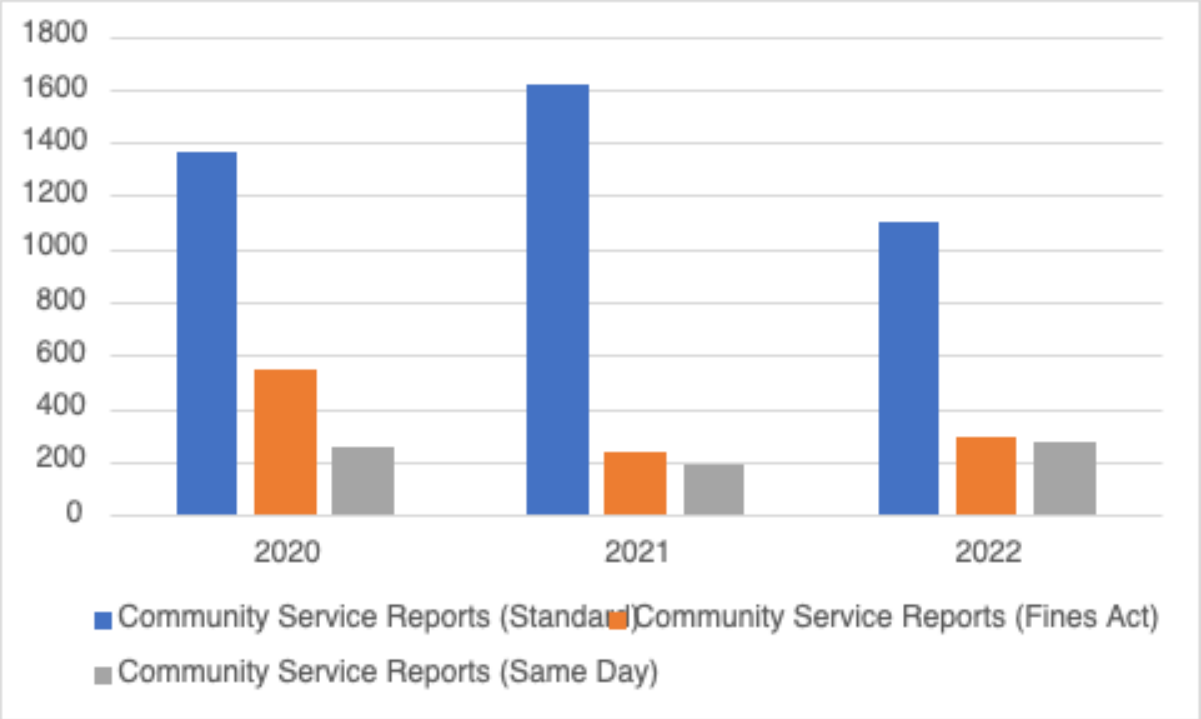
[37] This information is reported in response to a written question submitted to the Minister for Justice, Helen McEntee on 13.06.23 and pertains to data from 2022. The response includes the following detail: "The figure includes all elements of net expenditure incurred to the Irish Prison Service vote within the year, (such as salaries, utilities/maintenance, ICT, services provided to prisoners including education, healthcare, work training etc.) and excludes capital expenditure on buildings and vehicle purchases." Available at: https://debatesarchive.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2023061300100#WRTT00300

were introduced, CSOs were intended to address problems of prison overcrowding (Guilfoyle, 2017, 2018), and under the legislation a CSO is positioned as a direct alternative to custody, meaning that that an order can only be made when the threshold of a custodial sentence has first been met. Later amendments to the legislation (*Criminal Justice (Community Service) (Amendment) Act 2011)* as well as the *Fines (Payment and Recovery) Act 2014* have been intended to expand the use of the provision as an alternative to imprisonment The 2011 amending legislation placed a requirement on judges *to consider* imposing a CSO when they would otherwise have imposed a prison sentences of 12 months or less. This was intended to curb the use of short-prison sentences and represented an important marker of the legislature's desire to encourage the use of CSO by the judiciary (O'Hara and Rogan, 2015). While the 2011 Act reaffirmed the legislative intent that a CSO should be used as a direct alternative to a prison sentence of less than 12 months (O'Hara and Rogan, 2015), Maguire (2014) and Guilfoyle (2017) observed that the new provisions were relatively weak in that they merely required judges to *consider* the imposition of a CSO and consequently did not achieve the desired policy effect. The *Fines (Payment and Recovery) Act 2014* was explicitly enacted to curb the use of imprisonment for fine defaulters. Under the legislation a court may impose a CSO of up to 100 hours (benchmarked in legislation as being equivalent to 30 days in prison) (Kennefick and Guilfoyle, 2022).

In 2022, 1,670 Community Service Assessment Reports were completed by the Probation Service (16% of which were completed in the same day) (Probation Service, 2023). As well as reports to specifically assess a person's suitability for Community Service, referrals are also made to the Probation Service from the Court for Pre-Sanction Reports (PSRs), with a specific requirement to consider Community Service. In 2022, Probation received 464 such referrals.[38] Data published by the Probation Service (**Figure 3** below) provides a further breakdown of the basis for Community Service Report Assessment referrals, a proportion of which are specifically requested under the *Fines (Payment and Recovery) Act 2014.* This data illustrates that court requests for Community Service Assessment Reports have declined in recent years, although the precise reasons for this decline are not clear.

[38] As well as 4,138 referrals for general PSRs.

Figure 3: Community Service Report Assessment Referrals (2020-2022)



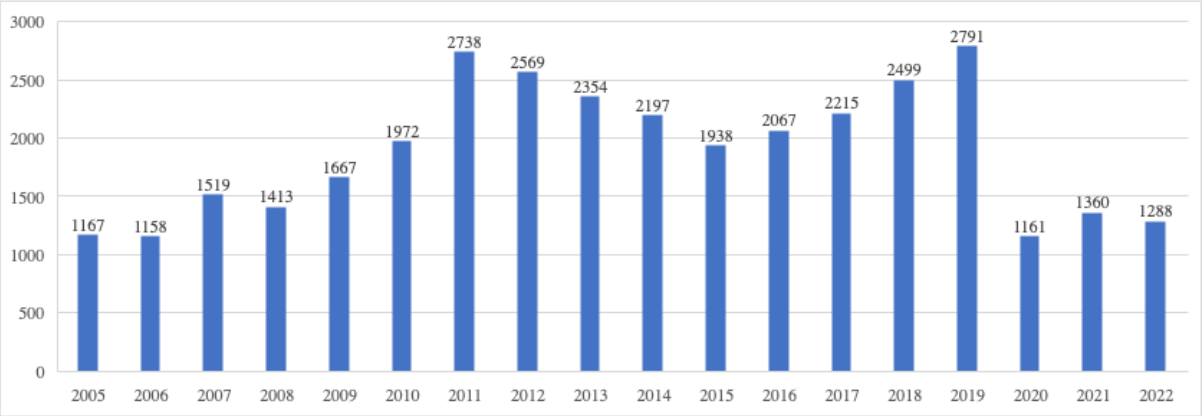
Source Data: Probation Service Annual Report (2022)

Probation Orders and Fully Suspended Sentences with supervisory requirements currently constitute the largest proportion of supervised sentences in the community. This is followed by 'Supervision During the Deferment of Penalty' (also referred to as Adjourned Supervision). Adjourned supervision is typically prompted by a court request for a pre-sanction report. During the period of adjournment in legal proceedings while the report is being prepared people are sometimes subject to 'adjourned supervision'. This involves a prolonged period of adjournment, between adjudication and sentencing, whereby the defendant is supervised by a probation officer (who gives regular update reports to the court on the defendant's progress) but is not subject to a formal sentence (Maguire and Carr, 2017). Adjourned supervision has been practiced for over 40 years in Ireland. Although it does not have a statutory basis in Irish law it has been characterised as a 'judicial innovation' (Healy and O'Donnell, 2005), which has emerged in the absence of any significant changes to the statutory framework governing probation (the *Probation of Offenders Act 1907* remains the primary underpinning legislation).

The number of Community Service Orders made by the Courts have fallen in recent years (from over 2,500 in 2019 to fewer than 1,300 in 2022). **Figure 4** below provides an overview of the longer-term trend which shows some variation in the use of CSOs over time. In 2011 there was a rise in the use of these sanctions, which corresponds with increased policy attention and investment in CSOs following the publication of a critical *Value for Money Review* in 2009 (DJELR, 2009). However, the number of orders imposed on an annual basis has subsequently fallen until a more recent uptick in 2016.

This corresponds to the timing of the implementation of the Fines *(Payment and Recovery) Act 2014* (Kennefick and Guilfoyle, 2022). From 2020 the number of orders has fallen more markedly. The initial fall-off in 2020 aligns with the COVID pandemic, and the overall reduction in cases being processed through courts. However, more recently the numbers of CSO sentences have remained relatively low.

Figure 4: Numbers of CSOs supervised by the Probation Service (2005-2022)



Source: Probation Service Annual Reports 2005-2022

The most recent available data shows that the most common offence categories for which Community Service Orders were issued in 2022 were: drug offences (18.8%); road traffic offences (18.7%); assault offences (11.8%); public order offences (11.7%) and theft (11.5%). Information on the geographical distribution of community sentences shows that there are differential patterns in their use across Ireland. For instance, rates of referrals to the Probation Service (which includes requests for reports) are highest in Longford, Limerick, and Carlow, while relatively low in Cavan, Meath, and Kerry. Looking specifically at Community Service Orders, their use is highest in Carlow, Kilkenny, and Clare (50 or more per 100,000 residents) while lowest in Meath and Kerry (less than 10 per 100,000). Again, the reason for this variation in use of sanctions is not explained, but presumably is indicative of sentencing preferences at District Court (and to a lesser extent Circuit Court) level as well as possibly pointing towards variability in availability of provision in these areas.

The Controller and Auditor General's (2004) review of the Probation Service attributed the decline in the use of the CSO to their lack of suitability for persons with substance misuse problems, a reduction in requests for pre-sanction reports assessing suitability for CSOs and a decline in unemployment rates.[39] More insight into variability across Districts can be gleaned from the Department of Justice (2009) evaluation of the

[39] Weekend CSOs have never been available in Ireland.

operation of the CSO Scheme. Using statistics not publicly published it found that in 2006 the majority (60%) of CSOs were imposed by just 12 District Courts. They also found that the equivalence rate between CSO hours and months in prison varied considerably. It concluded that judicial discretion, unsuitability of offenders and a lack of local projects most likely accounted for the low use of CSO in some areas. A key recommendation of that report was an information dissemination campaign to the judiciary, targeting the use of CSOs in specific areas and improving data collection systems (Department of Justice, 2009).

Research on the policy, practice and structures governing community service in Ireland notes that there are continued issues regarding accessibility and flexibility of community service provision in rural localities when compared to urban areas (Kennefick and Guilfoyle, 2022). However, as Kennefick and Guilfoyle (2022: 47) further observe:

> *The current lack of sentencing data hampers the ability to engage in meaningful analysis of CSO sentencing trends, and trends in the use of criminal sanctions more generally.*

This view is supported by a recent analysis exploring the lack of systematic sentencing data in the Irish context, and which has recommended the development of a comprehensive strategy and implementation plan to address this deficit (Gormley et al, 2022).

2.9 Recent Policy Initiatives

As outlined above, there has been a documented reduction in court requests for community service assessment referrals in recent years (Probation Service, 2023). To address this issue, the Probation Service commissioned an *Operational Review of Community Service* (Crowe, 2023) and an *Evidence Review of Community Service Policy, Practice and Structure* (Kennefick and Guilfoyle, 2022). The *Operational Review* analysed existing data on community service and carried out a consultation with a range of stakeholders. It found that the Community Service Scheme run by the Probation Service is broadly operating as intended, but that there were a number of 'significant issues in how the Scheme is organised' (Crowe, 2023:1). Some of the issues identified included sometimes significant delays in the time between a person being sentenced to a Community Service Order and being placed on a community service site.

Following a recommendation of the *Penal Policy Review Group (2014),* the Probation Service commenced an Integrated Community Service (ICS) pilot. This provided for community service to be imposed with additional conditions such as treatment for drug addiction or restriction of movement orders. The ICS provides for some flexibility in the operation of a CSO. A probation officer can grant permission for a person to spend up to one-third of their CSO hours in education, training, or a treatment programme (for men, and up to half of their CSO for women). The *Operational Review* outlines that in the period 2017-2019, the top three offences resulting in a referral for a Community Service Order from the courts are:

- Theft
- Drug Offences

- Assault

Since 2020, drug offences have accounted for the most referrals (19-23%), while in 2021 Road Traffic offences were the most common offence for which people received a CSO. Based on an analysis of crime data published by the Central Statistics Office, the *Operational Review* notes that there may be scope for the Probation Service to adopt some offence specific interventions. Analysis of demographic data provided in the Review points to some gender differentials regarding referrals for CSOs, particularly for people receiving sentences for Non-Payment of Court-Ordered Fines. Women feature more prominently in this category than in general figures on offending, and they also typically receive shorter prison sentences (of less than one year). Data on reoffending rates included in the *Operational Review* shows that there are much lower one-year reoffending rates across all offence types for people sentenced to community sanctions when compared to imprisonment. The *Operational Review* makes a number of recommendations to promote awareness of CSOs amongst the general public and key stakeholders including the judiciary and the Gardaí. Further recommendations include the development of partnerships between local and national organisations in order to expand the network of community service placement opportunities and that information on compliance with orders should be more systematically examined to explore factors promoting compliance and if these vary across placements.

In their evidence review of Community Service, Kennefick and Guilfoyle (2022) note that the CSO lacks a coherent penal purpose. It is positioned as an alternative to custody, but it does not incapacitate a person in the same way as imprisonment. Its retributive capacities, i.e. depriving a person of their time in recognition of the harm caused by offending are somewhat limited. A CSO may serve a rehabilitative purpose, but this may not be foregrounded in its execution. It can involve an element of reparation, i.e. 'paying back' to the community through undertaking unpaid work. All of the above (and in common with other jurisdictions where CSOs or their equivalent are available) has led to the characterisation of the CSO as comprising a 'smorgsabord of penal purpose' (Pease cited in Carr and Neimantas, 2023). McCarthy (2014) has also argued that the development of the CSO in Ireland has typically lacked an ideological slant and he points to its 'potential elasticity' as demonstrated by its inclusion in the Community Return Scheme[40], as a direct alternative to prison for sentences of less than 12 months, and as an alternative to imprisonment for fine defaulting. Drawing on wider research literature and examples from other jurisdictions, Kennefick and Guilfoyle (2022) have therefore proposed the development of a tripartite strategy for CSOs based on principles of *desistance, restorative justice* and *social justice.* This, they argue, would make the functions of CSOs more discernible to a broad range of stakeholders including people subject to such orders, sentencers and the wider community.

[40] The Community Return Scheme is a conditional early release scheme whereby persons serving a prison sentence of between 1 and 8 years, if eligible, may be released at the halfway point of their sentence but must perform a certain proportion of community service order hours per month of their remaining prison sentence when released. See: McNally and Brennan (2015)

2.10 Conclusion

This chapter has set out the context regarding the use of short-term prison sentences and Community Service Orders (CSOs) in Ireland. Policy aims to encourage the greater use of CSOs and to reduce the use of short-term prison sentences progressed through the expansion of legislative provisions have not yet achieved their desired effect although there has been a considerable reduction in recent years in the imprisonment of fine defaulters. Sentencing law and practice in the District Court, particularly in relation to repeat offending, are a likely contributing factor to the continued over-reliance on short prison sentences. Research on CSOs in Ireland has consistently highlighted variability in the use of this sentencing option across the country and some of the systemic factors, including accessibility to placements that have impacted on their use. A range of research has also underscored the importance of information sharing and awareness raising amongst the judiciary and the wider public.

The information provided by organisations such as the Irish Prison Service and the Probation Service on their caseloads cited in this chapter is useful for helping us to understand broad trends in the use of these sanctions, however this only provides a partial picture of overall sentencing practices and trends. Recent research on sentencing in Ireland identifies several shortcomings with existing data. Firstly, the offence categories used are very broad and potentially encapsulate a broad range of offending, secondly, they do not provide any information about the nature and circumstances of the offences or the offender, and thirdly they do not adequately capture cases involving multiple convictions (Gormley et al, 2022). Therefore, while existing organisational data, and a growing body of research, evidences some differential patterns in sentencing across Ireland, our understanding of overall sentencing patterns and trends is limited. This potentially hampers the effective implementation of policy, while at the same time restricting a fulsome assessment of the impacts of policy implementation in this area.

3. Rapid Review of International Literature

3.1 Introduction

This chapter presents some of the key findings from the rapid literature review. The chapter is structured around a number of relevant themes, which have been guided by the overall focus of this research along with prominent issues identified through the literature search. In the first section research literature documenting the impacts of short-term imprisonment is reviewed. An overview of relevant research on community sanctions and community service specifically is then presented. This section includes a focus on comparisons between community service and other forms of penal sanctions. In accordance with the literature search criteria, the review focusses mostly on findings from Council of Europe member countries in the period from 2005 to the present, but where relevant findings from other contexts are included (e.g., where salient issues regarding programme characteristics and implementation challenges are raised), and outside of this time frame where findings may be relevant to the Irish context. Research which outlines the characteristics of community service in different countries, including its status and scope as a penal sanction is also included, as well as policies which have sought to promote the use of community service as an alternative to imprisonment in different contexts. The final section of the chapter includes an overview of relevant research exploring judicial attitudes towards community sanctions and public understanding of these measures.

3.2 Impacts of Short-Term Imprisonment

A wide body of research from a range of different contexts has documented the negative impacts of short-term imprisonment. Such evidence has been cited as one of the drivers towards reducing the use of short-term imprisonment. For instance, in Scotland where a presumption against the use of short-term prison sentences has been introduced, the negative effects of this sanction has been articulated as one of the main impetuses behind this policy (Anderson et al, 2015). Alongside demonstrably higher rates of recidivism, short-term prison sentences are also criticised based on relative costs, both in terms of the financial costs of imprisonment itself, as well as the personal and social costs incurred by individuals made subject to such sentences.

Analysis of recidivism rates in a range of different countries typically shows that short-term prison sentences are associated with higher rates of re-offending than community sentences. A Dutch longitudinal study which explored re-offending rates of people sentenced in 2012, reported that being sentenced to a short-term prison sentence (of less than six months) rather than a non-custodial sanction increased recidivism by ten percentage points (Wermink et al, 2023). The impacts were worse for first-time offenders and adult offenders. Data from other countries, including England and Wales (Mews et al, 2015; Eaton & Mews, 2019) and Scotland (Scottish Government, 2023), shows similarly higher rates of recidivism for people sentenced to short-term imprisonment when compared to other sanctions.

In England and Wales, the high rates of reoffending for short-term prison sentences led to the introduction of post-release sentence supervision requirements for all prisoners regardless of sentence length. However, this policy has not had the intended effect (i.e., a reduction in recidivism rates), but has actually led to a situation of an extended net of punishment with more recalls to prison (Cracknell, 2021). The most recent analysis of comparative reoffending data from England and Wales reports that:

> …sentencing offenders to short term custody with supervision on release was associated with higher proven reoffending than if they had instead received community orders and/or suspended sentence orders. (Eaton and Mews, 2019: 1)

Some of the explanatory factors for the particularly negative impacts of short-term imprisonment include the fact that such sentences do not typically allow for access to rehabilitation, such as educational opportunities, or any meaningful engagement in offending behaviour programmes (Loeffler and Nagin, 2022). The prison environment has long been associated as providing a negative milieu, particularly in the context of peer-effects (Damm & Gorinas, 2020). Moreover, a sentence of imprisonment may have several collateral effects, including breaking of social ties and de-stabilisation of housing and employment. Research on the factors that promote desistance from offending shows that sentences of imprisonment have a particularly negative impacts on a person's social bonds, particularly in relation to disruption of family relationships (Kirk and Wakefield, 2018).

Research exploring people's experiences of short-term prison sentences from Scotland highlights the life circumstances and challenges faced by many people in this situation (Weaver and Armstrong, 2011). In many instances, people subject to short prison sentences will have had extensive histories of engagement with the criminal justice system and prior experiences of imprisonment. Drug and alcohol misuse and a long history of previous convictions are common issues. Weaver and Armstrong's (2011) study found that people who experienced short prison sentences typically characterised such sentences as involving a repetitive and unstimulating routine. Some respondents felt safer in prison than outside, and in this sense short prison sentences were viewed as both *hard* and *easy*. In terms of the overall purposes of such sentences, most considered that short-term imprisonment provided a short-term incapacitation effect but served little purpose beyond this. This feature is particularly underscored for people with long 'penal careers' (Schinkel et al, 2021), that is, persistent offenders who have experienced multiple short-term prison sentences.

The research evidence on the broad negative effects of short-term imprisonment, and on recidivism rates in particular, calls into question punishment rationales which justify the use of imprisonment based on its putative deterrent effects. The form of such sentences varies across different contexts and regimes, but the most that can be said in terms of penal justification is that sentences of short-term imprisonment provide a limited incapacitation effect.

3.3 Community Sanctions

A number of studies have explored the relative effectiveness of community sanctions compared to other criminal justice sanctions. In this body of research, the primary metric to establish effectiveness is a reduction in recidivism as measured by official data (Turner and Trotter, 2013). Some studies also include self-report data on offending alongside official recidivism data (e.g., Killias et al, 2010b). The inclusion of both official and self-report offending data is generally considered a more robust measure (Villetaz et al, 2015). Some studies also report on the comparative costs of different sanctions. In all the contexts where this comparison is undertaken community sentences cost a fraction of the cost of a prison sentence. In a Dutch study a sentence of imprisonment is reported as costing eight times the amount of a community service order (Wermink et al, 2010). In the Nordic countries community sentences are similarly considered a much cheaper option, both in terms of the economic costs, but also in relation to the social costs arising from imprisonment (Lappi-Seppalla, 2019). Other studies also measure differences in completion rates between different forms of sanctions and some include measures of social integration (e.g., Killias et al, 2000; Killias et al, 2010a; 2010b)

A number of reviews of existing research note that despite the fact that community service has existed as a sanction for several decades (since the 1970s in the United Kingdom and the 1960s in the United States), there has been a relatively limited body of research comparing differences in outcomes between community service and other penal sanctions (Bouffard and Muftic, 2006; Killias et al, 2010a; Villetaz et al, 2015). Some of the reasons put forward for the relative paucity of research includes the contention that the objectives of community service are often so diverse as to make measurement of outcomes difficult (Bouffard and Muftic, 2006). Meanwhile some have argued that the implicit assumption that community service is 'good' when compared with imprisonment has mitigated against systematic comparison (Killias et al, 2010).

The numbers of systematic reviews applying research criteria of comparability - i.e., where a person with broadly the same characteristics is randomly sentenced to either a community sentence or a short prison sentence are limited. However, a small number of studies do exist. Villetaz et al's (2015) Campbell Systematic Review includes studies which meet the strict inclusion criteria for this form of review.[41] The overall review explores data on the effects of custodial and non-custodial sanctions, a small proportion of which specifically consider community service. The research reported in the review includes studies carried out with both adult and juvenile populations.

[41] Randomized or natural experiments, as well as quasi-experimental comparisons between former prison inmates and those who served community sanctions …. provided that propensity score matching methods were used. Other quasi-experimental studies have been included… if subject were matched or if three or more potentially relevant independent variables had been controlled for. (Villetaz et al, 2015:9). This review covers studies undertaken between 1961 and 2013.

3.4 Effectiveness of Community Service

A small number of studies have compared the effectiveness of community service orders with short-term prison sentences. Research by Nirel et al (1997) carried out in Israel compared reconviction rates amongst prisoners and offenders sentenced to 'service work' (community service). This study explores reconviction rates after 14 months and used propensity score matching to assess the odds of recidivism between the two groups. The odds for reconviction were higher amongst the prisoner groups (1.7 times higher). Killias et al's research (2000) conducted in Switzerland in the late 1990s, compared the outcomes of people randomly assigned to sentences of community service with people sentenced to short prison sentences (sentences of up to 14 days). Such short sentences are routinely used for a variety of offences including minor thefts, drug use, drink-driving and other driving offences. This research found that there were no significant differences in reconviction rates for both groups, but that re-arrest was more frequent for those sentenced to short-prison sentences, and that overall people sentenced to imprisonment developed more unfavourable attitudes towards the criminal justice system.

The initial findings reported in Killias et al (2000) charted outcomes between the two groups two-years post-sentence. A subsequent follow-up study (Killias et al, 2010a) followed outcomes for the same group 11 years post-sentence. Although not reaching the level of statistical significance, reoffending was more common amongst the group originally sentenced to a short term of imprisonment compared to those who had been sentenced to community service. However, the overall results of this research showed that community service did not reduce rates of re-offending nor provide for greater levels of social integration (measured by financial and relationship status), when compared with short-term prison sentences. An important caveat to this overall observation is the fact that the duration of short-term imprisonment to which people were sentenced in this study was up to a maximum of 14 days. Therefore, some of the identified negative effects of short-term prison sentences, such as loss of accommodation or employment and disruption of social bonds, may not have materialised, because of the relative short duration of the custodial comparator.

Research conducted in Finland, however, which compared outcomes between people sentenced to short prison sentences (of up to 8 months), and those sentenced to community service found that recidivism rates after a period of five years were slightly lower for people sentenced to community service (Muiluvuori, 2001). However, the differences between the groups were not statistically significant. In a later Dutch study Wermink et al (2010) used longitudinal data on criminal records to compare recidivism rates of a large cohort (n=4,246) of people sentenced to community service orders or a short-term of imprisonment (up to six months) over a period of eight years.[42] The overall

[42] Since 1989 Dutch courts have been able to impose community service up to a maximum of 240 hours to replace an unconditional sentence of imprisonment of 6 months or less, or a partly suspended sentence of imprisonment in which the unconditional part would be 6 months or less. From 2001 onwards, community service has been available as an autonomous sentence. In

findings from this research show that people sentenced to community service had lower reoffending rates than those sentenced to short-term prison sentences. In a more recent Danish study, the reconviction rates of a large sample (n=1602) of people sentenced to a community service order or imprisonment in 2005-2006 were compared (Klement, 2015)[43]. This study found that a sentence to short-term imprisonment was associated with higher levels of recidivism and that this finding was statistically significant.

A smaller number of studies have examined the specific effectiveness of community service orders compared to other non-custodial sanctions. Killias et al's (2010b) research conducted in Switzerland examined the effectiveness of community service orders for people sentenced to this sanction compared to those who were made subject to electronic monitoring. This study included data on 240 people who were randomly assigned to either sentence option. The outcomes explored in this research included – reconvictions, self-reported delinquency and a range of social measures including marriage, income, and debts. Overall, this research found that those assigned to electronic monitoring (and who completed their sentence without breaching) reoffended less than those assigned to community service. This group also experienced greater levels of social integration.

It is noteworthy that in the Swiss context at the time that this research was conducted (i.e., in the early 2000s), both community service orders and electronic monitoring could be implemented as forms of executing short custodial sentences of up to six months. Persons assigned to community service were typically required to carry out unpaid work in welfare institutions such as homes for the elderly or in hospitals, or to carry out work cleaning up resort areas (Killias et al, 2010b). Interestingly, post-sentence interviews noted that while the experience of both forms of sanction was comparatively positive, those subject to community service orders viewed this sentence as being more meaningful. In respect of the different outcomes for both forms of sanctions, with electronic monitoring overall achieving better outcomes, the authors of this study hypothesise that those made subject to electronic monitoring who successfully completed their sentences, may have had less opportunities to engage with pro-criminal peers because of their curfew requirements. People on community service on the other hand, may have had more opportunities to engage with other offenders because of work placements.

However, this suggestion regarding the potential criminogenic effects of community service placements when compared with a more incapacitative requirement is clearly context dependent. For instance, other research has pointed to the possible benefits of

other words, it can serve as a primary penalty instead as solely a replacement for a short-term prison sentence (Wermink et al, 2010).

[43] In Denmark a community service order of between 30-240 hours can be imposed combined with a suspended prison sentence. In other words, the custody threshold must be met in order to impose this order and it can only be attached to a suspended sentence. Community service does therefore not exist as an autonomous sentence (Klement, 2015). Klement (2015:242) observes: "In theory, CS can be given in connection with any crime regardless of the prison sentence an offender might otherwise receive. In practice, however, CS is seldom used in cases that would otherwise result in incarceration of more than 1 year."

community service in respect of the potential for people subject to such sentences to have positive contacts with non-offending co-workers (Harris and Lo, 2002). Some of the extant research documenting the experiences of people who have undertaken community service notes the potential for positive benefits including learning new skills, and a sense of 'giving something back' (Rex, 2005; HMIP, 2016). 'Pathfinder' projects developed as part of the 'What Works' initiative in England and Wales the early 2000s, specifically promoted an enhanced form of community service, incorporating pro-social modelling, development of employability skills, and targeting problems contributing to offending (Rex and Gelsthorpe, 2002). An evaluation found links between service user's perceptions of the value of community service (i.e., whether they perceived community service to be of value to themselves or others) and positive changes in pro-social attitudes and their perceived likelihood of reoffending (Rex et al, 2004).

In other research people who participated reported examples of their unpaid work placements leading to links with organisations which then provided avenues to other social supports and in some cases employment. For instance, earlier research carried out by McIvor (1993a, b) in Scotland, noted that some of the people subject to community service carried on working with organisations in a voluntary or paid capacity following the completion of their order. The idea that there can be different beneficiaries for unpaid work is linked to a sense of meaningfulness for all parties, and indeed there is evidence also demonstrating a link with compliance (McIvor, 1992). Moreover, Rex et al's (2004) evaluation established links between people's perceptions of the value of community service (i.e., whether they perceived community service to be of value to themselves or others) and positive changes in pro-social attitudes and their perceived likelihood of reoffending. More recent analysis carried out for the Ministry of Justice on the implementation of community orders in England and Wales reported that people with an unpaid work requirement (the equivalent of community service) who said that they were listened to by their supervisor (including in respect of arrangements about when work would take place), were more likely to say that unpaid work benefitted the community and that the requirement made them less likely to commit crime (Cattell et al, 2014).

3.5 Community Service Orders – Accessibility and the Construction of Suitability

A common theme noted in a range of research regarding community service orders concerns issues relating to the construction of suitability (i.e., who is deemed suitable to undertake such a sentence), raising related issues regarding accessibility (i.e., who is precluded from undertaking such sentences). To a certain extent, these issues mirror broader concerns across criminal justice systems relating to the treatment of minorities, but also take on a particular resonance in relation to a sentence which is frequently constructed around an able-bodied male offender. Typical forms of community service placements in many countries for instance involve forms of manual labour (Beyens, 2010; Carr & Neimantas, 2023). Some of the themes highlighted in this literature concern issues of equitable access for women, people with substance misuse issues and mental health needs, and foreign nationals and ethnic minorities.

Gender and Community Service Orders

Issues of accessibility and suitability of community service order placements for different groups has been observed in a range of research. Some of the earlier research undertaken on community service in Scotland and in England and Wales, documents particular concerns regarding the accessibility and suitability of placements for women, which in some cases mitigated against referrals from court. Some of the issues raised include the nature of work placements, the issues of single-sex provision and the lack of child-care provision (McIvor, 1998; Howard League, 1999; Patel & Stanley, 2008).

A *Review of Women with Particular Vulnerabilities in the Criminal Justice System* carried out in England and Wales by Baroness Jean Corston in 2007 (commonly referred to as the *Corston Review*), noted the need for more responsive community sentences based on some women's differential pathways into offending and multiple experiences of trauma and victimisation (Radcliffe and Hunter, 2016). Accordingly, Women's Centres were developed to work specifically with women on probation, in some cases facilitating unpaid work placements that were suitable according to individual needs. However, even with the development of the Women's Centre model, because of the relatively small numbers of women on probation, there has continued to be a 'postcode lottery' of service provision (Birkett, 2019:100). In Catalonia, where a sentence of community service is imposed, a probation officer can seek to modify this sentence according to the offender's need. For instance, by requiring engagement with education or therapeutic services (Vasilescu, 2021). Research carried out in Catalonia on women's experiences of community sentences shows that women appreciated placements that were adapted to their needs (which for some women included the provision of childcare or the facility to bring their children with them to sessions) (Vasilescu, 2021).

Deemed Unsuitable? Disability, Substance Misuse and Mental Health Needs

Research from The Netherlands notes that people with certain characteristics such as people with disabilities, are less likely to be sentenced to a community service order (Boone, 2010). Other research has documented issues regarding access for people with health concerns and/or disabilities (Henning, 1997; Scottish Sentencing Council, 2021). In most contexts access to community service as a sentence option is preceded by some form of suitability assessment. This typically includes some form of assessment of physical and mental capacities to consider whether a person can carry out the requirements of the order. Active mental health issues and/or substance misuse and alcohol dependency (depending on their nature) may render someone 'unsuitable' for such an order (Carr and Neimantas, 2023). This has the effect of rendering a potentially significant cohort of people who appear before the courts, ineligible for a community service order.

Foreign Nationals, Ethnic Minorities and Indigenous Populations

The issue of differential access to community sanctions for foreign nationals is raised in wider literature. SPACE data (which includes information on prison and probation populations across Council of Europe members) for instance routinely shows higher proportions of 'foreign national' prisoners than 'foreign national' people on probation

(Aebi et al, 2023). For example, in 2022 in Belgium 43% of the prison population comprised of foreign nationals, while just 13% of the population of people subject to supervision in the community. Meanwhile data from Ireland included in the most recent SPACE I Report showed that foreign nationals comprised 15% of the prison population and 6% of the population subject to community supervision (Aebi et al, 2023). Some of the reasons for these differentials include the fact that there may be more barriers in place for a foreign national to be considered suitable for community sentences, including having a stable address, being more likely to be characterised as a flight risk, and possibly also facing immigration proceedings (Aebi et al, 2023). In the Irish context while there is some evidence to suggest disparities in District Court sentencing between 'nationals' and 'non-Irish nationals' (Brandon and O'Connell, 2018), there is no specific research exploring potential differential access to community sentences. Wider research on indigenous groups and the criminal justice system also points to differential treatment. Turner and Trotter (2013) report inequities of access to community service for Aboriginal people in Australia, while similar issues have been observed in Canada (Bracken, 2009). Research on Irish Travellers' over-representation and experiences of the criminal justice point to the possibility of differentials here also (Costello, 2014; Bracken, 2016).

3.6 Status of Community Service Orders and Impacts of Policies to Promote Their Use

The legal status of community service orders and the constitution of the sentence varies across different countries. In some contexts, a Community Service Order (or its equivalent) is not available as a stand-alone or autonomous sentence and can only be imposed in lieu of and/or in combination with a suspended prison sentence. In some countries changes have been introduced to encourage greater use of Community Service Orders and with the explicit aim to displace the use of imprisonment. In some countries this has included expanding the range of offences to which these sentences can be applied or specifying that they can be applied in the case of non-compliance with other penalties, such as for fine defaulters. In other cases, changes have been introduced that allow for the imposition of community service orders as autonomous sanctions, i.e., as sentences in their own right. Examples of the different ways in which Community Service Orders are applied, the rationales for changes in their use, and the impacts of such changes are outlined in the case of a number of countries in the section below.

The Nordic Countries

Community service was introduced in the Nordic countries (Denmark, Sweden, Norway, and Finland) in the late 1980s and early 1990s (Lappi-Seppalla, 2019).[44] Since that time initiatives have been introduced to expand the use of this sanction. Denmark and Sweden created a combination of community service and conditional/suspended sentence orders which increased the numbers of orders imposed. While in Norway, the

[44] Denmark introduced community service in 1982, Norway introduced it in 1984, Sweden in 1990 and Finland in 1991.

title of the sanction was changed to 'community punishment', which was aimed at promoting its credibility as a penal sanction, alongside the introduction of other elements to the sentence, and widening its remit to include cases of drink driving (Lappi-Seppalla, 2019:28). Amongst the Nordic countries the status and scope of community service varies. In Finland and Norway, it is an autonomous sanction, while in Denmark and Sweden it can only be attached to a sentence of imprisonment or to a probation order (Lappi-Seppalla, 2019). **Table 1** below provides an overview of the status of the sanction in each of these countries, whether conditions can be attached and the minimum and maximum number of hours which can be imposed.

***Table 1**: Community Service in Nordic Countries*

	Finland	Denmark	Norway	Sweden
Started	1991	1982	1984	1990
Status	Independent Sanction	Condition for conditional imprisonment	One part of 'community punishment'	Condition for conditional imprisonment
Other contents/conditions	No	Specific Conditions	Specific Conditions	No
Replacement Scope	Up to 8 months	Up to 12 months	Up to 12 months	Up to 12 months
Number of hours	20-240	30-240	30-420	20-240

Source: Lappi-Seppalla (2019:29)

In an overview of the differences in the application of community service in the different Nordic countries, Lappi-Seppalla (2019) explains that the approach adopted in Finland (which was the last of these countries to introduce this sanction), was based on observations and lessons learned about its operation elsewhere. He notes in particular that efforts were made to avoid the potential for net-widening seen in other countries. For these reasons the pre-requisites for imposing community service are outlined in the legislation and include specifications that the person must consent to the imposition of community service, and that they must be considered capable of carrying out this sanction based on an assessment report prepared by the probation service. A person's criminal record forms part of the criteria for eligibility. A first-time offender is not considered suitable for a CSO. However, there are also limits on the number of previous convictions a person may have to be considered suitable. In terms of 'penal weight', one day of imprisonment is considered the equivalent of one hour of community service (Lappi-Seppalla, 2019).

While there has been variable uptake in the use of community service orders in the Nordic countries over time and some evidence of net-widening, an analysis of the overall evidence leads Lappi-Seppalla (2019:33) to conclude that the introduction of CSOs:

> …have reduced both the number of people entering prisons and the daily prison populations to a substantial degree. This impact may even exceed fifty percent of incoming prisoners in Finland. One may assume, based on the trends observed…that daily prison populations could be ten to twenty percent higher without the introduction of community service.

When situated within an overall analysis of trends in the use of community sentences in the Nordic countries, while there is some evidence in net-widening effects (particularly in Norway and to a lesser extent in Denmark and Sweden), Lappi-Seppala (2019) concludes that community service in particular has substantially decreased the numbers of people who would otherwise have entered the prison system. Important also to note that the rates of reconviction for people sentenced to community service (as evidenced in the studies by Muiluvuori (2001) and Klement (2015) cited above), was lower than for people who received a prison sentence.

Spain

Community Service Orders were introduced in Spain under the Spanish Legal Code in 1995. However, as Blay (2010) notes there was an initial poor uptake in their use as CSOs were only initially available as a sentence for fine default and to be used as a substitute for weekend detention (a specific sanction within Spain). Subsequent legislative changes have expanded the scope for their use (including as an alternative to a prison sentence and as an autonomous penalty). These reforms led to a sharp increase in the numbers of CSO sentences and a change in the general profile of people made subject to these orders (Blay, 2010). In Spanish legislation Community Service Orders are calculated in days rather than hours, with one day of imprisonment considered equal to one day community service. A general principle of 180 days as the maximum sentence for a community service order applies[45]. However, Blay (2010) notes that since a CSO can be imposed as an alternative to a custodial sentence of up to two years, then in theory a CSO of 720 working days could be applied.[46] Most stand-alone community service orders are imposed for 'less serious forms of family and gender violence' and for driving offences (Blay, 2010: 67).

A significant expansion in the use of Community Service Orders in Spain can be linked to changes in legislation allowing for their imposition as an autonomous penalty for specific offences (namely lower-level family and gender violence and driving offences). However, analysis of the overall effects of the expansion of provision (as well as judicial practices in respect of sanctioning of recidivist offenders) shows some evidence that CSOs displaced the use of other penalties (specifically fines or administrative penalties). Moreover, Blay (2010:76) observes that the introduction of CSOs as autonomous penalties: '… has accompanied an increase in the penal response, and sometimes legitimated the possibility of imposing prison sentences for previously non imprisonable

[45] A day comprises of a maximum of 8 hours work, and there is an expectation that the CSO should be completed within a year (Blay, 2010).
[46] In practice where community service orders are imposed in lieu of custody, it is most often imposed in lieu of 1-year prison sentence.

behaviours.' The Spanish case therefore points to clear evidence of a net-widening effect.

The Netherlands

The Netherlands first introduced community service in the 1980s, specifically as an alternative to custody. Like the examples cited above, over time the Netherlands has also expanded the scope of Community Service Orders in legislation to enable them to be applied as autonomous sentences. One of the distinct changes made in the Netherlands was a change in law that allowed for a public prosecutor to impose a community service order as an out-of-court settlement (i.e. as a diversionary measure) (Boone, 2010). In more recent years, some curbs have been proposed in relation to CSOs, namely that they cannot apply for certain violent and sexual offences (i.e. offences for which a maximum custodial sentence of six years or more could apply). In an overview of the changes to the use of CSOs in the Netherlands over time, Boone (2010) identifies that some of the changes have been influenced by different political debates regarding the purposes of punishment and the role of the criminal justice system, as well as more pragmatic concerns regarding prison numbers and costs. Like some of the examples from other countries outlined above, the significant expansion in the use of community service orders in the Netherlands did not result in a corresponding decline in the prison population and Boone (2010) therefore concludes that there has been a significant net-widening effect. This notwithstanding, Boone (2010) concludes that community service orders have offered an alternative where imprisonment would have been too severe a punishment and where a sanction greater than a fine was required.

Belgium

Community Service was initially introduced in Belgium in 1994 as a condition of probation and also as a condition of mediation in cases involving diversion from prosecution (Beyens, 2010). In the early 2000s community service was made available as an autonomous sentence and re-characterised as a 'work penalty'. Beyens (2010) argues that this signalled a shift away from a rehabilitative focus towards a more expressively punitive dimension. A 'Work Penalty' can be applied for a wide range of offences, but some serious offences (such as kidnapping, rape, sexual offences against children, manslaughter, and murder) are specifically precluded. There are no limits placed on recidivist offending. In other words, community service can be imposed for both first time offenders and people with numerous previous convictions. A noteworthy feature of the Belgium system is that a sentence for a 'Work Penalty' does not subsequently feature on a 'certificate for good behaviour' (the Belgian equivalent of a criminal record)[47]. This, Beyens (2010) notes accords with broader rehabilitative aims.

[47] Certificates of Good Conduct (the equivalent of a criminal record) are required for employment purposes in Belgium. Central Sentence Registers (which can be accessed by authorised criminal justice personnel such as police and magistrates) will still include a record of this sanction (Beyens, 2010).

While there has been a rise in the use of community service in Belgium, there has not been a concordant reduction in the prison population. Beyens (2010) notes some reduction in the use of short-term prison sentences in the same period that sentences for community service orders expanded. However, in the absence of reliable sentencing data, the precise effect on the size of the prison population cannot be established. Moreover, in the same period the overall prison population has expanded (with increases in the length of prison sentences being a main driver). This leads Beyens (2010:18) to conclude:

> Due to a lack of reliable sentencing statistics, it is impossible to determine the influence of the substitutive effect of the work penalty. The least we could say is that the free space in prison is immediately taken up by other categories, such as long-term prisoners and remand prisoners.

Community Service for Fine Defaults

In some countries community service has been introduced or expanded to specifically deal with the issue of fine defaults where the non-payment of fines can result in imprisonment. In an overview of the extent to which community service is used as a sentencing option for fine defaults, McIvor et al (2013) note that such provision is available in a range of countries, including within the Australian states and territories, New Zealand, Canada, and a number of European countries (including Spain, Italy, Belgium, and the Netherlands). The policy impetus for the introduction of such measures has tended to be concerns with prison over-crowding, the potential damaging effects of imprisonment, and concerns regarding the weight of the punishment when the sentence for the original offence was for a financial penalty (McIvor et al, 2013).

In an examination of the impact of the introduction of provisions allowing for the imposition of community service for fine defaulters in Scotland and in Austria[48], McIvor et al (2013) noted some of the concerns voiced by stakeholders including the judiciary. This included a concern that introducing another means of imposing community service 'would undermine the credibility of community service as an alternative to an immediate custodial sentence' (McIvor et al, 2013:21). While there has been evidence of positive impacts in using community service rather than imprisonment as an alternative sanction for fine defaulters in both Scotland and Austria, the authors also caution against an overly optimistic interpretation of the data (McIvor et al, 2013). There was some evidence from Scotland for instance, that breach rates for non-compliance with community service orders was high, and that therefore some of the displacement effects of this sanction were not sustained.

Restricting the use of Short-Term Prison Sentences

Some countries have sought to reduce the use of short-term prison sentences by introducing legislation curbing or preventing their use. Scotland introduced Presumption

[48] At the time of their research provisions allowing the imposition of community service for fine defaulters had recently been introduced in Austria, while in Scotland such provisions had already been available for almost 20 years (McIvor et, 2013:6).

Against Short Periods of Imprisonment (PASS) legislation for prison sentences of less than 3 months in 2010. Under the same legislation (*Criminal Justice and Licensing (Scotland) Act, 2010),* a single disposal community sentence (the Community Payback Order) was introduced in place of Probation, Community Service and Supervised Attendance Orders.[49] In 2019 the legislation was extended to cover short-term prison sentences of less than 12 months.[50] Data on poorer reoffending rates for short-term prison sentences compared with community sentences formed part of the impetus for this policy.

The Scottish PASS legislation specifies that a court must not pass a sentence of imprisonment for 12 months or less *unless it considers that no other sentencing is appropriate, and the court must record the reasons for its sentencing decision.* In other words, while the legislation strongly encourages sentencers not to impose short-term prison sentences, it does not prohibit their use. Evidence to date shows that the introduction of this presumption against short term prison sentences, has had a relatively limited impact on their use (Anderson et al, 2015; Mills, 2019). Since the initial presumption was introduced, there has been some reduction in the use of short prison sentences of 3 months or less, but much of the decline is explained by a reduction in cases coming before the court, rather than because of changed sentencing practices. Moreover, there has not been a concomitant increase in the use of community sentences. Research on judicial attitudes to the reforms and associated sentencing practices suggests a mixed picture. Some sentencers reported that the presumption was a background factor in their decision not to impose custody in a small number of cases. However, others felt the presumption to be of no practical consequence (Anderson et al, 2015). There is also some evidence to indicate that the reform had contributed to 'up-tariffing' – i.e., the imposition of longer sentences. An overview of the impact of the policy concludes the following:

> Crucially, sentencing patterns suggests no discernible shift in sentencers imposing community sentences in the place of short-term custody. The data does not suggest the presumption had a notable impact on the use of short-term custody generally, let alone encouraged the use of community-based sentences in the place of short-term prison places in particular. (Mills, 2019:7)

Analysis of different ways in which presumption against short-term prison sentences can be implemented suggest that the precise framing of the presumption is important. In Scotland the legislation specified that a short-term prison sentence should not be imposed unless the sentencer considered 'that no other method of dealing with the person is appropriate'. In the Scottish context, previous non-compliance with community orders would easily position a person as a suitable candidate for a short-term prison sentence. Mills (2019) contrasts this with a presumption against short-term prison

[49] A Community Payback Order can be imposed with up to nine requirements, including and Unpaid Work requirement (the equivalent of community service).
[50] The initial statutory presumption against short term prison sentences (for sentences of less than 3 months) was introduced through the *Criminal Justice and Licensing (Scotland) Act, 2010.* The presumptive period was extended to 12 months under the *Presumption Against Short Periods of Imprisonment (Scotland) Order 2019.*

sentences in German legislation which specifies that a sentencer *can only impose such a sentence if there is a case as to why this would better fulfil a specific sentencing objective*. In the German example, previous non-compliance with community sentences, while relevant would not have the same disqualifying effect.

The issue of whether a potentially more straightforward legislative bar against the use of short-term prison sentences would achieve the desired policy effect has also been considered. In an exploration of the potential policy and practice implications of introducing a bar, Mills (2019) observes that this would likely have one or two effects: 1) up-tariffing of some custodial sentences and 2) down-tariffing to non-custodial options in some cases. While the latter of these two options might be the desired policy outcome, it is likely that both would occur thereby nulling the overall effect. Indeed, this has been the experience in Western Australia when such a bar was introduced (Eley et al, 2005).

In England and Wales, recent consideration has been given to various options to curb the use of short-term prison sentences, and legislation is currently in progress that will introduce a duty on courts to suspend short term prison sentences of 12 months or less. Such provisions will include a requirement that people to whom a suspended sentence is applied will be supervised by the Probation Service. Alongside questions of resourcing for this policy in the context of an over-stretched probation system (Carr, 2023), the current iteration of the Bill also provides for exemptions for this overall approach. Such a presumption will not apply where 'there is a significant risk of physical or psychological harm to an individual'. Cases involving domestic violence are specifically mentioned. Moreover, where there have been previous instances of non-compliance with community orders, the provision will not apply.

3.7 Judicial Attitudes and Sentencing Practices

There is a very limited amount of research exploring judicial attitudes towards community service and sentencing practices. Klement's (2015) Danish study of the comparative impact on recidivism of short-term prison sentences compared with community service orders cites a process evaluation by Lagoni and Kyvsgaard (2008) which reported that judicial willingness to impose a community service order was influenced by the severity of the crime committed and a defendant's prior criminal record. In practice this meant that only half of people eligible for community service received this sanction. Research carried out with magistrates in England and Wales, specifically exploring sentencing practices in relation to women, also noted a general lack of awareness regarding the availability of community provision, which impacted on sentencers' confidence in community sentences, and ultimately on their sentencing practices (Birkett, 2017). In this research some sentencers expressed concerns that community sentences were not sufficiently robust, alongside more general concerns regarding compliance. A view that there was a lack of suitable community sentence provision for women was also voiced as a consistent barrier (Birkett, 2017).

Research carried out by the *Scottish Sentencing Council* (2021) against the backdrop of the extension of a legislative presumption against the use of short-term prison sentences outlined above, and the legislature's ambition to expand the use of community sentences, also documents some of the issues regarding judicial confidence

in community-based sentences which have impacted on their use in Scotland.[51] The issues identified were based on a consultative exercise with a sample of Scottish sentencers. In general, sentencers viewed community sentences as providing a greater scope for achieving rehabilitation and a more cost-effective option than imprisonment. Criminal Justice Social Workers (Scotland's equivalent to Probation Officers) played an important role in providing assessments to the courts and in providing advice on the range and suitability of community-based orders in a court area. While there was a broad level of awareness of the scope of available community-based programmes and services, some judges reported not feeling they have a full awareness of what is available in certain areas. This was particularly an issue for sentencers who sat part-time, moved between courts and/or who serviced large districts. Issues of consistency in the availability of community-based programmes and services were also raised by sentencers. Gaps were noted in relation to the suitability and availability for unpaid work opportunities for specific groups including those with mental health difficulties, women, and young people, and for certain types of offending (e.g., domestic abuse). Inconsistencies in practices in relation to breach for non-compliance with community orders, were also raised as an issue of concern (Scottish Sentencing Council, 2021).

In order to promote the greater use of community sentences and in response to the issues raised by sentencers, the *Scottish Sentencing Council* (2021) recommended the provision of a greater amount of information in criminal justice social worker reports (the equivalent of Irish pre-sanction reports), about community sanctions, and more broadly that consideration be given to the development of a database of locally and nationally available community sentences and what they involve. Specifically in relation to unpaid work the need to ensure that these sentences are implemented without delay is noted. Issues with delays in people beginning their placements have been exacerbated by the backlog caused by the pandemic and have impacted on sentencers' confidence that the orders will be implemented in a timely fashion. The broader backdrop of the need to adequately resource community-based disposals was also noted.

Other research has also noted the importance of the provision of information in pre-sentence reports impacting sentencers' use of community sentences (Deane, 2000; Leifker & Sample, 2011). Pre-sentence reports (or similar assessment reports addressing suitability of a person for community service), provide information which can help to inform a sentencing decision (Halliday et al, 2009; Gelsthorpe et al, 2010). Tata (2018) cautions however against an overly simplistic view guided by 'quasi market logic' that the provision of more (and more fulsome) pre-sentence reports to sentencers (the consumers of the reports) are an effective means to reduce the use of imprisonment. Drawing on evidence from a range of countries regarding the net-widening effects of expanding the use of community sentences and a failure to simultaneously reduce the prison population (Aebi et al, 2015), he therefore argues that advocating for a greater use of pre-sentence reports to obviate against such trends requires more consideration:

[51] In 2019 the Scottish government extended a statutory presumption against short prison sentences (PASS) from periods of imprisonment of three months or less to periods of 12 months or less.

> This consumerist conceptualisation takes for granted and embeds the idea that the judicial sentence is minded towards prison as the obvious default if nothing else can prove itself. Making prison 'the last resort' may sound progressive, but it simply solidifies it as a backstop if nothing else seems good enough. Repeatedly it is said that judicial sentencers would be willing to use 'alternatives' to prison more, if those alternatives were shown to them to be more robust and credible. (Tata, 2018:486)

Tata (2018) advocates a reframing away from the seller/consumer logic of report provision to sentencers towards a more 'multi-disciplinary' and 'partnership' approach to sentencing with the judge as head of such a team. In putting forward such a proposal, it should be noted that Tata (2018:488) recognises that this challenges the fundamental construct 'that sentencing belongs solely and exclusively to the judiciary and to individual judges'.

3.8 Public Attitudes Towards Community Service

There has also been a limited amount of research exploring public attitudes towards community sentences generally. While clearly context dependent, in broad terms research on public attitudes has tended to report a poor understanding amongst the public regarding the aims, purposes and provision of community sentences. To some extent this is linked to broader issues regarding the relative visibility of community sentences, which are much less prominently featured in the media and public discourse than prisons (Robinson, 2016). That said, community service or unpaid work is typically the most visible form of community sanction (Maruna and King, 2008; Carr and Robinson, 2020), and indeed in some cases attempts have been made to increase the overall visibility of community sanctions by focussing specifically on community service.

Recent research carried out in England and Wales shows a limited general understanding regarding sentencing amongst the public (Roberts et al, 2022; House of Commons Justice Committee, 2023). In general, the public tends to view sentencing as too lenient, usually underestimating the length of sentences imposed, despite evidence that sentence lengths for imprisonment have increased over time[52]. Commenting on the context of England and Wales, where the custodial population is at an all-time high, the report from the Justice Committee notes the following:

> Public knowledge of sentencing trends is both poor and biased, manifested in the systematic under-estimation of severity of current practice. A circular relationship has developed: the general public believe that sentencing is too lenient. Misperceptions of the average prison sentence then colour attitudes to sentencing and sentencers.

A consistent finding of a range of research is that when people are provided with more information about sentencing, the backgrounds of people being sentenced and the circumstances of offences, they tend to take a more holistic and lenient approach to

[52] In England and Wales, the average custodial sentence has increased by 37% over the course of a decade, from 13.8 months in 2009 to 18.9 months in 2019 (Roberts et al, 2022:1).

sentencing (Roberts and Hough, 2005; Singer and Cooper, 2008; Grimmelikhuijsen and van den Bos, 2021; Roberts et al, 2022).[53]

Research on public attitudes to sentencing from the Netherlands shows that there is broad acceptance for community service for relatively minor offending and for first time offenders (Boone, 2010). Meanwhile, research undertaken in Scotland on public attitudes towards sentencing reports mixed views on the effectiveness of community sentences (Black et al, 2019). In a survey of public attitudes around half of respondents expressed the views that community sentences do not help to reduce offending (48%), while 40% expressed a view that they are an effective means of reducing offending (Black et al, 2019). This finding is set against the backdrop in which people generally tended to overestimate the extent to which custodial sentences are imposed by courts. When asked about what people considered to be the most important purpose of sentencing, half of respondents ranked public protection as the most important sentencing aim, while only a quarter ranked rehabilitation as the most important aim[54]. One of the conclusions of this research was there was more scope to raise public awareness about the general purposes of sentences and the specific reasons why non-custodial sentences may be imposed (Black et al, 2019).

3.9 Conclusion

This chapter has presented key findings from the rapid literature review. The research evidence on the impact of short-term prison sentences is consistent. Beyond short-term incapacitation, and in some instances an experience of respite, these sentences have little positive effects. On the other hand, there is ample evidence demonstrating that sentences of short-term imprisonment can be criminogenic. These criminogenic effects are widely reported in the literature and associated with the negative impacts of such sentences including disruptions to family ties, housing, and economic instability.

Community sanctions and measures are widely advocated as an alternative to the use of imprisonment generally, and short-term sentences of imprisonment specifically. Community service has been available as a community sanction in many European countries from the 1980s onwards. A small number of studies have systematically compared outcomes (usually based on re-offending rates) between community service and imprisonment. The results of this research broadly supports the finding that

[53] Deliberative engagement exercises are one method through which to achieve more developed understandings and a means through which to get a more accurate picture of public opinion (House of Commons Justice Committee, 2023).

[54] The Scottish Sentencing Council has published guidelines setting out the principles and purposes of sentencing and the following five key purposes were presented in no particular order to survey respondents, who were then asked to rank the aims in order of importance and to then select the aim they considered 'most important': 1) Protection of the public through preventative measures and by deterring offending behaviour; 2) Punishment of offenders; 3) Rehabilitation of offenders; 4) Giving the offender opportunity to make amends; 5) Expressing disapproval of criminal behaviour (Black et al, 2019:14).

community service is more effective at reducing recidivism. Wider evaluative research also suggests that community service can help to facilitate broader rehabilitative aims.

Policies to promote the use of community service to curb the use of imprisonment have had variable impacts in different countries. In some cases, there is clear evidence of a net-widening effect, while in others there is evidence to show some impact on reductions in the prison population. The eligibility requirements and positioning of community service in terms of penal weight is an important consideration. It is important to bear in mind an observation based on an analysis of several decades of reform in the Nordic countries: that there is a limited actual relationship between criminal sanctions and overall crime rates, which are much more impacted by wider structural factors (Lappi-Seppalla, 2019).

4. Judicial Perspectives on CSOs and Short Prison Sentences

4.1 Introduction

This section of the report presents the analysis of themes raised in interviews with judges of the District Court for this research. The interviews were thematically structured to address the research aims, and the information presented in this section addresses the topics covered in interviews. These included understanding of current legislation and any perceived limitations; barriers that might mitigate against the use of CSOs; and factors that impact on the use of short-term prison sentences.

4.2 Judicial perspectives on the Criminal Justice (Community Service) (Amendment) Act 2011

A key reason for interviewing District Court judges for this research was to understand, from their perspective, what impact, if any, the 2011 Act had on their approach to the use of CSOs as an alternative to short prison sentences. As the statistical information examined in Chapter 2 suggests, this legislation has not had the desired policy effect of increasing the use of CSOs and reducing reliance on short prison sentences. We asked judges a series of questions around their views on the 2011 Act and how it influenced their approach to sentencing in terms of the requirement it introduced to consider a CSO if imposing a prison sentence of less than 12 months.

All judges were aware of the 2011 Act and the requirement to consider the imposition of a CSO. In fact, many noted that they had always done this anyway. About half of the interview participants mentioned that the requirement to consider the imposition of a CSO meant that they needed to request a report to check that the person was suitable for a CSO and that they consented to it. As the respondent below explained:

> *That's exactly what it is – pretty clear. It's mandatory and we're obliged to consider it in any circumstance where we're thinking of imposing a custodial sentence, and effectively to use community service in lieu of a custodial sentence, if it's appropriate and if the offender has, first of all consented to it, and secondly is medically fit and willing to engage. (DCJ05)*

As the District Court judge above notes, the issue of an offender's consent is an important consideration as well as their fitness and willingness to engage. However, this same respondent noted that the effect of the 2011 Act was limited in that it merely requires the sentencer to *consider* the imposition of a CSO rather than mandating this:

> *My understanding as far as I'm aware, we have to consider giving a community service order as opposed to a prison sentence. We have to. And all we have to do is consider it. We actually don't have to impose a community service order, that's my understanding. (DCJ05)*

Judicial accounts showed that they share a common understanding of the impact that the 2011 Act on their sentencing practices. It only requires them to consider the imposition of a CSO, it does not make its imposition mandatory. Most judges (specifically those who had long careers), explained that they already routinely considered a CSO in lieu of imprisonment prior to the 2011 Act and that the Act did not therefore materially change their approach to sentencing. However, one judge noted that in their view the 2011 Act introduced a more comprehensive requirement than had previously existed because it applied to all those offences sentenced in the District Court that could potentially attract a term of prison for 12 months prison or less. As the following quotation illustrates this judge concluded that the 2011 Act requires judges to consider a CSO whenever they are considering a prison sentence:

> *…but all sentences in the District Court are 12 months or less, so every time you're sentencing somebody to a term of imprisonment you have to consider whether a Community Service Order would be suitable. (DCJ08)*

It is unclear whether or not the equivalence drawn between a 12 months (or less) prison sentence and a CSO by the 2011 Act applies to cases involving the sentencing of more than one offence, where the maximum prison sentence that may be imposed is 24 months. Similarly, there are certain offences for which a prison sentence is not an option and consequently neither is a CSO.

4.3 Judicial approaches to sentencing

In this section we explore how judges approach the choice between a short prison sentence and a CSO, how this is mediated by their understanding of the suitability requirement and the issues that, from their perspectives, arise when requesting reports on suitability form the Probation Service. When sentencing judges must first form the opinion, having analysed the circumstances of case, that a prison sentence is appropriate and second, that it is an appropriate case in which to substitute a CSO for a prison sentence. If the judge considers the person in question suitable for a CSO they will then request a Community Service Suitability Report, as required by the 2011 and 1983 Acts. In the first instance, judges approach the question around substitution of a CSO from a sentencing decision and only once they have made this decision will they then consider the suitability question in terms of the personal circumstances of the person and their ability to successfully complete a CSO. This second decision, in accordance with legislation requires judges to seek a report from a probation officer, and so this aspect will be examined later.

How judges approach the choice between a short prison sentence and a CSO

This section begins by examining what judges see themselves as trying to achieve when sentencing, the types of cases which, in their view, may be appropriate for a CSO rather than a short prison sentence, and it then examines their views on the question of the suitability of the person to perform a CSO based on their personal circumstances.

Sentencing aims and the perceived penal intent of a CSO

Most judges approach sentencing with a number of sentencing aims in mind but the precise one that will be applied in any case depends on a consideration of all the relevant

facts and circumstances of each case. This is consistent with Irish sentencing law which recognises three sentencing aims: rehabilitation, deterrence and retribution and specifically sees the balancing of these aims as being a key task carried out by judges when exercising their sentencing discretion. In this study, judges mentioned rehabilitation, deterrence and public protection most often when explaining how they approach the decision between a short prison sentence and a CSO. Few, if any, mentioned prioritising the aim of retribution preferring instead to rely on deterrence and public protection as key rationales for when a substitution of a CSO for a prison sentence was not warranted on proportionality grounds

As the following extract illustrates, many judges will ascertain if rehabilitation is an option in the first instance and if this is not an option they will quickly move on to other options, in this instance deterrence and public protection:

> *Well as you obviously know there's two sentencing aims, I really see sentencing in the District Court as either rehabilitative or a deterrent, I don't really, I never really view the sentencing as a punishment… I see sentencing as a kind of a tool to prevent crime and if the person who's committing the crime can be rehabilitated, that is the best result for them and society. If they can't, then deterrent starts to come into it and has to come into it because I see it as part of my function not just to sentence an accused but also if there's relentless offending to actually protect society from that particular case. (DCJ03)*

As this judge explains in the excerpt above, they see sentencing as a tool to prevent crime and while they prioritise rehabilitation in the first instance as the best option, where this is not possible, the next priority is deterrence and then public protection. Yet this judge also sees their function as protecting society from relentless offending. The same judge in the following extract elaborates further by explaining that for people with long records who have previously received opportunities to engage with the Probation Service including through a CSO, but they continue to offend, then the only option in their view that is appropriate is imprisonment:

> *It's a deterrent for both them and for society at large, so a point arises where a person for example who is committing thefts has committed so many thefts and I'm talking about hundreds that I have to come to the conclusion that at least notionally they're beyond rehabilitation because they have been offered engagement with the Probation Service, they've engaged with them previously, they've been given community service, they've been given suspended sentence, they've been ratcheting up all of the time and the behaviour continues and a point arises where imprisonment is just the appropriate remedy because it's a deterrent for them. And in a lot of instances, they don't come back, that's it, that was enough. And then you start thinking, my God, maybe that should have been done a little bit earlier and it would have stopped it earlier and it would have changed. It's not unusual for somebody to come in and thank you for sending them to prison, that it was the moment that they needed that changed everything, I'm not saying that should be the norm, but it does happen. (DCJ03)*

This view appears to be underpinned by a belief that a prison sentence can stop a person offending, protect the public and act as a deterrent, even after other more rehabilitative sentences have failed to do so. The view is underpinned also by the idea that a CSO is not appropriate for someone who is characterised as 'beyond rehabilitation'. That is, for persons who have previously had opportunities to engage and/or for persons with multiple previous convictions. For some sentencers, as the respondent above explains, prison is seen as a more feasible sentencing option in these situations because it offers the potential of deterring the individual and others from reoffending, and if it achieves nothing else at least in the short term it offers a public protection and containment benefit.

While the rehabilitative potential of a CSO was clearly acknowledged by judges, some judges doubted its ability to offer the same element of deterrence and public protection that a sentence of imprisonment offers. This point is encapsulated in the following extract where the judge identifies the potential of a prison sentence to temporarily stop the person committing crime but is unclear about what exactly the CSO would offer, particularly when there are ongoing concerns regarding reoffending:

> *Now, I never consider CSO for…. [no insurance offences]. Because they need the lesson. They're going to keep driving. The problem with these guys, you see, they're recidivists and they just don't… CSO is going to do nothing for them. Won't stop them driving. The whole reason you're putting them in prison is to actually physically stop them getting behind the wheel of a car. CSO doesn't do that. (DCJ07)*

Similar views were expressed by another judge who explained that in their estimation a prison sentence trumps a Community Service Order as it at least provides a containment and public protection element:

> *I'm on the side of prison should be the last option. And rarely will it make any great difference and improve things… but … you know, that doesn't mean I don't send people to prison. But sometimes… a lot of the time one is sending people to prison not because it is going to have any rehabilitative function but more as a containment or a protection to society after significant failures…(DCJ09)*

For some judges therefore a prison sentence is preferred over a CSO as it offers the immediate salve of containment, at least for a limited period of time. Community Service Orders on the other hand offer rehabilitative benefits but not to those who are deemed 'beyond rehabilitation'. Respondents in this research who saw merits in the use of a CSO for certain cases and types of offending, typically characterised the CSO as a rehabilitative option and not suitable for someone who is deemed beyond rehabilitation. Re-offending by someone who has had the prior 'benefit' of a community sentence was viewed by some as rehabilitation having 'failed' previously. Where a sentence of imprisonment may serve an incapacitating function, leading to a pause in offending in the community (however brief), there are potentially more tangible effects. This points to the idea of a potential higher bar for determining efficacy for community sentences such as a CSO, and therefore a barrier towards their use.

4.4 The Suitability Question from a sentencing perspective

Judges were asked about the types of offences and/or offenders that they consider to be particularly suitable or unsuitable for a CSO. A number of judges explained that when sentencing they do not separate out consideration of the offence from the offender and that consideration of suitability for CSO requires that both be considered together. Approximately one third of judges highlighted that the question around suitability for a CSO was one that they largely left to Probation Officers to determine. However, throughout the interviews it emerged that judges generally form their own initial sense of which cases might be appropriate for a CSO in lieu of imprisonment. This meant that in many cases where judges did not consider a CSO would be appropriate in the first instance, the case was not referred to the Probation Service for an assessment. This makes sense in the context of sentencing law-the decision to substitute a prison sentence for a CSO is in the first instance a sentencing decision. However, it is reasonable to assume that their views on suitability are to some extent informed by a combination of factors that might include: their view on which cases have reached the custody threshold, their sentencing experience and their sense of which cases Probation Officers will typically find suitable or unsuitable.

In the next section we explore the types of cases or circumstances that judges generally highlighted as being particularly suitable for the imposition of a CSO in lieu of a prison sentence and this will be followed by a section examining the types of cases and/or circumstances they perceived to be unsuitable.

Judicial perceptions of cases suitable for a CSO

Mixed views about suitability of offences

There was considerable variation amongst District Court judges in relation to the types of offences they considered might be suitable for a CSO. Over one third of judges thought that there was no particular offence suitable or unsuitable for a CSO although two qualified their statements by making exceptions to this general rule referencing offences involving weapons or extreme violence. Specific offences mentioned by respondents as suitable included drugs and public order offences, assault, burglary, criminal damage, road traffic offences and no insurance offences. One judge sets out the types of offences they usually use a CSO for in the following extract:

> *I suppose I'd consider it a lot in road traffic offences. For example, no insurance, where somebody is on their second or third conviction for no insurance, or other serious road traffic offences. Where you know they've had multiple chances now. And you know it's been fines up to now and it really does need to be a stricter penalty at this stage. So, I would usually consider Community Service Orders for that. Or again, multiple drugs convictions. But usually, road traffic would be the one that would spring to mind initially. (DCJ01)*

There was some disagreement around the suitability of a CSO for repeat no insurance offences and for assault. While one-off no insurance offences generally fell into the suitable category for most judges, others noted that they would never impose a CSO for repeat no insurance offences because a CSO would not stop repeat offenders driving. In

relation to assault, while one judge viewed assault (and potentially burglary) as being well within the scope of a CSO another stated that they would never consider a CSO as a suitable penalty for an assault charge as that would be unfair to the victim and society at large. The latter perspective is exemplified in the following excerpt where the judge gives an example of an assault that could be fairly serious and yet still be heard in the District Court:

> *Any crime in respect of which you're considering a jail sentence of you know six to 12 months, while it is a minor offence by definition because it's in the District Court it can be a very serious offence, including assault, sexual assault, even Section Three assault in some cases. Sometimes when you consider the mind of the victim and the effect on the victim and the gravity of what's happened and maybe a history of having committed the same offence, a Community Service Order just isn't severe enough and therefore that's an occasion which I would think a Community Service Order is not appropriate.*

The judge continues this example by considering how a victim in such a case would react if they were then to see the offender undertaking community service:

> *Imagine if the victim were to go to the local hotel for lunch the following week and find her assailant cutting the grass. Now I know they tend to cut the grass in public areas, but it could be a public area outside the hotel, that's just not good enough. So that would be a case in which I don't think I would, that would be the sort of case in which I wouldn't impose a Community Service Order. I wouldn't consider it appropriate as an alternative to imprisonment you know. (DCJ08)*

Mixed views were also expressed regarding the suitability of serious offences for a CSO. Some noted that any offence that attracts a prison sentence in the District Court is potentially suitable for a CSO in lieu of a prison sentence which might include assault and even burglary. However, others expressed the view that CSOs were not suitable for very serious offences involving violence or weapons. These examples illustrate the variability between judges in terms of their views on the types of offences they view as suitable and unsuitable for a CSO. In the absence of wider data and/or sentencing guidelines on specific offences judges understandably form their own sense of the types of sentences that are appropriate for different offences.

Judges perceive CSOs as being most suitable for less serious cases

Interviews with respondents suggest that some judges hold the view that a CSO is most suitable for first time offenders, relatively minor offences and in cases where there are very few previous convictions. Some judges highlighted examples of offences which they would prefer to have the discretion to impose a CSO if it were a standalone sentencing option de-coupled from the custody threshold, while others noted that they currently use it for offences where the maximum prison sentence is less than twelve months. A small number expressed a desire to combine a CSO with not imposing a conviction, an approach that is usually preserved for less serious offences.

Almost one half of research participants made statements during the interviews that align with the view that the CSO is a 'soft option', not on par with a prison sentence and reserved for relatively minor offences where the defendant has few or no previous convictions. In the following extract the respondent explains that they consider that a CSO is most suitable for a person whose criminal involvement is an **'**aberration**'** from the norm, a mistake or a one-off offence with a low likelihood of reoffending. As the respondent explains in the extract below, they have a 'type' of offender for whom they would consider a CSO because they know this 'type' will make it through the order and learn their lesson:

> *We have a type that we make the order for which would be the boy from a nice family who is absolutely apoplectic with fear in the courtroom, and you can see that they will comply, you know? They're terrified. And that's not a reason to make the order but it's a reason why you make the order, because you know he'll do it, and he'll get through to the other side of it and he'll be of use, and he'll learn something from it, and he'll never probably offend again. College students are great for that. You see those. Because they're aberrations, as I'd call them. These are wrong place, wrong time, I've learned my lesson. I'll hopefully be a consultant surgeon but really, I was smoking marijuana because I was bored. And in another country, I wouldn't be here at all. (DCJ07)*

Another judge noted that CSOs are suitable for first time offences of drug possession when the person is perceived as able-bodied and can complete the order:

> *…but most of the time what you have is you know some big able-bodied 22-year-old young fella who's in trouble for the first time, he's after being caught with drugs at a festival or something and you know would have no problem doing 40 hours community service and so, yeah. (DCJ03)*

As well as the view expressed above regarding the type of offending and offence history of a person, they would consider suitable for the imposition of a CSO, the reference to the physical characteristics of this ideal candidate is revealing. A CSO is frequently understood as involving some form of physical work, and therefore there is a view that a person must be physically able to undertake the order. Indeed, this forms part of the consideration in a probation assessment regarding suitability. However, problematically, this framing of CSOs potentially renders a cohort of people who appear before the courts automatically unsuitable for this order.

The view that CSOs were more suitable for first time offenders or for offences at the lower end of the scale was a theme voiced across a number of interviews, as illustrated succinctly by one respondent in the following extract:

> *But at the lower end for people with a small amount of convictions and no convictions, I think it's a brilliant idea and it is something that I like using. (DCJ10)*

One judge noted that some of their colleagues view the CSO as a 'soft option' and that increasing the number of hours currently available might encourage those judges to use it more often:

> *I expect that if you increased the number of hours that it probably would encourage some Judges to use it because I suspect that there may be a*

perception among Judges that it's a soft option. So, it would be yes, I think it would encourage them but no, I don't think it should. (DCJ11)

Some District Court judges highlighted examples of cases in which they would prefer to have the discretion to impose a CSO as a standalone sentence, that is, that it should be de-coupled from the requirement to meet the custody threshold that currently exists. In the following quotation, the judge provides an example of a person who has many previous convictions, who does not have the resources for a fine, and in relation to whom a prison sentence is not appropriate but that a CSO would be suitable. While judges can get around this requirement by finding a way to rationalise a prison sentence, some judges lamented the lack of freedom to impose a standalone CSO when it would be most appropriate for the particular offender.

I suppose on occasions we might find that you have … say an offender with numerous previous convictions, and for whom all sorts of disposals have been tried in the past, but he or she keeps coming back before you – and they don't have the resources to pay a fine, prison mightn't be really appropriate in any event. So, you sometimes have to have the slightly Jesuitical article, are you entitled to impose community service in circumstances where you're not really thinking of a prison sentence? That's probably not much of a problem, because you'll always find a way of rationalising it. I suppose it might be more of a problem for us in circumstances where there isn't a custodial sanction. But by and large it's okay. (DCJ04)

Another example given by the same judge was in relation to offences where a prison sentence is not a sentencing option. For instance, s.4 of the *Public Order Act* makes being intoxicated in a public place to such an extent as to be a danger to themselves or others a criminal offence punishment by a maximum sentence of a €500 fine. A CSO is not an option and cannot be considered by judges because prison is not a sentencing option in relation to this offence. This judge explained that this poses a problem because often the persons involved do not have the income to pay the fines and the fine default procedure takes many years to work through the system but eventually the option of enforcing the payment of the fine will arise through a Community Service Order. This judge noted that most of the time the fine will never be paid, and that in their view, this brings the justice system into disrepute. However, another way of looking at this example is that it confirms that some judges view CSO as more appropriate to relatively minor offences rather than those that have reached the custody threshold.

Another judge noted that they have started to use CSOs for public order offences including s.6 of the *Criminal Justice (Public Order) Act 1994* which prohibits threatening, abusive or insulting behaviour, as it does attract a custodial sentence. This example provides further support for the observation that the CSO is perceived by some judges to be suitable for offences at the lower end of the scale. The maximum prison sentence that can be imposed in s.6 is a three-month prison sentence and while this technically fits with the legislative intent for CSOs to be considered in sentences of 12 months or less, this type of offence sits squarely at the lower end of the scale.

A small number of judges noted that that if a CSO could be combined with the ability to leave a person without a conviction they would be more likely to impose it. Leaving

a person without a conviction is generally reserved for exceptional situations, including first offences, where the person is unlikely to reoffend. The desire to combine a CSO with not imposing a conviction provides an additional indication that some judges associate a CSO with first time offenders and/or offences at the lower end of the scale.

The perception that the CSO is suitable for first time offenders, offences at the lower end of the scale and for persons with very few previous convictions was not widespread but its presence amongst some of judges interviewed for this study suggests that some judges do not consider it to be a viable alternative to a prison sentence of 12 months or less. This conflicts with the key aim of the 2011 and the 1983 Acts which both require that judges must only consider the imposition of a CSO in cases in which the custody threshold has already been reached. Offences at the lower end of the scale with few or no previous convictions would typically not reach the custody threshold in the District Court. For some, therefore, this sense of the positioning of CSOs in the continuum of penal sanctions did not accord with where it currently sits (i.e., that the custody threshold must first be met before it can be imposed, except in the case of fine defaulters).

Judicial perceptions of cases not suitable for a CSO

In contrast to the variability of judicial perceptions on the type of cases that would be suitable for a CSO, there was considerable consensus amongst the judges interviewed regarding the types of cases that would not be suitable for a CSO as an alternative to a prison sentence. Judges identified the presence of a large number of previous convictions as a key determinant of the cases that they would consider to be unsuitable for a CSO. Multiple previous convictions denoted increased seriousness of the offending behaviour and as noted earlier, suggested to some that a person was most likely 'beyond rehabilitation', and as previous non-custodial chances including CSOs had been exhausted, many viewed imprisonment as the only option left. This corresponded with judges' views on the circumstances in which short prison sentences are appropriate, with a majority prioritising the deterrent impact of a short prison sentence in cases where other options had not worked. The ability to identify more positive than negative effects of short prison sentences made this stance tenable.

Lastly, Judges identified certain personal circumstances related to mental and physical health as being unsuitable or incompatible with the ability to successfully carry out a CSO to completion. Judges viewed these personal circumstances as being incompatible with a CSO more because of the practical inability to carry it out than rather than for sentencing reasons per se and reflect their understanding of the types of cases that in their experiences have been deemed unsuitable from an operational perspective by the Probation Service.

Previous convictions and persistent offenders: Short prison sentences or CSOs?

Almost half of those interviewed noted that having many previous convictions would make a person unsuitable for a Community Service Order and most viewed a short

prison sentence as suitable for persistent offenders. Previous convictions represent an important sentencing consideration for judges. A relatively common view expressed by respondents was that they would be more likely to impose a prison sentence than a CSO on persons with multiple previous convictions, even where the offence is relatively minor, because multiple convictions indicated that the person has previously received many different sentences that had not worked and eventually it comes to a point where a prison sentence is the only option:

> *My take is that it's [a community service order] a great idea. I think that it's something I'd use. It is obviously a factor that I would take huge consideration of is previous convictions and things like that, because whilst somebody may be up on a relatively minor charge, they may have a lot of previous convictions and I place a lot of weight on previous convictions, and whether someone has had the benefit of something like community service before, or a fine, or a suspended sentence. So, there's a whole area of factors that I would look at before I would impose something like that. A sentence of any description I'd look at what the previous convictions are, and I would generally give people a couple of chances for community service, but if they're continually coming back before me again for similar type of offences, I would form the view that they're not really learning from it. I might then move on to fine or suspended sentence, which I find works quite well and when all else fails, and they're constantly appearing and appearing and appearing, then I'd get to the stage where I feel a custodial sentence is the only option. (DCJ 10)*

Many judges viewed the process of arriving at a stage where the imposition of short prison sentence rather than a CSO as incremental and yet somewhat inevitable. The incremental nature of arriving at a short prison sentence was explained in the following quotation:

> *When a prison sentence is warranted, and a lengthy one, it tends to be incremental. So, if somebody comes before a court for a minor offence, it'll be a fine. The next time, if that person comes back, the fine will be increased again. The next time, you know if it's something slightly more serious, you're looking at a suspended sentence. So, it tends to become more and more incremental, so if they come back again with a slightly more serious… like you're looking then at a prison sentence, but a short one. So that tends to crop up quite a bit, that someone… because you're moving along the scale of seriousness, so you have to mark it with a custodial sentence…(DCJ06)*

A common explanation was that a time comes in a person's criminal activity where the judge feels that there is just no other option but to impose a short prison sentence. Other options have been tried and they have failed to deter or stop the person reoffending:

> *There's simply a point that comes in a criminal's activity that you have to actually just say, okay enough is enough, we're after trying all of these other things and it's just not working…(DCJ03)*

A short prison sentence is preferred over a CSO by some judges even in relation to very minor offences, which gives rise to proportionality concerns. In the following

quotation the judge gives an example of a conviction for theft involving a relatively small financial amou0nt, but even in this case they felt they had no other option but to impose a short prison sentence, principally because the person in question had 150 previous convictions:

> *But a lot of the times you know the values are quite low with these things. You know taking alcohol might be €30/€40. It doesn't merit more than a short sentence, but they have you know; 150 similar previous convictions and you know you feel that you have to step it up at that stage. But because of the value it's hard to you know, justify doing more than a short prison sentence. (DCJ01)*

For some judges, a CSO is not considered suitable for persons with extensive criminal records, particularly when they have had previous opportunities with a CSO. As the following quotation articulates, from this judge's perspective there comes a certain point, when the sentencing decision is no longer about the defendant's rehabilitation but more about protecting society by deterring further offending through a custodial sentence:

> *And 250 previous convictions and 90 previous convictions and they're after engaging three or four or five times with community service, they're after having five or six Community Service Orders imposed on them and it's just not stopping, and in some instances somebody can be caught stealing in a shop and brought to the Garda station and released on bail and be back there again in the afternoon and the victims must be thinking, what in the name of God is going in the Garda station and what's going on down in the court house and why is nothing being done about this? So I have a balance, it can't all be about the accused, it's all about the accused early on to see can they be rehabilitated in terms of not committing crime in the community which is bad for them and bad for the community but a point arises where I just think, within the mechanism that's available to me I have to ratchet this up to an actual custodial sentence, I've tried fines, I've tried community service, I've tried suspended sentences and it's just still going on, offence number 105, I now have to just bring deterrent into it …(DCJ03)*

Another judge similarly explained when a person accumulates a certain number of previous convictions then in their view a time comes when by this logic a prison sentence is unavoidable. In the extract below this judge explains that if they were to impose anything other than prison on a person who had amassed a large number of offences that would mean that they were not doing their job properly:

> *It really comes down to, I think, the amount of offending involved, as opposed to the offence. So if somebody is repeatedly say for instance damaging property, and it might only be minor, if it's repeated over a number of years, on a regular basis, …sometimes it's more the fact that people amass a large number of convictions in relation to one thing that drives you towards a certain point that … in order for you to be… seen to be doing my job properly, I'd have to impose a sanction, which is of a custodial nature. (DCJ06)*

One judge explained that imposing a CSO as an alternative to a short prison sentence on a person with multiple previous convictions may ultimately end up being a waste of resources because of the high likelihood that people in this situation would not comply with the conditions of the CSO. As the extract below underscores, for some judges the issues relating to a person's offending behaviour and their circumstances (e.g., inability to hold down a job) would make the possibility of engagement with a CSO unrealistic:

> *That would be my take on that generally. I mean, why am I wasting state resources on recidivists who are going to give the run around to the probation officers? … You give these fellows a chance sometimes and they'll give the probation officer a run around and then you'll be getting these revoke applications in, and the probation officer is chasing them every week. They haven't turned up because they'll only laugh at you. And they couldn't be bothered. And that's the problem. You know? You're dealing with a certain type of person as well really who doesn't take direction well. They generally have never worked. Or if they've worked, it's not in the strict sense that you and I are working, if that makes sense. They might be entrepreneurial of course. That could be another matter altogether. But that's different. And, you know, I suppose that's the problem. And maybe a lot of them have oppositional defiance disorder, I don't know. But they certainly don't do well to be told to be at a certain place at 10am on a Saturday morning where they're to turn up and pick weeds. And really, are you just wasting state resources at that point then is the question you kind of have to ask yourself. But you can judge that very quickly. You know the speed at which we have to sentence I suppose, do you? (DCJ07)*

The concern identified by this judge is that many persons before the courts for sentencing who have considerable previous convictions may not be able to structure their days sufficiently to turn up and complete work on CSO projects. It reflects a concern expressed by many judges that it would be counter-productive to impose a CSO in these circumstances as you might be setting a person up to fail because they would struggle to comply with the structure required. This reflects a wider issue about the degree to which the current model of CSO is designed to be responsive to persons with a long previous record and who may also experience multiple difficulties including addiction, homelessness and mental health issues.

Prison as a last resort?

Some judges explained that while they view prison as a last resort, they still saw this as being consistent with using short prison sentences for persistent offending as this was the only appropriate deterrent once all the other options had been tried and had not worked:

> *I really see it as a last resort, and particularly at the moment, the way things are, I think we've to be very conscious of that, so I do really see that, but I mean I think sometimes we have to remember that it's a deterrent as well, if you know what I mean? That you've someone that's repeatedly committing the same offences, sometimes you don't have an option but a short prison sentencing. That's unfortunately, as I said to you, we get from… you know, Probation Act Section 1.1 to imprisonment quite quickly, because we have so few options as Judges... (DCJ12)*

The examples given above by judges from their own sentencing experiences illustrate the point that even a very minor theft could result in a short prison sentence but that judges view this practice as legally justifiable, even required, due to the high prominence given to previous records under Irish sentencing law. As noted in the previous section, judges regard CSOs as inappropriate for persons who are deemed to be 'beyond rehabilitation' due to a combination of a large number of convictions they have accumulated and previous failures to engage with the Probation Service. One reason for this is that most judges were able to identify at least one (and some identified more than one) advantage associated with using short prison sentences for persistent offenders. These included its perceived ability to transform a person, to physically incapacitate them, to help them detox and to help them rehabilitate. Almost one half of judges interviewed believe that, depending on the individual, a sentence of imprisonment can have the desired effect through what some referred to as a *'short, sharp, shock'* to the system. This view is encapsulated in the following quote:

> *Well, the general thinking always that a short prison sentence, that can be a very effective… in terms of a short, sharp shock type of treatment, and you visually see a change in people when they come back from even an overnight. An overnight stay in a prison with the right person, can transform that person in terms of their attitude when they come back the next day, someone who is… has never been to prison before, and comes from a good background, but for one reason or another has had encountered the criminal justice system, but they haven't really saw the other side of it, so to speak. So, when they come back, they can be quite changed, and their attitude would improve considerably from a short… a very short stay. (DCJ06)*

Not all respondents agreed with the '*short, sharp, shock'* hypothesis, for example one judge disapproved of such an approach:

> *There can be a situation where you could have a very short sentence of a few days, but like a lot of the time that wouldn't actually be a sentence per se. It could be that you're adjourning the sentence and the person is in custody for that period of time, so you try to create a situation whereby – which is the concept of a short, sharp shock situation. I'm a bit dubious about that, I have to say, I'm not so sure really. Some people believe in it. I would be a little bit less enamoured towards it as in I think that might be a little bit cruel and I don't know whether it's the purpose. (DCJ09)*

Almost one third of judges believe that drug detox can be a positive side effect of a short prison sentence and that this break from drugs provides a 'form of rehab'. The following extract encapsulates this view:

> *But if somebody is offending regularly, maybe the term… this time… the next time the prison, even if it's only deserves six or eight weeks, means they don't have the access to substances, one would hope, and therefore it might just help them, but that's the best. Potentially I'd have to say that sometimes it's nearly you would think of it particularly in the context of somebody who is*

> *maybe… has an addiction – it might be a form of rehab, because it's a bit of cold therapy for them as well. (DCJ02)*

A small number of judges explained that they considered that sometimes a person can reform themselves in prison, they can learn a skill or start or finish an education course and, in this way, the short prison sentence, of at least 6 months, can sometimes have a rehabilitative impact.

> *That would vary for defendant to defendant, it might have a rehabilitative effect, if you like. A good candidate might learn a new skill in prison and come out and get a job with it. A person might do courses that would give them insight into what they've done, and they might come out and improve. That would be on the plus side or on the optimistic side…(DCJ08)*

While the extract above shows that such an interpretation of the impact of a short-term prison sentence 'would be on the plus side' most judges pointed to at least one disadvantage of short prison sentences, even those who had highlighted several of their upsides. Yet they still asserted the appropriateness in response to persistence. The main disadvantages highlighted by judges were the disruptive impact it might have on a person's supports in the community, their accommodation and any progress they might have made in addressing or stabilising their addiction; and the negative impact of mixing with other more serious criminals was more likely to have a criminogenic rather than rehabilitative impact. In the following quotation the respondent clearly alludes to these limitations:

> *…once they get into a prison environment, they're mixing with people who might hone their other types of skills that you mightn't want honed. And there's always the fear in the back of your mind about the safety of people in prison. You hear stories of all sorts of assaults and things that happen to people in prison. And you'd be… I'd be of a view, if we can't be assured that people who we entrust to the Prison Service are going to be safe in prison, that that is a problem. And then at the moment, as you know, there's significant overcrowding in prisons. So, [it's] not a healthy environment for people. (DCJ04)*

Other limitations of short prison sentences identified by judges was that people with mental health difficulties were unlikely to get help in prison but unlikely to stop offending or get help in the community thus leaving prison as the only option. Similarly, those with many previous convictions who wanted to rehabilitate were not going to get the help in prison and were repeating a cycle of offending and being imprisoned because there is no other option currently available.

In summary, many judges reported feeling compelled to use short prison sentences in these cases in order to be seen to perform their job appropriately and by the need to protect the interests of the community and/or the victim. Not only do many judges feel they have no choice but to impose a short prison sentence in response to persistence, some judges feel that they may actually be doing something positive for the person. Many judges remained resolute in their belief in the utility of short prison sentences over

CSOs, despite some of the dissonant views they articulated about the impacts of short prison sentences.

The Suitability Question: Personal Circumstances

However, judicial perspectives displayed much more consensus around the types of personal circumstances that might make a person unsuitable for a CSO. As the respondent in the following quotation succinctly explains:

> *While offences might not be unsuited to community services, there certainly are offenders who would be unsuited, for a whole variety of reasons. That's a separate issue. (DCJ04)*

A degree of consensus emerged amongst those interviewed for this study that certain personal circumstances render a person unsuitable for a CSO including the presence of previous convictions, health conditions (both physical and mental), addictions and a history of violent offences. This consensus suggests that in many cases judges may not refer particular cases for a Community Service suitability report because they already consider a person to be unsuitable based on their understanding of the suitability criteria, and from their experience of the types of cases that have previously been deemed unsuitable in the past. The following sections will examine each of these in turn.

Addiction

One third of judges mentioned addictions as one of the barriers to considering or imposing a Community Service Order. Most of the respondents who considered this a barrier, referred to the fact that some people with serious substance misuse issues would in their view (and in the view of probation, when reports were sought), not be able to manage the demands of a Community Service Order, such as the requirement to attend appointments at specific times and to carry out unpaid work. In such situations there was a high risk of non-compliance with the order and therefore many considered CSOs a non-starter for people before the courts with these kinds of issues. It should be noted that this potentially comprises a large group of people before the courts.

> *…The reality is that a lot of people between drug and alcohol use just can't regulate their day so they can't, you know they're not deemed suitable because you're setting them up to fail really with community service because they're not going to be able to regulate themselves to get there. (DCJ01)*

Two judges expressed the view that the current provision of CSO projects do not cater for people with an addiction but that if that could be changed, by for example, having drug rehabilitation as an integral element of the CSO, then this would make the CSO applicable to a much wider range of persons:

> *Well, I think they should be. Like but it might mean that there needs to be like the person with the active [addiction] probably needs to have a more intensive supervision with a therapeutic element in relation to it. You know? And it might be something that relates to their recovery. So, yeah, like… but that's where the probation services need to be probably more engaged with the places that do*

> *treatment and otherwise or something like that…And we probably also need to be aware of most people who have active addictions usually have a lot of other issues as well that need to be addressed and that seems to be constantly not taken into account. You know? (DCJ09)*

In the following quotation the judge suggests that the perhaps the system needs to be evaluated as to its suitability for the people who regularly appear before the courts and not the other way around:

> *Well apart from excluding them on the basis of the criteria that are in the Act, so just not available, medically unfit and whatever. There are, like leaving that aside, there's a cohort people …people with ADHD, ASD and mental health issues, all those sort of things, are not necessarily accommodated within the current CSO system. And that renders them unsuitable. But it's not that they are unsuitable, it's that the system doesn't cater for them, and you know in those situations, I would often ask for an assessment, and it'd come back and say that the person isn't suitable for CSO because of one of those issues. But if it were an appropriate project or venue or whatever for a CSO to be served out, it maybe that they would be appropriate for it. (DCJ10)*

The need for CSO to be reformulated to cater for diversity including neurodiversity, was highlighted by a number of judges as having the potential to significantly increase the uptake of CSO as a sentencing option in the District Court.

Health-mental and physical

Three judges highlighted the issue of health as a barrier to suitability for CSO. Both physical and mental health were highlighted. As mentioned above, many judges noted that the Probation Service would decide on suitability but that one of the most obvious reasons for lack of suitability would be physical or mental health conditions:

> *Normally the Probation Service carry out an assessment – it can be a detailed assessment, or it can be a very basic one. And the obvious thing would be physical health – in other words, suffering from some physical disability which would inhibit them from doing community service. Or some illness. The other…. certain mental health conditions, or mental health conditions of such severity that they're unsuitable to mix with other people or to be on a site, or to be in possession of tools or equipment, would be another category. (DCJ04)*

Interviews with judges appear to support the view that the current criteria around suitability (which may be linked to the types of projects currently available) as having a funnelling effect on the type of persons, particularly in terms of their personal characteristics, that will be deemed suitable for a CSO. Some judges suggested that the system needs to change to accommodate the circumstances and characteristics of a wider range of people coming before the courts and that this could be framed within an equality, diversity, and inclusion context.

4.5 Judicial responses to sentencing vignettes

Judges were asked to pass sentence on three short vignettes at the end of the interviews and their responses are considered here as they confirm a number of themes arising from the interview data, key among them being the variation in approaches to sentencing particularly in relation to custody threshold. This section briefly outlines each vignette and then provides a narrative overview of how judges approached each vignette when asked to pass sentence.

Vignette 1

John is before the District Court and pleads guilty to not having insurance and to careless driving. He has two previous convictions for no insurance, two for no tax and one for careless driving. He has previously received a fine, a probation order and suspended sentence. His solicitor says that he has recently sought help for his alcohol misuse and has moved back with his parents and is no longer homeless. His solicitor further submits that he is ready to turn over a new leaf and asks the Court to err on the side of a community service order rather than a term of imprisonment.

In relation to each scenario could you please say what further information you might need and whether or not you would impose a community service order and give reasons for your decision.

Impose a CSO or not

Judges responses to the first vignette which involved repeat no insurance and careless driving offences were mixed. Two judges did not consider that the case had reached the threshold of a prison sentence and therefore would not be considering a CSO. Just under one half would impose a CSO, as they felt that a prison sentence was an appropriate response given the previous similar offending. Many noted that once there is proof of efforts to reform, they would see this as a good option for a CSO. Three judges noted that if the current offences occurred relatively recently then they would regard them as forming a pattern of behaviour which may lead them to consider a prison sentence as appropriate in which case they may consider a CSO. Another three judges believed the behaviour warranted a prison sentence and would not consider a CSO. In their view no insurance offences are serious, and they potentially risk enormous financial damage to a person if a crash occurs. One of the three noted that the main concern was to prevent the person driving again and that prison or a suspended sentence was appropriate for this reason. Interestingly, one judge noted that they considered no insurance offences to be an economic crime but not a dangerous crime though they noted that most of their colleagues would regard it as dangerous and warranting a prison sentence.

Further information

The main issues which arose in terms of requiring further information were the timing of the offences, whether they were recent and the period of time between these and the previous offending. Judges also noted they would require proof of efforts to reform if this

were to be taken into account. Only one judge would request a probation report in relation to this vignette.

Insights from Vignette 1

Judges' responses to Vignette 1 illustrate the variability in their approaches to sentencing from a number of perspectives, but particularly in relation to their judgments around the seriousness of the offending behaviour. Some viewed it as not serious enough to reach the custody threshold, and for this reason a CSO would not arise for consideration. Others viewed it as potentially serious enough for imprisonment and this, coupled with efforts to reform, made a CSO potentially an option in lieu of a prison sentence. A third group viewed the case as having reached the custody threshold, but they would not consider a CSO because their aim was to prevent the person driving again. The expressed desire of some judges to prevent John from reoffending echoes references to the incapacitative effects of short prison sentences that emerged as an important theme during the interviews.

Vignette 2

Deirdre is 24 years old and is before court for Section 2 assault against a neighbour. At a house party, Deirdre become annoyed with statements made by her neighbour about her and pushed her over. Her neighbour was left with bruises and a sprained ankle. Deirdre works in the local Centra and has offered a small sum of €500 compensation to the injured party. She wishes to avoid a conviction and a prison sentence as she feels they might prevent her travelling abroad with her friends to Australia next year. Her solicitor says the assault was totally out of character and that the defendant had a significant amount of alcohol taken on the night in question.

In relation to each scenario could you please say what further information you might need and whether or not you would impose a community service order and give reasons for your decision.

Impose a CSO or not?

Most judges would not impose a CSO in relation to the second vignette as they did not consider it to be serious enough to warrant a prison sentence particularly because it was a relatively minor assault and a first offence. Two judges noted that a CSO might be appropriate but that it would depend on whether there were previous convictions. Most judges indicated that they would impose a compensation order, require double the amount of compensation originally offered but would adjourn to allow compensation to be gathered and some might impose a period of probation supervision in addition. Most judges would prefer not to impose a conviction given the youth of the defendant as this would limit the potential for travel. One judge remarked that it would be useful to be able to impose a CSO without imposing a conviction.

Further information

The most commonly requested further information was in relation to previous convictions, a victim impact statement, and a probation report.

The majority viewed the offending behaviour in this case as not reaching the custody threshold and therefore it was not viewed as a case in which a CSO could be imposed. Judges identified this case as falling well below the custody threshold and did not identify it as being appropriate for a CSO even if de-coupled from a prison sentence.

Vignette 3

Maria pleads guilty to her fourth charge of possession of cannabis. She has recently been made unemployed and is at risk of losing her home and her children. Maria, through her solicitor asks the court not to impose a custodial sanction as she fears her children will be put into State care. She says she is looking for another job and is attending narcotics anonymous to address her cannabis use.

In relation to each scenario could you please say what further information you might need and whether or not you would impose a community service order and give reasons for your decision.

Impose a CSO or not

The majority of judges did not consider vignette 3 as warranting a custodial response and so therefore were very clear that they would not be considering a CSO for this case. The main reasons for this were that prison is no longer considered appropriate for a possession of drugs offence unless there is considerable previous offending or some other factor aggravating seriousness. Most explained that it is only after the third conviction that you can consider something a sanction other than a fine so by the fourth conviction prison was not warranted. About one third of judges indicated that they would consider it serious enough to potentially warrant a prison sentence and thus might consider a CSO, but this would depend on the value of the drugs and a probation report to establish willingness to engage.

Further information

The most commonly requested further information was the value of the drugs in the current possession offence but also in previous. Willingness to engage and a probation report were also requested by some judges.

While overall there was consensus that Maria's offending would not reach the custody threshold and therefore would not be an appropriate case for a CSO in lieu of custody, a small group of judges came to the opposite conclusion illustrating the variations that exist in practice.

Overall insights from vignettes

Judges' responses to the vignettes confirm several key themes that emerged during the interviews regarding their sentencing approaches towards the imposition of a CSO in lieu of a prison sentence. Judicial variation, a key theme during the interviews, was most evident in relation to Vignette 1. This case involved two driving offences and a number of relevant previous convictions and proved the most divisive. Judges were divided between those who viewed the custody threshold as having been met and those form whom it had not been met. Even in relation to those who perceived that a sentence of

imprisonment was appropriate, this group were differently motivated some by rehabilitation, in which case they would consider a CSO, while others were motivated by the desire to prevent John from reoffending which led them to discount the option of a CSO. A clear consensus emerged amongst judges in relation to the fact that Vignette 2 did not reach the custody threshold, but judges were divided about the drug possession offence in Vignette 3. Judicial responses to the vignettes also confirm that it is in relation to offences of medium seriousness that most variation exists.

4.6 Judicial Perspectives on Community Service Suitability Reports and the Role of solicitors

Importance of seeking a community service order report?

Almost all judges interviewed agreed that seeking a Community Service Report to assess suitability for a CSO was an important feature of the process of sentencing someone to a CSO. A number of different justifications were given for the importance of seeking a report including: not wanting to set a person up to fail by imposing a CSO when they may not be capable of completing it; wanting to ensure they are suitable; ensuring that the Probation Service can work with the person and; that seeking a report is a legal requirement.

> *But, you know, you have to like… the probation officers are the ones that have to implement the Community Service Orders so they need to be satisfied that it can be done, otherwise it's just causing chaos for them to impose people that aren't suitable or aren't interested or are going to be troublesome or could be even threatening. (DCJ09)*

Some judges registered a lack of clarity about when a report is legally required but explained that they usually request a probation report to get insight into the person's background and would usually request a CSO report to leave that option open as a possibility. As the respondent below explains, the purpose of the report would be to ascertain the offender's suitability for and consent to the CSO:

> *…essentially all I'll be doing is looking for a probation report, ask for a probation report for sentencing, but also to consider whether the Community Service Order is something that's worthwhile exploring, which really is only in the context if they're suitable and would consent. (DCJ02)*

In contrast to this, another judge explained that it tends to be obvious to judges when engagement with the Probation Service and/or a Community Service Order would be appropriate and that many judges simply assert that they have considered the option without actually giving it much further thought or ordering a probation or community service suitability report:

> *It generally tends to be really obvious whether or not engagement with the Probation Service and a Community Service Order is appropriate in a particular case, and if it's not the reality is judges are simply saying in one line - I've considered community service here and it's not appropriate. (DCJ03)*

These two differing perspectives accord with wider data on the use of probation reports and referrals to the Probation Service, which as outlined earlier in the report shows wide variability across the country. Previous research on the use of PSRs has shown that judges tend to adopt their own practices regarding when to request such reports, and this is often linked to the presence of probation staff in court and wider resourcing issues, such as the time taken to produce reports.

Availability of Same Day Reports (SDRs)

Same Day Reports are community service suitability reports which are available on the same court day that they are requested. Judicial accounts show that there is considerable variation across the country in terms of the availability of same day reports. Roughly one half of judges explained that same day reports are either usually or always available to them and this contrasted with the experiences of the other half of judges who explained that same day reports are not usually available in their courts. The difference between the two groups was the availability of probation officers in their court. Judges who could count on reports being available on the same or next day basis usually had a probation officer who sat in on criminal lists or who could be called on short notice to attend. Typically judges who did not have a probation officer in court or access to one at short notice did not have access to same day reports. Some judges explained that probation officers are usually available in the larger court districts but never in the smaller courts. Some noted that the Courts of Criminal Justice used to have a dedicated probation officer and that this was the case in other district courts but not anymore:

> *Yeah. So, they used to be in court…but that seems to have fizzled out. I don't know why. Maybe during the recession there were cutbacks. It gradually petered out, and now we're left in the position that we… you're waiting. (DCJ06)*

> *Well, it depends on the court, if the probation is there, sometimes yes and if not, never, I mean not until, you have to put it back to another day. (DCJ08)*

> *Ideally, and it had… it did happen at one stage in the CCJ, and I could see it also potentially happened down the country where there was a Probation Officer in a court – it'll only take them five or ten minutes to assess the person. (DCJ02)*

A clear picture emerged of judges not requesting reports when probation officers are not available in court. From a judicial perspective the main disadvantage of not having same day reports available is the inability to choose a sentence you want to impose and not being able to finalise the sentence on the day.

> *What I would like to think would be that if I'm there on a day, if I deem community service appropriate, that the assessment is done on the day, the defendant is deemed suitable on the day, and then I just impose the sentence and finalise it on the day, would be an ideal situation to deal with, rather than it going back to another day in court in a month, and in a month's time the report isn't available, and it goes back to another date. (DCJ02)*

> *So, sometimes you can get a report from the probation officer there and then, if they're in court, which doesn't always happen…otherwise you have to put it back for another day, which is a nuisance you know. (DCJ08)*

Not having a probation officer in court and not being able to finalise a case particularly impacted moveable judges who usually spend just a few days to a week in a specific court and may not return for some time. Some moveable judges leave a note as to the sentence they have in mind should the report recommend a CSO. The other option to retain seisin of the case which is a much more complicated arrangement as it means arrangements have to be made for the moveable judge to dispose of the case at a later date and this can cause delays.

Another potential downside of not being able to finalise the sentence on the day and having to wait long periods for a report from a probation officer is the potential difficulty of getting the person being sentenced to come back to court once the report is available:

> *But there's no probation officer available that day. So, no matter what you want to do, you can't do it. And then you're looking at a list and you're kind of going, OK, I'm looking at the same person that you want to try and give the chance to with CSO. You're looking at them going, they're never going to come back. I'm going to be a year chasing them with a warrant. They'll lay low…the whole thing is resources. I'd say if we started to lash out the CSO orders…tomorrow, they wouldn't have the capacity to deal with them. So, I don't know. It's all very aspirational. They can barely get us a report. It's taken two months to get a report. (DCJ07)*

In addition, many complex cases are not capable of being finalised on the same day even when probation officers are available to deliver same day reports. Some judges noted that they can make a call to have a probation officer to attend court with short notice to carry out assessments. From a judicial perspective having a probation officer in court is an advantage because they get the context of the case and can establish a rapport with the person to be assessed as well as establish contact details. Sometimes there can be breakdowns in communications if the probation officer is not in court and this can result in delays in getting started on the report.

Delays and waiting periods for reports

However, even when probation officers are in court there can still be delays in getting a same day report-particularly if a medical report needs to be ordered. Judges noted with frustration that pre-sanction reports are taking much longer than in previous years. Some noted that it could take between 5 and 6 weeks, others quoted a 12 week wait and a wait of 18 weeks was mentioned.

> *I'm being told it'll take 12 weeks for a report, that's just completely excessive considering that I can give them a hearing date within about four weeks or six weeks and yet we've to wait 12 weeks to impose the penalty. (DCJ03)*

> *It's a concern to some of my colleagues, certainly – because, if a case is going back for 18 weeks, that's the best part of five months. And many offenders don't*

> *engage, so you come back five months later, and the fella hasn't turned up to two or three probation appointments, and has to be adjourned again. (DCJ04)*

Thus, considerable variation exists between districts in terms of the time periods for pre-sanction reports and a number of judges linked this back to under-resourcing of the Probation Service. As the judge in the following extract highlights, requiring judges to consider the imposition of a CSO as an alternative to prison sentence has resource implications, particularly in the context of a national shortage of probation staff:

> *They have a limited availability of social workers. So, I mean, it's all very aspirational to have an Act that tells me to go off and look for a CSO. But sure, what you're going to end up with is a whole court. You're going to end up a day or two a month with the courts backlogged to deal with CSO. (DCJ07)*

Delay as a disincentive to imposing a CSO

Judges expressed a number of concerns around the long adjournments involved in waiting for a report. The chief concern was that it was perhaps a disincentive to District Court judges, particularly for moveable judges, to request a report if there were likely to be long delays for several reasons. First, the delay means the case is added to the list and is not finalised. Second, a judge may prefer to impose another sentence of equal severity such as a prison or a suspended sentence which does not require a report, and which may be warranted by the previous convictions:

> *[I can see the] potential where maybe a judge presiding in a district might say 'Look it, it takes so long I'd prefer just to finalise it' you know 'for today', so might well be tempted just to impose the prison sentence where it may well be justified based on previous convictions, or alternatively may take the view that 'Well look, okay, we won't go with the prison sentence, but we'll go with the suspended sentence' because again it just means there's a finality in relation to it. (DCJ02)*

Furthermore, some judges pointed out the potential risk of reoffending within this period and the risk to the public if this happens. Other concerns raised related to the nature of summary justice and the requirement that justice should not be delayed excessively. Some felt that where a significant delay was likely this might put judges off requesting a report, especially where a judge had heard from the defending solicitor and considered that they had all the information they needed to impose a CSO:

> *[requesting a report] It's going to be a delay which is a waste of time and that the person should be able to get on with it, it's supposed to be a summary disposal and so in some instances I'm being told it'll take 12 weeks for a report, that's just completely excessive considering that I can give them a hearing date within about four weeks or six weeks and yet we've to wait 12 weeks to impose the penalty. (DCJ03)*

Another judge noted that there had been a recent judicial review of a case in which a judge decided, after considerable delay in waiting for the report, to impose a sentence without the benefit of the report. The High Court ordered that the judge should have

waited for the report even though the defendant in that case had not cooperated with the probation officers in attending meetings and was partially responsible for the delay.

> *And now the High Court have apparently said that even in those circumstances, you must wait for the probation report. So, that would give a carte blanche to offenders to simply thumb their noses at the system and walk away. So, I'm not sure how that's going to pan out…I think you might feel, if you were going to be given the run around by an offender, you might decide not to seek an assessment and just deal with it. I suspect that the colleagues in the CCJ who are dealing with this on a volume basis every day, and for whom, as I say, it's taking 16 to 18 weeks to actually get a report, are probably going to be less likely to commission a report in the circumstances that have now arisen. DCJ04*

The need for responsive justice in the District Court was highlighted by one judge who noted that issuing warrants to bring a person before the court who has failed to cooperate with a request for a Community Service Order report doesn't make any sense.

> *If they're suitable for CSO, they shouldn't be getting a warrant. They shouldn't be in custody either. And that's the problem. The system just… You know, it's just not responsive. That's the problem. You really need it to be responsive on the day for summary justice. It doesn't matter for Circuit Court stuff where you're remanding people in custody for three months to sentence them, and you have the luxury of time. DCJ07*

The role of Solicitors in requesting the imposition of a CSO

Mixed views were expressed by the judges who participated in this study about the role of solicitors in requesting the imposition of a CSO. Several judges noted that in their experience solicitors rarely ask for CSOs. A similar number stated that solicitors always ask for a CSO in their courts. The remaining judges explained that it depends on the practices and routines in the court in question, the suitability of the client and on the attitude of the judge towards CSO.

> *You know, like, it depends on the district to some extent and what habits and practices they've got into. So, you know, so a lot… in the places where it happens a lot, they are very involved. In places where… there might be some places where the judge hasn't given it much and, therefore, they haven't suggested, because they're used to well there's no point because he doesn't believe in it, or she doesn't believe in it. So… but I would think most courts at this stage the judges, the solicitors would raise the issue of a consideration of a community service. Or they might say it in a different way. Sometimes they will say directly community service. But other times they might just say a non-custodial option, you know? (DCJ09)*

The judge in the extract above suggests that experienced criminal solicitors know when to ask for a CSO, and that this is typically when prison is indicated. To ask outside of this scenario might suggest that a prison sentence is expected which may not be in the best interests of the client. Some judges noted that solicitors ask directly for it during the plea in mitigation, others explained that they might not ask directly but might request a non-custodial sentence. When the issue of clients preferring a prison sentence was

raised most judges noted that this is not something they have come across very much. The overall impression from judicial accounts is one of mixed experiences. As the judge in the following excerpt explains, shrewd solicitors will cut their cloth according to their measure-both in relation to their client's suitability, previous convictions and seriousness of their offence and the likelihood of receptivity of the judge.

> *I think probably [the] working majority of solicitors are fairly realistic about their clients' prospects. And will sort of say, well you know, accept that we may be at the level of and therefore would you consider suspended or Community Service. Now, as to specifically ask them for a Community Service, that's rare enough, they would just ask leniency, perhaps suspended or whatever. I'm just thinking about that now, you know, they generally don't point to Community Service. I'm not sure if Community Service is all that popular with their clients. You know, I think suspended sentences are probably more popular with the public, you know? (DCJ11)*

It appears therefore for a variety of complex reasons including the culture of the local court, solicitors' interpretation of whether prison is indicated and how favourably inclined the judge is towards the community service order, that at least from a judicial perspective solicitors are not typically inclined to request CSOs for their clients.

4.7 Judicial understanding of what happens on CSOs

Research participants were asked various questions about their knowledge and understanding of CSOs and how they operate in the court districts they sit in. The following sections highlight the gaps in judicial knowledge regarding CSOs generally, the desire of many judges for more information about CSOs and the types of information required by judges.

Awareness of CSO projects in your district

The majority of judges we interviewed had no information on the types of CSO projects in the district that they sentenced in. Some noted that they had visited or heard about CSO projects in their previous careers before they became a judge. A small number had seen people working on projects in their own community-usually painting fences, cutting grass or construction. Some felt that it might be a good to know more about the projects, others were less convinced, and one noted that they simply do not have time to visit projects. One judge had visited several projects and felt that they had benefited from doing so and that they were more favourably disposed towards CSO as a result.

Understanding of enforcement and compliance with conditions of CSOs.

When asked about their awareness of enforcement of CSOs and compliance, most judges interviewed explained that they typically only hear about non-compliance when a case is brought back to court by a Probation Officer. More than half noted that cases are brought back to court by probation where there is non-compliance. Some judges, as illustrated in the extract below, spoke about approaching the issue of non-compliance in a way that sought to promote continued engagement with the order:

> *Well, if they're not compliant the probation officer comes into me and gets a summons and serves it on them and we take it from there. I am a believer in giving them a second chance if they turn up to court and they say well look it for whatever reason I got a job or I did this or that or I got sick, then I couldn't do it. Then…I'd give them opportunity if they want to do it, if not we'll deal with them another way and I think that feeds into the delays because I feel that the longer, they're waiting for the work to start, the less likely they are to comply. (DCJ10)*

Most judges do not have access to statistical information on the level of overall compliance in Ireland with CSOs, but many expressed a belief that most are completed. At least half noted that the most common reason for re-entering a matter was the failure to complete the hours within the given timeframe. In these circumstances most judges interviewed would extend the time. Some judges mentioned cases in which the client simply did not cooperate or engage at all, but these were noted as relatively rare.

Overall judges interviewed for this study generally held positive views around completion and compliance rates, although this must be seen within the broader context of a general lack of information and awareness of the operational details on CSO projects.

Appetite for more information

Despite operating in context of a general lack of information and awareness of how CSOs work, many judges expressed a desire for and would welcome more systematic information about CSOs. This includes information on how suitability is decided, how projects are assigned and supervised, and overall compliance rates. This view is encapsulated in the following extract:

> *But I would love to know how… the analysis of the community service, like. So, I'm just wondering do the Probation Service do as much analysis of the suitable and the type of ones they should… rather than are they just doing what's easiest or whatever? So, I'm not… I'm unclear as to how well-considered and how, like I'm just wondering some courses might require a lot of supervision and a lot of input and I was just wondering do they get the same warm response by the Probation Service as ones who have little or no supervision? So, you know, I'd like to see … how the courses are determined and how are they fit to rehabilitative or changes particularly and which are more suitable to people with mental health difficulties, which are ones that are more suited to people with addiction…I haven't got that information, but I think it would be useful that the courts would have that information to be able to ensure that the correct course is done as perceived by the court rather than particularly as perceived by the Probation Service, but that's a different matter. (DCJ09)*

In the following quotation another judge notes that while they have had no statistical information about CSOs, anecdotally they heard that offenders' enthusiasm for CSOs is usually short lived and mainly related to avoiding a prison sentence:

> *I don't know what the full statistics are but just from anecdotally, there is a good proportion of people who are very enthusiastic at doing community service on the*

> *day to avoid a sentence, a custodial sentence, and then quite quickly thereafter, they show little or no interest. (DCJ09)*

From a judicial perspective this loss of initial enthusiasm could be related to delays experienced by some in actually commencing their CSO. Another judge noted what they perceived as lengthy delays waiting to go on a CSO:

> *Yes, I think that would be a good idea. I think that probably to do that there would have to be an expansion of the CSO scheme on the ground because I know that there's big delays, I know COVID fed into that…. (DCJ10)*

The quotes above speaks to a certain scepticism about the expressed willingness of people to engage in a CSO. However, it may also speak to a desire to move beyond anecdote to a fuller picture of what happens on CSOs. We can deduct from these queries and comments that judges do not have much information about CSOs and while some may not require such information, not providing it allows a vacuum in which anecdotal evidence becomes the only evidence they have about how it operates. As we will see later, when asked what might encourage greater uptake of the CSO by judges, many agreed that more information on CSOs generally would be helpful. One judge suggested that a CSO report for each District might be very useful both to inform the public and the judiciary.

Judicial Knowledge and Understanding of Recidivism

When discussing their approach towards sentencing, particularly the decision between a prison sentence and a CSO, the most commonly mentioned sentencing aim was deterrence. Judges appear to view deterrence as related to both warning the general public not to offend (general deterrence) and taking steps to prevent the particular person being sentenced from reoffending (specific deterrence). Given the importance of deterrence in Irish sentencing law, there is a public interest in understanding how judges approach the prevention of individual offenders they sentence and the extent to which their efforts are informed by an understanding of research on recidivism. We asked judges whether they take research on the relative rate of recidivism/desistance associated with CSOs and short prison sentences into account when sentencing.

Most of the judges in this study did not have any knowledge of research evidence on the relative rates of recidivism between CSOs and short prison sentences. However, most noted that if they were made aware of this type of research, they would take it on board. However, about half noted for various reasons that such knowledge might not make a huge difference to their decisions. At least two noted that while they would welcome research on recidivism, they are more guided in the end by their own experience of what is the appropriate sentence. This point is illustrated in the extract below:

> *There's also there's kind of your own knowledge of how it works and then there's your experience and I'm discovering as time goes on that the experience is actually the most valuable component, you can just read things, if you're perceptive at all, you can see what's going on and you can see where it's at and*

> *you can almost read the solicitors as well because you know you can tell if they're not putting their shoulder to the wheel. (DCJ03)*

One judge explained that even with such knowledge it would not make a big difference in what they could do particularly when dealing with prolific repeat offenders. The responsibility of the executive to make sure that rehabilitation is a real option was noted by a small number of judges. One judge questioned the validity of research that compares rates of recidivism between CSOs and short prison sentences on the basis that you are not necessarily comparing like with like. In this judge's experience, people who receive a Community Service Order are likely to be at an earlier point in their criminal careers so are therefore less likely to reoffend than people who have received prison sentences. This view accords with some of the views expressed in the earlier section regarding the positioning of CSOs in the penal continuum and for some their lack of a perceived equivalence with a sentence of imprisonment.

At least one judge noted that they just would not have the time to keep up to date with this type of information and that it is difficult enough to keep up with changes in the law. Another noted that if there were research that supported Community Service Orders as a more effective approach than short prison sentences that this would provide judges with a valuable backup against criticism when they impose CSOs instead of short prison sentences:

> *It would be great to have something to fall back on if, you know if you're sending somebody for community service rather than prison, and it can justify it on that basis, that this is… research has shown it's a preferred… it's more beneficial in the long run. It would be great to be aware of that research. We'd be on solid ground then when we're passing these sentences, and again it would help the public understand where we're coming from, that it's not that we're just being soft, but research has shown that it's the most effective way to reduce the rate of offending. Absolutely, it'd be great. (DCJ06)*

Deterrence and rehabilitation are important sentencing aims in Irish law and Irish judges have expressed an interest in acquiring more knowledge on the types of sentences or programmes of rehabilitation that are scientifically proven to be more successful in terms of reducing reoffending and recidivism and increasing rehabilitation. Around half of the research respondents in this study felt more comfortable relying on their own judgement and experience of what might be appropriate in terms of deterrence and rehabilitation. Nevertheless, most judges expressed a willingness to engage with this material were it to be provided by an independent and reliable source.

Judicial understanding of public perceptions of CSOs and a short prison sentence.

Most judges hold the view that the public regards CSOs as a relatively light sentence when compared with short prison sentences. The words: 'less than', 'lesser', or 'lighter', 'soft option' or 'getting away with it' were commonly used by judges to describe their perception of how the public perceives CSOs when imposed in lieu of a prison sentence. One judge took the view that public opinion is likely to be influenced by the length of prison sentence that a CSO is replacing:

> *I think the public would be reasonably happy with a Community Service Order instead of a short sentence, I think the public would be very unhappy with a Community Service Order instead of a long sentence, in other words for a serious thing. (DCJ08)*

Another judge explained that judges are often criticised for imposing prison sentences that are perceived to be too short, and that the public tend to view anyone getting a CSO as 'getting away with it'. A different judge, in the following quotation, highlights the fact that public dissatisfaction is often reinforced by the media portrayal of CSOs which then can lead to public disquiet against judges who impose CSO instead of prison sentences:

> *Anything other than throwing them into the cell and throwing the key away is regarded in general by the public and whipped up by the press as being 'getting off soft'. That's, like when you talk to people individually, they fully appreciate that there's a range in sentencing and for a lot of situations but if you go by the public perception represented in papers and so on and so forth, like that's the reality. There's a huge difficulty with the public perception in relation to it so you need public education as well. (DCJ11)*

Some judges relayed stories of colleagues being intensely criticised by the media and sometimes by the victim for imposing a CSO in lieu of a prison sentence in certain circumstances, particularly if the person continues to offend or has committed a serious offence or has many previous convictions. Many attributed this to a lack of public education around what a CSO is and around sentencing more generally. Many judges pointed out that they would like more information on what public really think about CSOs and other sentences. One noted that more could be done to promote the positive benefits of CSOs over other sentencing options, particularly for young people, where there may be opportunities to learn skills:

> *I mean, it should be spun in a positive way for all of us, as if it's a really good thing to do for young people. Rather than fine them €500 for having no insurance, would you not give them 40 hours CSO and get them working on a local project that they might get a job out of? Now, that would be… I would be only happy to make that order…You know, teach them how to swim. Well, do something like teach them how to swim. Teach them how to garden. Teach them how to grow vegetables. Anything. (DCJ07)*

Judges were asked whether they thought the public differentiates between first time and repeat offenders in terms of how it perceives the suitability of a CSO. The consensus amongst judges was that the public generally has more sympathy for the first time offender and much less for persons with three or more offences. When asked whether they thought public opinion on sentencing differs between Districts most respondents expressed the view that it differs depending on the profile of the area and the District. Similar sized Districts might have completely different levels of crime for the same population, or completely different types of crime and some judges pointed out that in their view this influences public opinion on the acceptability or otherwise of a CSO in lieu of a prison sentence. As the extract below illustrates, in this judge's view public

perceptions of the acceptability or otherwise of different types of sentences may be affected by the type and extent of crime in an area:

> *So, I would say public perception is different compared to where you live, so you know, if crime isn't such a big problem in a particular area, they probably would have a more benign view of community service, but if you have someone that maybe is committing repeat drug offences in a district where drugs are a huge issue, I would think that maybe the public might see it as it's not severe enough, you know? Because obviously you're looking at deterrents then when you're talking about something like repeat drug offences. So, I think it's so different in each area, you can't really… definitely there can't be a policy for the whole country there, if you know what I mean, in terms of it. I think it's so subjective, you know? (DCJ12)*

In summary, the general consensus amongst the judges we interviewed for this study was that from a judicial perspective the public do not generally understand community service orders, or indeed sentencing more generally, and that in many cases the public tends to view CSOs as a soft option when imposed in lieu of a prison sentence. Judges would welcome more research on the nature of public perceptions and called for greater education of the public around sentencing more broadly, and CSOs more specifically.

4.8 What might encourage District Court judges to use CSOs more, instead of relying on short prison sentences?

Judges were asked a series of questions about the potential changes that might encourage greater use of CSOs as an alternative sentencing option in the District Court. We firstly present judicial perspectives on two different types of legislative changes that would impact how CSO could be used as a sentencing option and then examine a more specific question about types of changes they think might encourage greater use of CSOs.

Legislative changes

Legislative presumption, with a requirement to give reasons for not using?

A majority of judges were not in favour of a legislative presumption in favour of imposing a CSO as an alternative to prison sentences of less than 12 months with a duty to give reasons if the presumption was rebutted. Judges noted a variety of concerns but the most prominent was a view that 'tying the hands' of sentencing judges would be an unacceptable interference with their sentencing discretion. Some noted that many convicted people would simply not be suitable for a CSO and imposing a CSO on a person who is not suitable would be anathema to justice. Judges who both agreed with and disagreed with the idea of a presumption in favour of the imposition of a CSO noted that a duty to give reasons would be meaningless because all a judge has to say is that they considered it and the deemed a CSO inappropriate or unsuitable. In other words, reasons are often formulaic and do not really reflect the real considerations behind the decision. Some noted that giving reasons is not always possible due to confidentiality considerations and others that it delays courts. Another judge noted that judges can easily get around the duty to give reasons. Two noted that some judges have a policy of never applying a CSO because they do not believe in it. Of those who were in favour of

the presumption, many still felt the reasons would be ineffective but that it was worth trying if it might increase the uptake of CSOs and reduce the use of short prison sentences.

CSO in lieu of a prison sentence as a mandatory requirement?

Most judges interviewed were not in favour of legislation that would require them to impose a CSO on people convicted of non-violent offences instead of a prison sentence of 12 months or less. The main reason cited by most was the loss of discretion which is fundamental to sentencers in the District Court due to the wide range of offences and circumstances that appear before them. Other reasons highlighted were the lack of suitability of many offenders for a CSO; that CSO does not represent a deterrent in the same way that prison does; the potential hardship that might be caused by having a mandatory sentence with no options to adapt to circumstances; the lack of resources in terms of the perceived limited availability of CSOs at the current time and; that voluntary consent is necessary from the defendant.

The following quotation illustrates some of these ideas. The judge highlights that for repeat offenders who previously had the benefit of a CSO and continued to offend and commit more serious offences it would not make sense to impose another CSO, they also mention the potential difficulties that may ensue if a judge's hands are tied in relation to the type of sentence he can impose.

> *Something I would always look at is had they previous community service, and I know you're not allowed impose community service where there's outstanding community service hours, but if you have a situation where you see somebody that has previous, like very heavy offending, you know, quite prolific offending, or a lot of previous convictions, and you have a situation where perhaps they've had previous Community Service Orders and then they've gone on to commit more serious offences and don't seem to have understood it as a punishment, if you know what I'm trying to say? That I think in those circumstances I think it would be very difficult to tie a Judge's hands and say 'You must impose community service', so I suppose I think, like a lot of things, I'd always be very aware of mandatory elements in sentencing, because I think there's so many aspects, particularly in the District Court, where you're dealing with quite a lot of offences, but you're also dealing with people that are in very poor circumstances a lot of the time, people that are in very… you know, mental health issues, drugs issues, family issues, etcetera, and that sometimes community service mightn't be appropriate for other reasons that you've heard in evidence, or in facts, or whatever, that… you know…… I'd always be wary of something that would tie the hand of a Judge – that would be my view – particularly in the District Court. (DCJ12)*

Three judges expressed the view that a CSO is not as effective a deterrent as a prison sentence particularly for repeat offenders. The following quotation illustrates a belief that requiring a CSO for certain offences would be a counterproductive interference with the judicial discretion:

> *I have no difficulty in that legislation, in fact I would take the view that that… that it's already in place effectively. Community Service Order is there as an option, and it's an option that Judges always use, but the reality of it is there are times when a short, sharp prison sentence is the only thing that will actually work with somebody. I mean an awful lot of the stuff you're looking at is repeat thefts, and you're looking at repeat drunk and disorderlies, and sometimes, you know, it can happen if people get a short prison sentence, and they sober up that some of them end up… but it has to get a judicial discretion. I mean consideration, you know you… the legislation should not interfere with the Judges' autonomy to make a decision based on all of the facts that they hear. (DCJ13)*

CSO as a Standalone penalty?

When asked if they would welcome legislation which made the CSO a sentence in its own right, the majority of judges interviewed agreed that having a CSO as a standalone penalty would be a good idea. Some were motivated by a desire to impose a CSO earlier in the fines process (rather than in default of payment of a fine) particularly where a person does not have the means to pay the fine. Others felt that having a prison sentence attached to a CSO sometimes suggests a gravity that was not there in the first place and leaves the defendant with a prison record which suggests that perhaps sometimes judges impose a CSO in circumstances in which a prison sentence is not warranted. One judge considered that prison and CSO are not really comparable because they are so dissimilar so separating them might be wise and might lead to greater uptake of CSOs. A number of judges highlighted the need for more resources if CSOs became a standalone sentence as currently in their District there is a waiting time of 12 to 18 months for people going on CSO. In the following quotation this judge identifies the need for a middle ground between fines and prison and that linking CSO to prison probably reduces rather than promoting it:

> *I think by virtue of tying it to imprisonment, it isn't used enough in my view. And like the distance between in adult cases at any rate between a case [that] would merit a fine and a case that wouldn't merit imprisonment. I think there's a middle ground in there. And... there are additional community type sanctions like CSO would be appropriate in there. Now I know that you can put Restorative Justice in between there and you know, I do that to some extent as well. So, but yes, I think there'd be a place for a gradation of CSO where you're not necessarily considering a custodial sentence. (DCJ11)*

Other judges noted that making a CSO a standalone sentence has been the subject of discussion amongst legal colleagues who sometimes feel that because it is currently linked to a prison sentence it appears on their record and this creates problems if there is non-compliance. This quotation also highlights the desire for more sentencing options that many judges highlighted throughout the interviews:

> *I think that's something that I, myself, with a number of other colleagues, have discussed already, saying that I do think Community Service Orders should possibly be standalone, rather than it being linked … because sometimes community service is very appropriate, … for a particular individual. But once it's*

linked to a sentence, it appears on their record and if they don't comply for whatever reasons, you're into another issue there with them, you know? …. I would be very much of the view that as Judges we don't have enough options available to us to deter offending and reoffending…so I think that we have such a limited range of options in terms of sentencing, that having the Community Service Order standalone, without it being linked to imprisonment, would be a very positive idea. (DCJ12)

Factors that might encourage greater use of CSOs

Judge were asked a series of questions about the types of changes that might enable them to use CSOs more frequently. These questions only required a yes or no answer but, in some cases, judges elaborated on their reasons. The table below summarises the overall response of judges to the various questions. The next section briefly summarises their perspectives in relation to each change.

Which, if any of the following, might encourage you to use CSOs more? (Prompt: Answer Yes/No)	
More CSO projects in your area	YES 12 NO 01
More information about CSO in your area, such as completion rates, recidivism rates, advantages…	YES 12 NA 01
Visits to CSO projects in your area	YES 09 NO 04
Broader range of hours of CSO 40-240 or Fine default for summary offence 30-100	YES 08 NO 05
Legislative presumption, with a requirement to give reasons for not using?	YES 04 NO 08
Anything else?	MORE RESOURCES 06

More CSO projects in your area and more information about CSO in your District

All except one judge believes that more CSO projects in their district could help to encourage greater uptake of CSOs by judges in the District Court. Most judges also agreed that more information about the types of CSOs in their areas/districts would be useful and might increase uptake. Two judges noted that accurate and up to date statistics on CSOs (including projects, compliance, benefits etc.) would be a very useful and one suggested that a CSO report for each District would not only help judges but would be of wider benefit, particularly in helping to win over the public, by showing the public all the benefits in the community accruing from CSOs.

Visits to CSO projects in your area

A majority felt that visits to CSO projects in their District might help encourage greater uptake of CSOs instead of short prison sentences. Two judges in particular noted that visiting a local CSO project might encourage them towards greater uptake but that it was unlikely to encourage other judges, particularly those who had a policy not to use CSOs. One noted that judges were too busy and had no time to visit projects, and that if they were going to visit something they should prioritise a prison visit because this is the sanction they use often and causes the most harm.

Broader range of hours of CSO

A majority of judges felt that increasing the range of hours that could be imposed might work to increase the uptake of CSOs over short prison sentences. Most of the eight judges who felt this would be a good idea were in favour of increasing the number of hours many noting that the current maximum of 240 can sometimes be perceived as too lenient, particularly for more serious offences that might attract sentences of 8 to 24 months in the District Court. One noted that some judges perceive a CSO to be too soft a sanction and another noted that the lower end of the range should be removed. The remaining five judges who felt the range should not be increased noted that the longer the hours the more likely it is that they will not be completed and that the concept of diminishing returns should apply. This question highlights that a significant cohort of judges perceive the CSO as being a relatively lenient sentence particularly when given as an alternative to sentences at the higher end of the scale for example 8-12 months. One noted that if convicted of more than one offence a maximum sentence of 24 months is available in the District Court and that a sentence of 240 hours of CSO is not a real alternative to a sentence of this severity.

More Resources

Judges were asked if they had any other thoughts about the changes that might help increase the uptake of the CSO over short prison sentences. Almost half of judges strongly suggested that increased resources for the Probation Service, increased availability of suitability reports and more CSO projects would help. Of these many specifically mentioned more resources for people with addictions and the recruitment of more social workers. One judge noted that a change in public opinion would be helpful as they could recall at least one judge being vilified by the local community, victim and local media after imposing a CSO in a particular case. Lastly, one judge noted that it was incumbent upon judges to do their best to give someone the best outcome in terms of justice and that judges should be actively seeking out what alternative options are available to them.

In response to the question about the purpose of the 2011 Act one judge explained that if they are not provided with the resources and/or the people coming before them are not suitable for a CSO then how can they use CSO in lieu of prison.

This judge provided examples of the types of cases where he felt from a sentencing perspective a CSO would be appropriate, but this was not possible in their view due to limited resources:

> *I had two cases where community services, I would have liked to have done community service or I would have liked to have done something else other than a custodial sentence, but some of those options weren't available. For example, someone who's committing offences regularly because they've got an active drug addiction, like you can't commit someone to a treatment programme. All you can do is give them a suspended sentence with a condition of it that they go to a treatment programme, which isn't as really as useful. But then the State needs to be able to provide facilities for treatment programmes for that purpose. So, you know, it is sometimes a little bit difficult for the judges to hear another arm saying that we should be doing things when the reality is the options available to us are extremely limited. And then, you know, I had another person who again would have been better off getting a community service but, you know, they're just not capable, physically, to do community service. Not even light work because of surgery and other things… I would be a fan of community service. I would like it to be more expansive. I would like our options to be more… have greater involvement and I'd also like to have a bit of feedback on that to some extent. (DCJ09)*

The judge in the extract above highlights the point that judges cannot expand their use of CSOs in the absence of resources such as drug treatment programmes. These echoes observations made by other judges about the shortage of social workers, probation officers and CSO projects suitable for a wider spectrum of offenders than currently exists.

4.9 Conclusion

This chapter has highlighted several themes arising from interviews with District Court judges. A number of issues relating to the perceived limitations of existing legislative provisions and the factors impacting the use of CSOs and short-term prison sentences have been raised. These include concerns regarding the thresholds for imposing a community service both in lieu of a prison sentence or as a penalty for fine defaults. The issue of suitability of people who are prolific repeat offenders for CSOs is raised as a particular area of concern, as is the question of suitability for people with drug and alcohol addictions and mental health needs. There was a perceived gap in current sentencing options available in the District Court. Other issues potentially impacting on the use of CSOs were raised, including the timely availability of assessments, and delays in people starting CSO placements. Judges are generally not in favour of any changes to legislation which would reduce the scope of judicial discretion. There is support for more information about CSOs, including the scope of range of work that can be done on such orders, and information about their relative effectiveness. There is also a recognition of a need to raise wider public awareness of the aims and scope of such sentences.

CONCLUSIONS

This report has provided an overview of available data setting out the comparative use of prison sentences (particularly short prison sentences) and community service orders. While recent policy and legislative initiatives, such as the introduction and enactment of the *Fines Payment and Recovery Act, 2024,* has led to the reduction of the numbers of fine defaulters entering prison, the use of short-term prison sentences and the relative under-use of community service orders remains a policy concern. Findings from national and international research document the deleterious impacts of short-term prison sentences. At the same time policies intended to promote the use of community sanctions (such as community service orders) to reduce the use of imprisonment have yielded mixed effects. Insights from international research and policy initiatives in other comparator countries, as well as the findings from interviews with District Court judges, provide useful insights and possible avenues for policy change to address this area. We have distilled these into five key areas below:

CSO THRESHOLD AND CURRENT STATUS

The issue of the threshold at which CSOs can be imposed is one area for consideration. Currently under the 2011 Act, for a CSO to be imposed the sentencer must consider that the threshold to custody has first been met. Reducing the threshold for the use of CSOs is likely to have a net-widening effect. Available evidence suggests that CSOs are not currently acting as an alternative to custody as has long been their policy intention. There is some evidence from this study and previous research to show that as it currently stands the CSO does not occupy a position on the penal continuum that accords with where judges would typically position them. Judges associate CSOs with rehabilitation and position them as an appropriate sanction between fines and before imprisonment. At the same time, judges perceive there to be too few penal options occupying this position and no penal options for petty persistent offenders other than short prison sentences.

Reducing the bar at which CSOs can be imposed does not address this substantive question. Rather, it would most likely lead to an expansion in the use of CSOs for offending that would not have made the threshold for custody in the first instance with no concomitant reductive effect on the prison population. In fact, international evidence points to the potential opposite effect – expanding the use of community sanctions such as CSO can lead to *increases* in prison populations (Aebi et al, 2015). Part of the reason for this is that enforcement policies and practices for non-compliance with community orders often ultimately result in recourse to imprisonment (Padfield and Maruna, 2006).

Instead, properly resourcing CSOs so that they are available and responsive to the specific needs of persistent offenders with multiple difficulties (addictions, mental and physical health issues etc) may potentially increase CSO uptake and reduce reliance on short prison sentences. These sentences are at the very least less likely than short prison sentences to be harmful. The development of sentencing guidelines on the sentencing of CSOs in lieu of prison sentences and on the sentencing of persistent

offenders who commit minor offences may help to increase the update of CSOs in lieu of short prison sentences.

SUITABILITY CRITERIA AND ADAPTABILITY OF CSOs

The point above relates to criteria of suitability and issues of adaptability of CSOs to be more tailored towards the profile of people appearing before the Courts. Consistent with international research, there is evidence that some of the people most commonly appearing before the District Courts for whom sentences of short-term prison is imposed, such as prolific repeat offenders and people with substance misuse issues, are not considered suitable (either from a sentencing perspective and/or based on the Probation Service's assessment criteria) for a CSO. This potentially renders a significant proportion of people ineligible for this form of sanction. Initiatives such as the Integrated Community Service Order have been piloted and further developments and adaptions to CSOs drawing on the tripartite model outlined by Kennefick and Guilfoyle (2023), may have a) the benefit of addressing CSOs to the profile of cases that appear before the Courts and b) increasing the confidence of the judiciary and the public in the use of this sanction.

RESOURCING OF CSOS

A recurrent theme in this study was the availability of resources necessary to support an expansion in the use of CSOs as alternatives to prison. We know that CSOs are an economically more efficient use of public funds than imprisonment, but they have not been fully resourced throughout the country. A consistent theme in this and previous research is the variations across the country in uptake of CSOs by the courts. One reason for this is variations in sentencing approaches between different District Court areas. However, almost half of research respondents in this study reported that they did not have access to community service suitability reports on a regular basis in their courts and the same proportion did not have a probation officer sitting regularly in their court. Fully resourcing CSOs means ensuring that all courts have access to community service suitability reports without delay. Access to both same day suitability reports and more in-depth pre-sanction reports which consider CSO suitability are required.

Resourcing CSOs requires increasing the availability of projects in each District and ensuring that there are no geographical disparities. There is a need to adapt the CSO model so that it is suitable for the broad range of individuals who come before the courts for sentencing but specifically for categories that are currently not considered suitable including persons with substance misuse issues, mental health difficulties and physical disabilities. Specific consideration needs to be directed towards persons who come before the courts with very large numbers of previous convictions who also experience multiple difficulties (e.g., addiction, disability, mental illness, poverty) and how the current model of CSO can be adapted to respond their needs. Reformulating CSOs so that they cater for a greater diversity-including neurodiversity, gender, race and ethnicity-will potentially increase the uptake of CSOs in Ireland. The need to provide equal access to sanctions that offer a greater opportunity of rehabilitation may also be

considered as an important requirement from both a distributive justice and a human rights perspective.

RESEARCH AND DATA ANALYSIS

Numerous reports have documented gaps in research and data which impact on the ability to achieve evidence informed policy. This is particularly evident in respect of sentencing data. Recent analysis by Gormley et al (2022) has recommended the development of a systematic approach to gathering sentencing data in Ireland. The publication by the Central Statistics Office of reconviction data highlighting differential outcomes between community sanctions and sentences of imprisonment is a positive development. Reconviction data, however, only provides one part of the picture. Further research on the experiences and longer-term outcomes of people subject to community service orders, exploring areas such as impacts on social inclusion, employability etc. is needed. There is evidence from this study that the judiciary are positively disposed to receiving such information.

AWARENESS RAISING AND INFORMATION SHARING

While judges are well aware of the legal requirements of CSOs, there is less awareness of the substantive operations of CSOs, including information about the type of placements available, the work undertaken and the potential benefits to people under supervision and the wider community. Increased awareness raising about the operation of CSOs including information about supervision may have an impact on greater use. Indeed, the statistics on the use of CSOs over time in Ireland shows that there has been some uptake in the use of these orders following previous information campaigns and awareness raising exercises by the Probation Service.

There is also a need to raise awareness amongst the wider public and consideration should be given to a wider public awareness campaign in this area. International experiences would caution against the positioning of CSOs merely as alternatives to custody, or to expressively seeking to demonstrate the 'toughness' of such sanctions. Rather an approach which emphasises the potential for social inclusion, reparation and desistance as per the tripartite model would potentially yield more benefit.

Appendix A

INFORMATION AND CONSENT SHEET FOR RESEARCH PARTICIPANTS

Researchers:

Dr Niamh Maguire, Senior Lecturer, Department of Law and Criminal Justice, South East Technological University (SETU), Waterford Campus.

Professor Nicola Carr, Professor of Criminology, University of Nottingham, UK.

Project Title: An exploration of the use of short custodial sentences and community service orders as part of the review of the Criminal Justice (Community Service) (Amendment) Act 2011.

Commencing: April 2023.

This research is funded by the Department of Justice (DOJ). The DOJ has identified the use of community service orders and short term prison sentences in the District Court as an important area of research as part of the review of the impact of the Criminal Justice (Community Service) (Amendment) Act 2011.

Research Aim: The main purpose of the research is to investigate the views of District Court Judges on use of community service orders in lieu of short prison sentences. The primary research question is what impact, if any, did the 2011 Act have on the practices of the judiciary in relation to the use of CSOs as an alternative to short prison sentences?

The secondary research questions are as follows:

1. What are the perceived and real barriers to judiciary using CSOs more frequently than short prison sentences for minor offences?
2. From a judicial perspective, what are the limitations and advantages of short term prison sentences?
3. From a judicial perspective, what are the limitations and advantages of community service orders?
4. What might encourage judiciary to use CSOs more than short prison sentences?
5. What are judicial perspectives of public opinion on the sentencing of first time offenders and repeat offenders in relation to the use of CSOs and short prison sentences?
6. What is the understanding of the judiciary in relation to research on the management of offenders and recidivism in CSOs and short term prison sentences?

What is involved?

Your participation is entirely voluntary. Participation in this study will not confer any professional advantage or disadvantage on you. If you initially decide to take part, you can subsequently change your mind and withdraw from the study without difficulty. If you would like to participate, you will be requested to read the information sheet and provide consent to participation. The researcher will conduct a one-hour, semi-structured interview. You will be asked for your views on sentencing through direct questions and responses to short vignettes or case scenarios. You will have the option of an online zoom interview where the audio is recorded or an in-person interview where the audio is electronically recorded using a Dictaphone. You will have the opportunity to review a transcript of the interview to ensure accuracy.

Confidentiality

This study is confidential and information from the study cannot be disclosed without the written consent of the DOJ. Dr Niamh Maguire will be responsible for overseeing the collection and analysis of data. All information will be anonymised and interviewees will be assigned a reference code and their data stored securely on a password protected computer on SETU's Teams. Digital recordings will be erased after transcription and anonymised hard copies will be kept in a locked filing cabinet in SETU during the data analysis stage and then destroyed by shredding. Digital Data

(a digital copy of the anonymised transcript) will be retrained for a period of at least 10 years in line with SETU Data Retention Policy.

Right to withdraw

Once data collection is complete, judges will be offered an opportunity to review their transcripts for accuracy. After this point, all identifying data of the participants (names, contact details) will be deleted and it will not be possible to withdraw from the research as it will not be possible to identity which participant took part in which interview.

What are the benefits or risks associated with the study?

While there may be no direct benefit from your participation, the findings will provide up-to-date information on District Court Judges' views on the sentencing process in the District Court, which has been identified as an area in need of further study by DOJ. The study will assist the DOJ in the carrying out of their legislative and policy making functions. There are no identified risks associated with participation.

Protocols:

1. The researcher will take the utmost care to preserve the anonymity of any District Court Judge who agrees to be interviewed. In this regard, no identifying information will be recorded in the interview. Contact details for judges who participated in the research will be stored in a password-protected file and destroyed once all the data is collected.
2. The researcher will ensure the confidentiality of the work and will not disclose any information related to the project without the written consent of the DOJ.
3. The researcher will ensure that there are robust data protection measures in place at all times during the course of this research.

Next steps

If you are willing to take part in the research, please email the researchers at the email addresses noted below to confirm your consent to participation in the research. Please sign and return this consent form to the researchers. Your consent form will retained for a period of 10 years in line with SETU's Data Retention Policy after which point it will be deleted.

Consent

I hereby give my consent to use the information that I provide for the purposes of this research on the basis that:

1. I have read and understand the information leaflet provided.
2. I understand that agreeing to participate in the interview is voluntary.
3. I have the right to refuse to answer any particular question without having to give a reason for my refusal.
4. I understand that all information that I give will be confidential.
5. I understand that my name or any information that might identify me will not be used in the analysis, report or in any publication.

Signed:_____

If you have any questions with regard to the study, please feel free to contact the researchers using the details provided below.

Researcher Contact Details:

Dr Niamh Maguire email: niamh.maguire@setu.ieNiamh.Maguire@setu.ie

Professor Nicola Carr email: Nicola.carr@nottingham.ac.uk

Please keep this page for your information.

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