

# Alternatives to Prison

## With a focus on drug using offenders

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### INTRODUCTION

The UN Single Convention on Narcotic Drugs of 1961 was the first international document endorsing the principle of providing measures of treatment, education aftercare, rehabilitation and social reintegration as an alternative to, or in addition to, conviction or punishment (Article 36b) for drug related offences. This principle has been reaffirmed several times in subsequent years in international agreements, strategies and action plans (European Monitoring Centre for Drugs and Drug Addiction - EMCDDA 2005). The EU Drugs Action Plan 2005-2008 asks member states to 'make effective use and develop further alternatives to prison for drug addicts who commit drug-related offences' (European Commission, 2005). A recent select issue in the Annual Report of the EMCDDA has considered the situation throughout the EU with regard to the use of Alternatives to Prison (ATP) (EMCDDA 2005). Between 25 per cent and 75 per cent of inmates in EU prisons are thought to be drug users or problematic drug users. The EMCDDA reports that several countries in the EU have introduced legislation establishing ATP.

In Ireland, the importance of developing alternatives to imprisonment has been recognised in many policy documents and reports over the past thirty years (Prison Study Group 1973; Prisoners Rights Organisation 1980; Council for Social Welfare 1983; National Economic and Social Council 1984; National Economic and Social Forum 2002; Committee of Inquiry into the Penal System 1985; Department of Justice 1994,1997; Prison Service Operating Cost Review Group 1997; National Crime Forum 1998; Expert Group on the Probation and Welfare Service

1999; Oireachtas Sub-Committee on Crime and Punishment 2000; Comptroller and Auditor General 2004). Although these policy documents and reports do not always specify the link between such sanctions and drug using offenders, it has been widely accepted that many people are in prison as a result of offences committed as a consequence of drug addiction (Furey and Browne 2003; O'Mahony 1997; O'Mahony 2004; Hannon et al 2000; Millar et al 1998; Keogh 1997. Hannon et al (2000, 37) found from a national sample of Irish prisoners that, excluding the use of marijuana and cannabis, 63 per cent of male prisoners and 83 per cent of female prisoners had used drugs in the previous 12 months. With regard to the association between drug use and crime, 51 per cent of the male and 69 per cent of the female prisoners stated being under the influence of drugs when they committed the offence for which they were serving a prison sentence (Ibid 38).

Research indicates that when a crime is directly linked to the use of drugs, treatment is more effective at reducing re-offending than imprisonment.<sup>1</sup> (O'Donnell and O'Sullivan 2001) and (O'Mahony 2002) suggest that a 29 per cent reduction in recorded crime in Ireland between 1995 and 1999 might be partially explained by the increased availability of methadone maintenance programmes throughout the Dublin area during that period. Of 131 drug users surveyed by Furey and Browne (2004), 110 had looked for treatment and 100 had received it. Sixty-four respondents reported an association between the receipt of treatment and engagement in crime. Forty-nine of those respondents reported doing 'a 'lot' less crime' (p. 34).

Treatment in the community is also far less costly than imprisonment. Kilcommins et al (2004,241) suggest that the cost of keeping one person in prison in Ireland, estimated at €84,750 in 2002, is 'probably the most expensive in the world'. An analysis by the Comptroller and Auditor General (2004) estimates that the average cost of a community-based sanction ranges from 2 per cent to 8 per cent of the cost of a custodial sentence (Comptroller and Auditor General 2004, 48). Other studies have highlighted the way in which the prison environment, where access to drugs and drug using equipment is more limited than outside prison, can exacerbate the negative health consequences

<sup>1</sup> For a review of international and Irish research evidence see Connolly (2006)

of drug use, such as the spread of blood borne viral diseases such as HIV and hepatitis B and C. For example, research has shown that drug users who generally smoked heroin outside prison came under pressure to inject once inside prison due to the lesser availability of the drug in prison and the perception that smoking was wasteful (Long et al 2004). This can then lead to the sharing of injecting equipment and consequent health problems. Allwright et al (2000,78), in a study to determine the prevalence of antibodies to hepatitis B core antigen, hepatitis C virus, and HIV in the prison population of the Republic of Ireland and to examine the risk of infection concluded that 'Infection with hepatitis C secondary to use of injected drugs is endemic in Irish prisons'.

Surveys of public opinion in Ireland also show broad public support for the view that prison should be used as a last resort. In a survey of public perceptions of crime in Ireland, nearly three-quarters (73 per cent) of respondents believed that non-custodial sanctions, such as fines and community service, would be more fitting than custodial sanctions for certain crimes (McDade, 1999). A survey carried out by the Garda Sfochana showed a high level of scepticism as to the value of imprisonment. Eighty-one per cent of more than 10,000 adults surveyed agreed that 'prison does not prevent re-offending' while two-thirds believed that alternatives to prison, such as fines, community service and probation should be used for all but the most serious crimes (Garda Research Unit 2002).

The broad consensus that imprisonment be used as a last resort is now reflected on a statutory basis, at least for minors, with the passage of the Children Act 2001. The Act emphasises prevention and the diversion of young offenders from prosecution, it raises the age of criminal responsibility from seven to twelve years, puts the Garda Sfochana Juvenile Diversion Scheme on a statutory footing and introduces elements of a restorative justice approach to the criminal justice system, including Family Group Conferencing. Underlying the Act is the principle that detention should only be used as a last resort. However, although certain provisions of the Act were introduced in May 2002 (SI 2002/151), most of the Act's provisions await implementation. The National Drug Strategy 2001-2008 has two relevant references in this area ((Department of Tourism Sport and Recreation 2001). With relevance to the pre-trial stage, Action 13 aims: 'To monitor the efficacy of the existing arrest referral schemes and expand them,

as appropriate'. With regard to the trial stage, Action 20 aims: 'To have in Local Drug Task Force areas an 'early intervention system, based on the Drug Court Model, if the evaluation of the pilot in the North Inner City of Dublin is positive. This should be accompanied by appropriate familiarisation for the judiciary on the role of the Drug Court'.

This article will assess the available non-custodial sanctions in use in Ireland with a particular focus on offenders whose criminality is linked to a drug addiction with a view to assessing their implementation and future potential.

### DATA LIMITATIONS

A major difficulty in evaluating the impact of alternatives to custody is the inadequacy of data in the criminal justice system in Ireland. This is relevant at each stage of the criminal justice system. The absence of an integrated data system throughout the different stages and between the different agencies of the system is particularly problematic in an area where we are seeking to trace the progress of offenders through the system.

Among the problems encountered are the following:

- It is not possible to track offenders through the system.
- There is no regular information on sentencing practices.
- There is no regular data on recidivism rates.

A number of difficulties have been identified in relation to data throughout the criminal justice system in Ireland (Connolly 2006; O'Sullivan and O'Donnell 2003; Bacik 2002; O'Donnell and O'Sullivan 2001; O'Malley 2000; McCullagh 1996). Also, a report by the Comptroller and Auditor General on the Probation and Welfare Service (PWS) states that: 'In practice, the Service has very poorly developed management information systems. This is compounded by the lack of relevant statistical information from other parts of the criminal justice system on a consistent basis' (Comptroller and Auditor General 2004, p. 51). The issue of crime statistics has recently been considered by the government appointed Expert Group on Crime Statistics. This committee has reviewed the data problems throughout the system and presented its recommendations, along with a minority report, to the government (Expert Group on Crime Statistics 2004a, 2004b).

Despite a number of concerns raised in the minority report, the implementation of the recommendations of the committee should improve data sources within the criminal justice system, thereby enhancing our ability in the future to assess the extent to which alternatives to prison are being applied in Irish courts.

## LEGAL BASIS OF ALTERNATIVE SANCTIONS

Alternative sanctions in Ireland are provided for in statute law. However, many have evolved by way of judicial practice and have no statutory basis. Their implementation is therefore heavily dependent on the willingness of the judiciary to apply them.

Section 28 of the Misuse of Drugs Act 1977, called for probation and medical reports to be made available to the court prior to sentencing. These reports were obligatory up until the Misuse of Drugs Act 1984, when the reports became an option for the trial judge. An order under Section 28 could involve the court releasing the offender subject to the condition that he or she attend a treatment center. The Children Act 2001 sets out a number of general principles to guide courts in dealing with children. These principles are biased towards rehabilitation and the discouragement of custody for child offenders. Also, judges will be required to seek pre-sentencing reports from the Probation and Welfare Service (PWS) in all cases involving persons under eighteen years of age where the judge is considering a custodial sentence or community sanction. Although certain provisions of the Act were introduced in May 2002 (SI 2002/151) most of the Act's provisions await implementation. Although many commentators have welcomed the overall thrust of the Children Act 2001, the government has come in for criticism due to delays in its implementation. The provisions of the Act relating to functions by officers of the PWS have not yet been brought into effect (Comptroller and Auditor General, 2004)

O'Mahony (2002, p. 9) suggests that the Children Act could 'potentially revolutionise the area of juvenile justice'. However, he is also critical for what he sees as a continuation of criminal justice approaches inconsistent with the principles of the Act. For example, in April 2002, following the death of two members of the Garda Síochána in a juvenile-related 'joyriding' incident, the Minister for Justice announced plans to open a new wing in St. Patrick's Institution for 14-15-year-olds (Dooley and Corbett, 2002). O'Mahony (*Irish Times* 2003, 3 October) stated that this

initiative 'totally undermined the basic principle contained in the Act, which was not to jail under 15-year-olds'. Similar criticisms have been made by groups opposed to the introduction of UK-style Anti-Social Behaviour Orders (Irish Youth Justice Alliance 2004). Following strong opposition to the introduction of ASBOs, a number of significant differences between the UK legislation and Irish proposals as outlined in the Criminal Justice Bill 2004 have been introduced. Nevertheless, UK Home Office figures published in 2005 show that the breach rate of ASBOs is 42 per cent. In 2002, of the 403 ASBOs issued 212 led to a prison sentence<sup>2</sup>. The UK experience suggest that the introduction of ASBOs will lead to an increase in the use of imprisonment in Ireland.

### ARREST REFERRAL AND ALTERNATIVES TO IMPRISONMENT IN THE IRISH CRIMINAL JUSTICE SYSTEM

Many of the alternative sanctions in operation in Ireland are not based on statute but have evolved over time in the form of judicial practice. For example, almost half of the offenders referred for supervision by the Probation and Welfare Service (PWS) in 2000 were supervised by the service without formal court orders being made. In these cases sentence is deferred by the judge for a stated period. Most reports to courts are also provided on a non-statutory basis. The agencies involved in the operation of alternative sanctions in Ireland include the Garda Síochána, the PWS and the courts. The Garda Síochána have a role in the operation of juvenile diversion schemes and also in relation to restorative justice interventions.

#### *Pre-trial stage - arrest referral and juvenile diversion*

The Garda Juvenile Diversion Programme was initiated in 1963 (Comptroller and Auditor General 2004, Vaughan 2001, Expert Group on the Probation and Welfare Service, 1999). The programme allows that, if certain criteria are met, a juvenile offender may be cautioned as an alternative to being prosecuted. For a juvenile to be eligible for caution he or she must be under eighteen years of age, must admit involvement in the crime or

<sup>2</sup> <http://morello.homeoffice.gov.uk/rds/pubsintrol.html>

offence, must not have been cautioned previously (or if so, it must be deemed appropriate to administer a further caution), and the parents, guardians or person acting *in loco parentis* must agree to the terms of the caution. There are procedures in place to enable the Gardai to divert juvenile offenders (those under eighteen years of age) found in possession of small quantities of drugs, where drug trafficking is not an issue, away from the judicial process. Whereas up until 2001 the programme operated on the basis of the common law principle of police discretion, the Children Act 2001 has now placed it on a statutory footing.

Juveniles cautioned under the programme may be subject to supervision by a juvenile liaison officer (JLO). Supervision may involve a range of activities and involve other statutory or voluntary organisations with appropriate expertise to respond to the particular matter. The Children Act 2001 also introduces restorative justice principles to the operation of the system. There is now a process whereby the offender and the injured party can be brought together to discuss the offence and its related impact on the injured party. In the context of so-called victimless crimes, such as simple possession of cannabis for example, identifying the injured party is a matter of some controversy. As these represent early interventions, they cannot be described strictly as alternatives to custody. Also, data produced annually by the police in relation to juvenile diversion programmes does not provide information on whether the offence is drug related, as distinct from a drug offence.

The main aim of arrest referral schemes is to provide information to arrestees about appropriate services and to facilitate referral to treatment at the primary points of entry into the criminal justice system - usually police cells or court premises. Arrest referral is an intervention aimed at people who have been arrested and whose offences may be linked to drug use. Such policies are premised on the idea that treatment will lead to a reduction or cessation of illicit drug use and thus reduce or negate further drug-related offending by the drug user.

Action 13 of the National Drugs Strategy 2000-2008 obliges the Garda Sfochana to 'monitor the efficacy of the existing arrest referral schemes and expand them, as appropriate' (Department of Tourism, Sport and Recreation 2001). A pilot juvenile arrest referral scheme has been established in a police station in Dublin's north inner city. This is a joint initiative between the Garda Sfochana, the Northern Area Health Board and the North

Inner City Drugs Task Force. An evaluation of the scheme has recommended that the scheme should be extended, with additional resources in terms of staff, programme development and monitoring (Connolly, 2005).

### *Trial stage*

#### *Suspended sentence - Butler Orders and Orders of Recognisance (Misuse of Drugs Act 1977)*

A suspended sentence occurs where the court, having passed a sentence of imprisonment for a specific term, suspends its operation. Although this option is used widely there is no statutory authority in Ireland enabling the court to suspend the operation of a prison sentence. Walsh (2002) highlights the fact that a suspended sentence must be seen as an alternative to prison. It should not be imposed, therefore, 'where the gravity and circumstances of the offence taken by themselves would not have warranted a prison sentence' (p. 1033). There is no publicly available information on the number of suspended sentences imposed in any one year. Usually, a sentence of imprisonment will be suspended upon the offender's entering into a recognisance to keep the peace and be of good behaviour for a specified period. A Butler Order, which derives its name from the decision of Butler J in *State (Woods) v. Attorney General* (1969, p. 385), arises where a court imposes a lengthy sentence with a direction that the offender be brought back to the court having served a portion of the sentence. It is then up to the judge to decide what to do with the remainder of the sentence. Walsh (2002, p. 1033) makes the observation that this form of suspended sentence has become increasingly popular 'as a means of building in an element of rehabilitation to a custodial sentence, particularly in respect of a young person or a person with an addiction'. There is some uncertainty as to the constitutional validity of Butler Orders. This issue has not been fully determined by the Supreme Court. However, following consideration of the orders by the Supreme Court in the *People (DPP) v. Finn* it appears likely that Butler Orders represent a constitutionally invalid exercise of judicial power.<sup>3</sup>

Another form of suspended sentence provided for by statute is an Order of Recognisance as set out in Section 28 of the Misuse of Drugs Act 1977. This order requires an offender to undergo

<sup>3</sup> For a discussion of this judgment see Walsh (2002, p. 1035).



treatment for his or her drug condition in a residential center or in the community. Within Section 28 (MDA, 1977) there is also the possibility of sentencing a person to a custodial treatment centre for up to one year. Under Statutory Instrument 30 of 1980, the Central Mental Hospital in Dundrum was designated the custodial treatment center. Charleton and McDermott (1998) point out however, that between 1977 and 1998 only two persons were sentenced to custodial treatment by an Irish court. The non-custodial option in s.28 has also been used infrequently by the courts. Between 1995 and 1999 only five MDA Orders of Recognisance were recorded by the Probation and Welfare Service, which has a supervisory role in this area (Probation and Welfare Service 2001).

Moran et al (2001) suggest that the reason the courts have been reluctant to exercise this option is because the necessary rules and regulations have not been made. In order to facilitate the greater use of this sentencing option, the Expert Group on the Probation and Welfare Service has recommended that 'the necessary Courts Rules and Regulations be updated by the various Court Rules Committees' (Expert Group on the Probation and Welfare Service 1999, p. 49).

#### *Adjournment of sentence*

The court may adjourn a prison sentence for a certain time to see how the offender behaves. Although this practice has no statutory footing, there is usually an expectation that the offender will take some intervening action, such as undergoing a treatment programme in a drug-related case. The court, when it comes to reconsider the matter, may proceed with the originally intended sentence in the event that it is not satisfied with the offender's progress in the interim period.

#### *Probation Orders, Intensive Community Supervision (ISP) and Supervision During Deferment of Penalty*

A probation order is a formal warning to an offender that if he or she does not abide by conditions imposed by the court for a specified period he or she will be brought back by the court for punishment. These orders are usually supervised by a probation officer. The Probation and Welfare Service was involved in 118 such supervision orders in respect of offences under the Misuse of Drugs Act in 1999, the last year for which figures are available (Probation and Welfare Service 2001). Intensive Community

Supervision was designed to provide increased controls on the offender in the community. Intensive Supervised Probations for young offenders with drug-related problems are currently provided via the Bridge project and the Tower project in Dublin.<sup>4</sup>

Although orders for Supervision During Deferment of Penalty have no statutory basis, such orders are used where the court is unsure as to an offender's capacity to participate in community-based programmes while avoiding further crime. At a later hearing, a report is presented to the court on the progress of the offender. In 1999, 192 such orders were issued in respect of offences under the Misuse of Drugs Act 1977.

### *Community Service Orders*

Community Service Orders (CSOs) involve the imposition of a sentence to a programme of work in the community as an alternative to imprisonment. The sanction is available only in respect of offenders over sixteen years of age who have been convicted of a criminal offence. Any court exercising a criminal jurisdiction, except for the Special Criminal Court, can apply a CSO. However, the vast majority are applied by the district court.

### *The Drug Court*

The drug court (Farrell, 2002) initiative is based in the District Court. The jurisdiction of the drug court is confined to persons over the age of seventeen years who have been convicted of or have pleaded guilty to certain non-violent offences, deemed to have been committed in order to feed their drug habit. The drug court was established on a pilot basis in Dublin's north inner city in February 2001. On conviction, the offender is offered the alternative of a prison sentence or a supervised drug treatment programme. Walsh (2002, p. 54) describes the drug court as the district court operating 'a novel sentencing jurisdiction. The emphasis is on therapeutic rehabilitation as distinct from punishment'.

Compliance with the drug court programme in terms of treatment is generally assessed by drug courts through urinalysis. One of the conditions of the drug court is mandatory urine analysis, generally on a weekly basis. As the participant progresses successfully through the programme the frequency of

<sup>4</sup> For a description of these projects see the EMCDDA's Exchange on Drug Demand Reduction at [http://www.emcdda.eu.int/responses/methods\\_tools/eddra.shtml](http://www.emcdda.eu.int/responses/methods_tools/eddra.shtml)

the urine testing is reduced.

In the first twelve months of the pilot project the drug court judge imposed numerous sanctions including:

- registering on a daily basis at the local garda station;
- imposition of a curfew, for example from 8pm to 8am,;
- revocation of bail for a period of days;
- verbal warning of a curfew;
- increased court appearances.

The Judge also rewarded the participants for satisfactory progress with a range of incentives:

- reduced court appearances;
- removal of curfew;
- week off court;
- gifts appropriate to the participant.

## EVALUATING ALTERNATIVES TO IMPRISONMENT

European evaluation studies of ATP are rare and inconclusive (EMCDDA 2005). Research is usually linked to pilot projects or particular services. However, research consistently shows that a key indicator of success is retention in treatment (EMCDDA 2005). The EMCDDA reports that 'dropout rates are one of the biggest problems in drug treatment in general and particularly so in treatment taken as an alternative to prison. Some studies suggest that it is the characteristic of the treatment provided, and not of the patient or of their route into treatment, that is important in predicting success in treatment' (EMCDDA 2005). The review by the EMCDDA found a success to be more likely:

- if addicts are motivated, if they are actively and intensively approached and advised to go into treatment;
- if care facilities follow clinical standards and have enough and qualified staff;
- if there is a feeling of a real threat of punishment;
- if there is close cooperation between judicial authorities and care programmes and if sufficient aftercare is available;
- if there is effective monitoring and review of offenders and streamlining breach procedures, good non-bureaucratic management control;

- if there are quality improvement mechanisms, reduction of waiting time to begin treatment, adaptation of the treatment offer to the necessities of the client;
- if there is cooperation of local authorities to encourage reintegration in the community.

Negative indicators of achievement included an excess of officials involved in the process, excessive costs of proceedings and administrative complexity. Also a deficit of treatment places in neighbourhoods was an obstacle to success.

The report of the Comptroller and Auditor General on the Probation and Welfare Service points to the lack of evaluations on alternatives to custody: 'Neither the Department (of Justice, Equality and Law Reform) - which oversees the operation of the criminal justice system - nor the (Probation and Welfare) Service has carried out evaluations of the relative effectiveness of the different forms of sentence' (Comptroller and Auditor General 2004, 47). Specific studies have been conducted on the operation of the Garda Restorative Justice projects (O'Dwyer 2001), the pilot Drug Court (Farrell 2002) and the Community Service Orders (Walsh and Sexton 1999). Vaughan (2001) conducted a study on the attitudes of a small sample of district court judges on their attitudes to such penalties.

A review of a Garda Siochana restorative justice pilot programme in 2001 reports that, of the sixty-eight cases reviewed, six cases involved drug possession (O'Dwyer, 2001). Three of these led to a caution and three to a family group conference. Of the 20,647 offences in respect of which juveniles were referred in 2002, 1,054 (5.1 per cent) were for the possession of drugs and 154 (0.7 per cent) were for the sale or supply of drugs (Garda Siochana 2003). It can also be assumed that many other referrals were for drug-related offences, involving theft or burglary for example. Although serious crimes were dealt with, offences which could result in a prison sentence, the study did not specify whether restorative justice conferences were used in drug-related offences, as distinct from drug offences, or whether it would be appropriate in relation to serious drug users.

An evaluation of the operation of the pilot drug court was carried out by Farrell (2002). Of the sixty-one offenders who were referred to the drug court in its first year of operation, thirty-seven were deemed suitable to enter the programme (Farrell, 2002). The participants were primarily male, in their late 20s and

unemployed, with a low level of educational achievement. Between them, thirty-five of the participants had a total of 872 prior convictions and the majority were deemed to present a 'very high risk of reconviction' (p. 5). The main drug of addiction of the participants was heroin. Overall, participants were using an average of five different illicit drugs at the time of entering the programme.

The main findings of the Farrell study indicated that, although a number of participants continued to offend while in the programme, the rate at which participants were arrested, charged and had their bail revoked declined the longer they were in the programme. This finding conforms with the findings of international research in this area. In terms of substance abuse, the percentage of those testing negative for opiates increased significantly as the programme progressed, from 42 per cent over the first three months to 82 per cent in the last three months. Although no graduations had been anticipated during the pilot period, compliance had improved significantly and eleven of the thirty-seven participants (30 per cent) were clean of all illicit drugs by the end of the evaluation period. All of those interviewed as part of the evaluation believed that there continued to be a strong rationale for the continuation of the drug court. However, the low number of referrals and the absence of an agreed mission statement and clear identity for the drug court were identified as issues which needed to be addressed.

The most significant obstacle to progress identified by the evaluation is the difficulty encountered in providing participants with access to full and timely treatment services. According to the report, 'Many stakeholders believed that the drug court cannot continue to operate without access to full treatment within a reasonable time period' (p. 5). A marked decline in offending behaviour and an increase in compliance as the pilot progressed suggest, according to the report, 'that the drug court will have the desired impact if it can succeed in retaining participants over the early months' (p. 6).

Research limitations of the study prevented an adequate examination of the programme's economic benefits. However, the report identified a number of areas where the efficiency and effectiveness, and ultimately the economics, of the programme could be refined. Furthermore, the authors concluded that, should the drug court reduce recidivism, significant long-term savings to the criminal justice system would be made. The Minister for

Justice, Equality and Law Reform has supported the recommendation in the report that the drug court should be continued and it has now been extended to another part of the city: the Dublin 7 area. In February 2006, the Irish Courts Service announced that the drug court was to be made permanent and expanded Dublin city wide.<sup>5</sup>

Another recent evaluation was conducted of a methadone maintenance clinic in Dublin. The study attempted to measure the levels of effectiveness in terms of clients' outcomes while undergoing treatment (Lawless and Cox 2003). A questionnaire was administered to clients who were registered at the centre in 1999 and then again to those who remained on treatment eighteen months later. At baseline stage, over half of clients (57 per cent) reported having being in prison at some point in time. At follow-up stage the findings included the following:

- improvements in the extent of drug using risk behaviour among clients;
- reduction in quantity and frequency of both licit and illicit drug consumption;
- increase in sexual risk behaviour among clients;
- reduction in frequency of criminal activities undertaken by clients;
- improvements among clients in relation to social functioning;
- marked decrease within a range of psychiatric complaints especially with regards to reported levels of anxiety among clients

#### ARE ALTERNATIVES BEING IMPLEMENTED?

Unpublished data provided by the National Drug Treatment Reporting System provides information on the numbers referred to treatment from the criminal justice system in general. As shown in Table 1, since 1998 there has been no noticeable increase in the numbers of people referred to treatment from the criminal justice system relative to the total numbers referred to treatment. In 2003 only 8 per cent of the total number of referrals to treatment originated in the criminal justice system. Procedures for monitoring the outcomes of treatment programmes are not publicly available.

<sup>5</sup> <http://www.courts.ie/courts.ie>

Data is not available as to the precise stage of the criminal justice system from which the client is referred. Table 1 provides the total number and percentage of those referred to treatment from the criminal justice system.

*Table 1 The number (%) of cases referred to drug treatment from the criminal justice system*

	1998	1999	2000	2001	2002	2003	Total
Court/ probation/ police	518 (10.5%)	427 (7.1%)	439 (6.5%)	480 (6.4%)	598 (7.4%)	698 (8.1%)	3160 (7.5%)

Total referrals 4,956 5,993 6,754 7,532 8,116 8,656 42,007

*Source: National drug treatment reporting system (Unpublished data).*

Despite the overwhelming political and public consensus that alternatives to prison should be used where possible, there is no evidence that their use is displacing the use of imprisonment in Ireland (Kilcommins et al 2005; Comptroller and Auditor General 2004).

In Ireland, in 2002, there were approximately 4,100 persons under supervision in the community, compared to a daily average of approximately 3,200 prisoners - ratio of 1.3 : 1. Between 1995 and 2002, the estimated total number of persons under supervision increased by half, and there was a similar increase in the prison population. There does not appear to have been any increase in the use of alternatives to prison relative to custodial sanctions between 1995 and 2002 (Comptroller and Auditor General 2004).

A concern which arises in this context is that, rather than witnessing a decline in the use of imprisonment and a corresponding increase in non-custodial sanctions, we are seeing an overall increase in the number of people falling under the supervision of the criminal justice system. This has been referred to as 'net-widening' (Cohen 1985). There is some evidence of this phenomenon in relation to the use of the Community Service Orders. Technically, the CSO should only be applied in cases where a custodial sanction would otherwise have been applied. However, a study by Walsh and Sexton (1999) found evidence of a more flexible approach being adopted by the courts and some evidence of a 'net-widening' effect whereby people who would

not have received a prison sentence were being sentenced to CSOs. The authors recorded evidence of a 'feeling among some judges and other practitioners in the field that legislation was too restrictive in confining CSOs as a substitute for a prison term' (p. 97). Of the 269 offenders they studied who had been served a CSO, they found that almost half did not have a previous criminal conviction and the most frequent offences committed were road traffic offences, public order offences and less serious assaults.

### OBSTACLES TO IMPLEMENTATION

It can be seen therefore that despite the broad policy consensus that prison should be used as a last resort and that alternatives to prison should be used more often, the reality is that this consensus is not reflected in practice. A number of factors have been identified in the literature which contribute to an explanation as to why this might be the case.

#### *Political influence and the prison rate*

Firstly, it is important not to lose sight of the broader societal context in which sanctions are applied and the factors which impact both on the sentencing process and therefore on the prison rate. The National Economic and Social Forum (NESF) has recently considered the possible reasons why alternatives to custody have not been introduced more in practice (NESF 2002). The NESF highlights the complexity of policy implementation in the area of criminal justice and the particular problems arising here:

On the one hand, there is consensus that prison should be a last resort, while on the other, there is strong support for the current prison-building programme, during a period when recorded crime is on the decrease, but fear of crime remains high. Policy implementation issues in this area tend to be more political than usual, as likely (or even more so) to be more influenced by various interpretations of public opinion and media reaction rather than by the findings of empirical research, lessons emerging from practical experience or financial considerations such as value for money (NESF 2002, p.35).

The role of political considerations rather than crime rates or evidence-based analysis of sentencing practices in determining



the number of prison cells built is a theme taken up by other contributors in this area (Kilcommins et al 2004; O'Donnell 2004; O'Sullivan and O'Donnell 2003). A recent emphasis on a repressive approach to penal policy during the 1997 election campaign was contributed to in particular by the drug-related murder of a high profile investigative journalist. A subsequent expansion in prison building was situated within the context of a 'zero tolerance' approach to crime (O'Donnell and O'Sullivan 2001). As a consequence, despite a downward trend in recorded crime figures between 1995 and 2000, the Irish prison population increased by 40 per cent.

Kilcommins et al (2004, 266) also argue that a contributory factor explaining the penal expansion of the late 1990s was that finances were available in the national coffers to match the law and order rhetoric:

During previous law and order crises the system did not have the capacity to respond. It was all bark and no bite. A harsh streak has long existed among Irish legislators but in the past they did not have the financial wherewithal to give practical effect to their retributive desires...If the money had been available in the past, tough talk could well have had similar consequences

Identifying the poor correlation between prison population and crime rates, the NESF identifies the need to determine an appropriate level of imprisonment and to limit additional prison building.<sup>6</sup>

#### *Judicial practices and priorities*

A number of commentators have detected what they see as a general tendency to imprison in Ireland relative to other countries. Vaughan (2001, p. 12) states: 'What does seem indisputable is that Ireland relies upon imprisonment to a far greater degree than in most other Western European countries'. A number of recent referenda on the bail laws led to the Bail Act 1997, which increases the grounds on which bail can be refused by the courts and which became operational in 2001, has led to an increase in the prison remand population (O'Donnell 2004; NESF 2002). A trend towards longer sentences has also been identified recently (O'Donnell 2004; NESF 2002; Vaughan 2001). The NESF also

<sup>6</sup> See also the discussion in Kilcommins et al (2005) Chapter 7.

highlights the fact that approximately one quarter of the Irish prison population is under twenty-one years of age. Ireland had, according to Vaughan (2001, p. 31) 'the second highest proportion of prisoners under 18 (6.2 per cent) of 40 Council of Europe countries surveyed in 1997'. Furthermore, if we consider the number of committals, *the prison flow*, in a given year rather than the daily prison population, *the prison stock*, it is clear that many of those sentenced to prison in Ireland have committed minor offences and have received short sentences. The National Economic and Social Forum (NESF) report states: 'while there are about 3,000 prison spaces, in the region of 11,000 committals are made each year' (NESF 2002, p. 37). Almost half of all adults imprisoned receive less than three months; in three-quarters of cases the sentence was less than one year.

Furthermore, these prison sentences do not appear to display any concern with the rehabilitative potential of the sanctions being imposed. Although we do not have detailed follow-up data on prisoners to assess recidivism rates, a survey of prisoners found that each had accumulated an average of fourteen convictions and ten separate prison sentences (O'Mahony 1997). A study of 150 young offenders found that half were serving their first sentence, of those who had served a previous sentence 53 per cent had been in prison on one previous occasion, 19 per cent had served two previous sentences and 27 per cent had served three or more sentences (Geiran et al 2000).

Generally speaking, the determination of what sentence to impose in any individual case is an exercise of judicial power. In order to assess the degree to which alternative sanctions are being applied in relation to custodial sanctions, it is necessary to be aware of the many variable factors which influence the judicial process. A number of factors have been seen to impact on the types of sentences handed down in relation to drug offences. These might include the type of drug (Connolly, 2004), the quantity of drugs found in the offender's possession, whether the drugs were for personal consumption (Charleton and McDermott, 1998), and the circumstances of the offender. With regard to offences committed to feed a drug habit, Charleton and McDermott (1998, p. 347), in a consideration of the judicial response to such cases, conclude that, 'Irish courts have struggled ... with the concept of drug addiction as mitigation. Differences have been drawn between the cold-blooded non-user of drugs and those who commit various crimes in order to finance their needs'.

However, the primary concern of the courts has, they suggest, been the criminogenic effects of drugs from the point of view of the public, with the personal circumstances of the offender being of secondary consideration. Also, where the accused assists the authorities in the investigation and prosecution of further offences, this will be seen as a mitigating factor in sentencing<sup>7</sup>.

Vaughan (2001, p. 28) suggests that the dramatic increase in prison committals since 1992 must be explained 'by a greater recourse to custody by the judiciary'. This only led to a noticeably larger prison population after 1997, he suggests, due to the reduction in the use of temporary release. This was a controversial policy whereby prisoners were being released after serving only a small portion of their sentence due to the pressure of space for new inmates. This became known as the 'revolving door' syndrome. The recent prison-building programme has led to a reduction in the use of temporary release. In July 1996, 19 per cent of serving prisoners were on full temporary release, compared to 7 per cent in 2000 (O'Sullivan and O'Donnell 2003).

As against this trend, O'Donnell (2004) identifies a slight reduction in the number of prison committals under sentence by the district court in the latter half of the 1990s. O'Donnell questions whether the slightly downward trend in incarceration at district court level will continue however, given, among other things, the increased incarceration of non-nationals in Ireland. O'Donnell (2004, p. 257) also identifies 'a strong orientation towards custody among Irish judges'. Mc Cullagh (1992, p. 17) concludes: 'the increased punitiveness of the Irish judiciary... has created the crisis in the prison system'. He suggested that their social background renders them unable to understand the circumstances of the offenders they routinely confront and that they are more susceptible to 'punitive-minded' views from within their own social circle and in the media, described as 'their major source of access to the nature of 'public opinion''.

On the same theme, a study by Bacik et al (1998) has suggested that the tendency to imprison is directed disproportionately towards specific deprived sections of society. The study suggests a degree of bias in the way in which Irish courts respond to particular defendants. The study, which sought to examine links between economic deprivation and crime, looked at court

<sup>7</sup> For a review of these various factors see Drug Misuse Research Division (2004)

appearance and sentencing patterns. The study found that age, sex and level of community deprivation were key factors predicting the likelihood of a court appearance. Secondly, the study found that defendants from more economically deprived areas were 49 per cent more likely to receive a custodial sentence than those from less deprived areas, once other variables were accounted for. This study did not focus on specific crimes; however, given the acknowledged link between economic deprivation, problematic drug use and crime, it can be assumed from the study that many of those sent to prison from deprived areas have committed crime as a consequence of their drug addiction.<sup>8</sup>

O'Donnell (2004) also identifies differential patterns of sentencing in different parts of the country. A comparison of Limerick and Dublin case management found that in Limerick, for larceny, assault and public order offences, immediate incarceration was more common than probation and community service combined, whereas in Dublin probation was more commonly used than immediate imprisonment. O'Donnell (2004, 259) concludes that either 'Limerick court is more punitive; or that it deals with more serious offences; or that it has less access to community sanctions and measures'.

### *Sentencing guidelines*

The decision of the court in relation to sentencing may be influenced by a pre-sanction report which is compiled by the Probation and Welfare Service and which might highlight factors such as drug addiction as a contributory factor in explaining the offender's behaviour. The judge is also not entirely free to impose whatever decision he or she decides in an individual case. Walsh (2002) suggests that the judge must exercise such discretion fairly and in keeping with case law and judicial principles and practices as have evolved over the years. A failure to follow such principles can lead to successful appeals against sentence.

A problem which arises in this area, however, is that these principles have not been expressly laid out either by statute or in the form of judicial guidelines (Bacik 2002). Furthermore, the judiciary has been extremely reluctant to allow itself to be circumscribed by the legislature in terms of its freedoms in this

<sup>8</sup> For a review of research on the links between drugs and crime in Ireland see Connolly (2006)

area. In *The People (DPP) v. Gannon*<sup>9</sup> the Court of Criminal Appeal set itself against the principle of sentencing guidelines or tariffs: 'We put great store on the fact that each case must be considered in its individual frame, while being mindful that a sentence must be proportionate to the offence in question and to other sentences imposed in similar situations - though it needs to be emphasized, that very rarely will two cases be exactly alike'. A survey of seventeen district court judges conducted by Vaughan (2001, p. 127) found a 'general belief among judges that 'each judge should be left to their own devices' because 'circumstances differ so often'. However, Vaughan concludes that judges may unwittingly be imposing different sentences for similar offences due to a lack of data on their own and other sentencing practices. Vaughan conducted a sample of judges in the district court. They were asked whether they had statistics regarding sentencing:

*Table 2. Judicial access to statistics regarding sentencing*

	<i>Yes</i>	<i>No</i>
In your own court	4	12
In other courts	1	14

*Source:* Vaughan (2001, p. 127)

Vaughan (2001, p. 127) concludes from this survey that 'not only are the majority of judges not able to review their own work, although some judges may operate their own review procedures, they are also unable to compare it to those of their colleagues'. Interestingly however, Vaughan also found that judges expressed frustration with the use of imprisonment for drug users with many complaining about the lack of rehabilitation within prisons, 'especially for drug addicts' (p. 123).

### *Judicial training*

Vaughan's survey of district court judges found that most of the sample felt there was a need for training to understand the circumstances surrounding drug misuse. The current practice in this area is that new judges attend an induction course and observe another judge for a couple of weeks. A handbook on

<sup>9</sup> *Court of Criminal Appeal, 15 December, 1997. Quoted in Charleton and McDermott(1998)*

essential matters is circulated to new judges on the bench. District court judges have two statutory meetings per year to discuss sentencing matters. However, Farrell's (2002, p. 51) evaluation of the pilot drug court found that:

... although members of the Drug Court Team had been afforded opportunities to attend training conferences and visit international Drug Courts, some members of the Drug Court Team did not receive any specific Drug Court training prior to the commencement of the Drug Court and in some cases Team members had very little time to prepare for their new roles.

A recommendation made following the mid-term review of the National Drug Strategy 2001-2008 looks at the question of judicial training. The Report of the Steering Group recommends that: 'A framework of co-operation with the Judicial Studies Institute on the provision of specialist training on drug-related issues to members of the Judiciary should be developed by January 2007' (Community, Rural and Gaeltacht Affairs 2005, 21).

### *Resource allocation*

Another factor which has been seen as contributing to the reluctance of the judiciary to apply alternative sanctions relates to the question of resources. In explaining a 20 per cent decline in the use of Community Service Orders between 1992 and 2001, Vaughan (2001, p. 75) suggests that, although it is unclear why this reduction has taken place, 'some judges have expressed frustration with the difficulty of obtaining insurance for these projects, as the state will not cover the cost'. A sample survey of seventeen district court judges conducted by Vaughan (2001) was asked questions about the judicial willingness to apply community-based sanctions. Judges appeared to be positively disposed to the use of the PWS. However, there was a reluctance to use the PWS due to the under-resourcing of the latter, a factor which was seen to undermine the efficacy of such sanctions. The NESF also identifies staff and resource shortages in the Probation and Welfare Service. In 2001, the PWS budget was about 15 per cent of the Prison Service operations budget - €171 million (excludes €34 million for prison capital spending) compared with €25 million. The NESF also identifies significant staff shortages in the PWS, with over 3,000 prison officers compared to a staff of

only 310 in the PWS. The NESF recommends that targets should be set to enhance the resources and functions of the PWS, for example developing a reduced staff/client ratio. An account of the historical development of the PWS by Kilcommins et al (2005, 49-53) suggests that it is a component of the infrastructure of the Irish criminal justice system which has never been given a high priority by policy makers. In its final report on the PWS, an expert group appointed by the minister recommended an increase in staffing and resources to assist the PWS in responding to an ever-increasing workload.

*Unsuitability of alternatives with regard to drug-using offenders*

The Expert Group on the Probation and Welfare Service (1999, p. 46) noted the decline in the use of CSOs since the mid-1990s and attributes this in part 'to the lack of suitability of community service for offenders with addictions'. Walsh and Sexton (1999) found that drug offences hardly featured in their study sample. Of the 297 offences involved in the CSO study, only six involved drugs. Three of these were convictions for simple possession and three were for possession with intent to supply.<sup>10</sup> The Expert Group on the Probation and Welfare Service (1999) called for the introduction of additional non-custodial sanctions, to include: treatment orders, mediation orders, reparation orders, counselling orders and combination orders.

## CONCLUSION

As we have seen, over the past twenty years, numerous studies and reports, both government sponsored and non-governmental, have advocated the use of alternatives to prison. There is also broad public support for the proposition that imprisonment should be used sparingly. Despite this overwhelming political and public consensus that alternatives to prison should be used where possible, there is no evidence that their use is displacing the use

<sup>10</sup> The simple possession offences involved small quantities of cannabis. Nevertheless, the authors concluded, 'they attracted relatively severe sentences: 120 hours or 4 months imprisonment; 120 hours or 11 months imprisonment and 159 hours or 10 months imprisonment' (p. 40). However, it is possible that other offences covered by the CSOs were drug-related. Walsh and Sexton found, from a sample of CSOs, that 83 per cent were completed successfully, i.e without the order being revoked because the offender was formally found to be in breach of conditions

of imprisonment in Ireland. Indeed, rather than witnessing a decline in the use of imprisonment and a corresponding increase in non-custodial sanctions, we are possibly seeing an overall increase in the number of people falling under the supervision of the criminal justice system as a whole. Proposals to introduce UK-style anti-social behaviour orders, with the likelihood that many will lead to terms of imprisonment, will, in all likelihood, widen further the net of the criminal justice system.

It is clear that a number of practical measures will be required before non-custodial sanctions can fulfill their potential within the Irish criminal justice system. These include a greater dissemination of information to members of the judiciary as to what alternatives are available and the allocation of additional resources so as to develop them further. The failure to promote greater use of alternatives to prison does not appear to relate only to a question of resources or adequate information however. Ultimately, despite the evidence as to their greater utility in responding to drug-related crime and the general public scepticism about the benefit of imprisonment as a response to most criminal activities, there appears to be an absence of sufficient political and judicial will to maximise the use of alternatives to imprisonment.

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