**Presentation to Fifth Meeting of All-Party Oireachtas**

**Group on Penal Reform**

**Professor Ian O'Donnell**

At the outset, it is worth noting that there is a reasonable degree of consensus about what needs to be done in terms of penal reform. This can be summarised as follows: to reserve prison for the most serious offenders; to minimise the collateral consequences of incarceration for them and their families; and to deal with all other lawbreakers in the community as efficiently, effectively, and humanely as possible.

Crime and punishment do enough harm and cost enough money as it is. It is hardly controversial to suggest that the €1M it costs to keep a dozen people locked up for a year could be better spent in numerous ways that are more beneficial to offenders, victims, families, and communities.[[1]](#footnote-1)

Let’s start with two items of good news.

First, since the report of the Sub-Committee on Penal Reform was published in 2013, the problem of people being committed to prison for failing to pay court-ordered fines has been largely eradicated. The most recent annual report of the Irish Prison Service relates to 2021. It shows that 234 fine defaulters were committed to prison that year. This compares with a peak of almost 10,000 in 2015.[[2]](#footnote-2) This is a very welcome development.

Second, in 1963, Minister for Justice, Charles Haughey, spoke of the antiquated and unsuitable nature of St Patrick’s Institution and committed to finding an alternative. In 1985, the Whitaker Committee recommended its urgent replacement. It was eventually closed in 2017. Again – although belated – a positive development.

When the Sub-Committee was established in 2011, the daily prison population averaged 4,390. By the time it reported, a decline in numbers was underway. This continued until 2017, when the prison population had fallen to a daily average of 3,680; a drop of 17 per cent over six years.

There was a slight uptick in 2018 and 2019, but numbers fell again during the COVID pandemic and the average in 2021 was 3,792.

The factors behind the decline were not clear and I observed while it was happening that:

“If some of the cost savings associated with falling prisoner numbers were directed towards a programme of research to deepen understanding and guide policy, a short-term gain might be converted into a sustainable programme of decarceration … It would be a matter of considerable regret if what might prove to be a once-in-a-generation opportunity was not seized.”[[3]](#footnote-3)

Regrettably, the opportunity was not seized, and the trend has gone steeply into reverse. There are now over 4,500 men and women in custody; a jump of 20 per cent in two years.[[4]](#footnote-4) This sudden rise is putting the system under strain.

Turning now to the Sub-Committee’s recommendations.

The first recommendation was for a policy of decarceration. To its great credit, the Sub-Committee went further than simply expressing an aspiration that the prison population be reduced. It specified the magnitude of the desired reduction (one third) and the timeframe over which it should be achieved (10 years). This target was based on an assessment that the prison population had been allowed to drift upwards to a politically unacceptable level and that decisive action was required to halt, and then reverse, this momentum.

This target has been missed and rather than being one third lower, the prison population is now higher than it was 10 years ago.[[5]](#footnote-5)

The second recommendation was that community service should be substituted for prison terms of less than six months imposed for non-violent offences.

In 2021, one in four committals under sentence was for less than three months, more than half were for less than six months, and over three quarters were for less than one year.[[6]](#footnote-6) This is a deeply engrained part of Ireland’s sentencing culture and persists despite a wide acknowledgment that brief bursts of custody are too short to allow meaningful intervention in terms of addressing substance misuse, educational disadvantage, and cognitive or emotional difficulties. They cause significant disruption as regards employment, access to housing, and childcare. They contribute to prison overcrowding. They do not allow sufficient time for sentence planning.[[7]](#footnote-7)

A review that I carried out for the Department of Justice found that short terms of imprisonment are less effective in terms of reducing recidivism than community service. The review concluded:

“If prison is criminogenic, as the evidence suggests, the arguments in favour of using it less are persuasive. While necessary as a last resort, the desirability of a more parsimonious approach is indicated.”[[8]](#footnote-8)

Minor offenders could be diverted from custody, thereby reducing pressure on the prisons in terms of space and resources. It would make sense to punish them in the community where they could make reparation for the harms they caused, continue to play a role in the lives of their families, and be connected with an appropriate range of treatment options.

We need to shift our language, to think about community sanctions as the default approach with imprisonment as the occasional ‘alternative’.[[9]](#footnote-9)

The third recommendation was that the standard rate of remission should be increased from one quarter to one third, with a possible further increase to one half for certain categories of prisoner, in particular first timers. The first limb of this recommendation could be given swift effect as Prison Rule 59(2) permits an enhanced rate of remission “where a prisoner has shown further good conduct by engaging in authorised structured activity and the Minister is satisfied that, as a result, the prisoner is less likely to re-offend and will be better able to reintegrate into the community.”

This rule has only been used in a handful of cases. Employing it widely would serve several purposes. It would incentivise prisoners to take part in programmes that reduce the threat they pose, reduce prison overcrowding, usher in a more structured approach to release, and save money. Special allowance for first-time prisoners also merits consideration as the recidivism rate tends to be lower for this group and their prospects for successful re-integration are better.

The fourth recommendation was that a modern legislative framework should be provided for all forms of early release, including parole. This has happened, in part at least, and a statutory parole board is now in place to consider life sentences.

The fifth recommendation was that there should be a rebalancing of the system so that greater use is made of open prisons and all prisoners are held in sanitary and uncrowded conditions that are not an affront to human dignity and a threat to bodily integrity. It hardly needs to be said that multiple occupancy of small cells for the greater part of each day is inconsistent with dignified treatment. Furthermore, many prisoners in Ireland are incarcerated at levels of security that are not warranted on the basis of the escape risk they pose. This has the unfortunate consequence that they are denied a phased restoration of liberty as part of their preparation for release.

Also, our prisons are far too big. We should be thinking about rescaling rather than expanding the estate. In its original report the Sub-Committee took inspiration from the Scandinavian approach to criminal justice and visited Finland.

Finland has a slightly larger population than Ireland but fewer prisoners, around 2,800, and they are accommodated in 26 prisons (vs. 4,500 in 12 prisons in Ireland).[[10]](#footnote-10) If we want our prisons to be safe, active, rehabilitative, hopeful places, then smaller is better.

In an article welcoming the Sub-Committee’s report ten years ago I noted that:

“There have been many reports down the years advocating a fundamental reappraisal of penal policy along the lines set out by the Sub-Committee. It is fair to say that these have not had a sustained effect. What is different today is that the recommendations have attracted cross-party support, they are precisely focused, and their desired impact is measurable. In addition, the financial and social costs of inaction have become too great to ignore. The challenge is to close the gap that exists between worthwhile proposals on paper and real progress on the ground.”[[11]](#footnote-11)

Closing this gap is a perennial problem. The challenge is to create a context where the public trusts legislators to formulate rational, effective and proportionate responses; and where legislators are confident enough to challenge the centrality of the prison at every opportunity.

Getting this right is extremely difficult but vitally important. I believe that the principles of restorative justice might point a way forward.[[12]](#footnote-12)

The National Commission on Restorative Justice published its final report in 2009 after a two-year period of research and deliberation. It concluded that restorative justice was “an invaluable cost-effective option”. It recommended that where a judge is contemplating a custodial sentence of up to three years, he or she should be required to consider referring the case to a restorative process. It called for nationwide implementation of restorative justice by 2015.[[13]](#footnote-13)

While the National Commission and its recommendations have largely been forgotten, a high-level commitment to the principles of restorative justice remains in evidence. The *Programme for Government* undertakes to “Work with all criminal justice agencies to build capacity to deliver restorative justice, safely and effectively”. The *Justice Plan 2023* promises to “Deliver restorative justice safely and effectively.”

If this commitment could be given practical effect it might go some way towards realising the Sub-Committee’s desire to reduce the size of the prison population, move away from a reliance on short bursts of imprisonment, and protect society.

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**Ian O’Donnell, Professor of Criminology, University College Dublin**

**Tel: (01) 716 4121, Email: ian.odonnell@ucd.ie**

1. Based on Irish Prison Service figure of €80,335 per “available, staffed prison space” in 2021. [↑](#footnote-ref-1)
2. The Fines (Payment and Recovery) Act 2014 introduced the option to pay a fine by instalment over 12 months and other measures including attachment of earnings for unpaid fines and community service instead of imprisonment in default. [↑](#footnote-ref-2)
3. Ian O'Donnell (2017) ‘Ireland’s shrinking prison population’, *Irish Criminal Law Journal*, 27(3) at 75. [↑](#footnote-ref-3)
4. If we include those on Temporary Release, the rise is even steeper. On Wednesday 6 October 2021 there were 3,804 people in custody, with another 287 on TR (giving a total of 4,091). On Wednesday 4 October 2023, the respective figures were 4,585 and 414 (giving a total of 4,999). [↑](#footnote-ref-4)
5. In 2013 the daily average number in custody was 4,158. A reduction of one third would have brought this down to 2,744. The imprisonment rate per 100,000 population was 91 in 2013 (based on an estimated population of 4,593,100). A one-third reduction would have brought this to 60. In 2023 it stood at 87 (based on an estimated population of 5,281,600). [↑](#footnote-ref-5)
6. Irish Prison Service (2022), *Annual Report 2021*, at 38. [↑](#footnote-ref-6)
7. For sentences longer than one month, remission is applied, further reducing the time served. [↑](#footnote-ref-7)
8. Ian O’Donnell (2020) *An Evidence Review of Recidivism and Policy Responses*, at 93. [↑](#footnote-ref-8)
9. The Criminal Justice (Community Service) (Amendment) Act 2011requires courts to consider community service instead of imprisonment for an offence that would attract a sentence of 12 months or less. The Department of Justice recently invited tenders for research “to identify the impact of the 2011 Act in terms of custodial sentences and community service, and to examine causes for the continued use of short custodial sentences of 12 months or less, and the possible underutilisation of community service orders”. Hopefully the findings of this research will be available soon. [↑](#footnote-ref-9)
10. <https://www.prisonstudies.org/country/norway>; site accessed 12 October 2023. In Norway there are 58 establishments for less than 3,000 prisoners and in Denmark the respective figures are 54 and 4,100. [↑](#footnote-ref-10)
11. Ian O'Donnell (2013) ‘Making progress with penal reform’, *Irish Criminal Law Journal*, 23(3) at 68. [↑](#footnote-ref-11)
12. For an early argument in favour of such a change of direction, see Ian O’Donnell (1998) ‘Challenging the punitive obsession’, *Irish Criminal Law Journal*, 8(1): 51-66. [↑](#footnote-ref-12)
13. National Commission on Restorative Justice (2009) *Final Report*, at 20-25. [↑](#footnote-ref-13)