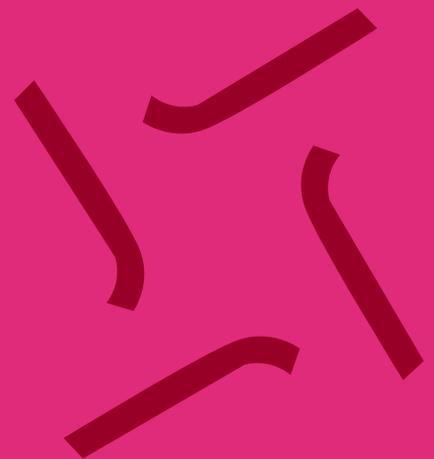




IPRT
Irish Penal Reform Trust

IPRT Position Paper 9
**Reform of Remission,
Temporary Release and Parole**



October 2012

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Introduction

The Irish Penal Reform Trust (IPRT) is Ireland's leading non-governmental organisation campaigning for the rights of everyone in the penal system, with the use of prison as a last resort. IPRT is committed to reducing imprisonment while advocating for the progressive reform of the penal system based on evidence-led policies. IPRT works to achieve its goals through research, raising awareness and building alliances.

In line with the principle of imprisonment as a last resort and as outlined in the Irish Penal Reform Trust Position Paper *Penal Policy with Imprisonment as a Last Resort*¹, IPRT promotes the concept of 'penal moderation': that where more effective ways of dealing with offending behaviour are available, those options should be used in preference to imprisonment. Increased levels of imprisonment have not reduced crime rates, and the high recidivism rates among prisoners² in Ireland indicate that imprisonment has not acted as a deterrent.

A core problem within the Irish prison system is overcrowding that has resulted from a steady increase in the prison population over the past decade. As part of its submission to the Thornton Hall Review Group in May 2011, IPRT recommended a number of ways to reduce the prison population, noting that the most immediately effective approach to bring the prison population within safe custody limits³ is to release earlier some prisoners serving sentences.⁴ IPRT suggested that this could be done in a safe and structured way with some reform of the present early release processes, which would be preferable to the current unstructured over-use of the temporary release system.

Following the publication of the Thornton Hall Review Group's Report in July 2011, IPRT welcomed the Group's refusal to accept that the prison population "must continue its upward spiral and that the only response to increases in the prison population should be to build more and more prisons."⁵ At a general level, the report's emphasis on alternatives to custody indicated a significant and progressive shift in penal policy. The Minister for Justice, Equality and Defence, Alan Shatter made a commitment to set up a Penal Policy Review Group which will "undertake an all-encompassing strategic review of all aspects of penal policy" by the end of 2011.⁶ The establishment of this working group was announced in September 2012.

One key recommendation contained in the Thornton Hall Review Group's Report was the introduction of an incentivised scheme for earned temporary release under which offenders who are assessed as posing no threat to the public are offered early release in return for supervised community service. Subsequently, a piloted programme known as the 'Community Return Scheme' was introduced in October 2011. IPRT welcomes the introduction of this scheme which provides a more structured form of release for prisoners.

1 See The Irish Penal Reform Trust (2009) *Penal Policy with Imprisonment as a Last Resort* available at http://www.iprt.ie/files/IPRT_Position_Paper_5_-_Penal_Policy_with_Imprisonment_as_a_Last_Resort.pdf (accessed 19/06/12)

2 I. O'Donnell, E.P Baumer & N. Hughes (2008) Recidivism in the Republic of Ireland, *Criminology and Criminal Justice*, 8(2) 123-46.

3 Significant reductions in occupancy levels are required in the Dóchas Centre, Mountjoy, Cork, Wheatfield, Limerick and Midlands prison. See IPRT (2011) *IPRT Submission to Review Group on Thornton Hall*, p.8 available at http://www.iprt.ie/files/IPRT_Submission_to_Review_Group_on_Thornton_Hall.pdf (accessed 20/09/12)

4 Ibid, p.7

5 *Report of the Thornton Hall Project Review Group*, 2011, p.64 available at <http://www.justice.ie/en/JELR/ThorntonReviewReportRedacted.pdf/Files/ThorntonReviewReportRedacted.pdf> (accessed 17/08/12)

6 See *Minister Shatter announces capital allocation available to the Justice Sector in 2012*, available at <http://www.inis.gov.ie/en/JELR/Pages/PR11000217> (accessed 10/10/12)

A Sub-Committee on Penal Reform of the Joint Oireachtas Justice Committee was also established in late 2011 “to examine the possible use of non-custodial alternatives to imprisonment – in particular back-door strategies which involve some form of early release.”⁷ This Sub-Committee is due to publish its report at the end of 2012. In addition, the Minister for Justice, Equality and Defence has stated that he is currently considering options to place the existing Parole Board on a statutory footing.

IPRT believes that the early release system in Ireland should be coherent, transparent and fair. Our analysis finds that a number of aspects of our current system are inconsistent with the emerging norms of European human rights law. In this paper we set out a comprehensive programme for reform of all aspects of current law on the early release of prisoners. In bringing forward these proposals we are informed also by our assessment of alternative early release mechanisms in other jurisdictions. We believe that the establishment of a statutory parole system, along with reform of the existing systems of remission and temporary release, will help to achieve clarity in the law and support a proper equilibrium between the protection of the public and the rights of sentenced persons to a fair and balanced system of early release.

⁷ See *Sub-Committee on Penal Reform* http://www.oireachtas.ie/parliament/oireachtasbusiness/committees_list/de-committee/sub-committeeonpenalreform (accessed 05/10/12)

Chapter One: Early Release in Ireland

This chapter outlines the existing early release system for men and women in prison in Ireland. At present, there are three mechanisms for early release: remission, temporary release/parole, and the constitutional power to commute or remit a sentence. Although falling within the general legal category of temporary release, for the purposes of this paper IPRT distinguishes temporary release of long-term prisoners (those within the remit of the Parole Board) as a separate category of release.

1.1 Remission

Remission refers to the complete ending of a sentence at a reduced point, which in the Irish system means release without any further supervision or conditions. Currently, there are two forms of remission of sentence set out in the *Prison Rules 2007*: standard remission and enhanced remission.

1.1.1 Standard Remission

Standard remission allows prisoners to earn up to one quarter off their whole sentence through good behaviour.⁸ However, in practice, standard remission is automatic if no offence is committed while in prison. Remission marks the complete ending of a prisoner's sentence, which must be longer than one month to be eligible. Remission does not apply to prisoners who are serving a life sentence, or those who are in prison as a debtor or because of contempt of court.⁹

1.1.2 Enhanced Remission

The *Prison Rules 2007* permit up to one-third remission for prisoners who have shown further good conduct by "engagement in authorised structured activity to such an extent as to satisfy the Minister for Justice and Equality that they are less likely to reoffend and will be better able to reintegrate into society."¹⁰

1.1.3 Criticisms of Current Remission Regime

There has been some frustration with regard to the failure to activate the enhanced remission system.¹¹ The Programme for Government of the current Government provides:

"Violent and sexual offenders may only earn remission based on good behaviour, participation in education and training, and completion of addiction treatment programmes and, where appropriate, sex offender programmes. We will review the workings of the *Prison Act 2007* in relation to incentivising engagement with rehabilitative services in prison."¹²

Standard remission is a well-established part of the Irish prison system, but the one quarter remission rate in Ireland is low by international comparison (see chapter 2).

8 S.I. No. 252 of 2007, *Prisons Rules, 2007*, Rule 59(1).

9 Ibid, Rule 59(3).

10 Ibid, Rule 59(2).

11 See Parliamentary Question on *Prison Releases*, 13 May 2010, available at <http://www.kildarestreet.com/wrans?id=2010-05-13.692.0&s=one+third+remission#g694.0.r> (accessed 15 November 2011). Regarding the availability of enhanced remission, in May 2010 the former Minister for Justice, Dermot Ahern stated that: "this additional concession will only be awarded in exceptional cases and where I am satisfied beyond any doubt that the prisoner concerned has demonstrated that she/he meets the requirements as set out in the Prison Rules. Perhaps I should also point to the fact that despite this additional opportunity to earn additional remission our remission rates are significantly below the level currently operating in the UK and Northern Ireland for automatic conditional release where rates of 50% are in place. While there are a number of applications for extra remission under consideration at present, to date only one prisoner has been granted this concession."

12 Fine Gael, Labour Party (2011) *Towards Recovery: Programme for National Government 2011-2016* Fine Gael; Labour Party, Dublin.

1.2 Temporary Release

The *Criminal Justice Act 1960* allows the Minister for Justice to grant temporary release to prisoners at any time before they qualify for standard remission or to life-sentenced prisoners who are not entitled to standard remission. The *Criminal Justice Act 1960* permits the granting of 'temporary release' rather than 'early release' and at the time of passing into law, it was envisaged that the prisoner would be released for a defined period with the expectation that the individual would return to prison at the end of that length of time unless granted a further extension.

The *Criminal Justice Act 1960* as amended by the *Criminal Justice (Temporary Release of Prisoners) Act 2003* specifies the factors considered when authorising temporary release. A prisoner may be granted temporary release at the discretion of the Minister for Justice who considers a number of factors including: the offence committed, the individual's circumstances, attitude to rehabilitation and employment and training skills.¹³

While remission marks the complete ending of the sentence, temporary release and parole (discussed in 1.3 below) are forms of release on licence. In effect there are two categories of temporary release: (i) temporary release granted with a view to the person returning to detention; and (ii) full temporary release which is intended as ending the period of detention. Within the first category there are several different purposes for which temporary release can be granted.¹⁴

1.2.1 Release on Compassionate Grounds

Release on compassionate grounds is granted if there is a family emergency, such as a death or serious illness.¹⁵ Under this, prisoners may also be released to attend special family occasions such as christenings or communions. A practice of releasing significant numbers of prisoners for the Christmas period is also well-established.¹⁶

1.2.2 Day-to-Day Release

Day-to-day release usually arises to permit prisoners to participate in work outside the prison, but may also be used to support the building of family relationships. In some circumstances a prisoner may be accompanied by a prison officer (under escort), or may go unaccompanied.¹⁷ Day-to-day release and weekend release offer great potential to facilitate work training as well as supporting the development of family relationships – particularly in relation to longer-term prisoners – if utilised carefully in order to gradually prepare them to rejoin the community in a safe, structured and supported manner.

¹³ Section 39 of the *Prisons Act 2007* also provides for short-term release in certain circumstances, but it appears that this mechanism is not generally used for the release of prisoners.

¹⁴ The Minister for Justice and Equality introduced a piloted Community Return Scheme in 2011, which allows prisoners serving 1-8 years exchange part of his/her prison sentence for community service. A more structured form of early release than the current temporary release system, offenders remain under supervision and may be brought back into the prison system if they fail to comply with the conditions set. See section 4.4 of this paper.

¹⁵ *Mountjoy Prison Booklet*, p. 41.

¹⁶ Jewkes, Y and O'Donnell, I. "Going Home for Christmas: Prisoners, a Taste of Freedom and the Press", *The Howard Journal of Criminal Justice*, Vol. 50, Issue 1, 2010, pp75-91

¹⁷ *Mountjoy Prison Booklet*, p. 42.

1.2.3 Exclusion of Certain Categories from Temporary Release

There are certain categories of prisoners who do not qualify for temporary release. As discussed in section 1.3.3 below, persons convicted of the murders of diplomats, a Garda or a member of the Prison Service in the course of their duty cannot be considered for temporary release unless for “grave reasons of a humanitarian nature.”¹⁸ A person sentenced to imprisonment for certain drug offences may not be granted temporary release unless for a “grave reason of a humanitarian nature.”¹⁹ Restrictions also apply to persons serving a presumptive sentence for certain firearm offences under the *Criminal Justice Act 2006*.

1.2.4 Criticisms of Temporary Release

The main criticism of the current temporary release system is that it is now used for quite different purposes than was originally envisaged. Overcrowding has resulted in an increase in the number of prisoners granted temporary release, from an average of 4.4% in 2007²⁰ to an average of 17% in 2011.²¹ Temporary release has, therefore, become an increasingly important administrative measure to alleviate overcrowding rather than being used as a tool to facilitate the reintegration of prisoners. A further criticism of the current system is that the decision-making process around temporary release is opaque and prisoners are not generally provided with clear reasons for refusal of requests for temporary release.

IPRT believes that temporary release should not be used as a quasi ‘alternative to imprisonment’ at the prison gate, in order to avoid further overcrowding where short prison sentences have been imposed. Instead, judges should be guided by the principle of imprisonment as a last resort and make greater use of *actual* alternatives to prison such as probation and Community Service Orders (CSOs) as provided for in the *Criminal Justice (Community Service) Amendment Act, 2011*.

1.3 The Parole Board and Temporary Release of Long-Term Prisoners

As there is no statutory definition, the term ‘parole’ in the Irish context is used to refer to the temporary release of longer-term prisoners. The Parole Board was established by the Minister for Justice on a non-statutory basis in 2001 to consider temporary release for life sentence and other long-term prisoners.

1.3.1 Remit and Powers of the Parole Board

The Parole Board reviews the sentences of long-term prisoners (currently defined as those serving eight years or more) referred by the Minister for Justice and makes recommendations to the Minister as to whether the prisoner should be granted temporary release. The Parole Board reviews prisoners serving fixed-term sentences of between eight years and fourteen years at the half-way mark of the sentence. The Parole Board reviews prisoners sentenced to fourteen years or more (including those sentenced to life imprisonment) after seven years.

¹⁸ See Section 5 of the *Criminal Justice Act 1990*.

¹⁹ Misuse of Drugs Act, s.27(31) as substituted by the *Criminal Justice Act 2007*, s.33. Section 15A is the offence of having for the purposes of sale or supply a controlled drug with the street value of €13,000 or more. The same arrangement applies to section 15B offences which involve the importation of prohibited drugs.

²⁰ *Report of the Thornton Hall Project Review Group* (2011), p.2 available at <http://www.justice.ie/en/JELR/ThorntonReviewReportRedacted.pdf/Files/ThorntonReviewReportRedacted.pdf> (accessed 17/08/12)

²¹ See The Irish Prison Service (2012) *Annual Report 2011*, p.45 available at <http://www.irishprisons.ie/images/pdf/annualreport11.pdf> (accessed 21/08/12)

The Parole Board advises the Minister for Justice of the prisoner's progress, the degree to which he/she has engaged with therapeutic services, and how best to proceed with his/her sentence. However, the recommendations of the Parole Board are not legally binding. The decision to release a prisoner or not is made by the Minister for Justice. Furthermore, there are no clear guidelines on the criteria that indicate a prisoner's eligibility for parole. Research indicates that a wide variety of factors are cited in various annual Parole Board reports when deciding on the release of a prisoner including the murder rate at the time, the prevalence of knife and gun-related crime and the importance of general deterrence.²²

1.3.2 Review of Decisions

Where the Parole Board does not recommend the prisoner's release, the Board holds an annual review if the prisoner is serving less than ten years and a review every two to three years if the prisoner is serving more than ten years.²³ If the prisoner is released and breaches conditions set by the Board, he/she can be returned to prison.²⁴

1.3.3 Life-Sentenced Prisoners

For life-sentenced prisoners, as there is no tariff set by the sentencing judge and since there is no formal provision for the release on licence²⁵ of life-sentenced prisoners, such prisoners can only be granted renewable temporary release.²⁶ Ireland does not provide a sentence of life without the opportunity of parole, but in practice prisoners can expect to serve a significant period of time in detention under a life sentence. In 2010, the Minister for Justice, Equality and Law Reform told the Dáil that the average length of time served on a life sentence between 2004 and 2010 was 17 years, compared to periods of 7½ years for releases dating from 1975 to 1984, an average of 12 years for the period dating from 1985 to 1994, and 14 years for the period dating from 1995 to 2004.²⁷

Under the *Criminal Justice Act 1990*, murders or attempted murders that would previously have been classified as capital crimes (treason or the killing of members of the armed forces, police, politicians or diplomats) are to be treated differently, with a minimum period of 40 years to be served for any such murder (20 years for an attempt). These sentences cannot be commuted and section 5 of the 1990 Act also states that temporary release cannot apply to such cases except where there are "grave reasons of a humanitarian nature." Standard remission does apply if the person had been sentenced to a determinate sentence of 40 years or 20 years.

In the case of *Whelan and Lynch v Minister for Justice, Equality and Law Reform*²⁸, the appellants challenged the constitutionality of the mandatory life sentence system in Ireland, as well as its

22 O'Donnell, I. and Griffin, D. (2012) *The Life Sentence and Parole*, *British Journal of Criminology* 1(1)p.8

23 See *The Parole Board Annual Report 2011*, p.7 <http://www.justice.ie/en/JELR/Parole%20Board%20Annual%20Report%202011%20English.pdf/Files/Parole%20Board%20Annual%20Report%202011%20English.pdf>

24 O'Malley, Tom. "The Ends of Sentence: Imprisonment and Early Release Decisions in Ireland", paper delivered at Fitzwilliam College, Cambridge, June 2008 available at <http://www.irishsentencing.ie/en/MSIS/Pages/WP09000222>, (last accessed 15 November 2011).

25 Release on licence exists in England and Wales where a prisoner must adhere to certain conditions. If he/she fails to comply with these rules, he/she may be recalled to prison.

26 O'Malley, Tom. "The Ends of Sentence: Imprisonment and Early Release Decisions in Ireland", paper delivered at Fitzwilliam College, Cambridge, June 2008, p. 16. As O'Malley has pointed out, the decision on a life prisoner's release date rests entirely with the executive branch of the government. This could be regarded as the exercise of a sentencing power which arguably should rest exclusively with the judiciary.

27 Dáil Debates, Written Answers - Crime Levels, Vol. 707 No. 5, Thursday, 29th April 2010, Mr Ahern, paragraph 170.

28 [2010] IESC 34.

compatibility with the ECHR. In that case, the Supreme Court held that the Minister's power to grant temporary release was neither unconstitutional nor incompatible with the ECHR. Distinguishing the European Court of Human Rights (ECtHR) decision in *Kafkaris v Cyprus*²⁹ the Supreme Court held that the power to grant temporary release was exclusively an Executive function, and there was no separate decision to extend a person's detention (See also 3.1). The Supreme Court also found that life-sentenced prisoners had no right to have their case heard at a public hearing before an independent judicial body in which they would have adversarial rights.

1.3.4 Criticisms of the Current Parole System

There are numerous difficulties associated with the current parole system in Ireland. The Board is merely advisory and that the decision on the release of every prisoner is made by the Minister for Justice is of primary concern. The general views expressed by the Supreme Court in the Whelan case contrast with the view of the Irish Human Rights Commission in its report on Indeterminate Sentencing (2006) which found that, as long as the mandatory life sentence is retained, the establishment of a fully independent Parole Board would be necessary to ensure Ireland's compliance with the ECHR.³⁰

While there are different views as to the compatibility of this system with the ECHR (see Section 1.3.3), IPRT believes that it would be preferable from a policy perspective to remove Government from the process. Putting the Parole Board on a statutory footing would provide greater clarity as to the criteria by which release applications of long-term prisoners should be evaluated, since "there is no clear legislative mandate as to the factors that should be taken into account in making recommendations or as to the priority to be accorded to the various individual and social interest involved."³¹

Even within the limited parameters of an advisory parole board, there are also a number of difficulties in how the current Board executes its functions, including the lack of reasons given to prisoners for refusal of their release, as well as delays in parole hearings. These all feed a lack of confidence in the current parole system on the part of sentenced persons, which is evidenced by the highest ever percentage of eligible prisoners refusing to participate in the process in 2012.³²

1.4 The power to commute or remit any sentence

The power to commute or remit any sentence (also known as 'special remission') is outlined under Article 13.6 of the Constitution of Ireland:

"The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may also be conferred by law on other authorities."

The Oireachtas utilised the final part of the above provision to confer upon the executive branch of Government the power to commute or remit, in whole or in part, any punishment imposed by a criminal

29 (2009) 49 EHRR 35.

30 *Report into the Determination of Life Sentences* submitted to the Irish Human Rights Commission by Professor Paul McCutcheon and Dr. Gerard Coffey available at http://www.ihrc.ie/download/pdf/report_determination_life_sentences.pdf (accessed 02/10/12)

31 O'Malley, Tom. "*The Ends of Sentence: Imprisonment and Early Release Decisions in Ireland*", paper delivered at Fitzwilliam College, Cambridge, June 2008, p.12, available at <http://www.irishsentencing.ie/en/SIS/Pages/WP09000222>, (last accessed 15/11/11).

32 The Parole Board Annual Report 2011 p.3 available at <http://www.justice.ie/en/JELR/Pages/PB12000223> (accessed 15/10/12)

court subject to such conditions as it may think proper.³³ Legislation was also enacted to delegate this power to the Minister for Justice.³⁴

Prior to the 1995 decision of *Brennan v Minister for Justice*,³⁵ many people who were given fines following conviction in the District Court successfully applied to the Minister for Justice, through their local politicians, for remission of all or part of the fine. However, in *Brennan* (a case involving a District Court judge whose fines had been reduced on a number of occasions by the then Minister), the High Court held that the Minister's practice of remitting fines, although technically permissible under the Constitution, should not operate as a parallel system of justice. The Court held that it would only be appropriate for the Minister to alter a fine "on the basis of an opinion that the amount imposed was wrong in the rarest of circumstances."³⁶

While the decision in *Brennan* seems to suggest that any system of granting release in individual cases might fail the test of constitutionality, it is not clear whether a blanket scheme to pardon or commute a whole category of persons might be permissible, for example, were a Minister to pardon a wide range of fines where a backlog had developed.

33 *Criminal Justice Act 1951*, s. 23(1) as amended by *Criminal Justice Act 1990*, s. 9.

34 *Criminal Justice Act 1951*, s. 23(3) as substituted by *Criminal Justice (Miscellaneous Provisions) Act 1997*, s. 17. S. 23 (3) provides: "The Government may delegate to the Minister for Justice any power conferred by this section and may revoke any such delegation."

35 [1995] 1 I.R. 612, [1995] 2 I.L.R.M. 206.

36 O'Malley, T. "*The Ends of Sentence: Imprisonment and Early Release Decisions in Ireland*", paper delivered at Fitzwilliam College, Cambridge, June 2008, p.5-6.

Chapter Two: Early Release Systems in Other Jurisdictions

This chapter examines the operation of early release systems in some other jurisdictions. For present purposes, the term ‘temporary release’, as used in the Irish context, is equated with the terms ‘parole’, ‘early release’ and ‘conditional release’ when discussing systems in other jurisdictions.³⁷

2.1 England and Wales

The early release provisions in England and Wales are complex and depend on whether the sentence is a determinate or indeterminate sentence. Within the category of determinate sentences the administration of early release provisions depends on three factors: the nature of the offence, the length of the sentence and when it was imposed.³⁸ Since the *Criminal Justice Act 2003* came into force on 4 April 2005 those prisoners who are sentenced to determinate sentences are entitled to an automatic release at the half way point in their sentence. This release does not require the involvement of the Parole Board. Sentences imposed under previous statutory frameworks are unaffected by these provisions. Most prisoners serving determinate sentences are therefore released automatically. The Parole Board now only makes the decision as to the initial release of determinate sentence prisoners in a small number of cases.³⁹

Indeterminate sentences, whether life sentences or sentences of imprisonment for public protection (IPP)⁴⁰, are imposed with a minimum term which must be served before the prisoner can be released.⁴¹ Indeterminate sentence prisoners who have served their minimum term cannot be released until the Parole Board “is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.”⁴²

The Parole Board must also decide if an indeterminate sentence prisoner is suitable for transfer to an open prison as part of their preparation for release. Life-sentenced prisoners are released on license for the rest of their lives. IPP prisoners can apply to have their licenses terminated after 10 years in the community.

In England and Wales there can (but not always) be an oral parole hearing. The prisoner is in attendance and there is a right to legal representation. Although there are certain conditions, the vast majority of prisoners are entitled to legal aid for the purposes of representation before the Parole Board and in the preparation of their case for release. The Secretary of State, through the National Offender Management Service (NOMS), prepares a file relating to the prisoner. The file provides the necessary evidence and risk assessments according to various models. The dossier may include the ‘view’ of the Secretary of State as to the correct outcome. The members of the Parole Board in England and Wales are appointed under section 239 and Schedule 19, paragraph 2 of the *Criminal Justice Act 2003* by the Secretary of State. Candidates attend a half day assessment course and are interviewed by a panel of three, a person from the Ministry of Justice, a person from the Parole Board and a person from the Office of the Commissioner for Public Appointments (OCPA). There is a requirement that the appointment be governed by OCPA principles and that the appointment stands up to independent scrutiny.

37 See Recommendation (2003)22 of the Committee of Ministers to member states on conditional release (parole), available at <https://wcd.coe.int/ViewDoc.jsp?id=70103&Site=COE> (last accessed 03/01/12).

38 Arnott, H. and Creighton, S. (2010) *Parole Board Hearings* (2nd ed), London: Legal Action Group: Chapters 5 & 6 and Arnott, H. and Creighton, S. (2009) *Prisoners: Law and Practice*, London: Legal Action Group.

39 Arnott, H. and Creighton, S. (2010) *Parole Board Hearings* (2nd ed), London: Legal Action Group: 92.

40 These are essentially life sentences for offenders deemed ‘dangerous’ whose offence would not generally merit a life sentence. The conditions for their imposition are set out at ss 224-229 of the *Criminal Justice Act 2003*.

41 The exception to this is the relatively rare ‘whole life tariff’ which means a prisoner can never be released.

42 Section 28(6)(b) of the *Crime (Sentences) Act 1997*.

2.2 Scotland

Under the *Prisoners and Criminal Proceedings (Scotland) Act 1993*, short-term prisoners (those serving less than four years) are released automatically once the individual has served half of his/her sentence. A long-term prisoner (those serving over four years) is released on licence after two-thirds of his/her sentence has been served and, if directed by the Parole Board, can be released at the half way point of his/her sentence.

2.3 New Zealand

Prisoners in New Zealand who are serving sentences under two years are released automatically at the half way point.⁴³ Offenders sentenced under the *Parole Act 2002* to a determinate prison term of more than two years become eligible for parole after serving one third of their sentence. Prisoners serving sentences of life or preventative detention are eligible for parole once they have served the minimum sentence set by the sentencing judge. If no minimum sentence was set by the court, the prisoner is eligible for parole after serving ten years.

2.4 France

In France, first time offenders may apply for conditional release halfway through their sentence.⁴⁴ Recidivists must have served at least two thirds of their sentence before submitting an application for conditional release. Prisoners serving life sentences have to wait 15 years before applying for conditional release. If the sentencing court has added a *période de sûreté* (similar to the UK-style tariff) to the sentence, the person will have to wait for the end of this period before applying for conditional release.⁴⁵ Decisions regarding early release are made by Tribunals of Judges, a judge sitting alone for most decisions and a three judge Tribunal for a smaller number of decisions.⁴⁶

43 See New Zealand Parole Board website at <http://www.paroleboard.govt.nz/about-us/cases-and-eligibility.html> (accessed 20/09/12)

44 "Factsheet-France-Legal System (Release)", publication of Prisoners Abroad, p.2 at www.prisonersabroad.org.uk (accessed 21/09/12)

45 Ibid p.3

46 Ibid, p.2

Chapter Three: Parole, the ECHR and European Human Rights Norms

A central question in assessing the need for reform of the Irish system of temporary release and parole is the relevance of the State's obligations under the European Convention on Human Rights (ECHR). There are a number of provisions of the ECHR which are of direct relevance to the Irish system. In addition to the general provisions of the ECHR itself, the Council of Europe has also developed a large body of non-binding standards providing clarification on how systems of early release should operate at national level. The *European Prison Rules (2006)* address the area of prisoner release, providing that a system of prison leave (temporary release) should be an integral part of general prison regime (Article 103), and also that temporary release should form part of a structured gradual release process for long serving prisoners (Article 107).

As we set out below, there are a number of areas where Ireland's system of parole may fall short of the standards required by the ECHR. However, apart from the more narrow question of compatibility with the ECHR, the combined body of European standards relating to early release provide a framework for a coherent system of remission, temporary release and parole. The Council of Europe instruments articulate a set of core principles which can provide a blueprint for reforming legislation.

3.1 Transparency and Predictability

In *Kafkaris v Cyprus* the ECtHR found that a person being sentenced should be able to determine, with the appropriate advice, the scope of the penalty and the manner of its execution. In that case, the system for determining the length of life sentences had changed in Cyprus since the time of sentence. Consistent with this principle, it has been argued that this finding can be open to a wider application requiring State-parties to put in place clear release procedures for all life-sentenced prisoners including clear indications of what prisoners need to do to qualify for release.⁴⁷

As far back as 1982, the Committee of Ministers of the Council of Europe issued a Recommendation on Prison Leave, which identified the factors that should be considered in any decision around temporary release and also directed that the prisoner should be informed "to the greatest extent possible" of the reasons for any refusal of leave, and that any refusal should be open to appeal.

The Committee of Ministers, *Recommendation on Conditional Release (Parole) (2003)* also provides direction on how decisions on release should be taken. The key provisions in this Recommendation require that the criteria which prisoners have to fulfil to qualify for release "should be clear and explicit", and the criteria "should also be realistic in the sense that they should take into account the prisoners' personalities and social and economic circumstances" (Article 18).

3.2 Independence of Decision Making and the Parole Process

At a general level, the ECtHR has tended to hold the view that decisions about conditional release within a determinate sentence do not give rise to the full range of procedural rights to fairness and impartiality under the ECHR. However, it is also clear that there is a growing trend in applying standards of procedural fairness to all decision-making processes which affect the liberty of individuals. The argument for extending Article 6 rights in this way is that parole decisions, in substance at least, affect the liberty rights of persons. The common law rule of procedural fairness is also relevant here. The *Recommendation on Conditional Release (Parole) (2003)* states that all decision-making processes relating to early release should follow fair and open procedures (Article 32) and any decision to refuse or revoke leave should be open to an independent appeal process (Article 33).

⁴⁷ van Zyl Smit D & S. Snacken (2009) *Principles of European Prison Law and Policy: Penology and Human Rights*, Oxford University Press, USA, p. 335.

The relevant tests to measure the level of independence of a parole process were summarised in a recent English case of *R (on the application of Michael Brooke and Gagik Ter-Ogannisyan) v The Parole Board and The Lord Chancellor and Secretary of State for Justice*:⁴⁸

- Can there be an oral hearing, and if so can it take the form of a tribunal or court?
- Who prepares the information upon which the Board relies in making their decision, and does the information provided include a 'view' if it comes from the executive?
- How are the members appointed? What is their term and security of office?
- Who is responsible for rule making and directions?
- How is the Parole Board funded?

That case concerned a long-term prisoner who had been recalled to prison and the Court found that England's arrangements for parole had compromised the independence of the Parole Board at common law and Article 5(4) of the ECHR.

3.3 Speediness of Parole Hearings and Regular Reviews

Under Article 5(4) of the European Convention on Human Rights, it states:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

The European Court of Human Rights (ECtHR) has never specified exact time-frames that will or will not be considered speedy under Article 5(4), since the issue is difficult to determine in the abstract. However, the ECtHR has accepted “periods of less than a year between reviews and rejected periods of more than a year.” In *R (Murray) v Parole Board*,⁴⁹ the English Court of Appeal stated that the jurisprudence of the ECtHR regarding the parole review periods for life-sentenced prisoners (specifically discretionary lifers) was that, for an interval of more than a year, the onus is on the State to establish that the period is not in breach of Article 5(4).

There have been numerous successful challenges regarding the speediness of parole hearings in the UK and while UK case law is only of marginal relevance to the Irish context, it is likely that the ECtHR will be instrumental in the future to ensure that Ireland complies with the speediness of parole hearings. Two key issues that have arisen in England are (i) prisoners whose parole hearings are delayed have a right to compensation⁵⁰ regardless of the eventual parole outcome;⁵¹ and (ii) where there are systemic delays, the system should be flexible enough to prioritise important or urgent cases.⁵²

48 2007 EWHC 2036 Admin, available at <http://www.bailii.org/ew/cases/EWHC/Admin/2007/2036.html> (last accessed 17 January 2012).

49 [2003] EWCA Civ 1562.

50 In *Faulkner v The Parole Board* [2010] EWCA Civ 1434 and [2011] EWCA Civ 349, the Court of Appeal held that where a prisoner's consideration of parole is unjustifiably delayed, they may be entitled to compensation under Article 5(4) of the ECHR. The Court of Appeal held that the applicant was entitled to compensation for breach of his right under Article 5(4) because he could demonstrate, on a balance of probabilities, that he would have been released if the review had been completed earlier.

51 In *Sturnham v The Parole Board* [2011] EWHC 938 (Admin), the High Court awarded a prisoner nominal compensation for a breach of Article 5(4) of the ECHR owing to a 6 month delay in his parole hearing, even though the Board did not ultimately direct his release. His lawyer argued that even though Sturnham was not released, he should be awarded damages to compensate him for his “anxiety, distress and frustration.” Although Mr. Justice Mitting refused to overturn the parole decision, he awarded £300 compensation.

52 Due to the back-log of cases before the Parole Board of England and Wales, a ‘Prioritisation Tool’ was introduced in March 2009. The Prioritisation Tool emphasises that the framework is a flexible one, and that: “where exceptional circumstances are put forward by the prisoner

3.4 Revocation of Release

In a number of cases the European Court of Human Rights (ECtHR) has had to consider whether the decision to revoke a conditional release was taken in accordance with Article 5 (4), the provision which guarantees that decisions taken to detain a person must be subject to due process protections. In the case of *Stafford v United Kingdom*, the ECtHR found that a decision to revoke a licence constituted a decision to detain and therefore fell within Article 5 (4), meaning that due process obligations applied. In that case, the plaintiff had been released from a life sentence, having served the minimum tariff period, and had subsequently completed another related period of imprisonment. The State sought to detain him beyond the end of his second sentence on the basis that he had violated the terms of his licence under the life sentence.

With regard to the revocation of conditional release, two separate Council of Europe instruments also direct that a failure to comply with conditions of release should not automatically lead to a return to prison. The European Rules on Community Sanctions and Measures (1992) and the Recommendation on Conditional Release (2003) both direct that any person whose release may be revoked should be given an opportunity to make representations to a competent body, and that all of the relevant circumstances of the violation should be taken into account including prior behaviour on licence.

3.5 Legal representation before the Parole Board

Legal representation (state-funded in some cases) is an accepted feature of parole hearings in other jurisdictions including England & Wales and New Zealand.⁵³

The European Court of Human Rights held that in a UK parole hearing where the applicant was denied legal representation, that this did not meet the requirements of due process.⁵⁴

To date, judicial decisions made on the right to legal aid in front of the Parole Board have been unsuccessful in Ireland. For example, in the case of *Grogan v the Parole Board*⁵⁵, it was contested that Grogan should have been able to make adequate representation as he had obtained a law degree.

for higher prioritisation (including but not limited to medical/mental health issues, compassionate reasons, etc.) the case must be put before the duty ICM (Intensive Case Management) member for assessment.” See “Parole Board Oral hearing listing framework Listing tool for prioritisation of oral hearings - revised November 2010”, available at <http://www.justice.gov.uk/guidance/prison-probation-and-rehabilitation/parole-board/oral-hearing-listing-framework.htm> (last accessed 7 October 2012)

53 O'Malley, T. “*The Ends of Sentence: Imprisonment and Early Release Decisions in Ireland*”, paper delivered at Fitzwilliam College, Cambridge, June 2008, p.14, available at <http://www.irishsentencing.ie/en/ISIS/Pages/WP09000222> (accessed 04/02/12)

54 *Thynne V United Kingdom* (1991) 13 EHRR 666

55 2008 IEHC 204 available at <http://www.bailii.org/ie/cases/IEHC/2008/H204.html> (accessed 04/03/12)

Chapter Four: Towards a New, Coherent Irish Early Release Model

In this chapter, IPRT sets out our proposals for reform of the early release system in Ireland. The purpose of these reforms is to ensure that the system is fair and transparent and in compliance with Ireland's obligations under the European Convention on Human Rights. The proposed early release scheme would ensure a more structured release plan for prisoners, which would facilitate more effective reintegration into society, while also ensuring public safety.

4.1 A Single Early Release Act

The operation of the early release system is set out in primary legislation in many jurisdictions such as Scotland⁵⁶ and New Zealand.⁵⁷ Rather than introduce disparate Bills over time to plug the gaps in a piecemeal way, it would be preferable to set out the logic of the new early release scheme in a single piece of legislation – for example a *Remission, Temporary Release and Parole Act* – and repeal all the existing legislative provisions affected by the new laws. The new legislation should provide for the use of periods of short temporary release such as weekend or day-to-day release (e.g. for work purposes in the community) as well as for full parole for life-sentenced prisoners. It would also address remission and the commuting of sentences.

- **IPRT recommends that the proposed amendments to remission, temporary release and parole law should be set out in a single piece of legislation, for example a *Remission, Temporary Release and Parole Act* which would repeal all the existing legislative provisions affected by the new scheme.**
- **The legislation should set out the principles and objectives underpinning the system of early release, namely:**
 - * **Graduated systems of early release are an integral part of an incentivised prison regime as a preparation for full release**
 - * **Fair procedures and independent decision-making should apply to all categories of early release**
 - * **Clear and transparent criteria for release in all categories should be set out in legislation and should be accessible to all prisoners**
 - * **Detailed reasons should be disclosed to prisoners for all decisions taken**
 - * **Remedies should be available to challenge refusals of leave in all categories**

The new legislation should provide prisoners with clear information as to whether his/her release will occur automatically at a certain point, whether they will be subject to review by the Parole Board and what criteria will be applied by those considering their case. It would also act to provide transparency and clarity to the general public on the purpose of each category of release and how each form of release operates.

4.2 Reform of Remission

A reformed system of remission offers the potential to play a vital role in the reintegration of the prisoner into society. As highlighted by O'Malley,⁵⁸ remission is treated as a right, though one which may

⁵⁶ *Prisons (Scotland) Act 1989, Prisoners and Criminal Proceedings (Scotland) Act 1993 and The Parole Board (Scotland) Rules 2001.*

⁵⁷ *Parole Act 2002 and Criminal Justice Act 1985.*

⁵⁸ O'Malley, Tom. "The Ends of Sentence: Imprisonment and Early Release Decisions in Ireland", paper delivered at Fitzwilliam College, Cambridge, June 2008, p.12, available at <http://www.irishsentencing.ie/en/SIS/Pages/WP09000222> (accessed 07/02/12)

be forfeited in part or fully through misbehaviour while in prison.

As an automatic entitlement, standard remission for good behaviour has a limited incentive effect within the prison. However, in the context of serious prison overcrowding which undermines rehabilitative efforts generally across the Irish prison system, an increase in remission to bring Irish law in line with practice in other common law jurisdictions could have an immediate positive effect. IPRT prefers to increase standard remission from 25% to 50% for sentences of 1-5 years, and from 25% to 33% for sentences over 5 years. Other levels of increase or distinctions between sentence length could also be adopted.

While prisoners may technically qualify for up to one third remission under the *Prison Rules 2007* if he/she engages with authorised structured activities, there is currently no practical mechanism for prisoners to access this enhanced remission regime.⁵⁹ The proposed new early release scheme should provide that prisoners can earn remission and there should be clear guidance on the rules governing the earning thereof.

Earning such remission must also be attainable: if engagement with rehabilitative (education/training, drug treatment, etc.) programmes is a requirement, then such programmes need to be adequately resourced and accessible. Consideration should be given to a targeted increase of remission for certain categories of offenders, such as drug users, who engage with drug treatment services and other rehabilitative mechanisms as part of each prisoner's specially tailored integrated sentence plan.

Canada's system is a good example of one which focuses on the need for public safety, while advocating the need for earned remissions under the *Corrections and Conditional Release Act*.⁶⁰ Earned remission in Canada is supplemented by adequate safeguards including, increasing the monitoring of prisoners in their progress, raising their accountability and providing more communication with the victim.⁶¹

A system of incentives should apply to long-term prisoners through the operation of an enhanced remission scheme to allow prisoners benefit from higher remission (up to 50%) where they can demonstrate constructive engagement with services. This type of system would allow for targeting schemes of enhanced remission around certain group of offenders (e.g. drug offences) and certain type of prison services such as addiction, counselling and literacy.

- **IPRT believes that standard remission should apply at the half-way point for all sentences up to five years, with standard remission of a third for prisoners with sentences of over five years.**
- **An incentivised scheme should be in place to allow longer-term prisoners up to 50% off their sentence. This would require an internal Prison Service system of measuring engagement with services, which should be combined with the existing Integrated Sentencing Management system.**

59 IPRT Submission to Review Group on Thornton Hall, 2011, p. 7. Available at <http://www.justice.ie/en/JELR/ThorntonReviewReportRedacted.pdf/Files/ThorntonReviewReportRedacted.pdf> (accessed 17/08/12)

60 Justice Action (2012) *Remission-Earning One's Release* available at <http://justiceaction.org.au/cms/publications/remissions> (accessed 06/03/12)

61 Ibid.

4.3 Temporary Release⁶²

IPRT supports the use of short periods of release for a number of specific purposes. These should include:

- i. Release for compassionate or family grounds, including illness of the prisoner or a family member or bereavement.
- ii. Day release for other significant family events such as weddings, or religious sacraments or ceremonies.
- iii. Christmas release or release for other equivalent religious events.
- iv. Release for purposes of employment or training in preparation for full release.
- v. Weekend or daily release in preparation for full release.

With regard to all of the above categories of short-term release, clear criteria should be set out for how a prisoner can qualify for such release; decisions should be made in an open and transparent manner; full reasons should be given for each decision; and decisions should be open to appeal. In the proposed legislation, there should be clear demarcation between the purposes and criteria of short term temporary release and parole, which is release on licence for the purpose of ending the period of detention. The use of short-term temporary release as a prelude to parole should be carefully structured within sentence planning.

- **The proposed new legislation should provide for the use of periods of short temporary release such as day-to-day release (e.g. for work purposes in the community) and weekend release (e.g. for facilitating family relationships).**
- **In the new legislation there should be a clearer demarcation between the purposes and criteria for two broad categories (i.) short-term temporary release and (ii.) parole, which is release on licence for the purpose of ending a period of detention.**

4.4 Earned Early Release

As outlined earlier in this report and in line with the Thornton Hall Review Group's recommendations, the Minister for Justice introduced a piloted Community Return Scheme in 2011. This scheme allows certain prisoners serving 1-8 years exchange part of his/her prison sentence for community service. It is a more structured form of early release than the current temporary release system. This programme differs from earned remission in that offenders remain under supervision and may be brought back into the prison system if they fail to comply with the conditions of the relevant community service placement. It must be acknowledged that for any incentivised early release scheme such as the Community Return Scheme to be effectively administered, and with the increase in the use of Community Service Orders under the *Criminal Justice (Community Service) Amendment Act 2011*, the Government must adequately fund the Probation Service and the Irish Prison Service.

IPRT submits that Integrated Sentence Management (ISM) should also play a role in any scheme of earned early release, whereby risk and needs assessments of all prisoners would be conducted and a care plan constructed in which rehabilitative and reintegration programmes would be tailored to suit the recipients. Ensuring that ISM is effective in practice requires dedicated ISM staffing and on-going investment in prison regimes and services.

⁶² IPRT proposes that short-term temporary release should be distinguished from earned early release and from early release as determined by the Parole Board.

A comprehensive reintegration plan for all prisoners is essential to ensure their smooth transition to life outside prison and maintain the safety of the communities to which they return. In its strategic plan, the Irish Prison Service proposes a Community Integration Plan nine months prior to the release of a prisoner, IPRT urges for the programme to be implemented as priority.

IPRT believes that systems of earned release to community sanctions are a positive development and should be placed on a statutory footing. IPRT also believes that other forms of earned early release without community sanctions, but with community supervision by the Probation Service should be set out in the legislation. Systems of earned early release should be operated by the Irish Prison Service in conjunction with the Probation Service, however the criteria and decision-making process should be open and transparent. Where an application is refused, a prisoner should be allowed to appeal that decision and the Parole Board may also have a role in overseeing the operation of the decision-making process.

IPRT also believes that there is no objective justification for the exclusion of certain categories of offender from earned release. In line with the principle of proportionality, eligibility for early release should, in general, be determined by sentence length. Restrictions applying to certain categories of offenders do not generally exist in other jurisdictions and are unfair since they only take into account the offence and not the circumstances of the offender.

- **A system of Earned Early Release should be provided for in the new Act, including the existing Community Return Scheme, but also including other forms of Earned Early Release without community sanctions, but with community supervision by the Probation Service.**
- **The qualifying criteria and systems of measuring eligibility for earned early release should be set out in the proposed Act and made accessible to all prisoners. Decisions should be made in an open and transparent manner where full reasons should be given for each decision, and decisions should be open to appeal.**
- **IPRT recommends that the Government adequately resource the Probation Service into the future to effectively administer the Community Return Scheme and the increased volume of Community Service Orders following the enactment of the *Criminal Justice (Community Service) (Amendment) Act 2011*.**
- **The Government must ensure that the *earning* of early release is achievable. This means ongoing investment in activities (workshops, educational, recreational etc.) and rehabilitative services (drug treatment, mental health services, behaviour management programmes) for prisoners. The Irish Prison Service should resource Integrated Sentence Management (ISM) in all Irish prisons by the end of 2012 to ensure that it is fully operational in all prisons.**
- **Community Integration Plans will need to be adequately resourced to ensure that they are effectively administered.**

4.5 Parole Reform

(A.) Independence

An independent Parole Board should have full responsibility for decisions relating to the release of life-sentenced prisoners and the early release of other long-term prisoners, removing the Executive from

any role in the process. The question of operational independence of the Parole Board is also important. Currently, the Minister for Justice enjoys wide discretion in appointing persons to the Parole Board.⁶³ In order to assess if the Board is fully independent the following questions must be asked: Who prepares the information on which the Board relies, and does it contain a 'view' from the Executive? How are members appointed, and what is their term and security of office? Who is responsible for rule making and directions? How is the board to be funded? The Board should also have an independent chairperson.

- **The Parole Board must be granted independence and given the power to make binding decisions on prisoner release. The Parole Board should be placed on a statutory footing in order to remove parole decisions from political control.**
- **The proposed new legislation should consider how the following issues be addressed: Who prepares the information on which the Board relies, and does it contain a 'view' from the executive? How are members appointed, and what is their term and security of office? Who is responsible for rule making and directions? How is the board to be funded?**
- **The Board should have an independent chairperson.**

(B.) Speediness of Parole Hearings

In order to comply with the speediness requirement of Article 5(4) of the ECHR, prisoners should be automatically scheduled by law for a parole review within six months of their eligibility date. If a prisoner does not secure release at a parole review, follow-up reviews should be scheduled every year for prisoners serving under ten years and every two years for prisoners over ten years. However, in light of the English experience, the revised Irish parole system must be flexible enough to allow the individual circumstances of a prisoner's case to be taken into account in terms of prioritising a review, particularly should a back-log occur.

- **In order to comply with the speediness requirement of Article 5(4), prisoners should be automatically scheduled by law for a parole review within six months of their eligibility date.**
- **If a prisoner does not secure release at a parole review, follow-up reviews should be scheduled every year for prisoners serving sentences of under ten years and every two years for prisoners serving over ten years.**
- **The revised Irish parole system must be flexible enough to allow the individual circumstances of a prisoner's case to be taken into account in terms of prioritising a review, particularly should a back-log occur.**

(C.) Right to Legal Representation

In light of developing international jurisprudence, IPRT believes that prisoners should be entitled to be legally represented in proceedings before the Parole Board. The right to legal representation is particularly strong in the case of those serving life sentences. A decision by the Parole Board not to recommend the release of a life prisoner is particularly onerous as he/she does not have a release date to which he or she can look forward. Hence, life-sentenced prisoners should have the right to legal representation, and where necessary a right to legal aid, in his/her parole hearing.

⁶³ See *The Irish Examiner (2012) Calls for Reform of the Parole Board*, available at <http://www.irishexaminer.com/ireland/icrime/calls-for-reform-of-parole-board-203309.html> (accessed 21/08/12)

- **In light of developing international jurisprudence, IPRT believes that prisoners should be entitled to be legally represented in proceedings and where necessary, a right to legal aid in a parole hearing before the Parole Board.**

(D.) Focus on Risk

When the Carlisle Committee in England and Wales reported on the prison system in 1988, one of its key recommendations was that the Parole Board concentrate exclusively on the risk of a prisoner committing a serious offence if released and not to engage in “resentencing” by considering the seriousness of the offence and aggravating circumstances. Determining whether an imprisoned individual poses an ongoing risk to the public if released is a complex matter. Indeed, the exercise is capable of doing enormous injustice to the prisoner if the calculation of risk is left in the hands of an inexperienced group of people. In order to evaluate properly the risk posed by a particular prisoner if released, it is crucial that the Parole Board comprises members with the requisite expertise, including psychiatrists and psychologists.

- **The focus should be on risk in any new or amended legislation defining criteria to be considered by the Parole Board.**⁶⁴
- **The Parole Board must be structured to ensure that it has the requisite expertise to make responsible decisions. This means being adequately resourced and having sufficient psychiatrists and psychologists.**

(E.) Removal of Restrictions on Certain Categories for Parole

The removal of restrictions on certain categories of prisoners for parole should also be addressed in the legislation. These restrictions do not generally exist in other jurisdictions and are unfair since they only take into account the offence and not the circumstances of the offender.

- **There should be a removal of the restriction on certain categories of long-term prisoners being considered for parole.**

(F.) Expanding the Remit of the Parole Board

The range of sentences to be considered by the Parole Board should be expanded to sentences of five years or more. This reflects the categorisation of “serious crime” used within agencies of the Irish criminal justice system. Expanding the remit of the Parole Board in Ireland would provide an opportunity for careful consideration of the prisoner’s suitability for release on licence,⁶⁵ as opposed to the current system of ad hoc, unplanned early release of prisoners arising from the need to ease overcrowding.

If the Parole Board is granted jurisdiction to adjudicate early release applications in respect of sentences between 5 and 8 years on top of its current remit, there would be serious time and resource implications

⁶⁴ See Rule 8 of the *Parole Board (Scotland) Rules 2001*, which states –

“In dealing with a case of a person, the Board may take into account any matter which it considers to be relevant, including, but without prejudice to the foregoing generality, any of the following matters:–

(a) the nature and circumstances of any offence of which that person has been convicted or found guilty by a court;

(b) that person’s conduct since the date of his or her current sentence or sentences;

(c) the risk of that person committing any offence or causing harm to any other person if he or she were to be released on licence, remain on licence or be re released on licence as the case may be; and

(d) what that person intends to do if he or she were to be released on licence, remain on licence or be re released on licence, as the case may be, and the likelihood of that person fulfilling those intentions.”

⁶⁵ O’Malley, Tom. “The Ends of Sentence: Imprisonment and Early Release Decisions in Ireland”, paper delivered at Fitzwilliam College, Cambridge, June 2008, p.13, available at <http://www.irishsentencing.ie/en/MSIS/Pages/WP09000222>, (last accessed 15 November 2011).

for the Board. IPRT submits that the Minister for Justice would have to increase the funding and staffing levels (including making adequate provision for psychological, psychiatric, legal and sentencing experts to be members of the Board, in addition to well-trained support to administer the new mid-range applications) of the Parole Board if he/she wishes to proceed with a workable, efficient model of earned temporary release.

- **The Parole Board should be granted jurisdiction to adjudicate earned early release applications in respect of sentences between five and eight years. This will require an increase in funding and staffing levels to ensure that the new scheme is workable and efficient.**

(G.) Revocation

When release is conditional, the terms should be reasonable and proportionate. If an individual's release is revoked, then he/she should be entitled to a hearing in front of the Parole Board where all the relevant circumstances of the case are taken into account.

- **Conditions attached to release should be reasonable and proportionate. A violation of conditions, in the absence of a criminal offence being committed, should not mean a prisoner is automatically returned to prison.**

4.6 The Power to Pardon Collectively

Countries such as France have made extensive use of collective pardons to tackle overcrowding in prisons, rather than having recourse to the time-consuming early release mechanism.⁶⁶ IPRT submits that as a response to the ongoing overcrowding crisis in Irish prisons, the Minister for Justice should consider making use of the right of pardon and the power to commute or remit punishment to bring the prison population within the safe custody limits recommended by the Inspector of Prisons. In light of recent austerity measures in Ireland and on-going delays in upgrading the Courts Service ICT system to process fines by instalment, consideration should be made to remitting fines (in whole or part) or introducing an amnesty.

- **As a response to the ongoing overcrowding crisis in Irish prisons, the Minister for Justice should consider making use of the right of pardon and the power to commute or remit punishment to bring the prison population within the safe custody limits recommended by the Inspector of Prisons.**

⁶⁶ Tournier, Pierre V., "Systems of Conditional Release (Parole) in the Member States of the Council of Europe", Vol 1, 2004 at para.16, <http://champpenal.revues.org/378> (last accessed 15 November 2011). At para. 18, Tournier writes: "There is a convergent trend, over a twenty-five year period, toward the replacement of individualizing practices by mass measures, with the dwindling number of conditional releases, the reduction, in 1986, of the legal possibilities for individualizing sentence-shortening, the introduction and extension of safety periods and conversely, the almost systematic granting of sentence cuts for good behavior (this dates back to 1973), the systematic granting of collective pardons by the President of the Republic—be he on the left or right—each year since 1991 for the national holiday."

Chapter Five: Recommendations

- **IPRT recommends that the proposed amendments to remission, temporary release and parole law should be set out in a single piece of legislation, for example a *Remission, Temporary Release and Parole Act* which would repeal all the existing legislative provisions affected by the new scheme.**
- **The legislation should set out the principles and objectives underpinning the system of early release, namely:**
 - * **Fair procedures and independent decision-making should apply to all categories of early release**
 - * **Clear and transparent criteria for release in all categories should be set out in legislation and should be accessible to all prisoners**
 - * **Detailed reasons should be disclosed to prisoners for all decisions taken**
 - * **Remedies should be available to challenge refusals of leave in all categories**
 - * **Graduated systems of early release are an integral part of an incentivised prison regime as a preparation for full release.**
- **IPRT believes that standard remission should apply at the half-way point for all sentences up to five years, with standard remission of 33% for prisoners with sentences over five years.**
- **An incentivised scheme should be in place to allow longer-term prisoners up to 50% off their sentence. This would require an internal Irish Prison Service system of measuring engagement with services, which should be combined with the existing Integrated Sentencing Management system.**
- **The new legislation should provide for the use of periods of short temporary release such as day-to-day release (e.g. for work purposes in the community) and weekend release (e.g. for facilitating family relationships) carefully structured as incentives within sentence.**
- **In the new legislation there should be a clearer demarcation between the purposes and criteria for two broad categories (i.) short-term temporary release and (ii.) parole, which is release on licence for the purpose of ending a period of detention.**
- **A system of Earned Early Release should be provided for in the new Act, including the existing Community Return Scheme, but also including other forms of earned early release without community sanctions, but with community supervision by the Probation Service.**
- **The qualifying criteria and systems of measuring qualification for earned early release should be set out in the Act and made accessible to all prisoners. Decisions should be made in an open and transparent manner, full reasons should be given for each decision, and decisions should be open to appeal.**

- **IPRT recommends that the Government adequately resources the Probation Service into the future to effectively administer the Community Return Scheme and the increased volume of Community Service Orders following the enactment of the *Criminal Justice (Community Service) (Amendment) Act 2011*.**
- **The Government must ensure that the *earning* of early release is, in fact, achievable. This means ongoing investment in activities (workshops, educational, recreational etc.) and rehabilitative services (drug treatment, mental health services, offender management programmes) for prisoners. The Irish Prison Service should resource Integrated Sentence Management (ISM) in all Irish prisons by the end of 2012 to ensure that it is fully operational in all prisons.**
- **Community Integration Plans will need to be adequately resourced to ensure that they are effectively administered.**
- **Existing exclusions of categories of prisoners from eligibility for temporary release should be removed.**
- **The Parole Board should be granted independence and placed on a statutory footing, thereby removing parole decisions from political control. A transparent, accountable, adequately resourced, independent decision-making process is crucial to the proper functioning of the parole system.**
- **The new legislation should provide prisoners with information as to whether they will be released automatically at a certain point, whether they will be subject to review by a Parole Board, in what circumstances an oral hearing might take place and what criteria will be applied by those considering their case.**
- **Prior to the new legislation, consideration of the following issues will need to be addressed: Who prepares the information on which the Board relies, and does it contain a 'view' from the executive? Will oral hearings take place in a tribunal or court-like venue? How are members appointed, and what is their term and security of office? Who is responsible for rule making and directions? How is the board to be funded?**
- **The Parole Board should be granted jurisdiction to adjudicate early release applications in respect of sentences between five and eight years, but will require an increase in funding and staffing levels to ensure that the new scheme is workable and efficient.**
- **In order to comply with the speediness requirement of Article 5(4) of the ECHR, prisoners should be automatically scheduled by law for a parole review within six months of their eligibility date. If a prisoner does not secure release at a parole review, follow-up reviews should be scheduled every year for sentences under ten years and every two years for sentences over ten years.**

- **The focus should be on *risk* in any new or amended legislation defining criteria to be considered by the Parole Board.**
- **The Parole Board must be structured to ensure that it has the requisite expertise to make responsible decisions. This means having sufficient psychiatrists, psychologists, as well as an independent chairperson.**
- **Consideration should be given to removing the restriction on certain categories of long term prisoners from being considered for parole.**
- **In light of developing international jurisprudence, IPRT believes that prisoners should be entitled to be legally represented in proceedings (particularly those involving oral hearings) before the Parole Board.**
- **Conditions attached to release should be reasonable and proportionate. A violation of conditions should not mean a prisoner is returned to prison in the absence of a criminal offence being committed. A prisoner should be able to appeal any decision to revoke his or her conditional release.**
- **As a response to the ongoing overcrowding crisis in Irish prisons, the Minister for Justice should consider making use of the right of pardon and the power to commute or remit punishment to bring the prison population within the safe custody limits recommended by the Inspector of Prisons.**

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