COMMENTS ON WHITE PAPER ON CRIME: "CRIMINAL SANCTIONS"

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INTRODUCTION

I welcome the publication of the discussion paper on criminal sanctions[1], which is a balanced and thoughtful document. It raises many important questions and all I can do in the time available is to touch on a few central issues in relation to sentencing policy and sentencing decision-making in the hope that they may provide a basis for further discussion both here today and into the future.

I. THE IMPORTANCE OF SENTENCING WITHIN THE SYSTEM

Although we have a significant and ever expanding corpus of substantive and procedural criminal law, we must not forget that for the vast majority of those charged with criminal offences, sentence is all that matters, simply because they plead guilty. In 2008, for example, almost 3,000 defendants were convicted in the Circuit Court. Of these, 2,500 pleaded guilty, representing a guilty plea rate of 83%. For drug offences, there was a guilty plea rate of 94%. A similar pattern is found in other common law jurisdictions.

II. SENTENCING WITHIN THE CRIMINAL JUSTICE SYSTEM

The criminal justice system may be analysed in both institutional and systemic terms. At one level, it consists of a set of institutions including police, prosecution service, courts, probation service, prison service, parole authority and so forth. It differs, however, in one crucial respect from, say, a large private corporation which may also have several different units

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[1] (Department of Justice, Equality and Law Reform, February 2010).

but all of which ultimately report to a single governing authority such as a board of directors. Moreover, the corporation and all its constituent units have a clear overarching goal which is the success of the business and the maximisation of profit. Criminal justice institutions, by contrast, operate largely independently of one another, though not entirely so. There is nothing equivalent to a board of directors to direct the others in the discharge of their duties. Some might see the courts as exercising this function, but the court's supervisory role is confined to ensuring that all public bodies remain within the limits of their legal powers and that they observe the principles of legality and fairness in the discharge of their functions. The functional independence accorded to criminal justice institutions is, for the most part, a good thing: it allows for a certain amount of checks and balances. But it also illustrates the point that the courts are not the only institution to influence sentence. A court imposes sentence; the implementation is usually in the hands of another institution such as a parole authority of some other executive body. As for the presence of an overriding institutional goal, one could argue that there is such a goal, namely the creation of a safer society, though this, in turn, must be tempered by other important social values such as observance of the rule of law.

From a systemic perspective, the criminal process may be viewed as a continuum beginning with the political decision to classify a certain kind of conduct as a criminal offence and ending when a convicted offender has finally served a judicially-imposed sentence, though in many individual cases it will end much earlier where the offender has been acquitted or where no prosecution has been taken. That continuum may be viewed, for the sake of convenience, as a straight line punctuated by certain key decisional points most of which call for the exercise of discretion.

Even when we zone in on the point at which sentence is imposed, we can see that several actors other than the judge influence the sentencing outcome. Nowadays, sentencing decisions are often based, partly at least, on various pre-sentence reports, including probation reports, victim impact statements and the results of drug testing. In guilty plea cases, the facts of the case will be put before the court by the police, and some degree of horsetrading may take place between the defence and the

prosecution as to how precisely those facts are to be presented. It would be naïve to proceed on the assumption that all reports put before the court are rigorously objective and accurate, with the ultimate judicial decision being the only discretionary one. Anyone who is charged with the establishment and interpretation of facts is likely to bring certain subjective assumptions and beliefs to bear upon them.[2] When engaging on research on sentencing practice, we must abandon our present preoccupation with judicial decisions which merely reflect sentencing outcomes and reorient our attention towards the sentencing process by examining more carefully the true determinants of sentence – and there are many others besides those I have just mentioned – in order to get a more complete understanding of how decisions are actually reached. Empirical sentencing research must therefore concentrate at least as much on the raw material which influences outcomes as on the outcomes themselves.

III. PENALTIES AND SANCTIONS

The discussion paper is entitled "Criminal Sanctions". The choice of title is probably appropriate because "sanctions" encompass more than "sentences" and "penalties" in the conventional sense of those terms. From an offender's perspective, the adverse consequences of a criminal conviction are potentially fivefold:

(1) A primary penalty, such as a fine or term of imprisonment;
(2) A secondary penalty, such as disqualification from driving;
(3) An ancillary order of disputed penal character, such as a sex offender notification order;
(4) A collateral consequence arising by operation of law, such as automatic disqualification from holding certain offices or disqualification from jury service (in cases where a certain term of imprisonment is imposed); and
(5) A collateral consequence arising as a matter of fact, such as loss of employment. (This can often be the most serious

[2] Hudson, "Assessing the 'Other'", (2005) 45 Brit. J. Criminol. 721.

consequence of a conviction; one reason why section 1 of the Probation of Offenders Act, 1907, should stay as it is).

Another possibility which arises mainly in relation to revenue offences is that the same underlying conduct may leave a person liable for civil or administrative penalties as well as criminal punishment. Conviction nowadays often entails not just one but several of the consequences just mentioned. One important question which arises as a result is whether ancillary and collateral orders are sufficiently punitive that their impact should be taken into account when deciding on the primary punishment.

IV. IMPRISONMENT

Debate about sentencing tends to revolve around imprisonment, a tendency which some regard as unfortunate because it reinforces the centrality of imprisonment in our collective thinking about state punishment. Yet, it is also understandable because imprisonment is the most severe penalty which a court may impose in this and most other countries. It is also a penalty which may continue to exercise a strong and detrimental impact on the offender's life long after the term of imprisonment has been served. Every prison sentence is, to some extent, a life sentence. This, in turn, explains the common belief that imprisonment should be reserved as a penalty of last resort, and should be used only when a non-custodial measure is, for one reason or another, clearly inadequate or inappropriate.

Imprisonment rates are usually presented in terms of the number of prisoners per 100,000 of the population. While this is regarded as one reasonably reliable method of evaluating imprisonment rates, it also calls for some qualifications.[3] First, cross-national evaluations of sentencing practices must always be sensitive to definitional and computational differences. Some countries may treat various forms of juvenile detention as imprisonment for statistical purposes; others may not. Some may

[3] Indyk and Donnelly, *Full-time Imprisonment in New South Wales* (Judicial Commission of New South Wales, 2001), p. 7.

count prisoners using a so-called pinpoint census which counts the number of prisoners in custody on a given day whereas others may apply the average daily population approach. Where the total prison population is covered, as in Ireland, it will obviously include a significant number of remand as well as sentenced prisoners which means that it is as much a reflection of prevailing bail laws as of sentencing practices.

The website hosted by the International Centre for Prison Studies at King's College London is a tremendous source of current data on prison populations and imprisonment rates worldwide. Because of constant fluctuations in both general and prison populations, one can never be sure that any such data is always entirely accurate down to the last digit, but for present purposes we may assume that it reflects existing levels of imprisonment reasonably accurately.

One problem attending any debate on imprisonment rates is that there does not appear to be any internationally-accepted optimal level of imprisonment against which the performance of individual countries can be measured. As Professor Michael Tonry has written: "[t]here is no value-free or scientific way to determine optimal levels of imprisonment in any country …".[4]

Just by way of illustrating the absence of consensus of optimal levels of imprisonment, let us consider the present situations in Ireland and New Zealand. These two countries have much in common – almost the exact same general population, a shared common law tradition, and broadly similar criminal justice and judicial systems. The general principles of sentencing applicable in both jurisdictions also have much in common. Yet, New Zealand has more than twice as many prisoners as Ireland and consequently an imprisonment rate more than double that of Ireland.[5] So, we might ask, which country has got it right? In the absence of any agreed yardstick against which to measure imprisonment rates it is impossible to say.

According to the King's College website, in June 2009, Ireland had an imprisonment rate of 85 per 100,000 of the general

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[4] Tonry, "Controlling Prison Population Size" (1996) 4 *European Journal on Criminal Policy and Research* 26.

[5] As of April 2010, New Zealand had a prison population of 8,532 representing a rate of 196 per 100,000 of the population.

population, which was estimated at 4.58 million. The rate may be somewhat higher now, because of changes in both populations. But assuming that the figure is somewhere between 85 and 90, it is still relatively low by European standards. Apart from a few, mainly Scandinavian, countries that have lower figures, our imprisonment rate, which is about the same as Germany's, is considerably lower than many other EU and Council of Europe member states. The figure for England and Wales, for example, is 154, for Scotland 149 and for Northern Ireland 79.

Let us look at our present prison population from an historical perspective. Quite famously in 1958, our average daily prison population reached an all-time low of 369. However, it would be a mistake to treat this as something of a Golden Age or to regard it as a time "when the condition of the human race was most happy and prosperous", as Gibbon famously characterised the second century AD. Our prison population may have grown more than tenfold over the past 50 years but a number of other factors must also be borne in mind. First, the number of reported serious offences has grown by about the same amount over the same period. Secondly, we are now experiencing forms of crime, mainly drug related, which were virtually unknown in the 1950s and 1960s. Thirdly, the imprisonment level in that era was probably too low in one respect because we now know that there was a great deal of hidden crime, particularly in the form of child sexual abuse, which has only come to light in the recent past. In fact, this present generation is now picking up the tab, literally and metaphorically, left behind by previous generations through their failure to address the problem as it was occurring. This has had a considerable impact on our court and prison systems because the number of delayed prosecutions has not been insignificant, and the prison sentences imposed on those convicted have often been quite lengthy. Finally, it bears remarking that the greatest social change in this era has not been so much the increase in imprisonment but the decline in overall levels of state custody. In 1961, for example, when the prison population was still less than 500, there were 21,000 patients in psychiatric hospitals and approximately 4,500 children in industrial schools and reformatory schools.

I do not say any of this in order to create a sense of complacency about our present sentencing practices. While our rate of imprisonment may not be excessive by international standards, it does not follow that we are making wise and proper use of imprisonment as a sentencing option. For instance, in referring to the decline in the population of psychiatric hospitals and juvenile institutions, I do not for a moment intend to imply that many of those who might formerly have been detailed in such institutions are now caught up in the criminal justice system. That is patently not the case. But what is true is that the criminal justice system in general and the prison system in particular often find themselves coping with persons who have a mental illness or disability of some kind, and that is a function which, for the most part, they are ill-equipped to address. One priority in reforming the sentencing system should be to develop appropriate measures and facilities for this category of offender.

The most fundamental deficiency in the present system is absence of anything remotely approximating to a consensus on who should be sent to prison and why they should be sent there. According to the Prison Service Report for 2008, there were just over 8,000 committals under sentence in 2008. Of these, 3,500 were for periods of less than three months and 1,500 were for periods of three to six months. This means that over 60% of committals were for six months or less. About 80% of committals were for a year or less. However, to put the matter in perspective, the same report shows that on the 5th December 2008, only about 6% of those in custody on that day were serving sentences of six months or less.

The prevalence of short sentences clearly demands considerable thought, and it is certainly not a problem confined to Ireland. Some continental European countries try to address the problem either by imposing strict conditions for the imposition of a short sentence or by proceeding on an assumption that such a sentence, if imposed, will not be executed. The German Criminal Code, for instance, provides (section 47):

> The court shall not impose a term of imprisonment of less than six months unless special circumstances exist, either in the offence or the person of the offender, that strictly require

> the imposition of imprisonment either for the purpose of reform of the offender or for reasons of general deterrence.

Some other, common law, countries have had statutory provisions to the effect that a court shall not impose a short sentence, less than three or six months, without providing written reasons for doing so.

Critics of short sentences in this country are sometimes inclined to point a finger at the District Court. However, it must be recalled that the District Court in this country has a very wide criminal jurisdiction. Secondly, many offences which are formally classified as summary, including some road traffic offences, can actually be quite serious in nature. Thirdly, many offenders sentenced by the District Court will have been simultaneously convicted of several offences and may well have previous convictions, matters which are seldom apparent from official statistics. The stories lying behind statistics are often far more complex than that statistics themselves could ever realistically reveal.

Imprisonment, we are told, should be a sanction of last resort. This is accepted to be a common law principle and in recent times has been written into the statute law of a number of common law countries including England and Wales, Canada and Australia (although all three of these jurisdictions have imprisonment rates vastly in excess of ours). We need therefore to move well beyond the bare formal assertion of the last resort principle and try to work out some more specific criteria for custodial sanctions. Such efforts have occasionally been made. The current version of the *American Bar Association (ABA) Criminal Justice Standards* provides:

> (a) A sentencing court should prefer sanctions not involving total confinement in the absence of affirmative reasons to the contrary. A court may select a sanction of total confinement in a particular case if the court determines that:
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> (i) The offender caused or threatened serious bodily harm in the commission of the offence,
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> (ii) Other types of sanctions imposed upon the offender for prior offences were ineffective to induce the offender to avoid serious criminal conduct,

(iii) The offender was convicted of an offence for which the sanction of total confinement is necessary so as not to depreciate unduly the seriousness of the offence and thereby foster disrespect for the law, or

(iv) Confinement for a very brief period is necessary to impress upon the offender that the conduct underlying the offence of conviction is unlawful and could have resulted in a longer term of total confinement.

(b) A sentencing court should not select a sanction of total confinement because of community hostility to the offender or because of the offender's apparent need for rehabilitation or treatment.[6]

This is a difficult area. Suppose, for example, that the principles set out in the *ABA Criminal Justice Standards* were formally applied in this country, would they lead to any fewer prison sentences being imposed? This difficulty should not, however, deflect us from giving close consideration to what is nowadays called Cusp sentencing – namely the sentencing of those cases which are on the borderline between custodial and non-custodial sanction. It goes without saying that the success of any efforts to reduce reliance on short-term custody will strongly depend on the available of a wide of range viable and publicly acceptable community-based options, as well as general judicial consensus as to when the custodial threshold has been reached.

V. SOME RECOMMENDATIONS FOR REFORM

A. Criminal Law Reform as Memorial

The first recommendation is negative in nature in that it concerns something which we must avoid doing, and that is to use criminal law reform as memorial. By that I mean the following. We have seen many instances in recent times here and elsewhere

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[6] American Bar Association, *Criminal Justice Standards: Sentencing*, Standard 18-6.4 (1994), available at http://newabanet.org/sections/criminaljustice/Pages/Standards.aspx. On the origin and influence of the *Standards*, see Marcus, "The Making of the ABA Criminal Justice Standards: Forty Years of Excellence" (2009) 21 *Criminal Justice*.

of relatives and friends of persons who have died as a result of violent acts embarking on immediate campaigns to have certain changes made to the criminal law. This phenomenon has become particularly prevalent in the United States, where the better-known examples include Megan's Law and the Adam Smith Act.[7] In this country in recent times we have seen a few examples of people who have suffered the loss of a close relative through a criminal law act agitating for certain changes in the law, including at times the introduction of mandatory penalties. Their actions are entirely understandable in view of the great personal tragedies which they have suffered. But we must always remain rigorously committed to the principle that the criminal law is enacted on behalf of the entire community for the benefit of the entire community. Sometimes, indeed, the changes being advocated are misconceived to the extent that they fail to reflect the real problem. I can think of a number of recent media interviews by a person advocating mandatory sentences for a particular crime in light of the tragic death of a close family member. Yet, to the best of my knowledge, the problem in that particular case is not the absence of a sentence but rather the absence of an arrest.

Furthermore, the campaigns to which I am referring are often carried out in an information vacuum, and this is particularly true of sentencing. Indeed, this holds true, not only of public campaigns for legal change but also of political initiatives. Rarely if ever do those advocating mandatory sentences or other structural change take the trouble to acquaint themselves with existing sentencing practice. If they did, they might well discover that the sentences imposed are considerable higher than they imagine and perhaps even higher than they themselves would recommend.

It is, of course, true that the commission of a criminal act or the subsequent process of investigation or prosecution may bring to light legal problems or deficiencies which need to be addressed. But, if so, reform should be made after careful deliberation of the problem rather than a kind of homage to the victim. Certainly, the worst possible time at which to consider

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[7] See generally, Karem, *Crime Victims: An Introduction to Victimology* (7th ed., Wadsworth, 2010).

law reform is in the immediate aftermath of the crime itself at which point it will usually be impossible to predict how the investigation or subsequent legal proceedings will unfold. To be more specific, the problem is that while there is often great enthusiasm for reform in the aftermath of the crime, once that crime fades out of the news it is largely forgotten about.

VI. REFORMING SENTENCING: POLICIES, PRINCIPLES AND DECISIONS

The sentencing policies and practices most appropriate in any given jurisdiction necessarily depend on certain variables including the size of the population, the extent of the crime problem, the nature of the more prevalent recorded crimes, the constitutional framework and values within which the sentencing system operates and the broader legal culture. Bearing these factors in mind, it may safely be concluded that this country does not need a very elaborate scheme of sentencing guidelines of the kind that now exist in some American jurisdictions.

A. Policy-Making

It is now trite wisdom that we suffer from a serious deficit of empirical information on the operation of the criminal justice system in this country, and our policy-making has often been much the poorer for it. We need a centralised Criminal Policy and Research Unit, something equivalent to the ESRI but on a much smaller scale, which would act as a clearing house for the coordination and analysis of criminal statistics and which would undertake research on criminal justice law reform. General law reform bodies are seldom well equipped to engage in this type kind of research as there is far too much knowledge out there and good quality research requires at least as much attention to the findings of social science research as to traditional legal sources. This body should be charged with monitoring the impact of recently enacted laws as well as being tasked with examining the need for further legislation or administrative changes. Above all, this Policy and Research Unit should be operationally independent of government departments, prosecution, police, prisons, courts and other criminal justice agencies, though all of

these bodies should be legally required to cooperate with it in the discharge of its functions.

B. Principle-Making

The Court of Criminal Appeal, as it now operates, is ill-equipped to act as a forum of principle. The number of cases coming before the Court has grown enormously in recent years. On Monday the 19th May 2010, for example, the Court sat, as it does periodically, in order to assign dates to appeals that are due for hearing over the coming months. Almost 120 cases were listed in all. It is completely unrealistic to expect that all of the sentencing cases listed might result in important judgments setting out authoritative principles. According to official statistics, that court disposed of 267 cases, including 240 sentence appeals, in 2007. In 2008 it disposed of 305 cases including 264 sentence appeals.[8] Only about 10% of these resulted in approved judgments. The Courts Service website carried 27 Court of Criminal Appeal judgments for 2007 (three of which resulted from the same appeal) and 24 for 2008 (two of which resulted from the same appeal).

Appellate review (or, more properly appeal court judgments) is probably the best way of structuring judicial discretion in this country. But for the delivery of effective guidance, we need what I would call assisted appellate review. This would entail the establishment of a sentence information unit within the courts system which would assist the appeal courts in the discharge of their functions by maintaining statistical data bases on existing sentencing practices as well as preparing detailed working papers on general sentencing issues (including first and foremost the establishment of custody thresholds) and on the sentencing of specific offences. All this information would, of course, be publicly available through its website and therefore available to trial judges and to lawyers and litigants appearing in criminal cases. The reason why such a service is needed is that every individual appeal is, of necessity, fact specific and the precedent value of a decision will be very much contingent on the

[8] Figures drawn from Court Service, *Annual Report 2007* and *Annual Report 2008*.

facts. If a court is to perform effectively as a forum of principle, it needs to have before it more general information and data than would be necessary for the disposal of the case before it. An appeal court could flag certain cases in advance as ones which might be appropriate for the delivery of a headline judgment, so that the parties could make appropriate submissions. Again, I emphasise that all of the data and documentation produced by the sentence information unit would be available to the parties, and to everyone else well ahead of the hearing, so that it can be the subject of submissions (and disagreement) by parties arguing the case.

C. Decision-Making

I can deal with this very briefly. Decision-making, in the sense of determining the sentence appropriate in any specific case, must be left to the courts, as now. This is demanded by the Constitution, save in the case of mandatory sentences, and is also demanded by the interests of justice. The structures I have just recommended are intended to assist principled decision-making, not to replace it.