

Sentencing in the District Court: "Here be dragons"

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Introduction

The dearth of raw data into sentencing practice has long been lamented in this jurisdiction, as with many other areas of the criminal justice system.¹ Indeed, the paucity of information in this area recalls the hitherto neglected issue of crime rates in Ireland and its colourful depiction by Brewer *et al.* as an area where "here be dragons".² This phrase, employed by latter-day cartographers to mark areas about which nothing was known, might well have equal application in the area of sentencing. In an effort to remedy this situation to some small extent and gain some insight into sentencing practice in the busiest of the criminal courts, the Irish Penal Reform Trust ("IPRT") undertook a study into sentencing patterns in Dublin District Court during the summer of 2003. The purpose of this sentencing study was twofold. First, to identify how judges use the sentencing options open to them and the patterns, if any, in their choices; and, second, to determine how often reasons are given for sentences. While the IPRT does not purport, as did Brewer *et al.* in their work on crime levels, to "remove the dragons" in this critical area of the criminal justice system, it was hoped that the study would, at least, serve to identify the key areas in which further research is needed. It is the aim of this article, therefore, to analyse the results of the study in the light of the available sentencing literature. In accordance with the IPRT's mandate, the focus will be on the following topics: imprisonment; community sentences; fines; inconsistency in sentencing; and the right to reasoned sentencing.

Methodology

The study was carried out over an eight-week-period between June 9, 2003 and July 31, 2003, when two IPRT researchers³ observed proceedings in the Dublin Metropolitan District Court. The majority of this observation took place in Courts 44 and 46 at the Bridewell Courts, the main "charge sheet courts" for the central Dublin area, although the researchers also observed a week of specially fixed District Court hearings in Courts 7 and 8, across the road from the Bridewell at the Four Courts. During this period, the IPRT recorded details and outcomes for 356 individual defendants. The small sample size of the study naturally urges caution in relation to the results but, given the paucity of available data on sentencing at this level, the IPRT offered this study as a snapshot rather than a complete picture of sentencing practice. It was also considered that the value of the quantitative research would be significantly enhanced by qualitative techniques such as interviews and questionnaires with criminal solicitors and court staff.

The following information was recorded: defendant characteristics such as age; sex; nationality; plea; previous convictions; the offence category; and the sentence. The individual defendant was taken as the unit of study, not the offence. Where defendants were sentenced in respect of many offences, they were coded for the offence related to their most serious sentence. The IPRT also took note of any verbal reasons given by judges at the time of sentencing. The term "verbal reasons" was given a very broad definition—anything from a few casual remarks to elaborate speeches from the bench were recorded—so long as the judge was in some way offering an explanation for imposing a particular sentence.

Findings

The IPRT found that the most common outcome, representing 38 per cent of the defendants sentenced, was a dismissal under s.1(1) of the Probation of Offenders Act 1907, which allows an offender to be left without a conviction. Approximately half of these cases (18 per cent) concerned a simple application of s.1(1), while the remainder were also required to make a contribution to the Poor Box (20 per cent). Heavy use was also made of fines, which were the second most frequent outcome (21 per cent). The third most common outcome was a strike-out, which is in effect a dismissal without prejudice to the re-entry of the matter at a later date, or a dismissal (acquittal). A custodial sentence was imposed in respect of 12 per cent of the study group. Community sentences, however, such as probation bonds (1 per cent) and community service orders (1 per cent), only accounted for a very small proportion of the sample outcomes. In relation to the sex of the sample group, analysis of the defendants in respect of which information was available revealed that a strong majority were male (81 per cent). Defendants were also predominantly in the younger age brackets, with over half of the defendants surveyed being in their 20s (55 per cent) and 83 per cent below the age of 40.⁴

Disappointingly, reasons were given by judges for the sentence imposed in respect of a mere 32 per cent of cases, and this number only climbed to 42 per cent for custodial sentences. An examination of the reasons given by the sentencing judges revealed that judges rarely make explicit connections between custodial sentences and rationales for imprisonment. When judges did speak of rationales, however, they demonstrated no coherent policy. Researchers observed judges in the Bridewell committing offenders to prison for the purposes of incapacitation ("I

can't let you roam the streets"); deterrence ("you need to be taught a lesson"); rehabilitation and retribution.

In their interviews, solicitors voiced concerns about the lack of accountability of District Court judges. It was felt that complaints made to the President of the District Court were largely ineffective. Serious concerns were also raised about perceived inconsistencies in sentences handed down by different District Court judges. The questionnaires and interviews reflected the findings above in that there was a feeling that peace bonds, probation bonds and community service orders are underused by judges. In relation to fines, some solicitors felt that if proper consideration was not given to an offender's means a fine could in effect be a custodial sentence "by the back door". Most of the interviewees also observed that judges rarely explicitly offer reasons for sentencing decisions, even decisions to impose custodial sentences, and that this situation should be remedied. There was a strong consensus that this would result in greater clarity, transparency and consistency in sentencing.

Prison terms

Although the IPRT recorded the imposition of a custodial sentence in respect of 12 per cent of the study group, previous studies conducted by O'Mahony⁵ and Bacik *et al.*⁶ into District Court sentencing have recorded a higher rate of imprisonment at approximately 26 per cent and 20 per cent respectively. The most recent statistics available from the Courts Service suggest a considerably lower rate of approximately 5 per cent of all outcomes, but these statistics use the individual offence rather than the offender as the base unit of study and are therefore not comparable.⁷ It is also interesting to note that males in their 20s received 16 of the 43 custodial sentences recorded. While it is difficult to draw firm conclusions from the research in light of the small number of those sentenced to imprisonment, this finding is consistent with the figures in relation to defendants generally, who were mostly male (81 per cent) and below the age of 40 (83 per cent). The patterns also find a resonance in Bacik *et al.*'s study, which found that defendants appearing before Dublin District Court are overwhelmingly young and male. Analysis of the custodial sentences imposed broken down by offence category revealed some interesting findings, although the very small number of defendants within the assault and drugs categories may have skewed some of the results. Assault convictions led to custodial sentences in the highest percentage of cases (43 per cent) followed by drugs (25 per cent) and property offences (24 per cent). Offenders sentenced in respect of public order offences only made up 6 per cent of those sentenced to imprisonment, a figure which again tallies with Bacik *et al.*'s study.

It is also notable that the custodial sentences imposed were typically for very short periods of six months or less (63 per cent). This reliance on short sentences of imprisonment accords with previous research in the field. Writing in 2001, O'Donnell compared Irish prison profiles with those of other European countries, and observed that

"[in Ireland] the average prison sentence is short (2.5 months). Generally speaking one in every three committals is for less than three months, the majority are for less than six months and three quarters are for less than one year."⁸ This feature of Irish sentencing practice is also borne out by the most recent figures available from the Prison Service on committals under sentence.⁹ As in previous years, the category of sentences of less than three months continued to account for the highest proportion of all sentences, at 38.5 per cent. It barely needs restating that short prison terms are a particularly pointless form of imprisonment, placing a huge strain on penal resources yet with minimal deterrent or rehabilitative effect on the offender.¹⁰ Further, the over-reliance on short sentences calls into serious question the extent to which the principle of detention as last resort, recently given statutory expression in the Children Act 2001,¹¹ is adhered to by judges. The prevalence of short terms of imprisonment would suggest, however, that Ireland is a jurisdiction with great potential for the use of non-custodial sanctions as a means of reducing the prison population.

Community sentences

The results of the study were disappointing in this regard, with only 2 per cent of the offenders surveyed receiving a community sentence of either a probation order or community service order. While again it must be emphasised that these figures are offender rather than offence based, this low figure is in line with court statistics on sentencing in the District Court in the most recent Courts Service *Annual Report* which use the offence as their base unit of study. Only 2,883, or 0.7 per cent, of the 374,944 summary offences and indictable offences dealt with summarily in the District Court in 2003 were finalised by means of a community service order.¹² Community service orders are a practical and cheaper alternative to imprisonment and have been praised for their reparative element and the increased sense of personal responsibility developed by offenders. Further, community service orders tend to be fully performed. In a submission to the Law Reform Commission, the Probation and Welfare Service indicated that the completion rate for the orders was consistently high at 83 per cent.¹³ It is unsurprising, therefore, that both the Law Reform Commission¹⁴ and the Whitaker Committee¹⁵ have recommended the fullest possible use of the community service order. Indeed, the underuse of community service in this jurisdiction can be contrasted with the position in other European countries, such as Finland, which have fully realised its potential as an alternative to custody. In Finland, it is usual that courts convert unconditional prison sentences of up to eight months into community service of between 20 and 200 hours unless there are good reasons for not doing so.¹⁶ This approach, along with other systematic policy choices, succeeded in reducing the Finnish rate of imprisonment from 187 per 100,000 in the 1950s (one of the highest in Western Europe) to 55 in 2000.

The problem is compounded by the fact that the use of community service as a sanction would appear to be in decline. The Expert Group on the Probation and Welfare Service, in its *Final Report*, has observed a significant decrease in the number of community service orders made by the courts since the mid-1990s and attributes this in part to the “perceived lack of suitability of community service for offenders with addictions”.¹⁷ This development appears to have led the Expert Group to recommend that such orders should also be available as a sanction in their own right, thereby removing the requirement that, prior to imposing a community sentence order, a judge must be satisfied that the offence is one which would warrant a custodial sentence.¹⁸ Such a recommendation is surprising in light of the Expert Group’s recognition earlier in the Report of the dangers of “up-tariffing” or “net widening”.¹⁹ This phenomenon can be described as a process whereby successive alternatives to custody simply become alternatives to alternatives, and has proved a significant limitation on the effectiveness of non-custodial alternatives in other jurisdictions. This has the effect of escalating some offenders, such as those who would have received a fine or other lesser sentence, up the sentencing ladder and bringing more people within the “net” of the correctional system. It is salutary to note the English experience in particular. What Ashworth²⁰ has termed the “policy of proliferation”, or the increase in the range of alternative sentences available to the courts, has not met with success in terms of its impact on the use of custody, which has remained unchanged. Increased discretion in the area of community service orders is therefore unlikely to have an impact on the use of custody by the courts, but may instead replace other community penalties such as the probation order or the fine. It is submitted that the removal of this important condition precedent in the legislation should be forestalled in the absence of Irish research on the problem of up-tariffing.

Probation orders or bonds were also under used sanctions. A probation order denotes a conditional discharge on entering into a recognisance to keep the peace and be of good behaviour while under the supervision of a Probation Officer for a fixed period not exceeding three years. Under the Probation of Offenders Act 1907, as amended, such conditions may also be included in the order as the court considers necessary, for example, residence in a certain place.²¹ No research has been conducted into the effectiveness of probation orders in this jurisdiction, but research in England indicates a consistently high rate of completion of over 80 per cent for many years.²² As Ashworth²³ notes, this is probably a more reliable measure of success or failure than the reconviction rate and should be viewed against the considerable social disadvantages experienced by those on probation. Support for such measures within the Probation and Welfare Service itself was also observed by the Law Reform Commission in its *Report on Sentencing*. The Commission noted, “the experience of officers working in the courts is that a significant number of people who are placed on probation do not make further court appearances.”²⁴

In considering how to make optimum use of this alternative, it is interesting to note that the Whitaker Committee recommended, over 20 years ago, that a probation report should be mandatory where a court is contemplating a prison sentence, unless the judge is prepared to state in writing the reasons why it is judged undesirable or unnecessary in a particular case.²⁵ In the view of the Committee, this would “ensure the court was in possession of all relevant facts about the offender and that, therefore, the court’s ultimate disposal of the case would have as much regard for the offender as the offence”.²⁶ While laudable, this would necessarily require expansion and increased funding of the Probation and Welfare Service, which has been beleaguered by resource and staffing shortages for many years now.²⁷ Given that the deficit in staffing of the service has “got worse, not better”²⁸ since the Whitaker Committee reported in 1985, this issue must be addressed as a matter of priority prior to reform in this direction.

Fines

Fines represented a heavily used non-custodial alternative in the IPRT’s study, representing 21 per cent of all recorded outcomes. This figure broadly corresponds with the latest statistics available from the Courts Service, which indicate that fines represent 28 per cent of all sentencing outcomes.²⁹ As the sub-committee on Crime and Punishment has observed, however, District Court judges compare unfavourably to magistrates in England in their use of fines, particularly in respect of indictable offences.³⁰ While the significant use of fines by judges as an alternative to imprisonment is laudable, it should not be forgotten that this sentence currently carries with it the risk of several days imprisonment in default. Indeed, fine defaulters represent a significant percentage of all committals under sentence to prison in any given year. In 2001, for example, 1,204 persons were committed for non-payment of fines, amounting to 23 per cent of all committals.³¹ The risk of custody is considerably increased if the fine imposed is not adjusted according to an offender’s means, a concern which came to the fore during the questionnaires and interviews with criminal solicitors. One solicitor described as “disquieting” situations whereby homeless persons who are fined for a minor offence which does not attract a term of imprisonment are in effect being sentenced to imprisonment on account of their inability to pay. This is particularly disconcerting given the fact that there is an existing statutory obligation on District Court judges under the Criminal Justice Administration Act 1914³² to consider an offender’s means prior to imposing a fine. The sub-committee on Crime and Punishment has expressed concern at the current system of fining and has made a number of recommendations in this regard which are respectfully adopted here. One of the most important is that there should be a full means enquiry in every case where a financial penalty is being considered and, as a general rule, fines should be payable within one year.³³ The committee also

recommended that measures other than imprisonment should be available in the event of default, such as community service or a suspended committal.³⁴ This proposal merits serious consideration in light of the fact that imprisonment is much more severe than the offender's original penalty.³⁵

Inconsistencies

Inconsistencies were observed by IPRT researchers, who witnessed very different outcomes for cases with very similar factual matrices. One researcher summarised his observations, thus:

"A common scenario: a young man in his 20s is convicted of a s.4 public order offence [breach of the peace] in connection with late-night roaring on O'Connell street; he gives no trouble to the gardai and has no previous convictions IPRT observed that [this] typical defendant may, depending on the judge, solicitor, and the atmosphere of the court, receive any of the following: a straightforward application of s.1(1) [of the Probation Act], resulting in no recorded conviction; an application of s.1(1) with a charitable donation of 50, 100 or 200 euro; or a fine with a conviction recorded, ranging from 50 to 400 euro."

The significant point in respect of the above observation is of course the effect on the defendant. For the same minor offence, the penalty ranged from a simple reprimand to a recorded conviction that restricts employment opportunities and may expose an impecunious offender to the risk of imprisonment. This divergence of approach also extended to the amount of the fine or contribution. In relation to defendants convicted of offences under both s.4 (intoxication in a public place) and s.6 (breach of the peace) of the Criminal Justice (Public Order) Act 1994, the highest charitable contribution ordered was €500, ten times higher than the lowest at €50. The impression of inconsistency formed by the IPRT researchers was affirmed in interviews with solicitors who appear frequently in the Bridewell Courts. In relation to dismissals under s.1(1) of the Probation Act 1967, solicitors indicated that judges vary considerably in their criteria of application. For example, some judges felt it should be confined purely to summary matters, such as public order offences, whilst others felt it could also be applied to indictable offences triable summarily such as theft. More generally, the solicitors voiced serious concerns about inconsistencies and noted a marked failure by judges to align their approaches to sentencing as a body. The resultant uncertainty has led to solicitors strategising on behalf of their clients. As one interviewee remarked, "differing practices between judges definitely leads to judge-shopping. Some judges known for leniency end up with busy lists."

Regrettably, no comprehensive research study has been carried out into this important aspect of sentencing practice. Specific studies on particular aspects of the sentencing system, however, shed some light on the problem. Walsh and Sexton's³⁶ study into community service orders, for example, revealed considerable variations between judges both in relation to the average length of community service orders imposed and the average length of the alternative prison term imposed. As Bacik³⁷ notes, this is disturbing in an area where detailed legislative provision already exists and raises questions as to the extent of disparity in other areas which are not similarly regulated. The Law Reform Commission has also observed significant variation in the application of the Poor Box in its recent Consultation Paper on the topic: "[i]t is undoubtedly true that the court poor box is not applied to an equal extent by judges. Some judges do not apply the court poor box at all. Other judges apply it to varying degrees."³⁸ The Law Reform Commission noted two cases reported in the *Irish Times* where co-defendants charged with the same offence received different sentences.³⁹ Some were fined, while others were ordered to contribute to the Poor Box and thus avoided a conviction.

A valuable contribution has also been made to existing research in this area by a study carried out for a recent RTÉ *Primetime* programme on sentencing in the District Court.⁴⁰ The results of the study were collated from over 1,000 provincial newspaper court reports of sentences imposed by various District Court judges in the first half of 2004. While conceding that their methods were "not scientific", *Primetime* found startling disparities between judges in relation to many of the most common sentencing disposals, revealing what criminologist Paul O'Mahony described on the programme as "an intolerable level of inconsistency". Overall, the harshest judge imprisoned offenders in almost 40 per cent of the reported cases, which was 12 times as many as the most lenient sentencer, who imposed a custodial sentence on just over 3 per cent of offenders. Nationally, the average fine for all offences was around €300, but the harshest judge averaged €700, over five times the most lenient whose fines averaged €130. In relation to the Poor Box, the research supported the concerns expressed by the Law Reform Commission, with one judge applying it in 52 per cent of all his reported cases and other judges never using it at all.

The research also served to highlight considerable disparities between judges in different districts, creating an impression of a "geographical lottery". In this regard, *Primetime* examined figures from the Courts Service *Annual Report 2003* which were based on recent computer records from a pilot scheme in Dublin and Limerick District Courts.⁴¹ A comparison of the rates of imprisonment between the two cities, revealed an 80 per cent differential in relation to drink driving and public order offences, which were less likely to attract a custodial sentence in Dublin,⁴² while Dublin judges jailed twice as many offenders for drugs offences.⁴³ Whilst the full scale of the problem cannot be known, the above research provides some much-needed insight into a problem which, as the interviews and questionnaires

revealed, is very familiar to practitioners in the criminal courts. In the absence of any information on sentencing norms, however, and, as will be seen below, a common sentencing rationale, it is difficult to criticise judges for such divergence of approach. It is clear, however, that this is an area which would benefit greatly from further research.

The right to reasons

The research revealed that under half of those offenders imprisoned were given a reason for their detention, resulting in a majority of offenders going from the courtroom to prison without an understanding of the factors motivating the judge's decision. In this regard it should be remembered that the IPRT coded any remark made by a judge in relation to his or her sentencing decision as a "reason".⁴⁴ Some 58 per cent of judges, however, failed to meet even this low standard. This is clearly a highly unsatisfactory state of affairs and one which offends basic principles of natural justice, particularly when the effect of the decision in question is the deprivation of an offender's liberty for a period of up to 12 months.

In the light of the above, it is submitted that the creation of a statutory obligation on District Court judges to give written reasons for a decision to sentence an offender to a term of imprisonment, as recommended by the Law Reform Commission, is overdue. In its 2003 *Report on Penalties for Minor Offences*,⁴⁵ the Law Reform Commission recommended that District Court judges give brief written reasons, outlining the aggravating and mitigating factors influencing the decision, with particular emphasis on why the non-custodial options available to the judge were not appropriate. The Report explored in considerable detail the policy arguments in favour of reasoned decision-making in sentencing such as increased transparency and accountability in sentencing, leading to increased public confidence in the criminal justice system. Most importantly, the Law Reform Commission felt that a duty to give reasons for a decision would lead to more considered legal decisions. In this relation, O'Donnell has remarked, "[it] would force the consideration and reasoned elimination of each alternative measure before a prison sentence was imposed. It is possible that such a process of deliberation would, of itself, reduce the use of imprisonment."⁴⁶ Overall, reasons ensure that justice is both done and seen to be done by the defendant and the community at large. It is noteworthy that in recent years in England and Wales both statute and case-law has imposed a duty to give reasons for sentence in an increasing number of situations. The most significant of these measures is s.1 of the Criminal Justice Act 1991 which requires a judge to specify in open court the criterion upon which a custodial sentence is based and furthermore to explain this to the offender in ordinary language.⁴⁷ Under the Magistrates' Court *Sentencing Guidelines*, magistrates in England are also required to give reasons for sentence.⁴⁸

The second plank of the Law Reform Commission's argument rested on the fact that the recommendation is "merely an aspect of the general constitutional and human rights obligation to give reasons for a decision". In this

relation, it is surprising to note that the constitutional jurisprudence in relation to a judicial duty to give reasons is underdeveloped, with the case-law focusing on the obligation on administrative bodies to give reasons in accordance with the dictates of natural and constitutional justice.⁴⁹ Further, statute has now intervened in the form of the Freedom of Information Act 1997 imposing extensive duties on public bodies to give reasons. In relation to the judicial duty to give reasons, on the other hand, the high-water mark was reached in the Supreme Court case of *O'Mahony v Judge Thomas Ballagh and the DPP*.⁵⁰ In *O'Mahony*, the Supreme Court held that a District Court judge had "fallen into a unconstitutionality" in failing to rule on the submissions made by counsel and to give reasons for his ruling. While the Commission may be correct in their argument that "from this position it is only a few steps further to impose a requirement that the reasons for a judge's decision to impose a custodial sentence are recorded [even in the absence of such submissions]", it seems highly incongruous that administrative bodies are mandated by case-law and statute to give reasons for their decisions while a similar onus is not placed on sentencers making decisions in relation to a citizen's liberty. Ashworth makes the point that "it is a fundamental tenet of natural justice that decision-makers should give reasons for their decision, and the argument is surely at its strongest where the decisions affect the liberty of the subject. The case for reasoned decision in sentencing is therefore unanswerable in principle."⁵¹

Further, the requirements of natural and constitutional justice are now to some extent overlaid by the fair trial provisions of Art.6 of the European Convention on Human Rights. Under s.2 of the European Convention on Human Rights Act 2003, domestic law must be interpreted in the light of this Article and the case-law of the European Court of Human Rights. As noted by the Law Reform Commission, the case-law is quite robust in this area and requires a court to give reasons for its judgment in both civil and criminal matters.⁵² Further, the extent of the duty may vary according to the nature of the decision and the circumstances of the case, so that the more grave the consequences of a decision the greater the obligation to give reasons.⁵³ It follows that in the context of a criminal case where the defendant is in peril of imprisonment, the obligation on a sentencing judge to give reasons must be considerable.

The Commission's proposal has been rejected by the Working Group on the Jurisdiction of the Courts in their *Report on the Criminal Jurisdiction of the Courts*.⁵⁴ The Group's criticisms fall into two broad categories: first, that the imposition of such a duty is unnecessary as "the reasons for a particular sentence will often be apparent ... and in effect the parties will both know and understand the issues", and second, that the recording of written reasons would be both "onerous and time consuming" and therefore quite simply impracticable. With respect, however, these arguments fail to thoroughly convince. As anyone who has paid even a fleeting visit to the District Court will know, the reasons for a decision made in the noisy, pressurised

environment of the District Court will only be obvious to someone who is familiar with the unspoken language of the court. A solicitor or barrister who is managing a busy list, or who is simply indifferent, cannot be relied upon to communicate the reasons for a sentence to his or her client.

Arguments on the grounds of practicality were considered by the Law Reform Commission in its report, but ultimately dismissed on the basis that the right to effective reasons in a case where an individual's liberty is at stake should not be sacrificed at the altar of administrative convenience. It is simply not acceptable to say to offenders "we cannot explain the factors motivating our decision to imprison you in any level of detail (if indeed, at all) because we do not have the staff/time/resources to do so". It should, further, be remembered that a judge would only be required to record the reasons for his or her decision where a custodial sentence was imposed. In the study conducted by the IPRT, this would have meant a brief note of the main aggravating and mitigating factors in approximately one in every eight cases.

Mention should also be made here of the mixed rationales for sentencing observed by the IPRT researchers. References in passing sentence to deterrent, incapacitative, rehabilitative and retributive principles, led the IPRT to conclude that there is no shared understanding among District Court judges as to what prison can accomplish. Mixed motives were also apparent in an earlier survey of judicial attitudes to sentencing conducted by the IPRT,⁵⁵ where District Court judges acknowledged that rationales differed between judges but exhibited a preference for principles of deterrence and incapacitation. The Law Reform Commission, on the other hand, recommended the adoption of a "just desserts" or retributive model of sentencing, which means that the sentence should generally reflect the seriousness of the crime.⁵⁶ Even the Law Reform Commission could not reach unanimity on this issue, however, with a minority favouring a more rehabilitative approach. In the absence of a clear statutory rationale for sentencing or guidance from the appellate courts on this central problematic, it is difficult to see how issues discussed above such as inconsistency and the appropriate use of alternatives to custody can be fully addressed.

Recommendations

In light of the above, the IPRT makes the following recommendations:

- The fullest possible use should be made of existing measures such as community service orders (CSOs) and probation orders. This should be facilitated by increased resourcing of the Probation and Welfare Service. With a progressive strengthening of the Service, consideration should also be given to the introduction of a requirement that a probation report must be obtained by a judge prior to imposing a custodial sentence.

- In light of the problem of up-tariffing, research into sentencing practices is needed prior to the expansion of alternatives to custody or significant alterations to the existing scheme, such as those proposed by the Expert Group of the Probation and Welfare Service in relation to community service orders. It is important to distinguish reliance on non-custodial alternatives from mere proliferation of such sanctions. As shown in countries such as Finland, a small group of standard penalties with powers of substitution may prove more effective.
- In line with the recommendations of the sub-committee on Crime and Punishment, there should be a *full* means enquiry in every case where a financial penalty is being considered and, as a general rule, fines should be payable within one year. Consideration should be given to imposition of a CSO or suspended sentence as a response to default on payment of a fine.
- Further research to "remove the dragons" in relation to sentencing practice in the District Court should be commissioned, particularly research into inconsistencies in sentencing.
- The creation of a sentencing database and a set of non-statutory guidelines to assist judges with sentencing merits serious consideration, as recommended by the Law Reform Commission in its *Report on Sentencing*.
- District Court judges should be required under statute to give written reasons for a decision to sentence an offender to a term of imprisonment, as recommended by the Law Reform Commission in its *Report on Penalties for Minor Offences*.

¹ See, e.g. the comments of Finlay C.J. in *People (DPP) v Tiernan* [1989] I.L.R.M. 149 at 152; Law Reform Commission *Report on Sentencing* (LRC 53-1996), pp.33-35; O'Malley, *Sentencing Law and Practice* (Round Hall Sweet & Maxwell, Dublin, 2000), p.xiii; and Bacik, "The Practice of Sentencing in the Irish Court" in O'Mahony, *Criminal Justice in Ireland* (2002, IPA), p.348.

² Brewer, Lockhart and Rodgers, *Crime in Ireland 1945-1995: Here Be Dragons* (Oxford, Clarendon Press, 1997).

³ Original research conducted by Aaron Hunter and Emma Ward. Research report subsequently prepared by Aaron Hunter. For a synopsis see IPRT Newsletter Winter 2005, available at www.iprt.ie.

⁴ Four per cent of offenders were in their teens; 24 per cent were in their 30s; 10 per cent were in their forties; 5 per cent in their fifties; and 2 per cent were 60 years of age or above.

⁵ O'Mahony, *An Investigation of the Operation of the Bail System* Unpublished Report for the Minister for Justice, 1996.

⁶ Bacik, Kelly, O'Connell and Sinclair "Crime and Poverty in Dublin: An Analysis of the Association between Community

- Deprivation, District Court Appearance and Sentence Severity" in Bacik and O'Connell (eds), *Crime and Poverty in Ireland* (Round Hall Sweet and Maxwell, Dublin, 1998).
- ⁷ Courts Service *Annual Report 2003* (Stationery Office, Dublin), p.103. The number of cases which resulted in imprisonment was 17,880 out of an overall total of 374,944.
- ⁸ O'Donnell "Prison Matters" *Irish Jurist* (NS) Vol.36 (2001) 153 at p.164.
- ⁹ Committal figures are used as an indicator of the extent to which the courts exercise the option of a custodial sanction.
- ¹⁰ See, e.g. the comments of the sub-committee on Crime and Punishment of the Joint Committee on Justice, Equality, Defence and Women's Rights *Report on Alternatives to Fines and the Uses of Prison* (Stationery Office, Dublin, 2000), which states at para.38: "there is little evidence that a high use of imprisonment makes society safer or people less fearful. At best it provides a temporary measure of protection through incapacitation. Short terms of imprisonment are particularly unsatisfactory as they do not even allow time for prisoners to take advantage of educational or other programmes that might be offer within an institution."
- ¹¹ Children Act 2001, s.96.
- ¹² Courts Service, *op.cit.*, p.103.
- ¹³ Law Reform Commission *Report on Sentencing* (93-1996) at p.50. Statistical information based on the submission of Martin Tansey, Principal Probation and Welfare Officer, 28/7/93.
- ¹⁴ *ibid.* at p.54.
- ¹⁵ *Report of Committee of Inquiry into the Penal System* (Stationery Office, Dublin, 1985). See also Keynote address of T.K. Whitaker, "Alternatives to Custody: An Overview" presented at the Alternatives to Custody Conference held in Dublin on April 7-8, 1988.
- ¹⁶ See further International Centre for Prison Studies "Submission to the Independent Inquiry into Alternatives to Custody sponsored by the Esmée Fairburn Foundation" (September 2003) at p.4 and Annex.
- ¹⁷ Expert Group on the Probation and Welfare Service *Final Report* (Stationery Office, Dublin, 1999) at para.2.4.
- ¹⁸ Criminal Justice (Community Service) Act 1983, s.2.
- ¹⁹ Expert Group on the Probation and Welfare Service, *op.cit.*, at para.1.8.
- ²⁰ Ashworth, *Sentencing and Criminal Justice* (3rd ed., Butterworths, 2000), p.269.
- ²¹ Criminal Justice and Administration Act 1914, s.8.
- ²² Ashworth, *op.cit.*, p.283.
- ²³ *ibid.*
- ²⁴ Law Reform Commission *Report on Sentencing* (93-1996) at p.56. Information in the Report was grounded on an address given by Emer Hanna, Senior Probation and Welfare Officer, Department of Justice, to the Dublin Solicitor's Bar Association on April 15, 1994.
- ²⁵ *Report of Committee of Inquiry into the Penal System* (the "Whitaker" Report) (Stationery Office, Dublin, 1985).
- ²⁶ *ibid.*, paras 5.24-5.25.
- ²⁷ See further O'Dea "The Probation and Welfare Service: Its Role in Criminal Justice" in P. O'Mahony, *Criminal Justice in Ireland* (IPA, 2002) pp.640-642.
- ²⁸ *ibid.* at p.641.
- ²⁹ Courts Service, *op.cit.*, p.103.
- ³⁰ Sub-committee on Crime and Punishment of the Joint Committee on Justice, Equality, Defence and Women's Rights *Report on Alternatives to Fines and the Uses of Prison* (Stationery Office, Dublin, 2000) at para.14.
- ³¹ Irish Prison Service *Annual Report 2001* (Stationery Office, Dublin) at p.8.
- ³² Section 43 of the 1914 Act provides:
"[A] court of summary jurisdiction, in fixing the amount of any fine to be imposed on an offender, shall take into consideration, amongst other things, the means of an offender so far as they appear or are known to the court."
- ³³ Sub-committee on Crime and Punishment of the Joint Committee on Justice, Equality, Defence and Women's Rights, *op.cit.*, para.17.
- ³⁴ *ibid.*, para.24.
- ³⁵ For an interesting discussion on the interaction of desert rationales in sentencing and back-up sanctions in the event of default, see Wasik and Von Hirsch "Non Custodial Penalties and the Principle of Proportionality" in Von Hirsch and Ashworth (eds), *Principled Sentencing* (Hart Publishing, Oxford, 1998), p.279.
- ³⁶ Walsh and Sexton, *An Empirical Study of Community Service Orders in Ireland* (Government Publications, Dublin, 1999).
- ³⁷ Bacik "The Practice of Sentencing in the Irish Court" in O'Mahony, *Criminal Justice in Ireland* (IPA, 2002), p.362.
- ³⁸ Law Reform Commission *Consultation Paper on the Court Poor Box* (CP 31/2004) at p.45.
- ³⁹ *ibid.* at p.45-46. The first case concerned "two individuals who had been involved in a rally of four cars travelling at almost 120 miles per hour late at night. One of the drivers had been disqualified from driving for three years and fined £400. Another of the drivers (who had appeared before a different District Court judge) was merely ordered to pay £400 to charity and his case was adjourned for ten months with a view to avoiding the necessity for a conviction." (*Irish Times*, November 22, 2000). The second case involved "eight persons charged with the same offence, four were convicted of the offence and each was fined £300 while the other four each contributed £500 to the court poor box and, thus, avoided a conviction." (*Irish Times*, August 5, 1999 (letter from Patrick J Brennan (retired District Court Judge) to the Editor).
- ⁴⁰ I am indebted to the presenter of the RTÉ *Primetime* programme, Mike Milotte, for this information. The statistical information contained in this article is based on extracts from the script of *Primetime* "Judging Judges" December 13, 2004.
- ⁴¹ See, Courts Service *Annual Report 2003* (Stationery Office, Dublin). Criminal Case Tracking System statistics are at pp.104-111.
- ⁴² Dublin judges imprisoned offenders at a rate of 25 for every 1,000 convicted. In Limerick the rate was 45 per 1,000. Limerick judges imprisoned 22% of those convicted of public order offences, Dublin judges just 12% per cent.
- ⁴³ Dublin imprisoned 20% of those convicted, double Limerick's rate of 10%.
- ⁴⁴ The Council of Europe has defined a reason as follows "[A] motivation which relates the particular sentence to the normal range of sentences for the type of crime and to the declared rationales for sentencing." Council of Europe *Consistency in Sentencing, Recommendation No. R (92) 17* Strasbourg October 19, 1992, Recommendation E.2.
- ⁴⁵ Law Reform Commission *Report on Penalties for Minor Offences* (69-2003), March 2003, at Chap.3.
- ⁴⁶ O'Donnell "Judges need to explain why sentence fits the crime" *Irish Times*, December 13, 2004.
- ⁴⁷ There are three possible criteria under the 1991 Act. First, that the offence, or the combination of the offence and one other offence associated with it, was so serious that only such a sentence can be justified for the offence (s.1(2)(a)); second, where the offence is a violent or sexual offence, that only such a sentence would be adequate to protect the public from serious harm from the offender (s.1(2)(b)); and third, that the offender refuses to give his/her consent to a community sentence which is proposed by the court (s.1(3)). This section is now consolidated in s.79 of the Powers of the Criminal Courts Sentencing Act 2000.
- ⁴⁸ The Magistrates' Association *Magistrates' Court Sentencing Guidelines* (The Magistrates Association, 2000).
- ⁴⁹ See, e.g. *State (Creedon) v Criminal Injuries Compensation Tribunal* [1988] I.R. 51.
- ⁵⁰ Supreme Court, December 13, 2001 (*Irish Examiner Law Report* January 28, 2002).
- ⁵¹ Ashworth, *op.cit.*, p.305.
- ⁵² See, e.g. *Hiro Balani v Spain* (1994) 18 E.H.R.R. 481. See also Law Reform Commission, *op.cit.*, pp.45-47.
- ⁵³ *Ruiz Torifa v Spain* (1995) 19 E.H.R.R. 553; *Georgiadis v Greece* (1997) 24 E.H.R.R. 606.
- ⁵⁴ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Stationery Office, Dublin, 2003.)
- ⁵⁵ B. Vaughan, *The Judiciary and the Penal System* (Dublin: Irish Penal Reform Trust, forthcoming).
- ⁵⁶ Law Reform Commission *Report on Sentencing, op. cit.*