Making Progress with Penal Reform

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For some time the prospects for penal reform have been undermined by a sense of pessimism about the possibility of reversing a steady upward trend in prisoner numbers. While the scale of imprisonment is not excessive by international standards, what sets Ireland apart is the rapidity of change, especially over the past five years. This rapid growth has been accompanied by a lack of imagination concerning how best to deal with crime and its consequences, conditions that have created the regrettable situation where more people are being sent to prison for longer but the public feels no safer.

Until recently the proposed solution centred on expanding capacity, epitomised by the plans – now shelved – for Thornton Hall, an excessively large prison at an inappropriate location in north county Dublin. This expansionist approach was wrongheaded for several reasons. First, it placed an exaggerated emphasis on imprisonment as the default sanction, to the detriment of probation and community service; an approach that was at odds with the

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1 The prison population has doubled in two decades, from a daily average of 2,185 in 1992 to 4,318 in 2012. See O’Donnell, I., O’Sullivan, E. and Healy, D. (2005) Crime and Punishment in Ireland 1992-2003: A Statistical Sourcebook, Dublin: Institute of Public Administration, at 155; Irish Prison Service (2013) Annual Report 2012, Longford: IPS, at 15. It is important to bear in mind that these figures undercount the total number of sentenced prisoners as they do not include persons on Temporary Release (TR) who are serving their sentences in the community. (There were 732 prisoners on TR on 15 May 2013.) Taking account of the substantial immigration that characterised this period, the change in the rate of imprisonment per 100,000 population is less marked; up from 61 in 1992 to 93 in 2012.

2 For up-to-date comparative data on imprisonment see the World Prison Population Brief maintained by the International Centre for Prison Studies at the University of Essex (http://www.prisonstudies.org/info/worldbrief/). Figures from the Irish Prison Service show that the number of committals increased from 11,934 in 2007 to 17,318 in 2011, before dropping slightly to 17,026 in 2012 (Annual Report 2012, at 44).

recommendations of numerous review groups. Second, it saddled the taxpayer with a substantial financial burden; to keep one person in custody for a year costs over €65,000. Third, it failed to recognise the very real capacity that politicians possess to place limits on the size of the prison population.

In this context the decision by the Joint Committee on Justice, Defence and Equality to signal that a fundamental change of direction is required is most welcome. The Joint Committee unanimously accepted the report of a Sub-Committee on Penal Reform which had been created to analyse the recommendations of the Thornton Hall Project Review Group. The latter body had been set up by the Minister for Justice, Alan Shatter, to examine the need for additional prison capacity and, specifically, to advise whether the Thornton Hall development should proceed as originally envisaged.

The Sub-Committee consulted widely and worked quickly, producing its final report within 18 months of its establishment. The submissions made to the Sub-Committee suggested the existence of a strong degree of consensus about what needed to be done, namely: to reduce prisoner numbers by reserving prison for the most serious (or dangerous) offenders; to minimise the harms that incarceration causes to those in custody and to their families outside; to keep prisoners in decent conditions and for no longer than necessary to meet the demands of punishment and reform; and to deal with as many offenders as possible in the community.

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4 Examples include the Whitaker Committee (1985), the Expert Group on the Probation and Welfare Service (1999), and the Sub-Committee on Crime and Punishment (2000). Also of relevance here are Council of Europe recommendations on prison population inflation (1999) and community sanctions (2000).

5 Irish Prison Service, Annual Report 2012, at 19. This figure, which is high in international terms, has fallen from €97,700 in 2007 (Irish Prison Service, Annual Report 2007, at 30); the average costs being driven down by a combination of rising prisoner numbers and reduced overtime payments to prison officers.


8 The chairman of the Sub-Committee was Deputy David Stanton and its rapporteur was Senator Ivana Bacik. Full transcripts of the public hearings are published as Appendix 5 to the final report.
After due deliberation the Sub-Committee accepted the need for a policy of decarceration. There have been calls in the past for a cap to be placed on prisoner numbers, but a declared intention to shrink the prison population is novel.\textsuperscript{9} In its first recommendation, the Sub-Committee went further than simply expressing an aspiration that the prison population be reduced. It stated the size of the desired reduction (one third) and the timeframe over which it should be achieved (10 years).\textsuperscript{10} This ambitious target was based on an assessment that the prison population had been allowed to drift upwards to a politically unacceptable level and that decisive action was required to halt, and then reverse, this momentum.

The Sub-Committee drew inspiration from the experience of Finland, a country where a political consensus emerged that prison was overused and this was followed by the adoption of a widely-admired policy of decarceration.\textsuperscript{11} The Finns have been resolute in their determination to reserve prison for the most serious offenders. When an individual is deprived of their liberty the emphasis is on keeping the sentence short; holding them in humane conditions, where insofar as is compatible with the requirements of security and control they retain responsibility for their daily lives; and making adequate arrangements for their release.

Given differences in national culture and criminal justice arrangements it would be too much to expect that the Finnish model could simply be transplanted to Ireland and have similar effects. Sentencing, for example, is much more lenient in Finland,\textsuperscript{12} expert involvement in

\textsuperscript{9} In 1994, the Department of Justice argued for a “limitation policy” advocating a ceiling of 2,200 to 2,300 on the number of offenders in custody (\textit{The Management of Offenders: A Five Year Plan}, at 31-32).

\textsuperscript{10} \textit{Report on Penal Reform}, at 13

\textsuperscript{11} For detailed accounts of the distinctive features of Nordic approaches to criminal justice see Tonry, M. and Lappi-Seppala, T. (2011) (eds.) \textit{Crime and Justice in Scandinavia}. Crime and Justice: A Review of Research, Vol. 40. Chicago, Ill: University of Chicago Press. In 1960 the imprisonment rate per 100,000 population was 164 in Finland and 16 in Ireland but by 2013 the situation had been dramatically reversed with rates of 60 and 93 respectively (\textit{Report on Penal Reform}, at 12).

\textsuperscript{12} For example in 2006 most convicted rapists in Finland did not go to prison and those who did served sentences of 24 months on average (Aebi, M.F. et al (2010) \textit{European Sourcebook of Crime and Criminal Justice Statistics – 2010}, 4\textsuperscript{th} edition, Netherlands Ministry of Justice, Research and Documentation Centre (WODC), at 222, 261). Clearly, both the rate and duration of incarceration are low by Irish standards.
Policy making is more highly valued there, and media coverage of law and order issues is more subdued, with most newspapers purchased on subscription and so not competing for potential readers at the newsstands with sensational headlines. But the crucial lesson is that politicians can be effective agents of penal reform once they determine that this is in the national interest.

It is refreshing to see Irish legislators turn to other small European countries for new ideas in matters relating to criminal justice. Far too often in the past England and the US were selected as points of reference on account of a shared language, common legal tradition and close historical ties. But these are not good countries to emulate when it comes to penal policy. Their prison populations have surged to unprecedented levels and remain stubbornly high and their elected representatives have made law and order such hot political issues that the fear of being perceived as soft on crime acts as a major brake on progress. Attitudes towards offenders have hardened to a point where minimum standards are derided as unacceptably luxurious.

The situation in Ireland has deteriorated, but not this far, and the report of the Sub-Committee sets out a clear marker that further deterioration should not be countenanced. To this end it makes five recommendations that, taken together, constitute an important change of focus. The first of these, as noted above, is that the government should adopt a strategy of

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15 One example is the tendency to decry the prison diet as superior to that available to the hard-working and law-abiding taxpayer who struggles not only to earn enough to buy the ingredients for family meals but also to find the time to prepare and share them. See O’Donnell, I. and Jewkes, Y. (2011) ‘Going home for Christmas: Prisoners, a taste of freedom and the press,’ Howard Journal of Criminal Justice, 50/1: 75-91.
decarceration. This is an emphatic statement of confidence in the ability of politicians to moderate the penal climate.

The second recommendation is that community service should be substituted for prison terms of less than six months that have been imposed for non-violent offences.16 Short sentences are hugely disruptive for those concerned and do not allow sufficient time for meaningful sentence planning. It would make sense to punish such individuals in the community where they could make reparation for the harms they caused, continue to play a role in the lives of their families, and be connected with an appropriate range of treatment options. There are obvious implications here for the role of the District Court where short prison sentences are commonly awarded, and resistance can be anticipated unless the judiciary is persuaded of the logic of this position.17

The third recommendation is that the standard rate of remission should be increased from one quarter to one third, with a possible further increase to one half for certain categories of prisoner, in particular first-timers.18 The first limb of this recommendation could be given swift effect as the Prison Rules 2007 permit an enhanced rate of remission for prisoners who behave well and reduce the level of risk they pose.19 This provision has only been employed in a handful of cases and has clear potential for wider application. Special allowance for first-


17 In 2003 the Law Reform Commission recommended that, prior to imposing a prison sentence, District Court judges “should be required to give concise, written reasons” as well as recording “the aggravating and mitigating factors which influenced the decision with particular emphasis on why the non-custodial options available to the judge are not appropriate” (Report on Penalties for Minor Offences, Dublin: LRC, at 50). This recommendation was less than enthusiastically received by the judges at whom it was aimed.


19 Rule 59 (2) states that: “The Minister may grant such greater remission of sentence in excess of one quarter, but not exceeding one third thereof where a prisoner has shown further good conduct by engaging in authorised structured activity and the Minister is satisfied that, as a result, the prisoner is less likely to re-offend and will be better able to reintegrate into the community.”
time offenders also merits consideration as the recidivism rate is lower for this group and their prospects for successful re-integration are better.20

The fourth recommendation is that a modern legislative framework should be provided for all forms of early release, including parole. A statutory overhaul of this kind is long overdue and has been called for regularly during the past 30 years. A recent review showed that life sentence prisoners today spend more than a decade longer in prison than their counterparts who were released in the early 1980s, and concluded that the lack of attention to the plight of the long-term prisoner had created a context where “benign neglect has had malign effect.”21

The fifth recommendation is that there should be a rebalancing of the system so that greater use is made of open prisons than is the case at present and all prisoners are held in sanitary and uncrowded conditions that are not an affront to human dignity and a threat to bodily integrity.22 Many prisoners in Ireland are incarcerated at levels of security that are not warranted on the basis of the escape risk they pose.23 This has the unfortunate consequence that they are denied a phased restoration of liberty as part of their preparation for release. There is also a serious safety problem in closed institutions where prisoners are often so fearful that they ask to be held apart from their peers, under what can amount to 23 hour a day lock-up.24

22 There has been progress in this regard, especially in Mountjoy prison in Dublin, where it is expected that the disgusting practice of slopping out will finally have been abandoned by September 2013.
23 In 2012, just 5 per cent of men – and no women – were held in open prisons (calculated from Annual Report 2012, Appendix IV, at 43).
24 A snapshot of the prison population on 30 November 2012 showed that there were 889 prisoners under protection, amounting to one in five of the entire prison population (Irish Prison Service, Annual Report 2012, at 15)
Were they to be adopted these five recommendations would lead to significant cost savings over time. They are pragmatic, evidence-based, and serve the interests of justice. This combination of virtues does not guarantee implementation, but it places the onus on those who might oppose a change of direction to come up with coherent arguments for their position rather than lapsing into the vacuous sloganising that so often characterises debates in criminal justice.

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

There is one obvious danger. This is that the government will delay taking action until other deliberative processes that are currently underway, such as the strategic review of penal policy (scheduled to conclude by mid-2013, but unlikely to be able to cover the ground adequately by this date given the wide-ranging terms of reference) and the drafting of a White Paper on crime (already in arrears), have come to a conclusion. Such a scenario

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25 When the Department of Justice and Equality announced the composition of the working group on 18 September 2012 it defined the parameters of the strategic review it was to conduct in very broad terms, namely, to take into account: “relevant work already carried out in this jurisdiction and elsewhere; the rights of those convicted of crimes; the perspective of those who are victims of crime; and the interests of society in general; and shall make recommendations as how a principled and sustainable penal system might be further enhanced taking into account resource implications, Constitutional imperatives and our international obligations. In the context of that review, the Group shall include in particular an examination and analysis of: (i) the role of penal policy in crime prevention; (ii) sentencing policies; (iii) alternatives to custody; (iv) custodial accommodation and regimes; (v) reintegration and rehabilitation; (vi) any special issues relating to female offenders and prisoners.” To meet such ambitious targets would require a substantial parallel research programme but this was not initiated.

26 The publication of a White Paper on crime was promised for 1998 and remained a priority for several years but resulted in no published outputs (see O’Donnell, I. (2008) ‘Stagnation and change in Irish penal policy,’
should be avoided. The Sub-Committee has charted a sensible route out of a difficult situation. Further drift is in no-one’s interest.

Irish society has become preoccupied with its history of coercive confinement.\textsuperscript{27} Particular attention has been given to the excessive incarceration of women and children, generally in institutions that operated outside of the criminal justice system.\textsuperscript{28} The focus today is on rising prisoner numbers and the wider ramifications of allowing an unacceptable trend to continue, unchecked. The value of the Sub-Committee’s report is that it draws our collective attention to the importance of taking action now rather than waiting to bemoan our inaction later.

\textit{Howard Journal of Criminal Justice,} 47/2, 121-133, at 126). The process was resuscitated in January 2009 and the emergence of the White Paper, now overdue, is awaited.
