Briefing on Penal Reform and Community Sanctions,
Leinster House, 31 March 2010

Remarks made by Professor Ian O'Donnell,
Director of the UCD Institute of Criminology

My comments today are limited to two themes, each of which addresses a key concern of this meeting, namely to think about ways of reducing our dependence on imprisonment without placing the population at risk; whether the risk is thought of in terms of additional criminal victimisation or increased expense. Crime and punishment do enough harm and cost enough money as it is. It is hardly controversial to suggest that the €93,000 we spend on every prison place every year could be better spent in numerous ways that are more beneficial to offenders, victims, families and communities.

Involving Judges

The first of my themes relates to what might be called 'front-end' criminal justice strategies. The recent position paper on community sanctions focuses on this aspect of the criminal justice system, i.e. how to keep people out of custody.[1] There are dangers here of what criminologists call 'net widening'. In other words, extending the range of available penalties might draw people into the system who otherwise would be dealt with outside it. Also, if the measures are too stringent, people can end up in prison for failing to comply with them, thereby inflating the prison population rather than reducing it. These possibilities must be guarded against.

When considering front-end measures I believe that the discussion could be developed in one important way. This is by getting judges involved in it. Given that the bulk of those committed to prison each year receive short sentences at the District Court – most prisoners most years are given less than six months – it is this sector of the judiciary that has most to offer.

[1] Irish Penal Reform Trust, *Community Sanctions*, Position Paper 8. January 2010.

In an attempt to uncover the principles that animate judicial decision-making a study recently completed at the UCD Institute of Criminology revealed the existence among judges of a strong belief in the capacity of individuals to redeem themselves.[2] They were prepared to suspend prison sentences, or adjourn cases that could have led to a custodial sentence, in order to give the defendant an opportunity to demonstrate willingness to reform. The guilty party was regularly offered a second chance, putting the onus on them to change. The Probation Act and the court poor box were used to enable first-time or minor offenders walk away without a conviction. This is particularly important given the lack of expungement provisions for adults; when the slate cannot be wiped clean, acquiring a conviction for a minor matter can have disproportionate, lifelong consequences.

Despite favouring a rehabilitative model, judges did not often impose community-based sentences, which would have compelled offenders to engage, under supervision, with formal support services. While this could indicate a lack of faith in the utility of probation, there are other possible explanations. It may be that judges believed that intensive intervention was not appropriate for the kinds of cases that are dealt with in the District Court, or reflect the unavailability of suitable programmes in the area, or indicate a belief that meaningful change cannot be imposed, but must come from within.

Judges in Ireland enjoy wide discretion when sentencing. While this ensures that sentences can be tailored to individual circumstances, it can also lead to different outcomes for similar cases. The resultant disparities and inconsistencies can be difficult to interpret and, on occasion, give rise to concern and controversy. The UCD Institute of Criminology study that I have described suggests that these variations are rooted, to some extent at least, in an optimistic view of human nature; that people contain within themselves the seeds of their own redemption. This is to be welcomed.

However, this tendency coexists with a heavy use of custody for minor offences. Most years more prison sentences are imposed than probation supervision and community service combined. This is the reverse of what could reasonably be expected to be the

[2] Deirdre Healy and Ian O'Donnell, 'Crime, consequences and court reports', *Irish Criminal Law Journal*, 20(1): 2-7. March 2010.

case. In other countries with similar legal arrangements to our own community penalties outnumber prison sentences.

Also – and importantly – the use of imprisonment varies considerably by District Court area, a pattern that might suggest an element of what could be described as 'justice by geography'. Looking at some figures from annual reports of the Courts Service it can be seen that 10 per cent of public order / assault convictions dealt with by the District Court across the country led to imprisonment. But this varied from 2 per cent in one area to 25 per cent in another. For offences of theft the national average imprisonment rate was 18 per cent, but again there was significant local variation, ranging from 11 to 31 per cent. It is possible that this reflects more serious kinds of stealing and fighting in certain parts of the country, or a different approach taken by particular judges, or a mixture of both.

There is potentially a positive message to be drawn from this situation. The variation in sentencing practice might offer a route to reform in that a judiciary that holds to a view of the individual offender as having the potential to change his or her ways could be encouraged to embrace, in a more systematic fashion, the possibilities offered by community sanctions and measures.

Achieving Change

My second theme is that discussions about crime and punishment tend to have a circular feel to them. Numerous reports over the past twenty-five years have recommended rebalancing the system away from the prison and towards better use of fines and community sanctions. What is striking is the extent to which the same recommendations are restated and all the while the prison population continues to rise. It is probably fair to say that there is a reasonable degree of consensus about what needs to be done; namely, reserving prison for the most serious (or dangerous) offenders, trying to minimise the harms that it causes to them and their families, while dealing with all other offenders in the community as efficiently and effectively as possible. The problem is generating momentum behind the reform agenda. Despite a consistent line advocating a shift away from prison that has been taken over a long period of time, the prison population has continued to grow steeply.

There is one report that I thought it might be appropriate to review at this juncture. This is the one produced by the Sub-Committee on Crime and Punishment.[3] I single out the work of this body for three reasons. *First*, it was a parliamentary committee so it shows the kind of direct contribution that elected representatives can make to debates about law and order. *Second*, this month marks the tenth anniversary of the report's publication. *Third*, the issues that the report dealt with – alternatives to prison and more efficient use of fines – and the recommendations made, remain pertinent. This raises the critical question about how to translate into action, recommendations that have achieved a measure of consensus.

So what was the Sub-Committee's report about? What was the position taken by Oireachtas members a decade ago on the issues that we are considering today? Here are half a dozen of the key observations, conclusions and recommendations, none of which are less relevant now than they were then.

> 1. Greater recourse to imprisonment is not the only way in which the problem of crime can be addressed.
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> 2. Those without financial means are more likely to receive an immediate sentence of imprisonment than a fine.
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> 3. Widening the range of enforcement options and requiring courts to consider them all before imposing a penalty for non-payment is likely to yield results. Before a sanction for non-payment can be imposed, all of the available enforcement measures should be considered by the courts.
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> 4. A package of measures should be formulated to increase the use of fines and reduce the number of fine defaulters going to prison.
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> 5. The number of prison places 'required' to protect society is to a large extent a political calculation and, despite popular belief to the contrary, imprisonment rates have a very small impact on crime rates and can be lowered significantly without exposing the public to serious risk.
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> 6. Statistical models should be designed to show how many prison spaces would be required under different sets of prevailing conditions, based on a detailed analysis of sentencing practice around the country.

[3] 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*. March 2000.

The Sub-Committee noted that Ireland was in the happy situation of lagging behind other countries which have experimented with increased use of imprisonment. It recommended that the opportunity should be used to ensure that we learn from other countries' mistakes and 'design out' of Irish penal policies unintended but foreseeable consequences.

Concluding Thought

Finally, I would like to say something about why meetings like this are so important. The language that politicians use has a major impact on how citizens perceive the crime problem and how anxious they feel about it. Countries where political parties have played the law and order card have paid dearly in terms of bigger prison populations, longer sentences and increased public apprehension. This is particularly true of the US and England where we so often look for inspiration. Tough political rhetoric has real consequences: public fears are stoked, there is increasing recourse to the prison without acknowledgement of its collateral harms, families are broken up, the fabric of communities is sundered and victims' needs go unaddressed.

We need to look elsewhere for fresh ideas and to capitalise on existing strengths. These strengths include judges who are open to the possibility of redemption and politicians who have sometimes shown commendable restraint when it comes to setting the tone of the debate about crime and punishment. The Sub-Committee report that I mentioned is a good example of this. From time to time, of course, usually in response to heinous crimes, strong language is used and draconian measures are called for. These are not always introduced and if they are, they do not always have the desired effect.

The challenge is to create a context where citizens believe the penal system to be legitimate and trust legislators and policy makers to formulate rational and effective policies; and where legislators and policy makers are confident enough to challenge the centrality of the prison at every opportunity. Getting this right is extremely difficult but vitally important.

Professor Ian O'Donnell, UCD Institute of Criminology, Belfield, Dublin 4
Tel: (01) 716 8733; Fax: (01) 716 8723; Email: ian.odonnell@ucd.ie