



IPRT Submission to Oireachtas Special Committee on COVID-19 Response

1st September 2020

Introduction

The Irish Penal Reform Trust (IPRT) is Ireland's leading non-governmental organisation campaigning for the rights of everyone in the penal system and for the progressive reform of Irish penal policy. For 26 years, IPRT has been promoting policies that make communities safer, based on the evidence of what works to prevent and reduce offending and reoffending. Our vision is of a penal system that is just and humane; that protects and promotes human rights, equality and social justice; and that only uses prison as a sanction of last resort.

The Irish Penal Reform Trust (IPRT) welcomes the present opportunity to make a submission to the Oireachtas Special Committee on COVID-19 Response in response to the following:

- (1) *“how the State’s legislative framework contributed to an effective response to the current crisis;*
- (2) *how this compares to the use of statutory frameworks in other jurisdictions;*
- (3) *how the legislative framework might be improved upon to deal with similar major events in the future and the constitutional/legal risks that should be considered in this context;*
- (4) *how well statutory Instruments/regulations, as opposed to guidelines and public health advice, were communicated to those who needed to be aware of them, the methods used and how this compares to the practice in other jurisdictions.”*

In considering how our contribution can assist the Committee, we have focused on the following areas:

- 1. Prioritising social measures over penal measures during a pandemic**
- 2. Minimising the use of imprisonment as a sanction during a pandemic**
- 3. Ensuring equal access to justice in remote court hearings**
- 4. Strengthening inspection and oversight of all places of detention**
- 5. Protecting against the negative effects of prolonged isolation on mental health**
- 6. The role of parliamentary committees in promoting human rights during a pandemic**

1. Prioritising social measures over penal measures during a pandemic

Communities marked by social and economic marginalisation and exclusion are over-represented in the penal system¹. The introduction of any new criminal offences designed to regulate public behaviour during the pandemic is likely to impact disproportionately on certain groups, and further compound cycles of disadvantage. While the general deterrent effects of sentencing depend on awareness of sanctions and rational decision-making,² Penal Reform International (PRI) has identified that some public health measures, such as quarantine, can have adverse consequences for people in precarious low-paid employment.³ In particular, penalising people who are homeless⁴ or who have mental health issues, addictions or disabilities for failing to adhere to public health regulations would be both unfair and largely ineffective. Therefore:

“In cases of emergency the presumption of innocence is paramount. States must ensure social measures are in place to support those most at need, before taking any possible penal measure.

Furthermore, imprisonment should only be a last resort measure and any judgement should take into account the conditions and the reasons for which the particular individual had to violate a protective measure ordered.”⁵

To this end, investment in public healthcare and in community-based services that support people to meet public health guidance must take priority over the introduction of new offences and penalties.

Recommendation:

1.1. Any penalties for the breach of COVID-19-related laws should adhere to the principle of proportionality, consist of non-custodial measures to the greatest possible extent, and take account of the particular risks posed by a prison sentence or pre-trial detention (Penal Reform International).⁶

2. Minimising the use of imprisonment as a sanction during the pandemic

In spring 2020, the devastating effect of outbreaks of COVID-19 in residential congregational settings was witnessed in care settings across Ireland, and in particular nursing homes. By contrast, the success of the Irish Prison Service (IPS) in keeping prisons largely free of COVID-19 was achieved through early preventative planning and action, and a reduction in over-crowding through the structured release of 10% of the prison population. This was supported by amendments to the criteria for consideration of temporary

¹ Irish Penal Reform Trust (2012) *The Vicious Circle of Social Exclusion and Crime: Ireland's Disproportionate Punishment of the Poor*, available at: https://www.iprt.ie/site/assets/files/6264/position_paper_final.pdf

² For a recent summary of deterrence theory, see: Law Reform Commission (2020) *Report on Suspended Sentences*, available at: <https://www.lawreform.ie/fileupload/Reports/LRC%20123-2020%20Suspended%20Sentences.pdf>

³ Penal Reform International (2020) *Coronavirus: Healthcare and human rights of people in prison*, available at: <https://cdn.penalreform.org/wp-content/uploads/2020/03/FINAL-Briefing-Coronavirus.pdf>

⁴ In 2019, 7.8% of committals to prison declared they were of 'no fixed abode'. See Irish Prison Service, *Annual Report 2019*, p.31 https://www.irishprisons.ie/wp-content/uploads/documents_pdf/IPS-Annual-Report-2019-Web.pdf

⁵ Penal Reform International (2020) *Coronavirus: Healthcare and human rights of people in prison*.

⁶ Ibid.

release (TR) and to the administrative arrangements for prisoners granted TR, among other emergency policy and operational measures.⁷

However, IPRT is now concerned that the ability of the IPS to keep prisoners and prison staff safe will be seriously undermined by any significant increase in prisoner numbers in autumn 2020 when court activity resumes. Overcrowded and unsanitary prison conditions; an ageing prison population; and higher levels of compromised health, ill-health and chronic conditions⁸ all make prisons high-risk environments for the transmission of infectious diseases such as COVID-19. The substantial risk of the virus spreading in closed establishments such as prisons is referred to as “cluster amplification”. This places prison staff, people in custody, and the wider community at risk due to the continuum between prison health and public health. As the UN ODC has stated:

“The scenario of a rapidly increasing transmission of COVID-19 within prison systems will have an amplifying effect on the epidemic within the general public.”⁹

Considering the significant risk to the health and safety of prison staff and prisoners alike during this pandemic, **it is critical that prison is used sparingly, reserved for serious offences and offenders who present a serious risk to society, and for whom all non-custodial alternatives have been deemed inappropriate.** This means (i) minimizing the number of committals to prison, whether on remand or under sentence; and (ii) ensuring that legislative options are available to facilitate the release of prisoners assessed as not presenting a public safety risk, including those most at risk of adverse health complications arising from COVID-19 infection.

IPRT observes that 76% of committals to prison under sentence in 2019 were for sentences of less than 12 months, despite 2011 legislation requiring the courts to consider community service orders as an alternative. Therefore a positive action the legislature could take is to strengthen the 2011 Act with an amendment to include a presumption against imprisonment.

Recommendations:

2.1 Introduce bail supervision supports to ensure that pre-trial detention is used as a last resort.

2.2 Amend the *Criminal Justice (Community Service) (Amendment) Act 2011* to include a “presumption against” short custodial sentences for offences that ordinarily attract custodial sentences of less than 12 months.¹⁰

2.3 As recommended by the Joint Committee on Justice, Defence and Equality (2013)¹¹, introduce a single piece of legislation that would form the basis of a structured prison release system.

⁷ Department of Justice (2020) *Briefing Document for Minister*, June 2020.

⁸ World Health Organisation (2020) *Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Interim guidance*, available at: https://www.euro.who.int/data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf

⁹ United Nations Office on Drug and Crime (2020) *COVID-19 Preparedness and Responses in Prisons*, available at: https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Position_paper_COVID-19_in_prisons.pdf

¹⁰ See for example *Presumption Against Short Periods of Imprisonment (Scotland) Order 2019*, which extends the original statutory presumption against short-term sentences approved by the Scottish Parliament through the *Criminal Justice and Licensing (Scotland) Act 2010*. For background, see: <https://sp-bpr-en-prod-cdneq.azureedge.net/published/J/2019/6/21/Presumption-Against-Short-Periods-of-Imprisonment--Scotland--Order-2019/JS052019R14.pdf>

2.4 As recommended by the Penal Policy Review Group, remove the prohibition on temporary release for those offenders who receive the presumptive mandatory sentence for a drugs or firearms offence.¹²

2.5 Introduce a legislative provision requiring that prisoners be accommodated in single cells, as previously provided for in the Prison Rules 1947 until removed by statutory instrument in 1983.

3. Ensuring equal access to justice in remote court hearings

The *Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020* was commenced on 17th August 2020. It includes provisions for the use of video links for remote hearings, including between persons in custody and the courts. While this takes a pragmatic response to the current emergency, IPRT is concerned there may be potential impacts on equal access to justice for children and for vulnerable adults, including people with disabilities or cognitive impairments – notwithstanding protections included under section 24(3) of the Act. In the UK, the Equality and Human Rights Commission¹³ has raised several concerns about the use of video hearings “increasing unfairness, limiting access to justice and potentially impacting court outcomes”, while the House of Commons Justice Committee cites emerging evidence that remote hearings are less satisfactory for vulnerable court users, making a number of practical recommendations.¹⁴

IPRT notes the Minister’s statement that “*Nothing in the Act affects the right of an accused person to be present in person during the trial itself*”. However, IPRT remains concerned that robust safeguards and supports must be in place to (i) ensure the capacity of children in detention and people in prison custody to give full, free and informed consent to the use of audio-visual links and waive the right to attend the court in person; and (ii) protect against communications or other barriers to effective participation in court proceedings that may be exacerbated by remote hearings. Furthermore, the Department of Justice should conduct both a rapid review and medium-term evaluations on the impact of new measures introduced on people and/or justice outcomes.

Recommendations:

3.1 The application *Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020* must be closely monitored, including rapid reviews and post-enactment scrutiny (PeS) that examines the impact of new measures on justice outcomes.

¹¹ Houses of the Oireachtas (2013) *Joint Committee on Justice, Defence and Equality: Report on Penal Reform*, <https://www.oireachtas.ie/parliament/media/Penal-Reform-Report-13-March-2013-Final.pdf>

¹² Rec 29, Department of Justice & Equality (2014) *Strategic Review of Penal Policy: List of Recommendations*, available at: <http://www.justice.ie/en/JELR/Recommendations.pdf/Files/Recommendations.pdf>

¹³ Equality and Human Rights Commission (2019) ‘Written evidence submitted by the Equality and Human Rights Commission’ to House of Commons *Transforming Courts and Tribunals: progress review*, available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-accounts-committee/transforming-courts-and-tribunals-progress-review/written/106341.html>

¹⁴ House of Commons Justice Committee (2020) *Coronavirus (COVID-19): The impact on courts*, available at: https://publications.parliament.uk/pa/cm5801/cmselect/cmjust/519/51907.htm#_idTextAnchor021

4. Strengthening inspection and oversight of all places of detention

The legislative framework governing inspections and oversight of places of detention in Ireland requires strengthening. Monitoring by independent bodies of places where people can be deprived of their liberty is a fundamental safeguard against torture and ill treatment.¹⁵ **Settings where people may be deprived of their liberty include psychiatric units, immigration detention centres, and nursing homes.** Independent oversight is of even greater importance during emergency situations such as the present pandemic, when there is reduced access to detention settings and fewer external eyes on practices, regimes and conditions therein. The Optional Protocol to the UN Convention against Torture (OPCAT) is an international human rights instrument that assists States in preventing torture and other forms of ill treatment through systems of national and international inspections. It takes a preventive and improvement approach to inspections, which are informed by multi-disciplinary expertise. Ireland signed the OPCAT in October 2007, but has yet to ratify it.

Recommendations:

- 4.1 **Strengthen Ireland’s legislative framework governing inspections of places where people may be deprived of their liberty through meeting the Programme for Government commitment to ratify the UN OPCAT within 18 months of formation of Government**
- 4.2 **Strengthen in legislation and resources inspection mechanisms of all places where people may be deprived of their liberty in Ireland, including progressing the *Inspection of Places of Detention Bill***

5. Protecting against the negative effects of prolonged isolation on mental health

There is a positive obligation on the State to support the right of everyone to enjoy the highest attainable standard of physical and mental health (Art. 12 ICESCR).¹⁶ The negative and often irreversible effects of prolonged isolation on a person’s physical and mental health are well established. The current pandemic has seen increased use of confinement across prison systems, beyond its proportionate use for medical reasons (such as quarantine). In Ireland, there is currently no data at all on the *lengths of time* that individuals are held in confinement in prisons. (By contrast, the use of segregation beyond 72 hours in approved psychiatric centres must be notified to the Inspector of Mental Health Services.) Solitary confinement is defined as confinement in isolation for 22 hours a day or more, while prolonged solitary confinement is defined as isolation lasting 15 or more consecutive days.¹⁷ In July 2020, the Committee of Ministers of the Council of Europe adopted a recommendation on the revised European Prison Rules, which

¹⁵ Joint statement by the UN Committee against Torture, the UN Subcommittee on Prevention of Torture, the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, and the Board of Trustees of the UN Voluntary Fund for Victims of Torture (26th June 2020) *COVID-19 exacerbates the risk of ill-treatment and torture worldwide – UN experts*, available at:

https://www.ohchr.org/Documents/HRBodies/OPCAT/26June_statement_UN_Torture_Prevention_Experts.pdf

¹⁶ International Covenant on Economic, Social and Cultural Rights, available at:

<https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> This obligation under Art 12. also extends to taking steps “necessary for the prevention, treatment and control of epidemic, endemic, occupational and other diseases.”

¹⁷ Irish Penal Reform Trust (2018) *‘Behind the Door’: Solitary Confinement in the Irish Penal System*, available at:

<https://www.iprt.ie/iprt-publications/behind-the-door-solitary-confinement-in-the-irish-penal-system/>

includes that States should set in their national legislation the maximum period for which solitary confinement may be imposed.¹⁸

Recommendations:

- 5.1 **Legislate for the maximum number of days that anyone can be held in isolation or confinement, which should be no more than 15 consecutive days in line with the UN Mandela Rules.**
- 5.2 **Require that the Irish Prison Service collate and publish data on the lengths of time that individuals are held in prolonged confinement, including, but not limited to, the use of safety observation cells and close supervision cells.**

6. The role of parliamentary committees in promoting human rights during a pandemic

Overarching guidance issued by the Council of Europe and the United Nations is that the State must take fully into account the rights of persons deprived of their liberty, their families, detention and healthcare staff when taking measures to combat the pandemic.¹⁹ Regarding the situation of persons deprived of their liberty in the context of the ongoing COVID-19 pandemic,²⁰ the CPT reiterates:

*“the ongoing crisis demonstrates the clear need to put human rights first, in decision-making in the context of the pandemic and beyond. **Each measure taken by the authorities of member States should be based on a thorough assessment of its concrete implications for the human rights of all persons concerned.** In short, respect for human rights should become a reflex for all officials.”*
[emphasis added]

IPRT notes the important and positive role that the present Special Committee on Covid-19 Response has played since its establishment in May 2020. Parliamentary committees on justice and on human rights in England and Wales and in Scotland have similarly played an important role throughout the COVID-19 pandemic in holding the Government to account across areas of the criminal justice system including prison, probation and courts systems.²¹ Engagement between the Scottish Parliament Justice Committee and the Minister for Justice, for example, scrutinised closely the introduction of pandemic-related amendments to existing rights, such as daily access to showers, under the Scottish Prison Rules;²² while in England & Wales, the Joint Committee on Human Rights examined the impact of the curtailment of prison visits on the rights of children whose mothers are in prison.²³ This acts to promote human rights whilst also supporting transparency, accountability and public confidence in the justice system. IPRT would welcome

¹⁸ See Rule 60.6.d “The maximum period for which solitary confinement may be imposed shall be set in national law.” In *Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules*, 1st July 2020, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016809ee581

¹⁹ IPRT (2020) *Irish prisons and COVID-19: Proposed Measures*, revised 30 April 2020, available at: <https://www.iprt.ie/iprt-submissions/irish-prisons-and-covid-19-proposed-measures>

²⁰ Council of Europe (July 2020) *Follow-up statement regarding the situation of persons deprived of their liberty in the context of the ongoing COVID-19 pandemic*, available at: <https://rm.coe.int/16809ef566>

²¹ See for example www.parliament.uk, *Coronavirus: The impact on prisons*, available at: <https://publications.parliament.uk/pa/cm5801/cmselect/cmjust/299/29904.htm>

²² See here: <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/114916.aspx>

²³ Joint Committee on Human Rights (2020) *Human Rights and the Government’s response to COVID-19: children whose mothers are in prison*, available at: <https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/518/51802.htm>

consideration by the present Committee of how Oireachtas committees might maintain important levels of public scrutiny and oversight both during the ongoing pandemic and any future emergencies, in particular through examining relevant issues and emergency measures through a human rights lens.

Recommendation:

6.1 Consider the positive role that all Oireachtas committees can play in supporting public scrutiny of the human rights impact of measures introduced in response to emergency situations, in particular as they relate to places where people may be deprived of their liberty in Ireland.

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