



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

## Response to Department of Justice Consultation on a Review of Community Sentences

### Summary

This response comments on the range of disposals available to the judiciary to provide an effective response to adults sentenced for low level offending.

Whilst acknowledging the high use of community sentences in Northern Ireland, it is argued that more needs to be done to avoid the use of custody for low level and non-violent offences including fine default. Alternative diversionary measures should seek to address the root cause of offending, offer appropriate support to both victim and offender, and provide routes out of the cycle of re-offending. There is a need to ensure ongoing work with sentencers to increase understanding of the particular needs of different categories of offenders and facilitate the use of the full range of non-custodial sentences.

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,<sup>1</sup> advising on legislative and other measures which ought to be taken to protect human rights,<sup>2</sup> advising on whether a Bill is compatible with human rights<sup>3</sup> and promoting understanding

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<sup>1</sup> Northern Ireland Act 1998, s.69(1).

<sup>2</sup> *Ibid*, s.69(3).

<sup>3</sup> *Ibid*, s.69(4).

and awareness of the importance of human rights in Northern Ireland.<sup>4</sup> In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies.

2. The Commission welcomes the opportunity to comment on the effectiveness of the range of disposals available to the judiciary to provide an effective response to adult offenders sentenced for low level offending. The Commission has commented previously on a range of related consultations, most recently the Draft Strategy for the Management of Women Offenders and the Justice Bill. In general the Commission has supported alternatives to custody for low level offences, particularly for women in conflict with the law.
3. In considering options that present alternatives to prosecution, human rights standards must be adhered to, and the principles of restorative justice should form a central component of any measures introduced to respond to low level offending. It is important that opportunities be provided for an offender to acknowledge harm caused and to enable reparation to the victim. As para 2.27 of the consultation document states, reparation is usually provided through unpaid work in the community and less frequently through a restorative intervention. The operation of community-based restorative justice schemes enables the Public Prosecution Service, with the consent of victims and offenders, to provide a community restorative disposal as an alternative to prosecution. Victim awareness and restorative work to address victim harm may also form part of a Probation Order (para 2.16).
4. There is a large body of international human rights standards and conventions that support restorative justice within the criminal justice system. These include the UN Standard Minimum Rules for the Administration of Justice (the Beijing Rules); the UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules); the Council of Europe Recommendation Concerning Mediation in Penal Matters; the EU Framework Decision on Restorative Justice and the Council of Europe Recommendation Concerning Mediation on Restorative Justice and the UN Economic and Social Council-endorsed Basic Principles on the use of Restorative Justice

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<sup>4</sup> *Ibid*, s.69(6).

Programmes in Criminal Matters (the Basic Principles); the Council of Europe Recommendation R(92)16 on the European Rules on Community Sanctions and Measures; the Council of Europe Recommendation R (2000)22 on improving the implementation of the European Rules on community sanctions and measures and Recommendation CM/R(2010)1 of the Committee of Ministers on the Council of Europe Probation Rules.

## **Effective use of community sentences**

5. As stated at para 2.24 of the consultation document, there are a number of factors listed that contribute to men and women coming into conflict with the law, including homelessness; lack of educational attainment; unemployment; mental health issues; alcohol and substance dependencies; lack of stable family relationships and being a victim of sexual abuse or domestic violence. When such circumstances apply, short custodial sentences are unlikely to be an appropriate response to low level offending. As stated at para 2.33, those sentenced to three months, or less, serve just over four weeks in custody.
6. The Northern Ireland Prison Service can only provide a resettlement plan to prisoners serving longer than six to eight weeks. Thus opportunities to address underlying causes of offending behaviour are extremely restricted and imprisonment may only serve to exacerbate factors such as limited employment opportunities, housing needs and inadequate familial and social supports. There is also evidence of high re-offending rates amongst this cohort. Some 40 per cent of adult offenders discharged from custody in 2007, who had received sentences of 6 months or less, re-offended within 12 months of their release (para 2.37); this against a backdrop of a significant rise in the number of prison receptions for short term sentenced prisoners (para 3.17).
7. The consultation at paras 2.24 – 2.31 acknowledges the benefits of community sentences in that they provide opportunities for rehabilitation and reparation. Whilst not directly comparable, re-offending rates of those on community sentences do compare positively to those on short sentences. In 2007, re-offending rates for those on Community Service Order were 23.5 per cent; Probation Order, 24.4 per cent and Combination Order, 34 per cent.

8. An aspect of community sentences requirements that is of concern to the Commission is the availability of electronic tagging as an optional additional requirement to a Probation Order. At para 2.14 of the consultation, reference is made to the “electronically monitored curfew”. This option, in the absence of an alternative and compelling justification in each case, will be seen primarily as a punitive measure, as opposed to rehabilitative, and as such seems unlikely to have a positive impact on offenders as part of an alternative diversionary approach. Such conditions potentially engage a number of rights under the ECHR: Article 5 (the right to liberty); Article 6 (the right to a fair trial); Article 8 (the right to privacy and family life); Article 9 (the right to freedom of thought, conscience and religion), Article 10 (the right to freedom of expression) and Article 11 (the right to freedom of assembly). Where such provisions are made use of, it is crucial that this be done proportionately with due regard for the individual’s rights.
  
9. A further concern relates to the requirement to “submit to treatment for mental disorder, whether as an inpatient or outpatient for the whole or part of the probation period” (para 2.14). It is understood that the DHSSPS is taking work forward to ensure that new mental health and capacity legislation will be introduced in the Assembly by December 2011.<sup>5</sup> In that context, in late 2010 the Commission reviewed the Mental Capacity (Health, Welfare and Finance) Bill, Equality Impact Assessment (EQIA). Under the section of the EQIA entitled ‘Criminal Justice System’, it was noted that provisions of the Bill would generally apply to those subject to the criminal justice system, that is, presumption of mental capacity, powers of intervention for those who lack mental capacity and proportionate safeguards where interventions are made. However, at point 20 of the EQIA, it was noted that separate provision might be required for a small group of people subject to the criminal justice system. Such people may have mental capacity, but may require treatment, and it was stated that separate provision might be required to allow a court to direct hospital care or treatment. This would raise some concern as to compliance with Article 25 (health) of the United Nations Convention on the Rights of Persons with Disabilities (CRPD). In particular, 25(d) obliges states to:

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<sup>5</sup> *Women’s Offending Behaviour in Northern Ireland: A Strategy to Manage Offenders and those Vulnerable to Offending Behaviour 2010-2013*, DoJ/NIPS/PBNI, October 2010.

Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care.

10. The meaning of Article 25 is further clarified by reference to Article 3, General Principles, which reads: "The principles of the present Convention shall be: (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons". Thus in relation to the enforcement of a "mental condition treatment requirement", this aspect of the CRPD will take on particular relevance in the formulation of any new legislative proposals.
11. In relation to the range of community sentences available, the consultation document indicates that the Probation Board "consider[s] that current disposals provide sufficient flexibility in the management of offenders" (para 3.15). However, it is essential that sufficient inter-departmental resources be provided to ensure that rehabilitative and reparative requirements are fulfilled.

## **Fine default**

12. One aspect of the sentencing process that requires immediate attention is the provision of an alternative to custody for fine defaulters in Northern Ireland, a disposal that is available in England, Wales and Scotland. Supervised Activity Orders (SAOs) were legislated for in the Criminal Justice (Northern Ireland) Order 2008, but are not yet available as a disposal.
13. The Northern Ireland Prison Service Annual Report (2009-2010) shows that out of a total of 5,701 prison receptions, 1,778 were fine defaulters (1,635 males and 143 females), with prison sentences averaging four days. Figures recently obtained from the Prison Service indicate that in 2010, 186 females and 1,774 males received a custodial sentence for fine default (some on more than one occasion). This continues to represent a significant proportion of those imprisoned and must carry significant cost implications for the NIPS in terms of staff time and resources.
14. We are aware of the recent initiatives to ensure that improved information is provided to the courts on 'means to pay' and the provision of additional supports which are to be

welcomed. However, the impact of such measures (once they are all in place) on the numbers of fine defaulters being given a custodial sentence has yet to be ascertained.

15. The Commission notes that part of the package of measures under consideration to address fine default may include direct deduction from benefits and earnings (para 3.23). The impact that this might have on low-income families needs to be fully considered to ensure compliance with Article 11 of the International Covenant on Economic, Social and Cultural Rights (right to an adequate standard of living) and Article 9 (right to social security).
16. We note the references to SAOs in the Justice Bill currently pending assent (Part 5, clause 58 and Schedule 7, paragraph 14 of the final version) and understand that such legislation, once passed, would enable the introduction of a pilot scheme on SAOs. However, following a recent evidence session on the Justice Bill (13 January 2011) where the importance of having an opportunity to run a short pilot was acknowledged, it appears that before any such scheme is trialled a number of issues, including resources, need to be addressed. Also, if such a pilot goes ahead, it could lead to a situation where non-custodial sanctions will be available only to those residing within a specific geographical area. While the Commission is not opposed in principle to the trialling of a new sanction, the pilot should either be run across Northern Ireland as a whole, or in one or more localities for only a short time, so that it does not lead to a significant number of individuals being denied access to a non-custodial disposal because of where they live.
17. We are aware of some concerns about the introduction of SAOs in that they may represent an 'up-tariffing' (that is, that a community sentence might be imposed rather than paying a fine, with potential for escalation in case of breach). However, adequately resourced gender-specific alternatives to custody that minimise the risk of breaches urgently need to be put in place. The fact that, at present, there is *no* alternative to custody for fine defaulters remains a serious gap in available sentencing options to sentencers.
18. A further concern is our understanding that women (and men) are receiving custodial sentences for non-payment of TV licence fines. The Commission's advice to the Secretary of State on a Bill of Rights for Northern Ireland recommended that "no-one shall be deprived of his liberty merely on the

ground of the inability to fulfil a contractual obligation".<sup>6</sup> This proposed provision incorporates the Fourth Protocol, Article 1 of the European Convention on Human Rights (ECHR). While the Article was not intended to cover fine default, many of the considerations that motivated this humane and sensible measure apply at least equally in cases where there are genuine reasons for failure to discharge a criminal penalty, rather than a civil debt or contractual obligation; for example, the sum at stake is not recovered by imprisonment, and the cost to society and to the individual of imprisonment is likely to exceed by a vast measure the original fine. The distinction between TV licensing and, for example, utility billing, where non-payment is a wholly civil matter, is hard to discern other than by reference to a statute that Parliament very likely did not intend to lead to the frequent and traumatic imprisonment of defaulters, at great public expense, for short periods.

19. It is also important that appropriate levels of resources be put in place to support all those on community sentences, including SAOs if introduced, to ensure that breaches are kept to a minimum. This, in our view, would be in accordance with the Department's Addendum to the Programme for Government (hereafter, the Addendum) which signals its intention to "develop more effective ways of dealing with fine default" and to ensure that appropriate options are available for sentencers dealing with less serious offending.

## **New measures in Justice Bill**

20. There is a range of state obligations towards victims of crime, and the rights of victims in that regard are not dependent on the ability of the state to secure all or part of the cost of redress from the offender. Some of the benefits of a restorative approach, in terms of rehabilitation and behavioural change, are likely to be lost if compensation is not offered through a process of acknowledging harm and acceptance of responsibility, but is imposed by way of compulsory financial penalties on offenders.
21. Whilst acknowledging measures within the Justice Bill to provide alternatives to prosecution and custody for low level offences, through imposition of a fine or fixed penalty notice (amongst other options), the Commission is concerned that

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<sup>6</sup> NIHRC (December 2008) *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland*, pp63-64. The male pronoun is used, as in the Protocol, to refer also to females.

such disposals have the potential to escalate to a default situation and possibly a custodial sentence.

### ***Penalty Notices***

22. The provisions in Chapter 1 of Part 6 of the Bill as passed create a power for the police to dispose of certain prescribed offences without a direction from the Public Prosecution Service, through a Fixed Penalty Notice. There is a potentially problematic degree of discretion available to the police in responding to a range of offences such as being drunk; breach of the peace; disorderly behaviour; obstructing police; indecent behaviour; criminal damage and petty shoplifting. Where the option of trial is not exercised, this proposal removes the separation of functions of investigation, prosecution and adjudication, so a robust mechanism would have to be in place to ensure effective police training and oversight of the use of the proposed new powers. The seriousness, or otherwise, of such offences is open to interpretation, and runs the risk of being susceptible to subjective decision-making by police officers.
23. In considering the imposition of a fixed penalty or fine as an appropriate response, the high levels of poverty that exist in Northern Ireland must be acknowledged along with the potential difficulties that this may present in relation to default.
24. Within the criminal justice system in Northern Ireland, there already exists a range of disposals for responding to low-level minor offending including the Youth Conference Service, community-based restorative justice schemes, community service sentences and the range of work undertaken by the Probation Board for Northern Ireland. Additional options should not be introduced in a piecemeal fashion.
25. In general terms, a positive aspect of the fixed penalty is that it provides an alternative to prosecution, and the potential benefits to low level or first time offenders in avoiding a criminal record are acknowledged unless, of course, the individual defaults on payment.
26. Net widening through an 'over-enthusiastic' application of the Penalty Notice may run the risk of minor offending behaviour that may previously have been disregarded or dealt with informally by police officers, escalating to the use of a penalty. Clear guidance to police officers must be put in place

to ensure that responses are proportionate, reasonable and fully accountable.

### ***Conditional caution***

27. Decisions in relation to this disposal are prosecution-led, unlike the issuing of Penalty Notices which are police-led. This disposal appears to conform better to restorative justice principles, in that it enables prosecutors to attach rehabilitative and reparative conditions to a caution. However, it is our understanding that a conditional caution will be included on an individual's criminal record. Experience in England and Wales demonstrates that compensation to the victim is the most commonly applied condition to cautions (in 64 per cent of cases). Again, the issue of cost neutrality has been raised by way of explaining the high use of compensation rather than referral to rehabilitation programmes. Such high use of a condition that involves financial compensation raises similar concerns in relation to the ability of some low-income groups to meet the compensation payment. Once this disposal is introduced, conditions other than a financial penalty should be considered.

### **Women's Strategy**

28. In March 2007, Baroness Jean Corston published her *Review of Women with Particular Vulnerabilities in the Criminal Justice System*. The 'Corston Report' called for community sentences to be the norm and that they should be designed to take account of "women's needs, vulnerabilities and domestic responsibilities". The Government response to the report, published in December 2007, endorsed the view that there is a need to explore what more can be done to "avoid the use of custody" for those who have not committed serious or violent offences and are low-risk. The conclusions of the Corston Report were given further support by the Prisons Minister for England and Wales in July 2010. The Women's Strategy found that Baroness Corston's findings "mirror the experiences of women offenders in Northern Ireland".<sup>7</sup>
29. It is noted at para 1.4 of the consultation document that the work of "this strategy will link in with the recently published Women's Strategy". In Northern Ireland, the recently

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<sup>7</sup> *Women's Offending Behaviour in Northern Ireland: A Strategy to Manage Offenders and those Vulnerable to Offending Behaviour 2010-2013*, DoJ/NIPS/PBNI, October 2010, para 2.12.

published strategy for the management of women offenders<sup>8</sup> acknowledged the particular impact on women in conflict with the law of issues around family relationships, children, health and well-being, addictions, history of sexual or other violent abuse, self-harming and financial and accommodation needs. Research commissioned by the NIO further highlighted these factors, and found that there was a requirement to “gain a deeper understanding of women’s offending behaviour and criminal justice practices” through research that takes account of the “social, political and economic context within which women live and the system operates”.<sup>9</sup>

30. The female prison population in Northern Ireland is relatively small and stable, averaging approximately 45 at any one time, with a significant percentage comprising remand prisoners. However, this average figure can be misleading as a large number of women are imprisoned for very short sentences. The number of receptions into prison for 2009-10 totalled 300.<sup>10</sup> In 2009, 25 per cent of all women entering prison received a custodial sentence of three months or less. In Scotland, the Criminal Justice and Licensing (Scotland) Act 2010 includes a presumption against sentences of three months or less.
31. Figures recently obtained from the Prison Service indicate that in 2010, 186 females received a custodial sentence for fine default, some on more than one occasion. Such sentences average four days in duration. This and the high proportion of remanded female prisoners are two areas that urgently need to be addressed. Whilst it is important to acknowledge the high use of community sentences in Northern Ireland, it is time to ensure that prison is used only for the small number of women for whom a custodial sentence is necessary as a last resort.
32. The treatment of women in our criminal justice system engages issues of compliance with the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In July 2008, the CEDAW Committee, in its Concluding Observations on the UK’s Sixth Periodic Report, called upon the State party to “intensify its efforts to develop alternative sentencing and custodial strategies, including community interventions and services, for women convicted of minor offences”.

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<sup>8</sup> *Ibid.*

<sup>9</sup> NIO (January 2010) *Addressing Offending by Women: A Literature Review*.

<sup>10</sup> Northern Ireland Prison Service (2010) *Annual Report and Accounts 2009-10*.

33. An important aspect of meeting the State's obligations in this area will be to ensure that those Women's Centres that wish to work with women in conflict with the law, or at risk of offending, are provided with long-term funding. It is noted that in 2009 the Ministry of Justice secured £15.6 million as a first step to building capacity in this area in England and Wales. Significant funding has been provided to Women's Community Projects to take this work forward. However, it is not clear whether this level of funding will be sustained.
34. It is important to acknowledge the work of the Probation-led Inspire Women's Project in the development of a range of women specific community based provision. The work of the Women's Community Support Project<sup>11</sup> is a further positive initiative to link women into community-based women's services.
35. There is a need to ensure ongoing work with sentencers to increase their understanding of the particular needs of different categories of offenders and facilitate use of the full range of non-custodial sentences available to courts. This helps in diverting offenders into the community. For example, an indication of ongoing or planned contact with the Judicial Studies Board to increase awareness of the range of and the benefits of community disposals would be useful.

## Short sentences

36. The consultation document highlights the high rate of re-offending amongst adults who received sentences of 6 months or less (para 2.37). It also refers to limited opportunities to provide any element of direct reparation to the victim, or indirect to the community (para 2.38). It recognises that "with the high cost per prisoner place", short custodial sentences "do not provide good value for money" (para 2.39).
37. The Prison Review Team,<sup>12</sup> established in June 2010, by the Minister for Justice, was asked to review the conditions of detention, management and oversight of prisons. It published its Interim Report in February 2011. In the Report concerns

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<sup>11</sup> The Women's Community Support Network is funded by LankellyChase Trust Foundation and is a partnership involving PBNI, NIACRO and the Women's Support Network and Women's Centres including Falls, Shankill and Windsor.

<sup>12</sup> Review of the Northern Ireland Prison Service (February 2011), *Conditions, Management and Oversight of all Prisons*, Interim Report.

are expressed regarding the size of the projected prison population, with the Team taking the view that “neither a more punitive penal policy nor an increase in re-offending should be assumptions underlying [the prison] estate strategy”. It is noted that in other jurisdictions “there have been recent moves towards justice reinvestment: moving resources out of prisons and into more effective alternative, preventive and resettlement work outside”.

38. The Team made reference to particular local needs within community provision in that there were “insufficient opportunities for diverting offenders from prison to appropriate mental health facilities and interventions”. It also called for action to “achieve real and measurable reductions in the fine defaulter and remand populations”, and suggested that this could include the removal of some prisoners serving short sentences for non-violent and less serious offences.
39. Whilst it is useful to examine the experience of other jurisdictions in attempting to reduce the numbers of those sentenced to custody for short periods, the Prison Review Team also recommended that there be an inter-departmental initiative to develop a “safer society strategy” and to “plan for investment outside as well as inside prison.” This, in our view, would allow for careful consideration of the range of interventions required to meet local needs and concerns and as such the outcome of the Review Team’s final report will have an important part to play within this process.
40. The consultation document also draws attention to a lack of specific research on those people serving short prison sentences for less serious offences (para 3.42). It is important that this identified knowledge gap be addressed so as to inform future policy and practice development.

## **Conclusion**

41. Difficulties relating to adequate resource and capacity building must be addressed so that options are available that provide support and incentives to reduce the likelihood of re-offending. Human rights standards must be adhered to and the principle of restorative justice should form a central component of any measures introduced to respond to low level offending. Community-based activities should ensure the safety of offenders within their communities, should be constructive and should respect the human dignity of the

offender with an aim of securing reintegration and acceptance. Alternative diversionary measures should seek to address the root cause of offending, offer appropriate support to both victim and offender, and provide routes out of the cycle of re-offending.

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