

Green Paper

Strengthening mutual trust in the European judicial area – A Green Paper on the application of the EU criminal justice legislation in the field of detention

Ireland's response

Ireland would like to take this opportunity to thank the European Commission for the Green Paper on the application of the EU criminal justice legislation in the field of detention. This is a useful document in terms of stimulating discussion on how differing standards and approaches to various cross border co-operational measures within the Justice sphere are impacting on the effectiveness of those measures.

As requested by the Commission, Ireland is now providing feedback, as part of the consultation process, on the 10 questions raised.

Questions on mutual recognition instruments

Question 1 – Pre-trial: What non-custodial alternatives to pre-trial detention are available? Do they work? Could alternatives to pre-trial detention be promoted at European Union level? If yes, how?

The law on bail in Ireland is described in the reply to Question 4.

The Green Paper suggests the possibility of future EU initiatives in the area of bail law. Such initiatives could have significant implications for Irish law in this area, and Ireland would have to examine carefully the possible impact that such initiatives may have on the flexibility currently available to the Irish courts in dealing with the requirements of individual bail cases. Given that the relevant Framework Decision in this area has yet to be fully implemented by Member States, it would appear premature to examine the need for EU legislative proposals in the area at this stage, as the practical issues regarding the operation of the Framework Decision have yet to be seen.

Question 2 – Post-trial: What are the most important alternative measures to custody (such as community service or probation) in your legal system? Do they work? Could probation and other alternative measures to detention be promoted at European Union level? If yes, how?

Fines

The penalty most commonly applied by the courts is a fine. Of these, the majority are for road traffic and public order offences. In theory, however, nearly all offences, except the most serious, can be punishable with a fine, either on its own, or with a prison sentence. The maximum fine is set in legislation for some offences and is at the court's discretion for others.

The Fines Act 2010 improves the effectiveness of the fines system as an alternative to custody by making provision for:

- indexation of District Court maximum fines so that their monetary values are brought up to date,
- increasing certain fines imposed by the higher courts,

- giving the courts the power to take into account the capacity of persons to pay fines and take into account their impact on the person or on his or her dependants before determining the amount of a fine,
- the payment of fines by instalments, and
- alternatives to imprisonment for default on payment of fines.

Dismissal under the Probation of Offenders Act 1907

In a case where an offender's guilt has been proven to the court's satisfaction, the court may dismiss the charge under the Probation of Offenders Act 1907 without conditions either because of the minor nature of the offence or extenuating circumstances. There are no continuing obligations or requirements to be met, but the matter may have been adjourned previously to allow for the completion of some undertaking. This option is widely used in the District Court with first-time and/or minor offenders.

Compensation Orders

The Criminal Justice Act 1993 established a system enabling the courts to make orders requiring offenders to pay compensation to identified victims. Orders for compensation are sometimes made on an informal basis without reference to the above Act. In practice, there will often be situations where the offender has limited means and such an order would not be practical.

Court Poor Box

A further option exercised in less serious cases, most commonly in connection with minor public order offences, has been developed over time by the courts without a specific statutory basis and is known as the "Court Poor Box". This involves an arrangement whereby the court, although satisfied as to the offender's guilt, does not proceed to conviction but instead dismisses the charge on condition that the offender accepts responsibility for the offence and makes a donation to a nominated charity.

Binding to the Peace

The court may order that an offender enter into a bond to keep the peace and be of good behaviour. This involves undertaking to observe specified conditions for a period of time determined by the court. A person who fails to comply with the terms of the bond will forfeit the amount of money that was specified by the court in the bond.

Probation Orders

The Probation of Offenders Act 1907 enables a court to make a probation order discharging an offender subject to the observance of conditions, including supervision by a probation officer, over a specified period. In most instances the court will have requested a report from the Probation Service on the suitability of the offender for this approach.

Additional conditions can be ordered by the court, such as participation in training, residence in a hostel or attendance at a treatment programme. The Probation Service works with the offender to identify the cause of the offending behaviour and seeks to avoid its recurrence.

Community Service Orders

Community Service Orders under the Criminal Justice (Community Service) Act 1983 involve supervised, unpaid work in the community that is overseen by the Probation Service. The number of hours worked cannot be less than 40 and not more than 240 hours. The court must also specify the length of sentence that would otherwise have to be served and which may be imposed if the order is not complied with. The Act does not apply where the sentence is mandatory (e.g. for murder) or the offender is before the Special Criminal Court. The offender must be over 16 years of age when the order is made.

Suspended Sentence

A further option available to the courts in sentencing is to suspend the sentence of imprisonment. This is a long-standing practice in Irish law which was placed on a statutory footing by section 99 of the Criminal Justice Act 2006. That provision allows the court to suspend a custodial sentence in whole or in part. Both wholly and partly-suspended sentences may be subject to conditions.

Where a person breaches those conditions, the court that made the original order suspending the sentence may revoke the order so that the entire original sentence must be served, or as much of it as the court considers just in the circumstances.

The Green Paper suggests the possibility of future EU initiatives in the area of probation and alternatives to detention. Such initiatives could have significant implications for Irish law in this area and Ireland would have to examine carefully the possible impact that such initiatives may have on the flexibility currently available to the Irish courts under existing law in dealing with the requirements of individual cases. We cannot identify any need for or benefit of an EU initiative in this area. In addition, given that the relevant Framework Decision in this area has yet to be fully implemented by Member States, it would appear premature to examine the need for EU legislative proposals in the area at this stage, as the practical issues regarding the operation of the Framework Decision have yet to be seen.

Question 3 - How do you think that detention conditions may have an effect on the proper operation of the EAW? And what about the operation of the Transfer of Prisoners Framework Decision?

Prison conditions are frequently cited in the grounds of objection in EAW cases. Irish courts in considering requests for surrender do examine the issue of prison conditions when raised.

Prison conditions are not a factor in the transfer of prisoners under the Council of Europe Convention. They may however, arise in the implementation of the Framework Decision where a prisoner has not consented to a transfer.

Question 4 - There is an obligation to release an accused person unless there are overriding reasons for keeping them in custody. How is this principle applied in your legal system?

This principle is applied strictly by the courts in Ireland.

Bail is governed by the Constitution, common law and by statute law. Statutory provisions are contained in a number of enactments, the principal Acts being the Criminal Procedure Act 1967 and the Bail Act 1997. The provision of the Constitution of Ireland on the right to liberty which governs the power of the courts in relation to the denial of bail is Article 40.4.1, which provides as follows:

“No citizen shall be deprived of his personal liberty save in accordance with law”

Also crucial to the power of the courts in relation to bail is the constitutional right to a trial within a reasonable time. This right arises from Article 38.1 of the Constitution which provides:

“No person shall be tried on any criminal charge save in due course of law”.

Traditionally, Irish law held that bail could only be refused if the accused would evade justice by failing to turn up for trial or interfering with witnesses.

The seminal Irish case on bail, *The People (Attorney General) v O’Callaghan* [1966] IR 501 explicitly decided that there was a constitutional impediment to refusing bail to prevent the commission of crime. That decision also set out clearly the factors which a judge could consider in dealing with bail applications. The case concerned an accused person charged with a number of offences which he was alleged to have committed while on bail. Bail was refused in the District Court and in the High Court.

The Supreme Court rejected the notion that bail could be refused on the basis of a risk of the commission by the accused person of offences while on bail. The court emphasised that the purpose of bail was to ensure that the accused person stands trial. It was not a punitive or preventative measure. The accused person was entitled to the presumption of innocence. The criteria accepted by the Supreme Court which may be taken into account in determining bail applications were affirmed as follows:

1. The seriousness of the charge;
2. The nature of the evidence in support of the charge;
3. The likely sentence to be imposed upon conviction;
4. The possibility of the disposal of illegally acquired property;
5. The possibility of interference with witnesses and jurors;
6. The prisoner’s failure to answer bail on a previous occasion.

Relevant considerations, but not grounds for refusal, are:

- The objection of the Attorney General or the police authorities;
- The possibility of a speedy trial;
- The amount of bail.

In the light of concerns at the increase in the incidence of offences committed while on bail, a referendum took place in 1996 on a proposed amendment to the Constitution of Ireland to allow the courts to deny bail where there are grounds for believing that the accused will commit serious offences while on bail. The referendum was passed and the Constitution was amended by the addition of the following provision to Article 40.4.6:

“Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person.”

Section 2 of the Bail Act 1997 gave effect to the constitutional amendment. It permits a court to refuse bail to a person charged with a serious offence (a scheduled offence punishable by 5 years imprisonment or more) if such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person.

In reaching its decision, the court can take into account:

- The nature and degree of seriousness of the offence apprehended and the likely sentence,
- The nature and strength of evidence in support of the charge,
- Any conviction of the accused person for an offence committed while on bail,
- Any previous conviction of the accused person,
- Any other offence for which the accused person is awaiting trial, and
- If one or more of these factors is taken into account the court can also take into account the fact that the accused person is addicted to a controlled drug.

Section 6 of the Bail Act 1997 (as amended by section 9 of the Criminal Justice Act 2007) makes provision for conditions of bail. It is a condition of every bail recognisance that the accused person must appear before the court at the end of the period of remand and not commit an offence while on bail. The recognisance may also be subject to such conditions as the court considers appropriate, including any one or more of the following:

- (i) that the accused person resides or remains in a particular district or place in the State,
- (ii) that the accused person reports to a specified Garda Síochána Station at specified intervals,
- (iii) that the accused person surrenders his or her passport or travel document or refrains from applying for a passport or travel document,
- (iv) that the accused person refrains from attending at a specified premises or place,
- (v) that the accused person refrains from having any contact with specified persons.

Section 3 of the Bail Act 1997 provides that where a person has been refused bail and the trial for the offence has not commenced within 4 months from the date of refusal the person can apply to the court for bail on the basis of delay by the prosecutor. The Court can release the person on bail if satisfied that the interests of justice so require.

Question 5 - Different practices between Member States in relation to rules on (a) statutory maximum length of pre-trial detention and (b) regularity of review of pre-trial detention may constitute an obstacle to mutual confidence. What is your view? What is the best way to reduce pre-trial detention?

Matters relating to pre-trial detention do not constitute an obstacle to mutual confidence.

It has to be accepted that differences will arise between the different legal systems of the Member States but only within the parameters established by the jurisprudence relating to the European Convention on Human Rights.

Question 6 - Courts can issue a EAW to ensure the return of someone wanted for trial who has been released and allowed to return to his home State instead of placing him in pre-trial detention. Is this possibility already used by judges, and if so, how?

Ireland is not in a position to comment in relation to this question. Regrettably, court statistics are not maintained in such a way as to provide information regarding whether judges have used the EAW in the circumstances outlined.

Question 7 - Would there be merit in having European Union minimum rules for maximum pre-trial detention periods and the regular review of such detention in order to strengthen mutual trust? If so, how could this be better achieved? What other measures would reduce pre-trial detention?

We do not see any merit in EU rules on maximum pre-trial periods.

Question 8 - Are there any specific alternative measures to detention that could be developed in respect of children?

Alternatives to Detention

The Children Act, 2001, constituted a fundamental revision of legislation governing the treatment of children in conflict with the law and non-offending children in need of special care or protection. The considerations behind the Act were that:

- Prevention, through early intervention, is desirable and in the medium to long term likely to produce positive results;
- Where a child is apprehended for committing an offence, diversion should, where possible and where the interests of society would not be adversely affected, be the preferred option;
- Where it is necessary to bring a child before the courts on a criminal charge, a wide range of community sanctions should be available to the court;
- Detention should be a last resort, but where it is unavoidable it should be in institutions where the ethos is educational rather than penal.

Among other things, the Children Act, 2001 provided the framework for the development of the juvenile justice system. It reflected the thinking that young offenders, by reason of their age and level of maturity, deserve to be dealt with differently than adult offenders. The philosophy underpinning the juvenile justice aspects of the Act is that there should be a suitable intervention for every child who commits an offence, no matter what the offence or the circumstances of the child who commits it.

The central principle that governs the Children Act, 2001 is that children should be brought up in their own communities and families. Where intervention occurs, it should aim to support and maintain children within these relationships and networks because it is clear that this is where children do best.

Summary of Alternatives to Detention

Diversion Programme

The Garda Diversion Programme operates under Part 4 of the Children Act, 2001 and provides a package of measures for dealing with children aged 12-17 who commit an offence or offences. This programme enables child offenders to be dealt with by way of caution rather than the formal court system. These measures include an informal (unsupervised) caution and a formal (supervised caution). To be considered for admission to the Diversion Programme a child must accept responsibility for the offence(s) committed and consent to be cautioned and supervised. In addition to this, the Children Act, 2001 has introduced the concept of 'restorative justice' to the juvenile justice system in the form of restorative cautions and restorative family conferences.

Garda Youth Diversion Projects (GYDP)

Garda Youth Diversion Projects (GYDPs) work in tandem with, and act as a resource to, the Garda Diversion Programme. GYDPs are community-based, multi-agency crime prevention and crime reduction initiatives which, primarily, seek to divert young people, who have been involved in anti-social and/or criminal behaviour by challenging the offending behaviour and by providing suitable activities to facilitate personal development, promote civic responsibility and improve long-term employability prospects. The projects work closely with An Garda Síochána, especially Juvenile Liaison Officers and Community Gardaí. The projects contribute to improving the quality of life within communities and to enhancing Garda/community relations. The projects may also work with young people who are significantly at risk of becoming involved in anti-social and /or criminal behaviour. There are 100 GYDPs nationwide.

Young Persons Probation (YPP) Projects

Young Persons Probation (YPP) is a specialised division of the Probation Service with dedicated resources to work with young people aged 12 to 18 who are prosecuted before the courts. YPP officers may intervene at two levels. Judges may use the option of YPP supervision of young offenders during deferment of penalty. This supervision can include structured activities, for example, education, training, mentoring etc. These activities may also include involvement with a YPP Community Project. Secondly, YPP officers are involved in supervised alternatives to custody ordered by the courts including, a probation order, community service order (for 16/17 year olds), mentoring order, training/activities orders, day centre orders, etc. These activities also might involve the young offender attending a YPP Community Projects which are funded by the Irish Youth Justice Service.

Anti Social Behaviour Measures

Part 13 of the Criminal Justice Act 2006 introduced new measures with effect from 1st March 2007 to tackle anti-social behaviour of children through a civil process. These measures provide that when a Garda becomes aware of anti-social behaviour, the Garda may issue a behaviour warning to the child. Failure to obey the warning may result in a good behaviour contract being made involving the child, their parent(s) or guardian and the Gardaí. If a contract is broken or if it is not working, it can be renewed or, an application can be made to the Children Court for a Civil Behaviour Order. In addition to the Order, the court may also make a plan for the child to be supervised by their parents or guardian.

Community Sanctions

Part 9 (Sections 115 – 141) of the Children Act 2001 (as amended)) provides for community sanctions for young offenders under the age of 18 and introduced a new range of community sanctions available to the Courts. These sanctions are aimed at reducing the number of children sentenced to detention by the Courts and improving the outcomes for children in a range of areas, including such matters as the rate of re-offending, education attainment, family supports and substance abuse.

Pre-trial detention

Section 5 of the Green Paper deals specifically with children and pre-trial detention.

In this jurisdiction, children are afforded special protections when they come into contact with the criminal justice system. These protections have been statutorily provided for in the Children Act 2001. The Act provides for the treatment of a child in a particular way at various stages of the criminal justice process.

Remands in custody pre-trial are related to refusals of bail.

The paper at section 5 talks about the particularly vulnerable position of children in relation to pre-trial detention. Section 88 of the Children Act, 2001 specifically provides for how the Children Court (District Court) shall act when it decides to remand a child in custody pre-trial.

The Court must explain to the child the reasons for its decision in open court in language that is appropriate to the child's age and level of understanding. Children remanded in custody shall, so far as is practicable and where it is in the interests of the child, be kept separate from and not be allowed to associate with children on whom a period of detention has been imposed. The Court is not permitted to remand a child in custody if the sole reason for doing so is that the child is in need of care or protection or the Court requires the assistance of the Health Services Executive (where welfare or protection issues arise) in dealing with the case.

The length of any remand period in the Children's Court pursuant to section 88 of the Children Act 2001 should be in line with the periods set out in section 24 of the Criminal Procedure Act 1967 (as substituted by section 4 of the Criminal Justice (Miscellaneous Provisions) Act 1997. These provisions permit a remand in custody on each occasion the child is before the court for 8, 15 or 30 days depending on the number of times a child has been before the Court on particular charges.

Where a child is before the Circuit Criminal Court on more serious charges, there is no legislation governing the length of remand periods. However, the right to an expeditious trial applies to every accused person irrespective of age and this right has particular significance when the accused is a child.

A remand in custody may also take place after a finding of guilt by any court (Children Court or Circuit Criminal Court) for the purposes of the preparation of a probation report. On receipt of a probation report, the Court may request other reports such as medical, psychiatric or psychological. The maximum period for a remand in custody in those circumstances is 28 days.

Post trial detention

The question is raised about alternatives to post trial detention. Again, the Children Act 2001 (S115) provides for what may happen as an alternative to detention when a court is satisfied of the guilt of a child. These are called community sanctions (as described above) and include community service orders, day centre orders, probation orders, training or activities orders, intensive supervision, residential supervision, suitable person (care and supervision) order, mentor (family support) order and a restriction on movement order.

Question 9 - How could monitoring of detention conditions by the Member States be better promoted? How could the EU encourage prison administrations to network and establish best practice?

We would question what the legal basis would be for the EU to encourage prison administrations to network and establish best practice. Detention issues are the responsibility of Member States. Ireland is of the view that prison detention conditions cannot be dealt with in isolation from other challenges facing the country, particularly in an economic context.

In addressing this issue, Ireland has made substantial progress in recent years. It is primarily dealing with this issue in two ways; by providing new and upgraded prison facilities and by creating a legislative environment which facilitates the greater use of alternatives to custody.

The Commission will be aware of the recent launch of The European Organisation of Prison and Correctional Services (EuroPris), of which Ireland is a member. This Association exists to improve co-operation among European prison and correctional services, with the aim of enhancing public safety and security; reducing re-offending; and advancing professionalism in the corrections' field.

The specific goals of the EuroPris association are in keeping with the thrust of encouraging prison administrations to network and establish best practice by:

- a) advancing the operational capabilities and professionalism of prison and correctional practitioners across Europe;
- b) acting as an 'expert group' on prison matters within Europe;
- c) contributing to, and supporting the development of, European prison-related policy and legislation, within the framework of standards established by the European Union and the Council of Europe;
- d) being available to policy-makers in an advisory capacity on prison-related matters;
- e) generating relationships and exchange information with other organisations working in the prisons and criminal justice arena, both in Europe and beyond, with a view to developing best practice in the field; and
- f) advancing the above agenda by, wherever possible, engaging in collaborative, funded, programmatic work.

Question on detention standards

Question 10 - How could the work of the Council of Europe and that of Member States be better promoted as they endeavour to put good detention standards into practice?

Best practice covering all aspects of penal policy is constantly evolving worldwide. There have been major developments in the international guidance offered to European States on the full range of prison related issues. Most of which has come from the Council of Europe. We are satisfied with the measures being taken through the Council of Europe.