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Extending the Reach of the State into the Post-Sentence Period: Section 26 of the Criminal Justice Act 2007

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(2008) 15(1) DULJ 214 Article: EXTENDING THE REACH OF THE STATE INTO THE POST-SENTENCE PERIOD: SECTION 26 OF THE CRIMINAL JUSTICE ACT 2007 AND "POST-RELEASE" ORDERS

MARY ROGAN*

The *Criminal Justice Act 2007* heralded a plethora of changes to Irish criminal law and procedure. The law on sentencing was also affected by its provisions. The focus of this article is on section 26 of that Act which introduces a general power on a court to make an order while passing sentence which will take effect on the expiration of a sentence of imprisonment. Under section 26 a court can impose two such orders, the "monitoring" order and the "protection of persons" order. The author assesses the background to the introduction of these dispositions and the potential application and the implications of their operation. Comparisons with similar provisions already in use in Ireland and also in England and Wales are drawn and insights from theoretical literature on the concept of "punishment" are utilised to assess the nature of these new developments for Irish sentencing practice. The author argues that section 26 orders represent a further example of a growing phenomenon in Irish criminal justice; that of increasing reliance on dispositions taking effect after the expiration of a "primary" sentence. Finally, the author points to some potential policy and practical difficulties with the operation of the orders.

SECTION 26 CRIMINAL JUSTICE ACT 2007

Section 26 introduces two types of order which can be imposed in addition to an ordinary sentence upon conviction. *[1]* Such orders can be imposed on adult offenders convicted, on indictment, of particular offences outlined in Schedule 2 of the Act. The relevant dispositions are entitled the "monitoring" order and the "protection of persons" order. The key feature of both orders is that they come into force after the convicted person has served a sentence of imprisonment.

The 'monitoring order'

Section 26(2) contains provision for the "monitoring" order. Where such an order is made, an offender is required to notify an Inspector of the Garda Síochána of the district in which his or her home *[2]* is located of his or her address as soon as practicable after the order comes into force. In addition, any change of address or proposed absence for more than 7 days must be notified in writing to the Inspector before such a change of address or absence.

A monitoring order may be made for any period which the court considers appropriate up to a maximum of seven years. *[3]*

The "protection of persons order"

Section 26(5) of the Act introduces the "protection of persons order." Under section 26(4) the purpose of such an order is declared as the protection of the victim of the offence concerned or any other person named in the order from harassment by the offender. This order is to prohibit an offender from engaging in any behaviour that "in the opinion of the court, would be likely to cause the victim of the offence concerned or any other person named in the order fear, distress or alarm or would be likely to amount to intimidation of any such person." *[4]* These orders can also be made for a period which the court considers appropriate, again up to a maximum of 7 years.

Both "monitoring" and "protection of persons" orders come into force on the date on which the sentence of imprisonment for the offence to which the order attaches expires, or, if the offender has been imprisoned for another offence, the date on which that other sentence of imprisonment expires or on the date of release due to remission.

Significantly, breach of these orders is itself an offence. A person who fails "without reasonable cause" to comply with a monitoring or protection of persons order is guilty of an offence and liable on summary conviction to a fine of up to €2000 or imprisonment of a term not exceeding 6 months or to both. *[5]*

Restriction to Certain Offences

Section 26 orders can only be applied when an individual is convicted on indictment of certain offences and when released from serving a sentence of imprisonment for such an offence. These offences are contained in Schedule 2 of the Act and include murder, assaults causing serious harm, *[6]* threats to kill or cause serious harm, *[7]* false imprisonment, *[8]* explosives offences, *[9]* firearms offences, *[10]* aggravated burglary, *[11]* drug trafficking offences, *[12]* blackmail, extortion and demanding money with menaces, *[13]* and "organised crime offences" under the *Criminal Justice Act 2006* . *[14]*

The clear intent of this section is to apply the orders involved to serious offence, particularly those perceived to be of a "gangland" nature. As such, the target will be some of the most serious offenders before the courts.

Provision to apply for revocation or variation of the order

The legislation gives provision to a person subject to such an order to apply to be released from its requirements. Such individuals may apply to the court that made the order for its variation or revocation. The court may grant a variation or revocation of the order if satisfied that there are circumstances put forward by the applicant which have occurred since the making of the order which warrants the variation or revocation. *[15]* If a person subject to a section 26 order makes an application of this nature, notice must be given to an Inspector of the Gardaí in the area in which the offender ordinarily resided at the time when the order was made or "if appropriate" to an inspector in the area in which the offender lives at the time of application. *[16]*

Under section 27 of the Act, a person against whom a monitoring or protection of persons order is made may receive legal aid under the *Criminal Justice (Legal Aid) Act 1962* in any application to have the order varied or revoked. *[17]*

LEGISLATIVE BACKGROUND

The provisions relating to monitoring and protection of persons orders are part of the extensive *Criminal Justice Act 2007* . The introduction and debate on this Act within the Oireachtas has been subject to trenchant criticism on several grounds, including the content of the provisions themselves and the manner of their enactment. *[18]*

The provisions which eventually became *section 26 of the Criminal Justice Act 2007* are vividly illustrative of the infirmities within the process of scrutiny and debate within the Houses of the Oireachtas on the Bill more generally.

The Criminal Justice Bill 2007 was introduced in March of that year. Its provisions regarding post-release orders as originally envisaged were of a materially different nature and scope to those which were eventually signed into law by the President.

The Bill had envisaged a single post-release order for persons over 18 who had been convicted on indictment of an offence listed in the Schedule to the Bill and who received a sentence of imprisonment which was less than the maximum available for that offence. This order, made in addition to a sentence of imprisonment, was to be known as a "crime prevention order" and was aimed at ensuring that: "(a) persons who are likely to be adversely affected by the presence of the offender are protected and (b) the offender will not commit any further offences." *[19]*

Such an order could have been made for a maximum period of ten years, but could not go beyond that which was the maximum term of imprisonment for the offence itself. *[20]*

The Bill also stated that conditions should be attached to the "crime prevention order" by the courts. These conditions were to apply for periods deemed appropriate by the sentencing judge. Suggestions for such conditions were also elucidated in the legislation and included a requirement to keep the peace, restrictions or prohibitions on the person gaining access to specified places at specified times, or making contact with specified persons as well as the requirements to notify the Gardaí about one's address and changes in this, as well as changes in employment or place of education. These conditions could apply for various periods. *[21]*

Serious Crime Act 2007: UK inspiration

The genesis of the introduction of such provisions appears to have stemmed from proposed UK legislation, now the *Serious Crime Act 2007* , which allows for the imposition of a "serious crime prevention order" by the High Court. Such orders are civil in nature and can be made without the need for a conviction to have been recorded or a person to have been charged with any offence. *[22]* The Crown Court can also make similar orders after a person has been found guilty of an offence. *[23]* The English courts already had the power to impose an anti-social behaviour order on persons convicted of offences and the court considered that the offender has acted in an anti-social manner and an order was necessary to protect the public from further anti-social acts. *[24]*

The *Serious Crime Act 2007* provides for even wider orders to be made than the Irish Act does. To make such an order the court must be satisfied that the individual has been involved in "serious crime" *[25]* and has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime. *[26]* "Serious crime" under the Act refers to some very serious offences, including drug trafficking, people trafficking, arms trafficking, prostitution and the involvement of children in sexual offences, armed robbery, money laundering, fraud, offences relating to public revenue, bribery and corruption. *[27]* An order may contain "such prohibitions, restrictions or requirements and such other terms" as the court considers appropriate for this purpose. *[28]*

These provisions allow for the English Crown Court to make any order it sees fit that is designed to protect the public by preventing crime. Such orders could include placing restraints on a person's financial dealings, means of communication, use of premises and travel. Even more stark is the ability of the High Court to make these kind of orders when no offence was found to have been committed, but the Court is satisfied that the individual has been involved in serious crime and the order is reasonably necessary to protect the public. *[29]*

This Act is a dubious inspiration for Irish legal responses to crime and attempts at its prevention. The combined effect of the original content of the Bill and its emulation of UK provisions which are themselves yet to be tested is disquieting. The legislative pedigree for section 26 is less than inspiring

and indicates a lack of reflection and interrogation of the proposals at the pre-drafting stages. *[30]*

Had the Bill as it initially stood been enacted, serious questions could have been raised about its constitutionality as well as the effectiveness and impact of the particular policy. The original format of what became section 26 gave courts extremely wide powers to place restraints on the liberty, freedom of expression and property of persons who had served their original sentence for an offence.

The UK influence on the introduction of these elements of the *Criminal Justice Act 2007* is, moreover, an example of the continuing preoccupation with "policy transfer" from our nearest neighbours, and the tendency to look to the UK for inspiration in criminal justice policy making. *[31]* While assessing the activities of other jurisdictions in the field of crime control is a valid exercise, it is not clear that the provisions were framed after long or careful consideration of the *Serious Crime Act 2007* , which itself was only passed in November 2007. This propensity disregards the need to ensure Irish measures respond to Irish problems and privileges the lamentable situation of applying a cut and paste approach to criminal justice innovations from abroad.

The use made of the *Serious Crime Act 2007* is also illustrative of the approach which the then Minister for Justice and his Department were planning for Ireland. In the truncated time frame in which the legislation was introduced, it is hardly surprising that these officials had ready recourse to UK proposals. Patently a change of heart ensued, but the manner of this turnaround and the eventual legislative result still leave much to be desired.

The progress of the proposals through the Dáil is useful both as a guide to the intended operation of the orders involved, though this may be of greater interest from an academic and policy-making perspective than as a means of assistance for judicial construction; *[32]* but such analysis is also of a broader relevance. Closer attention to the policy-making process is a valuable exercise in shedding light on the manner in which legislation is passed; assessing the practical validity of investigations of legislative intent *[33]* and exploring the links between legal norms and the political, social and cultural contexts in which such norms are made. *[34]*

Dáil Debates and section 26

What became section 26 was put before the Oireachtas in the Criminal Justice Bill 2007. Initially, Fine Gael and Labour were happy with the proposals. Mr Jim O'Keefe TD stated they "seem like a good idea." *[35]* Mr Brendan Howlin TD, for the Labour Party, described them as an "extremely valuable development" *[36]* and a vindication of victims' rights and in fact flagged his intention to seek "more draconian" provisions, particularly in relation to vicious sexual offenders. Mr Damien English, TD, described the order as "a good idea," which would give victims a feeling of security, but thought the ten year period was too long and clarification about the conditions was needed. *[37]*

Not all voices were in favour however, with Ms Róisín Shorthall TD, for the Labour Party criticising the lack of time or debate and the potential implications on the "restriction on movement order" brought in by *section 101 of the Criminal Justice Act 2006* . *[38]*

At the Second Stage, the only proposed amendment was to provide for legal aid when a person applied for variation or revocation of such an order. However, at Report Stage, unease and disquiet was expressed from a number of quarters. This concern appears to have erupted somewhat suddenly and in reaction to criticisms of the Bill from commentators and legal professionals. Mr Aengus Ó Snodaigh, for Sinn Féin, proposed amendments to the sections on the basis that they involved an imposition of an additional penalty for activity which itself would not be criminal in nature. Mr Howlin expressed a retrenchment from his original position, being avowedly influenced by an article by the former Attorney General, John Rogers SC, in *The Irish Times* on the subject. *[39]* Mr Howlin now argued that the orders as proposed were very vague and that it should be explicitly stated that they were "civil" in

nature, referring to their nomenclature as "super ASBOs." *[40]* Mr O'Keefe then also called for extra debate on the practical effect and benefit of the measures and their impact in Britain. *[41]*

The former Minister for Justice, Mr Michael McDowell, stated that he did not agree with the article written by Rogers and, furthermore, that the reason for their introduction was to provide for preventative orders to protect victims or other persons or to keep the perpetrator "on the straight and narrow" after release and give the Gardaí "some handle" over the person. *[42]* As such, the former Minister felt they were not "wildly controversial" *[43]* and their provisions could be replicated in the form of a suspended sentence in any event.

However, by 24 April 2007, a radical restatement of his position was in evidence. Mr McDowell tabled amendments to the Bill which subsequently became those provisions under consideration in this article. The "crime prevention order" had been scrapped and the "monitoring" and "protection of persons" orders were constructed in its stead. The reason for this change given by the Minister for Justice was that the Department had "considered the debate that took place" *[44]* in earlier sessions of the Dáil, and had decided to alter its course. The Minister acknowledged the original provisions could have been "unconstitutionally broad" *[45]* and that the new sections were of a "sharpened focus" such that they could not be considered a "broad blunderbuss to allow courts to make orders interfering with people's lives to a very substantial extent after release". *[46]* It is obvious that serious reservations had been expressed by drafters and policy-makers and that the negative commentary carried in the media had caused a reassessment of these provisions of the Bill. The Dáil's role in the affair is less obvious, with the legislative branch of Government enduring a less than glorious chapter in its history.

Remarkably, the amendments were the last tabled on the Bill and were introduced with not much more than five minutes left before the time for consideration of the Bill was up. The amendment was not circulated amongst the public and the whole process was subject to criticism by the Opposition. *[47]* At that stage, it being 10pm, the entire Bill was put to vote and carried.

Such a situation and approach to legislating is unsatisfactory. In addition to the speed at which section 26 was introduced, the absence of legislative debate means that there is very little guidance to be gleaned on the intention of the Oireachtas on enacting such a provision.

Evidently the Minister was concerned to ensure that the amended provisions would not interfere with a person's liberty as was feared regarding the original proposals; and believed that the changes would pass constitutional muster. He also stated that such orders were orders made on foot of a criminal conviction, and appealable to the Court of Criminal Appeal. As such, the Minister argued, they were not akin to civil orders or anti-social behaviour orders, nor did they require a "standard of proof," as they were orders made upon sentence. *[48]* From the evidence that can be garnered from such analysis, it appears the Oireachtas intended section 26 orders to be post-release elements of a sentence and not civil orders in the nature of the anti-social behaviour order.

These short statements are the only guidance available from the Houses of the Oireachtas as to the potential scope and operation of section 26. This being so, it falls to look at comparable provisions already in existence and the first principles of sentencing to assess the likely implementation of the section.

SEX OFFENDERS ACT 2001

The provisions in *section 10 of the Criminal Justice Act 2007* are part of a recent trend towards greater use of "post conviction" dispositions in both Irish and English law. This movement can also be allied to a more general tendency towards enforcing control of behaviour and infringing liberty by means of untraditional sanctions. *[49]* The growth of civil orders or "ASBOs" is one patent development in this

area. All of these measures are imposed in ways different from the usual imposition of penalty on foot of conviction, which, on expiration, has no further legal effects. Section 26 and other similar legislation will operate to extend the ability of the state to intervene in the lives of those who have served their sentences long after their involvement with the criminal justice system would otherwise have come to an end. For this reason, they require serious justification for their introduction and close scrutiny of their potential operation.

The obvious first point of reference is the *Sex Offenders Act 2001* , provisions of which relate to the imposition of a post-release obligation on those convicted of offences under that Act.

Post-Release Supervision under the Sex Offenders Act 2001

Under *section 28 of the Sex Offenders Act 2001* , a court which sentences a person convicted of an offence to which the Act relates "shall consider" whether to impose a sentence involving post-release supervision. Such supervision is carried out by a probation officer and cannot exceed the duration of the maximum term of imprisonment which the sexual offence would otherwise attract. In addition to supervision, section 30 allows a sentencing court to impose a number of conditions on the offender. Section 30(2) gives the court the option to impose a "condition prohibiting the sex offender from doing such one or more things as the court considers necessary for the purpose of protecting the public from serious harm from the offender." Under section 30(3) the court may also impose a condition that the offender receive psychological counselling or other appropriate treatment provided by either the probation service or any other suitable body which provides counselling or treatment.

When making a decision whether or not to impose conditions of this nature, the court is to have regard to:

1. The need for a period, after the offender has been released into the community, during which his or her conduct is supervised by a responsible person,
2. The need to protect the public from serious harm from the offender,
3. The need to prevent the commission by the offender of further sexual offences, and
4. The need to rehabilitate or further rehabilitate the offender.

Failure to comply, without reasonable excuse, with any of the supervision conditions is an offence attracting on summary conviction a fine of up to €3000, or 12 months imprisonment, or both.

In addition, under Part II of the Act, a person convicted of a certain offences to which the Act relates is also under an obligation to notify certain information to the Gardaí. This has been described as the creation of a "sex offenders' register." *[50]* A person who is subject to this "register" remains on it for a period contingent on the sentence which they originally received. There is a sliding scale of duration of registration depending on the length of sentence. For example, if a person has received a custodial sentence of more than two years, registration is indefinite. *[51]*

Those who are subject to the notification requirements must, under section 10, notify the Gardaí of his or her name, date of birth, home address, a change in name or address and any "qualifying periods" in which he or she is away from their usual address. If a person spends more than seven days away from this address then they must inform the gardaí of this fact within seven days of the move. There is no requirement that the offender notify the Gardaí periodically, it is only when the person's circumstances change that notification must be given, either directly or in writing.

Furthermore, a court is empowered to make "sex offenders orders" under section 16 of the 2001 Act. These prohibit the person from doing a thing or things as the court considers necessary to protect the public from serious harm. *[52]* Importantly, the court must be satisfied on the balance of probabilities that the person has been convicted of a sexual offence in the State or abroad and further satisfied that the person concerned has behaved on one or more occasions since release in a way that gave

reasonable grounds to believe that the order is necessary to protect the public from serious harm. Under section 16(4) the court may order that the person be prohibited from doing specified things for a period of at least five years, during which the notification requirements also apply *[53]* Breach of such an order constitutes a hybrid offence with a potential penalty of a fine of €3000, or 12 months imprisonment on summary conviction, or an unlimited fine or sentence of up to 5 years imprisonment if convicted on indictment.

SEX OFFENDERS ACT 2001 AND SECTION 26 COMPARED

Monitoring and Notification

There are a number of parallels in these provisions with those of the 2007 Act. The notification requirements are ostensibly similar, but the 2007 Act does not lay down any explicit or concrete time periods during which the notification requirements are to apply. All monitoring orders created by section 26, regardless of the duration of the original sentence, must expire after seven years, which, in light of the seriousness of the offences involved, is significantly less onerous than the provisions in the Sexual Offences Act. However, there is an obvious element of arbitrariness in the 2007 Act as there may be wide variations in the original sentence, yet the total period in which an order can operate is seven years, regardless of the length of the original sentence or the perceived threat which the individual offender poses, either at the time of sentencing, or upon release.

As with the "sex offenders register," the individual is not subject to periodic monitoring but must notify an inspector of the Garda Síochána in the district in which they reside if they change address or propose to be absent from that address for a period of more than seven days. Unlike the Sex Offenders Act, such notification must be given before any such change of address occurs. Such a requirement may make it easier to breach a monitoring order under section 26 as it may not always be realistic to expect a person to be aware of changes in address in advance and to take steps to notify the Gardaí. Moreover, the effect of the section may be to place extra administrative burdens on the Gardaí themselves who must process and check these changes and compliance with the legislation. *[54]*

The fact that a failure to give the Gardaí notice of a change of address is a breach of the monitoring requirements is troublesome from a practical and philosophical perspective. An offence is committed if a person fails to notify Gardaí in advance of any change in address. This obviously results in practical difficulties for offenders whose chaotic lifestyles may mean changes of address are not planned, or even desired. Such individuals would be guilty of an offence unless they could show "reasonable cause" for the failure, placing the onus personally on such accused to give proof of some justification for their actions. This holds out the possibility of a large number of individuals being liable for prosecution and requiring a great deal of court time to investigate any defence put forward. Furthermore, another pertinent question arises. It is unclear from the face of the provisions if the offence is committed once the status of an unnotified address change occurs, or arises once the accused has resolved ("proposed") to change address or made plans, or taken steps with that end in mind. As will be seen below, the *Criminal Justice Act 2006* contains an explicit procedure should such a scenario arise.

Post-Release Supervision/'Protection of Persons' Orders

The post-release supervision for sex offenders is somewhat different to the "protection of persons" order as contained in *section 26 of the Criminal Justice Act 2007* . Under section 30 of the 2001 Act, a court may impose conditions prohibiting the individual from doing "such one or more things as the court considers necessary for the purpose of protecting the public from serious harm from the offender." Under the 2007 Act, a "protection of persons" order is made in respect of an individual

victim or any other person named in that order. Its purpose is to prevent the harassment of such individuals and is worded in a manner akin to the anti-social behaviour legislation. The Sex Offenders provisions give a sentencing court a wide discretion to impose whatever conditions they see fit. However, these conditions must be explicitly laid down by the sentencing judge and explained to the offender. *[55]* By contrast, under section 26 of the 2007 Act, a person in receipt of a "protection of persons order" is prohibited from engaging in "any behaviour that, in the opinion of the court, would be likely to cause the victim of the offence concerned or any other person named in the order fear, distress or alarm or would be likely to amount to intimidation of any such person." Such a formulation has already been criticised in the context of anti-social behaviour orders as being overly vague and difficult to define in precise terms what behaviour is being prohibited, *[56]* something which is potentially in conflict with the principles outlined in *King v Attorney General* *[57]* and a recent strong restatement of the need for clarity in the criminal law by Hardiman J in *DPP v Cagney and McGrath* . *[58]*

The post-release supervision provisions for sex offenders are also patently aimed at attempting to address and change the behaviour of a person who has been convicted of a sexual offence. A court may make such an order to effectively commit the individual into the care of a probation officer or to oblige that person to receive counselling or treatment. There are no such provisions laid down in the 2007 Act. A person against whom a monitoring or protection of persons order has been made is obliged to notify the Gardaí and stay away from persons named in the order without any provision for supported supervision. On their face at least, the post-supervision requirements contained in the Sex Offenders legislation contain evidence of an attempt to balance the need to protect the public and to endeavour to aid an individual's rehabilitation. However, there is no such balance contained in the *Criminal Justice Act 2007* . The efforts involved are all stacked up on the side of public protection. This is difficult to explain given public perceptions would be unlikely to be that sexual offenders are more worthy of rehabilitative efforts than those convicted of offences in the Schedule to the *Criminal Justice Act 2007* .

Some comparison may be made between *section 26 of the Criminal Justice Act 2007* and the "sex offenders' orders" under *section 16 of the Sex Offenders Act 2001* . The latter provisions at least make explicit just what behaviour is prohibited by the court. Furthermore, in the case of orders under the 2001 Act, there must be some evidence of behaviour that has already given rise to concern about future risk though that behaviour need not warrant a criminal prosecution. In section 26, no account at all is taken of the offender's behaviour after release, which is *prima facie* assumed to be undesirable and the onus left on the offender to apply for the revocation or variation of the order. As such, imposition of an order under section 16 of the 2001 Act would not be automatic on conviction, but could be activated if the Gardaí were concerned about the individual's behaviour at any stage after release, once the court is satisfied, on the balance of probabilities, that a person has been convicted of such an offence. In addition, unlike section 26, the burden of proof for the making of such an order is also plainly stated.

THE DRUG OFFENDERS REGISTER": PART 9 OF THE CRIMINAL JUSTICE ACT 2006

Another example in the trend to increase the surveying capacity of the state on offenders who have served their sentences comes from *Part 9 of the Criminal Justice Act 2006* . Under this Act, a person who has been convicted, on indictment, of a "drug trafficking offence" *[59]* and who has received a sentence of over one year, is subject to a number of requirements and obligations. *[60]*

Any person who is subject to Part 9 will be issued with a certificate to that effect by the sentencing court *[61]* and must notify the Gardaí his or her name or names used, date of birth and his or her home address *[62]* within seven days of the "relevant date" which, for in the usual run of cases will be the

date of conviction. *[63]* A person is also required to notify the Gardaí within seven days of a change of name, change of address, residence away from the home address for a "qualifying period" *[64]* or the return to the State after a period abroad for seven continuous days or more. In addition, it is a requirement to notify the Gardaí if it is intended to leave the state for seven days or more and, if known, this location. If there is no such intention but residence abroad for more than seven days is, in fact, the result, then the person must notify the Gardaí with seven days from the date of the first of the seven days of residence abroad. *[65]*

Notification of such complicated matters can by effected by attending at any Garda station which is a divisional or district headquarters and informing a garda there orally of the matters concerned or by post, using a written notification to any Garda station which is a divisional or district headquarters, or by other prescribed means. *[66]*

Like the *Sex Offenders Act 2001* , a person will be subject to the requirements of Part 9 for periods of time which depend on the original duration of sentence. The sliding scale operates such that, for example, if a person receives a sentence of life imprisonment they must fulfil the notification requirements for 12 years. *[67]*

As with the 2007 Act, a person can apply to the Circuit Court to have such requirements discharged. *[68]*

There are two offences created by *section 94 of the Criminal Justice Act 2006* . If a person fails, without reasonable excuse, to comply with Part 9 then that person commits an offence. *[69]* In a prosecution for failure to comply with Part 9 a statement on oath by a member of the Gardaí of the rank of Sergeant or above, that notification was not given, shall, until the contrary is shown, be evidence that no such notification was given. *[70]*

A person also commits an offence if he or she furnishes any information which he or she knows to be false or misleading to the Gardaí. The penalties in both cases are, on summary conviction, a fine of up to €3000, or imprisonment for a term not exceeding 12 months, or both. *[71]*

The 'Drug Offenders' Register' and Section 26 compared

The provisions of section 26 of the Criminal Justice Act have the advantage of simplicity as compared with the labyrinthine notification requirements contained in the 2006 Act. The dispensing of the sliding scale is more straightforward, but, inevitably, a standard period of seven years during which notification is required will result in some offenders being subject to periods longer than they would have been for the same original sentence length had the offence been one of drug trafficking under the 2006 Act. Similarly, there will be offenders who will receive notification periods shorter than those which would be imposed under the 2006 Act for sentences of comparable length.

There is one significant anomaly contained in the inter-connections between these two Acts. Under the 2007 Act, certain offences to which the notification requirements attach are laid down in its Second Schedule. These include a "drug trafficking offence" within the meaning of *section 3(1) of the Criminal Justice Act 1994* . The 2007 Act does not claim to repeal the provisions regarding notification contained in the 2006 Act. It is therefore unclear which provisions the Court must apply in the case of a drug trafficking offence which comes before it, *ie* should a monitoring order or protection of persons order be made, or should the notification requirements in the 2006 Act be activated, or, can all three be brought into operation. It remains to be seen how the courts will interpret this clash of provisions. In this case, a more general statute has followed a more specific one. As such, it cannot be said with certainty to have repealed the earlier one. The courts have been left with the task of navigating these complicated provisions and their interaction. The minimalist Explanatory Memoranda give no guidance on this matter. This, in itself, is a consequence of the speed by which the 2007 Act was introduced.

Moreover, while the 2006 Act, like the *Sex Offenders Act 2001* , contains extensive provision to prove the commission of an offence relating to the notification requirements and which cover the situation where a person has left their address without notifying the Gardaí in advance. No such detail is given in the 2007 Act. Again, it will be left to the courts to decide if such additional conditions and procedures should be read into the Act. Again, such potential anomalies were not picked up in the Oireachtas given the manner of debate over section 26.

MONITORING AND PROTECTION OF PERSONS ORDERS: "PUNISHMENTS"?

The requirement to notify the Gardaí of one's movements and to ensure compliance with a protection of persons order impose considerable burdens on persons against whom they have been ordered. Such obligations, being court sanctioned and imposing restrictions on the behaviour of individuals, could arguably constitute penalties in their own right, in addition to the sentence of imprisonment to which they attach.

However, there appears to be some conflict within judicial decisions regarding the characterisation of such obligations as punishment. This debate has arisen in relation to the *Sex Offenders Act 2001* , but the principles derived from that case law are also applicable here.

Requirements regarding notification

The constitutionality of the notification requirements contained in the *Sex Offenders Act 2001* has been upheld in *Enright v Ireland* . *[72]* The Supreme Court concluded that these requirements did not constitute a penalty or part of a penalty or punishment. Notification requirements have also been upheld in England; *[73]* by the European Court of Human Rights *[74]* and even more onerous obligations have been sustained in US case law. *[75]*

The Irish case law regarding the notification requirements is of some assistance when analysing the nature of the provisions at issue and the likelihood of success in any constitutional challenge to these measures.

Enright applied: punitive intent

In *Enright* itself, Finlay-Geoghegan J in the High Court took a number of factors into account in deciding that the notification requirements were constitutionally sound. In reviewing a number of authorities, *[76]* Finlay-Geoghegan J concluded that in order to be considered part of a criminal penalty, a restriction or forfeiture which, allied to the main sentence, must be considered to be punitive in intent and effect. However, the fact that any disability or restriction which attaches to a criminal sanction may have such a punitive or deterrent element does not *per se* mean that it should be categorised as a penalty.

Finlay-Geoghegan J decided that the 2001 Act itself did not evidence an intent on behalf of the Oireachtas that the registration process be considered punitive. Looking at the long title of the Act, the learned judge laid emphasis on the fact that the requirements were stated to be in the interest of the common good and, significantly, that the imposition of such requirements also indicated a purpose of rehabilitation.

When assessing the comparable requirements in section 26, the long title of the Act does not demonstrate a clear intention of the Oireachtas as to the purpose of the requirements. Nor do the Dáil

debates on the issue. Of course, the avowed purpose of the Legislature when attempting to deal with organised crime was seeking to act in the common good in the prevention and punishment of such offences. However, there is no indication of the secondary aim of rehabilitation on either the face of or the presumed intention of the Oireachtas in this regard, in fact, quite the opposite might be inferred. The court also placed emphasis on the fact that the time limits would be proportionate to the risk posed by offenders at the date of conviction and the possibility of discharge of the requirements by a court at a later date.

The question of risk is an interesting introduction by Finlay-Geoghegan J as risk of reoffending is not generally considered an aim of sentencing. *[77]* In the judgment, risk also seemed to be peculiarly related to sex offenders, as the court demonstrated in its analysis of the expert evidence on the condition. It is not so clear that it has similar application to offences under Schedule II of the 2007 Act. Furthermore, the 2007 Act makes no discrimination between offenders, all of whom are subject to notification requirements regardless of their original offence, be it one of murder, possession of a firearm or otherwise, and with no assessment of the future risk of their reoffending.

In deciding if the registration procedure had such a punitive intent and effect, Finlay-Geoghegan J was assisted by a number of US decisions, in particular *Kennedy v Mendoza-Martinez* , *[78]* which laid down seven factors to address the punitive effect of a statute. In concluding that there was no such punitive effect, the court took into account, *inter alia* , the fact that though section 10 of the 2001 Act did impose a burden on an offender, it did not restrain him in his movements or activities or place him under a disability. It was held that the requirements were, in any event minimal, having the purpose of protecting the public and were not excessive in terms of the extent of intervention. In addition, the registration requirements could be considered as a deterrent rather than retributive. This distinction is somewhat fine as punishment may comprise deterrent elements and is not only a retributive concept. Again, the court referred to the "therapeutic" context in which registration was the lowest form of an intervention programme to prevent relapse. *[79]*

Moreover, Finlay-Geoghegan J held that the imposition of a notification requirement did not constitute a disproportionate interference with the guarantee of fair procedures under Articles 38.1 and 40.3 of the Constitution, given the purpose of the Act was to protect the constitutional rights of other citizens. Following the tests developed in *Tuohy v Courtney* *[80]* and *Heaney v Ireland* *[81]* as applied in subsequent decisions, *[82]* the court held that the test of proportionality was passed.

The court in *Enright* relied on expert evidence which showed that sexual offenders present a significant risk to society by reason of their tendency to relapse; that it is a condition which cannot generally be cured, and which should be thought of in terms of management of risk and the facilitation of personal and social control rather than providing a "cure." *[83]* It was held that the particular nature of sexual crime meant the notification requirements were of assistance in facilitating these aims and so were rationally connected to the objective of protecting society from offenders who may relapse and imposed a minimal burden on such offenders.

Application to Section 26

When assessing the potential application of such principles to the section 26 notification requirements, it is clear that the Oireachtas' transmutation of registration requirements from their original *locus* of the sex offender registration to more general categories of offence is problematic. While there is no doubting that a court would pay significant attention to the intention of the Oireachtas to protect the public from all serious offenders who may offend again, such as those targeted by the 2007 Act, and the rights of other members of the public, it is not so obvious that the *Enright* decision can be easily applied to assume automatically that section 26 is constitutionally sound. The court laid great emphasis on the particular nature of the crime involved and expert evidence on reoffending and the particular characteristics of sexual offenders. The need to extend this to a whole range of other

offences would have to be cogently proven rather than assumed. While the court held that the notification requirements did not infringe an individual's liberty impermissibly, it is further submitted that this was a very narrow definition of liberty. *[84]* The requirement to inform the Gardaí of one's movements and plans may fulfil a legitimate aim, but is unrealistic to contend that such contact with the criminal justice authorities and the potential impact on reintegration that this involves does not place significant restraints on an individual's freedom of movement and freedom to choose his or her own residence. There may well be a chilling effect on such plans brought about by the knowledge that it may potentially be a breach of the order and an allied reluctance to contact the Gardaí concerning the making of such plans. In addition, the court in *Enright* clearly took cognisance of the avowed purpose of rehabilitation and the management of the risk posed by sexual offenders in the *Sex Offenders Act 2001* , placing weight on this feature of the Act in finding that there was not an impermissible interference with liberty. No such motivations can be assumed here.

The section 26 orders are made on foot of a criminal conviction. There is an obvious difference between an order being made without any criminal sanction being involved and those which arise in conjunction with a criminal conviction, whereby an individual has already proven themselves a threat to the rights of others. However, it is nonetheless imperative that the fact of conviction should not allow the state to interfere with an individual's liberty for a significant period after the expiration of a sentence. A sentence of imprisonment records society's censure and is designed, in part, to effect retribution on the individual, with rehabilitation as a permissible aim. *[85]* However, once such a sentence had expired, the State had no further claim on the individual. It must always be borne in mind that the individuals subject to such orders may have criminal convictions in the past, but the primary sentences for these offences have already been served. The fact that a very particular scheme with a number of aims and unique characteristics has been upheld in *Enright* should not warrant the extension of similar procedures without compelling justification.

Taking into account the imposition of such orders at sentencing stage

Subsequent decisions on the *Sex Offenders Act 2001* have suggested that obligations such as notification requirements may in fact represent a penalty. In *DPP v NY* *[86]* Fennelly J held that in the case of a person with a low likelihood of reoffending, the application of the Act "constitutes a real and substantial punitive element" and the court may have regard to it in deciding on penalty. *GD v Ireland* *[87]* held that enrolment on the sex offenders' register was "in itself a punishment." In *CC v Ireland* , *[88]* Hardiman J was of the view that enrolment on such a register was a "very formalised stigma" and a matter of "intense shame" to an individual and his or her family. Placement on the register would also be incompatible with some forms of employment. In light of these considerations, Hardiman J had no hesitation in regarding the compulsory enrolment as a punitive consequence of conviction.

An analysis of these conflicting decisions was given by Clarke J in *PH v Ireland* . *[89]* Clarke J reviewed the state of the case law. The learned judge looked at the concept of "secondary punishment" alluded to in *NY* and *GD.* The argument that placement on the sex offenders' register was now being treated as part of the punishment was, however, rejected. Clarke J held that such requirements were merely an "additional burden placed upon a convicted person which must be weighed in the balance in all the circumstances of the case in order to determine an appropriate sentence." *[90]* These were no different to the many "adverse consequences" which may attach to a criminal conviction, such as the loss of employment, to which a sentencing court may pay attention. The matter remains unresolved with the later Supreme Court judgment in *CC* making it clear that notification requirements may have a punitive nature.

From this case law, therefore, it is clear that a court in sentencing a person for an offence under *Schedule II of the Criminal Justice Act 2007* may take into account the notification requirements when passing sentence. *[91]* Gerard Murphy argues in the context of the "drug trafficking register," that this may have the ironic and unintended effect of a sentencing court imposing a lesser sentence than might

otherwise have been the case in light of the obligations which take effect after sentence. *[92]*

Whatever about the likely effect of part 9 on sentencing practice, the attempt to extend the reach of the state long after conviction and the expiration of sentence through monitoring of individuals is to be regretted. The legitimacy of and necessity for the extension of a procedure designed originally to deal with the peculiar requirements of sex offenders and upheld in a case in which a court was faced with the potential result of a convicted sex offender avoiding reporting requirements and having the scheme declared unconstitutional to many other categories of offence is questionable.

In the space of six years, registration requirements and tracking have been extended from a targeted and select category - that of sex offenders - to offenders found guilty of drug trafficking offences and now more general offences of violence and possession of dangerous articles. It is clear that registers have developed something of an appeal for policy-makers and the burgeoning of such devices tends to suggest that their use will be extended further. A plethora of legislative measures as opposed to investment in social and other responses have been thrown at the prevention of recidivism. This is despite the lack of appraisal of the existing facilities in terms of effectiveness and the administrative burden on the Gardaí.

'Protection of persons' orders

There are some parallels between the "protection of persons" order contained in *section 26 of the Criminal Justice Act 2007* and other legislation. The *Sex Offenders Act 2001* contains a facility whereby a court may impose particular conditions on an offender prohibiting her from doing things the court feels necessary to protect the public from serious harm. This is included in the same section as the provision to make conditions regarding counselling or treatment as part of the sentence.

These post-release conditions have not been challenged in the courts. However, it is unlikely that the conditions regarding rehabilitation would be considered a "punishment" given the lack of punitive intent and the similarity between such stipulations and many general orders made by a sentencing court *eg* to attend drug counselling, *[93]* though Tom O'Malley argues that the constitutionality of the section is doubtful as it could be viewed as a form of "collateral punishment." *[94]* The protection of the public may also be characterised as a more formal manner of directing an individual to "keep the peace" or refrain from further criminal activity. More problematic would be more specific conditions such as particular prohibitions interfering with a right of movement. Unlike post-release supervision or post-detention supervision of young offenders, there is no requirement that the offender must meet a probation officer regularly or undergo a supervised post-release programme in the *Criminal Justice Act 2007* . The only condition under section 26 is to avoid behaviour likely to alarm or harass a named individual. Avoiding the label "punishment" might be more difficult in such circumstances, regardless of the declared aim of protecting others rather than imposing retribution. In many cases there would be a fine line between these two aims. The protection of persons order in section 26 is prima facie even more wide-ranging.

COMPARISONS WITH ANTI-SOCIAL BEHAVIOUR LEGISLATION

This wording of the protection of persons order follows closely that of the civil order known as the "ASBO." *[95]* An often-cited criticism *[96]* of such orders is the vagueness inherent in them and, more broadly, the legitimacy of using civil remedies to regulate behaviour but without the protections of a criminal trial such as the burden of proof and prohibitions on hearsay evidence, even though a breach of such an order may eventually result in a criminal conviction, *[97]* though, more recently, Peter Ramsay has identified a normative basis for the effective and legitimate use of civil orders such as the ASBO and the control order, as mechanisms to reduce the vulnerability of others and to impose

liability on those who "fail to reassure" others, protecting laudable values and pursuing worthy goals. *[98]*

The Anti-Social Behaviour Order was introduced into Irish law by the *Criminal Justice Act 2006* . *[99]* Both such provisions involve civil orders, breach of which is a criminal offence. An important difference in section 26 of the 2007 Act is that such an order can only be made after conviction for an offence proven in court. *[100]* This approach follows that prevalent in England and Wales since 2002 *[101]* when courts were empowered to impose such conditions after conviction. Ashworth states that most ASBOs are now made after conviction in that jurisdiction. *[102]*

The development of preventative orders made after conviction is one strand in a movement towards an ever-growing list of civil dispositions designed to regulate behaviour under UK law. Since 1998, ASBOs have been joined by sex offender orders, *[103]* "sexual offences prevention orders," "foreign travel orders," "risk of sexual harm orders," *[104]* "banning orders" preventing known football hooligans from causing further trouble at home and abroad, *[105]* and control orders under the *Prevention of Terrorism Act 2005* . *[106]* "Serious crime prevention orders," dubbed the "super ASBO" have also been introduced by the *Serious Crime Act 2007* , to be applied against persons who were involved in "serious crime" and which contain potentially wide restraints on a person subject to such an order, before such a person has ever been convicted. The House of Lords' Select Committee on the Constitution, in its report on the proposed Serious Crime Bill in the UK *[107]* has warned against the escalating use of such measures, citing the dangers posed to individual liberty and the lack of procedural safeguards. It is pertinent to note that the introduction of the "serious crime order" appears to have been the immediate impetus behind the introduction of the original section 6 in the Criminal Justice Bill 2007.

Judicial consideration in England and Wales

The nature of the ASBO has not yet been pronounced on by an Irish court. However, a small but authoritative set of judgments have been laid down in England and Wales which may prove useful in any assessment of the comparable English legislation when section 26 comes to be scrutinised judicially.

Very useful guidance is given by English case law on post-conviction ASBOs imposed under the *Police Reform Act 2002* . These differ from section 26 as, before a civil order can be made, the court must consider the offender to have acted in an anti-social manner and the order is necessary to protect the public from further anti-social acts. No explicit reference to past behaviour is made in section 26. This is a very important distinction as, in England and Wales, the prosecution must prove that, in addition to the substantive offences, the offender engaged in acts of anti-social behaviour to the criminal standard and the defendant must receive a proper opportunity to meet the case put against him or her. By contrast, the fact of proven offence alone is the trigger for a section 26 order.

Under English case law, the courts will scrutinise whether the individual has behaved in an anti-social manner before making a post-conviction anti-social behaviour order. Unless the facts of the offence for which the defendant has been convicted show such behaviour, the prosecution is obliged to prove it by reference to facts other than the facts giving rise to the conviction. While serious offences are involved under *Schedule II of the Criminal Justice Act 2007* , it cannot be conclusively presumed that those offences are, without more, evidence that the individual should warrant a civil order aimed at preventing behaviour likely to cause others fear, distress or alarm or behave in a way likely to amount to intimidation. *[108]* In *R v Lovegrove* *[109]* the English Court of Appeal held that proven offences of theft did not demonstrate that the public were likely to be harassed, alarmed or distressed by the defendant's behaviour and quashed the anti-social behaviour order which had been imposed. It should be noted, however, that evidence which would not have been admissible at the criminal trial may however be tendered at the section 26 hearing.

Secondly, under the English legislation which creates post-conviction ASBOs, a court must also be satisfied that the order is necessary to protect persons from further anti-social acts. Under section 26, the Court may make an order for the purpose of protecting the victim of the offence concerned or other persons. While it is not explicit from the terms of the legislation, it does appear that the Irish courts, in exercising their discretion whether or not to make an order under section 26 should assess whether the order is necessary for the purposes of protecting others from harassment.

One very interesting matter in this regard is the effect which the sentence itself will have on the assessment of the necessity for a section 26 order. The English Court of Appeal has already found that the sentence imposed may make an anti-social behaviour order unnecessary. In *R v P* , *[110]* the Court of Appeal took into account the fact that a substantial custodial sentence was being imposed and that the offender was likely to be later released on licence and likely to be recalled to prison on any breach of that licence. As such, it was held to be impossible to determine whether such an order was necessary to protect members of the public in the future and there was a real possibility that the custodial sentence would prove effective, *[111]* though it was ruled that such orders may be utilised in appropriate cases and circumstances. One such circumstance occurred in *R v Parkinson* *[112]* where the offender at issue had many previous convictions and a long history of anti-social behaviour. Given the lack of success of previous interventions, an anti-social behaviour order was considered necessary.

Guidance for the Judiciary in England and Wales states that courts should, when weighing such matters, take into account the nature and length of the sentence; its likely effect on the defendant; the nature, length and effect of any previous sentences and the duration conditions; and likely effect of any release on licence (which would be akin to temporary release here). *[113]* It can be posited that the objective of rehabilitation in sentencing upheld by the Irish courts would also be taken into account here, *[114]* though the courts may also be cognisant of the difficulties of such efforts at rehabilitation in practice and the potential receptivity of the offender to reform. It may well be the case that an Irish court could consider a section 26 order a further impediment to rehabilitation, or at least providing no extra chance of rehabilitation, rather than an extra layer of protection for the public.

The English courts have, furthermore, consistently posited that anti-social behaviour orders made on conviction should under no circumstances be used to extend the penalty for a particular offence. *[115]* It is to be hoped that such a finding would be followed in this jurisdiction to avoid the charge that section 26 orders have created the inverse of the suspended sentence, extending periods of supervision and restraints on behaviour on top of full custodial sentences.

Judicial consideration of other civil orders

The English courts have also looked at the nature of the ASBO under UK law more generally. The House of Lords has held in *R (McCann) v Manchester Crown Court* *[116]* that an ASBO was civil rather than criminal in nature as its purpose was to impose a prohibition rather than a penalty. Their Lordships held further that, for reasons of fairness, the burden of proof should be the standard of "being satisfied so that they were sure" such an order was required. However, in deciding if the defendant had been involved in anti-social behaviour, the criminal standard and burden applied. In addition, procedural fairness required that certain safeguards should be upheld even in the context of the making of a civil order. These safeguards were further assessed in *R v W* . *[117]* There, the Court of Appeal held that hearsay evidence may be adduced in applications for anti-social behaviour orders, but the defendant had to be given a proper opportunity to consider and challenge that evidence with Aikens J noting, *per curiam* , that the actual and potential consequences for the recipient of an anti-social behaviour order made it particularly important that procedural fairness was "scrupulously observed." *[118]*

Clingham v Royal Borough of Kensington and Chelsea *[119]* and *R (Lonergan) v Lewes Crown Court* *[120]* have also held that the purpose of these orders was not to punish, but was, *per contra* , protective

and preventive, a finding criticised by Ashworth among others. *[121]* *R v Kirby* *[122]* and *R (Rabess) v Commissioner of Police of the Metropolis* *[123]* similarly reiterate the protective nature of the ASBO.

More recent judgments, however, appear to signal a more cautious approach by the courts to the granting of anti-social behaviour orders and other civil dispositions of even more onerous natures. For example, in *RE JJ* *[124]* the Court of Appeal for England and Wales held that an order made under the *Prevention of Terrorism Act 2005* , known as a "control order," which confined a person to a small flat for 18 hours every day, breached the applicant's right to liberty under Article 5 of the European Convention on Human Rights. This was recently upheld by the House of Lords. *[125]* In *Secretary of State for the Home Department v MB (FC)* , *[126]* Lord Bingham of Cornhill concluded that "control orders" made under the 2005 Act were not, on balance, criminal penalties. In his judgment, Lord Bingham relied on the fact that there was no assertion of criminal conduct by the state, only a foundation of suspicion. Furthermore, no identification of any specific criminal offence was provided for in the order which was considered preventative in purpose, not just retributive or punitive. The court also affirmed that the obligations imposed must be no more restrictive than this preventative purpose required. *[127]* Lord Bingham acknowledged, however, that the effect of a preventative measure may be so adverse as to be penal in its effects if not in its intention. His Lordship also found that, under Article 6 of the ECHR, persons subject to control orders were entitled to procedural protections commensurate with the gravity of the potential consequences.

The court in *R v Boness and Bebbington and others* *[128]* issued guidelines as to the proper use of anti-social behaviour orders, ruling that their use must be proportionate, *ie* commensurate with the risk to be guarded against. In this case a number of anti-social behaviour orders were imposed following various convictions for burglary, handling stolen goods, affray and threatening behaviour. The orders ranged in duration from four to ten years. Hooper LJ held that the test for making such an order was one of "necessity" in that each separate order must be necessary to protect persons from further anti-social acts and must be tailor-made for an individual offender, not just "designed on a word processor for use in every case." Hooper LJ further opined: "the test for making an order is not whether the offender needs reminding that certain matters do constitute criminal conduct, but whether it is necessary." *[129]* His Lordship held, further, that proportionality was particularly important where an order might interfere with a right guaranteed by the ECHR such as Articles 8, 10 or 11. Some of the orders made were quashed on the grounds that they were unnecessary and their terms were disproportionate and unclear. *[130]* One order, made for ten years, was quashed on the grounds that its duration was manifestly excessive.

The principles laid down in *Boness* have been applied subsequently in the English courts. *[131]* In *R v Ward* , *[132]* an indefinite anti-social behaviour order was made in addition to a sentence of imprisonment for the offence of attempted theft. It was submitted that Ward had a long history of targeting motor vehicles in Kensington and Chelsea in London and the trial judge made an order restraining him from entering that area and having in his possession any articles in connection with removing car wheels or alloys. The Court of Appeal upheld the geographical specificity of the order and the prohibition on the particular items involved, but felt that the length of the order was disproportionately long, applying *Boness.*

Hills v Chief Constable of Essex *[133]* also assessed the *Boness* principles. One of the questions for determination in that case was whether an anti-social behaviour order can prohibit acts which would amount to a criminal offence. Keith J applied *Boness* which had held there was no absolute bar on such a prohibition, but that anti-social behaviour orders should not be used merely as a means of providing a longer "sentence" than would be the case if such an offence was proven and courts should aim to prevent acts which are preparatory to the commission of a criminal offence rather than acts constitutive of a criminal offence. *[134]* Other cases have applied *Boness* to vary orders on the grounds that their original content and prohibitions were drafted in an impermissibly wide manner. *[135]* *R v W* *[136]* affirmed that conditions attached to anti-social behaviour orders made upon conviction should not impose generic prohibitions, but should identify and prohibit the particular type of anti-social

behaviour which gave rise to the need for the order. *R v Lovegrove* *[137]* also reiterated that unnecessary orders should not be made and the terms of any order should be narrowly drawn. *[138]*

It is clear, therefore, that the bulk of judicial opinion in England and Wales favours a narrow approach to the imposition of anti-social behaviour and other orders. These orders should, from the case law, be made only where necessary and in clearly identifiable terms.

The 'Burden of Proof under Section 26

The above cases are instructive in a consideration of the potential operation of section 26 and the burden which has been placed on the courts to ensure that the orders involved are applied fairly and judiciously.

Under section 26, a court "shall consider" whether it is appropriate to make an order or orders under the section *[139]* and, furthermore, has discretion over the duration of such an order. From the face of the statute, it is mandatory for the court to consider such an order, but within its discretion to impose an order. No other guidance is given as to the factors to be weighed when making a section 26 ruling.

The Judicial Studies Board for England and Wales has addressed the question of the position of the post-conviction anti-social behaviour order and its interaction with the sentencing process. Taking into account the civil nature of the anti-social behaviour proceedings and the fact that the purpose of an ASBO is not to punish a defendant, the Board considers it most advisable to treat the ASBO hearing as entirely separate to the sentencing process, stating: "the question of whether to make an order is not part of the sentencing process: it is better to decide the appropriate sentence and then decide whether to make an ASBO, whether at the sentence hearing or a later hearing." *[140]* The cleavage between these processes is evident as the Board also indicates, following *Boness* , that arguments in mitigation that a court should make an ASBO instead of passing a custodial or other sentence are irrelevant and the court must resist being "diverted in that way." *[141]* As such, Murphy's point regarding discounted sentencing on the imposition of an anti-social behaviour order may be unfounded. *[142]*

In introducing section 26 to the Dáil, the Minister argued that because such orders would be made on foot of a conviction the question of the burden of proof would not arise as it would be a sentencing matter. This would seem to be misguided in light of the UK approach outlined above and the comments in *Enright* to the effect that a defendant could make submissions to a court regarding the imposition of notification requirements. The fact that the imposition of an order is prima facie discretionary and there is provision to apply for a discharge of the order would also seem to suggest that a court could not impose an order under section 26 without making some sort of judgment regarding its necessity. A court must utilise some standard in deciding to impose an order and its duration.

In addition, a court would have to be vigilant that such an order was not, in substance, a criminal penalty without concomitant safeguards, contrary to the constitutional guarantee of fair procedures and Article 6 of the European Convention on Human Rights. Adam Sandell discusses this point in the context of control orders which are designed to prevent criminal activity. Sandell states that where the standard of proof is merely the balance of probabilities, other procedural protections applicable to criminal trials should apply "*a fortiori* ." *[143]*

The European Court of Human Rights has addressed the question of whether a dispute can be categorised as civil or criminal under Article 6. Three main considerations are addressed. First, the formal classification of the matter within the domestic legal system, second, the nature of the offence, and third, the severity of the penalty. *[144]* The substance of the offence and its consequences are of greater weight in such an investigation than the drafting of the impugned provision. *[145]*

The indications from recent English case law assessing the Convention position suggest that the courts there are now inclined to apply more rigorous scrutiny to the imposition of civil orders. At base, the English judicial opinion on such orders is largely in favour of a finding that they do not constitute punishments. This combined with the *Enright* principles are likely to ensure that an Irish court would find the protection of persons order to constitute a preventive and deterrent disposition rather than a retributive one, or indeed, to negate the legitimate contention that section 26 involves the creation of a *de facto* criminal offence. *[146]*

While this may be the likely result, the experience in the English courts demonstrates the need for and value in close scrutiny of such measures. There the courts have taken on the role of applying a questioning and searching approach to ensure that orders made under comparable English statutes are applied in a manner that complies with human rights norms and procedural fairness.

This is particularly pertinent when assessing the section 26 order. Under the *Boness* principles a "blunderbuss" approach to making these kinds of orders is to be denigrated and avoided. Courts exercising their discretion under the legislation must ensure that the disposition takes account of the individual circumstances of the offender involved. In particular, the court will be required to exercise independent judgment when making these kinds of decisions, rather than relying automatically on the submissions or requests from the prosecution and the information given by the Gardaí. In *R v Pedder* *[147]* the English Court of Appeal criticised the process whereby an agreed anti-social behaviour order is presented to the court. Instead, it held that proposed terms of the order should be given to the court and adequate time given for consideration and submissions about the terms of the order.

The Irish courts must be especially alive to the need for proportionality when there are potential restrictions on the right to liberty, private and family life under both Constitutional and Convention principles. A fine-grained and sensitive approach on behalf of sentencing courts is therefore necessary to avoid findings that section 26 orders made are, in fact, penal in their effects and unconstitutional in their operation.

The legislature has given life to the possibility of infringements on the rights of individuals potentially subject to section 26 orders. The courts have been left with the task of fashioning a constitutionally valid solution in individual cases. These cautionary principles are even more important given that the orders at issue give rise to the possibility of criminal conviction. Following the restatement of *King v Attorney General* *[148]* by the Supreme Court in *DPP v Cagney and McGrath* , *[149]* the courts must avoid the creation of orders which are overly vague, difficult for the convicted person to follow or comply with. In this regard the wording of the "protection of persons" order is itself problematic. While the purpose of the order is declared as being protection of victims or other individuals from "harassment;" *[150]* the order itself may prohibit behaviour considered by the court as likely to cause fear, distress or alarm, or which would be likely to amount to intimidation, *[151]* with no indication as to the possible differences between these concepts or their interaction. As such, the details of section 26 orders must be clear, capable of compliance by the individual and limited in effect and operation to the aims of protecting others to avoid being considered penal in effect, if not intent. A significant burden is also thereby placed on defence counsel to ensure that a defendant is made aware of the implications of any order and in making submissions on the content of proposed orders. The possibility of having an order made under section 26 must also be brought to the defendant's attention in the pre-trial stages. *[152]*

PUNISHMENT AND THE OFFENDER UNDER SECTION 26

While the English courts have held that such orders do not constitute punishment, but instead are protective and preventive and Irish courts and the European Court of Human Rights have held that notification requirements are, similarly, not a form of punishment, theoretical and philosophical

discussions of the nature of punishment point in other directions.

Ashworth, for example, has argued that where the effect of a disposition is to criminalise and the coerced imposition of "pain" is involved, the fact that a measure is deemed "civil" and not "criminal" should not necessarily mean that it cannot be correctly considered "punishment." *[153]* Zedner, in her analysis of the tenets of punishment, suggests that the definition should also encompass putative offenders and those neither suspected nor convicted of a criminal offence. *[154]*

Punishment evokes considerations of unpleasantness, but it is overly limiting to think of the concept in this way. The prevention of future offending and the overall benefit to the common good are also justifications for the infliction of punishment, even though these may be dressed up as being for the good of the individual offender or others. Drawing on Hudson, the goals of deterrence or incapacitation, which section 26 attempts to achieve, are generally considered to be legitimate grounds on which to enforce punishment. *[155]* Given this, it is unduly constricting to conceive of punishment simply as "retribution" or "vengeance."

Assessing the effects of section 26 on the offender involved is a useful paradigm in considering whether its operation involves the imposition of punishment. *[156]* Both the notification requirements and the protection of persons order may give rise to criminal liability in the event of a breach. This in itself should alert us to the rigorous consequences of the making of orders under section 26. It is somewhat unrealistic to separate the civil part of the order from the potential for criminal liability on breach given their close linkage in practice. Furthermore, such an occurrence may occur unless the individual him or herself shows "reasonable excuse" for the breach. The same provisions apply to the breaches of notification orders. This runs the danger of establishing a "shadow legal system" *[157]* where individuals are accused of criminal activity on pain of punishment but without the traditional protections of the criminal law, short circuiting the protections of Article 38.1 in the process.

Such orders will also operate to restrict the liberty of an individual to prevent them from acting in particular ways. While the restrictions may not be especially onerous, it is nonetheless philosophically inaccurate to say no deprivation of liberty is involved just because it is of a limited nature. Any physical restraint on activity can only be pursuant to a lawful power under Articles 38.1 and 40.4.1° of the Constitution and Article 6 of the European Convention on Human Rights. Historically, this has been confined to arrest, remand and detention on foot of conviction. While modern methods in criminal justice have increased the categories under which liberty can be restrained, further erosions of the right, even for persons who have been convicted of offences, should only be permitted where strictly necessary.

The necessity for the "protection of persons" order must be particularly closely watched. Much of the behaviour targeted would be likely to be criminal regardless, *eg* intimidation or harassment of a victim or another person. As such, it can be argued that section 26 is simply dressage or legal surplusage. If an individual is engaging in activity of this nature, then prosecution for a criminal offence is the most appropriate response. Instead, what has been created is a facility for the prosecution through the establishment of a strict liability offence. Once proof of the breach has been given, it is for the subject of the section 26 order to prove he or she had "reasonable cause" for his or her actions, with failure to do so resulting in a fine of up to €2000 or a term of imprisonment of up to 6 months, or both. *[158]*

Sentencing for breach of such an order has been assessed in a number of cases in England and Wales. It has been held that a sentence for a breach of a civil order can be longer than would be the case for the conduct involved if it was prosecuted as a criminal offence, though the maximum sentence for the substantive criminal offence should be borne in mind when sentencing for breach of the post-conviction ASBO. *[159]* The relatively low penalties involved for breach of section 26 orders in Ireland militates against the possibility of such concerns arising in this jurisdiction, however, there may well be scenarios in which the potential penalty for breach is higher than that which would be applied on a criminal conviction arising out of the same facts. The English approach to these matters is

disappointing and, it is submitted, should not be followed by an Irish court in such circumstances. Moreover, the comparatively minor nature of the penalties under section 26 lends further credence to the contention that the section was unnecessary. If greater penalties could be achieved through the normal route of prosecution, then the culpability of the offender should be addressed through this process rather than for breach. In addition to providing a penalty commensurate with the wrongdoing involved, the protections of the criminal trial would also attach.

The fact that the individuals involved have been convicted of serious offences should not mean that their rights can be put permanently in abeyance. The implications of such an attitude are serious. In addition to the burden of showing "reasonable cause," it is for the recipient of a section 26 order to apply to the court for revocation or variation of the order. Convicted persons must prove themselves "worthy" on release, deserving re-entry to normal society. This is a radically different position from that which pertained hitherto. Formerly, and in relation to other offences, on the expiration of a sentence an adult had no further formal disabilities imposed on release. There were no such requirements placed in legislation to demonstrate one's own "reform," apart from requirements to inform employers of previous convictions, for example. Now there is a statutory requirement on those who have served their sentences to provide evidence that state control or monitoring over them is unnecessary, rather than the default position that, once a sentence had been served, the offender was an "ex-offender" and the state had no other part to play in his affairs.

The "failure model"

First, the introduction of such orders implies a "failure model" *[160]* in Irish criminal justice and penal policy. An assumption is made that all such offenders are incapable of change and that the prison system is impotent to make any difference to their behaviour and so further restrictions are necessary on their activities after release. Those involved have been found guilty of very serious crimes and the protection of victims and the public generally is vitally important. However, section 26 suggests a resignation and submission regarding the ability of the state to create the conditions in which behaviour can be changed. This is a clear indictment of the prison system and an overt recognition in legislative form that the Irish prison system is incapable of facilitating change in offenders. This would tend to go against the declarations made by the Prison Service *[161]* that prison should provide opportunities for transformation, and the position of the Irish courts that rehabilitation is a legitimate ground for sentencing and a worthwhile goal to pursue.

Garland considers such trends to be part of an increasing "punitive segregation" *[162]* which itself is predicated upon a reconceptualisation of the relationship between offenders and society. Rights of offenders have declined, with an accompanying upsurge in declarations of the primacy of "public safety", often instrumentalised in the form of notification requirements and registers. *[163]* Overall, Garland feels that in the US and UK "crime complex," "there is no such thing as an 'ex-offender' - only offenders who have been caught before and will strike again." *[164]*

It is difficult to state with certainty what the intention of the Oireachtas is in this regard, particularly when viewed in conjunction with other trends which tend to suggest a commitment towards rehabilitation. On the face of it, however, the position and attitude identified by Garland has been transplanted, it appears, to Ireland, without advertence to whether it is desired by the public, in keeping with the rest of our penal policy or even necessary for the Irish context. This could be because Irish penal policy is, in fact, taking on a more punitive tone or due to the unthinking importation of legislation from abroad. Little evidence is available to ascribe any particular philosophy to the introduction of the legislation. In any event, on the evidence of section 26, Albert Camus' plea that: "it is no man's right to despair of another, to consider he has no chance of making amends" *[165]* has not been heeded by Irish legislators.

Spent Convictions Schemes

These tendencies in criminal justice legislation appear, furthermore, to be in contradiction with the philosophy behind the proposals for a Spent Convictions Scheme, proposals for which are contained in the Spent Convictions Bill introduced in October 2007 following a Law Reform Commission report on this topic. *[166]* The Commission's Report recommended the introduction of a system under which convictions could be expunged for adult offenders *[167]* on the basis that an underlying value in such a scheme should be "an acknowledgement that a criminal record is not necessarily an indicator of the current or future behaviour of an individual … the scheme should reflect that the law recognises a point at which an individual is entitled to put their past behind them." *[168]* However, the Commission took a restrictive view of this principle, recommending that all sexual offences, offences tried in the Central Criminal Court and all offences which result in a sentence of imprisonment for more than six months should be ineligible for expungement.

To qualify, the individual would have to remain "conviction free" for seven years after a conviction in the case where a sentence of imprisonment has been imposed, or five years in the case of a non-custodial sentence. *[169]* Such an expungement would then be automatic. *[170]* This has been criticised by the "Spent Convictions Group," a collection of interested parties including the Northside Community Law Centre, the Ballymun Community Law Centre, the Ballymun Local Drugs Task Force, Business in the Community and the Human Rights Committee of the Law Society of Ireland. *[171]* In a report commissioned by the Department of Justice before the Law Reform Commission Report and the publication of the Spent Convictions Bill 2007, a review of spent convictions schemes from various jurisdictions was conducted. Shane Kilcommins *et al* found that those with similar provisions to those contained in our putative legislation were part of a movement towards making expungement more conditional and difficult to obtain. *[172]*

The Bill follows the Commission's recommendations and uses the terminology of "rehabilitated person" to describe those to whom the scheme applies. *[173]* Under the Bill, any spent conviction cannot be tendered in evidence at any subsequent trial nor be disclosed in any other context. *[174]* However, certain types of employment retain a disclosure requirement such as any occupation involving children or vulnerable persons; health care professions; the legal profession; the civil service; firearms dealers; traffic wardens; the defence forces; prison officers; the probation service; prison visiting committees; the Gardaí and the accountants or directors of financial institutions. *[175]*

The Spent Convictions Bill signals a commitment by Government to assist offenders to wipe the slate clean and put their offences behind them without the stigma and continued impediments posed by their past involvement in the criminal justice system. Section 26, when viewed in the light of this intention by the Oireachtas, seems disconsonant. Most of those dealt with by section 26 would be likely to fall without the terms of this scheme in any event.

Through the Scheme, the Government has made a laudable, if belated, attempt to ease the difficulties associated with reentering society on receipt of a criminal conviction, but it has done so in a restrictive manner. For those not deemed worthy of inclusion in the Scheme, many of whom will overlap with those affected by section 26, the law appears to recognise a category of offender which is to be considered as permanently dangerous and incapable of reintegration. The exclusion of certain categories from consideration by the Parole Board also reflects a similar sentiment. *[176]*

The principle that a sentence is the primary punishment for a crime: Section 26 as an extra hurdle to reintegration

The *Criminal Justice Act 2007* betrays an apparent lack of interest or regard for the principle that once a person has served a sentence they should be allowed to move on with their lives. The orders introduced by section 26 and their counterparts in Sex Offenders legislation and the *Criminal Justice Act 2006* all represent a significant break with past practice that once a sentence had been served, there

was no further claim by the state over an adult offender. This principle has now been eradicated. Not only is this the case, it is also likely that such orders may in fact operate to lessen the chances of successful reintegration to the community upon release.

As the Irish courts have held regarding the sex offender register, inclusion on this is a heavy stigma on an individual and has implications regarding employment and an offender's future life. Inclusion on a "drug traffickers' register" or a "violence" register would be similarly stigmatising. Continuing involvement with the criminal justice authorities would also militate against an attempt to put past criminal activity behind a person.

"Protection of persons" orders pose particular difficulties. These may involve, for example, prohibitions on a person from entering particular areas, which may also include areas in which their own roots and families are, or where potential employment or other facilities might be situated. This gives rise to the potential for these dispositions to further marginalise ex-offenders. *R v H* *[177]* is instructive in this regard. Here the appellant had attacked a man who remained very troubled by the attack. In addition to three years' detention, an anti-social behaviour order was made prohibiting the appellant from contacting the victim either directly or indirectly and from entering an area around which the victim lived. However, the offender's parents also lived close by, which meant, in effect, that they would have to move if the appellant, who was still a young man, was to continue to live at home after release or else he would not have been able to return to his family home. On appeal, the Court of Appeal reduced the period of the order to reflect the time needed for the offender to mature and the prohibition relating to the geographical exclusion zone was reduced to a single street in which the victim lived.

Speaking of the USA, where civil disabilities attendant upon imprisonment include the suspension of driving licences and life-time bans on receiving welfare assistance in some states, Deborah Archer and Kele Williams note that this web of legal and extra-legal consequences following imprisonment "condemns ex-offenders to a diminished social and economic status," with attendant negative effects on their families and communities. *[178]*

While Ireland proffers far fewer legal restrictions on former prisoners than some states in the USA, ex-offenders here already face a myriad of hurdles when attempting to return to society, including social, financial, and cultural restraints and inhibitions, otherwise known as the "collateral consequences" of imprisonment. *[179]* Statutory impediments have now also been put in the way of ex-offenders seeking to reintegrate into Irish society.

Lack of investment in aftercare

Section 26 seeks to place controls on an individual without concomitant investment in reintegration services. The "monitoring" and "protection of persons" orders seek to restrain an individual's behaviour through the mechanisms of legal orders with the backup of further criminal sanctions. While these have the laudable aims of protecting the community and individual victims from harm, their success is unlikely without additional resources being applied to prisoner after-care strategies. The question of re-entry of prisoners into society presents particular challenges and a multitude of difficulties. Concerns have been expressed about inadequate after-care in Ireland for decades, though the efforts made in this regard have been, in the main, localised and on a small scale with a historically heavy reliance placed on voluntary and religious organisations.

From as far back as 1962, the Government has recognised the need to provide structured and well-resourced supports for prisoners upon release. The Mountjoy After-Care Committee was established in 1965 as part of recommendations made by an Inter-Departmental Committee set up to investigate *inter alia* , the penal system and treatment of offenders. The Whitaker Committee in 1985 also highlighted the importance of prison after-care in desistance from crime and the deficiencies in the system, noting,

in particular, the deplorable practice of authorising temporary release without supervision. *[180]*

Significant barriers to successful re-entry remain. A recent study by Mairéad Seymour and Liza Costello *[181]* highlighted, *inter alia* , the particular difficulties faced by ex-prisoners in relation to housing and the heightened risk of homelessness. A lack of housing provision, access to information about support services, follow-up drug treatment and pre-release supports were all identified by the authors as impediments to successful re-entry into society.

An important contribution to the analysis of the Irish situation has been made by O'Donnell *et al* . *[182]* Their study explores the nature of prisoner resettlement in this country. The authors found, *inter alia* , that prisoners tended to return to a small number of areas with one of many startling findings showing that in some of the most deprived areas of the country there were 145.9 prisoners per 10000 population, with only 6.3 prisoners per 10000 population in the least deprived areas of the country, though the correlation was not always uniform, with rural areas often characterised by high levels of deprivation but low numbers of prisoners within the community.

In a finding similar to those proffered by Ivana Bacik *et al* *[183]* and also by Paul O'Mahony, *[184]* most prisoners in Ireland come from areas characterised by significant socio-economic problems. However, more significantly for present purposes, O'Donnell *et al's* study demonstrates that prisoners also return to these areas, concluding "it is the areas already marked by social disadvantage that must bear the brunt of the social problems that accompany released prisoners." *[185]* Such findings demonstrate that Irish prisoners already face serious environmental constraints when re-entering the community, and, concomitantly, such prisoners place severe burdens on areas structurally ill-equipped to cope with such populations.

The continuing problems regarding unsupervised temporary release from prison, a lack of sentence or pre-release planning *[186]* and a general deficiency in numbers and funding for the probation service, particularly regarding after-care for prisoners all militate against efforts to ensure that an individual does not reoffend. *[187]* The Court of Criminal Appeal has also held that release with supervision, support and pre-release planning is far more desirable for the community and beneficial to offenders than release without such support. *[188]* It is difficult to see how adding further criminal justice checks and civil orders will reduce a recidivism rate of 27.6% (being the number of prisoners who are serving a prison sentence again within one year of release rising to 39.2% after two years, 45.1% after three years and 49.2% after four years) *[189]* without additional and more imaginative methods being introduced.

Such methods have been debated extensively in the National Economic and Social Forum's 2002 Report on the Reintegration of Prisoners. *[190]* This report made a number of proposals aimed at improving the chances of a prisoner leading a law-abiding life after release, including pre-release planning; educational, social, employment and family interventions; liaisons between probation staff and supports in the community. In its assessment of the services required to encourage law-abiding behaviour, no mention was made of post-release orders of the nature contained in section 26. In fact, the Department of Justice already provides funding for a variety of local projects which work with offenders on release providing the types of assistance lauded by the NESF. *[191]*

In addition, a Council of Europe Report from 2006 made a number of draft recommendations regarding the social reintegration of prisoners including measures to tackle discrimination on the basis of criminal records and the provision of supports on release. Again, monitoring orders or protection of persons orders or their equivalents were not detailed in its conclusions. *[192]* The evidence of their effectiveness in preventing reoffending or protecting the public has yet to be presented by the Department of Justice.

Such orders are, instead, forms of window-dressing which ostensibly target reoffending on release, but do so only at a superficial level, providing hybrid civil and criminal law responses and threats, but

nothing more. As O'Donnell *et al* aver, "former prisoners are more likely to have drug and alcohol problems, to suffer from mental illness, to come from unstable families, to have lower levels of education and to be less employable, all factors that elevate the risk of recidivism." *[193]* They counsel the investment of resources and services targeted at the most vulnerable areas in which the majority of prisoners end up upon release.

In light of the above considerations, it is unlikely that section 26 orders will have any significant impact on the realities of prisoner reintegration and desistance and will be likely to create merely an extra administrative burden for the Gardaí and for the judicial authorities charged with imposing them.

CONCLUSION

The provisions of section 26 were hastily composed in a rush to legislate which characterised the introduction of the Criminal Justice Bill 2007. This resulted in an inevitable lack of scrutiny over the potential operation and effectiveness of section 26. The tendency to introduce registers in an attempt to give the appearance of public protection and prevention of reoffending without accompanying investment in prisoner through-and after-care services is regrettable. For those prisoners who wish to get on with their lives after release, such orders may function as a form of punishment and further exclude them from society, impact on their liberty and keep them within the criminal justice net for years after release. If the sanctions already available for behaviour targeted by section 26 prove ineffective, it is unlikely that a summary offence for non-compliance will prove a greater deterrent. For those unwilling, or unable, to comply with such orders, all that will result will be another progression route into the criminal justice system.

[*] [Assistant lecturer in Socio-legal Studies, DIT. I wish to thank my colleague Dr Elaine Fahey for her assistance on the topic of legislative interpretation.]

[1.] [Section 26 came into effect on May 18 2007, SI No 236 of 2007, Criminal Justice Act 2007 Commencement Order 2007.]

[2.] [For the purposes of the Act 'home' means the person's sole or main residence or, if s/he has no such residence, his or her usual place of abode, or, if he or she has no such abode, the place which he regularly visits (subsection 12). The difficulties which this requirement imposes upon homeless offenders are manifest]

[3.] [Criminal Justice Act 2007 , section 26(3) .]

[4.] [Criminal Justice Act 2007 , section 26(5) .]

[5.] [Criminal Justice Act 2007 , section 26(10) .]

[6.] [Non-Fatal Offences Against the Person Act 1997 , section 4 .]

[7.] [Non-Fatal Offences Against the Person Act 1997 , section 5 .]

[8.] [Non-Fatal Offences Against the Person Act 1997 , section 15 .]

[9.] [Explosive Substances Act 1883 . These include: causing an explosion likely to endanger life or damage property (section 2); possession of explosive substances (section 3), making or possessing explosives in suspicious circumstances (section 4).]

[10.] [These include: possession of a firearm with intent to endanger life (Firearms Act 1925 , section 13); possession of firearms while taking a vehicle without authority (Firearms Act 1964 , section 26); the use of firearms to assist or aid an escape (Firearms Act 1964 , section 27); possession of a firearm or ammunition in suspicious circumstances (Firearms Act 1964 , section 27A); carrying a firearm with criminal intent (Firearms Act 1964 , section 27B); shortening the barrel of a shotgun or rifle (Firearms Act 1990 , section 12A).]

[11.] [Criminal Justice (Theft and Fraud Offences) Act 2001 , section 13 .]

[12.] [As defined by section 3(1) of the Criminal Justice Act 1994 .]

[13.] [Criminal Justice and Public Order Act 1994 , section 17 .]

[14.] [These include conspiracy (section 71), organised crime (section 72), and commission of an offence for a criminal organisation (section 73).]

[15.] [Criminal Justice Act 2007 , section 26(8) .]

[16.] [Criminal Justice Act 2007 , section 26(9) .]

[17.] [This is subject to the applicant not having the means to obtain legal aid and it is essential in the interests of justice, having regard to the conditions imposed by the order, that legal aid be provided.]

[18.] [See, for example, Irish Human Rights Commission and The Irish Council for Civil Liberties, What's Wrong with the Criminal Justice Bill? (Irish Council for Civil Liberties, 2007) www.iccl.ie/DB_Data/publications/CJBFactSheet_FINAL.pdf (visited September 1 2008); John Rogers, "Elements of the Criminal Justice Bill do not stand up to scrutiny" The Irish Times 4 April 2007; Pauline Walley et al , Letter to The Irish Times 21 February 2007; Shalom Binchy et al , Letter to The Irish Times 26 April 2007; Ken Murphy, "Criminal Justice Bill should be withdrawn" The Irish Times , 29 March 2007; Paula Clancy, "A functioning democracy requires informed citizens" The Irish Times 5 April 2007; Brendan Grehan, "Criminal Justice Bill increases erosion of civil rights" The Irish Times 26 April 1997; and, generally, Michael O'Higgins, " Human Rights and Criminal Justice Conference" (Irish Human Rights Commission and the Law Society of Ireland), Blackhall Place, Dublin, 13 October 2007.]

[19.] [Criminal Justice Bill 2007, section 25(2)(a) and (b).]

[20.] [Criminal Justice Bill 2007, section 25(3).]

[21.] [Criminal Justice Bill 2007, section 25(2)(7).]

[22.] [Serious Crime Act 2007 , section 1 . The Act applies to England and Wales and to Northern Ireland.]

[23.] [Serious Crime Act 2007 , section 19 .]

[24.] [Police Reform Act 2002 , section 1 .]

[25.] [Section 2(1) of the Act states that for the purposes of the Act, a person has been involved in serious crime in England and Wales if he: (a) has committed a serious offence in England and Wales; (b) has facilitated the commission by another person of a serious offence in England and Wales; or (c)

has conducted himself in a way that was likely to facilitate the commission by himself or another person of a serious offence in England and Wales (whether or not such an offence was committed).]

[26.] [The person can have been involved in serious crime anywhere, but the purpose is to prevent serious crime in England and Wales or Northern Ireland.]

[27.] [Serious Crime Act 2007 , schedule 1 .]

[28.] [Serious Crime Act 2007 , section 1(3) . Section 5 gives examples of what might be included. These are orders which can restrict: (a) an individual's financial, property or business dealings or holdings; (b) an individual's working arrangements; (c) the means by which an individual communicates or associates with others, or the persons with whom he communicates or associates; (d) the premises to which an individual has access; (e) the use of any premises or item by an individual; (f) an individual's travel (whether within the United Kingdom, between the United Kingdom and other places or otherwise). The requirements involved can also include an obligation to answer questions or attend a particular place at a particular time, or produce documents at such a date, place or time.]

[29.] [Serious Crime Act 2007 , section 1 .]

[30.] [Jill Lorimer has criticised the provisions of the Serious Crime Act 2007 on the ground that they pose threats to civil liberties. Jill Lorimer, "Super ASBOs" (2008) 158 NLJ 56.]

[31.] [Trevor Jones and Tim Newburn assess the degree to which UK criminal justice policy is inspired by that developed in the USA. Trevor Jones and Tim Newburn, "The Convergence of US and UK crime control policy" in Jones and Newburn eds, Criminal Justice and Political Cultures: National and International dimensions of crime control (Willan Publishing, 2004), 127; Jones and Newburn, "Comparative Criminal Justice Policy-Making in the United States and the United Kingdom" (2005) 45 British Journal of Criminology 58, at 59; Tim Newburn, "Atlantic Crossings: Policy Transfer and Crime Control in America and Britain" (2002) 4(2) Punishment and Society 165. There has been little work done to date on the phenomenon of policy transfer in Ireland, though Hamilton has been critical of the ready adoption of English provisions by Irish law-makers, Claire Hamilton The Presumption of Innocence and Irish Criminal Law (Irish Academic Press, 2007), at 141-152; Claire Hamilton, "Anti-Social Behaviour Orders and the Presumption of Innocence" (2005) 23 ILT 215.]

[32.] [Crilly v Farrington [2002] 1 ILRM 161 *.]*

[33.] [Pepper v Hart [1993] 1 All ER 42 *; Wavin Pipes v. Hepworth Iron Company Ltd* [1982] 8 FSR 32 *; Wadda v Ireland* [1994] ILRM 126 *; DPP v McDonagh* [1996] 2 ILRM 468 *; Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 *; Crilly v Farrington* [2002] 1 ILRM 161 *; B v Minister for Health and Children* [2003] 3 IR 12 *; Interpretation Act 2005 , section 6 ; Minister for Finance v Civil and Public Service Union* 20 January 2006 (HC) . *See further, Kenneth Mullan, "What is the case for Pepper v Hart"* (2004) 26 DULJ 235 *; Kenneth Mullan "Purposive Interpretation and Parliamentary Materials" in Eoin O'Dell ed, Leading Cases of the Twentieth Century (Round Hall Sweet and Maxwell 2000), 491; Seán Patrick Donlan and Rónán Kennedy, "A Flood of Light? Comments on the Interpretation Act 2005 " (2006) 6 JSIJ 92.]*

[34.] [Lord Windlesham, Responses to Crime (Clarendon Press, 1987, 1993, 1996, 2001); Politics, Punishment and Populism (Oxford University Press, 1998); Ian Loader and Richard Sparks, "For an Historical Sociology of Crime Policy in England and Wales since 1968" (2004) 7(2) Critical Review of International Social and Political Philosophy 5; Paul Rock, "The opening stages of criminal justice policy-making" (1995) 35 British Journal of Criminology 1; Andrew Rutherford, Transforming Criminal Policy: Spheres of Influence in the United States, the Netherlands and England and Wales

during the 1980s (Waterside, 1996); Richard Downes and Rod Morgan, "No Turning Back: The Politics of Law and Order in the New Millennium" in Mike Maguire, Rod Morgan and Robert Reiner eds, The Oxford Handbook of Criminology (4th edition, Oxford University Press, 2007), 201; Barbara Ann Stolz, Criminal Justice policy making: Federal Roles and Processes (Praeger, 2002).]

[35.] [634 Dáil Debates 397, 22 March 2007.]

[36.] [Ibid , at 407.]

[37.] [634 Dáil Debates 691, 23 March 2007.]

[38.] [Ibid , at 699.]

[39.] [John Rogers, "Elements of the Criminal Justice Bill do not stand up to scrutiny" The Irish Times 4 April 2007.]

[40.] [634 Dáil Debates 617.]

[41.] [Ibid.]

[42.] [Ibid , at 619.]

[43.] [Ibid.]

[44.] [634 Dáil Debates , col 636, col 137, April 24 2007.]

[45.] [Ibid , at 138.]

[46.] [Ibid , at 139.]

[47.] [Mr Howlin stated: "this is no way to make law of this nature". Ibid , at 140.]

[48.] [634 Dáil Debates 636, 140, 24 April 2007.]

[49.] [See Mary Rogan, "Crime Control Without the Criminal Law?: Perspectives on Emerging Strategies for Dealing with Crime" (2007) 25 ILT 23 and (2007) 25 ILT 42.]

[50.] [These offences are contained in the Schedule to the Act, but some offences do not attract notification requirements if the victim was aged 17 or over and a non-custodial sentence has been passed. Other sexual offences which involved a victim aged 15 or 16 and an offender who was not more than three years older than the victim do not require notification. Sexual Offences Act 2001 , section 3 . See generally, Alisdair Gillespie, "Sex Offenders' Register" (2007) 17(1) ICLJ 9.]

[51.] [If the person has received a custodial sentence of more than 6 months but less than 2 years, 10 years is the duration of registration, 7 years applies to custodial sentences of less than 6 months, 5 years for fully suspended sentences and non-custodial sentences. Section 8(3) of the Act. Different provisions apply if the offender is under 18.]

[52.] [The order is made in a private hearing on the application of a member of An Garda Síochána, not below the rank of chief superintendent (section 16(1)).]

[53.] [The person may also appeal the order or make an application to discharge or vary its terms (sections 18 and 19).]

[54.] [Sir Hugh Orde, Chief Constable of the Police Service of Northern Ireland made a similar point about the extra pressure placed on police officers by such schemes in terms of administrative effort and the potential to "slip up" with embarrassing consequences. Hugh Orde in reply to a question put by the author at a lecture: "Penal Reform: The Abolition of the Prison" at University of Dublin, Trinity College, 3 December 2007.]

[55.] [Sex Offenders Act 2001 , section 31 .]

[56.] [See, for example, Hamiltion, "Anti Social Behaviour Orders and the Presumption of Innocence", note 31; Rogan, note 49; Andrew Ashworth "Anti-Social Behaviour: The Subversion of Human Rights?" (2004) 120 LQR 263.]

[57.] [[1981] IR 233.]

[58.] [[2007] IESC 46. Commenting on the offence of "reckless endangerment" under section 13 of the Non-Fatal Offences Against the Person Act 1997 , Hardiman J opined: "the obvious potential for conflict with the fundamental value that crimes must be defined with precision and without ambiguity so that the criminal law is 'certain and specific' require that this notably open ended section be carefully, and indeed strictly, construed in accordance with fundamental principles of law and of construction."]

[59.] [Within the meaning of section 3(1) of the Criminal Justice Act 1994 (as amended)]

[60.] [Various procedures must be followed if such an order is sought against a person who is still serving a sentence, section 89, Criminal Justice Act 2006 . For a comprehensive elucidation of the relevant sections, see Gerard Murphy, "An Analysis of Sentencing Provisions in the Criminal Justice Act 2006 " (2007) 1 JSIJ 60.]

[61.] [In addition, the Garda Síochána and the Governor of the prison in which the person is to be imprisoned will also be issued with such a certificate.]

[62.] [Criminal Justice Act 2006 , section 92(6) .]

[63.] [For those who have been convicted before the commencement of Part 9 on October 2 2006, it is 7 days from the date of commencement of Part 9.]

[64.] [Such a period is either any period of seven days, or two or more periods in any 12 months, which, taken together amount to seven days. Section 92(11) of the Act.]

[65.] [Unless that person returns to the State before the expiry of this second period of seven days.]

[66.] [Section 92(8) of the Act. In addition, an acknowledgement of the notification must be in writing, section 93(2) of the Act.]

[67.] [For a sentence of over ten years but less than life, seven years is the duration of the notification period, a sentence of more than five years but less than ten results in a five year period of notification, a sentence of more than one year but less than five years implies a three year notification period, while a wholly suspended sentence attracts a one year notification period. These periods are halved if the offender is under 18 years old.]

[68.] [Criminal Justice Act 2006 , section 93 .]

[69.] [Such an offence is committed on the first day of a failure to notify and the person continues to commit the offence throughout any period of continuing failure, but may only be prosecuted once in respect of such failure, section 94(2) of the Act.]

[70.] [The court must also be satisfied that the member in question is familiar with the systems of recording such notifications within the Gardaí and that the member has made all proper enquiries whether notification by the defendant was received: section 94(5) of the Act.]

[71.] [Section 94(3) of the Act.]

[72.] [[2003] 2 IR 321.]

[73.] [See, for example, R v Durham Police ex parte R [2005] UKHL 21 *.]*

[74.] [Ibbotson v United Kingdom (1998) 27 EHRR 332 *and Adamson v United Kingdom* (1999) 28 EHRR CD 209 *.]*

[75.] [Russell v Gregoire (1997) 124 F 3d 1079 *; Doe v Otte* (2001) 259 S 3d 979, United States Supreme Court 5 March 2003 *.]*

[76.] [Melling v O'Mathghamhna [1962] IR 1 *; Conroy v Attorney General* [1965] IR 411 *; The State (Pheasantry) v Donnelly* [1982] ILRM 512 *and Cartmill v Ireland* [1987] IR 192 *.]*

[77.] [Barry Vaughan, "The Potential Dangers of Risk Analysis for the Criminal Justice System" (2002) 12(3) ICLJ 6.]

[78.] [(1962) 372 US 144.]

[79.] [Finlay Geoghegan J also relied on Russell v Gregoire (1997) 124 F 3d 1079 *; Adamson v United Kingdom* (1999) 28 EHRR CD 209 *; and DPP v Cawley* [2003] 4 IR 321 *. Herbert J held that the notification requirements under the Sex Offenders Act 2001 were "undoubtedly a consequence of the offences but could hardly properly be said to be a 'penalty' even in the broad dictionary definition of: 'a punishment imposed for breach of law, rule or contract: a loss, disability or disadvantage of some kind either ordained by law to be imposed for some offence or agreed upon to be undergone in case of violation of a contract'" (relying on the Oxford English Dictionary 1991 edition's definition).]*

[80.] [[1994] 3 IR 1.]

[81.] [[1994] 3 IR 593.]

[82.] [Re Article 26 and the Employment Equality Bill 1996 [1997] 2 IR 321 *and Re Article 26 and The Planning and Development Bill 1999* [2000] 2 IR 321 *.]*

[83.] [Recent evidence from a UCD study of recidivism points out, contrary to the finding of fact by the court that relapse rates and risk of reoffending are in fact lower amongst those convicted of sexual offences compared with other offences. Ian O'Donnell, Eric Baumer and Nicola Hughes, "Recidivism in the Republic of Ireland" (2008) 8(2) Criminology and Criminal Justice 123.]

[84.] [Article 5(1) of the European Convention on Human Rights deals with "deprivation" rather

than "restriction" of liberty. In Guzzardi v Italy (1980) 3 EHRR 333 *, it was held that deprivation must be looked at in terms of its degree and intensity, not just its nature or substance. From Engel v Netherlands* (1976) 1 EHRR 647 *account must be taken of the nature, duration, effects and implementation of the disposition or measure which deprives the subject's liberty.]*

[85.] [DPP v McBride 7 December 1998 (CCA) *; DPP v MS* [2000] IR 592 *; DPP v R O D* 25 May 2000 (CCA) *.]*

[86.] [[2002] 4 IR 309.]

[87.] [13 July 2004 (CCA).]

[88.] [[2006] 4 IR 1.]

[89.] [16 February 2006 (HC).]

[90.] [16 February 2006 (HC), at [7.7].]

[91.] [Except of course in the case of murder for which there is a mandatory life sentence.]

[92.] [Murphy, note 60, at 60.]

[93.] [Allowing for this, it is still important to remember Zedner's warning that just because orders are avowedly for a beneficent purpose, this should not cloud the fact that they are oftentimes nevertheless coerced and involuntary. Lucia Zedner, Criminal Justice (Oxford University Press, 2004), at 73. The characteristics of punishment from a philosophical perspective is discussed further, infra.]

[94.] [Tom O'Malley, "Principles of Sentencing: Some Recent Developments" (2001) 1(1) JSIJ 55. For further discussion, see Terry Thomas, "Protecting the Public: Some Observations on the Sex Offenders Bill" (2000) 10(2) ICLJ 12; Sabine Walsh, "Doing Justice: Recent Developments in Sentencing and Rehabilitation of Sex Offenders" (2002) ICLJ 6 6.]

[95.] [Section 113 of the Criminal Justice Act 2006 prohibits "anti-social behaviour" which is described as behaviour "likely to cause … harassment, significant or persistent alarm, distress, fear or intimidation, or significant or persistent impairment of their use or enjoyment of their property."]

[96.] [For an excellent study on this topic, see Hamilton, The Presumption of Innocence and Irish Criminal Law , note 31, at 141-152]

[97.] [The Council of Europe's Commissioner on Human Rights expressed concern at the UK's use of anti-social behaviour and order civil orders in 2005, averring: "proper evidential requirements and a sensible control of what actually constitutes anti-social behaviour are essential as ASBOs can bring their subjects, literally, a mis-placed step away from the criminal justice system. Indeed, the ASBO blurs the boundaries between the civil and criminal justice systems and great care must consequently be taken to ensure that the rights to fair trial and liberty are respected." Alvaro Gil-Robles, Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights on his visit to the United Kingdom 4-12November 2004 (Council of Europe, 2005). Ashworth, "Is the Criminal Law a Lost Cause?" (2000) LQR 116; Andrew Simester and Andrew von Hirsch, "Regulating Offensive Conduct Through Two-Step Prohibitions" in von Hirsch and Simester eds, Incivilities (Hart Publishing, 2006); www.asboconcern.org.uk (visited 1 September 2008); www.statewatch.org/asbo/ASBOwatch.html (visited 1 September 2008); www.liberty-human-rights-org.uk/7-asbos/index.shtml (visited 1

September 2008).]

[98.] [Peter Ramsay, "The Theory of Vulnerable Autonomy and the Legitimacy of the Civil Preventative Order" Law Society Economy Working Papers Series, www.lse.ac.uk/collections/law/wps/WPS2008-01_Ramsay.pdf (visited 1 September 2008).]

[99.] [Section 115 of the Criminal Justice Act 2006 introduces such orders for adults, while section 159 of the Criminal Justice Act 2006 does the same for children.]

[100.] [This has led some to term the new order a "super ASBO."]

[101.] [Under the Police Reform Act 2002 .]

[102.] [Ashworth, "Sentencing" in Mike Maguire, Rod Morgan and Robert Reiner eds, note 34, 990, at 1019. See also Elizabeth Burnley, Making People Behave: Anti-Social Behaviour, Politics and Policy (Willan Publishing, 2005), at 94-100.]

[103.] [Section 2 of the Crime and Disorder Act 1998 which gives a chief officer of police the power to seek a type of ASBO where the person involved is a sex offender and where that person acts "in such a way as to give reasonable cause to believe that an order under this section is necessary to protect the public from serious harm from him."]

[104.] [Part 2, Sexual Offences Act 2003 .]

[105.] [Football (Disorder) Act 2000 .]

[106.] [Control orders can be passed for an indeterminate duration and may contain onerous and specific obligations and prohibitions on the activities and movements of individuals with the potential penalty of five years' imprisonment. The introduction of the "control order" has been criticised for the "rushed manner in which the Bill was introduced, showing little regard for Parliament", Hamilton, note 31, at 213-216.]

[107.] [House of Lords Select Committee on the Constitution, Serious Crime Bill Report (The Stationery Office Ltd, 2007).]

[108.] [Criminal Justice Act 2007 , section 26(5) .]

[109.] [[2006] EWCA Crim 255.]

[110.] [[2004] EWCA Crim 287.]

[111.] [There the offender was 15 years old and received a four year custodial sentence.]

[112.] [[2004] EWCA Crim 2757.]

[113.] [Lord Justice Thomas, Anti-Social Behaviour Orders: A Guide for the Judiciary (Judicial Studies Board, 2007), at 36.]

[114.] [The People (Attorney General) v O'Driscoll (1972) 1 Frewen 343 *; The State (Stanbridge) v Mahon* [1979] IR 214 *; DPP v Tiernan* [1988] IR 250 , *DPP v M* [1994] 3 IR 306 *; DPP v McBride* 5 July 1999 (CCA) *; DPP v McCormack* 18 April 2000 (CCA) *; DPP v R O'D* 25 May 2000 (CCA) *; DPP v Drought* 4 May 2007 (HC) *; see further, Law Reform Commission, Report on Sentencing*

(Stationery Office, 1993), at 19.]

[115.] [R v Kirby [2005] EWCA Crim 1228 *; R v Lawson* [2006] 1 Cr App Rep (S) 323 *; R v Williams* [2006] 1 Cr App Rep (S) 305 *.]*

[116.] [[2002] UKHL 39]

[117.] [[2007] 1 WLR 339.]

[118.] [R v W and another [2007] 1 WLR 339, at 346 *.]*

[119.] [[2003] 1 AC 787.]

[120.] [[2005] 1 WLR 2570.]

[121.] [Ashworth, note 56.]

[122.] [[2005] EWCA Crim 1228]

[123.] [[2007] EWHC 208.]

[124.] [[2006] EWCA Civ 1141]

[125.] [[2007] UKHL 45; [2007] 3 WLR 642.]

[126.] [[2007] UKHL 46.]

[127.] [In Secretary of State for the Home Department v E [2007] UKHL 47; [2007] 3 WLR 720 *, the House of Lords held that a control order must be subject to meaningful review by the Home Secretary in order to uphold the recipient of the control order's rights under article 8 of the European Convention on Human Rights. The police must be consulted about the prospect of successfully bringing a prosecution against the individual rather than relying on the civil mechanisms.]*

[128.] [[2005] TLR 1; [2006] 1 Cr App R(S) 120.]

[129.] [[2006] 1 Cr App R(S) 120, at 131.]

[130.] [One order prohibited Boness from possessing in public any article that could be used as a weapon. The Court held that this could have encompassed many otherwise innocent items and was impermissibly broad.]

[131.] [See further, for useful and detailed view of the law, Lord Justice Thomas, note 113.]

[132.] [[2007] EWCA Crim 1436.]

[133.] [[2006] EWHC (Admin) 2633.]

[134.] [A point reiterated by R v W [2007] 1 WLR 339 *.]*

[135.] [R v Blackwell [2006] EWCA Crim 1671 *.]*

[136.] [[2007] 1 WLR 339.]

[137.] [[2006] Crim LR 569, at 572.]

[138.] [See further R v H [2006] EWCA Crim 255 *; R v Rush* [2006] 1 Cr App Rep (S) 200 *.]*

[139.] [Criminal Justice Act 2007 , section 26(1) .]

[140.] [Thomas LJ, note 113, at 34.]

[141.] [Ibid.]

[142.] [Murphy, note 60, at 60.]

[143.] [Adam Sandell, "Liberty, Fairness and the UK Control Order Cases: Two Steps Forward, Two Steps Back" (2008) European Human Rights Law Review 120, at 125.]

[144.] [Engel v Netherlands (1976) 1 EHRR 647 *.]*

[145.] [Öztűrk v Germany (1984) 6 EHRR 647 *.]*

[146.] [Melling v O'Mathghamhna [1962] IR 1 *.]*

[147.] [[2005] EWCA Crim 3163.]

[148.] [[1981] IR 233.]

[149.] [[2007] IESC 46.]

[150.] [Criminal Justice Act 2007 , section 26(4) .]

[151.] [Criminal Justice Act 2007 , section 26(5) .]

[152.] [See further, Lucian Ferster and Santiago Aroca, "Lawyering at the Margins: Collateral Civil Penalties at the entry and completion of the criminal sentence" in Christopher Mele and Teresa Miller eds, Civil Penalties, Social Consequences (Routledge, 2005), 203. It is also worth noting the approach advocated by Deborah Archer and Kele Williams who suggest that advocates adopt a "litigation strategy" in order to counteract collateral sanctions in the USA. Deborah Archer and Kele Williams, "Making America 'The Land of Second Chances': Restoring Socio-economic Rights for Ex-Offenders" (2006) 30 New York University Review of Law and Social Change 527.]

[153.] [Ashworth et al , "Neighbouring on the Oppressive: The Government's 'Anti-Social Behaviour Order' Proposals" (1998) 16 Criminal Justice 7. See further Zedner, note 93, at 70-6.]

[154.] [Zedner, note 93, at 76.]

[155.] [Barbara Hudson, Understanding Justice (Open University Press, 2003).]

[156.] [See CC v Ireland [2006] 4 IR 1 *and the contrasting approach in Enright v Ireland* [2003] 2 IR 321 *.]*

[157.] [Hamilton, The Presumption of Innocence and Irish Criminal Law , note 31, at 150.]

[158.] [Criminal Justice Act 2007 , section 26(10) .]

[159.] [R v Stevens [2006] EWCA Crim 255 *, referred to by David Thomas "Sentencing: Anti-social Behaviour Orders on Conviction" [2006] Crim LR 569, at 570; R v Lamb* [2006] Crim LR 256 *. See further, Stuart MacDonald, "The Principle of Composite Sentencing: Its Centrality to, and Implications for, the ASBO" [2006] Crim LR 791.]*

[160.] [The genesis of this approach has been attributed to an article, later qualified and partially retracted, by Robert Martinson, "What Works? Questions and Answers about Prison Reform" (1974) 35 The Public Interest 22. "Nothing works" was the claim taken from this piece and it heralded a time of pessimism within criminology and a belief that rehabilitation was futile and an infringement of prisoners' rights. See generally, David Garland, The Culture of Control (Oxford University Press, 2001); Garland, "The Limits of the Sovereign State" (1996) 36 British Journal of Criminology 445. For another perspective, see Zedner "Dangers of Dystopias in Penal Theory" (2002) 22 Oxford Journal of Legal Studies 341.]

[161.] [The Mission Statement of the Irish Prison Services declares: "The mission of the Irish Prison Service is to provide safe, secure and humane custody for people who are sent to prison. The Service is committed to managing custodial sentences in a way which encourages and supports prisoners in their endeavouring to live law abiding and purposeful lives as valued members of society." www.irishprisons.ie/about_us-home.htm (visited 1 September 2008). The Minister for Justice, Mr Brian Lenihan TD has also said of the proposed development of a new prison at Thornton Hall, Dublin: "The campus design is regime orientated and will allow for the development of progressive rehabilitative programmes, a key objective for my Department under the Programme for Government"; Address by the Minister for Justice, Equality and Law Reform at the launch of "The Whitaker Report 20 Years On - Lessons Learned or Lessons Forgotten?", available at: wwwjustice.ie/en/JELR/print/The%20Whitaker%20Report%2020%20Years%20On (visited 1 September 2008); Francesca Lundström, The Development of a New Multi-Disciplinary Sex Offender Rehabilitation Programme for the Irish Prison Service (Irish Prison Service, 2002).]

[162.] [Garland, The Culture of Control (Oxford University Press, 2001), at 142.]

[163.] [Ibid , at 180.]

[164.] [Ibid , at 180-1.]

[165.] [Albert Camus, "Reflections on the Guillotine" in Albert Camus, Resistance, Rebellion and Death (Hamish Hamilton, 1957), at 68.]

[166.] [Law Reform Commission, Report on Spent Convictions (Law Reform Commission, 2007).]

[167.] [A scheme is already in place for offenders under the age of 18 (Children Act 2001 , section 258) .]

[168.] [Law Reform Commission, note 166, at [3.06], [5.03].]

[169.] [Offences for which the Probation of Offenders Act 1907 was applied should not "stop the clock". Ibid , at [3.40]]

[170.] [However, certain jobs, professions and posts would continue to be excluded from the scheme,

to be determined by the Oireachtas. Ibid , at [4.65].]

[171.] [The Commission's recommendations have been criticised by the "Spent Convictions Group" who propose an alternative scheme, which would be an "application-based scheme" open to all offenders irrespective of the nature of the offence or the sentence imposed. A central authority would assess each application and decide on expungement after hearing from the offender, providers of rehabilitative programmes and taking into account the risks posed by such offenders. The conviction free periods would be for either two or four years after release, depending on sentence. Bronagh Maher, "Announcement of Spent Convictions Project." Paper presented at Human Rights and Criminal Justice Conference, IHRC and the Law Society of Ireland, 13 October 2007.]

[172.] [Shane Kilcommins et al, Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination (Stationery Office, 2004).]

[173.] [Spent Convictions Bill 2007, section 3.]

[174.] [Spent Convictions Bill 2007, section 4. However, this does not apply to those convicted of fraud, deceit or dishonesty in respect of an insurance claim.]

[175.] [Spent Convictions Bill 2007, section 5.]

[176.] [On the work of the Parole Board and for an interesting discussion on the provision of supervision while on remission see: The Parole Board Annual Report 2005 (Government of Ireland, 2006).]

[177.] [[2006] EWCA Crim 255; Thomas, note 159.]

[178.] [Archer and Williams, note 152, at 527.]

[179.] [Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Re-entry (Oxford University Press, 2003); Shadd Maruna and Russ Immarigeon eds, After Crime and Punishment: Pathways to Ex-Offender Reintegration (Willan Publishing, 2004); Alison Liebling and Shadd Maruna eds, The Effects of Imprisonment (Willan Publishing, 2005); Shadd Maruna, Making Good: How Ex-Convicts Reform and Rebuild Their Lives (Washington DC, American Psychological Association Books, 2001). For a review of the literature and empirical studies, see Sesha Kethineni and David Falcone, "Employment and Ex-offenders in the United States: Effects of Legal and Extra Legal Factors" (2007) 54(1) Probation Journal 36.]

[180.] [Commission of Inquiry into the Penal System, Report on the Commission of Inquiry into the Penal System (Stationery Office, 1985), at 102-108.]

[181.] [Mairéad Seymour and Liza Costello, A Study of the Number, Profile and Progression Routes of Homeless Persons Before the Court and in Custody (Government of Ireland, 2005).]

[182.] [Ian O'Donnell, Conor Teljeur, Nicola Hughes, Eric Baumer and Alan Kelly, "When prisoners go home: Punishment, Social Deprivation and the Geography of Reintegration" (2007) 17(4) ICLJ 3.]

[183.] [Ivana Bacik et al , "Crime and Poverty in Dublin: An Analysis of the Association with Community Deprivation, District Court appearance and Sentence Severity" (1997) 7(2) ICLJ 104.]

[184.] [Paul O'Mahony, Mountjoy Prisoners: A Sociological and Criminological Profile (Stationery

Office, 1997). See further, Ian O'Donnell, "Crime, Punishment and Poverty" (1997) 7(2) ICLJ 134.]

[185.] [Ian O'Donnell et al , note 182, at 3.]

[186.] [See, for example, Paul O'Mahony, "Recent Penal Policy is Losing Touch with the Goal of Rehabilitation" (2005) 23 ILT 154; Tim Murphy, "Offender Rehabilitation Programme for Imprisoned Sex Offenders-Grounds for Optimism?" in Paul O'Mahony ed, Criminal Justice in Ireland (Institute of Public Administration, 2002); and the Annual Reports of the Prison Inspector, eg the late Inspector's comments regarding the CONNECT project: www.justice.ie/en/JELR/4th AnnRpt.pdf/Files/4th AnnRpt.pdf (visited 1 September 2008).]

[187.] [It should be noted that there are a number of individual community-based projects funded by the Probation Service which are aimed at prisoner re-integration throughout the country, see www.probation.ie/pws/websitepublishing.nsf/Content/Counselling+and+Offender+Re-Integration+Projects (visited 1 September 2008). On criticisms of the provision of after-care by the state, see, for example, the comments by John Lonergan in Irish Penal Reform Trust and Katherine Howard Foundation, The Whitaker Committee Report 20 years on: Lessons Learned or Lessons Forgotten? (Katherine Howard Foundation, 2007), at 69. www.iprt. ie/fles/publication/whitakerreport2007.pdf (visited 1 September 2008).]

[188.] [DPP v MS [2000] 2 IR 592 *.]*

[189.] [Interestingly, 46% of those sentenced for violent crimes returned to jail within four years of release while 42% of those sentenced for drug offences returned to prison within this time frame. 18% of sex offenders went back to prison within four years. O'Donnell, Baumer and Hughes, note 83.]

[190.] [National Economic and Social Forum, Re-Integration of Prisoners (NESF, 2002) www.probation.ie/pws/websitepublishing.nsf/AttachmentsBy Title/NESF+Re-integration+of+Prisoners/$FILE/NESF+Re-integration+of+Prisoners.pdf (visited 1 September 2008).]

[191.] [www.probation.ie/pws/websitepublishing.nsf/Content/Counselling+and+Offend er+Re-Integration+Projects (visited September 1 2008).]

[192.] [Council of Europe Report, Social Re-Integration of Prisoners Doc 10838, 7 February 2006.]

[193.] [O'Donnell et al , note 182, at 8-9.]