

## Post-custody Supervision in Ireland: From Tickets-of-Leave to Parole?

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**Summary:** This paper examines the history and development of post-custody supervision in Ireland. It begins by reviewing the Crofton System and the ticket-of-leave, generally agreed to be the precursor to modern parole. Next it briefly discusses the emergence of aftercare as a focus of the Probation Service. It then describes the formalisation of four types of conditional post-custody supervision: temporary release from prison, part-suspended sentences, post-release supervision for people convicted of sexual offences, and community return. Finally, it briefly explores the practice and implications of the increasing number of people supervised post-custody in recent years and asks whether, in effect, Ireland now has an ad hoc system of parole.

**Keywords:** Aftercare, Criminal Justice Act 2006, parole, Parole Board, probation, sentencing, supervision.

### Introduction

In 2004 a teenager was convicted of the murder of another teenager and was sentenced to life imprisonment. Because of his age, this sentence was not mandatory but Mr Justice Barry White, the sentencing judge, imposed the sentence due to the ‘premeditated, brutal, [and] callous’ nature of the murder. However, he did note that he would review the sentence after 10 years. In 2014, Mr Justice White did just that and, after a hearing, ordered that the young man be released in July 2016. He ordered post-custody supervision but left the details and length of the supervision period up to the Irish Probation Service (Reid, 2014).

This case raises numerous issues related to early release from prison and post-custody supervision in the Irish criminal justice system. Although

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Ireland does not have parole in name, it does have a variety of statutory and judicial mechanisms for both early release and post-custody supervision, which are sometimes conditional. However, as this paper explains, those mechanisms are complex, and the case referred to above does not fit neatly into any of the categories of post-custody supervision. This paper examines the development of these categories and discusses some of the issues raised by what we conclude is effectively an ad hoc system of parole.

### **The origins of post-custody supervision**

Post-custody supervision first appeared in Ireland in the 1850s as a result of reforms instituted by Walter Crofton. In 1854, after participating in a panel that harshly criticised the management and state of prisons in Ireland at the time, Crofton was appointed chairman of the Board of Directors of Convict Prisons (Carey, 2000: 63–4). After instituting some relatively minor reforms to the system, and to Mountjoy Prison in particular, the Board turned its attention to establishing a system that would, according to the First Annual Report of the Directors of Convict Prisons, restore the prisoner ‘to society with an unimpaired constitution, and with sufficient health and energies to enable him to take a respectable place in the community’ (quoted in Carey, 2000: 66).

The system introduced by Crofton was modelled on the ‘mark system’ developed by Alexander Maconochie on Norfolk Island, Australia in the early 1840s (Heffernan, 2004; Morris, 2001). The mark system allowed people to shorten their sentences in prison through good behaviour. The last phase in the system called for ‘graduated release procedures, including supervision within the community’ (Morris, 2001: 195). However, in part due to the prison’s island location, Maconochie was unable to fully develop this part of his system. A few years later, along with John Lentaigne and Raleigh Knight, the other Convict Prisons directors, Crofton expanded Maconochie’s system and was able to implement the community supervision phase.

Beginning in 1857, after an individual had successfully moved through three custodial stages, starting in solitary confinement and finishing in intermediate prisons focused on labour, he or she was released on licence (Heffernan, 2004: 2). According to Carey, if the inmate wished to emigrate, he or she was unconditionally discharged (2000: 80). Otherwise, he or she would be issued with a ‘ticket-of-leave’ that conditionally released him or her to the community. A conditionally released inmate

was required to immediately register with the local constabulary and thereafter report monthly. He or she could be returned to prison for failing to comply with these reporting requirements, misconduct, committing a new crime, or any 'irregularity' (Heffernan, 2004: 2; Carey, 2000: 80). As Carroll-Burke points out, although the ticket-of-leave was not 'unique to Ireland, the way it was combined with police surveillance was' (2000: 126). In the Dublin area, in addition to this surveillance, those on licence received assistance, primarily with finding employment, from James Organ, variously described as 'a teacher at Lusk', the intermediate prison (Eriksson, 1976: 95), or 'the lecturer of the intermediate prisons' (Carroll-Burke, 2000: 126). Carroll-Burke argues that Organ was the first probation officer in Britain and Ireland, while Petersilia (2003: 57) argues that this was the origin of the 'modern-day parole officer'.

Later knighted for his contributions, Crofton made numerous speeches about his system and encouraged visits by American reformers to Ireland (Heffernan, 2004: 2–3). As a result, the 'Irish system' became well known by penal reformers in the United States, including the New York Prison Association. With the Association's support, Elmira Reformatory – the first prison based on the Irish system – opened in New York in 1876. Led by Zebulon Brockway, Elmira operated an indeterminate sentencing model with parole release. As in Ireland, after a period of good behaviour in prison, inmates were released to the community where they were required to report regularly. Any misconduct could result in a return to prison (Petersilia, 2003: 58). Brockway's model spread quickly and indeterminate sentencing with discretionary parole release was implemented in all states and the federal system by 1942. Despite some changes in the structure of parole release, the vast majority of people released from prison in the United States are still released conditionally with some form of post-custody supervision (Scott-Hayward, 2015). In Ireland, however, Crofton retired in 1862 and 'By the 1890s the last vestiges of his system had disappeared' (Carey, 2000: 112). Despite this disappearance, as we demonstrate in this paper, over the past 20 years, a complex and fragmented version of what is known outside Ireland as the 'Irish system' has re-emerged within Ireland and has become a strong feature of the criminal justice system. In fact, in 2015 for the first time, the Probation Service began presenting the disaggregated data on individuals supervised in the community post-custody as a separate category.<sup>1</sup>

<sup>1</sup> Probation Service: Monthly Offender Population Report (March 2015).

## The return of post-custody supervision

In the 1960s, references to post-custody supervision began to appear again, with the suggestion that the Probation Service should have a role in this process. In the early 1960s, the term ‘after-care’ began to appear and during debates on the Prisons Bill of 1970, then Minister for Justice Desmond O’Malley repeatedly referred to the ‘probation and after-care service’ as one entity (McNally, 2009: 192–4). Further, McNally (2007) cites evidence supporting the fact that during the 1960s, Probation Officers were supervising individuals after release from prison (p. 21). However, it does not appear that this supervision was conditional. Instead, the Probation Officers who were part of what was then known as the Welfare Service worked with community organisations to provide services for people leaving prison; what are now more widely known as re-entry services (McNally, 2009: 194–5).

During the same period forms of *conditional* post-custody supervision also began to appear. The first form of temporary release was established by the Criminal Justice Act of 1960 and refined in 2003 by the Criminal Justice (Temporary Release of Prisoners) Act. The second, a form that included part-suspended sentences, first appeared in the 1940s, became more common in the 1970s, and was eventually codified in the Criminal Justice Act of 2006. The third form of post-custody supervision applies to people convicted of sex offences and was created by the Sex Offenders Act of 2001. Finally, in 2011, the Community Return Scheme was instituted. The remainder of this section discusses the origins and development of these four types of supervision in more detail.

### 1. Supervised temporary release

First established as part of the 1960 Criminal Justice Act, temporary release allows the Minister for Justice to permit a sentenced prisoner reviewable release and while not required, the Act allows for conditions to be attached in particular cases.<sup>2</sup> Initially, temporary release was intended to be ‘granted for short periods for compassionate reasons, or to allow some prisoners to return home for Christmas ... In effect, however, the grant of temporary release came to function for all practical purposes as an early release or parole system’ as unless an individual committed a new offence or breached a condition of release, he or she could expect to

<sup>2</sup> Criminal Justice Act 2006, Section 2.

remain free (O'Malley, 2010: 249).<sup>3</sup> Not all people granted temporary release were subject to supervision, but some were supervised by Probation Officers. According to a 1991 report, this supervision 'may require residence at a hostel, or placement at a workshop, or require the attendance of therapeutic programmes. Offenders may also be released to obtain or sustain employment prospects' (Probation and Welfare Service Report, 1991: 13). It appears that during the 1980s the vast majority of full temporary releases were for the purpose of seeking or taking up employment.<sup>4</sup>

The 1960 statute contained no guidance for the Minister in terms of factors that should be considered in making release decisions. This gap was addressed with the passage of the Criminal Justice (Temporary Release of Prisoners) Act of 2003. As then Minister of State at the Department of Justice, Equality, and Law Reform Brian Lenihan stated, 'the purpose of the Bill is to provide a clearer legislative basis for the [Minister's power] to grant temporary release to a prisoner by amending the Criminal Justice Act, 1960 and setting out the purposes for which temporary release may be granted, the circumstances in which it is to occur and the criteria which are to apply to the process'.<sup>5</sup> Minister Lenihan also cited decisions of both the High and Supreme Courts that recommended more clarity and transparency as reasons for the introduction of the bill.

For the most part, members of the Oireachtas were supportive of the bill; however, there was some criticism, particularly during the Committee Stage, of the extent of the discretion given to the Minister and the lack of a statutory parole board. For example, Deputy Joe Costello argued: 'The grounds on which prisoners can be released range from humanitarian grounds through to rehabilitation, reintegration, and the good management of the prison etc. The Bill envisages all this happening under

<sup>3</sup> Temporary release for Christmas, although generally unsupervised release, has received some attention from scholars. According to O'Donnell and Jewkes (2011), temporary release for Christmas was fairly common between the mid-1960s and the mid-1990s: approximately one in eight people were temporarily released from prison to return home for Christmas. Since then, however, numbers released for that purpose have declined significantly (p. 77).

<sup>4</sup> Annual Reports of the Probation and Welfare Service between 1980 and 1990 presented information on people released on full temporary release, weekend temporary release, one day temporary release, and day to day temporary release. The reports also noted the purpose of the temporary releases. Interestingly, day to day release was referred to as 'working parole', whereby the individual was allowed out during the day for work or training while being returned to custody at night.

<sup>5</sup> Criminal Justice (Temporary Release of Prisoners) Bill, 2001: Second Stage, 8 October 2003.

the eye of the Minister and at his sole discretion.’ Another member of the committee, Deputy John Deasy, agreed: ‘We cannot have an ad hoc situation. We need more than the discretion of the Minister. We need experts who will examine each individual case.’<sup>6</sup> However, despite these concerns, the bill passed without any significant changes to the basic structure of the existing system. As O’Malley (2010) argues, ‘the system remains unaltered’ and the effect of the 2003 Act was simply to lay out in detail the rationales for release as well as factors for determining release. The rationales listed are numerous but include health and humanitarian grounds, rehabilitation, preparation for release, and ensuring the ‘good government’ of the relevant prison.<sup>7</sup> Factors to be considered before release range from the risk of the person to the views of relevant parties, and the original offence and sentence.<sup>8</sup>

The conditions imposed on those released temporarily vary by case, but under the rules established by the 2003 Act, all those released are subject to three standard conditions: ‘(a) the person shall keep the peace and be of good behaviour during the release period; (b) he or she shall be of sober habits during that period; (c) he or she shall return to prison on or before the expiration of the release period’.<sup>9</sup> This means that all temporary releases are now ‘conditional.’ Aside from these minimal conditions, the Minister has wide discretion in imposing conditions and, according to O’Malley (2010), courts rarely intervene (p. 259). Temporary release is for the most part unsupervised by the Probation Service unless it is specifically requested by the Department of Justice, or if the person released had been subject to a statutory life sentence: generally, under Section 2 of the 1990 Criminal Justice Act, those convicted of murder. Life-sentenced prisoners are only released with the consent of the Minister for Justice and are always under the supervision of the Probation Service.<sup>10</sup>

### The Parole Board

As mentioned above, although it is not a statutory body, Ireland does have a Parole Board, the recommendations of which can determine whether some prisoners are selected for temporary release. The board was

<sup>6</sup> Criminal Justice (Temporary Release of Prisoners) Bill, 2001: Committee Stage, 12 June 2003.

<sup>7</sup> Criminal Justice (Temporary Release of Prisoners) Act, 2003, Section 1.

<sup>8</sup> Criminal Justice (Temporary Release of Prisoners) Act, 2003, Section 2.

<sup>9</sup> Prisoners (Temporary Release) Rules, 2004 (S.I. 680/2004), Section 3.

<sup>10</sup> As of 1 April 2016, the Probation Service was supervising 79 life-sentenced prisoners in the community (Probation Service: Monthly Offender Population Report). For a discussion of the supervision of life-sentenced prisoners on temporary release, see Wilson (2004).

established in 2001, replacing the Sentence Review Group, which had operated since 1989 (although, as Griffin and O'Donnell point out, this was essentially just a change in name) (2012: 615). Despite moves in other jurisdictions to transition parole release decisions 'from a process that was often political, informal and discretionary to an increasingly formalized and judicial one', parole in Ireland remains 'avowedly political' (Griffin and O'Donnell, 2012: 614, 615). Until recently, calls to reduce the discretion of the Minister for Justice and to put the board on a statutory footing had met with little support. However, in June 2016, Fianna Fáil Deputy Jim O'Callaghan introduced the Parole Bill 2016, which would do just that (O'Regan, 2016). During the Second Stage debates, although some concerns were expressed, there was broad support for the bill, including from the Government. At the time of writing, the bill was in the Committee Stage.<sup>11</sup>

The role of the board is to review the sentences of prisoners referred to it by the Minister for Justice, Equality, and Law Reform (Parole Board, 2015: 7). It reviews only the cases of those sentenced to eight years or longer, which is a small percentage of the total prison population. Cases are only eligible for referral after a certain minimum term has been served; life-sentenced prisoners for example, must serve a minimum of seven years before being eligible for release. Factors taken into consideration in making recommendations for release include the 'nature and gravity of the offence', 'conduct while in custody', risk of reoffending, and 'likelihood of period of temporary release enhancing reintegration' (Parole Board, 2014: 8). Not surprisingly, these factors closely resemble the factors listed in the 2003 Criminal (Temporary Release of Prisoners) Act. Although the details of the recommendations made to the Minister are not available, data from the Board show that between 2010 and 2015, between 89% and 97% of recommendations that were made by the Parole Board were subsequently accepted in full by the Minister (Parole Board, 2015: 17).

## *2. Part-suspended sentences*

Temporary release is not the only form of conditional release that results in post-custody supervision. The second type is what is known as 'part-suspended sentence[s]' (Osborough, 1982: 245). According to Osborough, these sentences began to be issued by judges in the 1940s. Courts in effect gave themselves the power to exercise continued review

<sup>11</sup> Parole Bill, 2016: Second Stage [Private Members], 15 June 2016.

of cases after the initial sentence was handed down. As Bacik notes, ‘The practice arose whereby judges would frequently insert a review date into a sentence, in order to give offenders a prospect of rehabilitation. An offender given a review date understood that if he or she complied with prison rules, or availed of the opportunity of treatment for drug addiction, for example, the remainder of the sentence would be suspended upon the review date’ (2002: 350). However, the earliest example cited by Osborough, in the case of *People v. Grey* (1944), did not seem to be imposed for the purposes of rehabilitation. In that case, the judge sentenced the defendant to two consecutive sentences, one of six months and one of three months; however, he essentially provided that so long as the defendant stayed out of trouble, the three-month sentence ‘would not be put into operation’ (Osborough, 1982: 245).

This type of sentence began to be imposed more frequently during the 1970s, although it was almost entirely confined to the higher courts (the Central Criminal Court and the Circuit Court). The practice was for the Probation Service to complete a report for the courts detailing the progress of an offender in custody. These sentence reviews would often include the requirement for supervision by the Probation Service as a condition of the suspended sentence. During the early 1980s, the number of such reports remained fairly static: 28 in 1981, 34 in 1982 and 32 in 1983 (Irish Probation Service, 1984). Post 1983, annual reports did not specifically identify the number of sentence review reports completed.<sup>12</sup> Judges continued to include these review provisions in their sentences while at the same time the Supreme Court and the Court of Criminal Appeal expressed their disapproval of the practice, in terms of both validity and appropriateness. For example, in 1980, in *People (D.P.P.) v. Cahill*, among other concerns, Henchy J. argued that the practice infringed on the function of the executive, which holds the power to remit sentences (pp. 11–12). Henchy J. overturned the sentence, noting that ‘a sentence of a term of penal servitude or imprisonment which is coupled with the reservation to the Court, or to the particular judge, of a power to review the sentence at a future date should not be imposed’ (p. 12). Despite this

<sup>12</sup> In the 1988 Annual Report, the Probation Service started to identify reports completed in prisons for ‘appropriate administrations’ (Irish Probation Service, 1989). However, it does not specify the purposes of those reports; some are identified as prepared for the Sentence Review Group, the precursor to the Parole Board, and it is likely that the remainder were prepared for the Courts. If that is the case, then there was a big increase in the numbers of reports prepared in the 1990s, with over 100 reports completed in both 1995 and 1997.



decision, trial judges continued to impose the sentence, and occasionally on appeal those sentences were overturned. Interestingly, in at least one such case, *People (D.P.P.) v. Sheedy*, such a sentence was overturned because the review provision did not include any need for and corresponding requirement for treatment or rehabilitation. While seeming to approve of the practice in general, Denham J. noted that in the case before her: 'There were no factors such as would render it appropriate to invoke a structure of treatment and then to review the sentence' (p. 194).

It wasn't until 2000, in *People (D.P.P.) v. Finn* that the issue was finally resolved and the Supreme Court ruled, albeit as non-binding *obiter*, that the practice of imposing this type of sentence should be discontinued. The primary rationale for the decision was that at the point of review, if the individual has met the conditions imposed and the Court suspends the remainder of the sentence, the Court 'is in substance exercising the power of commutation or remission which the Oireachtas has entrusted exclusively to the government or the Minister for Justice' (p. 45). Keane C.J. also noted that there appeared to be positive aspects to the practice, but that it was for the Oireachtas to place it on 'a clear and transparent basis' (p. 47). In the 2006 Criminal Justice Act, the legislature attempted to do so.

First introduced to the Oireachtas in 2004, what became the 2006 Criminal Justice Act was a comprehensive criminal justice bill that addressed such varied topics as electronic tagging, firearms, bail, antisocial behaviour orders and mandatory minimum sentences for people convicted of drug offences. It also proposed giving additional powers to the Gardaí and allowing increased detention periods. What eventually became Section 99 of the statute was not in the initial version of the bill and instead was introduced as an amendment on 28 March 2006 upon the bill's referral to committee. As the Minister for Justice, Equality, and Law Reform, Michael McDowell, made clear, the clear goal of the section was to 'put the arrangements for suspending sentences on a statutory footing for the first time'.<sup>13</sup> He also emphasised the rehabilitative goals of the Act, noting that it would 'enable the court to direct a person to deal with the underlying cause of the offending person through treatment or courses on, for example, substance abuse'.<sup>14</sup>

<sup>13</sup> Criminal Justice Bill, 2004: Second Stage, 8 March 2006.

<sup>14</sup> Criminal Justice Bill, 2004: Committee Stage, 11 May 2006.

Section 99 of the Act permits the suspension of a custodial sentence (either in whole or in part), conditional on the person complying with the conditions of the order of suspension. While the only mandatory condition is to ‘keep the peace and be of good behaviour’,<sup>15</sup> subsection 3 allows the court to impose any other condition that is appropriate to the offence and that will reduce the likelihood of reoffending. In addition, subsection 99.4 lists other possible conditions including co-operation with the Probation Service, participation in treatment programmes, and supervision by the Probation Service. These are commonly referred to as Part Suspended Sentence Supervision Orders (PSSSOs). The Probation Service is given specific authority to request the imposition of any of these conditions. Nothing in the Act specifically excludes the sentenced person from consideration by the Parole Board during the custodial portion of their sentence.

### *3. Post-release supervision orders*

The third type of post-custody supervision is governed by the Sex Offenders Act of 2001, which gave judges the option to sentence individuals convicted of certain sex offences to a period of post-release supervision following their release from prison.<sup>16</sup> This provision was part of a wider effort to regulate this population, and the statute includes other provisions, including notification requirements. The aims of the 2001 Act were: ‘First, to help the offender maintain self-control over his or her offending behaviour and, second, to provide external monitoring of his or her post release behaviour and activities’. The minister noted the particular importance of this provision for ‘those offenders who have undergone sex offender treatment programmes while in prison and who would benefit from a continuation of appropriate programmes following release from prison’.<sup>17</sup>

Part 5 of the 2001 Act requires judges, when imposing a custodial sentence on individuals convicted of certain sexual offences, to consider a period of post-release supervision. They are obliged to consider four factors in deciding whether to impose post-release supervision: the need for supervision, the need to protect the public, the need to prevent further

<sup>15</sup> Criminal Justice Act, 2006, Section 99(2). This condition mirrors the first required condition for people released on temporary release. See note 6 above.

<sup>16</sup> Sex Offenders Act, 2001, Section 28(1).

<sup>17</sup> Sex Offenders Bill, 2000: Second Stage, 6 April 2000.

sex offences, and the need to rehabilitate the individual.<sup>18</sup> If the court does decide to impose a supervision sentence in addition to a prison sentence, the total sentence cannot exceed the statutory maximum sentence.<sup>19</sup> The court has the general authority to set conditions of supervision including conditions that protect the public from harm and those that require the individual to receive counselling or treatment.<sup>20</sup> However, the statute also makes provision for these conditions to be discharged either in the interests of justice or where protecting the public from harm no longer requires them.<sup>21</sup>

As with the 2006 Act, a person subject to Part 5 of the Sex Offenders Act 2001 can also make application to the Parole Board. It is important to note that people convicted of sex offences can also be released on a part-suspended sentence under the 2006 Act.

#### *4. The Community Return Scheme*

The final and most recent form of post-custody supervision is known as the Community Return Scheme (Irish Prison Service, 2014). This scheme is co-managed by the Prison Service and the Probation Service and was instituted in 2011. Individuals serving between one and eight years can be granted temporary release with a form of community service. If the individual is deemed to be of good behaviour and does not represent a significant risk to the public, once he or she has served 50% of the sentence, he or she may apply for Community Return. If granted, the individual is released to the community under the supervision of the Probation Service and is required to engage in unpaid community work, usually for three days a week, for half the time remaining on their prison sentence. Failure to comply results in an individual being returned to custody. A recent evaluation of the programme shows compliance rates of almost 90% among participants, and of those who began the programme in its first year and successfully completed it, as of December 2013, just 9% had been committed to prison on a new custodial sentence (Irish Prison Service and Irish Probation Service, 2014).

<sup>18</sup> Sex Offenders Act, 2001, Section 28(2).

<sup>19</sup> Sex Offenders Act, 2001, Section 29(2).

<sup>20</sup> Sex Offenders Act, 2001, Section 29(1)(b).

<sup>21</sup> Sex Offenders Act, 2001, Section 30(2).

## Revocation of release

All of the forms of supervision described above are conditional. Any individual not complying with the terms of his or her supervision order must be returned to the relevant authority for consideration of the violation. For example, those subject to a life sentence who are on temporary release and violate a condition of that release are handled by the executive branch. This means that there is no hearing or appeal mechanism and violations generally mean a return to custody. However, violators are not precluded from applying for temporary release again at a future date.

The options available to courts vary depending on the type of order. For example, until recently, the court had significant discretion in the case of PSSSOs: it could reactivate the whole or part of the suspended portion of the sentence and effectively return the individual to prison, or it could determine that the violation was not sufficiently serious and take no action.<sup>22</sup> However, in April 2016, some of the revocation portions of the 2006 Act were declared unconstitutional because of the differential impact the law had on individuals' rights of appeal (*Irish Times*, 2016a). Mr Justice Michael Moriarty declared sub-sections 99.9 and 99.10 of the Act, which allow for the reimposition of the suspended portion of a sentence if a person is convicted of a new crime, unconstitutional. Justice Moriarty noted in his judgment that 'section 99 frequently causes difficulty and was in need of urgent and comprehensive review'; however, the ruling does not appear to affect sub-section 99.17, which covers revocation as a result of a breach of a condition.<sup>23</sup>

In the case of the Post Release Supervision Orders (PRSOs) for sex offences, an individual who violates his or her conditions is effectively charged with a new summary offence by the Probation Service and after a court hearing can be sentenced to up to 12 months in custody and/or a fine.<sup>24</sup> If an individual does serve time in prison, his or her post-release supervision is suspended while he or she is in prison and recommences upon release. As with section 99 of the 2006 Act, difficulties can arise in practice with the revocation of orders and the imposition of sanctions in the event of violation. Finally, in relation to the Community Return

<sup>22</sup> Criminal Justice Act, 2006, sub-sections 99(10) and 99(17).

<sup>23</sup> Some commentators have argued that the April ruling affects all suspended sentences (*Irish Times*, 2016b) but it appears that they are not properly distinguishing between revocation for a new offence and revocation for a condition violation.

<sup>24</sup> Sex Offender Act, 2001, Section 33.

Scheme, participants with two instances of non-attendance or lateness are removed from the scheme and returned to custody (Irish Prison Service and Irish Probation Service, 2014: 13).

### **The use of post-custody supervision**

Because data collection and reporting have varied over the years, it is difficult to analyse trends in post-custody supervision. No information is available on either patterns of sentencing involving supervision orders in the courts or the length of supervision orders, and there has been very little empirical research on the conditions of supervision or on revocation causes, rates or consequences.<sup>25</sup> However, based on the publicly available data, it does appear that the use of supervised temporary release has declined in recent years, while Part Suspended Sentence Supervision has increased.

The use of full supervised temporary release peaked in 1994, when 228 cases were recorded. Just five years later that number had been cut to just 92 cases, and by 2004 it was down to 79 (Irish Probation Service, 1995, 2000, 2005). On the other hand, in 2007, the year after the passage of the 2006 Criminal Justice Act, no PSSSOs were issued by the courts. In 2008 there were just 141, but the number has been growing steadily and in 2014, the most recent year for which data are available, courts issued 586 PSSSOs, approximately 8% of all supervision orders issued that year (Irish Probation Service, 2008, 2009, 2015). Similarly, although the numbers are smaller, between 2010 and 2014 the number of PRSOs for people convicted of sex offences issued increased from 33 to 40 (Irish Probation Service, 2011, 2015).

In March 2015, for the first time, the Probation Service began presenting monthly snapshots reporting information about the population it supervises. Interestingly, included in these reports is a category entitled 'Supervision in the Community Post Release from Custody'. This includes individuals in all of the categories described above. Between March 2015 and April 2016, this number ranged from a low of 1217 individuals to a high of 1324, averaging 15–16% of all individuals under supervision.

<sup>25</sup> An article by Nicola Carr and colleagues (2013) summarising existing research on both the experience and practice of supervision in Ireland demonstrates the lack of research focusing specifically on *post-custody* supervision.

## Does Ireland now effectively have parole?

Parole is usually defined as the *release* of an individual from prison followed by a period of conditional *supervision*. In its traditional form, it is discretionary, meaning that after an individual has served a portion of the prison sentence, the parole board determines whether he or she should be conditionally released from prison. If released, he or she must comply with certain conditions or risk being returned to prison (Scott-Hayward, 2015). In general, parole *supervision* is aimed at improving public safety by reducing recidivism and promoting reintegration (Scott-Hayward, 2011). As an early release mechanism, parole is ‘a means whereby a sentence of imprisonment imposed by a court can be operated with a degree of flexibility as regards the proportion of the sentence to be served in custody rather than under conditions of licence in the community’ (Hood and Shute, 2000: 101). Thus in some jurisdictions, at particular points in time, parole can be used to manage prison populations.

Through a series of legislative and executive actions, in particular over the past 15 years, it is arguable that Ireland has moved towards the reestablishment of a system of parole. This almost unseen and little commented on development<sup>26</sup> raises a number of questions about the management and supervision of individuals in the community post custody, and how post-custody supervision can yield positive outcomes in terms of reduced recidivism and greater community reintegration. However, without a statutory parole board, what exists now is a complex system where a variety of mechanisms for release from prison determine the type of supervision, the number and types of conditions imposed, the definition of violation, the processes of dealing with violations, and the options available to the court or the executive in the event of a violation.

Further, because all of these mechanisms operate independently, a particular individual might be subject to more than one type of supervision. For example, while courts rarely grant temporary release to people convicted of sex offences,<sup>27</sup> such an individual could be granted temporary release, and then, after the sentence expires, be subject to a

<sup>26</sup> Although Griffin and O'Donnell (2012) discuss parole and the process of release for life-sentenced prisoners, their analysis is limited to the formal Parole Board, they don't distinguish between conditional and unconditional release, and they fail to consider other methods of early release from prison, which we argue are equivalent to parole.

<sup>27</sup> According to the 2009 Department of Justice Discussion Document on Sexual Offenders, ‘Because of the risks attached, temporary release has only been used with sex offenders in a small number of cases.’

PSRO under the Sex Offenders Act of 2001. Similarly, an individual could be sentenced with a PSSSO under the 2006 Act but before the minimum custodial sentence is served, he or she could be released under the Community Return Scheme. If the individual breaches the terms of the programme and is returned to prison, he or she will then be released again under the PSSSO to be supervised by the Probation Service.

The life sentence case described in the Introduction illustrates some of the issues with the current system. By statute, life-sentenced prisoners convicted of murder that are released to the community are on temporary release and remain under the supervision of the Probation Service. If they violate a condition of supervision, they will generally be returned to custody with the executive making the decision. Unlike most life-sentenced prisoners, however, the defendant in this case is not on temporary release and instead is subject to a PSSSO. Thus if he violates a condition of release, he is entitled to a hearing at which a judge will determine what action should be taken. Further, the recent decision by Mr Justice Moriarty demonstrates some of the legal implications of the current situation, but what has yet to be studied is the practice implications of the development of such a wide range of post-custody supervision options. Although research on probation practice has increased over the past 10 years, none of this research examines the implications of the context of that supervision, including whether practices are (or should be) different for individuals on community supervision as a true alternative to custody and individuals who are on post-custody supervision.

In recent years, committals have increased significantly as a result of both longer sentences and an increased number of admissions.<sup>28</sup> If the prevailing drive is to seek to contain prison numbers, and one can debate at length the interplay between economic, political, and practice drivers in this reality, then early release, whether through temporary release, community return, or PSSSOs, has the potential to become of increasing significance for population management. Further, to ensure that decisions about temporary release and post-custody supervision are made rationally, co-operation between the relevant parties is vital. The importance of co-operation was recognised by the Probation Service and the Prison Service in their joint strategy in 2013: 'Both organisations have as their primary goal the maintenance of public safety through the reduction in offending

<sup>28</sup> For example, in 2007 there were 9771 committals to prison; by 2013 this number had increased to 13,055. Virtually all of this increase is explained by committals of individuals serving sentences of at least one year.

of those in their care. Increasingly people are sentenced to periods in custody followed by periods under supervision in the community after release.’ This co-operation is evidenced in particular by the co-location of Prison Service staff in the Probation Service Headquarters in order to manage the Community Return Scheme and the Joint Agency Response to Crime (J-ARC) initiative.<sup>29</sup> However, the various forms of release and post-custody supervision have developed almost independently of one another, with different actors playing different roles depending on the mechanism of release. Thus, both the courts and the executive also play important roles in this area. The proposed statutory parole board might go some way toward streamlining the management of release and post-custody supervision and towards achieving the shared goals of safer communities and effective community reintegration.

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<sup>29</sup> J-ARC is a joint strategy, agreed by An Garda Síochána, the Probation Service and the Irish Prison Service in 2015, to provide a strengthened inter-agency approach to managing people who are identified as recidivism risks.



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