



Carr, N. and Maguire, N. (2017) Pre-sentence reports and individualised justice: consistency, temporality and contingency. *Irish Probation Journal*, 14 (1). pp. 52-71. ISSN 1649-6396 (In Press)

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Pre-sentence Reports and Individualised Justice: Consistency, Temporality and Contingency

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Summary: This paper reports on selected findings from a study on pre-sentence reports (PSRs) in the Republic of Ireland, entitled *Individualising Justice: Pre-Sentence Reports in the Republic of Ireland* (Maguire and Carr, 2017). The research was commissioned by the Probation Service and was a small-scale, in-depth study exploring the role of PSRs in sentencing, with a particular emphasis on understanding the *process of communication* involved from the perspectives of Probation Officers who create the reports and judges who request and receive them. This paper draws on the findings from the research to explore specific aspects of the use of PSRs. It begins by highlighting certain features of the Irish context and then provides a brief overview of the methodological approach before presenting a summary of selected findings, including those relating to the purpose of reports and variation in their use. We explore some of the key themes arising from the research, including consistency, temporality and contingency. We conclude by noting the potential positives of pausing a process, but highlight the need for greater consistency to ensure equitable access across the country.

Keywords: Courts, judges, Ireland, sentencing, assessment, pre-sanction reports, probation.

Context

Various policy documents over the years have called for an increase in the range of alternatives to prison as a means of reducing the reliance on imprisonment, especially for those who commit less serious offences (Maguire, 2014; Carr 2016). However, this policy aim has been met

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with varying levels of political commitment over the past 30 years. The *Strategic Review of Penal Policy* (Department of Justice and Equality, 2014) highlighted the need to make appropriate non-custodial sanctions available to the courts in order to reduce prison numbers in Ireland. However, legislative change in the area of sentencing reform is conspicuous by its absence (Kilcommins *et al.*, 2004; Maguire, 2016; Carr, 2016).

Despite the publication of the Criminal Justice (Community Sanctions) Bill in 2014, which promised to update and overhaul legislation in the area of community sanctions that is now over a century old (Carr, 2016; Maguire, 2016), the most recent legislative innovation in this area was the Community Service Order (CSO) introduced by the Criminal Justice (Community Service) Act 1983, which was conceived as a way of reducing reliance on the prison system. In an attempt to reduce the use of short prison sentences, the legislature introduced amending legislation in 2011 (the Criminal Justice (Community Service) Amendment Act 2011) requiring judges to consider imposing a CSO when contemplating a prison sentence of 12 months or less. However, the use of CSOs by the judiciary actually decreased in the years following the 2011 amendment (Probation Service, 2013). The Community Return Scheme, a form of back-door early conditional release first introduced in 2011, has had much greater success in terms of its impact on reducing prison numbers (McNally and Brennan, 2015).

A recent study that analysed the use of imprisonment and community sanctions in European countries has shown that Ireland fits with the trend observed in many European states whereby the use of community sanctions has grown in tandem with increases in the use of imprisonment (Aebi *et al.*, 2015). While there was an overall increase in the use of community sanctions by the courts in Ireland over the past three decades (Healy, 2015; Carr, 2016), the ratio of imprisonment to community supervision is still lower in Ireland than in our neighbours, England and Wales, and Northern Ireland (Aebi *et al.*, 2015).

Irish governments have traditionally been reluctant to 'intervene' in the formulation of sentencing policy and, as a result, legislative sentencing guidance is still relatively limited: there is no statutory sentencing framework that prioritises one or more specific sentencing aim(s) and no legislative guidance on how the various available sanctions should be used. Indeed, legislative provisions dealing with offence definitions, typically, only refer to the fact that a fine and/or a period in imprisonment may be imposed following conviction, even though judges may also consider a

wide range of other options including a Probation Order, a compensation order, a contribution to the poor box, Community Service Order and a suspended sentence.

Until recently, the superior courts in Ireland refused to issue guideline judgments on the grounds that doing so might interfere with judicial sentencing discretion, and Ireland is one of the only common law countries in the world that still does not have any form of statutory sentencing guidelines (O'Malley, 2013; Maguire, 2016).

In the absence of external sentencing guidance, judges have developed the principle of proportionality to guide their sentencing discretion (O'Malley 2006, 2013; Maguire 2016). This differs from traditional proportionality principles in that it requires that the sentence be proportionate to both the gravity of the offence and to the personal circumstances of the offender¹

However, the Law Reform Commission (2013) in its *Report on Mandatory Sentencing*, noting the research evidence of inconsistency in Irish sentencing practices (Hamilton, 2005; Maguire, 2010), recommended the establishment of a Judicial Council to develop and publish suitable guidelines on sentencing, thus implicitly acknowledging that the principle of proportionality is not in itself a sufficient mechanism to ensure consistency in sentencing. Previous research that asked judges of the District Court to explain their sentencing choices found that judges rarely referred to the principle of proportionality in their accounts (Maguire, 2010). Instead judges prioritised doing justice on a case-by-case basis over consistency in sentencing and, when asked about what guidance they rely on, some judges explained that 'probation reports' offered guidance that informed their sentencing (Maguire 2010). Given the lack of sentencing guidance and the perception of judicial 'ownership' of sentencing, exploring the role and influence of PSRs may potentially provide important insights into how reports are requested and thus into the nature of sentencing in Ireland.

While PSRs are sometimes associated with a specific policy mandate related to increasing the use of community sanctions (see for example Tata *et al.*, 2008), this connection has not been explicitly made in Irish penal policy documents to date. While the Probation Service's internal PSR guidance manual does state that courts are 'encouraged to seek a PSR before making a supervised community sanction' (Probation Service, 2014), it is not clear how widely shared this expectation is. Furthermore,

¹ Per Denham J. in *People (DPP) v. M* [1994] 3 I.R. 306, at 317.

the potential for PSRs to play a large role in promoting greater use of community supervision over the use of imprisonment should not be overplayed.

In 2015, the District Court received a total of 405,007 new offences and resolved 298,797 offences, and the higher criminal courts (including the Circuit Criminal Court) received 15,743 new offences and resolved 11,423 offences (Court Service, 2015). However, as Table 1 shows, the total number of referrals to the Probation Service from the courts in 2015 was 8466 and the total number of PSRs requested by the courts in the same year was 5072. PSRs will only be requested in a small proportion of the cases dealt by the criminal courts in any one year, thus understanding how the courts use this finite resource is a matter of some importance.

Table 1. New referrals to the Probation Service (2014–2016)

<i>New referrals from court</i>	2014	2015	2016
Probation (Pre-Sentence) Report	4,817	5,072	5,342
Community Service Report	1,943	1,702	1,773
PSR to consider Community Service	649	719	783
Orders without prior report	1,037	936	929
Family conference	36	37	20
Total	8,482	8,466	8,847

Pre-sentence reports: context and variation in use

PSRs are reports prepared by the Probation Service on the request of a judge following a finding of guilt and in advance of sentencing. PSRs conform to a specific structure, providing background information on the defendant (e.g. their family background, education and employment history, living arrangements, health), an analysis of the offence(s) before the court, any pattern of offending and the defendant's level of insight into their offending, including victim awareness where relevant (Probation Service, 2014).

Informed by a structured risk assessment tool (the Level of Service Inventory Revised, LSI-R), the reports include an assessment of the risk of reoffending and, depending on the circumstances of the case, they may also include an assessment of the risk of harm. The reports typically conclude with the Probation Officer's assessment of the defendant's

suitability for specific sanctions including community sentences such as a Probation Order, a Community Service Order or a part-suspended custodial sentence (which involves a period spent in custody followed by supervision in the community).

Research in other jurisdictions has examined the influence of PSRs on the sentencing process (Tata *et al.*, 2008; Beyens and Scheirs, 2010; Wandall, 2010; van Windgerden *et al.*, 2014). While PSRs provide contextual information on a person's background and the circumstances of their offending, thereby situating them within a social domain, in many countries PSRs have become increasingly risk-oriented (Robinson, 2002; Persson and Svensson, 2012; van Windgerden *et al.*, 2014).

Reflecting broader penal trends, the extent to which risk becomes a central organising principle, impacting on the construction of the 'offender', the report's conclusion and ultimately the sentence imposed, has been considered in a range of research. The answers to these questions are culturally and context specific, but there is some consistency in studies from diverse contexts noting that risk orthodoxies can combine with more traditional conceptions of welfare. In the Canadian context, for example, Hannah-Moffat (2005) describes the melding of risk assessment and need profiles to produce the 'transformative risk subject'. Research in Ireland exploring aspects of PSRs, in both the adult and youth settings following the introduction of structured risk assessment tools, has found that while there was an increased focus on risk within reports, practitioners still tended to prioritise the welfarist dimension of their practice (Fitzgibbon *et al.*, 2010; Bourke, 2013; Quigley, 2014).

Studying the use, construction and interpretation of PSRs provides a useful vantage point from which we can explore how broader penal trends translate into everyday practice. Earlier research examined congruence between report recommendations and sentencing outcomes (e.g. Gelsthorpe and Raynor, 1995), while more recent research has explored the iterative processes involved in the construction and interpretation of PSRs (McNeill *et al.*, 2009; Field and Tata, 2010).

In requesting a PSR the court is seeking background information that will inform the sentencing decision. The extent to which the report author anticipates the court's decision and therefore tailors the report to be well received by a sentencer through the use of particular language, framing devices and recommendations has been explored in some research. Of specific interest is whether the use of reports encourages a greater uptake in community sentences.

The interaction between reports and sentencing outcomes in Ireland is of particular analytical interest given the fact that, as identified, judges exercise a high degree of discretion and there is significant geographical variation in the use of reports (O'Malley, 2013; Carr, 2016). Despite a constitutional requirement for judges when exercising their sentencing discretion to consider whether the personal circumstances of the defendant merit mitigating the sentence, there is no legal obligation for a judge in the Republic of Ireland to request a PSR.² This contrasts with other jurisdictions. For example, in Northern Ireland, there is a presumption that the court should obtain a PSR prior to the imposition of a custodial sentence, and if a report is not requested, the reasons should be stated in open court. Further, if a case is appealed, a court of appeal can subsequently request a report.³ There is also a presumption that a court should request a PSR when considering a defendant's suitability for the range of available community sentences. Given the lack of similar statutory requirements in the Republic of Ireland, it is perhaps unsurprising that there is variation in the use of PSRs across the country.

Information available from the Probation Service's most recent annual report shows the pattern of referrals to the service from the courts (Probation Service, 2016). New referrals to the service are categorised as follows: those made for PSRs, community service reports, PSRs to specifically consider Community Service and orders made without a prior report. Table 1 shows the numbers of referrals for each category. Referrals for PSRs account for the largest category (60% of total referrals); noteworthy also is the fact that 11% of orders supervised by the Probation Service were made without a report.

While the numbers of PSRs requested by the courts has risen in recent years, analysis of available data shows fluctuation in their use over time. For example, in 2008 the Probation Service received 7,034 requests for PSRs, compared to 5,342 in 2016 (Probation Service, 2008, 2016). The reasons for these variations over time are not explained, but perhaps more striking are the variations in the patterns of referrals from across

² There is a requirement for judges to request a report when considering the imposition of a Community Service Order. Section 3 (1B) of the Criminal Justice (Community Service) Act 1983, as amended by the Criminal Justice (Community Service) (Amendment) Act 2011, states: 'Where in relation to an offender, the court considers that the offender is a person in respect of whom it may be appropriate to make a Community Service Order, it shall request the Probation Service to prepare a report (in this Act referred to as an "assessment report") in respect of the offender.'

³ Part 2, Article 9, Criminal Justice (Northern Ireland) Order, 2008.

the country. The limited existing research points to concerns regarding consistency in sentencing, particularly in the absence of sentencing guidelines (Maguire, 2010; O'Hara and Rogan, 2016). Data provided in the Probation Service's annual reports shows significant geographic variability in both the use of PSRs and community sentences. For instance, there are relatively high rates of referrals to the service for reports from counties Carlow, Cork and Cavan (250–300 people referred to the service per 100,000 of the population) compared to Kerry, where the rates of referral are lowest at 1–50 per 100,000 of the population. The counties with the highest use of Probation Orders are Carlow, Cork and Waterford with 80–100 persons on probation per 100,000; the lowest rates are in counties Mayo, Kerry and Monaghan, where there are 1–20 Probation Orders per 100,000 residents. There is similar variance in the use of Community Service Orders (Probation Service, 2016).

While they are not always directly mapping, there seems to be a higher use of community sentences in areas where there is a higher use of PSRs. Corresponding information on rates of imprisonment and comparisons with offence types would clearly add to this overall picture. Nonetheless, based on available information we can see that there is significant variation in use of PSRs and community sentences. This small-scale, in-depth qualitative study is an attempt to explore the circumstances in which PSRs are requested by judges, as well as how they are constructed and their impact on sentencing.

Methodology

The study adopted a multidimensional approach to capture the PSR process from a range of perspectives. The research was subject to ethical review at the Waterford Institute of Technology. The Probation Service, which also sponsored the project, supported access. The study sample was derived from report requests received in two centralised assessment teams in a busy metropolitan area at the beginning of 2014. The Probation Service provided us with a list of report requests and we selected possible cases based on the following criteria: originating court (i.e. District or Circuit); offence type; requesting judge; gender of defendant; and previous experience of Probation Service involvement. The sample was purposively selected based on these criteria in order to explore the range of cases for which reports were requested, possible differing reasons for report requests and any potential differences in report-writing styles.

A total of 18 cases were identified in the case selection process. Having selected cases, we approached the allocated Probation Officer and made arrangements with them to provide information on the study to the defendant and to ascertain if they would be willing to participate in the research. All potential participants were provided with written information on the study. It was made clear that participation was entirely voluntary and that the decision to participate in the research would not impact on the PSR in any way. For various reasons (including non-attendance at interview, or defendants not wishing to participate), the final study sample includes nine cases (five District Court and four Circuit Court cases). An overview of the sample, including the index offence(s) before the court, the final sentence and the time taken between report request and sentence outcome is provided in Table 2.

Table 2. Sample overview

<i>Case</i>	<i>Offence</i>	<i>Sentence</i>	<i>Length of time between report request and court sentence</i>
CC01	Assault on police officer (×2); Production of article in the course of dispute; Threatening to kill or cause serious harm	Suspended prison sentence (18 months) with Probation supervision for 12 months (Criminal Justice Act, 2006).	285 days
CC02	Possession of drugs with intent to supply	Suspended prison sentence (three years). No supervision.	140 days
CC03	Attempted Robbery	Suspended prison sentence (three years) with Probation supervision (Criminal Justice Act, 2006).	300 days

<i>Case</i>	<i>Offence</i>	<i>Sentence</i>	<i>Length of time between report request and court sentence</i>
CC04	Theft (Breach of suspended sentence)	Suspended prison sentence revoked. Probation Order imposed (12 months). Prison sentence reimposed (three years) and suspended to allow for completion of Probation Order.	95 days
DC01	Theft (×3). Value: €6358	Fine – €750	56 days
DC02	Theft. Value: €170	Probation supervision (12 months)	165 days
DC03	Unlawful possession of drugs (×2); Possession of drugs with intent to supply	Adjourned supervision – seven months then case struck out.	215 days
DC04	Possession of drugs for the purpose of sale or supply; Unlawful possession of drugs; Possession of a knife	Suspended prison sentence (nine months).	198 days
DC05	Possession of knives and other articles; Handling stolen property	Community Service Order (80 hours) (in lieu of two-month prison sentence).	197 days

For each case, we observed the PSR interviews between the defendant and the Probation Officer (21 interviews in total). We subsequently received a copy of the PSR (and in some cases further update reports) and then carried out an interview with the report author. We also carried

out a number of observations in the District and Circuit Courts within the study area.

The methods used were intended to capture the temporal dimensions of the process as well as the viewpoints of those involved, specifically the views of those who requested the reports (judiciary) and those who constructed the reports (Probation Officers). We had initially sought to interview the judges who had requested the reports included in our sample; however, for a variety of reasons (including pressures of time), some judges were not available to participate. We therefore broadened our sample by inviting all judges in the study area. This led to the recruitment of five judges to the study.

In the original study design, we had also intended to capture the views of those who were the subject of the reports, an important perspective that has been absent from previous research on PSRs (Tata *et al.*, 2008) and indeed from broader scholarship on the experiences of ‘offender supervision’ (Durnescu *et al.*, 2013). From an ethical point of view, we felt it was important that the court proceedings should be finalised before we interviewed defendants about their experiences of the report process. However, the time taken for the process to reach completion (i.e. from report request to sentence outcome), in one case almost a year, meant that it was possible to follow up with only one defendant. To avoid any possibility of identification we have not included this interview in our overall analysis. Each case was identified by the originating court – i.e. District Court (DC) or Circuit Court (CC) – and was assigned a number, e.g. DC01.

Temporality and the PSR process

One of the most striking features of the sample of reports included in the sample, as can be seen in the information provided in Table 2, is the amount of time the cases in the study took to reach completion, i.e. from the time a report was requested by the court to the final court decision. The cases ranged from 56 days to 300 days from report request to final decision. The shortest case (DC01) was one in which the defendant was a foreign national who did not have leave to remain in the country, and therefore a community sanction could not be recommended. In the longest case (CC03) the final outcome was a three-year suspended prison sentence, involving probation supervision during the suspension. There were a variety of reasons for the length of time taken in cases, including

a deferral for specialist assessment by a restorative justice agency, non-attendance of defendants or Gardaí at court, and deferrals initiated by the court to assess a defendant's progress before deciding on the final outcome. In the last of these, we observed that legal representatives made such requests on behalf of their clients in order to build up a picture of progress over time.

The information provided in Table 2 is the timeline for cases to be processed from the point of report request to sentence outcome. It does not therefore include the *entire case processing time*, i.e. from the point at which the person was charged, the first court appearance, hearings and so forth. We do know that some of the offences for which the report was requested dated back a couple of years (e.g. in the case of CC01). Therefore, while requesting a PSR entailed a lengthening of the overall time for the case to reach a conclusion, this is just one aspect of the overall timeline for case processing.

By way of comparison, the Courts Service annual report for 2015 shows that the average lengths of proceedings for summary offences and indictable offences tried summarily in the District Court are 232 and 284 days respectively. However, these lengths are counted from the date of issuing of the summons/lodgement of charge sheet to the date of disposal of the case (Courts Service, 2015: 68). The average lengths of proceedings for indictable offences heard in the Circuit Criminal and Central Criminal Courts are 678 and 645 days respectively, and these periods are counted from the date of receipt of the return of trial to the final order (Courts Service, 2015). While requesting PSRs increases the length of proceedings, this needs to be considered in the context of overall delays within the criminal justice system (an issue that clearly merits further research). A key question arises as to whether the benefit PSRs bestow, if any, outweighs the extra burdens they involve.

In all cases, at least two PSR interviews were held with the defendant and in some instances four interviews were conducted. Typically, the first interview was used to explain the process to the client and to seek their consent to make contact with relevant third parties (e.g. doctors, drug and alcohol services). Further interviews involved the collection and verification of information. In all but one case, report writers had access to the defendant's criminal record, and to further information on the circumstances of the specific offence(s) for which the report had been requested.

In Circuit Court cases Probation Officers consulted the 'Book of Evidence' to gain information; in District Court cases a précis of evidence was provided (however, this source of information was only available in two of the five District Court cases included in the sample). As Probation Officers explained to us, they used the interviews to seek information on the defendant's account of events and sometimes to challenge these accounts when they varied from information available from other sources.

The status of the information available from these sources, and the treatment of it as a potentially more reliable account, is an issue we discuss in our report. However, the general point to note here is that the interview process served a variety of purposes – establishing a relationship with the defendant, seeking information on the circumstances of the offence, the subject's background and account of their behaviour and, perhaps most importantly, 'testing' the defendant's capacity for change and therefore their suitability for a community sentence. This extract from an interview with a Probation Officer captures their view of the interview assessment process:

I think you have to build a relationship and you have to start the process in order, for, you know, to actually get the information and all that so ... if you could start the process with someone and get them to link in with a group or whatever at this stage ... that's great like, they've started the process. (Probation Officer, CC02)

One can see how the passage of time potentially assisted this process. Meeting with a defendant on a number of occasions meant a rapport could be established and that motivation could be tested over time, by for example setting tasks for the defendant such as making contact with a drug and alcohol treatment service or an employment adviser between appointments.

Sometimes, it can also be, when you are assessing it is also how realistic some people will ... aspire, they will have, they will aspire to one thing to engage and do X, Y and Z. But are they realistic about what it is going to entail? How difficult it could be? And again that's not about punishing, but you actually have to say okay we need to set realistic goals here because there is no point in putting somebody under supervision in either a conditionally suspended sentence or

the recognisance sentence that has very onerous conditions, that somebody doesn't really know what it means. You are actually setting them up for failure ... it would have parallels to informed consent I suppose in a way. (Probation Officer, CC01)

The above quote touches on issues explored further in the report: that in the process of report writing, particularly when extended over time, the defendant can be 'tested' to establish if they are sincere in their willingness to address the areas causing difficulty in their life, and if they have the capacity to do so. As this Probation Officer identifies, this may be as much about the defendant knowing what this will involve and thereby consenting to it as about the Probation Officer making an informed assessment based on evidence of engagement.

While this may be true to the original ethos of probation – a term denoting 'testing' or 'proving' – what is notable in the Irish context is that at least some, if not a substantial amount, of this work is done *prior to or without the imposition of* a court order. This contrasts with neighbouring jurisdictions. In Northern Ireland, for example, reports are prepared within a specified time period (usually 20 working days) and the court then decides upon the sentence.

Purpose of reports: pausing, intervening, individualising

Our observations of the PSR writing process and our analysis of the interviews with practitioners led us to conclude that PSRs serve a number of latent purposes apart from the more obvious, formal ones. As discussed above, the emphasis on establishing a relationship with the client went beyond the instrumental requirement to obtain reliable information, and once trust was established it allowed a certain 'testing' of the client in order to ascertain willingness and capacity to change. This emphasis on relationship and trust building, together with the referrals Probation Officers made to other services during the report-writing process, resembled the beginning of a supervisory relationship more than a simple series of meetings to ascertain factual insights to ground a recommendation to the court.

Although the time taken to meet with clients on multiple occasions and then to write the reports often meant additional delays to the court proceedings and thus to justice, there was a sense in which both the Probation Officers and judges viewed this process as potentially

representing the beginning of the client's process of engagement with the Probation Service and other agencies.

PSRs in some cases may thus represent a form of intervention in themselves. As discussed above, Probation Officers described the relevance of relationship building and referrals to other services and agencies as a way for the client to start a process of engagement, a key factor in testing willingness and capacity to change. Somewhat more surprising was that the judges we interviewed also perceived requests for PSRs as potentially offering something extra beyond their formal purposes:

if you were adjourning the matter for a probation report officially, unofficially you are giving that person an extra piece of leash ... to use the Probation Service as an assist in getting themselves detoxified or, or stabilised in terms of their accommodation and so on and so forth. (Judge 03)

The formal purpose of a PSR is to assist judicial decision-making in specific cases by providing greater insight into the client's background and to make a sentence recommendation based on a considered and professional judgement. However, a secondary or latent purpose, shared by the judges and Probation Officers who participated in our study, is that the report-writing process provides a momentary pause in the larger process during which the client has the opportunity to make a choice about whether or not they wish to engage by demonstrating willingness and capacity to change.

From my point of view they [PSRs] are terribly important because what I feel ... if you have a reservation about sentencing on the day which you could do just to get rid of it ... but if you have a reservation you go with it. There is always a reason why. Get the report and that may explain why you were right to pause and see what's the problem and see if you can get to the root of the problem and deal with it and move it along on that basis. (Judge 05)

An important caveat is the fact that this quasi-supervisory engagement is temporary due to the fact that the PSRs are written by dedicated assessment teams in the area in which we conducted this research, and clients who successfully begin a process of engagement with report writers are invariably referred on to a new supervisor if they are sentenced to some form of community supervision.

Both the formal and latent purposes of PSRs therefore underscore the centrality of the PSRs as a means of facilitating judges to individualise sentences to the specific facts of the case. Judicial perspectives on the purposes of reports emphasised their importance as a form of assistance to sentencers by providing insight into the background and attitude of the defendant, which, taken together, are highly relevant not only for understanding the reasons underpinning offending behaviour but also to the decision to impose a custodial or non-custodial sentence.

While Probation Officers and judges undoubtedly approach PSRs from different perspectives, we found a high level of congruence between the two groups in terms of their shared understanding of the key purposes (formal and informal) of PSRs. Judges tended to welcome sentence recommendations because they respect the distinct professional training of Probation Officers and thus the unique contribution they can make to understanding the case in hand. For the most part, Probation Officers were generally confident that their recommendations were given serious consideration.

Recognising the potential additional benefits of being referred to the Probation Service (for a PSR) places a greater onus on us to understand the basis on which such requests are typically made. An important finding of the study is that judges do not only request PSRs when considering imposing a community sentence; some judges request reports when they are genuinely unsure about which direction to take, whereas others admitted requesting reports as a form of due diligence when considering a term of imprisonment. This wide-ranging use perhaps reflects the lack of a clearly defined policy regarding how and when PSRs should be used, and suggests that there may be some merit in redefining their role.

The additional benefits that may potentially accrue when a PSR is requested raise important questions about consistency in sentencing. As noted earlier, judges are constitutionally required when exercising their sentencing discretion to consider both the gravity of the offence and the personal circumstances of the offender. Personal circumstances are relevant to mitigation of the sentence. As PSRs speak directly to the personal circumstances and thus to mitigation, it is of the utmost importance that there is a coherent policy guiding the types of cases in which reports are requested, to ensure that similarly situated persons are treated equally and fairly in terms of the quality of decision-making but also in terms of access to resources.

Contingency and the PSR process

A further finding from our study is that in the time taken to finalise the sentence outcome a defendant occupies something of a liminal space. In some instances, cases are categorised as being under ‘adjourned supervision’ in the period where there is some form of supervision but no formal sentence. This practice of ‘adjourned supervision’ has evolved over time and while it has no legislative basis, it is used frequently.⁴ Information from the Probation Service shows that in 2016 there were 1667 orders for Supervision During the Deferment of Penalty (i.e. adjourned supervision), constituting 24% of the supervisory case-load (Probation Service, 2016).

In our sample of cases, one of the nine cases (DC03) was categorised as being under ‘adjourned supervision’ and was ultimately struck out after the person had engaged with their assessment over a seven-month period. In other cases, which were potentially more ‘cusp’ cases (i.e. where a sentence of imprisonment was a real possibility), suspended prison sentences were ultimately imposed. Three of these cases received a suspended prison sentence coupled with community supervision orders (CC01, CC03, CC04). Two cases received suspended prison sentences without any form of supervision in the community (CC02, DC04). However, before the decision was made regarding the final sentence, the defendant was in something of a liminal space – neither formally subject to a court order nor fully free, in that their engagement with Probation was important for how their sentence was determined. This liminal position could extend over a number of months.

The questions of time and contingency of the PSR process and, by extension, practices of adjourned supervision raise a number of issues. There are issues of proportionality to be considered where a person is engaging in a process that is not an actual sentence, and which may or may not be taken into consideration in the final sentencing decision. However, concerns regarding proportionality or the ‘weight’ (McNeill, 2017) of the experience must also be considered alongside the potential benefits of this particular form of ‘judicial innovation’ (Healy and O’Donnell, 2005). For instance, in the case of DC03, after a seven-month process of

⁴ While deferred or adjourned sentences have no specific legislative basis, it could be argued that they fall under Section 1(1)(ii) of the Probation of Offenders Act 1907. Furthermore, the practice of deferral of sentence has a long and distinguished legal history in common law in this and neighbouring jurisdictions.

engagement precipitated by the request for a PSR, the case was ultimately ‘struck out’ by the court and no conviction was recorded. In other cases, where custody may have been a strong possibility (e.g. CC01), evidence of engagement with the Probation Service may have offset this outcome. While the cases in our sample provide some insight into this particular penal practice, it is clearly an area that merits further research.

Conclusion

PSRs perform an important, although often unacknowledged, role in the Irish criminal justice system. They facilitate communication between two distinct professional groups – Probation Officers and judges. Although they approach reports from different perspectives, the two groups share an understanding of their central purpose which includes providing information on the offender’s personal circumstances and background and, most importantly, providing a professional opinion on a person’s willingness and capacity to engage with a community sentence. The judges we interviewed welcomed sentence recommendations, acknowledging the distinct professional training and judgement that Probation Officers bring to the table.

PSRs are undoubtedly very valuable as a sentencing tool and as a resource available to judges. However, the variations in use that we observed in this study reflect the lack of clear policy or legislative guidance on when and for what purposes they should be used. The statistical data also show wide variations in proportion of reports requested across different parts of the country, which, we argue, has serious repercussions for fairness and consistency in sentencing. Beyond their formal sentencing function, PSRs potentially offer benefits to clients by encouraging and facilitating their engagement with various supports and services. In so far as they resemble a form of intervention in themselves, the variation in their use and thus availability in courts across Ireland raises important questions around the issue of distributive justice.

As Geiran (2017) notes, the term ‘probation’, while subject to contestation across time and place, captures something about the value of second chances and allowing people to prove themselves. The Probation of Offenders Act (1907), which remains the primary legislation governing probation in the Republic of Ireland, encapsulates something of this essence. The fact that the Republic of Ireland has retained this legislation as the primary statutory instrument governing probation has been

seen as evidence of ‘stagnation’ within the Irish criminal justice system (O’Donnell, 2008). Arguably the retention of legislation that allows for constructive ambiguity, including a period of ‘testing’ and the potential to avoid a criminal record, may accord to principles that will ultimately support desistance from offending more successfully. However, it is equally clear that there is a need for additional mechanisms, most likely in the guise of legal reform, to ensure equity of approaches across the country.

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