

Ireland: national report for 2015 - Legal framework

Health Research Board. Irish Focal Point to the European Monitoring Centre for Drugs and Drug Addiction

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0. Summary

0.1 National profile

The classification of drugs and precursors in Ireland is made in accordance with the three United Nations conventions of 1961, 1971 and 1988. Irish legislation defines as criminal offences the importation, manufacture, trade in and possession, other than by prescription, of most psychoactive substances. The principal criminal legislative framework is laid out in the Misuse of Drugs Acts (MDA) 1977 and 1984, and the Misuse of Drugs Regulations 1988. The offences of drug possession (s.3 MDA) and possession for the purpose of supply (s.15 MDA) are the principal forms of criminal charge used in the prosecution of drug offences in Ireland. The Misuse of Drugs Regulations 1988 list under five schedules the various substances to which the laws apply. There are no alternatives to punishment for the possession or supply of illicit drugs in the sense that they remain criminal offences under the above legislation. However, different factors can operate either in mitigation of an offence or as aggravating factors.

Trends

There have been no changes to the definition of the core offences since 2000. The most significant changes in the criminal laws applicable to drug-related crime began in 1996 following the assassination in the summer of that year, of Veronica Guerin, a high-profile journalist who had written a number of exposés about criminals linked to the illicit drug trade. This was a catalyst for a range of legislative and policy initiatives. Further significant laws were introduced in response to organised crime and then, more recently, in response to so-called 'head shops' selling new psychoactive substances (NPS).

New Developments

The Misuse of Drugs (Amendment) Act 2015 had to be introduced as emergency legislation after a court struck down the laws banning certain drugs. The Court of Appeal held that a section of the MDA 1977, under which regulations banning numerous substances have been introduced over the past two decades, was unconstitutional because it purported to vest in the Government law-making powers which are in the exclusive authority of the Oireachtas (Parliament). As a result of the judgement, all substances controlled by means of government orders made under the relevant section ceased to be controlled with immediate effect, and their possession ceased to be an offence. The substances included ecstasy, benzodiazepines and NPS. The authors of a study on the impact of legislation to close 'head shops' selling NPS concluded that use of NPS among adolescents attending drug and alcohol treatment was substantially reduced 6–12 months after the introduction of the legislation.

The Road Traffic Bill 2015 will introduce chemical, roadside drug-testing in response to drug driving. It will test for certain drugs including cannabis, cocaine, opiates and benzodiazepines.

1. National profile

1.1 Legal framework

1.1.1 Characteristics of drug legislation

The classification of drugs and precursors in Ireland is made in accordance with the three United Nations conventions of 1961, 1971 and 1988. Irish legislation defines as criminal offences the importation, manufacture, trade in and possession, other than by prescription, of most psychoactive substances. The principal criminal legislative framework is laid out in the Misuse of Drugs Acts (MDA) 1977 and 1984, and the Misuse of Drugs Regulations 1988. The offences of drug possession (s.3 MDA) and possession for the purpose of supply (s.15 MDA) are the principal forms of criminal charge used in the prosecution of drug offences in Ireland. The Misuse of Drugs Regulations 1988 list under five schedules the various substances to which the laws apply.

The vast majority of drug offences reported come under one of three sections in the MDA 1977: s. 3 – possession of any controlled drug without due authorisation (simple possession); s. 15 – possession of a controlled drug for the purpose of unlawful sale or supply (possession for sale or supply); and s. 21 – obstructing the lawful exercise of a power conferred by the Act (obstruction).

Other MDA offences regularly recorded relate to the importation of drugs (s. 5), cultivation of cannabis plants (s. 17) and the use of forged prescriptions (s. 18).

There are no alternatives to punishment for the possession or supply of illicit drugs in the sense that they remain criminal offences under the above legislation. However, different factors can operate either in mitigation of an offence or as aggravating factors.

1.1.2 Penalties

Sentencing in cannabis possession cases

As per the MDA 1977, ss.3, 27(1) (a), possession of cannabis for personal use is punishable by a fine on the first or second conviction. From the third offence onwards, the offender can incur prison sentences of up to one year (summary) or up to 3 years (on indictment), or a fine, or both.

Sentencing in trafficking cases

In Ireland the different drug trafficking offences and their associated penalties are set out in ss. 15, 15A and 15B of the MDA 1977 (as amended), and s. 3(1) of the Criminal Justice Act 1994 (as amended) as follows: 'Any person who has in his possession, whether lawfully or not, a controlled drug for the purpose of selling or otherwise supplying it to another in contravention of the regulations made under section 5 of this Act, shall be guilty of an offence.' The penalty on summary conviction may be a fine not exceeding €2,500, or up to 12 months imprisonment, or both, while the penalty for conviction on indictment may be a fine and/or imprisonment for life or both.

An offence under s. 15A (possession), s. 15B (importation) and s. 27(3A) of the MDA 1977 is similar to that in s.15, save that because the value of the drug is in excess of €13,000, there is a presumptive mandatory minimum sentence of 10 years. Provision is made for a court in imposing sentence for a first offence under either s. 15A or s. 15B to impose a sentence of less than 10 years, and the court determines that by reason of exceptional and specific circumstances. If, however, the accused has been convicted of a second or subsequent offence under either s. 15A or s. 15B, or is convicted of a first offence under one of these sections and has been convicted under the other section on another occasion, the court must impose a sentence of not less than 10 years.

Thus, the legislative provisions in Ireland relating to sentencing for drug trafficking offences do not differentiate between the different types of drug or by weight, only by market value. Section 27(3D) of the MDA 1977 sets out a number of different mitigating and aggravating factors (in subsections [b] and [c] respectively) that a court must consider when imposing a sentence under s. 15A and whether or not to deviate from the mandatory minimum sentence. Aggravating factors include any previous drug trafficking convictions, other than s. 15A or s. 15B, and whether the public interest would be served, e.g. by preventing drug trafficking by the imposition of a lesser sentence.

Mitigating factors include any matters the court considers appropriate, including whether the person pleaded guilty to the offence, and the stage at which he or she indicated the intention to plead guilty, the circumstances in which the indication was given, and whether the person materially assisted in the investigation of the offence. Other than the issues described above, there are no official guidelines for sentencing or prosecuting trafficking of illicit drugs.

1.1.3 Legislation to control New Psychoactive Substances (NPS).

On 11 May 2010 the government made the Misuse of Drugs Act 1977 (Controlled Drugs) (Declaration) Order 2010 (S.I. 199 of 2010), declaring a range of 'legal highs' to be controlled drugs. To give effect to this decision, on the same day the Minister for Health and Children signed the Misuse of Drugs (Amendment) Regulations 2010 (S.I. 200 of 2010), the Misuse of Drugs (Designation) (Amendment) Order 2010 (S.I. 201 of 2010), and the Misuse of Drugs (Exemption) (Amendment) Order 2010 (S.I. 202 of 2010). Under these statutory instruments, approximately 200 individual 'legal high' substances, which had been on sale in 'head shops' and which included the vast majority of products of public health concern, were declared to be controlled drugs. Following on from this, the Criminal Justice (Psychoactive Substances) Act 2010 was implemented (Irish Focal Point (Reitox) 2010) (Chapter1 section 1.2.1).

1.1.4 Other topics of interest

Drug driving

Driving under the influence of drugs (DUID) has been a statutory offence in Ireland since the introduction of the Road Traffic Act 1961. The Road Traffic (No 2) Act 2014 provides, *inter alia*, new measures to test for driver intoxication. Members of the Garda Síochána are empowered to require people driving or attempting to drive a mechanically propelled vehicle in a public place, to undertake intoxication impairment testing. This involves non-technology-based cognitive tests (e.g. walking a straight line, tipping one's nose, counting while standing on one leg). The results of these tests may be used in evidence in support of the Garda forming an opinion that the person is intoxicated. Under the new provisions, the Minister is empowered to prescribe in regulations the nature of the tests and their manner of administration, as well as a form for recording the observations made during the tests. It is also an offence to fail to comply with a requirement to undergo intoxication impairment testing. Section 12 amends the Road Traffic Act 2010 to allow for the taking, subject to medical approval, of a specimen of blood from an incapacitated (e.g. unconscious) person following a road traffic collision involving death or injury.

See Section 3.4 below for an account of the new Road Traffic Bill 2015, which will introduce chemical roadside testing in response to drug driving.

Drug testing in the work place

Legislative provision has been made for mandatory drug and/or alcohol testing in a number of specific contexts, including the defence forces, the maritime and railway industries, and the work place generally.

Defence Forces

In October 2002 a Compulsory Random Drug Testing (CRDT) programme aimed at deterrence was introduced in the Irish Defence Forces. Members of the Defence Forces may be discharged as a result of a positive test result.

Maritime safety

The Maritime Safety Act 2005 introduces prohibitions on the operation of vessels in Irish waters while under the influence of alcohol or drugs to such an extent as to be incapable of properly controlling or operating the vessel. Section 29, *inter alia*, entitles the person in command of a vessel to refuse permission to board a vessel to a person who is under the influence of alcohol or drugs to such an extent that they misconduct themselves or cause offence or annoyance to persons on the vessel. Section 31 introduces controls and penalties in relation to the consumption of alcohol or drugs on board vessels.

Railway safety

The Railway Safety Act 2005 provides for the testing of safety-critical workers for the presence of intoxicants, which include alcohol and drugs and any combination of drugs or of drugs and alcohol. The Railway Safety Commission, established under the Act, has the power to approve the codes of conduct, sampling procedures and support services which railway undertakings are required to put in place. The Commission is also required to report annually on the implementation by railway undertakings of the measures provided for in the Act in relation to testing of safety-critical workers.

Safety, health and welfare at work

The Safety, Health and Welfare at Work Act 2005 provides for drug testing in the work place. The legislation obliges the employee to ensure that s/he is not under the influence of an intoxicant to the extent that s/he is in such a state as to endanger his or her own safety, health or welfare at work or that of any other person. Also, if reasonably required by his or her employer, the employee must submit to any appropriate, reasonable and proportionate tests, by or under the supervision of a registered medical practitioner who is a competent person. An employer may require an employee to undergo an assessment by a registered medical practitioner, nominated by the employer, of his or her fitness to work.

Drug testing in prisons

The Prisons Act 2007 provides for the making of rules by the Minister for the regulation and good government of prisons. Such rules may provide for the testing of prisoners for intoxicants including alcohol and other drugs. Comprehensive Prison Rules (Department of Justice 2007) provided for the introduction of compulsory or mandatory drug testing (MDT) of prisoners. Section 28 (5) (a) states: 'In the interest of good order, safety, health and security and in accordance with directions set down by the minister, a prisoner ... shall, for the purpose of detecting the presence or use of an intoxicating liquor or any controlled drug ... provide all or any of the following samples, namely – urine, saliva, oral buccal transudate, hair.'

Organised crime offences – referral of cases to Special Criminal Court

The Criminal Justice Act 2006 created, for the first time, the offence of participation in a criminal organisation. In the following year, Section 8 of the Criminal Justice (Amendment) Act 2009 declared that the ordinary courts were inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to certain offences. The offences in question were the scheduled organised crime offences under Part 7 of the Criminal Justice Act 2006. Section 8 makes these offences for the purposes of Part V of the Offences against the State Act 1939, and they are to be referred by the Director of Public Prosecutions (DPP) for prosecution in the Special Criminal Court, which operates with three judges and without a jury. The power to use the Special Criminal Court for such offences reduces the possibility of jury-tampering or the intimidation of jurors by members of organised criminal gangs.

As in previous years, on 17 June 2015 the Minister for Justice and Equality, Frances Fitzgerald TD, moved that Dáil Éireann resolve that s. 8 of the Criminal Justice (Amendment) Act 2009 (No. 32 of 2009) should continue in operation for the period beginning on 30 June 2015 and ending on 29 June 2016. The motion was carried by 89 to 26. In proposing the motion the Minister for Justice and Equality noted: 'Although the provision has been in place since 2009 and there have been arrests under the relevant sections of the Criminal Justice Act 2006, no case has come before the Special Criminal Court in accordance with section 8. However, this does not invalidate the reasoning for having such a provision available for use in appropriate circumstances. The use of the Act to date serves to highlight the considered approach of the Director of Public Prosecutions in exercising her discretion to direct that cases would be tried in the ordinary courts where it is possible to do so. The Garda Commissioner has made clear to me her view that the provision will be required for some time to come... (Fitzgerald F 2015). .

Rehabilitation of offenders

The Criminal Justice (Spent Convictions) Bill 2012 was published on 4 May 2012. Its purpose is to assist with the rehabilitation of offenders, who often experience difficulties securing employment as a result of having a conviction. The Bill will provide a regime under which certain convictions can be disregarded after a number of years have elapsed since they were imposed. In March 2015 the Minister for Justice and Equality, Frances Fitzgerald TD, acknowledged the importance of the legislation and stated that, once amendments were finalised, it was her intention to enact the Bill before the summer (Fitzgerald 2015). The Bill had not been enacted by the time the Dáil adjourned for the summer recess.

In July 2015 the chair of the Irish Prison Reform Trust (IPRT), Professor Michael O'Flaherty, commented on the state of play: 'Amendments to the legislation ... are being drafted with the stated intent of bringing the Bill into line with Ireland's international human rights law obligations. Account needs also to be taken of a recent UK court judgment, applying the European Convention on Human Rights, that any duty to disclose criminal convictions must be relevant and proportionate. Disclosure requirements for minor past convictions engage human rights law obligations because they involve release of sensitive personal information (an aspect of private life) and because disclosure may stigmatise and impede access to education and employment, hampering reintegration and rehabilitation' (O'Flaherty 2015).

O'Flaherty expressed concern that the expected amendments to the Bill would be informed by the Administrative Filter for Garda Vetting Disclosures, introduced in March 2014, which provides that certain minor offences over seven years old need no longer be disclosed. This non-disclosure applies to all convictions received in District Courts for motoring offences and certain public order

offences, plus one other conviction where the person has committed one such offence. It does not apply to offences against the person or sexual offences. O'Flaherty commented: 'Worryingly, the provisions seem to form the basis of the amended spent convictions Bill. If this is the case, the legislation will be at odds with human rights because of the way it rules out whole categories of criminal records without paying attention to individual circumstances and contexts.'

1.2 Implementation of the law

1.2.1 Sentencing practice related to drug legislation

The Courts Service publish data on the outcomes for drug offences in its annual report. The latest report relates to the year 2014 (Courts Service 2015). In 2014 the District Court received 425,150 offences and made orders in respect of 312,861 – a 10% decrease on the 347,998 orders made in 2013. Orders made in respect of drugs offences decreased by 15% to 11,877 from 14,008 in 2013. Of these, 3,203 were struck out or dismissed, 2,309 led to a fine, 1,611 to probation and 378 to imprisonment or detention.

There were 13,684 offences received in the Circuit Court (a higher court with the jurisdiction to impose more severe sentences) involving 4,199 defendants. There were 1,878 drug offences involving 533 defendants; 1,610 resulted in a guilty plea, while 311 led to imprisonment.

Prison sentences for drug offences

In response to a Parliamentary Question, the Minister for Justice and Equality, Frances Fitzgerald TD, provided the data contained in Table 1.2.1.1 below, which gives a snapshot of the prison population on 31 August 2014, including the offence for which they were convicted and the length of sentence. On that day, there were 3,792 prisoners in custody across the prison system. Of these, 530 or almost 14% were serving sentences for drugs-related offences. In 2013 there were 846 committals to prison under sentence for controlled drug offences. This represented a decrease of 8% on the 2012 figure of 922.

Table 1.2.1: Prisoners in custody for drug offences, by offence and sentence length

	3 to <6 Mths	6 to <12 Mths	1 to <2 Yrs	2 to <3 Yrs	3 to <5 Yrs	5 to <10 Yrs	10+ Yrs	Total
Allowing car to be used s. 19 of MDA					1			1
Allowing premises to be used			1	1				2
Cultivation of cannabis plants and opium poppy	2	3	2		21	5		33
MDA - printing etc					2			2
Possession for sale or supply drugs valued €13,000.00 or more				7	23	42	37	109
Possession of drugs for the purpose of sale or supply	1	13	30	44	83	98	37	306
Unlawful possession of drug(s)		1	6	8	25	16	11	67
Unlawful supply/offer to supply controlled drug					1	1		2
Unlawfully importing or exporting controlled drugs			1	1		3		5
Unlawfully produce controlled drugs				1	1	1		3
Total	1	16	41	64	157	166	85	530

Source: (Fitzgerald F 2014, 24 September)

Sentencing practices in relation to drug trafficking offences

A recent study conducted by the Irish Sentencing Information System (ISIS) (see Section T2.2 below for a description of ISIS) examined the sentencing practice of the courts in relation to the offences of possession or importation of controlled drugs for the purpose of sale or supply (Mackey 2014). There are four such offences, which were covered by the study:

- possession of controlled drugs for unlawful sale or supply (s.15 of the MDA 1977, as amended);
- possession of controlled drugs (valued at €13,000 or more) for unlawful sale or supply (s.15A of the MDA 1977, as amended);
- importation of controlled drugs for unlawful sale or supply (several provisions found in the Customs Acts, MDA 1977–1984, as amended, and the Misuse of Drugs Regulations 1988); and

- importation of controlled drugs (valued at €13,000 or more) for unlawful sale or supply (s.15B of the MDA 1977, as amended).

Convictions under s.15A or s.15B attract a ‘basic presumptive sentence’ of 10 years or more (for a discussion of the legislation, see (Irish Focal Point (Reitox) 2011): Chapter 1.2.2). A sentencing court may, however, impose a lower sentence where there are mitigating factors that amount to ‘exceptional and specific circumstances’, which would render the imposition of a sentence of 10 years or more ‘unjust in all the circumstances’. Part I of Mackey’s study analysed the legislative basis for these drug trafficking offences and the reserved judgments of the superior courts. Part II examined the application of sentencing principles in relation to the ‘basic presumptive sentence’ provided for in ss. 15A and 15B of the MDA 1977. Part III examined 79 judicial decisions involving 81 offenders before the Court of Criminal Appeal from 2009 to 2012. Twenty of these judgements related to ordinary offences and 59 to offences carrying the presumptive sentence.

The case law analysed showed that ‘in the majority of s.15A and s.15B sentences (67% of those surveyed) the presumptive minimum sentence of 10 years imprisonment or more is not imposed by the courts despite the fact that this sentence is popularly described as a “mandatory minimum” ’ (p. 6). However, this did not mean that the courts were disregarding the presumptive minimum sentencing provisions. As the author explained, ‘the Court of Criminal Appeal has repeatedly emphasised that the upper parameters of these offences are properly defined by reference to the maximum penalty of life imprisonment and not, as is often the case, to the presumptive mandatory minimum of 10 years’ (p. 6).

Regarding importation offences, the analysis concluded that the statutory framework ‘is less coherent’. This was due to the fact that the ordinary offence exists under legislative provisions which provide different maximum penalties, ‘one of which carries a maximum penalty of 14 years imprisonment and the other carries a maximum sentence of life imprisonment’.

This anomaly exists primarily for historical reasons that can be traced back to the emergence of the heroin epidemic in Dublin in the mid-1980s. Prior to the introduction of the maximum sentence of life imprisonment in 1984, the upper limit of 14 years applied to importation and possession for sale and supply offences. Such a maximum sentence was imposed in *The People (Director of Public Prosecutions) v. L.D.*, i.e. Larry Dunne, a leading member of the family largely credited with introducing heroin to Dublin at that time (Flynn and Yeats 1985). In the period between the commission of the offence and the date of sentencing, the legislature had increased the maximum penalty. In passing sentence, McMahon J. stated that the major players involved in drug trafficking could in future expect life imprisonment. As the Mackey study shows, however, up to the time of the study no convicted person had received the maximum sentence of life imprisonment. As a consequence, as the author pointed out, ‘It is sometimes therefore popularly espoused that custodial sentences imposed are too short or that disparity exists from one sentence to the next’ (p. 7). Such disparity was demonstrated in the following cases examined by the study:

‘... one offender found with €300,500 of cannabis and cocaine was sentenced to the presumptive minimum of 10 years while another found with €329,301 of cocaine received a wholly suspended sentence; a man found with €43,000 of cocaine received a 1.5 year custodial sentence while another man found with €287,050 of cannabis received 4 years’ (p. 7).

The study found that in supply offences involving drugs valued at €13,000 or more, the value was the most important factor in the determination of the appropriate sentence. However, this was not the only factor considered as sentences differed relative to the circumstances of individual cases and individual offenders. This approach was regarded as consistent with general sentencing principles.

The analysis of cases provided in this study led to the conclusion that there were four primary factors that featured most prominently in the construction of sentences for drug trafficking offences:

- the quantity or value of the controlled drug or drugs,
- the type of the controlled drug or drugs,
- the role of the offender, and the condition of the offender.

1.2.2 Difference between implementation and texts of Laws

A review of the mandatory sentencing provisions for certain drug offences provides an interesting insight in to the way laws that are passed with a certain stated purpose in Parliament, can be implemented very differently in the courts.

The Law Reform Commission (LRC) highlighted in a consultation paper a number of serious deficiencies in the operation of the presumptive 10-year sentence for certain drug offences and recommended the provision be repealed (Law Reform Commission 2012). Section 15A of the Criminal Justice Act 1999 created a new offence of possessing controlled drugs having a value of £10,000 (€13,000) or more for sale or supply, which attracted a presumptive sentence of 10 years' imprisonment.

According to the LRC, the changes introduced in this legislation 'marked an important turning point in the Irish sentencing regime which had until 1999 – with the exception of the sentences for murder and capital murder – accorded primacy to judicial discretion in the determination of sentences' (p.102). This occurred 'against a backdrop of an escalating drug problem and a growing realisation that Ireland had become a portal not only to the Irish drugs market but also to the British and European drugs markets' (p.102). In the years immediately following these provisions, however, the courts appeared to be resistant to allowing their discretion to be eroded in this way.

The LRC paper cited a Department of Justice report on judicial sentencing practices for drug offences under s. 15A of the MDA (McEvoy 2005), which concluded that 'the courts showed a marked reluctance to impose the mandatory minimum sentence ... for fear that it would result in a disproportionate sentence in individual cases' (p.105). That report had found that, out of 55 cases between November 1999 and May 2001, a sentence of 10 years or more had been imposed in only three cases. The LRC suggested that further legislation be introduced to address this 'apparent rift which had developed between legislative intent and judicial execution' (p.102).

Introducing the Criminal Justice Bill 2004, the government announced that it would be making a series of legislative amendments in order to strengthen the presumptive sentencing provisions for drug offences. In its final form, the Criminal Justice Act 2006 created a new offence of importing drugs having a value of €13,000, which would attract a minimum sentence of 10 years. In addition, it introduced provisions to oblige the court to consider evidence of previous drug trafficking convictions. It also clarified that the *mens rea* regarding the value of the drugs was not an element of the offence; consequently, 'the prosecution needed only to establish that the accused knew that he or she was in possession of drugs with intent to supply and not that he or she knew the value of the drugs involved' (p.105).

Following a lengthy consideration of the way in which the legislation had been applied in the courts, the LRC highlighted a number of criticisms of the presumptive sentencing regime. As a consequence of the constraints it placed on the exercise of judicial discretion, the LRC suggested that the regime had created 'a discriminatory system of sentencing where all cases are treated alike regardless of differences in the individual circumstances of the offenders' (p.189). The LRC also referred to an assertion that the sentence was akin to a 'one-strike rule'. In this regard the LRC referred to the observation of one sentencing expert that 'by contrast to the "three strikes" laws enacted in some US states, [the Irish regime] does not require the accused to have a previous conviction for drug dealing or anything else before the presumptive minimum may apply' (p.131).

The LRC also stated, 'it has been observed that the majority of those being caught for offences under section 15A are drug couriers rather than drug "barons"' (p. 132). Those at the higher levels of the drugs trade had simply adapted to the sentencing regime by using expendable couriers or 'victims of circumstance', such as 'impoverished individuals from African countries or underprivileged Irish citizens', to hold and transport drugs, thus avoiding detection themselves. The regime had also, the LRC concluded, subverted the normal criminal process by leading accused people to plead guilty simply to avoid the sentence, rather than testing the prosecution case. LRC stated that the legislation had merely led to a 'bulge' in the prison system comprising low-level drugs

offenders serving lengthy prison sentences, and that it had not contributed to any reduction in levels of criminality.

In a subsequent report, the LRC recommended that the presumptive sentencing regime for drug offences be repealed (Law Reform Commission 2013).

In 2014, the report of the Strategic Review of Penal Policy Group (the Review Group) also raised a number of concerns about the impact of the mandatory sentencing legislation in respect of drug offences (Strategic Review Group on Penal Policy 2014). The Group was established by the then Minister for Justice and Equality, Alan Shatter TD, to conduct a review of penal policy including an examination and analysis of sentencing policies. The group was concerned that ‘the introduction and use of presumptive minimum sentences, in relation to certain drugs and firearms offences, has been in some instances disproportionate and should be reviewed’ (p.12). In terms of the offenders targeted, the Review Group shared the view of the LRC that ‘in relation to drugs offences, it is the less serious offenders, such as the so-called “drug mules”, who are most likely to be the recipients of these type of sentences’ (p. 96).

The Review Group recommended that no further mandatory sentences or presumptive minimum sentences be introduced. ‘In addition, the continuation of existing presumptive minimum sentences and the threshold for their application in drugs and other offences should be reviewed...with a view to determining if this type of sentencing satisfies the need for proportionality in sentencing and fulfils the objective of reducing crime. As an initial step to comply with the principle of proportionality, the Review Group recommends an increase in the value of drugs, currently €13,000, possession of which triggers the presumptive minimum sentence of 10 years to a level commensurate with that sentence’ (p. 99).

2. Trends

2.1 Changes in penalties and definitions of core offences

There have been no changes to the definition of the core offences since 2000. In terms of identifying the beginning of a trend, the most significant changes in the criminal laws applicable to drug-related crime began in 1996 following the assassination in the summer of that year, of Veronica Guerin, a high profile journalist who had written a number of exposés about criminals linked to the illicit drug trade. This was a catalyst for a range of legislative and policy initiatives introduced in response to the drug problem.

- The *Criminal Justice (Drug Trafficking) Act 1996* allows for the detention of suspected drug dealers for interrogation for up to seven days and places restrictions on the ‘right to silence’ (Keane 1997) (Ryan A 1997).
- The *Criminal Assets Bureau Act 1996* and the *Proceeds of Crime Act 1996* established the Criminal Assets Bureau with the power to seize the illegally acquired assets of criminals involved in serious crime including drug dealing and distribution (McCutcheon J and Walsh D 1999). This legislation allows the state to remove the property of citizens that it believes to be the proceeds of crime, by means of a civil process and without the requirement of a criminal conviction, thereby bypassing the traditional protections of the criminal law.
- The *Bail Act 1997*, facilitated by the passage of a referendum, places restrictions on the right to bail and allows for preventive detention, something previously unconstitutional under Irish law (Kilcommmins, et al. 2004).
- The *Criminal Justice Act 1999* introduced mandatory minimum sentences of ten years for drug dealing involving drugs with a street value of €12,700 or more.
- The *Housing (Miscellaneous Provisions) Act 1997* enables local authorities to evict individuals for drug-related antisocial behaviour.
- The *Non-Fatal Offences against the Person Act 1997* includes provisions specifically addressing the use of HIV-infected syringes in robberies and aggravated burglaries. This piece of legislation, along with the *Housing Act 1997*, was introduced in response to pressure from local communities to address open drug dealing by some residents in local authority housing estates (Connolly 2006).

Since 2000, significant laws have been introduced in response to organised crime and then in response to ‘head shops’ selling NPS. See also, Pike (Pike 2008) Appendix II for a listing of legislation enacted between 2001 and 2007 that impacts directly or indirectly on drug policy.

2.2 How the implementation of the law has changed since 2000

Diversion has become an important means of seeking to prevent crime including drug-related crime – both before, and after, a crime has been committed.

- **Garda Youth Diversion Projects** are local community activities which work with children. These projects aim to help children move away from behaving in a way that might get them or their friends into trouble with the law.
- In addition to the Garda Youth Diversion Projects, the **Garda Juvenile Diversion Programme (GJDP)** provides an opportunity to divert juvenile offenders from criminal activity. It operates on a nationwide basis under the supervision and direction of the Garda National Juvenile Office. The GJDP provides that, in certain circumstances, a young person under 18 years of age who freely accepts responsibility for a criminal incident be cautioned as an alternative to prosecution. The GJDP employs such strategies and initiatives as formal and informal cautioning, supervision, restorative cautioning and conferencing, community policing and referral to the Garda Youth Diversion Projects (which operate outside the GJDP but in concert with it).
- In 2005 the **Irish Youth Justice Service (IYJS)** was established to develop a co-ordinated partnership approach among agencies working in the youth justice system, to improve service delivery in the system through diversion, restorative justice, rehabilitation and detention as a last resort. Garda (Irish police force) statistics show that the types of offence committed by children under the age of 18 years are primarily theft, alcohol-related offences, criminal damage, assault, traffic offences, drugs possession, public order offences and burglary.
- First established on a pilot basis in 2001, the **Drug Treatment Court** is a specialised District Court, which offers long-term court-monitored treatment, including career and education support, to offenders with drug addictions as an alternative to a prison sentence. The idea is that by dealing with the addiction, the need to offend is no longer present. The 2014 progress report on the implementation of the NDS (Department of Health 2015) reported that following the completion of an examination of the operation of the court in 2012/2013, the Minister for Justice and Equality was examining options for the future operation of the Court. The matter was to be progressed alongside wider justice reforms such as consideration of the proposal to establish a Community Court.
- In a 2007 report making the case for **community courts** in Ireland, the National Crime Council (NCC) recommended the establishment of such a court in Dublin’s inner city to deal with ‘quality of life offences committed in the Store Street and Pearse Street Garda station catchment areas’ (National Crime Council 2007). In early 2014 the Dublin City Business Association (DCBA) called for the establishment of a community court as a means of addressing low-level crimes such as vandalism, theft, anti-social behaviour, drug use and drug dealing in the capital city (see Section 9.6.2 of the 2014 National Report (Health Research Board 2014) for an account of a seminar on community courts organised by the DCBA). In July 2014 the Joint Oireachtas Committee on Justice, Defence and Equality published its report on community courts, recommending that a pilot community court be established in central Dublin ‘under the supervision of a single judge, supported by an implementation group and with the support of local community groups and services’ (Joint Committee on Justice Defence and Equality 2014). Responding to the recommendation, the Minister for Justice and Equality, Frances Fitzgerald TD, stated her intention to bring forward proposals for the establishment of such a court: ‘I believe that appropriate planning is the key to getting an effective court in place and it will also entail significant consultation with all stakeholders including the community itself’ (Department of Justice and Equality 2014).

Following a series of pilots starting in 2007, the **Irish Sentencing Information System (ISIS)** now maintains an online database with information on sentencing in the criminal courts. The aim is to have a computerised information system on sentences and other penalties imposed for offences in criminal proceedings, which may inform judges when considering the sentence to be imposed in an individual case. The sentencing information system enables a judge, by entering relevant criteria, to access information on the range of sentences and other penalties which have been imposed for particular types of offence in previous cases. The project is overseen by a Steering Committee of judges, together with an expert on sentencing law, appointed by the Courts Service Board. See T 1.2.1 above for an account of a report recently published by ISIS on the sentencing practice of the courts in relation to the offences of possession or importation of controlled drugs for the purpose of sale or supply.

3. New developments

3.1 Changes in laws in the last year

The **Misuse of Drugs (Amendment) Act 2015** had to be introduced as emergency legislation after a court struck down the laws banning certain drugs. On 10 March 2015 the Court of Appeal found that a regulation making the possession of methylethcathinone (known as 4-Mec or Snow Blow) illegal was invalid (Hogan and Court of Appeal 2015).

The following statement was issued by the Department of Health in response to the decision (Department of Health Press Statement 2015).

'There is always a degree of uncertainty about the outcome of court cases. The outcome of this case does not affect existing laws regarding the supply, possession or sale of older drugs such as heroin, cocaine or cannabis. It does affect the possession of certain newer psychoactive substances which have been added to the Misuse of Drugs Act 1977 by successive governments.'(Department of Health Press Statement 2015)(Department of Health Press Statement 2015)

'The State successfully defended the original case in a High Court hearing in March 2014. The matter was appealed to the Court of Appeal and the Government made preparations for a possible negative outcome. ... "We had no way of knowing what the Court would decide today, but we prepared for this possibility. Legislation was prepared and approved in advance by Cabinet. The emergency legislation I am introducing today will re-instate the status quo ante and re-control all drugs that were controlled prior to this judgment. I want to thank the Opposition in advance for its co-operation," Minister Varadkar said.'

At issue in the case was the constitutionality of s. 2(2) of the MDA 1977. This section states: 'The Government may by order declare any substance, product or preparation (not being a substance, product or preparation specified in the Schedule to this Act) to be a controlled drug for the purposes of this Act and so long as an order under this subsection is in force, this Act shall have effect as regards any substance, product or preparation specified in the order as if the substance, product or preparation were specified in the said Schedule.' The court held that this section, under which regulations banning numerous substances have been introduced over the past two decades, was unconstitutional because it purported to vest in the Government law-making powers which are in the exclusive authority of the Oireachtas.

The original case concerned a prosecution of a man for possession of methylethcathinone, which was among a number of substances put on the controlled drugs list in 2010. Stanislav Bederev, who denied criminal charges of having the substance for supply in 2012, brought a High Court challenge seeking to stop his trial by claiming the regulations were unconstitutional. Lawyers for Mr Bederev argued it was not lawful to put this substance on the controlled drug list because there were no principles and policies guiding the introduction of such rules. In particular, it was argued that the decision to ban a particular drug was a matter to be considered by the Oireachtas before the relevant government minister could formally initiate the ban. Not to do so was an 'abdication of the

role of the Oireachtas' and an 'impermissible delegation of unfettered power where there were no guiding principles for doing so' (Hogan and Court of Appeal 2015).

In May 2014 the High Court had rejected Mr Bederev's challenge, saying s. 2.2 of the MDA 1977 could not be read in isolation and must be read in the overall context and purpose of the Act, which is to protect individuals and society from the misuse of certain harmful substances. The Oireachtas may not always be equipped or able to react with sufficient speed to deal with the emergence of new substances and misuse patterns, Mr Justice Paul Gilligan said in his High Court decision.

On behalf of the Court of Appeal, Mr Justice Gerard Hogan said, given what had been done in relation to this substance, it might also be asked whether it would be open to the government to employ the same law to ban other types of drugs, such as alcohol and tobacco, which are in everyday use and which are potentially harmful and liable to be misused. Given the breadth of s. 2(2) of the MDA 1977, the government is 'more or less at large in determining which substances or products should be declared controlled drugs', he stated. In the Bederev case, the judge said, the fundamental choice that remains with the government for the purposes of the MDA 1977, 'is which dangerous or harmful drugs are liable to misuse such that they should be declared controlled drugs' (Hogan and Court of Appeal 2015) (p. 28). The use of terms such as 'misuse', 'dangerous' and 'harmful' in the title of the 1977 Act 'represent laudable and desirable objectives. However, they do not in themselves constitute a sufficient restriction on the more or less unlimited power of regulation vested in the Government by Section 2(2) of the Act in relation to what substances should be declared controlled drugs', the judge said (p.28). Summing up for the court, Judge Hogan stated that the conclusion that this section of the Act purports to vest in the government what, in the absence of appropriate principles and policies in the legislation itself, 'are in truth law-making policies is accordingly unavoidable' (Hogan and Court of Appeal 2015) (p. 30).

As a result of the judgement, all substances controlled by means of Government Orders made under s. 2(2) of the MDA 1977 ceased to be controlled with immediate effect, and their possession ceased to be an offence. These included ecstasy, benzodiazepines and NPS. Following an emergency sitting of the Oireachtas, the Misuse of Drugs (Amendment) Act 2015 was passed and then signed into law by the President within forty-eight hours. This new legislation added the substances previously controlled under Government Order to the Schedule to the MDA 1977, thereby providing that they would once more be controlled. In order to reaffirm the controls which might apply to these substances, the legislation also confirmed a number of ministerial orders and regulations made under the Act, thereby giving these instruments statutory effect as though they were an Act of the Oireachtas.

3.2 Changes in the implementation of the law in the last year

Medicinal cannabis

In Section 1.2.2 of last year's [national report](#), it was reported that approved medicines containing the active ingredients of cannabis could be prescribed in Ireland, after outgoing Minister of State at the Department of Health Alex White signed regulations legalising their use in mid-July 2014 (Health Products Regulatory Authority 2015), the Health Products Regulatory Authority (HPRA), formerly the Irish Medicines Board, reported that the combination of the Misuse of Drugs (Designation) (Amendment) Order 2014 (S.I. No. 324 of 2014) and the Misuse of Drugs (Amendments) Regulations 2014 (S.I. No. 323 of 2014) facilitated the legal introduction into the Irish market of authorised medicinal products containing a liquid extract of cannabis. Any such products must have a specified composition and presentation in order to permit prescription, supply and possession for the treatment of patients' (p. 62).

Street sale of prescription drugs

Under the Medicinal Products (Prescription and Control of Supply) Regulations, it is prohibited for a person to supply a prescription medicine except in accordance with a prescription, and the supply must be made from a registered pharmacy by or under the personal supervision of a registered pharmacist. A person who contravenes these regulations is guilty of an offence. However, the illegal street sale of prescription drugs has emerged as an important issue in the Irish drug scene in recent years (see discussion in (Health Research Board 2012) Section One). In response to a

Parliamentary Question on the issue, Minister of State at the Department of Health, Deputy Kathleen Lynch TD, stated:

'My Department is reviewing the Misuse of Drugs Regulations with a view to introducing substantial additional controls on certain prescription drugs being traded illicitly, such as benzodiazepines and z-drugs medicines. The draft Misuse of Drugs (Amendment) Regulation being prepared is the most substantial amendment proposed to the Regulations since they were made in 1988 and involves a major overhaul of certain provisions so as to ensure that regulatory policy addresses international obligations and the evolution of current practice in the use of controlled drugs within the health system. As expected with any major overhaul of regulatory policy, different views have been expressed by different stakeholders in submissions on certain proposals and the work required to complete the necessary amendments is complex and technical in nature. In addition, you may be aware that there has been a legal challenge to a section of the Misuse of Drugs Act 1977, with a consequent prioritisation for the Department of work relating to this matter [see discussion in T.3.1 above]. The objective is to finalise the text of the amending Regulations in the coming months. Once the Regulations are finalised, they are subject to a 3-month EU notification period under the Technical Standards Directive, because of the implications of the proposed regulatory changes on trade in pharmaceutical products.' (Lynch K 2015, 12 February).

Plans to introduce controls on the above drugs have now been further delayed as a consequence of the Appeal Court decision discussed above in 3.1.

3.3 Evaluation of the law in the last year

So prohibition can work? Changes in use of novel psychoactive substances among adolescents attending a drug and alcohol treatment service following a legislative ban' is the title of a recent article that considers the impact of the Criminal Justice (Psychoactive Substances) Act 2010 (see Section 1.1.3 above) (Smyth, et al. 2015). This legislation led to the closure of 90% of the 'head shops' then in existence.

Smyth and colleagues examined the use of NPS among adolescents attending addiction treatment both before and after this legislation was introduced. The study included all adolescents entering assessment at one outpatient service and compared the six months immediately prior to the legislation in May 2010 with the same six-month period the following year. Clinicians identified problematic use of between one and four substances for each patient. In addition, information was recorded on recent (past three months) use of NPS.

There were 94 treatment episodes included, and the patients had a mean age of 16.8 years. Problematic use of any NPS fell from 14 treatment episodes (34%) in the pre-legislation period to zero treatment episodes in the post-legislation period. There was also a significant decline in recent use of any NPS (82% vs 28%). Recent use of cocaine and amphetamines also declined, but problematic use of these drugs was unchanged. The authors concluded that use of NPS among adolescents attending drug and alcohol treatment was substantially reduced 6 to 12 months after the introduction of legislation prohibiting sale of NPS and the resultant closure of most head shops.

3.4 Major political discussions in the last year relating to legislation and implementation

Currently going through the Dáil (Parliament), the **Road Traffic Bill 2015** will introduce chemical roadside drug testing in response to drug driving. When in use, it will test for certain key drugs, like cannabis, cocaine, opiates and benzodiazepines. For further information see presentation by Denis Cusack of the Medical Bureau of Road Safety to the Joint Oireachtas Committee on Transport and Communication, on 16 April 2015 (Cusack D 2015).

4. Notes and queries

4.1 Recent developments in the debate on cannabis legislation

As well as the recent provision for the sale and use of medicinal cannabis in Ireland (see 3.2 above), the debate on drug decriminalisation has developed. However, of particular interest is that this is focused around the decriminalisation of possession of all drugs, not just cannabis. The Portuguese experiment has been prominent in this debate. For further information see [National report for 2015- drug policy](#), Section 3.4.

5. Sources methodology and references

5.1 Sources

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<http://www.irishsentencing.ie/>
<http://www.hpra.ie/>
<http://www.drugsandalcohol.ie/>
<http://www.oireachtas.ie/parliament/>

5.2 Methodology

Irish Sentencing Information System study examined the sentencing practice of the courts in relation to the offences of possession or importation of controlled drugs for the purpose of sale or supply (Mackey 2014). The study examined 79 judicial decisions involving 81 offenders before the Court of Criminal Appeal from 2009 to 2012. Twenty of these judgements related to ordinary offences and 59 to offences carrying the presumptive sentence.

Law Reform Commission reports are based on case law examination and interviews with experts.

Study of impact of NPS legislation (Smyth, *et al.* 2015) – This study sought to examine use of NPS among adolescents attending addiction treatment both before and after this legislation. Included in the study were all adolescents entering assessment at one outpatient service comparing the six months immediately prior to the legislation in May 2010 to the same six-month period the following year. Clinicians identified problematic use of between one and four substances for each patient. Secondly, information was recorded on recent (past 3 months) use of NPS.

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European Monitoring Centre for Drugs and Drug Addiction

The European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) is a decentralised EU agency based in Lisbon. The EMCDDA provides the EU and its Member States with information on the nature, extent, consequences and responses to illicit drug use. It supplies the evidence base to support policy formation on drugs and addiction in both the European Union and Member States.

There are 30 National Focal Points that act as monitoring centres for the EMCDDA. These focal points gather and analyse country data according to common data-collection standards and tools and supply these data to the EMCDDA. The results of this national monitoring process are supplied to the Centre for analysis, from which it produces the annual *European drug report* and other outputs.

The Irish Focal Point to the EMCDDA is based in the Health Research Board. The focal point writes and submits a series of textual reports, data on the five epidemiological indicators and supply indicators in the form of standard tables and structured questionnaires on response-related issues such as prevention and social reintegration. The focal point is also responsible for implementing Council Decision 2005/387/JHA on the information exchange, risk assessment and control of new psychoactive substances.

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