



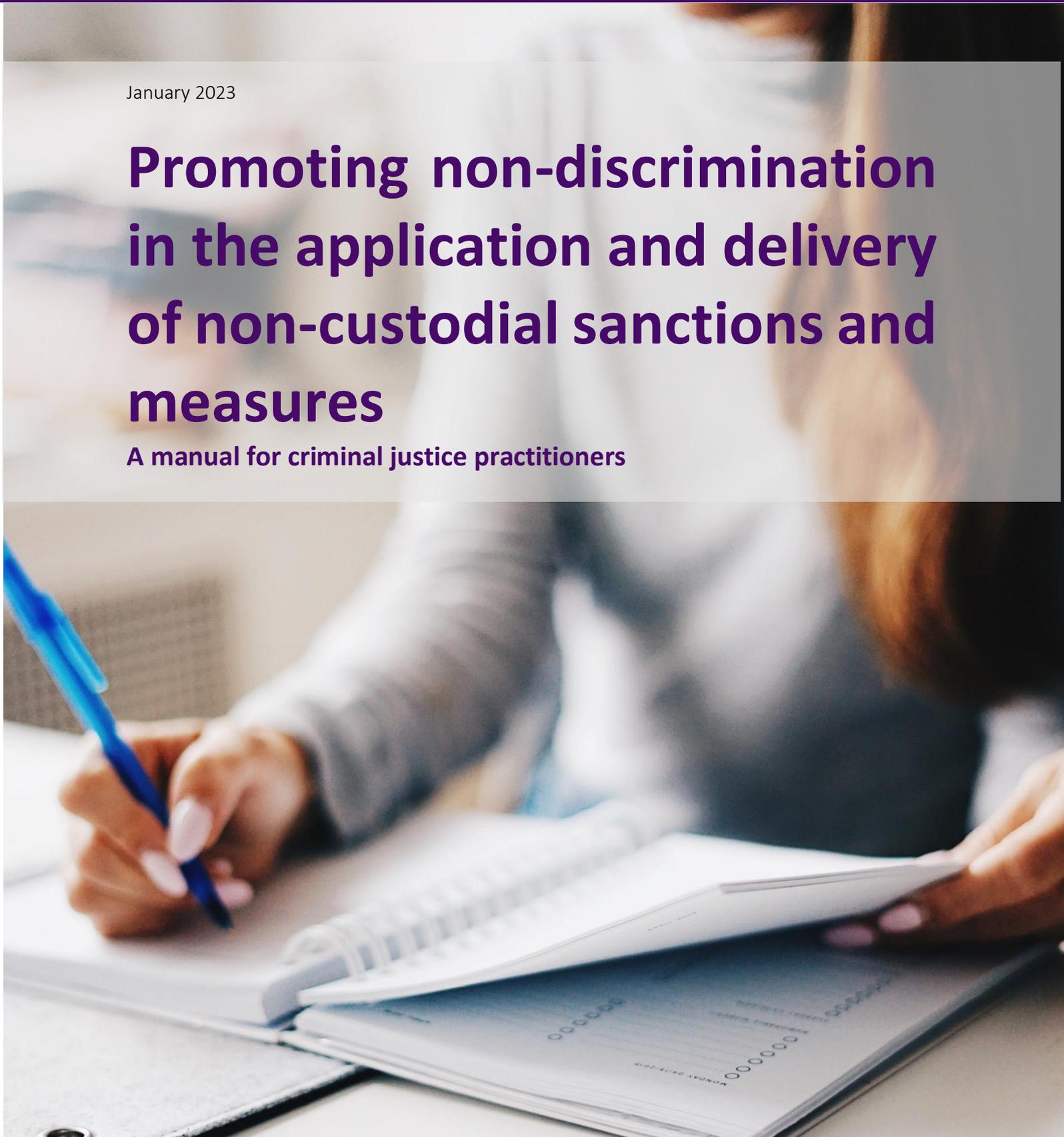
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Promoting non-discrimination in the application and delivery of non-custodial sanctions and measures

A manual for criminal justice practitioners



Promoting non-discrimination in the application and delivery of non-custodial measures:
A manual for criminal justice practitioners

This manual was developed by Penal Reform International (PRI) together with the Hungarian Helsinki Committee (HHC) and the Faculty of Law of the University of Coimbra (UC) as part of project PRI Alt Eur: Promoting non-discriminatory alternatives to imprisonment across Europe, funded through the European Union's Justice Programme. We would like to thank Rob Allen for his contribution to the project and the development of this manual.

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Promoting non-discriminatory alternatives to imprisonment across Europe

This manual has been written to assist criminal justice practitioners involved in the delivery of non-custodial sanctions to find ways of ensuring that any community-based measures are used effectively and do not discriminate against minority or marginalised groups or those left uniquely vulnerable in the criminal justice system due to specific personal or background characteristics or circumstances. The manual draws on work undertaken in the context of the project *PRI Alt Eur: Promoting non-discriminatory alternatives to imprisonment across Europe*.¹

The project is implemented by Penal Reform International (PRI) in partnership with the University of Coimbra, Portugal and the Hungarian Helsinki Committee. The manual draws in particular on research conducted as part of the project in Hungary and Portugal, as well as training conferences and workshops held at the University of Coimbra in May 2022 and in Budapest in November 2022. The manual should be read in conjunction with the presentations and resources produced and referenced at the training events.²

Background

Non-discrimination principle

The International Covenant on Civil and Political Rights makes clear that:

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*³

This obligation applies to the operation of the criminal justice system in general and sentencing in particular. As far as alternatives to imprisonment are concerned, the Council of Europe's Rules on community sanctions and measures also reinforce that:

There shall be no discrimination in the imposition and implementation of community sanctions and measures on grounds of race, colour, ethnic origin, nationality, gender, age, disability, sexual orientation, language, religion, political or

¹ The project (PRI Alt Eur, 101007466) is supported by the European Union's Justice programme. Running from January 2021 to March 2023, it includes national and cross-European research and varied capacity building activities aiming toward more pronounced, non-discriminatory use of non-custodial sanctions in the two focus countries – Hungary and Portugal – and across Europe. For more, visit the project website at www.prialteur.pt/index.php/home.

² All resources from the training are available online at www.prialteur.pt/index.php/home/activities/training and <https://helsinki.hu/pri-alt-eur-21-23/>.

³ United Nations, *International Covenant on Civil and Political Rights*, Article 26. Available at www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

*other opinion, economic, social or other status or physical or mental condition.*⁴

As a result of the work undertaken by the PRI Alt Eur project in Portugal and Hungary, PRI and its partner organisations decided that the manual should focus on two main groups who are known to face discrimination in the justice system: people from racial and ethnic minorities and persons with mental health issues.

Regarding racial and ethnic minorities, reporting by PRI in 2022 identified that:

*in countries where data is available... the body of evidence of systemic racism in criminal justice systems is overwhelming, with people from minority and indigenous communities constituting up to 50% of prison populations – and the rate of over-representation is growing in many jurisdictions. In many cases this is linked to over-policing, prosecution, and criminalisation of their communities.*⁵

Another recent study by Fair Trials found that:

*data from across Europe show that people of colour are disproportionately represented in prison, relative to the percentage of the population they represent. Further research shows that these disparities cannot be attributed to increased criminality or other factors: the disparities are because of structural racism.*⁶

As for mental health illness, a recent survey conducted for the Council of Europe (CoE) found a wide variation in estimates of the prevalence of mental health disorders in prisons ranging from 0-80% (median=18%) and among people on probation (ranging from 2%-90% (median 15%).⁷ Serving a prison sentence can lead to a deterioration in mental health, with higher rates of suicide and self-harm than in the community.⁸ However, identifying and addressing new or existing mental health issues as part of community supervision can pose challenges to probation agencies and requires partnership working with other organisations particularly in the public health sector.

Before setting out what can be done to reduce discrimination faced by these two groups, the manual looks at the importance of non-custodial sentences more generally.

⁴ Council of Europe, *Recommendation on the European Rules on community sanctions and measures*, CM/Rec (2017) 3, Rule 6. Available at www.coe.int/en/web/prison/conventions-recommendations.

⁵ PRI, *Global Prison Trends 2022*, p. 21. Available at www.penalreform.org/global-prison-trends-2022/.

⁶ Fair Trials, *Disparities and Discrimination in the European Union's Criminal Legal Systems*, January 2021, p.10. Available at www.fairtrials.org/app/uploads/2021/11/Disparities-and-Discrimination-in-the-European-Unions-Criminal-Legal-Systems.pdf

⁷ CoE, *Prisons and probation: a Council of Europe White Paper regarding persons with mental health disorders*, PC-CP (2021) 8 Rev 6. Available at rm.coe.int/pc-cp-2021-8-rev-6-white-paper-regarding-persons-with-mental-health-di/1680a69439.

⁸ See Fazel S et al, *Suicide in prisons: an international study of prevalence and contributory factors*, *Lancet Psychiatry*, 2017/4: pp. 946–52. Available at [www.thelancet.com/journals/lanpsy/article/PIIS2215-0366\(17\)30430-3/fulltext](http://www.thelancet.com/journals/lanpsy/article/PIIS2215-0366(17)30430-3/fulltext).

The importance of non-custodial sanctions

International standards emphasise the importance of countries developing a wide range of non-custodial measures, so that imprisonment is used only as a last resort.

Specific to Portugal, the further development of alternatives to imprisonment has been identified as a priority by the UN Committee against Torture which in 2019 observed that the country should seek to eliminate overcrowding in penitentiary institutions and other detention facilities, including through the application of non-custodial measures.⁹ Alternatives to imprisonment are not only a way of taking pressure off the prison system. It is widely recognised that “effective use of non-custodial measures in all appropriate cases should be promoted as beneficial in reducing reoffending, including by enabling the offenders to maintain their relationships and connection to their community.”¹⁰

In addition to national legislation and EU laws and guidance, such as relevant Framework Decisions and the *Council conclusions on alternative measures to detention*,¹¹ countries in Europe should have regard to the international standards at the United

Nations (UN) and the Council of Europe (CoE) levels in developing a system of non-custodial sanctions and measures.

The most relevant UN standards are:

- The Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules),¹² and
- The Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).¹³

The most relevant CoE standards are:

- The European Rules on community sanctions and measures,¹⁴ and
- The Council of Europe probation rules.¹⁵

The Council of Europe has also produced a recommendation on Restorative Justice¹⁶ and guidelines on implementing community sanctions and measures¹⁷ in addition to issuing recommendations about particular groups of people in the criminal justice context, including foreign prisoners,¹⁸ and guidelines for prison and probation services regarding radicalisation and violent

⁹ UN Committee against Torture, *Concluding observations on the seventh periodic report of Portugal*, 18 December 2019, para 22. Available at www.ohchr.org/en/documents/concluding-observations/catcprtco7-committee-against-torture-concluding-observations.

¹⁰ UNODC, *Report of the Expert Group Meeting on reducing reoffending* E/CN.15/2022/CRP.4, 29 April 2022. Available at www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_31/CRP/E_CN15_2022_CRP4_e_V2202541.pdf.

¹¹ Council of the European Union, *Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice* (2019/C 422/06), 16 December 2019. Available at eur-lex.europa.eu/.

¹² Available at www.penalreform.org/issues/alternatives-to-imprisonment/international-standards/.

¹³ The Rules and related guidance materials available at www.penalreform.org/issues/women/bangkok-rules/.

¹⁴ Available at www.coe.int/en/web/prison/conventions-recommendations.

¹⁵ Available at www.coe.int/en/web/prison/conventions-recommendations.

¹⁶ CoE, *Recommendation concerning restorative justice in criminal matters*, CM/Rec (2018)8. Available at www.coe.int/en/web/prison/conventions-recommendations.

¹⁷ Geiran V. and Durnescu I., *Implementing Community Sanctions and Measures*, December 2019. Available at rm.coe.int/implementing-community-sanctions-and-measures/1680995098.

¹⁸ CoE, *Recommendation of the Committee of Ministers to member States concerning foreign prisoners*, CM/Rec(2012)12. Available at www.coe.int/en/web/prison/conventions-recommendations.

extremism.¹⁹ Most recently, a White Paper regarding persons with mental health disabilities and disorders in prisons and probation has been published by the Council for Penological Co-operation (PC-CP).²⁰

These standards provide an important normative framework for the provision and implementation of alternatives to imprisonment. It is important to bear in mind that individuals in the criminal justice system may face multiple and intersecting types of discrimination and barriers to services. Because of this it is particularly important that, in the words of the European Probation Rules,

*Probation agencies shall take full account of the individual characteristics, circumstances and needs of offenders in order to ensure that each case is dealt with justly and fairly.*²¹

Recommendations

1. Judges and probation agencies should develop a shared agenda which aims to promote desistance from crime and reparation to the community with consideration of the factors, including personal or background characteristics such as race or ethnicity and mental health needs, or each person in conflict with the law.
2. In seeking to inform themselves of the challenges, vulnerabilities and needs faced by individuals in the criminal justice system, professional actors across the justice chain should frequently consult NGOs that work with or represent specific minority, marginalised or otherwise vulnerable to create more effective and humane interventions.
3. Courts, prosecution services, the police, prison and probation agencies and other institutions participating in the criminal justice process should pursue a multi-agency approach to align existing services – including those provided by charities and NGOs – with criminal justice measures to support the efficient and non-discriminatory application of community sanctions.

¹⁹ CoE, *Guidelines for prison and probation services regarding radicalisation and violent extremism*, March 2016. Available at www.coe.int/en/web/prison/conventions-recommendations.

²⁰ For more and the latest available version of the White Paper see: www.coe.int/en/web/prison/council-for-penological-co-operation.

²¹ CoE, *Recommendation CM/Rec (2010)1 of the Committee of Ministers to member states on the Council of Europe Probation Rules*, Basic Principle 4. Available at www.cep-probation.org/wp-content/uploads/2018/10/CoE-probation-rules-recommendation.pdf.

What can we do?

- Set up cross-regional platforms for probation officers to share challenges, resources and approaches as well as lessons learned among peers.

- Organise once or twice yearly seminars or meetings involving judges and probation staff to build on previous training initiatives²² and share new knowledge, learning and practice developments with each other.

- Identify and reach out to NGOs / CSOs working with and supporting specific minority or marginalised groups and maintain a database of available contacts and services in such representative groups to be used by probation staff in working with individuals under their supervision.

- Any additional ideas?

²² Including the capacity building events held in the context of the PRI Alt Eur project in Hungary and Portugal.

Tackling discrimination against racial or ethnic minorities

The principle of non-discrimination does not mean that everyone must be identically dealt with. As the Council of Europe has said:

*Differentiation, unlike discrimination, is expected to relieve any unfair disadvantage or to achieve some betterment. People and their circumstances are not all the same and there are circumstances in which people must be treated differently from others, in order to respond to specific individual problems, to meet distinctive individual needs or to take account of special situations. In this way, substantial justice is advanced.*²³

Moreover the Council of Europe Rules on community sanctions and measures require that account “be taken of the diversity and of the distinct individual needs of suspects and offenders.”²⁴

Tackling discrimination in criminal justice requires action at several levels. At the societal level, monitoring whether minorities are overrepresented can be an important first step. In some countries, like the UK, the Government must publish statistical data to assess whether any discrimination exists in how the criminal justice system treats people based on their race.

For example, in England and Wales a 2017 review identified systematic disparities in the way minorities are dealt with by the police, courts and prisons and gave rise to a number of initiatives designed to combat these.²⁵

Four main principles inform this work:

- A focus on ‘explain or reform’ which seeks to understand whether differential outcomes may reflect genuine differences rather than discrimination; where discrimination is likely steps should be taken to address it through changes in law, policy or practice;
- Working together with communities, individuals with lived experience and expert organisations, to identify the problems and find solutions;
- Responsibility for tackling disparities being shared by all in the criminal justice system – striving for racial equality should not only be an issue for those who are directly affected by it, and;
- A commitment to transparency and accountability.

At the level of individual casework, the Council of Europe has recommended that prison and probation staff should be trained in anti-discriminatory practice.

In many countries in Europe, however, including Portugal and Hungary, there are restrictions on the extent to which data about ethnic origin can be collected by governments.²⁶ While these restrictions have their origins in a desire to prevent the development of racist ideologies, the lack of data makes it difficult to assess the nature and extent of discrimination and develop evidence-based policy to combat it.

²³ CoE, Commentary on Recommendation CM/Rec (2017) on the European Rules on community sanctions and measures, P. 6. Available at rm.coe.int/168070c09b#:~:text=This%20Rule%20states%20that%20implementati on,with%20any%20internationally%20guaranteed%20rights.

²⁴ Basic principle 6. See www.coe.int/en/web/prison/conventions-recommendations.

²⁵ Lammy D, *The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*, September 2017. Available at www.gov.uk/government/publications/lammy-review-final-report.

²⁶ Portugal, as an example, has constitutional limitations on the collection and disaggregation of data on several grounds, such as religion or ethnic origin (art. 35.3).

Since 1998, the European Commission on Racism and Intolerance (ECRI) has advocated for the collection of ethnic data in a coherent and comprehensive manner.²⁷ The UN Human Rights Committee has also expressed concern “about the negative implications for the ability to further combat discrimination of the prohibition under the Constitution against collection of data that are disaggregated by race or ethnic origin” in Portugal.²⁸

While collecting data can help to drive reforms, it is important that “such information must not be abused to further stigmatise minorities, but rather used to identify and eliminate stereotyping or racial profiling by law enforcement officials”.²⁹

To help move in this direction, it has been suggested for example that Roma communities should be engaged “to explore how such data can be collected consensually, while respecting the anonymity and dignity of members of communities. Roma communities should also be given support to document and evidence the discriminatory impact of policing and criminal justice, for example, through personal accounts and qualitative data so they can hold member states accountable for their failings on non-discrimination.”³⁰ The European Court of Human rights (ECtHR) has ruled that as a result of their turbulent history and constant uprooting, persons from Roma communities have come to experience particular

disadvantages and vulnerabilities and constitute a minority that requires special protection.³¹

Despite a lack of formal monitoring and statistical data, the UN Human Rights Committee has expressed concern over reports that Roma people and African descendant communities continue to experience discrimination in Portugal, especially in the areas of education, employment and housing. In particular, it expressed concern at the high dropout rates at school and the low employment rate among these communities – factors that can contribute to disproportionate vulnerability and risk of involvement with the criminal justice system.

The main difficulties in implementing (community-based) sentences in the case of racial and ethnic minorities in Portugal have been identified as: a lack of knowledge on the part of probation staff of the specific cultural characteristics of some minorities, which is an important factor in establishing a relationship, and the contextualisation of behaviours and beliefs shown and practised by members of ethnic minority groups. The processes of change that are undertaken as part of probation service efforts to prevent recidivism can also be hindered in cases where criminal behaviour is justified by cultural values or beliefs incompatible with Portuguese law.³² Nevertheless, the Committee has welcomed “various

²⁷ See for example Farkas L, *Data Collection in the Field of Ethnicity*, 2017. Available at ec.europa.eu/info/sites/default/files/data_collection_in_the_field_of_ethnicity.pdf

²⁸ UN Human Rights Committee, *Concluding observations on the fifth periodic report of Portugal*, 28 April 2020, para 12. Available at www.digitallibrary.un.org/record/3861506?ln=en.

²⁹ Fair Trials, *Justice Denied: Roma in the Criminal Justice System*, 2022, P. 41. Available at www.fairtrials.org/articles/publications/justice-denied-roma-in-the-criminal-justice-system/.

³⁰ Fair Trials, *Uncovering anti-Roma discrimination in criminal justice systems in Europe*, December 2020, P. 44. Available at www.fairtrials.org/articles/publications/uncovering-anti-roma-discrimination-in-criminal-justice-systems-in-europe/.

³¹ ECtHR, *D.H. and Others v. the Czech Republic*, application n° 57325/00, 13 November 2007, para 182, quoted in ECtHR Factsheet. Available at www.echr.coe.int/documents/fs_roma_eng.pdf.

³² PRI, *The impact of the COVID-19 pandemic on the imposition and implementation of alternatives to prison and preparation of individuals for release in Portugal*, 2022. Available at www.penalreform.org/resource/country-reports-covid-19-impact-non-custodial-measures/.

programmes to improve the situation of these groups and the progress achieved in certain areas.” This shows that lack of data is not necessarily a barrier to taking action to improve the situation of minority groups.

In Hungary, according to research conducted by the Hungarian Helsinki Committee, Roma people are more likely to be ethnically profiled and drawn into the criminal justice system than non-Roma. Furthermore, once in the criminal justice system, Roma people are more likely to be held in pre-trial detention, receive longer sentences, and endure harsher treatment in prison than their non-Roma counterparts.³³ The UN’s Working Group on the Universal Periodic Review which assesses the human rights situation in every member state has recommended that Hungary “take effective measures to ensure full and effective implementation of existing legal provisions prohibiting racial discrimination, thus facilitating access to justice, and provide appropriate remedies for all victims of racial discrimination.”³⁴

Recommendations

1. Criminal justice agencies should give greater priority to raising awareness of issues of discrimination among practitioners.
2. Ways should be found to assess the challenges facing people from racial and ethnic minorities in the criminal courts and develop actions to address these.

What can we do?

- Judicial and probation practitioners can talk to colleagues about possible areas of discrimination and action that can be taken to address them. If courts and probation staff meet periodically to coordinate their work, this item can be included on the agenda. Leadership should foster a work environment that encourages open discussions and proactive measures against discrimination.
- Consider establishing a time-limited working group of courts and probation staff to collect available data on differential treatment of minorities, consider methods to expand ways of measuring it and producing an action plan aimed at the judiciary and probation service.

→ Any additional ideas?

³³ HHC, *Discrimination against Roma people in the Hungarian criminal justice system*, 2020. Available at www.helsinki.hu/en/discrimination-against-roma-people-in-the-hungarian-criminal-justice-system-2020/.

³⁴ Human Rights Council Report of the Working Group on the Universal Periodic Review, 21 December 2021, Available at <https://www.ohchr.org/en/hr-bodies/upr/hu-index>.

Tackling housing problems among racial or ethnic minorities

Inadequate housing can be a major barrier to serving a non-custodial measure and there is evidence that ethnic minorities are disadvantaged in respect of accommodation. Sentences involving supervision by the probation service generally require a person to have a fixed address and, in many cases, homelessness can lead to imprisonment even for less serious offences.³⁵

The UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context reported on a study that showed that in Portugal “housing conditions of Roma communities were particularly inadequate: approximately 31 per cent of the Roma population were living in a vulnerable situation, in substandard housing conditions, often in informal settlements consisting of barracks, shacks or tents, or in derelict housing units rented on the private market.”³⁶

The Committee on the Elimination of Racial Discrimination underlined its concern that, despite the long presence of African people and persons of African descent in Portugal and their contribution to the development of the country, they are still subjected to racism in the country, with no programmes specially targeting their concerns, including with regard to housing. African people, largely from former Portuguese colonies, such as Angola, Cabo Verde and Mozambique are also among the poorest and most deprived in terms of access to adequate housing, and as such they may face further marginalisation and vulnerabilities due to their socio-economic status.

Recommendations

1. The probation service should focus on supporting people of African descent and from Roma communities, alongside other racial and ethnic minorities, to improve their housing situation. This may take place at the level of individual casework and through the development of partnerships with housing providers.
2. Consideration should be given to developing diverse and flexible community service placements for people serving non-custodial sanctions that bring about tangible improvements to the local environments in which they live.
3. Courts should not automatically consider persons living in informal settlements or without a permanent address, whether or not from ethnic minorities, unsuitable for non-custodial sanction options.

What can we do?

- Work closely with municipalities, NGOs and other service providers that offer social housing and other support services for those in need.
- Probation agencies can meet with housing providers to review housing protocols and, if necessary, develop an action plan designed to improve access to adequate housing and explore possible contributions to improving local environments via unpaid work placements.

³⁵ See, for example <https://rm.coe.int/implementing-community-sanctions-and-measures/1680995098>.

³⁶ UN Human Rights Council, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, 28 February 2017, para 71. Available at <https://digitallibrary.un.org/record/863269?ln=en>.

→ Any additional ideas?

Changing discriminatory attitudes

While reducing discrimination clearly requires specific changes to the criminal justice system, work is also required to address wider negative attitudes towards ethnic minorities, including so-called “anti gypsism.” Particular attention needs to be paid to the recommendations addressed to member states by the European Commission against Racism and Intolerance (ECRI).³⁷

For instance, research has identified prejudicial attitudes of defence lawyers in Bulgaria, Romania, and Hungary, who openly admitted their reluctance to represent Romani defendants in case it damaged their personal reputation, and on account of perceptions of ‘unreasonable’ behaviour or expectations, the alleged tendency of Roma people to change their stories, and perceptions about low levels of education and literacy.³⁸

One way of tackling overt discrimination is through the establishment of processes for systemic oversight of criminal justice institutions. For example, Fair Trials proposes that “Community-led accountability mechanisms should have the ability to

review both individual incidences of discrimination or abuse, and hold the police, judges and prosecutors accountable for systemic barriers to equal justice. Such mechanisms should be set up and managed on the communities’ own terms, rather than by the police.”³⁹

At the same time, legal professional bodies must take proactive action to stamp out racism and discrimination in their professions and support lawyers in their work to tackle discrimination.

Recommendation

1. The “Right to Equality and Non-Discrimination in the Administration of Justice” module of the UN Manual (see page 14) should provide the basis for a domesticated curriculum that can form part of the training curricula for legal professionals in Portugal and Hungary.

What can we do?

- Criminal justice practitioners across the justice chain should talk to colleagues about whether induction and continuing training courses that are currently available to them address issues of discrimination and identify opportunities for strengthening knowledge and capacity-building opportunities on non-discrimination and equity,

³⁷ In the framework of its country monitoring work, ECRI examines the situation concerning manifestations of racism and intolerance in CoE member states. ECRI’s findings, along with recommendations on how to deal with the problems identified, are published in country reports drawn up after a contact visit to the country in question and a confidential dialogue with national authorities. ECRI’s country monitoring deals with all member states on an equal footing. More details at www.coe.int/en/web/european-commission-against-racism-and-intolerance/country-monitoring.

³⁸ Fair Trials, *Justice Denied* Fair Trials, *Justice Denied: Roma in the Criminal Justice System 2022*, pp. 34-35. Available at www.fairtrials.org/articles/publications/justice-denied-roma-in-the-criminal-justice-system/.

³⁹ Fair Trials, *Uncovering anti Roma Discrimination*, 2021, p.46. Available at www.fairtrials.org/articles/publications/uncovering-anti-roma-discrimination-in-criminal-justice-systems-in-europe/.

sharing these with relevant stakeholders. Leadership across criminal justice systems should work proactively to ensure such training and joint learning opportunities for staff.

→ Seek out opportunities to collaborate with and learn from service providers and organisations work with particular marginalised or minority groups and invite representatives of such organisations or individuals with lived experience to share their experiences, perspectives and knowledge with actors within the criminal justice system.

→ Any additional ideas?

Building trust in criminal justice

After a visit to Portugal in 2021, the UN Working Group of Experts on People of African Descent reported that People of African descent experience systemic racism in the country. The Working Group highlighted “racially motivated violence and ill-treatment, racial profiling, abuse of authority, frequent police brutality towards people of African descent.”⁴⁰

Research in Central Europe has found “that Roma experience ethnic profiling, stop-and-search, and encounters with police officers that completely erode trust in law enforcement.”⁴¹ The Hungarian Helsinki Committee reported that it is not uncommon for police to appear in streets or segregated areas inhabited by Roma people multiple times per day, and impose fines for petty offences related to bicycle or pedestrian traffic.⁴²

Minorities in many countries have relatively lower confidence in the criminal justice institutions. This can lead to reluctance to engage in the cooperation required by probation services in the implementation of alternatives to prison sentences. The requirement to develop anti discriminatory practice in policies, procedures and day to day practices suggests a number of measures which can be considered by Probation services to increase engagement.

England and Wales for example, it has been proposed that probation services:

- Ensure staff reflect the diversity of local communities served;

⁴⁰ United Nations Working Group of Experts on People of African Descent, Statement to the Media on the conclusion of its official visit to Portugal, 6 December 2021. Available at www.ohchr.org/en/statements/2021/12/statement-media-united-nations-working-group-experts-people-african-descent.

⁴¹ Fair Trials and European Roma Rights Centre Justice Denied Roma in the Criminal Justice System 2022 p. 9. Available at www.errc.org/reports--submissions/justice-denied-roma-in-the-criminal-justice-system.

⁴² Kazarján A and Kirs E, Discrimination Against Roma People in The Hungarian Criminal Justice System. Hungarian Helsinki Committee, Budapest, 2020 p. 17. Available at [www.helsinki.hu/wp-content/uploads/Discrimination against Roma people in the Hungarian criminal justice system.pdf](http://www.helsinki.hu/wp-content/uploads/Discrimination%20against%20Roma%20people%20in%20the%20Hungarian%20criminal%20justice%20system.pdf).

The *UN Manual on Human Rights for Judges, Prosecutors and Lawyers* includes a module on the right to equality and non-discrimination in the administration of justice.

Its learning objectives are:

- To familiarise the participants with the notion of equality before the law and the principle of non-discrimination as understood by international human rights law;
- To illustrate how these principles are being applied in practice at the universal and regional levels;
- To identify some groups that may be particularly vulnerable to discriminatory treatment and;
- To explain what legal steps, measures and/or actions judges, prosecutors and lawyers must take in order to safeguard the notion of equality before the law and the principle of non-discrimination.

Among the questions it addresses are:

- How would you define “discrimination” and/or “inequality” of treatment?
- How is the notion of equality before the law and the principle of non-discrimination protected?
- Have you ever been faced with cases of discrimination in your professional life?
- Are there any particularly vulnerable groups? If so, who are they and how are they discriminated against?
- What measures can you take as a legal professional to protect everybody’s right to equality before the law and to ensure the right of individuals and groups not to be subjected to discrimination?

The manual is available at:

www.ohchr.org/sites/default/files/Documents/Publications/training9Titleen.pdf.

- Consult racial and ethnic minority service users about services and provide opportunities for former racial and ethnic minority service users to act as volunteer mentors and in paid roles;
- Work with small local community organisations to provide culturally informed services.⁴³

In Romania and Bulgaria, an evaluation of programmes funded by the Norway grants programme reported that “projects targeting Roma in Bulgaria and Romania have tended to adopt the ‘explicit but not exclusive approach’ which focusses on Roma people without excluding other vulnerable and disadvantaged groups.”⁴⁴ This approach is encouraged by the EU’s 10 Common Basic Principles on Roma Inclusion.⁴⁵

Recommendations

1. Staff in the courts and probation service, as well as across the criminal justice chain, should be diverse and reflect as far as possible the population they deal with (e.g. in terms of gender, race, ethnicity or culture/religion, sexual orientation).
2. The different parts of the criminal justice system – including courts and probation – should make decided efforts to build public awareness of and trust in their work and the value and effectiveness of available non-custodial sanctions and measures.

3. Whenever possible, people with lived experience and organisations representing and/or supporting them should be included in professional discussions on enhancing the fair and effective implementation of non-custodial sanctions and measures.

What can we do?

- Set clear goals for increasing diversity and representation across staff in the criminal justice system – including courts and probation, and including management/senior level staff. Actively work toward the set goals.
- Talk to people you know from outside the criminal justice system about what they think of it. Do they have confidence in it? Consider whether there is need for courts and probation to renew or change their communication strategy, with a particular focus on minority groups?

→ Any additional ideas?

⁴³HM Inspectorate of Probation, *Race equality in probation: the experiences of black, Asian and minority ethnic probation service users and staff*, March 2021. Available at www.justiceinspectorates.gov.uk/hmiprobation/wp-content/uploads/sites/5/2021/03/Race-Equality-in-Probation-thematic-inspection-report-v1.0.pdf.

⁴⁴ INBAS, *Rapid Assessment of Correctional Services Programmes under the Norway Grants 2009-14*, 2020, p. 37.

⁴⁵ European Commission, Directorate-General for Employment, Social Affairs and Inclusion, *The 10 common basic principles on Roma inclusion*, vademecum Publications Office, 2010. Available at op.europa.eu/en/publication-detail/-/publication/7573706d-e7c4-4ece-ae59-2b361246a7b0/language-en.

A more creative approach to the supervision of non-custodial sanctions

The Tokyo Rules stipulate that “the competent authority may involve the community and social support systems in the application of non-custodial measures.”⁴⁶ This can be particularly important in developing non-discriminatory approaches to working with people from minority communities. In Portugal there is currently limited engagement between the probation service and civil society, although one large NGO, O Companheiros, undertakes important work with convicted people who are experiencing homelessness.⁴⁷ There has been a recognition of the lack of protocols and civil society organisations providing support specifically to persons serving alternative sentences.⁴⁸ The need for increased partnership working has been recognised, with discussions underway between key actors about ways to improve cooperation, joint work and mutual learning.

PRI’s *10-point plan on crisis-ready noncustodial sanctions and measures*, developed in the wake of pandemic lockdowns, has emphasised the need for a flexible approach to service delivery and communication, making full use of technology and partnership working to increase agility.⁴⁹

Some good practice examples are worth mentioning in this context, offering insight on varied ways in which flexibility can

support individualised, fair and effective delivery of non-custodial measures.

In Ireland, integrated community service orders were introduced in 2016, granting Probation officers discretion in deciding that persons under their supervision can complete a significant part of their community service hours through educational/rehabilitative/training activities as well as by undertaking unpaid work of community benefit.

In Romania, twenty mentors from the Roma community have been trained and a partnership created between the Probation Service and the National Roma Agency. Testimonies showed that the use of mentors from the Roma community led to Romani persons feeling that “for the first time they were recognized as a human beings when directly interacting with the correctional authorities.”⁵⁰ A similar programme, called Roma Mentoring, has also been used in the Czech Republic through a partnership between the Probation and Mediation Service and the non-governmental organisation, Rubikon Centrum.⁵¹

In Romania too, a local NGO facilitated the reintegration of prisoners by assisting them to find work in construction. Given the low level of education among prisoners the Ministry of Labour changed some regulations related to certification of trainings and accepted a reduced level of education (from 8 grades to 4 grades). This seems a positive

⁴⁶ United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), 1990, Rule 13.4. Available at www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/tokyorules.pdf.

⁴⁷ See O Companheiro Presentation made at University Coimbra Training May 2022, available at www.prialteur.pt/index.php/home/activities/training.

⁴⁸ PRI and the University of Coimbra, *The impact of the COVID-19 pandemic on the imposition and implementation of alternatives to prison and preparation of individuals for release in Portugal*, 2022, p.20. Available at www.penalreform.org/resource/country-reports-covid-19-impact-non-custodial-measures/.

⁴⁹ PRI, *Crisis-ready noncustodial sanctions and measures: Lessons from the COVID-19 pandemic*, January 2022. Available at: www.penalreform.org/resource/10-point-plan-crisis-ready-non-custodial-sanctions/.

⁵⁰ INBAS, Rapid Assessment of Correctional Services Programmes under the Norway Grants, 2009-14, 2020, p. 39. Available at www.eeagrants.org/sites/default/files/resources/Rapid%20Assessment%20Correctional%20Services%202009-2014.pdf.

⁵¹ <https://www.rubikoncentrum.cz/en/>

and practical measure that can benefit criminally sentenced people with lower levels of formal education, including Roma people.⁵²

In England and Wales, probation services are advised to improve the quality of assessments and pre-sentence reports on ethnic minority individuals; and to publish data on outcomes of probation supervision, breach, and recall of service users, to identify any disproportionality across different racial or ethnic groups.

→ Any additional ideas?

Recommendation

1. Courts and probation services should develop creative ways of imposing and implementing alternatives to imprisonment which provide opportunities for individualisation in meeting the needs of people serving sentences and flexibility to tailor interventions to particular groups.

What can we do?

- Talk to colleagues across judicial and probation staff about learning from failures. For example, when someone on probation does not comply, organise a peer review meeting to see whether something else might be done to better support compliance and successful sentence completion.
- Attend events and review materials – and create opportunities for staff from all levels to do so, in the case of managers – that offer insights and learning from the experiences of other regions, countries and diverse criminal justice stakeholder groups. Discuss these within your team.

Looking at legal reforms

A more meaningful way of reducing discrimination would be to decriminalise acts that cause no social harm and to place limitations on the extent to which petty offences can be punished by imprisonment, even when committed persistently. Where criminal sanctions are appropriate or necessary, fining policies and practices should be sensitive to individual circumstances and alternative, non-custodial sanctions should be available for those who cannot afford to pay. Courts and probation services should be able to translate fines into periods of community work.

Lack of access to effective legal assistance has been found to be a major reason for disparate criminal justice outcomes for Roma defendants,⁵³ underscoring the importance of facilitating representation for all.

A strong case can also be made for ensuring non-compliance with community-based sanctions does not automatically lead to imprisonment. While a custodial sanction may be appropriate in the event of persistent and wilful failures to fulfil the terms of community supervision, an individualised approach to addressing breaches is required. Consideration should be given to revising relevant terms and making adjustments to account for particular vulnerabilities. Enabling sufficient discretion for probation officers to address breaches can support

⁵² Ibid.

⁵³ Fair Trials and European Roma Rights Centre, *Justice Denied: Roma in the Criminal Justice System*, 2022, p. 44. Available at <http://www.errc.org/reports--submissions/justice-denied-roma-in-the-criminal-justice-system>.

effective measures while ensuring respect for individuals' rights and needs in line with international guidance. Providing alternative non-custodial measures as a response to breaches can also help keep prison as a last resort and facilitate proportionate sentencing at all stages of criminal justice.

A flexible approach is particularly important in times of crisis such as the COVID-19 pandemic. Some examples are given in PRI's *Ten Point Plan on Crisis-Ready Non-Custodial Sanctions*.⁵⁴

→ Varied criminal justice actors, including probation staff, should more actively participate in policy and law reform initiatives.

→ Any additional ideas?

Recommendations

1. Courts and probation services should initiate, where possible, and actively support efforts to decriminalise petty offences such as behaviour related to poverty, status (e.g. homelessness, sexual orientation) or activism. Where such behaviours result in criminal legal consequences, courts and other justice actors should make every effort to use non-custodial sanctions instead of prison.
2. Legislation should allow courts and probation staff sufficient discretion to meet individual needs and circumstances. This should include courts being allowed to bring an end to outstanding sentences when appropriate.

What can we do?

→ Keep a list of changes to law that you think might be needed, sharing these with colleagues and feeding into the legislative branches, the Ministry of Justice, etc. as appropriate.

⁵⁴ PRI, *Crisis-ready noncustodial sanctions and measures: Lessons from the COVID-19 pandemic*, January 2022. Available at: www.penalreform.org/resource/10-point-plan-crisis-ready-non-custodial-sanctions/.

Tackling discrimination against people with mental health issues

The relationship between mental illness and offending is complex. People with mental illness are more likely to be victims than perpetrators of violent crime.⁵⁵ However, it has been found that in most countries levels of mental illness among those involved in the criminal justice system are higher than in the general population. Research has consistently shown that people in prison have high rates of psychiatric disorders, and in some countries, there are more people with severe mental illness in prisons than psychiatric hospitals.⁵⁶

PRI has developed practical, gender sensitive, guidance for criminal justice professionals on understanding and appropriately responding to the mental health needs of people under their supervision.⁵⁷ An overview of policy and practice recommendations related to the development of mental health awareness raising and training for actors in the justice system has also been published by the AWARE Project.⁵⁸ While focussed on prisons, these resources provide important learning for courts and probation staff who are concerned about and come across mental

health issues in their work. The Confederation of European Probation (CEP) also continuously compiles information and resources on research developments, best practices and events related to mental health and probation in their online knowledgebase.⁵⁹

The UN Human Rights Committee has recommended that Portugal should increase the use of alternatives to the deprivation of liberty for persons with mental disorders in prisons.⁶⁰ Similarly in Hungary, people with mental health needs were identified as a particularly vulnerable group in the context of criminal sanctions.

The UN Committee on the Rights of Persons with Disabilities has been concerned about inappropriate translation of the terminology of the *Convention on the Rights of Persons with Disabilities* into Hungarian and derogatory terms, such as “abnormal mental condition”, being used in the Criminal Code of 2012 and the Criminal Procedure Code of 2017.⁶¹ It has also reported on “a lack of awareness of the rights recognized in the Convention among the judiciary and justice sector professionals, policy- and lawmakers, teachers, medical, health and social workers and all other professionals working with persons with disabilities”.⁶²

⁵⁵ Ghiasi et al, *Psychiatric Illness and Criminality*, 2022. Available at www.ncbi.nlm.nih.gov/books/NBK537064/.

⁵⁶ Fazel S. et al, *Mental health of prisoners: prevalence, adverse outcomes, and interventions*, *Lancet Psychiatry*, Vol 3 Issue 9, pp.871-881, September 1, 2016. Available at [www.thelancet.com/journals/lanpsy/article/PIIS2215-0366\(16\)30142-0/fulltext](http://www.thelancet.com/journals/lanpsy/article/PIIS2215-0366(16)30142-0/fulltext).

⁵⁷ See, for example: PRI, *Mental health in prison: A short guide for prison staff*, 2018, and *Women in prison: mental health and well-being – A guide for prison staff*, 2020. Available at www.penalreform.org/resource/mental-health-in-prison-a-short-guide-for/.

⁵⁸ AWARE, *Handbook: Developing mental health awareness and training in the correctional justice system – an overview of policy & practice recommendations*, undated. Available at www.cep-probation.org/wp-content/uploads/2021/03/AWARE_policy_and_practice_recommendations_handbook_final.pdf.

⁵⁹ See www.cep-probation.org/knowledgebases/mental-health/.

⁶⁰ UN Human Rights Committee, *Concluding observations on the fifth periodic report of Portugal*, 28 April 2020, p. 6. Available at digitallibrary.un.org/record/3861506?ln=en.

⁶¹ UN Committee on the Rights of Persons with Disabilities *Concluding observations on the combined second and third periodic reports of Hungary*, 20 May 2022 Available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/HUN/CO/2-3&Lang=En

⁶² Ibid

The Committee has recommended that Hungary, with the close involvement of organizations representing or led by persons with disabilities, provide capacity-building programmes on the rights of persons with disabilities for the judiciary and justice sector professionals, policy- and lawmakers, teachers, medical, health and social workers and all other professionals working with them.⁶³

In many but not all cases, mental health problems are accompanied by substance misuse and can lead to a range of other problems: low income, joblessness, precarious or inadequate housing, lack of family support and social stigma. People with mental health problems can struggle to keep appointments with agencies that can provide support and supervision including probation. As such, it is important that staff supporting individuals with mental health issues are sensitised to the often heightened risks and more complex support needs the people present and properly trained to respond to – even if through appropriate referrals – to their needs and vulnerabilities.

International standards

The UN Tokyo Rules require that:

*Specialized treatment of various categories of offenders, should be developed to meet the needs of offenders more effectively; and that treatment should be conducted by professionals who have suitable training and practical experience.*⁶⁴

The Council of Europe similarly recommends that training of probation staff should

include a specific focus on, inter alia, working with mental health,⁶⁵ and the Council's recent White Paper on the management of offenders with mental health disorders includes several valuable recommendations, such as:⁶⁶

- Making clear the probation officer's role in the recognition and assessment of mental health disorders and in providing interventions and/or facilitating access to mental health care;
- Addressing methods for collecting data within the probation service including data on suicide by probationers;
- Ensuring continuity of care for mental health disorders on transfer from prison to probation;
- Involving service users in the design and implementation of supervision;
- Providing training and establishing expert networks to raise the quality of support and supervision.

Recommendation

1. The probation service should audit how well its current policies and practices align with international standards and reflect the recommendations of the CoE White Paper, and take corrective action where needed.

⁶³ Ibid

⁶⁴ Rules 13.1 and 13.2.

⁶⁵ CoE, *Guidelines regarding recruitment, selection, education, training and professional development of prison and probation staff*, 2019, para 7.2 9(b). Available at www.coe.int/en/web/prison/conventions-recommendations.

⁶⁶ CoE, *Prisons and probation: a Council of Europe White Paper on the management of offenders with mental health disorders*, January 2022. Available at rm.coe.int/pc-cp-2021-8-rev-4-white-paper-january-2022/1680a5726a.

What can we do?

- Probation staff across different regions and roles should work collaboratively with mental health care providers to identify gaps in the provision of mental health services to people serving non-custodial sanctions and actively seek to address them.
- Establish clear referral routes to existing mental health services through strengthened partnerships with community service providers, thus also clarifying probation staff's role in identifying and addressing mental health needs.
- Identify concrete steps and develop action plans for needed reforms to ensure alignment with the principles and recommendations of international guidance, including the CoE mental health White Paper. Such steps could include capacity building through targeted training for staff and people under probation supervision as well as the development of new or improved partnerships with community service providers, where needed.
- Any additional ideas?

Partnerships with public healthcare agencies

A variety of approaches to the provision of comprehensive mental health support to people in contact with criminal justice systems have been adopted internationally, relating both to the courts and to probation practice. At the core of these is strong partnership working between criminal justice and healthcare agencies, with effective protocols about referral, assessment, information sharing and treatment. Several countries have developed diversion programmes, which can involve suspects or defendants with identified mental health issues being transferred out of the criminal justice system by the police, prosecutors or courts so that they can receive needed treatment in the community.

As part of the PRI Alt Eur Project (see footnote 1), a pilot scheme is underway to explore better cooperation between probation and mental health services in Portugal.⁶⁷ The evaluation of the project will provide important learning about ways to enhance the effectiveness of non-custodial sentences for this group.

In Hungary, while the number of custodial sanctions is rising, the application of reparation work and community service has been decreasing in the past decade. According to criminal justice professionals engaged during the PRI Alt Eur project, this can in part be explained by enforcement difficulties that create distrust in these institutions, making it less desirable for judges to apply reparation work or community service sentences. A particular reason for this is that an occupational health examination takes place only after sentencing, before the implementation of community service, often finding the sentenced individual to have a “reduced ability to work”, which serves as grounds for terminating the enforceability of community

⁶⁷ For more see: www.prialteur.pt/index.php/home/activities/pilot-project.

service according to the Hungarian Penitentiary Code (Article 289). As the assessment of reduced ability to work often relates to an individual's mental health needs, partnerships with healthcare providers and specialised support agencies may offer an avenue to enabling the availability and success of these sentencing measures for persons with mental health and social support needs.

Recommendations

1. The probation service should strengthen links with the public healthcare system(s) and develop partnerships with mental health care providers in the community to ensure persons serving non-custodial sanctions or under community-based measures have access to needed services and support. Lessons learned and protocols developed under the ongoing PRI Alt Eur pilot should be reviewed and rolled out more widely, where appropriate (especially in Portugal).
2. All criminal justice actors should pursue a multi-agency approach, building strong partnerships across the justice chain and with external organisations and service providers to support the humane and effective implementation of non-custodial sanctions when people with mental health issues get in conflict with the law.

What can we do?

- Reach out to and work with community service providers and public healthcare agencies to increase awareness and share knowledge of each other's work.
- Seek out and follow pilot projects and other initiatives aiming to improve the provision of mental health services to people in criminal justice systems through partnerships – in Hungary, Portugal (including the ongoing pilot under PRI Alt Eur) and elsewhere. Share and discuss emerging lessons and their applicability to the specific regional or national context with colleagues in and outside probation services.

→ Any additional ideas?

Problem solving courts

Problem solving courts have been established in various jurisdictions to give judges a more central role in overseeing the treatment of offenders in the community.⁶⁸ They are designed to use the authority of the court to encourage compliance with interventions and programmes designed to address mental health, substance misuse or other needs. In some jurisdictions in England and Wales there are specific Community Sentence Treatment Requirements that can form part of a non- custodial order.⁶⁹ These are court orders designed to improve access

⁶⁸ Centre for Justice Innovation, *Problem-solving courts: An evidence review*, 2015. Available at www.justiceinnovation.org/sites/default/files/media/documents/2019-03/problem-solving-courts-an-evidence-review.pdf.
⁶⁹ Centre for Justice Innovation, *Delivering a Smarter Approach Community Sentence Treatment Requirements*, 2021. Available at www.justiceinnovation.org/sites/default/files/media/document/2021/cstr.pdf.

to mental health and substance misuse treatment in the community.

In the United States, a more controversial version of problem solving courts is the HOPE Probation Programme which, while focusing on supporting deterrence and devised as an improvement over conventional probation processes, appears no better than traditional probation when replicated outside Hawaii, where the programme's approach originates.⁷⁰

When considering the introduction of any problem solving courts or similar programme models, jurisdictions should assess both their evidence base and alignment with international guidance and human rights standards.

Recommendation

1. Courts and probation services should keep informed on best sentencing practices and innovations elsewhere and actively examine possibilities for tailoring and applying them to the local context.

What can we do?

- Participate in regional and international forums and seek out innovative practices, research and international guidance on sentencing and criminal sanctions and measures, published by organisations such as:

The Council of Europe (CoE)

www.coe.int/en/web/prison/home

The Confederation of European Probation (CEP)

www.cep-probation.org

Penal Reform International (PRI)

www.penalreform.org

European Organisation of Prison and Correctional Services (Europris)

www.europris.org

United Nations Office on Drugs and Crime (UNODC)

www.unodc.org

- Any additional ideas?

⁷⁰ For more on Hawaii's Opportunity Probation with Enforcement and on evaluating the HOPE approach in the field, see: www.crimesolutions.ojp.gov/ratedprograms/49 and; Lattimore P et al, *Evaluation of the Honest Opportunity Probation with Enforcement Demonstration Field Experiment*, June 2018. Available at nij.ojp.gov/topics/articles/rigorous-multi-site-evaluation-finds-hope-probation-model-offers-no-advantage-over.

Improving probation practice with people who have mental health issues

There is growing recognition that when supervising persons with mental health issues (as well as people who use drugs⁷¹), practitioners must think about addressing underlying causes and how to encourage recovery, rather than simply apply treatment techniques.⁷² Underscoring the importance of improving overall health and wellbeing as well as encouraging active participation and positive contribution society, recovery as a goal shifts the focus of probation work from control to identifying and supporting the internal and external resources that can

enable successful sentence completion and encourage desistance from crime.

For criminal justice systems – from police to courts and prison and probation services – to deliver sanctions and support people with mental ill-health in recovery and desistance from crime effectively, working together across the justice chain and with service providers and partners in the community is key. Collaboration should span from knowledge sharing to joint training and partnerships in service delivery, tailored to the specific needs of each context and the people within it.

⁷¹ For more on drug use and good practice guidance on drug policy see the International Drug Policy Consortium's *Drug Policy Guide*, 2016, available at: www.idpc.net/publications/2016/03/idpc-drug-policy-guide-3rd-edition.

⁷² Best D, *A model for resettlement based on the principles of desistance and recovery*, 2019. Available at www.justiceinspectors.gov.uk/hmiprobation/research/the-evidence-base-probation/models-and-principles/personal-recovery/.