
ISSUES PAPER
**SUSPENDED
SENTENCES**

(LRC IP 12 - 2017)

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Background to this Issues Paper and the questions raised

Introduction

1. This Issues Paper forms part of the Commission's *Fourth Programme of Law Reform*.¹ It examines the principles applied by the courts when deciding whether to impose a suspended sentence. It also examines the procedure for imposing the suspended sentence, and for activating the custodial element, as set out in section 99 of the *Criminal Justice Act 2006*, which has given rise to practical and constitutional difficulties and consequent amendments. This Issues Paper deals with the suspension of adult sentences of imprisonment and the question of the suspension of detention orders for persons under 18 is not within its scope.
2. This Issues Paper builds on the Commission's previous work in this area, including the analysis of the principles of sentencing in its *1996 Report on Sentencing*² and its *2013 Report on Mandatory Sentences*.³ It also complements work undertaken by other bodies, notably the Irish Sentencing Information System, which seeks to gather and analyse sentencing information in the State under the auspices of the Courts Service.⁴

Suspended Sentences: Context and Historical Development

3. The suspended sentence is an important and, where used appropriately, a beneficial sentencing option.⁵ A suspended sentence is a sentence of imprisonment, the operation of which has been suspended – in whole or in part – on condition that the individual enters into a bond to keep the peace and be of good behaviour for a specified period of time known as the operational period. Thus, a court might impose a 3-year sentence but order that it be suspended for 2 years on condition that the offender is of good behaviour during that 2-year period, and also that he or she must abide by any further conditions specified by the court. Typical further conditions are that the person must agree to be under the supervision of the Probation Service and, in some cases, must agree to stay away from a certain person or area or be subject to a night time house curfew. Failure to comply with these conditions means that the offender is brought back to court where the sentence can be activated and the offender can be imprisoned. Once the operational period has expired and the individual has successfully complied with the conditions of suspension, he or she is discharged from any further obligation under the suspended sentence. However, should the individual reoffend or breach a condition of suspension during the operational period, he or she becomes liable to serve the whole or part of the term of imprisonment originally imposed by the courts. A suspended sentence is a recorded sentence in

¹ Law Reform Commission *Fourth Programme of Law Reform* (LRC 110-2013), Project 5.

² (LRC 53-1996).

³ (LRC 108-2013).

⁴ For further discussion see: Conroy & Gunning, "The Irish Sentencing Information System (ISIS): A Practical Guide to a Practical Tool" (2009) 1 *Judicial Studies Institute* 37; O'Malley *Sentencing: Towards a Coherent System* (Round Hall 2011) and paragraphs 3.19 ff.

⁵ For a discussion on the role of the suspended sentence see paragraph 1.20 ff.

the sense that the sentence that is to be served in the event of a breach of a condition of suspension is determined and announced when the suspended sentence is being imposed.⁶ It can be distinguished from a probation order imposed in the District Court, because this does not necessarily involve recording a conviction.⁷ The suspended sentence can be likened to probation in the sense that imprisonment does not arise directly, and it can therefore also be equated with other non-custodial sanctions such as community service orders. The similarities, and important distinctions, between these different sanctions is discussed in more detail below.

Origins of the Suspended Sentence in Ireland in the 19th Century

4. In Ireland, the suspended sentence emerged as a judge-made disposition in the late 19th and early 20th centuries. Although there is no printed reference to the suspended sentence prior to the mid-1920s, Osborough has attributed the introduction of suspended sentences in this jurisdiction to Sir Thomas O'Shaughnessey, Recorder of Dublin between 1905 and 1924 who formulated "a probation system of his own" whereby "the prisoner is not asked to serve [his or her sentence] unless and until he [or she] breaks the law again."⁸ Osborough also found earlier reference to a form of suspended sentence in the sentencing practices of the late 19th century Special Commissions established to suppress agrarian unrest. It appears that they sometimes suspended sentences of death on condition that the community at large remain peaceful. At the Cork Special Commission of 1822, Baron McClelland held: "if tranquillity were restored, and the surrender of arms in the district became general, mercy would be extended to them [those sentenced to death]; but if no sure signs of returning peace appeared, their doom was inevitable."⁹
5. For more than a century, the suspended sentence was governed in Ireland by common law principles.¹⁰ After the 2 jurisdictions on the island of Ireland were established in 1921 and 1922, the suspended sentence continued to operate in both, and the power to suspend a sentence of imprisonment was widely recognised and accepted as a valid and proper form of sentence,¹¹ as well as being a very beneficial jurisdiction for the courts to possess.¹² In 2006, 21,018 individuals received a custodial sentence in the District Court of which 6,443 or 31% were fully suspended. This represents a ratio of 3:1. Figures for 2005 show a comparable pattern with 31%

⁶ *R v Wightman* [1950] NI 124.

⁷ For a further discussion on the distinction between suspended sentences and orders under section 1 of the *Probation of Offenders Act 1907*, see paragraphs 4.07-4.08.

⁸ Osborough, "A Damocles' Sword Guaranteed Irish: The Suspended Sentence in the Republic of Ireland" (1982) 17 *Irish Jurist* 221. See also: Hardiman *The Suspended Sentences in Ireland* (paper delivered to the Middle Temple Colloquium 24 April 2004).

⁹ Osborough, "A Damocles' Sword Guaranteed Irish: The Suspended Sentence in the Republic of Ireland" (1982) 17 *Irish Jurist* 221. See also: *Lefroy Memoirs of Chief Justice Lefroy* (Hodges 1871) at 72.

¹⁰ Bacik, "The Courts: Consistent Sentencing?" (1999) 88(350) *Studies: An Irish Quarterly Review* 164.

¹¹ *Re McIlhagga* Supreme Court 29 July 1971; *The People (DPP) v Foley* [2014] IESC 2, [2014] 1 IR 360 at paragraph 48; In *R v Wightman* [1950] NI 124, the Northern Irish Court of Criminal Appeal proclaimed the inherent power of the criminal courts to record a sentence of imprisonment and to bind him or her over on recognisance to come up for judgment on notice.

¹² *O'Brien v Governor of Limerick Prison* [1997] 2 ILRM 349 at 353.

of all custodial sentences imposed in the District Court being suspended. This also represents a ratio of 3:1.¹³

Origins of the Suspended Sentence in other European Jurisdictions in the 19th Century

6. On the European continent, some civil law jurisdictions also began to introduce the suspended sentence. Although probation was developing in England and the United States during the late 19th and early 20th centuries, in continental European jurisdictions progress was slow. The continental form of the suspended sentence was first introduced in the Belgian Lejeune Act of 1888 and the French Bérenger Bill in 1891.¹⁴ Both emerged from a draft Bill put before the French Senate in 1884 by Senator Bérenger.
7. In France, the suspended sentence was introduced as a measure to combat short prison sentences for first-time offenders. There are 3 types of suspended sentence in French law, namely a “simple” suspended sentence (*le sursis tout court*), suspension with probation (*le sursis avec mise a l’épreuve*), and a suspended sentence with community service (*le sursis assorti d’une peine de travail d’intérêt général*). All penalties, except a prison sentence over 5 years, may be suspended. The “simple” suspended sentence provides for no conditions other than to be of good behaviour. It is available to offenders who have not received a custodial sentence in the last 5 years. Suspension with probation and suspended sentences with community service are available regardless of an offender’s prior record. Suspension combined with probation is one of the most frequently used measures.¹⁵ The offender must comply with general and specific conditions that are imposed by the court based on the nature of the offence and the circumstances of the offender.¹⁶ The operational period of the sentence is between 18 months and 3 years. Monitoring compliance with the conditions of suspension requires the Rehabilitation and Probation Prison Services¹⁷ to schedule regular meetings with the offender, to update the case file, to work with the offender and to provide the judge responsible for executing the sentence with a regular report.¹⁸
8. In Germany, Article 56 of the *Criminal Code* (*Strafgesetzbuch* (StGB)) provides for a suspended sentence with probation (*Strafaussetzung zur Bewährung*). Sentences of 12 months or less must be suspended unless it is necessary for the person to serve the sentence to protect the public. Sentences between 1 and 2 years may be suspended if an overall assessment of the crime and the circumstances of the

¹³ Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 224. As the Courts Service Annual Reports do not separately report on the imposition of suspended sentences in the District Court, the author, Judge Riordan, examined raw data sets maintained by the Courts Service and extrapolated the information on suspended sentences. See also paragraphs 3.25 – 3.34 for further analysis of the use of suspended sentences in both the District Court and the Circuit Court.

¹⁴ Ancel *Suspended Sentence: A Report Presented by the Department of Criminal Science of the Institute of Comparative Law, University of Paris* (Heinemann 1971) at 11.

¹⁵ Pelissier & Perrier, “France” in van Kalmthout & Durnesca (eds), *Probation in Europe* (Wolf Legal Publishers 2008).

¹⁶ A full list of general and specific conditions can be found under Arts. 132-145 of the French *Code of Criminal Procedure*.

¹⁷ *Services Pénitentiaires d’Insertion et de Probation*.

¹⁸ Pelissier & Perrier, “France” in van Kalmthout & Durnesca (eds), *Probation in Europe* (Wolf Legal Publishers 2008).

offender indicate that special circumstances exist justifying suspension. The maximum sentence that may be suspended is 2 years while the operational period is between 2 and 5 years.¹⁹ The court may impose conditions (*Auflagen*), such as the payment of compensation, payment of money for the benefit of a non-profit organisation or the State, or community service.²⁰ If it seems necessary to influence the offender's way of living, the court may also impose directives (*Weisungen*) with regard to his or her residence, training, work or leisure time. With the agreement of the offender, the court may direct that he or she stay in a (medical) treatment institution or live in a hostel.²¹ The longer the prison sentence, the more stringent the conditions of suspension will be. The offender is under the supervision of a probation officer for the duration of the sentence. The main task of the probation officer is to assist, guide and supervise the offender.²² For those sentenced to a term of immediate imprisonment and who have served at least two thirds of that sentence, the remaining period may be suspended and probation imposed.²³ In exceptional cases, the remainder of a prison sentence can be suspended and probation imposed at an earlier stage.²⁴

9. The German suspended sentence may be revoked where the offender reoffends and demonstrates by the commission of the subsequent offence that he or she is unwilling or unable to remain of good behaviour, or where the offender persistently or grossly fails to comply with the conditions or directives, or persistently rejects the supervision of the probation officer leading to the conclusion that he or she is likely to reoffend. However, the court will not revoke the suspended sentence where it considers that an extension of the operational period or the imposition of further conditions or directives would be more suitable. Since the early 1970s, the proportion of sentences that are suspended in Germany has significantly increased, and from the mid-1980s, suspended sentences amounted to two thirds of all prison sentences.²⁵
10. In Italy, Articles 163-169 of the *Codice Penale* provide for a "simple" suspended sentence (*sospensione condizionale della pena*). The maximum sentence that may be suspended is 2 years. The operational period is 5 years for a criminal offence and 2 years for a petty offence. For offences committed due to an offender's addiction to drugs or alcohol, the court may suspend a sentence not exceeding 4 years for a maximum of 5 years provided that the offender is already undergoing therapy or a social rehabilitation programme.²⁶ The "simple" suspended sentence does not provide for any involvement by the Probation Service. However, a conditional suspended sentence is provided for where, at the request of the offender serving an immediate custodial sentence, the remaining part of that sentence within the limit of 2 years may be suspended for a period of 5 years provided that the offender has

¹⁹ Article 56 of the StGB.

²⁰ Article 56(b) of the StGB.

²¹ Article 56(c) of the StGB.

²² Article 56(d) of the StGB.

²³ This may be done so long as the offender agrees and the interests of public safety have been considered.

²⁴ Mutz, "Germany" in van Kalmthout & Durnesca (eds), *Probation in Europe* (Wolf Legal Publishers 2008).

²⁵ Jehle *Criminal Justice in Germany* 6th ed (Federal Ministry of Justice and Consumer Protection 2015) at 34.

²⁶ *Sospensione dell'esecuzione della pena detentiva*.

served at least half of the custodial sentence.²⁷ These offenders are subject to certain conditions, namely to report to a police station on a stated day and time, to not to leave the habitual place of residence, and, as far as possible, comply with the obligations stated in the “Assignment to the Probation Service” Order.²⁸

Origins of the Suspended Sentence in Australia in the 19th Century

11. The Australian suspended sentence was also first introduced in the late 19th and early 20th centuries. It was introduced in South Australia in 1886,²⁹ in New South Wales in 1900³⁰ and in Victoria in 1915.³¹ It is thought that the Australian suspended sentence was influenced both by the continental European suspended sentence and the development of probationary measures throughout the commonwealth.³² The suspended sentence has had a chequered history in Australia. It has been abolished and then re-introduced on numerous occasions in a number of territories.³³ The suspended sentence did not exist in England and Wales until 1967.³⁴ Up until the introduction of the suspended sentence in England and Wales, the courts exercised a somewhat comparable power in the form of binding over.³⁵ The top-down legislative

²⁷ Sospensione condizionata dell'esecuzione della pena detentiva nel limite Massimo di due anni.

²⁸ Gandini & Zinna, “Italy” in van Kalmthout & Durnesca (eds), *Probation in Europe* (Wolf Legal Publishers 2008).

²⁹ It is argued that the introduction of this legislation was heavily influenced by the development of probationary measures throughout the commonwealth and the English-speaking world in the mid-1880s (see: Smith, “Modern Diversion or Colonial Hangover? The History and Development of Suspended Sentences in South Australia” (2016) 49(2) *Australian and New Zealand Journal of Criminology* 240 at 242).

³⁰ Sections 558-562 of the *Crimes Act 1900* (NSW).

³¹ Section 532 of the *Crimes Act 1915* (Vic).

³² Victorian Sentencing Advisory Council *Suspended Sentences: Final Report – Part 1* (May 2006) at paragraphs 2.6-2.21; Smith, “Modern Diversion or Colonial Hangover? The History and Development of Suspended Sentences in South Australia” (2016) 49(2) *Australian and New Zealand Journal of Criminology* 240 at 242.

³³ In Victoria, section 532 of the *Crimes Act 1915* (Vic), which introduced the suspended sentence as a sentencing option, did not reappear in the 1968 *Crimes Act* (Vic). The suspended sentence was reintroduced in Victoria in 1986 under sections 20-24 of the *Penalties and Sentences Act 1985* (Vic), with a conditional suspended sentence being made available under section 13 of the *Alcoholics and Drug-Dependent Persons Act 1968* (Vic). Suspended sentences have since been abolished in Victoria following a Report by the Victorian Sentencing Advisory Council (see: Victorian Sentencing Advisory Council *Suspended Sentences: Final Report – Part 1* (May 2006) and Victorian Sentencing Advisory Council *Suspended Sentences: Final Report – Part 2* (April 2008)). In New South Wales, suspended sentences were removed as a sentencing option in 1974 following recommendations of the Criminal Law Committee (See: *Report of the Criminal Law Committee on Proposed Amendments to the Criminal Law and Procedure* (1973)). New South Wales then reintroduced the suspended sentence in 2000 following recommendations by the Law Reform Commission of New South Wales (see: Law Reform Commission of New South Wales *Sentencing Report No 79* (1996) at paragraphs 4.20-4.23). In South Australia, the suspended sentence existed as a sentencing option from 1886 to 1913 and was then reintroduced in 1969. In 2013, the use of suspended sentences was restricted in cases of serious offences, organised crime, and repeat offenders save in exceptional circumstances (see: Smith, “Modern Diversion or Colonial Hangover? The History and Development of Suspended Sentences in South Australia” (2016) 49(2) *Australian and New Zealand Journal of Criminology* 240 at 240-241).

³⁴ The introduction of the suspended sentence in England and Wales was considered and rejected by the Advisory Council on the Treatment of Offenders in both 1952 and 1957. However, it continued to be advocated for in submissions to the Royal Commission on the Penal System, which sat between 1964 and 1966, but which was dissolved before it issued a report. The Royal Commission was replaced by the Advisory Council on the Penal System, and it was at this time that the power to impose a suspended sentence was introduced in England and Wales in section 39 of the *Criminal Justice Act 1967* (England and Wales).

³⁵ Offenders would be bound over to keep the peace and be of good behaviour. Like the suspended sentence, binding over carried the threat of actual punishment if the offender reoffended or misbehaved during the operational period (see: *R v Spratling* (1910) 5 CR App R 206). In *Morris v Crown Office* [1970] All ER 1079, the Court of Appeal of England and Wales (Denning J) held: “I have often heard a judge say at common law, for ordinary offences, before these modern statutes were passed: ‘I will bind you over to come up for judgment if called upon to do so. Mark you, if you do get into trouble again, you will then be sentenced for this offence. I will make a note that it deserves 6 months imprisonment. So that is what you may get if you do not accept this chance.’ That is the common law way of giving a suspended sentence.” However, it is worth noting that this is akin to a conditional discharge rather than a suspended sentence, as the actual sentence of imprisonment is not pronounced and then suspended. Instead, the sentencing judge merely notes the sentence of imprisonment that is deserved should the offender breach the conditions of his or her bond (see also: paragraphs 4.07-4.08)

approach underpinning the suspended sentence in England and Wales, the Australian territories and civil law jurisdictions in Europe is in marked contrast to the organic development of the sanction in Ireland. As such, the suspended sentence in Ireland has been referred to as a “distinctly Irish form of the sanction.”³⁶

Development of the Suspended Sentence in Ireland during the 20th Century, including Statutory Regulation

12. The common law suspended sentence seldom gave rise to any serious procedural issues, with the exception of issues concerning the use of reviewable suspended sentences.³⁷ Specific legislative provisions have alluded to the power to impose suspended sentences,³⁸ and some have also expressly prohibited their use for certain offences.³⁹ The use of the suspended sentence at all criminal court levels has also been established, with specific reference being made in the *District Court Rules, 1997* prohibiting the issuance of a warrant to activate a suspended sentence after 6 months from the date of the making of the order.⁴⁰ In general, therefore, the suspended sentence is said to occupy “an impregnable position in modern Ireland.”⁴¹
13. Courts have long made use of part-suspended sentences. Under this arrangement, an offender must serve a portion of the overall sentence in custody, but the remaining portion is suspended for a defined period provided the offender abides by specified conditions. This remains possible under section 99 of the *Criminal Justice Act 2006*. Indeed, it is a very widely used option,⁴² and the present Court of Appeal has encouraged the use of part-suspended sentences in circumstances where it seems likely to promote or encourage the rehabilitation of the offender.
14. Towards the end of the 20th century, the Central Criminal Court and the Circuit Court began to impose reviewable sentences that were, in essence, part-suspended sentences. Under this arrangement, a court would impose a specified term of imprisonment, but order that the offender be brought back before the court after serving a defined portion of it. This was on the understanding that the remainder would be suspended if there were positive reports on the prisoner. This gave rise to some practical difficulties⁴³ and, eventually, the Supreme Court held in *The People (DPP) v Finn*⁴⁴ held that such sentences were undesirable and should be

³⁶ Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 269.

³⁷ For further discussion see paragraph 14.

³⁸ Section 27(3J) and 27(3K) of the *Misuse of Drugs Act 1977*, as amended.

³⁹ Section 16(2) of the *Air Navigation and Transport Act 1973* and section 6 of the *Air Navigation and Transport Act 1975* provide that a court may not suspend a sentence for the offences to which these sections apply.

⁴⁰ Order 25, rule 4 of the *District Court Rules 1997*.

⁴¹ Osborough, “A Damocles’ Sword Guaranteed Irish: The Suspended Sentence in the Republic of Ireland” (1982) 17 *Irish Jurist* 221, at 229.

⁴² The Central and Circuit Criminal Courts frequently use the part-suspended sentence with 40% of all custodial sentences imposed in the Dublin Circuit Criminal Court in 2006 being partly suspended. Similarly, 38% of all custodial sentences imposed in Cork Circuit Criminal Court were partly suspended in the same year while the Central Criminal Court imposed a part-suspended sentence in 48% of cases. See: Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 282.

⁴³ The reviewable sentence was criticised by the Court of Criminal Appeal in *The People (DPP) v Cahill* [1980] IR 8 on the basis that it was incompatible with the powers of the President of the High Court to allocate cases, it was incompatible with the accused’s right to appeal, it encroached on the power of the Executive to commute or remit sentence, and it conflicted with the principles of penology.

⁴⁴ [2001] 2 IR 25.

discontinued. The Supreme Court expressly indicated that its remarks were *obiter* and should not be seen as invalidating any reviewable sentence in operation. It must be noted that the Supreme Court did not find the imposition of reviewable sentences to be unconstitutional. The sentence appears to be contrary to law only in the absence of an express statutory power.⁴⁵ Such a statutory power exists for an offence under section 15A or section 15B of the *Misuse of Drugs Act 1977*.⁴⁶ In certain circumstances,⁴⁷ a court may list such a sentence for review when at least one half of it has been served. Furthermore, in *The People (DPP) v G(D)*,⁴⁸ the Court of Criminal Appeal held that a reviewable sentence may be justified when sentencing children and young persons for murder.

15. Section 50 of the *Criminal Justice Bill 1967* first proposed to put the suspended sentence on a statutory footing. It also proposed the possibility of suspending fines. This represented an opportunity to identify a clear rationale for the suspended sentence in Irish sentencing law and practice. However, the 1967 Bill never became law⁴⁹ and more than 40 years were to elapse before the idea of legislating for the suspended sentence would be proposed again. The suspension of a sentence of imprisonment (but not of fines) was eventually legislated for in section 99 of the *Criminal Justice Act 2006*. Section 99 greatly expanded the regulation of suspended sentences in comparison to the original provisions in the 1967 Bill. The main aim of section 99 was to provide an effective mechanism for dealing with those who reoffended or breached a condition of suspension during the operational period of the suspended sentence. This has been regarded as a legitimate and commendable ambition.⁵⁰
16. However, despite amendments,⁵¹ section 99 has proven to be problematic. In 2016, in *Moore v DPP*⁵² the High Court declared subsections (9) and (10) of section 99 of the 2006 Act to be unconstitutional. These subsections concerned the activation of a suspended sentence in the event of the commission of a subsequent – or triggering – offence and set out the procedures to be followed in such circumstances. In response to this finding, the Oireachtas enacted the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, which not only amended subsections (9) and (10) of section 99 but clarified a number of other procedural issues identified in the

⁴⁵ *The People (DPP) v Dunne* [2003] 4 IR 87.

⁴⁶ For a further discussion on sections 15A and 15B of the *Misuse of Drugs Act 1977* see paragraphs: 2.24-2.33.

⁴⁷ A court may impose a reviewable sentence on an offender convicted of a section 15A or 15B offence if, at the time of the offence, the offender was addicted to one or more controlled substances and the addiction was a substantial factor leading to the commission of the offence. However, availing of this reviewable sentence is predicated on the imposition of the statutory 10-year presumptive minimum sentence, as the review can only be taken after a period of 5 years imprisonment has been served.

⁴⁸ [2005] IECCA 75.

⁴⁹ In 1985 the *Report of the Committee of Inquiry into the Penal System* (the Whitaker Committee) expressed concern about the status of suspended sentences, noting in particular that the sanction lacked the legislative clarity that the 1967 Bill would have given it.

⁵⁰ O'Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 22-01.

⁵¹ Section 99 was amended by section 60 of the *Criminal Justice Act 2007*, by section 51 of the *Criminal Justice (Miscellaneous Provisions) Act 2009* and by section 2 of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*.

⁵² [2016] IEHC 244.

section. However, further reform of section 99 may be necessary to address other issues with section 99 not addressed by the 2017 Act.⁵³

Views Sought on 8 Issues

17. This Issues Paper addresses a number of principles and procedural issues concerning the suspended sentence and seeks views on 8 Issues.
- Issue 1 examines general sentencing principles, and analyses the compatibility of the suspended sentence with these principles. This Issue reflects the individualised nature of the Irish sentencing system as well as the principles of consistency, proportionality and the general policy that, where appropriate, imprisonment should be viewed as a sanction of last resort. The general sentencing aims of deterrence, punishment, rehabilitation, reparation, incapacitation and avoidance of immediate imprisonment are also discussed.
 - Issue 2 examines the limited presumption of a custodial sentence for certain offences and offenders, and the circumstances in which a suspended sentence may be imposed in such cases. This Issue outlines offences for which a presumption of a custodial sentence exist, namely manslaughter, rape, assault causing harm and serious harm, social welfare fraud and offences carrying a statutory presumptive mandatory minimum sentences. This Issue goes on to analyse some examples of exceptional circumstances which may justify the imposition of a suspended sentence in these cases.
 - Issue 3 examines the principles governing the use of suspended sentences and discusses the application of these principles in Ireland. This Issue also discusses the necessity of monitoring and enforcing of these principles in order to minimise instances of net widening or penalty escalation and ensure the just and proportionate imposition of suspended sentences. It also suggests circumstances in which a suspended sentence may be an appropriate sanction.
 - Issue 4 locates the suspended sentence on the range of available penalties. This Issue identifies a conflict between perspectives on where the suspended sentence should fall on the sentencing range. Whereas one view is that the suspended sentence represents a real punishment and therefore is located just below immediate imprisonment on the range of available penalties, another view classifies penalties based on the immediacy of punishment.
 - Issue 5 examines the distinction between factors mitigating the seriousness of an offence and factors mitigating the severity of a sentence. It is argued that factors justifying suspension usually fall into the second category, that is, factors mitigating the severity of the sentence. This Issue examines whether these 2 categories of mitigating factors should be kept separate as

⁵³ O'Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 22-01. See also Robinson, "Keeping Us in Suspense" (2016) 110(4) *Gazette of the Law Society of Ireland* 28.

well as the use of part-suspension as mitigation. This Issue also identifies a number of factors that could arguably be classified as factors justifying suspension.

- Issue 6 examines the use of suspended sentences for corporate-related offences. This Issue outlines the general sentencing considerations for corporate -related offences and then goes on to discuss in detail 2 corporate-related offences for which no immediate sentence of imprisonment has been imposed to date, namely competition offences and health and safety offences.
- Issue 7 examines the combination of suspended sentences with other orders, namely community service orders and monetary orders, such as fines and compensation orders. This Issue outlines the characteristics and legal basis for such orders and discusses their role at sentencing with specific reference to the appropriateness of combining community service orders or fines with suspended sentences.
- Issue 8 examines the procedural issues in section 99 of the *Criminal Justice Act 2006* (as amended). This Issue looks in particular at the issue of the right to appeal which led to the finding of unconstitutionality in 2016 of subsections (9) and (10) of section 99. This Issue goes on to identify other procedural issues with suspended sentences that were not included in the amendments to section 99 by the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*.

ISSUE 1

GENERAL SENTENCING PRINCIPLES AND SUSPENDED SENTENCES

1.1 General sentencing principles

1.01 The Irish sentencing system is based on the principle of individualised justice with broad sentencing discretion afforded to the judiciary to impose a sentence that is consistent with current sentencing practice and proportionate to the gravity of the offence and the circumstances of the offender in specific cases. For most criminal offences, the Oireachtas provides a maximum penalty, thereby leaving the imposition of the specific sentence to the sentencing judge who will apply the principles of sentencing to the individual case in order to impose a just and proportionate sentence. The courts have consistently reaffirmed the importance of judicial discretion in sentencing.¹ In general, all criminal sanctions must comply with 2 fundamental principles of justice, namely consistency and proportionality.

1.1.1. Consistency

1.02 Under Article 40.1 of the Constitution, all citizens shall, as human persons, be held equal before the law.² From a sentencing perspective, this guarantee of equality requires a consistent approach so that like cases are treated alike and different cases are treated differently.³

1.03 It is important to note that when we speak of consistency, we are referring to consistency of *approach* rather than consistency of *outcome*.⁴ The distinction between inconsistency and disparity should also be noted. In its 2004 *Consultation Paper on Prosecution Appeals from Unduly Lenient Sentences in the District Court*,⁵ the Commission distinguished sentencing inconsistency from sentencing disparity: “While sentencing disparity may be justified, given the nature of the offence and the individual circumstances of the offender, sentencing inconsistency is not acceptable, such as where individual judges may differ widely in dealing with similar offenders for similar offences.”

1.04 There are a number of factors that can affect consistency in sentencing. These generally centre on the individual demographics and perspectives of sentencers.⁶

¹ See for example: *The People (DPP) v WC* [1994] 1 ILRM 321; *The People (DPP) v M* [1994] 3 IR 306; *The People (DPP) v Tiernan* [1988] 1 IR 250.

² See also: Article 14 of the European Convention on Human Rights.

³ O'Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 1-07.

⁴ Home Office, *Making Punishments Work: A Review of the Sentencing Framework for England and Wales* (2001) at 2.21.

⁵ (LRC CP 33-2004) at paragraph 6.07.

⁶ Ashworth argues that a sentencing judge's view on the facts of the case, the application of the principles of sentencing to that particular case, and his or her views on crime and punishment more generally, as well as factors such as age, social class, urban or rural

While sentencers are expected to have developed a certain level of resilience to outside influences, the Commission has previously noted that no one is entirely immune.⁷

1.1.2. Proportionality

- 1.05 Proportionality requires a sentence to be proportionate to the gravity of the offence and the circumstances of the offender.⁸ The courts have on numerous occasions reaffirmed the principle of proportionality as the cornerstone of the individualised and discretionary sentencing system in Ireland.⁹ In *the People (DPP) v M*,¹⁰ the Supreme Court held that “[T]he essence of the discretionary nature of sentencing is that the personal situation of the appellant must be taken into consideration by the Court...” In *The People (Attorney General) v O’Driscoll*,¹¹ the Court of Criminal Appeal stated that “It is... the duty of the courts to pass what are the appropriate sentences in each case having regard to the particular circumstances of that case – not only in regard to the particular crime but in regard to the particular criminal.”¹² The principle of proportionality has been referred to as a constitutional principle of sentencing on a number of occasions.¹³ In *The State (Healy) v Donoghue*,¹⁴ the Supreme Court invoked the constitutional rights of due process, fundamental rights and personal liberty to guarantee that the offender would receive “a sentence appropriate to his degree of guilt and his relevant personal circumstances.”¹⁵ As such, it is possible that the individualisation of sentence and judicial discretion are also constitutional requirements.¹⁶
- 1.06 In *The People (DPP) v Kelly*,¹⁷ the defendant was found not guilty of murder but guilty of manslaughter. The trial judge indicated that, on the basis of a policy of deterrence, the headline sentence in this case was a minimum of 20 years imprisonment. Taking mitigating factors into account, the trial judge imposed a sentence of 14 years imprisonment. The defendant sought leave to appeal on the basis that the trial judge had adopted a minimum sentence where none had been laid down by the Oireachtas. This, the defendant argued, constituted an error of principle. The Court of Criminal Appeal, in allowing the appeal, resented the defendant to 8 years imprisonment. The Court held that given the wide range of facts which can influence a case of manslaughter, it is difficult to establish a precise sentencing range. Nevertheless,

background, race, gender, religion and political allegiance can influence the imposition of a sentence. See: Ashworth *Sentencing and Criminal Justice* 3rd ed (Butterworths 2000) at 35-36.

⁷ Law Reform Commission *Report on Mandatory Sentences* (LRC 108-2013) at paragraphs 1.35.

⁸ O’Malley *The Criminal Process* (Round Hall 2009) at paragraph 22.02.

⁹ *The People (DPP) v M* [1994] 3 IR 306; *The People (DPP) v WC* [1994] 1 ILRM 321; *The People (DPP) v Sheedy* [2000] 2 IR 184; *The People (DPP) v Kelly* [2005] 1 ILRM 19; *The People (DPP) v O’Dwyer* [2005] 3 IR 134; *Pudlizewski v Coughlan* [2006] IEHC 304; *The People (DPP) v H* [2007] IEHC 335; *The People (DPP) v GK* [2008] IECCA 110; *The People (DPP) v Keane* [2007] IECCA 119, [2008] 3 IR 177; *The People (DPP) v Harty* Court of Criminal Appeal 19 February 2008; *The People (DPP) v O’C* [2009] IECCA 116; *The People (DPP) v Woods* [2010] IECCA 118.

¹⁰ [1994] 3 IR 306 at 316.

¹¹ (1972) 1 Frewen 351.

¹² *ibid* at 359.

¹³ *The State (Healy) v Donoghue* [1976] IR 325; *The People (DPP) v WC* [1994] 1 ILRM 321; *The People (DPP) v M* [1994] 3 IR 306.

¹⁴ [1976] IR 325.

¹⁵ *Ibid* at 353.

¹⁶ Maguire, “Consistency in Sentencing” (2010) 2 *Judicial Studies Institute Journal* 14, at 19.

¹⁷ [2005] 1 ILRM 19.

the Court emphasised that under the present sentencing regime in this jurisdiction, sentences must be proportionate not just to the crime but to the individual offender.

- 1.07 In its 2013 *Report on Mandatory Sentences*,¹⁸ the Commission discussed the formulation of a proportionate sentence in detail, which involves 3 inter-related steps.¹⁹ An outline of the procedure is provided below.

Formulation of a proportionate sentence

1. Identify the range of applicable penalties

To identify the range the courts must first consider whether the Oireachtas has provided any statutory guidance. The general approach of the Oireachtas is limited to specifying a maximum sentence that may be imposed subject to a few exceptions such as the mandatory life sentence for murder²⁰ and presumptive minimum sentences under the *Misuse of Drugs Act 1977* and the *Firearms Acts*. In addition, the courts have established certain points of departure, or presumptions of a custodial sentence, for serious offences such as rape,²¹ manslaughter,²² and social welfare fraud.²³ In two cases, namely *The People (DPP) v Ryan*²⁴ and *The People (DPP) v Fitzgibbon*,²⁵ the Court of Criminal Appeal identified, low, mid, and high sentencing ranges for certain firearms offences and for serious assaults. Furthermore, the Court of Appeal has stressed that a headline sentence should always be specified for an offence before adjustments are made for mitigating factors.²⁶ However, a failure to specify a headline sentence will not automatically be treated as an error of principle, especially where the sentence ultimately imposed appears just and proportionate in all of the circumstances.

2. Locate the particular case on the range of applicable penalties with reference to the harm caused, the culpability of the offender and the behaviour of the offender in relation to the offence

When assessing harm, the test should be the harm that the offender intended to cause or risked causing where harm was a reasonably foreseeable outcome.²⁷ On any hierarchy of protected rights and interests,

¹⁸ (LRC 108-2013) at paragraphs 1.45-1.101.

¹⁹ *The People (DPP) v M* [1994] 3 IR 306; *The People (DPP) v Crowe* [2009] IECCA 57, [2010] 1 IR 129.

²⁰ Section 99(1) of the *Criminal Justice Act 2006* states that "[w]here a person is sentenced to a term of imprisonment (other than a mandatory term of imprisonment)..." (emphasis added). It follows that a suspended sentence may not be imposed where an offender is convicted of murder, as this is a mandatory sentence of life imprisonment. Presumptive minimum sentences under the *Misuse of Drugs Act 1977* and the *Firearms Acts* are not mandatory per se, as they carry a presumption of a custodial sentence (see paragraphs: 2.24-2.37). This means that the sentencing judge may depart from the minimum term prescribed by the Act where there are exceptional circumstances justifying such a course of action.

²¹ *The People (DPP) v Tiernan* [1988] 1 IR 250.

²² *The People (DPP) v Princs* [2007] IECCA 142.

²³ *The People (DPP) v Murray* [2012] IECCA 60.

²⁴ [2014] IECCA 24.

²⁵ [2014] IECCA 12, [2014] 2 ILRM 116.

²⁶ *The People (DPP) v Flynn* [2015] IECA 270.

²⁷ O'Malley *Sentencing: Towards a Coherent System* (Round Hall 2011) at 194; O'Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at 4-14 – 4-16. See also: *The People (DPP) v Dwyer* [2005] 3 IR 134; *The People (DPP) v Fitzgibbon* [2014] IECCA 12, [2014] 2 ILRM 116.

life and bodily integrity rank highest followed by personal dignity and autonomy, and finally personal liberty.²⁸ In general private property ranks after life, dignity and liberty, but it must be kept in mind that the real test is the degree of hardship or harm caused by the offending behaviour. The harm done to the victim is also often taken into account at this stage.²⁹ When assessing culpability, intention represents the highest level of culpability followed by recklessness and finally negligence.³⁰ When assessing the offender's behaviour, the court will take factors that aggravate or mitigate the seriousness of the offence into account.³¹

3. Consider factors which aggravate or mitigate the severity of the sentence³²

Factors that ordinarily mitigate the severity of a sentence include a guilty plea,³³ cooperation,³⁴ attempts to remedy the harmful consequences of the offence,³⁵ where imprisonment would be particularly difficult for the offender by reason of severe personal injury suffered by the offender in consequence of the offence, age, ill-health, or otherwise,³⁶ previous good character,³⁷ and rehabilitative potential.³⁸

²⁸ O'Malley *Sentencing: Towards a Coherent System* (Round Hall 2011) at 195-196.

²⁹ *The People (DPP) v GK* [2008] IECCA 110.

³⁰ O'Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 4-17.

³¹ In its 1996 *Report on Sentencing* (LRC 53-1996), the Commission identified a number of factors that would either aggravate or mitigate the seriousness of an offence (at paragraph 3.2). These factors were reiterated by the Commission in its 2013 *Report on Mandatory Sentences* (LRC 108-2013) and the Commission noted that these lists would be useful for the purposes of developing sentencing guidance and guidelines.

³² It is important to distinguish factors that aggravate or mitigate the *seriousness of the offence* from those that aggravate or mitigate the *severity of the sentence*. Factors that aggravate or mitigate the seriousness of the offence arise for consideration when the sentencer is deciding on the seriousness of the offending behaviour with regard to the harm caused and the culpability of the offender. Factors that aggravate or mitigate the severity of the sentence arise later. When the sentencer considers these factors, he or she has already decided on the seriousness of the offence but now asks whether there is any reason why the offender should not suffer the full punishment. See: Law Reform Commission *Report on Sentencing* (LRC 53-1996) at Chapter 3; Law Reform Commission *Report on Mandatory Sentences* (LRC 108-2013) at paragraphs 1.89-1.98.

³³ Section 29 of the *Criminal Justice Act 1999* provides that the courts may take a guilty plea into account when sentencing. See also: *The People (DPP) v Tiernan* [1988] 1 IR 250.

³⁴ In *R v King* (1986) 82 Cr App R 120, the Court of Appeal of England and Wales noted some factors that would influence the extent to which cooperation would be regarded as a mitigating factor. These included the quality and quantity of the information provided, the willingness of the informer to cooperate and give evidence, and the degree to which the offender has put himself or herself at risk by reason of the information he or she has given i.e. the risk or reprisal.

³⁵ In *The People (DPP) v Princs* [2007] IECCA 142, the Court of Criminal Appeal held that the fact that the defendant attempted to save the deceased by stemming the blood flow merited only limited credit, as the defendant never called for outside medical assistance.

³⁶ In *The People (DPP) v H* [2007] IEHC 335, the High Court held that "[t]he age and health of the offender should be looked at. If the offender is so elderly, or so unwell, then prison will be a special burden to bear, the sentence should reflect how a particular term may punish him [or her] as much [as] a longer term for a younger offender in reasonable health."

³⁷ In *The People (DPP) v GK* [2008] IECCA 110, the court of Criminal Appeal distinguished "previous good character" from "previous convictions": "This court is satisfied that while previous good character is relevant to the character and circumstances of the accused which may be mitigating factors in terms of sentence, previous convictions are relevant not in relation to mitigation of sentence but in aggravation of offence." Therefore, previous convictions is a factor to be taken into consideration when assessing the *seriousness of the offence*, whereas previous good character may legitimately be taken into consideration when assessing the *severity of the sentence*" (emphasis added).

³⁸ In *The People (DPP) v M* [1994] 3 IR 306, the Supreme Court held: "...[A]n essential ingredient for consideration in the sentencing of a person upon conviction, in any case in which it is reasonably possible, is the chance of rehabilitating such a person so as to re-enter society after a period of imprisonment..."

1.08 It is clear from the preceding discussion that all sentences must conform to the fundamental principles of justice, namely consistency and proportionality. Whereas sentencers are afforded the discretion to choose from a range of general sentencing aims (as will be seen below), each sentence must be consistent with current sentencing practice and proportionate to the gravity of the offence and the circumstances of the offender. In its 2013 *Report on Mandatory Sentences*,³⁹ the Commission outlined the benefits of a consistent and proportionate sentencing system:

“The Commission considers that a principles-based sentencing system which reflects the importance of consistency and proportionality would lead to sentencing outcomes in which: (1) the most severe sanctions, including lengthy prison sentences, are reserved for the most serious crimes; (2) less severe sanctions, including medium range prison sentences, are reserved for less serious crimes; and (3) the least severe sanctions, including fines, probation orders and community service orders are reserved for the least serious crimes.”

1.1.3. Imprisonment as a last resort in certain cases, and the use of community sanctions

1.09 The last resort principle requires that a custodial sentence should not be imposed unless no other penalty or sanction would be sufficient to reflect the gravity of the case. This is a corollary of the principle that, for certain offences, a presumption of an immediate custodial sentence is justified: this is discussed in detail in Issue 2 below. There is a specific statutory provision that imprisonment should be the sanction of last resort in respect of child offenders⁴⁰ but a similar principle may be surmised to exist at common law in respect of adult offenders. The development of the principle has received less attention than other sentencing principles, such as proportionality.⁴¹ This means that the parameters of the principle of last resort are relatively unknown. Nevertheless, the jurisprudence of the European Court of Human Rights suggests that human rights law supports the principle of last resort.⁴² Similarly, the application of the principle of proportionality by the European Court of Justice, and indeed the Irish Courts, requires that the rights of an individual only be encroached upon to the extent necessary to achieve the State’s purpose.⁴³ Support for the principle of last resort can also be found in the principle of parsimony, which requires sentencers to impose the least severe sanction that will achieve the chosen sentencing aim.⁴⁴

1.10 Despite only moderate development of the principle of last resort, it has received longstanding and widespread support both in Ireland and internationally. As far back

³⁹ (LRC 108-2013) at paragraph 1.100.

⁴⁰ Sections 96(2) and 143 of the *Children Act 2001*.

⁴¹ O’Malley, “Comments on the White Paper on Crime” [2010] 2 *Judicial Studies Institute Journal* 1, at 8.

⁴² van Zyl Smit & Snacken *Principles of European Prison Law and Policy* (Oxford University Press 2009) at 19.

⁴³ Snacken, “A Reductionist Penal Policy and European Human Rights Standards” (2006) 12 *European Journal of Criminal Policy and Research* 143, at 149.

⁴⁴ Morris *The Future of Imprisonment* (University of Chicago Press 1974) at 11.

as 1985, the Committee of Inquiry into the Penal system (Whitaker Committee)⁴⁵ concluded that there was little justification for the use of imprisonment and that the costs outweighed the benefits. It recommended that prison be used only as a last resort. The Committee stated that: "imprisonment should be imposed only if the offence is such that no other form of penalty is appropriate."⁴⁶ In its 1996 *Report on Sentencing*,⁴⁷ the Commission reiterated the recommendation of the Whitaker Committee, recommending that imprisonment should be regarded as the sanction of law resort. The Commission unanimously agreed on this point despite disagreements on what the predominant sentencing aim should be. The Irish Penal Reform Trust also recommended the adoption of the principle of last resort, noting the cost, ineffectiveness and social harm of imprisonment, as well as the threat to human dignity as a result of prison overcrowding.⁴⁸

- 1.11 The Department of Justice 2014 *Report of the Penal Policy Review Group* similarly recommended that imprisonment be regarded as the sanction of last resort and that this principle be incorporated into statute.⁴⁹ Although there is statutory provision for the principle of last resort when sentencing juvenile offenders,⁵⁰ there is no general legislative definition or provision for the principle of last resort.
- 1.12 Nevertheless, there have been numerous legislative and policy initiatives to put the principle of last resort into practice. The *Fines (Payment and Recovery) Act 2014* encourages judges to use prison more sparingly for fine defaulters.⁵¹ Section 3 of the *Criminal Justice (Community Service Order) Act 1983*⁵² requires a judge who is of the opinion that the appropriate sentence in a specific case would be a sentence of imprisonment of 12 months or less to consider imposing a community service order (CSO) instead. Furthermore, the Community Return Scheme⁵³ shifts the emphasis away from prison and toward community-based sanctions.
- 1.13 With regard to judicial views on the principle of last resort, research⁵⁴ has found that whereas all Circuit Court judges and a majority of District Court judges agreed with

⁴⁵ *Report of the Committee of Inquiry into the Penal System* (1985) at 45.

⁴⁶ *ibid* at 45.

⁴⁷ (LRC 53-1996) at paragraph 2.20.

⁴⁸ Irish Penal Reform Trust, *Position Paper 5 – Penal Policy with Imprisonment as a Law Resort* (2009) at paragraphs 2.1-2.4.

⁴⁹ Penal Policy Review Group, *Strategic Review of Penal Policy* (2014) at 91-92.

⁵⁰ Section 96(2) and 143 of the *Children Act 2001* provide that detention should only be imposed as a measure of last resort.

⁵¹ The Act requires judges to take an individual's financial circumstances into account when imposing a fine, provides for the payment of fines by instalment or attachment of earnings, and also provides for alternatives to imprisonment for non-payment of fines including Community Service Orders (CSO) and Recovery Orders.

⁵² As amended by the *Criminal Justice (Community Service Order) (Amendment) Act 2011*.

⁵³ The Community Return Scheme involves the supervised release of qualifying prisoners to complete unpaid community work as a condition of their early release. Prisoners are assessed for suitability by both the Irish Prison Service and the Probation Service. It is available to prisoners serving between 1 and 8 years imprisonment who have served at least 50% of their sentence. See generally probation.ie.

⁵⁴ In 2014, Maguire published research exploring judicial perspectives on the principle of last resort. This research adopted a qualitative approach, applying 2 methodologies traditionally used to study sentencing, namely in-depth interviews and sentencing vignettes. District and Circuit Court judges were asked about the circumstances in which they would impose a sentence of imprisonment and whether or not they agreed with the principle that "prison should be used sparingly and only for the most serious cases where no other sanctions are appropriate." District and Circuit Court judges were also asked to "pass sentence" on a number of sentencing vignettes designed to be borderline between custodial and non-custodial sentences. The judges were encouraged to "think out loud" while doing so. See: Maguire, "When is Prison a Last Resort? Definitional Problems and Judicial Interpretations" (2014) 24(3) *Irish Criminal Law Journal* 62. This article is based on PhD research conducted by the same author. See: Maguire *Sentencing in Ireland: An*

the principle of last resort, several District Court judges qualified their support for the principle, and one judge disagreed with it. Those that attached some qualifications to their support for the principle of last resort explained that while they agreed with the principle, in practice it was not always followed, especially in the case of repeat offenders. A sentencing judge who disagreed with the principle commented:

“I think there are some offences which require to be dealt with seriously, and where a custodial sentence may even be the first resort... [I]f you are called upon to impose a penalty following a serious assault, I don't think you should start with fines.”

- 1.14 The principle of last resort has also received international support. The Council of Europe has published a number of recommendations aimed at reducing the reliance on imprisonment.⁵⁵ The preamble to the *European Prison Rules 2006* provides that “no one shall be deprived of liberty save as a measure of last resort.” Furthermore, Draft Resolution VIII of the *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders* recommended that imprisonment should be used as a sanction of last resort.⁵⁶
- 1.15 In England and Wales, the *Criminal Justice Act 1991* was enacted in light of the findings of the Home Office that prison was “an expensive way of making bad people worse.”⁵⁷ Section 1 of the 1991 Act included, among other things, a principle of last resort. However, it must be noted that the essential philosophy of the 1991 Act was to ensure that all sanctions were commensurate to the gravity of the offence, except that longer sentences could be imposed for certain violent and sexual offences. Many provisions of the 1991 Act have been substantially amended in the meantime. Many Australian jurisdictions legislatively provide for the principle of law resort, typically with a provision that the sentencing judge must give reasons for not imposing a less severe sanction. In New Zealand, the *Criminal Justice Act 1985* specifically identified the principle of last resort as a guiding principle in sentencing.
- 1.16 Other legislative and policy initiatives in civil law countries also aim to promote the principle of last resort. In Germany, certain public order and traffic offences were decriminalised, prison sentences of less than 1 month were abolished, and judges are legislatively encouraged to suspend short-term prison sentences.⁵⁸ In Finland, certain minor offences have been decriminalised, provision was made for enhanced

Exploration of the Views, Rationales and Sentencing Practices of the District and Circuit court Judges (PhD Thesis, Trinity College Dublin 2008).

⁵⁵ Council of Europe Recommendation No. R (99)22 of the Committee of Ministers to Member States concerning Prison Overcrowding and Prison Population Inflation; Council of Europe Recommendation Rec (2006)13 on the Use of Remand in Custody, the Conditions in which it Takes place and the Provision of Safeguards Against Abuse; Council of Europe Recommendation No. R (92)16 of the Committee of Ministers to Member States on the European Rules on Community Sanctions and Measures; Council of Europe Recommendation Rec (2003) 22 of the Committee of Ministers to Member States on Conditional Release (Parole); Council of Europe Recommendation Rec (2006) 2 of the Committee of Ministers to Member States on the European Prison Rules (European Prison Rules of 2006).

⁵⁶ United Nations, *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders* (1990).

⁵⁷ Home Office, *Crime, Justice and Protecting the Public: The Government's Proposal for Legislation* (1990) at paragraph 2.7.

⁵⁸ Weigend, “Sentencing and Punishment in Germany” in Tonry & Frase (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press 2001) at 192.

remission, and a presumption in favour of commuting short-term prison sentences to CSOs was introduced under section 3 of the Finnish *Community Service Act 1055/1996*.⁵⁹

- 1.17 Notwithstanding widespread support for the principle, it can be argued that there may be practical difficulties with its application. The parameters of the principle are, arguably, unclear. If the last resort is reached by reference only to the inherent gravity of the offence, then in what circumstances could an offence be deemed sufficiently serious to justify imprisonment? Could, for example, so-called white-collar crime (or any non-violent crime) ever be considered serious enough to warrant imprisonment under this principle? Furthermore, should certain factors such as previous convictions be taken into account when deciding if the custody threshold has been passed?
- 1.18 In general, however, there is wide-ranging support for the principle both domestically and internationally. As such, it is an important sentencing consideration to keep in mind, especially when examining the principles of suspended sentences and when locating the suspended sentence on the range of available penalties.

1.2 General sentencing aims

- 1.19 Whereas the general sentencing considerations discussed above will be applicable to sentencing in all cases, sentencing courts are entitled to choose one or more sentencing aims when imposing a sentence in individual cases. In its 2013 *Report on Mandatory Sentences*,⁶⁰ the Commission outlined the different general sentencing aims in detail, namely deterrence, punishment, rehabilitation, reparation and incapacitation. An outline of the general sentencing aims as discussed in the 2013 Report is provided below.

General sentencing aims

Deterrence

Deterrence seeks to prevent the commission of further offences. Deterrence can be specific, in that it attempts to prevent a particular individual from reoffending, or general, which endeavours to dissuade wider society from engaging in criminal conduct.⁶¹ In its 1993 *Consultation Paper on Sentencing*,⁶² the Commission observed that it was the certainty, rather than the severity, of the punishment that gave rise to the deterrent effect. To this, the Commission added a number of other factors that

⁵⁹ Lappi-Seppala, "Sentencing and Punishment in Finland: The Decline of the Repressive Ideal" in Tonry & Frase (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press 2001) at 112-132. See also: Seymour *Alternatives to Custody in Ireland* (IPRT 2006).

⁶⁰ (LRC 108-2013) at paragraphs 1.20-1.31.

⁶¹ O'Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraphs 2-12 – 2-17; Ashworth *Sentencing and Criminal Justice* 6th ed (Cambridge University Press 2015) at 83-88.

⁶² (LRC CP 2-1993) at paragraph 4.42.

have been shown to influence the deterrent effect of a sentence in its 2013 *Report on Mandatory Sentences*.⁶³ These are:

1. The nature of the crime;
2. The target group of the particular sanction;
3. The extent to which the offence attracts moral condemnation;
4. The extent to which the public has knowledge of the sanction, and
5. The swiftness of punishment.

Punishment

A sentence is punitive where it punishes an offender for his or her wrongdoing (retribution),⁶⁴ and formally condemns the offending behaviour (denunciation).⁶⁵ Retribution asserts that punishment is imposed because it is deserved. The contemporary form of retribution is “just deserts”, which requires the punishment to fit the crime.⁶⁶ Denunciation involves a formal condemnation of an offender’s behaviour.⁶⁷ It is primarily based on moral considerations.

Rehabilitation

Rehabilitation is also concerned with crime prevention, but whereas deterrence views individuals as rational actors, rehabilitation considers them to be in need of help and support. A sentence is rehabilitative where it aims to reintegrate the offender back into society.⁶⁸ Rehabilitative programmes, such as treatment programmes, counselling and vocational training, aim to address the underlying causes of the offender’s criminal behaviour.⁶⁹ The Irish courts consider rehabilitation to be a vital consideration at sentencing,⁷⁰ and frequently include it alongside another sentencing aim.

⁶³ (LRC 108-2013) at paragraph 1.21. See also Gabor and Crutcher *Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures* (Canadian Department of Justice 2002).

⁶⁴ O’Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 2-07; Department of Justice, Equality and Law Reform, *White Paper on Crime, Discussion Document No. 2: Criminal Sanctions* (February 2010); Walker, *Why Punish?* (Oxford University Press, 1991) at 69.

⁶⁵ O’Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 2-23; *R v M(CA)* [1996] 1 SCR 500 at paragraph 81.

⁶⁶ O’Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraphs 2-07-2-11; Walker *Why Punish?* (Oxford University Press 1991) at 69; Department of Justice, Equality and Law Reform, *White Paper on Crime, Discussion Document No. 2: Criminal Sanctions* (February 2010).

⁶⁷ O’Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 2-23; *R v M(CA)* [1996] 1 SCR 500 at paragraph 81.

⁶⁸ O’Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraphs 2-18 – 2-20; Ashworth *Sentencing and Criminal Justice* 6th ed (Cambridge University Press 2015) at 91-93; Department of Justice, Equality and Law Reform, *White Paper on Crime, Discussion Document No. 2: Criminal Sanctions* (February 2010).

⁶⁹ MacKenzie, “What Works. What Doesn’t work. What’s Promising” in Priestly and Vanstone (eds), *Offenders or Citizens? Readings in Rehabilitation* (Willan 2010) at 245.

⁷⁰ *The People (DPP) v M* [1994] 3 IR 306.

Reparation

A reparative sentence requires the offender to rectify the harm done by his or her offending.⁷¹ This can be done directly or indirectly to the victim, or where the victim is unwilling to accept reparation from the offender or there is no readily identifiable victim, then reparation can be made to the community as a whole through the performance of community service or payment into a public fund for example.

Incapacitation

An incapacitative sentence prevents an offender from committing further offences.⁷² Capital punishment is the ultimate example of incapacitation but in jurisdictions in which the death penalty is not applicable, life imprisonment and lengthy prison sentences have an incapacitative effect. Less severe examples include disqualification from driving or from acting as the director of a company, or a prohibition from working with children.⁷³ Incapacitation on the basis of predicted future offending was deemed to conflict with the constitutionally-protected right to personal liberty and the presumption of innocence in *The People (Attorney General) v O'Callaghan*.⁷⁴

- 1.20 The suspended sentence is potentially compatible with all of these aims. As such, it can be said that the suspended sentence can serve a number of sentencing aims either individually or collectively.⁷⁵ The sanction's punitive and stigmatic qualities can serve the requirements of deterrence and retribution. The suspended sentence can also be rehabilitative in that it provides an individual with an incentive to desist from crime or to persevere with treatment or counselling. The rehabilitative aim of a suspended sentence adheres to the "last chance" reasoning which is often adopted by the courts.⁷⁶ The incentive not to reoffend combined with the imposition of restrictive conditions can also have an incapacitative effect. A suspended sentence also has a denunciatory effect by marking the gravity of the offence while

⁷¹ Department of Justice, Equality and Law Reform, *White Paper on Crime, Discussion Document No. 2: Criminal Sanctions* (February 2010); Cavadino and Dignan *The Penal system – An Introduction* 3rd ed (Sage Publications 2002) at 44–45; Ashworth *Sentencing and Criminal Justice* 6th ed (Cambridge University Press 2015) at 98–100.

⁷² Department of Justice, Equality and Law Reform, *White Paper on Crime, Discussion Document No. 2: Criminal Sanctions* (February 2010); Cavadino and Dignan *The Penal system – An Introduction* 3rd ed (Sage Publications 2002) at 44–45.

⁷³ O'Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraphs 2–21 – 2–22; Department of Justice, Equality and Law Reform, *White Paper on Crime, Discussion Document No. 2: Criminal Sanctions* (February 2010); Cavadino & Dignan *The Penal System – An Introduction* 3rd ed. (Sage Publications 2002) at 44–45.

⁷⁴ [1996] IR 501 at 508–509. See also: *The People (DPP) v Carmody* [1988] ILRM 370 at 372; *The People (DPP) v Jackson* Court of Criminal Appeal 26 April 1993; *The People (DPP) v GK* [2008] IECCA 110; *Caffrey v Governor of Portlaoise Prison* [2012] IESC 4; *Minister for Justice and Equality v Nolan* [2012] IEHC 249. It is also argued that imposing an incapacitative sentence on the basis of predicted future offending is undesirable, as making accurate predictions regarding future behaviour is exceedingly difficult (see O'Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 2–22; Ashworth *Sentencing and Criminal Justice* 3rd ed (Butterworths 2000) at 69; Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 2–1996).

⁷⁵ Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 228.

⁷⁶ Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 229, 241 and 284. See also Law Reform Commission of New South Wales *Report on Sentencing* (NSWLRC 139–2013) at 227.

simultaneously acknowledging some extenuating circumstances.⁷⁷ Osborough has commented that the expressive nature of the suspended sentence might even be its sole purpose without any real intention to cause the offender to suffer any further consequences.⁷⁸ The imposition of a part-suspended sentence is said to combine elements of punishment, deterrence and rehabilitation.⁷⁹ As such, the suspended sentence can, in general, be used to fulfil the requirements of any of the general sentencing aims. In so doing, it has been suggested that the suspended sentence seeks to answer the demands of often contradictory or conflicting sentencing requirements.⁸⁰

- 1.21 The suspended sentence can also be used as a mechanism to keep an offender out of prison. The suspended sentence is a useful means for reducing reliance on imprisonment while simultaneously ensuring that the punitive impact of a sentence of imprisonment is maintained.⁸¹ This aim was the predominant consideration for the introduction of the power to suspend a sentence of imprisonment in England and Wales,⁸² and in many civil law jurisdictions also.⁸³ In Germany, for example, the suspended sentence was designed for the specific purpose of avoiding imprisonment and thereby reducing the size of the prison population.⁸⁴
- 1.22 Although it is well known that short prison sentences increase the size of the prison population,⁸⁵ research into the effect of the suspended sentence on controlling the size of the prison population is somewhat inconclusive.⁸⁶ Furthermore, the

⁷⁷ *The People (Attorney General) v Hunt* Central Criminal Court 10 December 1945, (1946) 80 ILTSJ 19; *The People (DPP) v O'Reilly* [2007] IECCA 118; *The People (DPP) v Keogh* Court of Criminal Appeal 9 June 2008.

⁷⁸ Osborough, "Deferment of Imposing Sentence" (1981) 16 *Irish Jurist* 262.

⁷⁹ Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 217, 249.

⁸⁰ *ibid* at 218.

⁸¹ Weatherburn & Bartels, "The Recidivism of Offenders Given Suspended Sentences in New South Wales, Australia" (2008) 48(5) *British Journal of Criminology* 667 at 668.

⁸² See HC Deb, 12 December 1966 vol 738 cc65-66, in which the Home Secretary, Roy Jenkins, commented that the main range of penal provisions for the *Criminal Justice Bill*, enacted as the English *Criminal Justice Act 1967*, revolved around the avoidance of immediate imprisonment. The suspended sentence was introduced as a mechanism to achieve this. The Home Secretary commented: "By this means, we shall substantially avoid sending people to prison for the first time unnecessarily." See also: *R v Sapiano* (1968) 52 Cr App R 674, in which the Court of Appeal of England and Wales held that "the main object of a suspended sentence is to avoid sending an offender to prison at all."

⁸³ The stated purpose of the draft Bill put before the French Senate in 1884 proposing to introduce suspended sentences as a sentencing option was "[t]o mitigate the punishment sufficiently to avoid the dangers of imprisonment while preserving the painful aspect of a penalty" (see: *Ancel Suspended Sentence: A Report Presented by the Department of Criminal Science of the Institute of Comparative Law, University of Paris* (Heinemann 1971) at 18).

⁸⁴ Weigend, "Sentencing and Punishment in Germany" in Tonry & Frase (eds), *Sentencing and Sanctions in Western Countries*, (Oxford University Press 2001).

⁸⁵ Warner, "Sentencing Review 2002-2003" (2003) 27 *Criminal Law Journal* 325; Sentencing Council of New South Wales, *Report on Abolishing Prison Sentences of Six Months or Less* (2004); Australian Law Reform Commission *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103-2006).

⁸⁶ In New South Wales, the introduction of the suspended sentence saw an increase in the use of imprisonment in the higher courts while it remained steady in the local courts (see: Brignell & Poletti, "Suspended Sentences in New South Wales" (2003) *Sentencing Trends and Issues No. 29*). In Victoria, prior to the introduction of the suspended sentence, 53% of offenders were sentenced to imprisonment. This fell to 43% following the introduction of the suspended sentence but rose again to 53% in 2004 (see: Victorian Sentencing Advisory Council *Suspended Sentences: Discussion Paper* (April 2005)). In New Zealand, research found that suspended sentences had little to no effect on the size of the prison population, which led to the abolition of the suspended sentence. However, the prison population continued to rise and it was suggested that the abolition of the suspended sentence contributed to this (see: Spier *Conviction and Sentencing of Offenders in New Zealand: 1987 to 1996* (Ministry of Justice 1997); Spier and Lash *Conviction and Sentencing of Offenders in New Zealand: 1994 to 2003* (Ministry of Justice 2004)). In England and Wales, although some analysis indicated that suspended sentences reduced the prison population (see: Oatham & Simon, "Are Suspended Sentences Working?"

suspended sentence is by no means the only factor influencing the size of the prison population.⁸⁷ Additionally, the Commission in its 1996 *Report on Sentencing* dismissed the idea of imposing sentences by reference to the availability of prison places as incompatible with the nature and function of sound sentencing policy.⁸⁸ Notwithstanding this, it has been argued that the suspended sentence enables offenders to avoid exposure to the corrupting influences of prison.⁸⁹ This can be particularly important for young and first-time offenders who have good prospects of desisting from criminal behaviour. Short-term prisoners are also less likely to be able to avail themselves of rehabilitative programmes while in prison and may not be subject to any post-release supervision, whereas undertaking some form of treatment or counselling, and engaging with the Probation Service upon release can be made conditions of suspension. Avoidance of immediate imprisonment is also thought to have a preventative effect by enabling the offender to maintain links with his or her community and minimising disruption to family life and employment.

- 1.23 A survey of judges in Ireland⁹⁰ identified the suitability of the suspended sentence as a specific deterrent, a rehabilitative tool, a symbolic gesture, and a mechanism for avoiding prison. In particular, judges referred to the suspended sentence as giving the offender “a chance”, “a second chance” or “one last chance”.⁹¹ Judges rarely identified the punitive element of the suspended sentence. In general, it would appear that any reference to the punitive aspect of the suspended sentence remained in the background until there was a breach of a condition of suspension. Only then would the punitive edge of the suspended sentence emerge as the primary consideration.
- 1.24 In *Dinsdale v The Queen*,⁹² the High Court of Australia was asked whether the aim of the suspended sentence was primarily rehabilitative or whether it could serve a broader range of sentencing aims. The Court held that rehabilitation is not the sole consideration for the imposition of a suspended sentence. The Court concluded that when deciding whether to impose a suspended sentence, a court must take all factors into consideration including the risk of reoffending, the impact that a sentence of imprisonment may have on an individual and his or her dependents, and the social stigma of having a recorded conviction. This has been considered the correct approach.⁹³ In *R v Petersen*,⁹⁴ the New Zealand Court of Appeal referred to

(1972) 21 *New Society* 233), the majority of research was less optimistic (see: Sparks, “The Use of Suspended Sentences” (1971) *Criminal Law Review* 384; Advisory Council on the Penal System, *Sentences of Imprisonment: A Review of Maximum Penalties* (1978)).

⁸⁷ Research conducted in Victoria found that other factors that influence the size of the prison population include law enforcement practices, legislative provisions such as mandatory minimum sentences and sentence length, crime rates, the criminal history of offenders and the use of parole and supervision orders. See: Freiberg *Sentencing Review: Discussion Paper* (Department of Justice 2001).

⁸⁸ (LRC 53-1996) at paragraph 2.2.

⁸⁹ Bartels, “An Examination of the Arguments For and Against the Use of Suspended Sentences” (2010) 12 FLJ 119 at 131.

⁹⁰ Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009). The author convened 4 focus groups of judges, 3 at District Court level and one at Circuit Court level. In addition, 6 semi-structured interviews were conducted at District Court, Circuit Criminal Court, Central Criminal Court and Supreme Court (Court of Criminal Appeal) level.

⁹¹ Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 229.

⁹² [2000] HCA 54; (2000) 202 CLR 321.

⁹³ O’Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 22-07.

the rehabilitative potential of the suspended sentence in that it encouraged reform while holding out the threat of imprisonment. The Court concluded that the suspended sentence could be appropriate in cases of moderately serious offending where there is a realistic opportunity for reform and the need for general deterrence is not paramount. In continental European jurisdictions, the suspended sentence was introduced with the ultimate aim of preventing recidivism through deterrence while maintaining the threat of the original sentence.⁹⁵

- 1.25 In Ireland, in *Cash v Halpin*,⁹⁶ the High Court (Baker J) considered the purpose of the suspended sentence to be primarily rehabilitative, but did not rule out the possibility of considering other sentencing aims in conjunction with rehabilitation when deciding whether to impose a suspended sentence. In *Clarke v Governor of Mountjoy Prison*,⁹⁷ the Court of Appeal reiterated the importance of the suspended sentence as a vital tool in promoting rehabilitation.
- 1.26 In sum, no one general sentencing aim can be said to maintain a pre-eminent position when it comes to imposing a suspended sentence. The purpose of the sanction is not fixed for all cases, but rather it changes with the circumstances of the offence and the offender. It can be argued that this level of flexibility and malleability is what makes the suspended sentence a valuable sentencing option for the courts to possess.
- 1.27 Although it is generally compatible with all sentencing aims, it has been suggested that a suspended sentence would be most appropriate where specific deterrence is the decisive sentencing aim.⁹⁸ The effectiveness of a suspended sentence as a specific deterrent has been widely recognised,⁹⁹ and research suggests that it has a marginally better deterrent effect than imprisonment.¹⁰⁰ However, this does not mean that the imposition of a suspended sentence would be inappropriate where a different sentencing principle would be more appropriate. The Irish courts have often imposed a suspended sentence where the goal of rehabilitation or denunciation

⁹⁴ [1994] 2 NZLR 533.

⁹⁵ *Ancestral Suspended Sentence: A Report Presented by the Department of Criminal Science of the Institute of Comparative Law, University of Paris* (Heinemann 1971) at 30.

⁹⁶ [2014] IEHC 484, [2014] 1 IR 328.

⁹⁷ [2016] IECA 244.

⁹⁸ O'Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 22-07; Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 228; Bartels *Sword of Feather? The Use and Utility of Suspended Sentences in Tasmania* (PhD Thesis, University of Tasmania 2008) at 15; Brignell & Poletti, "Suspended Sentences in New South Wales" (2003) *Sentencing Trends and Issues* No. 29; Weatherburn & Bartels, "The Recidivism of Offenders Given Suspended Sentences in New South Wales, Australia" (2008) 48(5) *British Journal of Criminology* 667 at 668; Lulham, Weatherburn & Bartels, "The Recidivism Rate of Offenders Given Suspended Sentences: a Comparison with Full-Time Imprisonment" (2009) *Crime and Justice Bulletin* No. 136 at 2. See also: *R v Taylor* [2000] NSWCCA 442; *R v Hinton* [2002] NSWCCA 405.

⁹⁹ O'Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 22-07; Bartels, "An Examination of the Arguments For and Against the Use of Suspended Sentences" (2010) 12 FLJ 119 at 127; Tait, "The Invisible Sanction: Suspended Sentences in Victoria 1985-1991" (1995) 28 *Australian and New Zealand Journal of Criminology* 143 at 145; Ashworth *Sentencing and Penal Policy* (Weidenfeld & Nicolson 1983) at 243; Wasik, "Sentencing Guidelines: the Problem of Conditional Sentences" (1994) 13 *Criminal Justice Ethics* 50 at 53.

¹⁰⁰ Weatherburn & Bartels, "The Recidivism Rates of Offenders Given Suspended Sentences in New South Wales, Australia" (2008) 48 *British Journal of Criminology* 667; Bartels, "The Weight of the Sword of Damocles: A Reconviction Analysis of Suspended Sentences in Tasmania" (2009) 42 *Australian and New Zealand Journal of Criminology* 72; Lulham, Weatherburn and Bartels "The Recidivism of Offenders Given Suspended Sentences: A Comparison with Full-Time Imprisonment" (2009) *Crime and Justice Bulletin* No. 136.

has outweighed the need for specific deterrence.¹⁰¹

- 1.28 Decisions of the former Court of Criminal Appeal appear to suggest that the predominant sentencing aim underpinning the suspension of sentence of imprisonment in Ireland is the specific deterrent approach with only marginal reference to the aim of avoidance of prison.¹⁰² In *The People (DPP) v Alexiou*,¹⁰³ the Court of Criminal Appeal approved the imposition of a suspended sentence where the defendant had been convicted of an offence under section 15A of the *Misuse of Drugs Act 1977*, which carries a presumptive minimum sentence of 10 years imprisonment.¹⁰⁴ The Court's reasoning was primarily based on the appropriateness of the conditions of suspension, which it considered to be essentially crime-preventative in nature.
- 1.29 The imposition of conditions of suspension may also suggest that the Irish suspended sentence is based on the principle of specific deterrence. It has been argued that the mandatory conditions to keep the peace and be of good behaviour¹⁰⁵ point to specific deterrence, as these are conditions that seek to control the future behaviour of the offender.¹⁰⁶ Similarly, section 99(3)(b) of the *Criminal Justice Act 2006* provides that a court may impose such conditions as the court considers will reduce the likelihood of the offender committing any other offences. Thus, the predominant purpose of these additional conditions is to act as a specific deterrent. As such, it is possible that Irish sentencers predominantly look to the deterrent elements of the suspended sentence, expressed through the conditions of suspension, as the primary sentencing aim when deciding whether to impose a suspended sentence. Furthermore, the Court of Appeal has often considered the part-suspension of a sentence of imprisonment to be a useful tool in promoting rehabilitation where there seems to be a reasonable prospect of achieving that.¹⁰⁷
- 1.30 In *R v Zamagias*,¹⁰⁸ the New South Wales Court of Criminal Appeal held that a suspended sentence is generally appropriate where the offence calls for deterrence, but that each case must be assessed on a case-by-case basis taking the objective seriousness of the offence and the subjective circumstances of the individual into account. The Court further held that the overarching purpose of punishment is the protection of the community, which means that in some cases the need to rehabilitate will outweigh the need for deterrence, denunciation or retribution. Furthermore, in *Wilson v United Kingdom*,¹⁰⁹ the European Court of Human Rights commented on the appropriateness of the suspended sentence where specific deterrence was necessary.

¹⁰¹ *The People (DPP) v M* [1994] 3 IR 306; *Cash v Halpin* [2014] IEHC 484; *The People (DPP) v O'Reilly* [2015] IECA 21.

¹⁰² *The People (DPP) v Alexiou* [2003] 3 IR 513; *The People (DPP) v Loving* [2006] IECCA 28, [2006] 3 IR 355.

¹⁰³ [2003] 3 IR 513.

¹⁰⁴ The circumstances in which a court may depart from a presumptive minimum sentence under the *Misuse of Drugs Act 1977* and the *firearms Acts* and then also suspend the lesser sentence is discussed at paragraphs 2.24 – 2.37.

¹⁰⁵ Section 99(2) of the *Criminal Justice Act 2006*.

¹⁰⁶ Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 235.

¹⁰⁷ *The People (DPP) v O'Leary* [2015] IECA 128.

¹⁰⁸ [2002] NSWCCA 17 at paragraph 32.

¹⁰⁹ (2014) 58 EHRR SE10.

- 1.31 It is worth noting that there is a certain degree of conflict with regard to the purpose of the suspended sentence across jurisdictions. Whereas the preceding discussion highlights that the suspended sentence in Ireland is predominantly compatible with the aim of specific deterrence, in England and Wales and most civil law jurisdictions the primary purpose of the suspended sentence is the avoidance of prison.¹¹⁰ It has been argued that the principle of avoidance of prison generally provides the legislature with a degree of control over the sanction.¹¹¹ As such, given the importance placed on judicial sentencing discretion in this jurisdiction, it may be that the aim of avoidance of prison is not an appropriate consideration when deciding whether to impose a suspended sentence in Ireland.

¹¹⁰ Section 11(3) of the *Criminal Justice Act 1973* ensured that the rationale underpinning the use of suspended sentences in England and Wales was the avoidance of immediate imprisonment. In Germany, suspended sentences were designed for the specific purpose of avoiding imprisonment and thereby reducing the size of the prison population.

¹¹¹ Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 227-228.

QUESTION 1

Your views are sought on the following questions:

- 1(a) Since the suspended sentence is compatible with a number of sentencing aims (deterrence, retribution, denunciation, rehabilitation, reparation, incapacitation and avoidance of immediate imprisonment), do you think that the suspended sentence should primarily serve one sentencing aim (such as specific deterrence, avoidance of prison or rehabilitation) or should the suspended sentence continue to serve a broader range of sentencing aims?
- 1(b) To what extent, do you think, the principle of avoidance of prison is an appropriate factor to be taken into consideration when deciding whether to impose a suspended sentence?

Please type your comments (if any)

ISSUE 2

THE PRESUMPTION OF AN IMMEDIATE CUSTODIAL SENTENCE FOR SPECIFIC OFFENCES AND OFFENDERS

- 2.01 In its 2013 *Report on Mandatory Sentences*,¹ the Commission considered it appropriate that certain offences at the highest end of the scale of gravity would attract an immediate and substantial custodial sentence, save in exceptional circumstances (in addition, murder carries a mandatory life sentence on conviction). These offences are said to carry a presumption of a custodial sentence. In such cases, a suspended sentence would not be appropriate, save in exceptional circumstances. Offences that carry a presumption of a custodial sentence are serious offences such as manslaughter, rape, assault causing harm or serious harm, serious fraud offences, and offences carrying presumptive mandatory minimums such as drugs and firearms offences.
- 2.02 Arguably, for offences carrying a presumption of a custodial sentence, the presence of mitigating factors common to many criminal cases, such as a plea of guilty and cooperation with authorities, may not be sufficient to justify the full suspension of the sentence. Factors need to be exceptional in order to rebut the presumption of a custodial sentence. Exceptional circumstances may amount to a combination of particular personal circumstances and/or factors that are specific to the individual case. The Commission now turns to consider the offences for which a presumption of an immediate custodial sentence applies.

2.1 Manslaughter

- 2.03 In *The People (DPP) v Princs*,² the Court of Criminal Appeal held that manslaughter resulting from an unlawful or dangerous act should normally be punished with a substantial custodial sentence. The Court held that only “where there are special circumstances and context will a moderate sentence or, *in wholly exceptional circumstances*, a non-custodial sentence be warranted.”³ Therefore, there is a presumption that a person convicted of manslaughter will ordinarily receive a custodial sentence in the absence of either special or exceptional circumstances.

¹ (LRC 108-2013) at paragraph 1.67.

² [2007] IECCA 142.

³ Emphasis added.

2.04 An analysis of the case law points to the following circumstances as qualifying as exceptional to justify the imposition of a suspended sentence for manslaughter:

1. Strong provocation, especially where it was preceded by a history of violent or abusive behaviour;⁴
2. Substantial diminished responsibility;⁵
3. Excessive self-defence or excessive defence of another;⁶
4. Where the personal circumstances of the individual at the time of sentence requires a merciful approach;
5. Mental illness or severe stress;⁷
6. Youth or old age, and level of maturity;⁸
7. Where the individual poses no future threat;
8. Genuine remorse, and
9. Where the individual has suffered in some way as a result of the offence or the circumstances leading to up to the offence.⁹

⁴ *The People (DPP) v Princs* [2007] IECCA 142. In general, provocation reduces murder to manslaughter. As such, in order to justify a suspended sentence in such instances, the provocation must have been particularly strong or brought about by prolonged subjection to violent and/or abusive behaviour. See for example: *In The People (DPP) v Hendrick* Central Criminal Court 20 June 1997, the defendant was given a 5 year suspended sentence for the manslaughter of his father. The deceased had sexually abused the defendant and his siblings. *In The People (DPP) v Bell* Central Criminal Court 13 November 2000, the accused was acquitted of murder but found guilty of the manslaughter of her abusive partner. She was given a 4 year suspended sentence. Many cases of this nature could, arguably, amount to murder, but in light of the exceptional circumstances and history of violence and/or abuse, the prosecution often submit a charge of manslaughter or accept a plea to that offence in such cases (see also: *R v Morrissey* 2000 SCC 39, [2000] 2 SCR 90). *In The People (DPP) v O'Brien* Central Criminal Court 21 December 1999, a man shot his 28-year-old son because the deceased was an alcoholic and had been very abusive towards members of his family. The accused was given a 7 year suspended sentence. *In The People (DPP) v Connell* Central Criminal Court 16 October 2001, the accused was acquitted of murder but found guilty of the manslaughter of his 25 year old son, who suffered from acute manic psychosis, whom he shot. He received a 4 year sentence of imprisonment with the final 3 years suspended.

⁵ Section 6 of the *Criminal Law (Insanity) Act 2006* introduced the defence of diminished responsibility to reduce murder to manslaughter. It follows, similar to the defence of provocation, that for a suspended sentence to be justified in such cases, there must be substantial diminished responsibility. See *The People (DPP) v Burke* Central Criminal Court 23 March 2010 in which the accused was acquitted of murder but found guilty of the manslaughter of her husband by reason of diminished responsibility. She was given a 5 year suspended sentence on the grounds that her diminished responsibility was considered substantial when coupled with evidence that the deceased had been very abusive.

⁶ *In The People (DPP) v Dunne* Central Criminal Court 27 November 1998 the defendant was acquitted of murder but found guilty of the manslaughter of a neighbour. It was accepted that he was trying to protect his mother who he believed was being assaulted and used excessive force. He received a 5 year suspended sentence.

⁷ This is commonly considered an exceptional circumstance in cases where a young child is killed by a parent or close relative. See *The People (DPP) v Ryan* Central Criminal Court 29 April 1999 a woman pleaded guilty to the manslaughter of her 15 month old daughter. She was given a 7 year suspended sentence subject to strict conditions. See also: *The People (DPP) v Reilly* [2004] IECCA 9, [2005] 3 IR 111, the Court of Criminal Appeal upheld a 5 year suspended sentence for the manslaughter of an 18 month old child in which the defendant had stabbed the child to death in the middle of the night but could not remember doing so.

⁸ *In The People (DPP) v Craig* [2010] IECCA 27, the defendant was given a 3 and a half year suspended sentence for secondary participation manslaughter in light of her age and level of maturity. Although the Court of Criminal Appeal held that the sentencing judge had attached insufficient weight to the fact that a gun had been involved, it sentenced the defendant to 3-and-a-half years' imprisonment with the final 2-and-a-half years suspended presumably on the same grounds as were highlighted by the sentencing judge. See also: *The People (DPP) v Cunningham* Central Criminal Court 30 April 2009 in which a teenager was acquitted of murder but convicted of the manslaughter of his father. The defendant had become enraged when his father arrived home drunk and without food for his elderly parents for whom he cared.

2.05 Manslaughter resulting from killing a family member after an unexpected row has occasionally been punished with a suspended sentence. In cases such as this, there is generally no premeditation, the offender often shows genuine remorse and he or she has suffered immensely as a result of the offence, as he or she is now bereft of a relative and will be mourning the loss as much as other family members. In *The People (DPP) v McElvaney*,¹⁰ the accused shot his younger brother during a sudden and intense row. He and his brother had been close friends. The accused was given a 9 year suspended sentence. However, it must be noted that intra-familial homicides may also be extremely serious, such as where an abusive partner kills the other. Thus, the particular facts of each individual case are still paramount, especially where the sentence range is particularly broad, as is the case in manslaughter.

2.2 Rape

2.06 In *The People (DPP) v Tiernan*,¹¹ the Supreme Court held that rape involves such a serious attack on the human dignity and bodily integrity of the victim that it should, save in exceptional circumstances, be punished with a substantial and immediate custodial sentence, even in the absence of aggravating factors. Therefore, there is a presumption that a person convicted of rape will receive a substantial custodial sentence, save where there are wholly exceptional circumstances.

2.07 However, the principle that rape should generally attract an immediate and substantial term of imprisonment does not restrict judicial discretion to impose the appropriate sentence based on the particular facts of a given case. In *The People (DPP) v Keane*,¹² the Court of Criminal Appeal set down 3 principles for sentencing rape:

1. The general starting position is that rape must attract an immediate and substantial custodial sentence, as set out in *Tiernan*.
2. This does not, in principle, exclude the possibility of a non-custodial sentence in wholly exceptional circumstances and where the judge has considered both the gravity of the offence and the circumstances of the offender.
3. In reaching his or her conclusion, the sentencing judge must have regard to the range of cases and take into account the variety of factors which can influence sentencing in rape cases.

2.08 The Court in *Keane* was not saying that a suspended sentence should be contemplated in every rape case. It is only where there are particularly strong or unusual circumstances that the possibility of a suspended sentence will arise. In *The People (DPP) v C(W)*,¹³ a sentence of 9 years' imprisonment, conditionally suspended

⁹ In *The People (DPP) v Roche* *The Irish Times* 8 November 2002, 2 defendants pleaded guilty to the manslaughter of a man as a new-age settlement in County Leitrim. Both defendants received a suspended sentence.

¹⁰ Central Criminal Court 8 May 1990.

¹¹ [1988] 1 IR 250, [1989] ILRM 149. See also: *R v Roberts* [1982] 1 All ER 609; *R v McDonald* [1989] NI 37.

¹² [2007] IECCA 119, [2008] 3 IR 177.

¹³ [1994] 1 ILRM 321.

for 6 years was imposed on a young man who pleaded guilty to rape at a very early stage in the investigation. The sentencing judge was also of the opinion that the defendant could be more effectively treated and rehabilitated within the community, as there was, at the time, no prison-based treatment for sex offenders. Early admission of responsibility followed by a guilty plea can, in the context of an offence of rape, be considered strong mitigating factors, as the victim is spared from giving evidence and undergoing cross-examination, but they will not ordinarily justify a suspended sentence in themselves. This reasoning was set out on in *Tiernan* and followed in *C(W)*. The Court of Appeal reaffirmed that an early guilty plea and an expression of remorse are important mitigating factors in *The People (DPP) v Counihan*,¹⁴ but clarified that a failure to plead guilty should not be considered an aggravating factor in the event of conviction.

- 2.09 In *The People (DPP) v WD*,¹⁵ the Central Criminal Court (Charleton J) examined cases of rape over a 3-year period in which lenient, ordinary and severe sentences had been imposed. With regard to the lenient category, the Court examined cases in which a suspended sentence had been imposed. The Court noted that a suspended sentence could only be contemplated where the circumstances of the case were “so completely exceptional as to allow the court to approach sentencing for the offence of rape in a way that deviates so completely from the norm established by law.”¹⁶
- 2.10 In May 2016, *The Irish Times* published an analysis of rape convictions in the Central Criminal Court between 2013 and 2015.¹⁷ The findings of this study were compared to the only other previous large-scale research into rape sentencing conducted by the Rape Crisis Network Ireland (RCNI). The analysis concluded that the average sentence for rape is now 10 years compared to 9 years and 3 months in 2005. When suspended portions are taken into account, the average is now 8 years compared to 7 years and 3 months in 2005. This gradual increase in rape sentences over the past 10 years, the analysis found, matches trends in other jurisdictions such as the UK.
- 2.11 The analysis showed that 70% of sentences for rape were partly suspended. In general, only those who went to trial and refused to admit guilt received entirely unsuspended sentences. However, in the case of some particularly heinous crimes, entirely unsuspended sentences were imposed despite a guilty plea. An example of this was the conviction of a 77-year-old man for abusing both his daughter and granddaughter. He was sentenced to 7 years imprisonment despite his guilty plea and advanced age.¹⁸
- 2.12 Fully suspended sentences for rape are extremely rare. In *The People (DPP) v Hustveit*,¹⁹ a Norwegian national convicted of raping his Irish girlfriend while she slept attracted much public attention when he received a wholly suspended sentence due to the exceptional circumstances of the case, namely that the case would never

¹⁴ [2015] IECA 76.

¹⁵ [2007] IEHC 310, [2008] 1 IR 308.

¹⁶ *ibid* at 319.

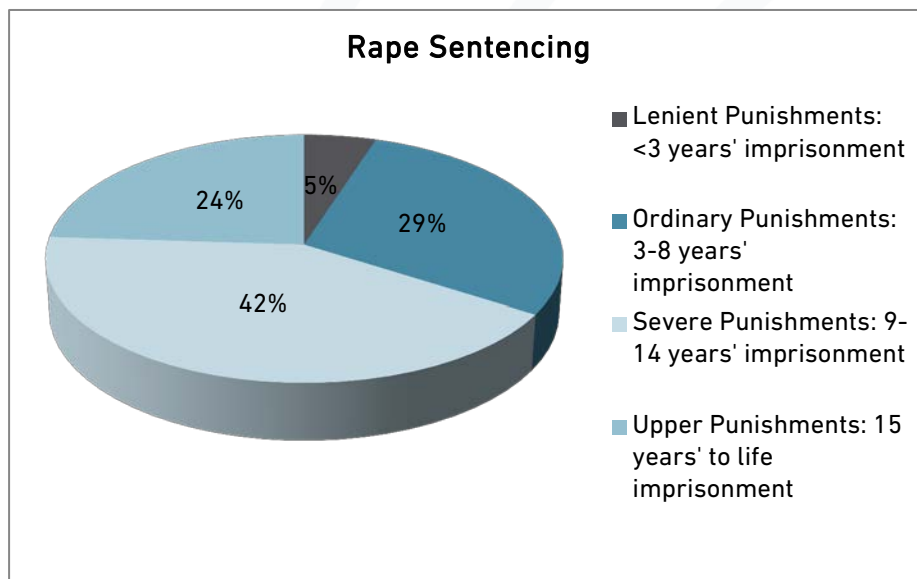
¹⁷ Gallagher, “Rape Sentences Averaging 10 Years after Rise over Last Decade” *The Irish Times* 23 May 2016.

¹⁸ *ibid*.

¹⁹ [2016] IECA 271.

have come to light but for the defendant's own admissions.²⁰ However, *Hustveit* was one of only 3 offenders to receive a fully suspended sentence for rape. 2 of these, including *Hustveit*, subsequently had their sentences quashed by the Court of Appeal and were sentenced to prison. The third man, who had an intellectual disability and had attempted to rape a woman at a party, did not have his non-custodial sentence overturned on appeal.²¹ It has been suggested that, in light of the decisions of *Tiernan* and *Keane*, it would take truly exceptional circumstances to justify a fully suspended sentence for rape. *Figure 1* illustrates a statistical analysis of sentencing for rape completed in November 2012.²²

Figure 1: Rape sentencing



2.3 Assault causing serious harm and assault causing harm

2.3.1. Assault causing serious harm

- 2.13 Assault causing serious harm is one of the few offences that has been the subject of judicially-developed sentencing guidance. In *The People (DPP) v Fitzgibbon*,²³ the defendant was under the care of 2 healthcare professionals who picked him up from the city centre. The defendant seemed quite agitated and appeared to be under the influence of alcohol and drugs. He asked the driver of the car to pull into a service station, after which he jumped out and launched into a serious and unprovoked attack on a 16-year-old youth. The victim was punched 26 times in the head, followed by 65

²⁰ "No Jail Term for Man (25) who Rapes Girlfriend while She Slept" *The Irish Times* 13 July 2015; "Woman Raped by Partner as She Slept Criticises Sentence" *The Irish Times* 14 July 2015; Brennan & Conlon, "Face of Man who Raped Girlfriend while She Slept" *Irish Independent* 13 July 2015.

²¹ Gallagher, "Rape Sentences Averaging 10 Years after Rise over Last Decade" *The Irish Times* 23 May 2016.

²² Charleton and Scott, "Throw Away the Key: Public and Judicial Approaches to Sentencing – Towards Reconciliation" (2013) 10 *Irish Probation Journal* 7. The sentencing information was analysed and compiled by the Judicial Researcher's Office within the Courts Service.

²³ [2014] IECCA 12, [2014] 2 ILRM 116.

stamps to the head and 2 stamps to the chest. The attack lasted approximately 4 minutes and had a devastating physical and psychological impact on the victim. The trial judge imposed a sentence of 15 years imprisonment with the final 3 years suspended. The Court of Criminal Appeal, having found an error of principle, invited further submissions on the appropriate sentence. In the end, the Court substituted a sentence of 9-and-a-half years' imprisonment.²⁴

2.14 Most importantly, the Court of Criminal Appeal in *Fitzgibbon* offered guidance on sentencing cases of assault causing serious harm. The Court listed a number of factors that may be taken into consideration when assessing harm and culpability in a case of assault causing serious harm, namely:

1. The severity and viciousness of the assault;
2. The injuries suffered;²⁵
3. The degree of culpability;²⁶
4. The general circumstances surrounding the assault, such as whether it was committed in the context of any further criminality;
5. Whether a weapon was used, and
6. Any other relevant factors which should be taken into account in each individual case.

With regard to the range of sentences, the Court held that, at the lower end of the range of gravity, a sentence of 2 to 4 years may be appropriate in the absence of unusual factors. In the mid-range, a sentence of 4 to 7-and-a-half years may be appropriate, and in the upper range a sentence of 7-and-a-half to 12-and-a-half years. The Court further held that cases of an exceptional nature may warrant, before taking mitigating circumstances into account, a sentence of 12-and-a-half years to life imprisonment.²⁷ The Court noted that, given the particularly serious nature of the assault in issue in the case and the fact that the majority of cases brought to the Court's attention fell into the upper range of gravity, the lower and mid-range sentencing guidance suggested by the Court might be open to adjustment at a future date in a more appropriate case. The Court also reiterated that the general sentencing guidance offered in the case may be departed from where there are special or unusual factors relating to either harm or culpability.

2.15 The approach taken in *Fitzgibbon* is arguably correct, especially when viewed in comparison with other common law jurisdictions. In Victoria, the case of *DPP v*

²⁴ *The People (DPP) v Fitzgibbon* [2014] IECCA 12, [2014] 2 ILRM 116.

²⁵ The Court emphasised that it must be kept in mind that there is not always a direct correspondence between the severity of the attack and the injuries sustained e.g. an attack may have been particularly vicious but the victim, luckily, escapes with minor injuries just as a minor attack can have serious consequences. The Court also held that greater weight will be attached to injuries that can reasonably be expected to flow from the nature of the assault or at least not wholly disproportionate to the assault.

²⁶ The Court held that an unprovoked attack will be regarded more seriously than an assault which arises out of an incident, especially where the incident is not, or at least not only, of the perpetrator's making. The Court further held that provocation is a legitimate factor to be taken into consideration when assessing the seriousness of an assault.

²⁷ See: *The People (DPP) v Z* [2014] IECCA 13, [2014] ILRM 132 for the circumstances in which the maximum penalty may be imposed.

*Terrick*²⁸ involved remarkably similar facts, with similar questions being raised and broadly similar sentences being substituted. In Ireland, the guidance offered in *Fitzgibbon* has proven to be very influential. The Court of Appeal has applied the guidelines in a number of cases.²⁹

- 2.16 As a result of the sentencing guidance offered by the Court of Criminal Appeal in *Fitzgibbon*, wholly suspended sentences for assault causing serious harm should be extremely rare. This is in light of the fact that, when developing the range of sentences, the Court of Criminal Appeal fixed 2 years imprisonment as the starting point at the lower end of the range rather than beginning with a non-custodial option. There would need to be special and unusual circumstances to rebut the presumption of a custodial sentence and to justify the imposition of a wholly suspended sentence in cases of assault causing serious harm.
- 2.17 Even part-suspension of a sentence for assault causing serious harm would require exceptional circumstances, although it may be appropriate where it is considered conducive to offender rehabilitation. For example, in *The People (DPP) v Healy*,³⁰ the Court of Appeal considered the headline sentence to be 12 years imprisonment and imposed a sentence of 8 years imprisonment following mitigation. The Court then went on to suspend the final 18 months of the sentence with a view to incentivise rehabilitation.

2.3.2. Assault causing harm

- 2.18 A presumption of a custodial sentence exists for cases that fall into the upper range of seriousness for assault causing harm. In *The People (DPP) v Foley*,³¹ the defendant pleaded guilty to assault causing harm in which he bit off part of the victim's ear during a pub fight. The trial judge imposed a 3 year sentence suspended for 5 years. The Court of Criminal Appeal, having found the sentence to be unduly lenient, substituted a sentence of 2 years imprisonment with the final 18 months suspended for 5 years. The Court of Criminal Appeal held that assaults causing harm "have to be treated seriously and should involve in principle a custodial sentence unless there are sufficient mitigating factors or other circumstances in the case warranting otherwise." This can be compared to *The People (DPP) v Dooley*,³² decided prior to *Foley*, in which 2 defendants pleaded guilty to beating a man unconscious and fracturing his skull. They both received sentences of 3 years imprisonment suspended for 4 years.
- 2.19 Cases such as *Dooley* and *Foley* clearly fall into the upper range of gravity for assault causing harm. Indeed, the attack in *Foley* was described as vicious and unprovoked. It can, therefore, be argued that cases of assault causing harm that fall into the upper range carry a presumption of a custodial sentence in the absence of strong mitigating factors. It could further be argued that in order to suspend a sentence for assault

²⁸ [2009] VSCA 220.

²⁹ See: *The People (DPP) Cullen* [2015] IECA 4; *The People (DPP) v McCarthy* [2014] IECA 8.

³⁰ [2015] IECA 176.

³¹ [2009] IECCA 47.

³² Circuit Criminal Court 21 June 2005, *The Irish Times* 22 June 2005.

causing harm which falls into the upper range entirely, there must be exceptional circumstances justifying such a course of action.

2.4 Serious fraud offences

2.20 In *The People (DPP) v Murray*,³³ a case involving an elaborated and sophisticated case of social welfare fraud which lasted several years amounting to the fraudulent misappropriation of €250,000, the Court of Criminal Appeal held that a presumption of a custodial sentence should apply. The Court stated:

“[O]ffences of this kind strike at the heart of principles of equity, equality of treatment and social solidarity on which the entire edifice of the taxation and social security systems lean... We therefore suggest for the future guidance of sentencing courts that significant and systematic frauds directed upon the public revenue – whether illegal tax evasion on the one hand or social security fraud on the other – should generally meet with an immediate and appreciable custodial sentence, although naturally the sentence to be imposed in any given case must have appropriate regard to the individual circumstances of each accused.”

2.21 However, in *The People (DPP) v Begley*,³⁴ a case involving the fraudulent evasion of customs duties to the sum of €1.6 million over several years, the Court of Criminal Appeal stressed that no special principles applied to the sentencing of social welfare fraud. In fact, the same principles may be assumed to apply to all serious frauds. As such, although *Begley* clarifies that the same sentencing principles should apply to serious fraud cases as to all other offences, it can be argued that a presumption of an immediate custodial sentence exists, which may be rebutted in exceptional circumstances. In *The People (DPP) v Montague*,³⁵ for example, a woman flew from London to Cork every month to sign on for jobseeker’s allowance. She had received €43,000 over 4 years in social welfare benefits. The court imposed a 3 year suspended sentence in light of an early guilty plea, the fact that the full amount was repaid and some personal mitigating circumstances.

2.5 Statutory presumptive minimum sentences

2.22 Under section 99(1) of the *Criminal Justice Act 2006*, a mandatory term of imprisonment, notably the mandatory life sentence for murder, may not be suspended. However, it appears that a suspended sentence may be imposed where legislation has provided for a presumptive minimum sentence. Presumptive minimum sentences require the imposition of a specified minimum sentence unless the court considers that it should not apply in a given case.³⁶ Presumptive minimum sentences represent a significant constraint on judicial sentencing discretion, but they permit a departure from the prescribed minimum in exceptional and specific

³³ [2012] IECCA 60.

³⁴ [2013] IECCA 32, [2013] 2 IR 188.

³⁵ Circuit Criminal Court 29 April 2013, *Irish Examiner*, 30 April 2013.

³⁶ Irish Penal Reform Trust, *Position Paper on Mandatory Sentencing* (May 2009).

circumstances.³⁷ In Ireland, presumptive minimum sentences have been prescribed under the *Misuse of Drugs Act 1977* and the *Firearms Acts*.

- 2.23 The Commission, in its 2013 *Report on Mandatory Sentences*, recommended the repeal of presumptive minimum sentencing provisions and to replace these with a more structured guidance-based sentencing system as a more appropriate alternative to presumptive minimum sentences.³⁸ While the Commission's general view was noted in the 2014 *Report of the Penal Policy Review Group*, the presumptive minimum provisions under the *Misuse of Drugs Act 1977* of the *Firearms Acts* have not, to date, been repealed. The establishment of a guidance-based sentencing system has not yet been realised, although attempts to establish such a system have been undertaken.³⁹ If these presumptive minimum sentences were to be repealed in the future and a guidance-based sentencing system established, it may be helpful expand guidance on such offences to include recommendations as to in what circumstances such offences could attract suspended sentences. Such guidance could, arguably, take account of the experience of the courts in England and Wales with respect to the imposition of suspended sentences in "exceptional circumstances" only.⁴⁰

2.5.1. Presumptive minimum sentences under the *Misuse of Drugs Act 1977*

- 2.24 There are 2 offences under the *Misuse of Drugs Act 1977* that carry a presumptive minimum sentence. These are offences of possessing⁴¹ or importing⁴² controlled drugs having a value of €13,000 or more with intent to sell or supply. Both offences carry a presumptive minimum sentence of 10 years imprisonment⁴³ unless exceptional and specific circumstances exist that would make it unjust to impose the presumptive minimum in all of the circumstances.⁴⁴
- 2.25 Exceptional and specific circumstances may include any matters that the court considers appropriate, including whether the individual pleaded guilty to the offence and whether he or she materially assisted in the investigation of the offence.⁴⁵
- 2.26 It is clear that, in order to depart from the 10 year presumptive minimum sentence, there must be exceptional and specific circumstances. A plea of guilty, cooperation with the authorities, and any other relevant factors may amount to exceptional circumstances for the purposes of departing from the presumptive mandatory minimum. However, these exceptional circumstances only justify the departure from the 10 year presumptive minimum and the imposition of a lesser term of immediate imprisonment. In order for a section 15A or 15B offence to attract a suspended sentence, there needs to be something more than exceptional and specific

³⁷ Law Reform Commission *Report on Mandatory Sentences* (LRC 108-2013) at paragraph 11.

³⁸ Law Reform Commission *Report on Mandatory Sentences* (LRC 108-2013) at paragraphs 4.238 and 4.239.

³⁹ See paragraphs 3.19 – 3.23.

⁴⁰ See paragraphs 2.42 – 2.47.

⁴¹ Section 15A of the *Misuse of Drugs Act 1977*, as inserted by section 4 of the *Criminal Justice Act 1999*.

⁴² Section 15B of the *Misuse of Drugs Act*, as inserted by section 82 of the *Criminal Justice Act 2006*.

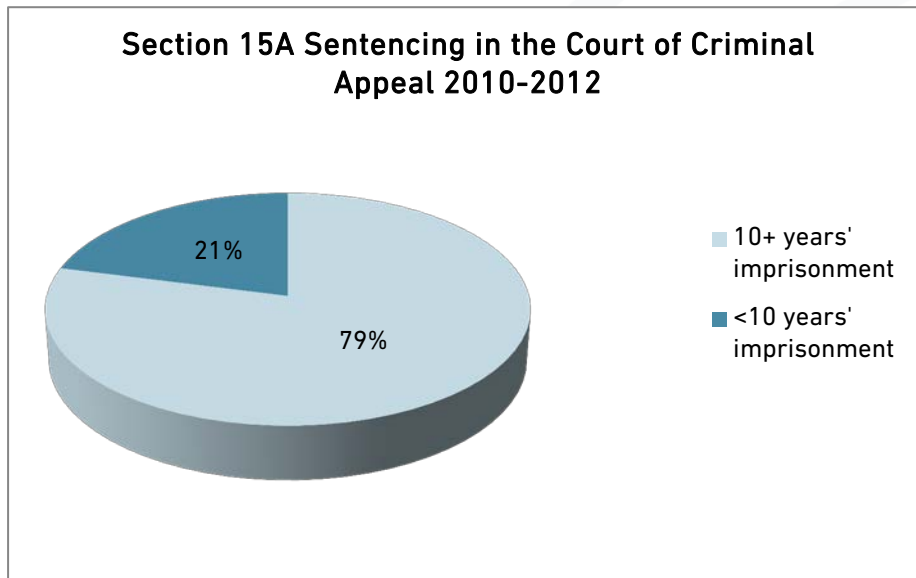
⁴³ Section 27(3C) of the *Misuse of Drugs Act 1977*, as substituted and inserted by section 33 of the *Criminal Justice Act 2007*.

⁴⁴ Section 27(3D) of the *Misuse of Drugs Act 1977*, as substituted and inserted by section 33 of the *Criminal Justice Act 2007*.

⁴⁵ Section 27(3D)(b) of the *Misuse of Drugs Act 1977* as substituted and inserted by section 33 of the *Criminal Justice Act 2007*.

circumstances. *Figure 2* illustrates sentencing for section 15A offences in the Court of Criminal Appeal between 2010 and 2012.⁴⁶

Figure 2: Section 15A sentencing in the Court of Criminal Appeal 2010 – 2012



- 2.27 In *The People (DPP) v McGinty*,⁴⁷ the defendant was sentenced to 5 years imprisonment, suspended under the normal conditions and the additional condition that he continue to attend and complete his drug rehabilitation course. The prosecution appealed the sentence on grounds of undue leniency, arguing, amongst other things, that the sentence gave insufficient regard to the intentions of the legislature by disregarding the minimum penalty provided for under section 27 of the *Misuse of Drugs Act 1977*.
- 2.28 The Court of Criminal Appeal, in dismissing the appeal, held that there was nothing in the Act to suggest that the Oireachtas intended to compromise the judicial function to impose an appropriate sentence based on the individual facts of the case. The Court did, however, stress that the possession of illegal drugs for the purpose of sale or supply, particularly in a significant quantity, is a very serious offence, which would normally warrant an immediate and substantial custodial sentence, even where the mitigating factors of the case justify a departure from the presumptive minimum in the 1977 Act. The Court went on to say that where there are “special reasons of a substantial nature and wholly exceptional circumstances,” the imposition of a suspended sentence might be appropriate in the interests of justice. The Court referenced *The People (DPP) v Alexiou*⁴⁸ as an example in which such exceptional

⁴⁶ Charleton and Scott, “Throw Away the Key: Public and Judicial Approaches to Sentencing – Towards Reconciliation (2013) 10 *Irish Probation Journal* 7. The sentencing information was analysed and compiled by the Judicial Researcher’s Office within the Courts Service.

⁴⁷ [2006] IECCA 37, [2007] 1 IR 633.

⁴⁸ [2003] 3 IR 513.

circumstances and special reasons arose. The Court of Criminal Appeal concluded that the sentencing judge had correctly taken the gravity of the offence and the circumstances of the offender into account, and that the rehabilitation of drug addicts was an important aspect of penal policy, which, coupled with the progress already made by the accused, justified the imposition of a suspended sentence in this case.

- 2.29 In *The People (DPP) v Renald*,⁴⁹ the defendant was sentenced to 5 years imprisonment for possession of drugs for sale or supply contrary to section 15A of the *Misuse of Drugs Act 1977*. It was argued that once the sentencing judge concluded that the presumptive minimum does not apply, he or she should ignore the 10 year presumptive minimum when determining the level of sentence that should be imposed. The Court of Criminal Appeal disagreed:

“Even where exceptional circumstances exist which would render the statutory minimum term of imprisonment unjust, there is no question of the minimum sentence being ignored... Even though that sentence may not be applicable in a particular case the very existence of a lengthy mandatory minimum sentence is an important guide to the Courts in determining the gravity of the offence and the appropriate sentence to impose for its commission.”

The Court quite rightly drew attention to the importance of the maximum sentence prescribed in legislation as a guide to assessing the gravity of the offence. However, it has been argued that the issue with the Court’s declaration that the presumptive minimum sentence should act as “an important guide” is that there is no basis for this in the Act itself. Section 27(3C) of the 1997 Act provides that “Subsection (3B) of this section *shall not apply*.”⁵⁰ This, it has been argued, may be interpreted as meaning that once the sentencing judge is satisfied that exceptional and specific circumstances exist that justify a departure from the presumptive mandatory minimum, then the ordinary principles of sentencing apply.⁵¹

- 2.30 In *The People (DPP) v Walsh*,⁵² the Court of Criminal Appeal held that there had been no exceptional and specific circumstances justifying a departure from the presumptive minimum, but that there were special reasons of a substantial nature that made the suspension of the final 2 years of the 10 year sentence appropriate in the interests of justice. This case suggests that the circumstances justifying a departure from the presumptive minimum sentence and the circumstances justifying the (part) suspension of a sentence are distinct from one another.
- 2.31 The existence of special reasons of a substantial nature and wholly exceptional circumstances is a particularly high bar of proof. In *The People (DPP) v Byrne*,⁵³ the Court of Appeal held that, while it was within the sentencing judge’s discretion to conclude that there were exceptional and specific circumstances, the circumstances

⁴⁹ Court of Criminal Appeal 23 November 2001.

⁵⁰ Emphasis added.

⁵¹ O’Malley *Sentencing Drug Offenders* (8th Annual National Prosecutors’ Conference 19 May 2007).

⁵² Court of Criminal Appeal 18 February 2010.

⁵³ [2015] IECA 5.

in the present case fell significantly short of what could be considered exceptional and specific circumstances justifying the imposition of a wholly suspended sentence:

“It is reasonable to conclude that where the court is satisfied that exceptional and specific circumstances exist, the person convicted may expect to avoid the mandatory minimum sentence of 10 years imprisonment and to receive a custodial sentence of a lesser period. However, to receive a wholly suspended sentence, it would appear that the threshold is much higher and the court must be satisfied as to the existence of circumstances which are wholly exceptional.”

- 2.32 The Court distinguished this case from *McGinty* and *Walsh*, stating: “[t]here is nothing so out of the ordinary or so wholly exceptional in relation to the offences under consideration, or the respondents themselves, that could justify the court concluding that a wholly suspended sentence could legitimately have been imposed.” The Court concluded that the wholly suspended sentences imposed by the sentencing judge were unduly lenient, but was satisfied that the significant mitigating circumstances in the case justified a departure from the presumptive minimum sentence. The Court of Appeal resentenced the defendants by identifying 7 years imprisonment as the headline sentence, reduced to 3 years in light of the significant mitigating circumstances. This approach was followed in *The People (DPP) v Flanagan*.⁵⁴
- 2.33 The fact that prison would be particularly hard for an individual has been recognised as a relevant factor in deciding if such specific and exceptional circumstances exist. In *The People (DPP) v Alexiou*,⁵⁵ the fact that the defendant was a foreign national justified the imposition of a 4 year suspended sentence, as serving prison in a foreign jurisdiction would amount to an additional and disproportionate hardship. In *The People (DPP) v Wallace*,⁵⁶ a 5 year suspended sentence was upheld, as defendant’s medical condition, which necessitated the use of a wheelchair, would have placed an added burden on him in a prison environment.

2.5.2. Presumptive minimum sentences under the *Firearms Acts*.

- 2.34 Part 5 of the *Criminal Justice Act 2006* amended the *Firearms Acts* to make provision for presumptive minimum sentences for certain firearms offences. As was discussed with regard to the *Misuse of Drugs Act 1977*, the presumptive minimum sentence for firearms offences must apply, save in exceptional and specific circumstances. Before analysing the circumstances which qualify as exceptional and specific with regard to firearms offences, it is worth outlining the legislative provisions that are subject to a presumptive minimum sentence. These are set out in the table below.

⁵⁴ [2015] IECA 94.

⁵⁵ [2003] 3 IR 513.

⁵⁶ [2016] IECA 57.

<i>Presumptive mandatory minimum sentences under the Firearms Acts</i>		
Legislation	Section	Penalties
<i>Firearms Act 1925</i>	s. 15 ⁵⁷	The possession or control of any firearm or ammunition (a) with intent to endanger life or cause serious injury to property, or (b) with intent to enable any other person, by means of the firearm or ammunition, to endanger life or cause serious injury to property, regardless of whether any injury to person or property has actually occurred is an offence.
<i>Firearms Act 1964</i>	s. 26 ⁵⁸	A person who contravenes section 112(1) of the <i>Road Traffic Act 1961</i> (that is, taking possession of a mechanically propelled vehicle without the consent of the owner) and who, at the time of the contravention, has a firearm or imitation firearm with him or her, is guilty of an offence.
<i>Firearms Act 1964</i>	s. 27 ⁵⁹	A person commits an offence where he or she produces a firearm or imitation firearm for the purpose of resisting arrest or aiding the escape or rescue of the person or another person from lawful custody.
<i>Firearms Act 1964</i>	s. 27A ⁶⁰	It is an offence to have possession or control of a firearm in circumstances that give rise to a reasonable inference that the person does not possess or control it for a lawful purpose, unless the person does possess or control it for such a purpose.
<i>Firearms Act 1964</i>	s. 27B ⁶¹	A person commits an offence where he or she has with him or her a firearm or

⁵⁷ As amended by section 42 of the *Criminal Justice Act 2006*.

⁵⁸ As amended by section 57 of the *Criminal Justice Act 2006*.

⁵⁹ As amended by section 58 of the *Criminal Justice Act 2006*.

⁶⁰ As amended by section 59 of the *Criminal Justice Act 2006*.

⁶¹ As amended by section 60 of the *Criminal Justice Act 2006*.

		imitation firearm with intent to commit an indictable offence or to resist or prevent the arrest of the person or another person.
<i>Firearms and Offensive Weapons Act 1990</i>	s. 12A ⁶²	It is an offence to shorten the barrel of a shot-gun to a length of less than 61 centimetres or a rifle to a length of less than 50 centimetres. ⁶³

2.35 The presumptive minimum sentence for a firearms offence is either 5 or 10 years imprisonment. Offences attracting a presumptive minimum sentence of 5 years are:

1. Possession of a firearm while taking a vehicle without authority;⁶⁴
2. Possession of a firearm or ammunition in suspicious circumstances;⁶⁵
3. Carrying a firearm or an imitation firearm with intent to commit an indictable offence or resist arrest,⁶⁶ and
4. Shortening the barrel of a shot-gun or a rifle.⁶⁷

Offences attracting a presumptive minimum sentence of 10 years are:

1. Possession of a firearm with intent to endanger life or cause serious injury to property,⁶⁸ and
2. Using a firearm to assist or aid in escape.⁶⁹

2.36 Similar to circumstances justifying a departure from the presumptive minimum sentence for section 15A and 15B offences under the *Misuse of Drugs Act 1977*, a presumptive minimum sentence of 5 or 10 years for a firearms offence may be departed from where there are exceptional and specific circumstances justifying such a course of action.⁷⁰ The court may take into account any matters it considers appropriate including a plea of guilty and whether the individual materially assisted in the investigation of the offence.

2.37 As was seen with respect to the presumptive minimum sentence for offences under section 15A or 15B of the *Misuse of Drugs Act 1977*, in order to impose a suspended

⁶² As amended by section 65 of the *Criminal Justice Act 2006*.

⁶³ It is interesting to note that the mere act of shortening the barrel of a shot-gun or a rifle is an offence, regardless of whether or not there is other criminal intent.

⁶⁴ Section 26 of the *Firearms Act 1964*, as substituted by section 57 of the *Criminal Justice Act 2006*.

⁶⁵ Section 27A of the *Firearms Act 1964*, as substituted by section 59 of the *Criminal Justice Act 2006*.

⁶⁶ Section 27B of the *Firearms Act 1964*, as substituted by section 60 of the *Criminal Justice Act 2006*.

⁶⁷ Section 12A of the *Firearms and Offensive Weapons Act 1990*, as substituted by section 65 of the *Criminal Justice Act 2006*.

⁶⁸ Section 15 of the *Firearms Act 1925*, as substituted by section 42 of the *Criminal Justice Act 2006*.

⁶⁹ Section 27 of the *Firearms Act 1964*, as substituted by section 58 of the *Criminal Justice Act 2006*.

⁷⁰ Subsection (5) of each provision and subsection (10) of section 12A of the *Firearms and Offensive Weapons Act 1990*.

sentence for a firearms offence, there must be reasons of a substantial nature and wholly exceptional circumstances which represents a particular high standard of proof. In *The People (DPP) v Farrell*,⁷¹ the co-defendant, Mr Furlong had received a 5 year suspended sentence and a fine for participating in an enterprise intended to intimidate people into handing over money. Mr Furlong had been in possession of an imitation firearm at the time of the offence. The Court of Criminal Appeal held that the imposition of a suspended sentence had been unduly lenient as there had been no wholly exceptional circumstances justifying the suspended sentence. The Court did, however, conclude that exceptional and specific circumstances existed justifying a departure from the presumptive minimum sentence and substituted a sentence of 12 months imprisonment.⁷²

2.6 Serious offences and other considerations as exceptions to the principle of last resort

2.38 Research⁷³ published in 2014 exploring judicial perspectives on the principle of last resort revealed that when asked about the circumstances in which they would impose sentences of imprisonment, a majority of judges of the District Court and of the Circuit Court identified 3 circumstances in which prison was not necessarily the sanction of last resort, but rather a presumption of a custodial sentence exists, namely:

1. Serious offences;
2. Repeat offenders, and
3. When no other sanction is appropriate.

2.39 Serious offences involving the violation of fundamental rights generally carry a presumption of an immediate custodial sentence.⁷⁴ It has been argued that imposing a prison sentence for a serious offence is generally compatible with the principle of last resort. The difficulty is deciding which offences are serious enough to justify the presumption of a custodial sentence.⁷⁵ As discussed above, the courts have already identified a number of serious offences for which a presumption of a custodial sentence exists, namely manslaughter, rape, assault causing harm and serious harm, and social welfare fraud. A number of District Court judges considered mugging and burglary to be serious offences for which a presumption of a custodial sentence exists. Serious assaults and offences involving the possession of knives were also considered to start off with a presumption in favour of a custodial

⁷¹ Court of Criminal Appeal 23 June 2010.

⁷² Counsel for Mr Furlong later urged the Court of Criminal Appeal to reconsider in light of new information demonstrating that Mr Furlong had not reoffended and had therefore not fulfilled the fears expressed in the Probation Report. Furthermore, Mr Furlong was in continuous and active employment. The Court of Criminal Appeal, with some hesitation, reconsidered and although it had found an error in principle in the sentencing judge's reasoning, it allowed the original sentence to stand in light of the new information brought forward by counsel.

⁷³ Maguire, "When is Prison a Last Resort? Definitional Problems and Judicial Interpretations" (2014) 24(3) *Irish Criminal Law Journal* 62. This article is based on PhD research conducted by Maguire. See: Maguire *Sentencing in Ireland: An Exploration of the Views, Rationales and Sentencing Practices of the District and Circuit Court Judges* (PhD Thesis, Trinity College Dublin 2008).

⁷⁴ O'Malley *Sentencing: Towards a Coherent System* (Round Hall 2011) at 194. See also: *R v Cox* [1993] 1 WLR 188.

⁷⁵ Maguire, "When is Prison a Last Resort? Definitional Problems and Judicial Interpretations" (2014) 24(3) *Irish Criminal Law Journal* 62 at 68.

sentence. In the Circuit Court, a judge commented: “if the offence is particularly hideous, that the public at large wouldn’t accept anything else and a marker has to be put down that that sort of offence cannot be tolerated – then they have to go to prison.” Therefore, where an offence is considered serious, a suspended sentence may only be appropriate where there are exceptional circumstances justifying a departure from normal sentencing practice.

- 2.40 Judges in the District Court explained that they usually send repeat offenders straight to prison, especially where there is a high likelihood of recidivism. This presumption of a custodial sentence is in line with case law on progressive loss of mitigation for previous convictions.⁷⁶ It could be argued that previous convictions of a similar nature could amount to a form of “progressive loss of suspension” for repeat offenders. However, in the survey, District Court judges qualified this presumption by explaining that they would be willing to give repeat offenders the chance to avoid prison if the offender can prove that he or she is willing to change his or her behaviour.⁷⁷ For example, the Court of Criminal Appeal has held that judges should be willing to suspend a custodial sentence where the conviction represents a turning point in the life of the offender.⁷⁸ Nevertheless, persistence is still a principal reason why many judges, in both the District and Circuit Court, continue to impose sentences of imprisonment on offenders who have committed relatively minor and/or non-violent offences.
- 2.41 While answering sentencing vignettes as part of the 2014 study, judges in both the District and the Circuit Court indicated that a presumption of a custodial sentence would exist where all other penalties have been tried but failed to stop the offender from reoffending. It is in these circumstances that judges from both courts favoured the use of a suspended sentence.

2.7 “Exceptional circumstances”

- 2.42 In England and Wales, the *Criminal Justice Act 1991* provided that a suspended sentence should only be imposed where there are exceptional circumstances justifying such a course of action. Although this provision has since been repealed, the English experience may provide some helpful guidance on what may constitute “exceptional circumstances” capable of rebutting the presumption of a custodial sentence.
- 2.43 Stone⁷⁹ analysed the imposition of suspended sentences in a shire county from October 1992 to September 1993. Although this research was conducted over 20 years ago, the circumstances that were considered to be exceptional can still, arguably, be considered relevant today.

⁷⁶ *The People (DPP) v Mahoney* [2016] IECA 27.

⁷⁷ Maguire, “Consistency in Sentencing” (2010) 2 *Judicial Studies Institute Journal* 14 at 45. See also: Healy & O’Donnell, “Crime, Consequences and Court Reports” (2010) 20(1) *Irish Criminal Law Journal* 2.

⁷⁸ *The People (DPP) v Jennings* Court of Criminal Appeal 15 February 1999; *The People (DPP) v Rowland* Court of Criminal Appeal 11 July 2008.

⁷⁹ Stone, “The Suspended Sentence Since the Criminal Justice Act 1991” (1994) *Criminal Law Review* 399.

- 2.44 First and foremost, it must be noted that within the first year of the 1991 Act coming into force, early Court of Appeal decisions in England and Wales made it clear that “exceptional circumstances” did not include relatively commonplace features, such as a guilty plea, previous good character, youth and adverse consequences of conviction.⁸⁰
- 2.45 The “exceptional circumstances” identified by Stone fall into 2 categories, namely offence-based exceptionality and non-offence-based exceptionality (which generally focuses on the circumstances of the offender, or third parties).
- 2.46 With regard to offence-based exceptional circumstances, Stone identified one clear-cut example from the shire county analysis, namely where the individual is pressured to commit the offence, in particular the offence of fraud. However, Stone also highlights a number of Court of Appeal decisions that were predominantly offence-based. Instances of exceptional circumstances in these cases included:
1. Exceptional provocation;⁸¹
 2. The importation of drugs but a refusal to hand them over to the intended recipients, and
 3. The handling of burgled goods left in good faith to the individual in a will.
- 2.47 Within the sample of cases analysed by Stone, the circumstances justifying suspension were predominantly non-offence-based. From his analysis, Stone identified the following exceptional circumstances:
1. Seeking treatment, that is:
 - a) Taking active steps to receive help for his or her problems;
 - b) Evidence that real progress has been made and that immediate custody would jeopardise this, and
 - c) A high degree of motivation and effort.
 2. Tragic circumstances, such as:
 - a) Where an individual’s life has featured an unusual amount of sadness, sickness, childhood abuse or disadvantage.
 3. Improved circumstances and efforts where immediate custody would undermine this progress, such as where:
 - a) The individual has experienced a significant improvement in life circumstances or has obtained a moral standing in the community since the commission of the offence;

⁸⁰ *R v Okinikan* (1992) 14 Cr App R (S) 453; *R v Lowery* (1992) 14 Cr App R (S) 485; *R v Sanderson* (1992) 14 Cr App R (S) 561.

⁸¹ *R v Huntley* (1993) 14 Cr App R (S) 795; [1993] Crim LR 721.

- b) The individual has secured employment or a training course following a prolonged period of unemployment;
 - c) The individual has severed ties with bad influences, moved away and/or made a fresh start;
 - d) The individual has re-engaged positively with his or her relationships, particularly with his or her spouse or parents.⁸²
 - e) Any other demonstration of a reaffirmation of identity and citizenship.
4. Stale offence, such as where:
- a) There has been a considerable lapse in time since the commission of the offence;
 - b) The individual has made an effort to distance him- or herself from that period of his or her life.
5. Adverse effect of custody on others, that is, a need to avoid collateral damage to third parties, in particular young children, elderly parents or ill or disabled spouses.
6. Preserving the status quo, that is, where the individual has a settled lifestyle and immediate imprisonment would at best, severely disrupt and, at worst, completely destroy this situation.

The Court of Appeal of England and Wales also identified severe financial and emotional difficulties as an exceptional circumstance in *R v French*.⁸³ In this case, psychiatric evidence that an immediate custodial sentence would hamper her recovery from clinical depression further justified the imposition of a suspended sentence.

⁸² This was affirmed as an exceptional circumstance by the Court of Appeal of England and Wales in *R v Cameron* (1993) 14 Cr App R (S) 801, [1993] Crim LR 721.

⁸³ (1994) 15 Cr App R (S) 194, [1993] Crim LR 893.

QUESTION 2

Your views are sought on the following questions:

- 2(a) Should certain offences carry a presumption of custody? Do you agree that all those considered in this chapter should attract the presumption? Are there other offences you would add to the list?
- 2(b) What circumstances do you consider to be “exceptional” to justify the imposition of a suspended sentence where there is otherwise a presumption of a custodial sentence? Are there any other circumstances that should be taken into account when deciding whether to impose a suspended sentence for an offence that falls within the upper range on the scale of seriousness?
- 2(c) What range of exceptional circumstance should justify the full or partial suspension of a sentence of imprisonment where an offence carries a presumption of immediate custody?

Please type your comments (if any)

ISSUE 3

PRINCIPLES GOVERNING THE USE OF SUSPENDED SENTENCES

3.1 General principles of suspended sentences

- 3.01 As already noted, the power to suspend a sentence of imprisonment was well-established prior to the enactment of section 99 of the *Criminal Justice Act 2006*.¹ As such, the principles governing suspension of sentence have been judicially developed.
- 3.02 In *The People (DPP) v Loving*,² the defendant pleaded guilty to making a gain by deception contrary to section 6 of the *Criminal Law (Theft and Fraud Offences) Act 2001* and to possession of child pornography contrary to section 6 of the *Child Trafficking and Pornography Act 1998*. On the child pornography count he was sentenced to 5 years imprisonment – the statutory maximum for a conviction on indictment – with the final 2 years suspended on condition that he avail of any and all psychiatric services available within the Prison Service and that he place himself under the supervision of the Probation Service on his release from prison. The defendant appealed against the severity of sentence.
- 3.03 The defendant emphasised that, despite the suspension of the final 2 years, the sentence imposed by the trial judge should be treated as a sentence of 5 years for the purpose of the appeal. The Court of Criminal Appeal agreed that the sentence to be considered was one of 5 years and not 3 years. In so doing, the Court quoted with approval the leading English case *R v Mah-Wing*³ in which the Court of Appeal of England and Wales held:

“When the court passes a suspended sentence, its first duty is to consider what would be the appropriate immediate custodial sentence, pass that and then go on to consider whether there are grounds for suspending it. What the court must not do is pass a longer custodial sentence than it would otherwise do, because it is suspended.”⁴

¹ See discussion on the origins and development of the suspended sentence in the background to this Issues Paper.

² [2006] IECCA 28, [2006] 3 IR 355.

³ (1983) 5 Cr App R (S) 347.

⁴ *ibid* at 348.

- 3.04 The Court in *Loving* was satisfied that the trial judge had erred in imposing the maximum sentence permitted by law, namely a sentence of 5 years imprisonment, notwithstanding that 2 years had been suspended. The Court held that the decision to impose the maximum sentence implied that the actual offence was at the highest level of seriousness in light of both the intrinsic quality of the offence and the personal circumstances of the offender. It also failed to allow for the basic mitigating factors of a guilty plea and previous good character. On the count of possession of child pornography, the Court ultimately reduced the sentence from 5 years to 1 year in prison.⁵
- 3.05 The extract quoted by the Court of Criminal Appeal in *Loving* from the English decision in *Mah-Wing* encompasses the 2 fundamental principles of suspended sentences. The first is that a court should not impose a suspended sentence unless it is satisfied that the offence is sufficiently serious to merit a sentence of imprisonment. From this principle, known as the *O'Keefe* principle,⁶ a 3-stage test can be derived:
1. The court must eliminate all community sanctions before deciding that this is a case for imprisonment;
 2. The court must then sentence the individual to a term of imprisonment;
 3. The court must then ask whether there are any reasons why the sentence of imprisonment need not be served immediately.
- 3.06 This principle emphasises that a suspended sentence is essentially a custodial sentence, albeit one that is not served in prison. The principle also adheres to the general sentencing consideration that imprisonment should be the sanction of last resort.
- 3.07 The second fundamental principle of suspended sentences, as set out in *Mah-Wing* in the extract quoted above, is that a term of imprisonment should never be increased merely because it is to be suspended. Increasing the length of the term of imprisonment can later create a misleading impression of the seriousness of the offence. Furthermore, if a suspended sentence is breached, the offender is at risk of serving a longer than deserved sentence of imprisonment.
- 3.08 These principles have been widely accepted. Although not referred to by name, they were effectively approved of in *The People (DPP) v Hogan*,⁷ which concerned the

⁵ The Court of Criminal Appeal conducted an extensive review of the case law regarding sentencing for possession of child pornography, including an analysis of 14 cases reported in *The Irish Times* between 1 January 2003 and 1 February 2006 and a review of a Court of Criminal Appeal case, *The People (DPP) v McC* [2003] 3 IR 609, in which the graduated levels of seriousness suggested by the Court of Appeal of England and Wales in *R v Oliver* [2003] 1 Cr App R 28 were approved. The Court then went on to identify the applicable range with reference to section 6 of the *Child Trafficking and Pornography Act 1998* and then to locate the present case within that range with reference to both aggravating and mitigating factors.

⁶ *R v O'Keefe* [1969] QB 29. The Court of Appeal of England and Wales held: "[B]efore one gets a suspended sentence at all, the Court must first go through the process of eliminating other possible courses, such as absolute discharge, conditional discharge, probation order, fines, and then say to itself: this is a case for imprisonment, and the final question, it being a case for imprisonment, should be: is immediate imprisonment required, or can a suspended sentence be given?"

⁷ Court of Criminal Appeal 4 March 2002.

length of the operational period of a suspended sentence. The Court of Criminal Appeal held that “[t]he correct approach is, first of all to determine the length of custodial sentence which is appropriate and, then if so minded, to suspend it either in its entirety or for part thereof.” The Court went on to describe this approach as logical. In *Moore v Brady*,⁸ the High Court (Feeney J), quoting *Loving*, endorsed the *O’Keefe* principle, commenting that “a suspended prison sentence is to be treated in the first instance as a recognition that an offence has been committed which would warrant an immediate custodial sentence.” In *The People (DPP) v Floyd*,⁹ the Court of Appeal reiterated the *Mah-Wing* principle by finding an error of principle where the trial judge, having decided that the appropriate sentence was one of 5 years imprisonment, imposed 6 years with 1 year suspended. The Court substituted a sentence of 5 years with 1 year suspended. In *The People (DPP) v Slattery*,¹⁰ the Court of Appeal held:

“As is well established, the issue of a suspended sentence is entirely distinct from the passing of a custodial sentence. The decision to issue a suspended sentence must take place only after a headline custodial sentence has been decided, as accepted in this jurisdiction in *The People (DPP) v Loving* [2006] 3 IR 355.”¹¹

3.09 The *O’Keefe* and *Mah-Wing* principles, as adopted by the Irish courts, represent the fundamental principles of suspended sentences developed by the courts. These 2 principles are primarily concerned with how a suspended sentence is imposed. From these guiding principles, 3 more tentative principles with regard to other aspects of the suspended sentence can be distilled, namely:

1. The conditions of suspension should be selected carefully and clearly defined so that the individual that is subject to the suspended sentence has a realistic chance of complying with them;¹²
2. The length of the operational period should be considered part of the punishment,¹³ and
3. There is a presumption that the offender is liable to serve the entire custodial sentence where he or she is found to be in breach of a condition of suspension.¹⁴

⁸ [2006] IEHC 434.

⁹ [2014] IECA 39.

¹⁰ [2017] IECA 90.

¹¹ *ibid* at paragraph 34.

¹² O’Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 22-09. See also: *The People (DPP) v Johnston* [2010] IECCA 97, in which the Court of Criminal Appeal held that the sentencing judge had been correct not to impose a suspended sentence because, in light of the defendant’s previous record, there was a real risk that he may have ended up serving the sentence. In *R v Law* Northern Ireland Court of Appeal (Criminal Division) 29 June 1973, the Court held that, generally speaking, it is undesirable to impose a suspended sentence on an offender who, by his or her record, has shown that he or she will almost invariably breach the suspended sentence.

¹³ O’Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 22-05.

¹⁴ Under the common law, a court could either decide to ignore a de minimis breach or activate the sentence entirely. There was no provision for activating the suspended sentence in part (see: *The People (DPP) v Stewart* Court of Criminal Appeal 12 January 2004). Although section 99 of the *Criminal Justice Act 2006* now provides for the part-activation of a suspended sentence, there is a

- 3.10 Some Australian territories have placed the fundamental principles of suspended sentences on a statutory footing.¹⁵ There has been no formal recognition of the *O'Keefe* and *Mah-Wing* principles in Irish legislation. However, it could be argued that the reference to "a term of imprisonment" in section 99 of the *Criminal Justice Act 2006* requires sentencers to impose suspended sentences in line with the *O'Keefe* principle.

3.2 The application of the principles of suspended sentences

- 3.11 Although the importance of applying these principles has been recognised in Ireland,¹⁶ the extent to which they are applied in practice is unclear. With the exception of the cases discussed above, Irish case law on suspended sentences rarely discusses the purpose and principles of the suspended sentence other than the issue of proportionality. When the issue of a suspended sentence comes before an appeal court, the focus of the review is invariably on the issue of proportionality or the sentencing procedure rather than the principles of the sanction. In general, Irish case law on suspended sentences tends to focus on the procedural aspects of the sanction.
- 3.12 It has been argued that, at a formal level, a sentence of imprisonment is indeed pronounced before it is suspended, but, at an informal level, at least in the case of a fully suspended sentence, the sentencing courts never intended that the offender would go to prison but impose a suspended sentence as a mechanism for securing the future good behaviour of the offender.¹⁷ Research into the perspectives of judges on the principles of suspended sentences revealed that although some judges expressly mentioned that they impose suspended sentences in lieu of immediate custodial sentences, others conceded that a tendency existed among the Irish judiciary to fashion a suspended sentence in a less restrictive manner than that prescribed by the *O'Keefe* and *Mah-Wing* principles.¹⁸ Furthermore, a number of judges mentioned a tendency to impose longer terms of custody because the sentence would be suspended.¹⁹ In light of this, it has been argued that although a significant number of suspended sentences are imposed by the criminal courts every year, only a small percentage of these are imposed as genuine alternatives for immediately contemplated custodial sentences.²⁰ It has further been argued that

presumption that the offender will serve the entire activated sentence of imprisonment unless the court considers this to be unjust in all of the circumstances of the case. See also: Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 228.

¹⁵ Section 40(3) of the *Sentencing Act 1995* (NT); sections 143 and 144(4) of the *Penalties and Sentences Act 1992* (Qld); Section 76(2) of the *Sentencing Act 1995* (WA).

¹⁶ O'Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraphs 22-08 – 22-09. See also: Irish Penal Reform Trust, *Position Paper 5 – Penal Policy with Imprisonment as a Last Resort* (2009) at paragraph 3.1., in which the IPRT argue that requiring judges to exhaust all other options before resorting to a sentence of imprisonment will prison overcrowding.

¹⁷ Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 217.

¹⁸ *ibid* at 241 and 261.

¹⁹ *ibid* at 261.

²⁰ *ibid* at 217.

rather than being used as alternatives to immediate imprisonment, suspended sentences are used as alternatives to other alternatives to imprisonment, such as probation and community service.²¹

- 3.13 It has been argued that the non-application of the *O'Keefe* and *Mah-Wing* principles could offend the principle of proportionality by the imposition of a longer term of imprisonment than would have otherwise been imposed were the sentence to be served immediately.²² This is particularly evident in instances in which the offender breaches a condition of suspension and is now liable to have the suspended sentence activated. However, it has also been argued that, viewed from a quasi-contractual point of view, the extra custodial element attached to the suspended sentence is the price that the offender must pay to have the sentence suspended in the first place.²³ In so doing, judges look to the responsabilisation of the offender as the salient feature when imposing the suspended sentence.

3.2.1. Net-widening or penalty escalation

- 3.14 Research from other jurisdictions has suggested that failing to apply the above principles can have an inflationary effect in the form of net-widening or penalty escalation. This refers to a tendency to use the suspended sentence as a substitute for less severe or intrusive measures such as community service and probation.²⁴ In England and Wales, research has shown that following the repeal of the "exceptional circumstances" proviso in 2005, the use of suspended sentences increased significantly. Suspended sentences accounted for 25% of all sanctions in 2013 compared to 1% in 2004. In indictable cases, the use of suspended sentences rose from 1% in 2004 to 13% in 2013. The use of immediate imprisonment also rose during this time period, but most significantly, there was a notable decline in the use of community sanctions.²⁵ Research conducted in Victoria found that, following the introduction of the suspended sentence, up to 50% of offenders that received a suspended sentence would have previously received a more lenient sanction such as probation, a fine or community service.²⁶ In New South Wales, it was found that up to 88% of suspended sentences imposed in the local courts represented net-widening.²⁷ The figures from New Zealand, albeit lower at 8% to 22%, also suggest a net-widening effect.²⁸
- 3.15 There is very little research in Ireland on the existence of net-widening or penalty escalation. The analysis that does exist concentrates on the possible net-widening

²¹ Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 217.

²² *ibid* at 261-262.

²³ *ibid* at 262.

²⁴ Austin & Krisberg, "Wider, Stronger and Different Nets: the Dialectics of Criminal Justice Reform" (1981) 18 *Journal of Research in Crime and Delinquency* 105; McMahon, "Net-Widening: Vagaries in the Use of a Concept" (1990) 38 *British Journal of Criminology* 121; Prichard, "Net-Widening and the Diversion of Young People from Court: a Longitudinal Analysis with Implications for Restorative Justice" (2010) 43 *Australian and New Zealand Journal of Criminology* 112.

²⁵ Roberts, "The Rise of the Suspended Sentence of Imprisonment in England and Wales" (2014) *Sentencing News* Issue 1 at 10.

²⁶ Tait, "The Invisible Sanction: Suspended Sentences in Victoria 1985-1991" (1995) 28 *Australian and New Zealand Journal of Criminology* 143 at 149.

²⁷ Brignell & Poletti, "Suspended Sentences in New South Wales" (2003) *Sentencing Trends and Issues* No. 29 at 11.

²⁸ Spier *Conviction and Sentencing of Offenders in New Zealand: 1987 to 1996* (Ministry of Justice 1997).

effect of community service orders in that there is a risk that these orders are being used as alternatives to lower tariff community sanctions rather than alternatives to imprisonment.²⁹ It could be possible that the suspended sentence could be used in a similar manner, especially for those not considered suitable for community service.³⁰ As a reduction in the size of the prison population is a key policy concern,³¹ it is important that individuals are not sent to prison unnecessarily, especially if the offence that they have committed never warranted a custodial sentence in the first place.

- 3.16 Failure to adhere to the *O'Keefe* and *Mah-Wing* principles creates the risk of suspended sentences being imposed where no sentence of immediate imprisonment was ever contemplated by the sentencer. The courts have, in the past at least, been criticised for imposing a suspended sentence in circumstances in which a custodial sentence was not contemplated, but also for inflating the sentence by increasing the length of the custodial element of the sanction merely because the sentence is to be suspended.³² In effect, it is likely that the Irish courts do not always apply the *O'Keefe* or *Mah-Wing* principles, as adopted by *Loving*,³³ when imposing a suspended sentence. Although there is a dearth of research into the principles and use of suspended sentences in Ireland, from the preceding discussion it can be argued that the net-widening or penalty escalation effect of the suspended sentence experienced in other jurisdictions is likely to be present in this jurisdiction.

3.2.2. Monitoring the application of the principles of suspended sentences

- 3.17 Monitoring the application of the *O'Keefe* and *Mah-Wing* principles is difficult in the absence of established sentencing guidance or custody thresholds. In contrast to other common law jurisdictions, Ireland has a largely unstructured sentencing system,³⁴ which is based on the principle of individualised justice. There is also a distinct possibility that the principles governing the use of suspended sentences, as adopted by the Court of Criminal Appeal in *Loving*³⁵ and in subsequent cases,³⁶ may be applied differently in the District Court and the Circuit Court where the majority of suspended sentences are imposed. In England and Wales it is more straightforward to assess whether an offence has passed the custody threshold with reference to established sentencing guidelines and custody thresholds. The *O'Keefe* 3-step test has been included in the relevant guidelines to be followed when deciding whether to

²⁹ Walsh & Sexton, *An Empirical Study of Community Service Orders in Ireland* (1999) at 67; Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 399-400.

³⁰ It has been suggested that there is a perception that CSOs are unsuitable for offenders with addictions (see: Expert Group on the Probation and Welfare Service, *Final Report of the Expert Group on the Probation and Welfare Service* (1999)). As the suspended sentence can be made conditional upon the offender undergoing treatment for alcohol or drug addiction, it can be argued that the suspended sentence is more appropriate in cases involving addiction.

³¹ Working Group on Penal Policy, *Strategic Review of Penal Policy: Final Report* (July 2014) recommendation 8.

³² Ryan & Magee *The Irish Criminal Process* (Mercier Press 1983); Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 260.

³³ [2006] IECCA 28, [2006] 3 IR 355.

³⁴ Bacik, "The Practice of Sentencing in the Irish Courts" in O'Mahony (ed), *Criminal Justice in Ireland* (IPA 2002) at 348.

³⁵ [2006] IECCA 28, [2006] 3 IR 355.

³⁶ *Moore v Brady* [2006] IEHC 434; *The People (DPP) v Floyd* [2014] IECA 39; *DPP v Slattery* [2017] IECA 90.

suspend a sentence of imprisonment.³⁷ In Ireland, however, it is difficult to show that a judge erred in deciding that an offence merited imprisonment, save in the clearest of cases. In *The People (DPP) v Floyd*,³⁸ for example, the sentencing judge considered 5 years to be the appropriate sentence. He proceeded to impose a 6 year sentence of imprisonment and suspended the final year. The Court of Appeal held that the judge had erred in principle, as a suspended sentence is a real sentence which may end up being served should a condition of suspension be breached or should the defendant commit a subsequent offence. The Court substituted a sentence of 5 years with the final year suspended.

- 3.18 Monitoring the imposition of the general principles of suspended sentences would ensure their just and correct use. Furthermore, such monitoring would enable research to be conducted into the effective use of the sanction and to minimise any potential instances of net-widening or penalty escalation, thereby enhancing not only its punitive value but also its potential as a mechanism for reducing rates of re-offending.

3.2.3. Sentencing Information System database 2007-2010

- 3.19 In this respect, the Irish Sentencing Information System was designed to gather, analyse and disseminate sentencing information within the State. It was intended to be descriptive, rather than prescriptive, in nature with a searchable database that would be available as a reference tool. As such, it was not intended to restrict judicial discretion because the manner and extent to which it would be used was to be left to the discretion of the individual judge. In so doing, the individualised nature of the Irish sentencing system would be maintained.
- 3.20 A pilot project which began in 2007 created a sentencing database, particularly for sentences imposed in the Dublin Circuit Criminal Court.³⁹ Researchers attended sentencing hearings and gathered the relevant sentencing data that would be inputted into the database. Only matters where the researcher was aware of all of the evidence put before the judge are contained in the database. This means that data was not collected where, for example, matters were adjourned, or where the researcher was not present on the first date on which evidence was heard. Researchers collected sentencing information from as broad a selection of judges and offences as possible. However, collection of information on offences was naturally limited to the types of offences coming before the Circuit Court.
- 3.21 The database contains sentencing information for cases heard between 2007 and 2010. In total, there are 447 cases in the database, the majority of which are from 2007 (180) and 2008 (140). The vast majority of offences are offences common to the

³⁷ Sentencing Guidelines Council for England and Wales, *New Sentences: Criminal Justice Act 2003 (2004)* at paragraph 2.2.11. The test states that a court must ask the following questions: (a) has the custody threshold been passed? (b) if so, is it unavoidable that a custodial sentence be imposed? (c) if so, can that sentence be suspended, bearing in mind that the court must be clear that it would have imposed a custodial sentence if the power to suspend were not available?

³⁸ [2014] IECA 39.

³⁹ The pilot project was extended outside of Dublin in April 2008 to include the Cork Circuit. For a detailed discussion on the Irish Sentencing Information System see Conroy & Gunning, "The Irish Sentencing Information System (ISIS): A Practical Guide to a Practical Tool" (2009) 1 *Judicial Studies Institute* 37.

Circuit Court such as robbery, burglary, unauthorised taking of a motor vehicle, possession of controlled drugs for sale or supply, and assault causing harm. The database also records some less common offences such as possession of child pornography, dangerous driving causing death and violent disorder. The database also records a small selection of cases such as child neglect, making a counterfeit social welfare travel pass and keeping a brothel.

- 3.22 With regards to suspended sentences, approximately 27% of all cases contained in the database received a wholly suspended sentence. The database makes it possible to extract part-suspended sentences from unsuspended sentences of imprisonment, which gives a more accurate view of sentences of immediate imprisonment. The database also provides information on the types of conditions attached to wholly- and part-suspended sentences. In the vast majority of cases, offenders were placed under the supervision of the Probation Service as a condition of suspension in addition to the standard conditions to keep the peace and be of good behaviour.
- 3.23 The sentencing information captured by this limited database is useful. However, it must be noted that the database has not been updated since 2010 and the information available predominantly covers sentences imposed in the Dublin Circuit Court only. Nevertheless, the initial pilot project undertaken between 2007 and 2009 is commendable and the continued collection and dissemination of sentencing information is highly desirable.

3.2.4. Proposed Sentencing Information Committee in *Judicial Council Bill 2017*

- 3.24 The *Judicial Council Bill 2017*, currently before the Oireachtas, proposes the establishment of a Judicial Council to promote and maintain excellence and high standards of conduct by judges. Section 18 of the 2017 Bill proposes the establishment of a Sentencing Information Committee, which would collate information on sentences imposed by the courts and disseminate that information to relevant parties from time to time. As such, this Committee would provide a statutory basis for work begun by the Irish Sentencing Information System, discussed above, and would thus be very well placed to develop sentencing guidance derived from any future database.

3.3 Analysis of Sentencing Information in the Courts Service Annual Reports

- 3.25 Sentencing statistics play a fundamental role in developing sentencing guidance that is consistent and reflects current sentencing practices. It has been suggested that information on general sentencing trends, patterns and standards can promote informed debate on consistency in sentencing, the scaling of the gravity of specific offences and whether certain offences are more prevalent than others.⁴⁰ It must be noted, especially in light of Ireland's current individualised sentencing system, that sentencing statistics are not intended to be used to influence sentencing in individual

⁴⁰ Freiberg & Krasnostein *Statistics, Damn Statistics and Sentencing* (Paper presented at the Australian Institute of Judicial Administration Conference 7-9 September 2011).

cases, but can provide important information on current sentencing practices and the development of sentencing guidance. As noted above, the Sentencing Information System database has not been updated since 2010. In the absence of the kind of research envisaged by section 18 of the *Judicial Council Bill 2017*, the Commission has analysed some useful data on sentencing published in the Annual Reports of the Courts Service from 2006 to 2015.

3.3.1. Methodology

- 3.26 The sentencing information extracted from the Courts Service Annual Reports for the years 2006 to 2015 was selected to ensure a large sample size and to encompass sentencing information following the enactment of section 99 of the *Criminal Justice Act 2006*. As there was some inconsistency in the reporting of specific offences and types of sanctions over the time period,⁴¹ the information was standardised in order to ensure the largest consistent sample size possible over the given time period. For the District Court, offences were standardised to include specific road traffic offences, namely drink driving, dangerous driving and unauthorised taking of a motor vehicle. It should be noted that data on the unauthorised taking of a motor vehicle is only available between 2006 and 2011. Sanctions imposed in the District Court were standardised to include probation, fines, community service orders, suspended sentences and imprisonment. In the Circuit Court, offences were standardised to include assault, sexual offences, drug offences, firearms offences, road traffic offences, and theft/robbery/fraud (these offences were generally grouped together in the sentencing information provided by the Courts Service). Sanctions imposed in the Circuit Court were standardised to include fines, community service orders, suspended sentences and imprisonment.⁴² As raw numbers are provided by the Courts Service Annual Reports, the sanctions included in this research were expressed as a proportion of total sanctions imposed by the courts.⁴³
- 3.27 Furthermore, the Annual Reports provide separate sentencing information on sanctions imposed in the Dublin Circuit Court and Provincial Circuit Courts. This information was amalgamated into one set of information encompassing sentencing information in the Circuit Court in general. Finally, sentencing information on the total sanctions imposed, the sanctions imposed for specific offences, and, in particular, the use of suspended sentences was extracted. The results of this analysis are discussed below.

3.3.2. Limitations

- 3.28 It must be noted that there are some limitations with regard to this analysis of sentencing information. Firstly, information on the number of suspended sentences

⁴¹ Other types of sanctions included dismissal, peace bond, poor box, disqualification and taken into consideration, etc. In many cases the Reports record other types of sanctions as "other".

⁴² Between 2006 and 2011, information on the length of the sentence of imprisonment (up to 2 years, 5 years, 10 years and over 10 years) is recorded.

⁴³ Total sanctions refers to all sanctions included in this research, that is, fines, community service orders, suspended sentences and imprisonment for the Circuit Court and probation, fines, community service orders, suspended sentences and imprisonment for the District Court (see paragraph 3.26) as well as all other sanctions as provided for by the Courts Service Annual Reports over the given time period.

imposed is provided in the Courts Service Annual Reports. However, there is no specific information on the imposition of part-suspended sentences. It was therefore assumed that part-suspended sentences fall into the “imprisonment” categories for both the District Court and the Circuit Court. In 2008, sentencing information in the District Court specified for the first time that the “imprisonment” category also includes part-suspended sentences. It is also worth noting that with regard to sentences imposed in the District Court for specific road traffic offences, “penalty points” were substituted for “unauthorised taking of a motor vehicle” in 2012. As a result, the information contained in the statistical analysis below on sanctions imposed by the District Court for unauthorised taking of a motor vehicle is limited to the years 2006–2011. Finally, it must be noted that the sentencing information provided records the imposition of a sentence at first instance. As such, where a sentence is appealed and subsequently quashed or varied, this is not reflected in the statistical information provided below.

3.3.3. Results: general

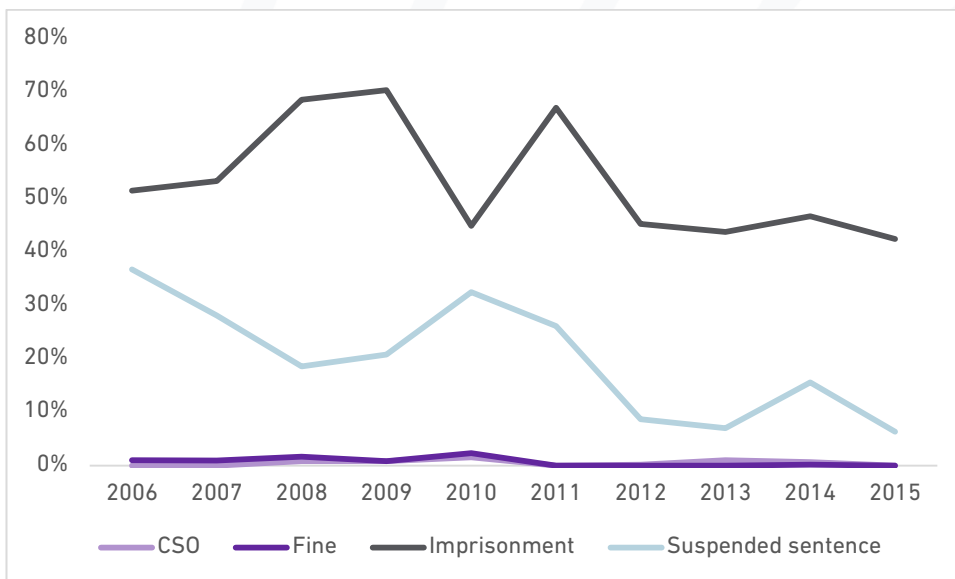
- 3.29 The results of the analysis of sentencing information in the Courts Service Annual Reports between 2006 and 2015, set out in *figures 3 to 12* below, suggests that there has been a decrease in the use of the suspended sentence in the Circuit Court for specific offences. In 2006, 40% of all sanctions⁴⁴ imposed for specific offences in the Circuit Court were suspended compared to 18% in 2015. The use of suspended sentences in the District Court for specific road traffic offences, namely dangerous driving, drink driving and the unauthorised taking of a motor vehicle, has generally remained constant at around 2% between 2006 and 2015.
- 3.30 As a proportion of all sentences imposed for assault between 2006 and 2015, 31% were suspended. 25% of all sentences imposed for drug offences and 22% of all sentences imposed for firearms offences were suspended during the same 10 year period. 22% of all sentences imposed for theft/robbery/fraud between 2006 and 2015 were suspended while sexual offences received the least amount of suspended sentences as a proportion of all sentences imposed in such cases with 14% being suspended. The majority of cases in the District Court for dangerous driving, drink driving and the unauthorised taking of a motor vehicle were dealt with by way of a fine. Suspended sentences were imposed in only a small proportion of cases. 4% of all sentences imposed for the unauthorised taking of a motor vehicle were suspended between 2006 and 2015, whereas 2% of all sentences imposed for dangerous driving and 1% of all sentences imposed for drink driving were suspended during the same time period.

⁴⁴ It must be kept in mind that when referring to “all sanctions” what is meant is all sanctions analysed in this research, that is, fines, community service orders, suspended sentences and imprisonment for the Circuit Court and probation, fines, community service orders, suspended sentences and imprisonment for the District Court. For a discussion on the selection methodology of these specific sanctions, see paragraph 3.26.

3.31 3.3.4. Results: sexual offences and assault

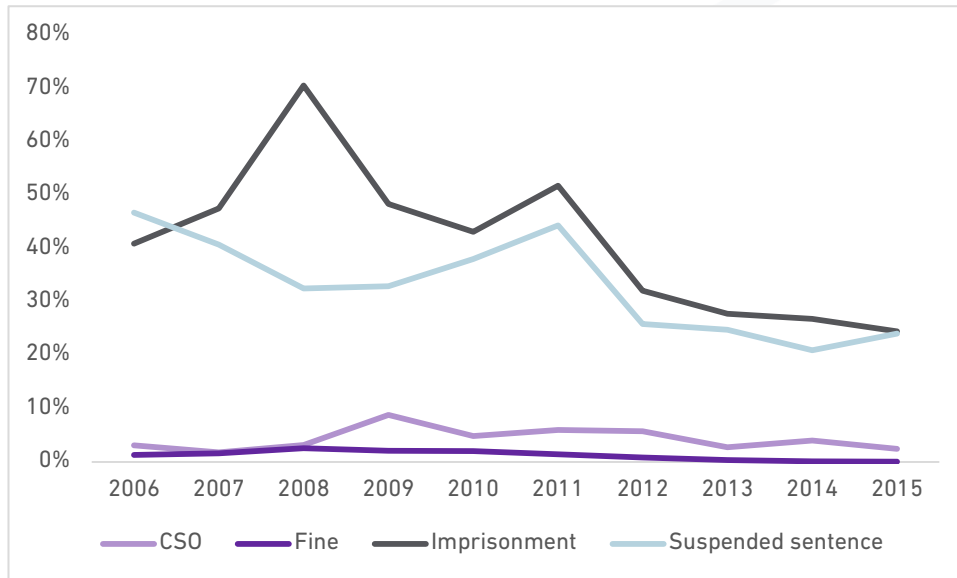
Figures 3 and 4 illustrate the sanctions imposed by the Circuit Court for sexual offences and assault. In general fewer suspended sentences have been imposed for these offences in the 10 year period covered. In 2006, 37% of all sanctions imposed for sexual offences were suspended compared with 6% in 2015. In assault cases, 47% of all sanctions imposed in 2006 were suspended sentences compared with 24% in 2015. With regard to sexual offences, the majority of cases received sentences of imprisonment. This is supported by the findings of research into rape sentencing conducted by the Judicial Researchers Office and presented by Charleton and Scott.⁴⁵ It is also supported by the discussion above regarding the presumption of a custodial sentence for rape and serious offences in general.⁴⁶ The majority of assault cases also received sentences of imprisonment. This is also in keeping with the discussion above on exceptions to the principle of last resort.

Figure 3: Sanctions imposed in the Circuit Court for sexual offences 2006-2015



⁴⁵ Charleton and Scott, "Throw Away the Key: Public and Judicial Approaches to Sentencing – Towards Reconciliation" (2013) 10 *Irish Probation Journal* 7. See also: paragraph 2.12.

⁴⁶ See paragraphs 2.06-2.12 and 2.39.

Figure 4: Sanctions imposed in the Circuit Court for assault 2006-2015

3.3.5. Results: drugs and firearms offences

3.32 *Figures 5 and 6* illustrate the sanctions imposed by the Circuit Court for drugs and firearms offences. Similar to sexual offences and assault, the use of suspended sentences for drugs and firearms offences has decreased over this time period. In 2006, 46% of all sanctions imposed for drug offences were suspended compared to 21% in 2015. 41% of all sanctions imposed for firearms offences in 2006 were suspended compared to 17% in 2015. These two offences carry presumptive minimum sentences under the *Misuse of Drugs Act 1977* and the *Firearms Acts*.⁴⁷ It is unsurprising, then that, generally, the majority of sentences imposed for these offences were sentences of imprisonment. With regard to drug offences, a possible cause of the large increase in sentences of imprisonment in 2007 could be the amendment to the *Misuse of Drugs Act 1977*, which provided for a presumptive minimum sentence of 10 years. It is interesting to note sharp decline in the use of both imprisonment and suspended sentence in 2012 with regard to both drug and firearms offences. In fact, from 2013 onwards, it appears that more suspended sentences than sentences of imprisonment were imposed for drug offences. The reason for this sharp decline is unclear and more research will have to be conducted to establish some likely causes.

⁴⁷ For an in-depth discussion, see paragraphs 2.22 – 2.37.

Figure 5: Sanctions imposed in the Circuit Court for drugs offences 2006-2015

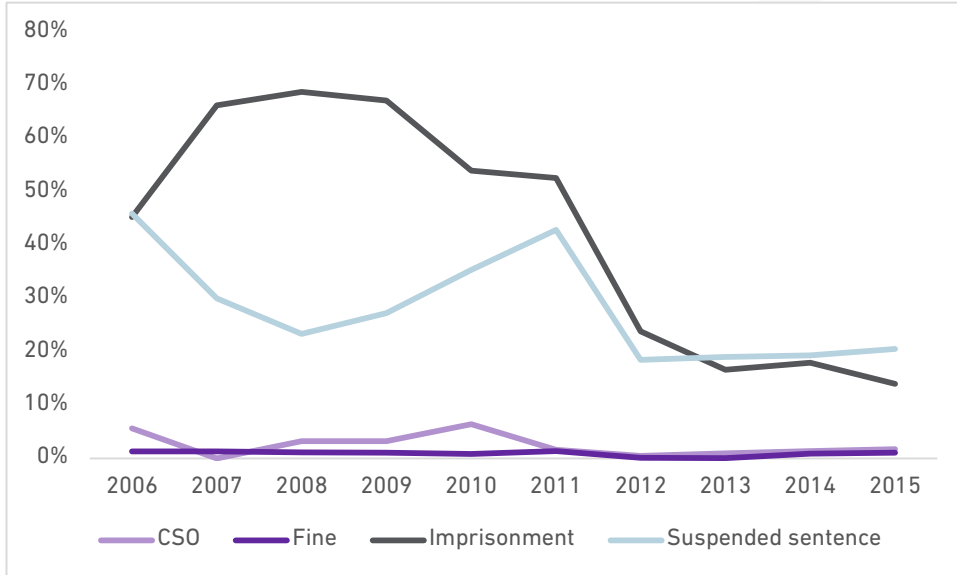
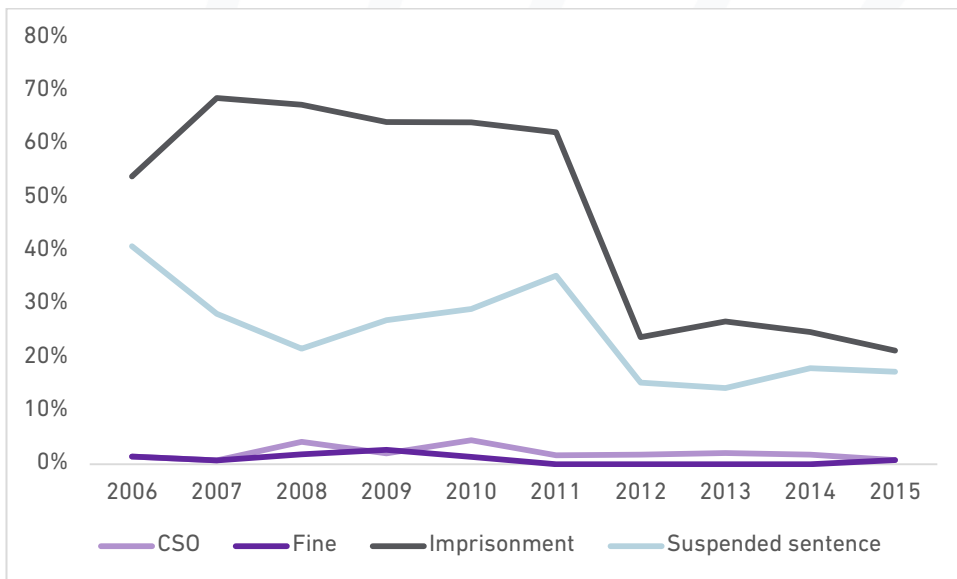


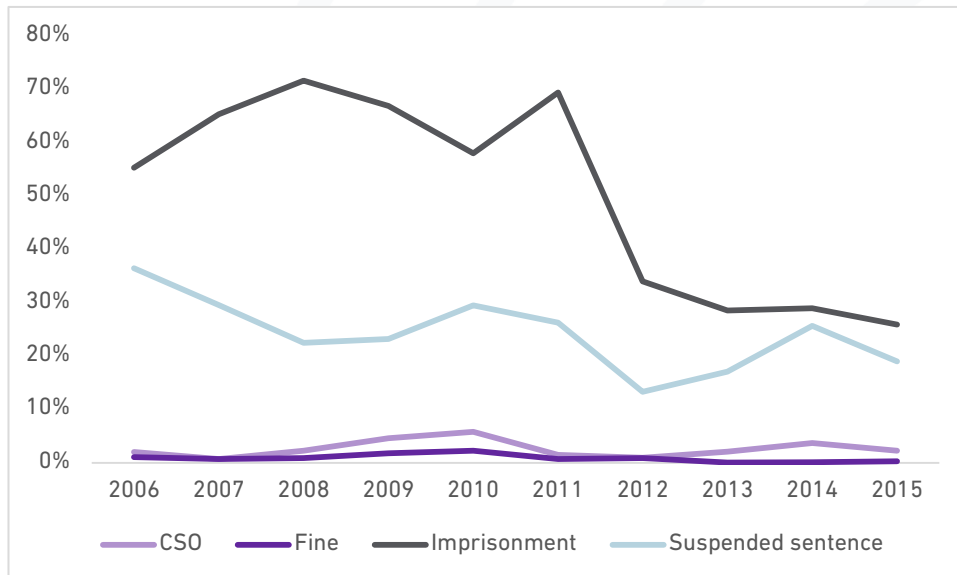
Figure 6: Sanctions imposed in the Circuit Court for firearms offences 2006-2015



3.3.6. Results: theft/robbery/fraud

Figure 7 illustrates sanctions imposed by the Circuit Court for theft/robbery/fraud. The data shows that the majority of these offences are dealt with by way of imprisonment. Between 2006 and 2011, the data shows that the majority of offenders received sentences of up to 5 years imprisonment for these offences. Similar to the offences discussed above, the use of suspended sentences for theft/robbery/fraud has decreased during this time period. In 2006, 37% of all sanctions imposed for theft/robbery/fraud were suspended compared to 19% in 2015.

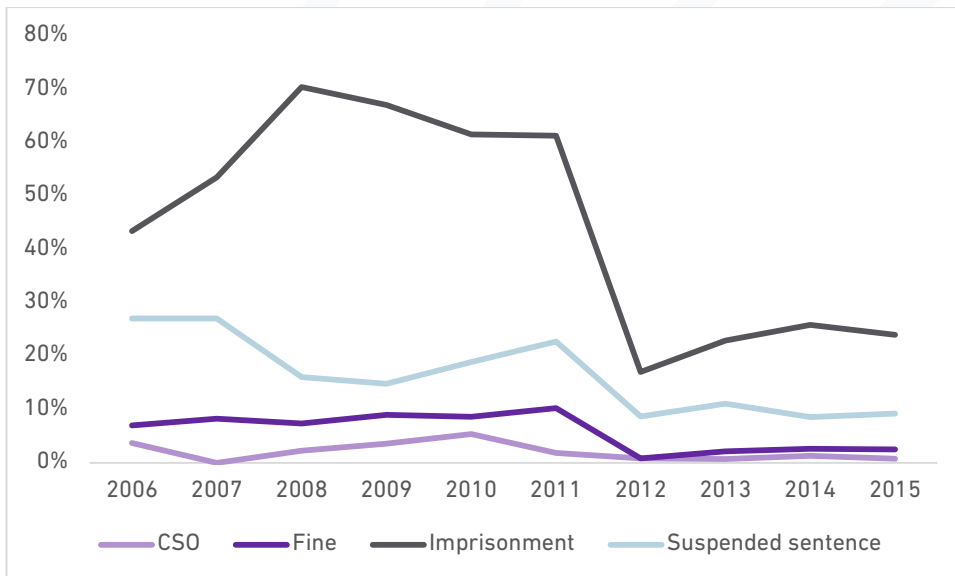
Figure 7: Sanctions imposed in the Circuit Court for theft/robbery/fraud 2006-2015



3.3.7. Results: road traffic offences

- 3.33 *Figure 8* illustrates sanctions imposed by the Circuit Court for road traffic offences. The data shows that the majority of sentences for road traffic offences dealt with in the Circuit Court were sentences of imprisonment. Between 2006 and 2011, the data shows that the majority of offenders received sentences of up to 5 years imprisonment. The use of suspended sentences for road traffic offences dealt with in the Circuit Court has also decreased during this time period. 27% of all sanctions imposed for these offences were suspended in 2006 compared to 9% in 2015. It is also interesting to note the comparably higher levels of fines and community service orders with regard to road traffic offences dealt with in the Circuit Court.

Figure 8: Sanctions imposed in the Circuit Court for road traffic offences 2006-2015



- 3.34 In the District Court, with regard to specific road traffic offences, the majority of cases were dealt with by way of a fine. *Figure 9* illustrates the use of fines for dangerous driving, drink driving and the unauthorised taking of a motor vehicle in the District Court. *Figures 10 to 12* illustrate the remaining sanctions imposed by the District Court for these specific road traffic offences. As a proportion of all specific road traffic offences dealt with in the District Court and included in this research (i.e. dangerous driving, drink driving and the unauthorised taking of a motor vehicle) the unauthorised taking of a motor vehicle received the most suspended sentences.⁴⁸

⁴⁸ It must be kept in mind that the data on the unauthorised taking of a motor vehicle is only available between 2006 and 2011.

Figure 9: Fines imposed by the District Court for specific road traffic offences 2006-2015

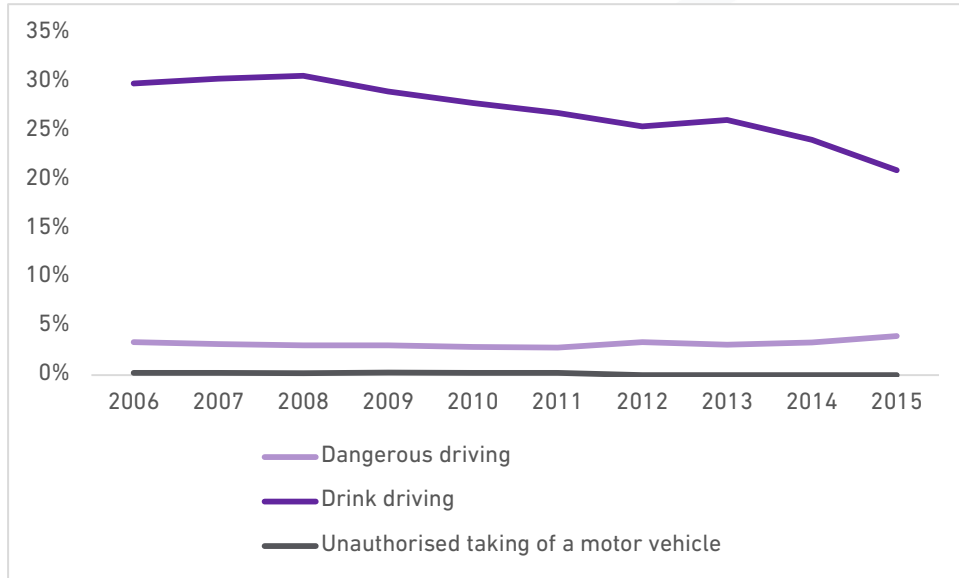


Figure 10: Sanctions imposed in the District Court for dangerous driving 2006-2015

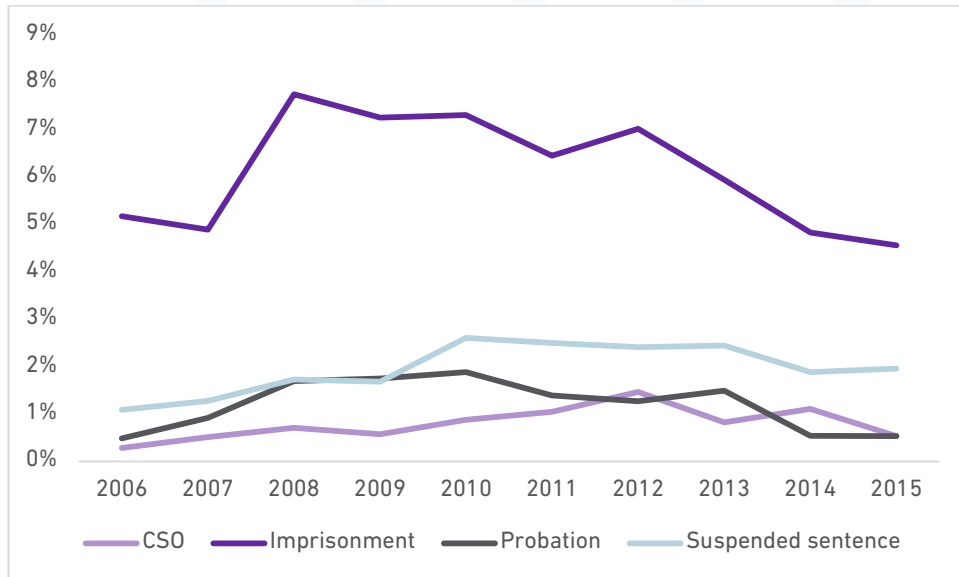


Figure 11: Sanctions imposed in the District Court for drink driving 2006-2015

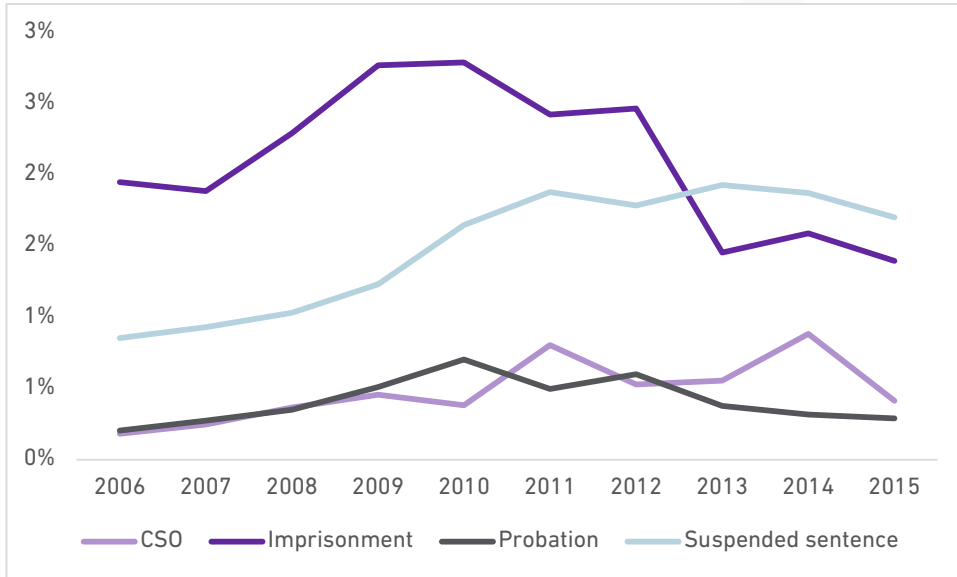
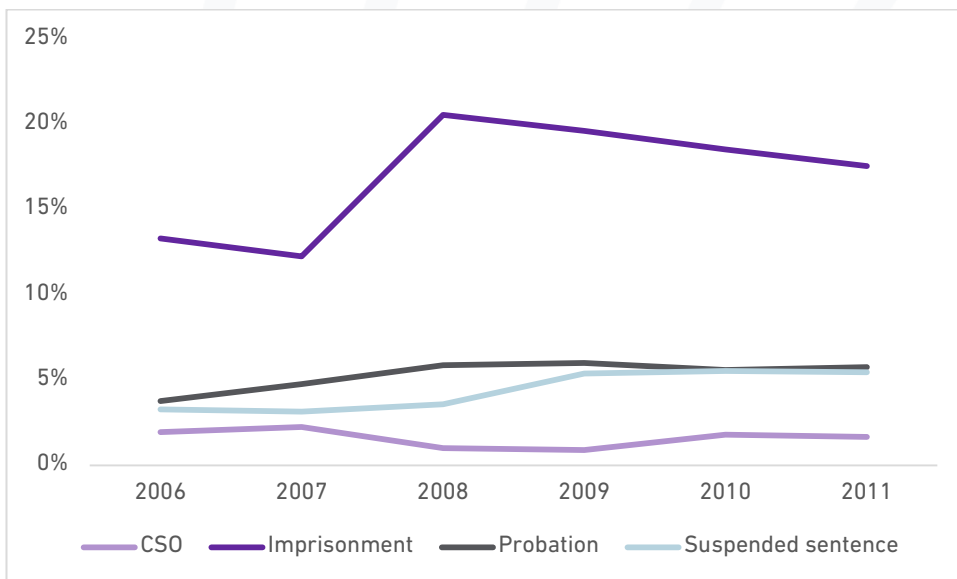


Figure 12: Sanctions imposed on the District Court for the unauthorised taking of a motor vehicle 2006-2011



3.4 When is a suspended sentence appropriate?

3.35 Issue 2 examined categories of serious offences in which the imposition of a suspended sentence may be inappropriate, save in exceptional circumstances. As already noted, there are very few legislative restrictions on the use of suspended sentences. In general, suspended sentences appear to be suitable for offences of moderate seriousness where the offender is a young, first time offender with good prospects of rehabilitation and general deterrence is not the primary sentencing

rationale.⁴⁹ It can also be argued that the suspended sentence is appropriate for serious offences where the level of culpability was particularly low, such as in cases of death caused by dangerous driving, but only where the harm was caused by a momentary or uncharacteristic lapse in the concentration of someone who is otherwise a careful driver.⁵⁰

- 3.36 A part-suspended sentence may be appropriate where the offence, in light of its inherent nature or the circumstances in which it was committed, is too serious to justify full suspension, but the presence of one or more mitigating factors or a real prospect of reform makes it just or expedient to suspend part of the sentence of imprisonment.⁵¹ In *The People (DPP) v O'Leary*,⁵² the defendant pleaded guilty to 3 serious robberies and one count of assault. The Court of Appeal considered the 10 year suspended sentence to be unduly lenient, as the gravity of the offences merited an immediate custodial sentence. The defendant had a gambling addiction and mental health issues but was making a determined effort to rehabilitate himself. Although on the particular facts of the case the Court of Appeal did not substitute a sentence of immediate custody, it nonetheless commented that in a case such as this it would have been more appropriate to impose a part-suspended sentence.
- 3.37 As already noted, in continental European jurisdictions, the suspended sentence was introduced as a mechanism for dealing appropriately with first-time offenders of general good character, usually sentenced to short-terms of imprisonment, and whose risk of reoffending was low.⁵³ The suspended sentence was considered to be an appropriate mechanism to ensure that such offenders avoided the negative effects of imprisonment, while also acknowledging the individualised and rehabilitative potential of punishment.⁵⁴

⁴⁹ O'Malley *Sentencing Law and Practice* 2nd ed (Thomson Roundhall) at paragraphs 22-09 – 22-12.

⁵⁰ *ibid* at paragraph 22-13.

⁵¹ *ibid* at paragraph 22-15.

⁵² [2015] IECA 128.

⁵³ *Ancel Suspended Sentence: A Report Presented by the Department of Criminal Science of the Institute of Comparative Law, University of Paris* (Heinemann 1971) at 12, 18.

⁵⁴ *ibid* at 12.

QUESTION 3

Your views are sought on the following questions:

- 3(a) Do the courts usually apply the *O'Keefe* and *Mah-Wing* principles when deciding to impose a suspended sentence and when determining the custodial term of such a sentence?
- 3(b) Should the *O'Keefe* and *Mah-Wing* principles be enshrined in legislation?
- 3(c) Is there a need for a mechanism to monitor the use of suspended sentences and the revocation of such sentences?

Please type your comments (if any)

ISSUE 4

LOCATING THE SUSPENDED SENTENCE WITHIN THE RANGE OF AVAILABLE PENALTIES

4.01 The suspended sentence has been referred to as “the chameleon” sanction, as it occupies an equivocal place in the Irish sentencing system.¹ Although the suspended sentence is a sentence of imprisonment, the “custodial” designation of the sanction is nominal unless it is activated for a breach of a condition of suspension. As a result, locating the suspended sentence on the range of available penalties is not a straightforward task. Furthermore, there appears to be a difference of opinion with regard to the actual location of the suspended sentence on the sentencing range. On the one hand, the suspended sentence has been regarded as a real punishment where the threat of activation of a known and certain sentence of imprisonment represents a real punishment that endures alongside the stigma of receiving a custodial sentence.² On the other hand, the suspended sentence has been regarded as a “let off”, requiring the offender to usually do no more than that which is expected of every citizen, namely to keep the peace and be of good behaviour.³

4.1 The suspended sentence: a real punishment?

4.02 A suspended sentence is, first and foremost, a sentence of imprisonment. Both the *O’Keefe*⁴ and *Mah-Wing*⁵ principles attest to this element of the sanction. Section 99 of the *Criminal Justice Act 2006* also specifically refers to a “term of imprisonment” that may be suspended.⁶ In *The People (DPP) v Loving*,⁷ the Court of Criminal Appeal located the suspended sentence just below a sentence of immediate imprisonment on the range of available penalties. From this, it is clear that, in principle at least, the suspended sentence should be located relatively high on the sentencing range.

¹ Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 215.

² O’Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraphs 22-04 – 22-05.

³ Ashworth, “Sentencing” in Maguire, Morgan & Reiner (eds), *The Oxford Handbook of Criminology* 3rd ed (Oxford University Press 2002) at 1103.

⁴ [1969] QB 29, [1969] 2 WLR 77, (1969) 53 Cr App R 91. See paragraphs 3.05 – 3.06.

⁵ (1983) 5 Cr App R (S) 347. See paragraph 3.07.

⁶ Section 50 of the *Criminal Justice Bill 1967*, which first proposed to put the suspended sentence on a statutory footing, also referred to “a sentence of imprisonment.”

⁷ [2006] IECCA 28, [2006] 3 IR 355; see paragraphs 3.02 – 3.04

- 4.03 The suspended sentence threatens future punishment for a past wrong.⁸ Those in favour of the suspended sentence argue that the “Sword of Damocles”⁹ element of the sanction represents a real deterrent and punishment. During the operational period, the threat of activation of the suspended sentence hangs over the individual that is subject to it. This threat of imprisonment, it is argued, is punishment in itself.¹⁰ It has also been argued that the sanction carries the full stigma of a sentence of imprisonment.¹¹ The fact that an offender now has a criminal record, even though the sentence of imprisonment was suspended, can have long-term consequences, particularly for young and first time offenders. Furthermore, the courts have the power to attach very onerous conditions to the suspended sentence in addition to the mandatory conditions to keep the peace and be of good behaviour. These conditions may require an individual to abstain from activities which he or she would otherwise be entitled to engage, or impose some positive obligations from which he or she would otherwise be exempt.¹² In *The People (DPP) v Harte*,¹³ the Court of Appeal held that a part-suspended sentence was not unduly lenient in light of the significant and onerous conditions attached to the sanction. It has also been expressly accepted that the length of the operational period forms part of the punishment,¹⁴ and the longer the operational period, the more onerous it is for the individual that is subject to it.
- 4.04 In *The People (DPP) v Christie*,¹⁵ the Court of Appeal dismissed an appeal against the undue leniency of a fully suspended 3 year sentence for arson of residential property. The Court held that the suspended sentence represented a real punishment that could be activated at any time should the offender fail to comply with the conditions of suspension. In particular, the Court noted the punitive impact of the “Sword of Damocles”, the operational period and the conditions of suspension. The Court concluded that although a suspended sentence did not involve the immediate deprivation of liberty, it nonetheless amounted to an onerous sanction.
- 4.05 Courts throughout the common law world have agreed that the suspended sentence represents a real punishment. In *Elliot v Harris (No. 2)*,¹⁶ for example, the Supreme Court of South Australia held:

“So far as being no punishment at all, a suspended sentence is a sentence of imprisonment with all of the consequences such a sentence involves on a

⁸ Bagaric, “Suspended Sentences and Preventative Sentences: Illusory Evils and Disproportionate Punishments” (1999) 22 UNSWLJ 535 at 535.

⁹ See Osborough “A Damocles’ Sword Guaranteed Irish: The Suspended Sentence in the Republic of Ireland” (1982) 17 *Irish Jurist* 221. The story of the Sword of Damocles, referred to by Cicero in his *Tusculan Disputations*, describes an imminent and ever-present threat hanging over an individual. In the story, Damocles taunts his king, Dionysius II of Syracuse, about how fortunate he is to be a man in a position of great power and authority. In response, Dionysius offers to swap places with Damocles and Damocles accepts. However, as Damocles takes his place on the king’s throne, Dionysius arranges for a sword to be hung over the throne, held in place by a single hair, which could descend at any moment. Eventually, Damocles begs to return to his position as courtier when he realises that with great fortune comes great danger. Cicero uses this story as part of his general theme that virtue is sufficient for a happy life.

¹⁰ O’Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 22-04.

¹¹ *ibid* at paragraph 22-05.

¹² *ibid* at paragraph 22-03.

¹³ [2015] IECA 121.

¹⁴ *The People (DPP) v Strange* [2011] IECCA 79.

¹⁵ [2017] IECA 110.

¹⁶ (1976) 13 SASR 516.

defendant's record and his future, and it is one which can automatically be called into effect on the slightest breach of the terms of the bond during its currency."¹⁷

- 4.06 Research into the perspectives of the judiciary on the suspended sentence revealed that most judges consider the suspended sentence to be located just below immediate imprisonment on the range of available penalties.¹⁸ This is a logical conclusion, as a suspended sentence is, in fact, a sentence of imprisonment, albeit one that is not served immediately.¹⁹

4.2 Distinguishing the suspended sentence from probation and deferred sentences

4.2.1. Suspended sentences and probation

- 4.07 There are many similarities between a suspended sentence of imprisonment and section 1 of the *Probation of Offenders Act 1907*. Two orders may be made under section 1(1) of the 1907 Act, namely a dismissal (where the charge is proved but it would be inappropriate to enter a formal conviction or punish the offender) and a conditional discharge (where the charge is proved but the offender will be sentenced for that offence only if he or she reoffends or breaches a condition of discharge within a period of time not exceeding 3 years). Section 1(2) of the 1907 Act, which applies to individuals convicted on indictment, only provides for a conditional discharge. Section 1(1) of the 1907 Act may be applied both to summary offences and to indictable offences tried summarily in the District Court.
- 4.08 While a conditional discharge under section 1 of the 1907 Act may, on the face of it, appear very similar to a suspended sentence, they are nonetheless distinct penalties. A suspended sentence is a recorded sentence of imprisonment, whereas a conditional discharge under section 1 of the 1907 Act may be imposed in lieu of a sentence of imprisonment (that is, a direct alternative to imprisonment). A conditional discharge does not involve the recording of a formal conviction, unless and until the offender breaches the conditions in which case he or she may be brought back to court and only then be subject to conviction and sentence. Although there are instances in which section 1(1) of the 1907 Act may be classified as a conviction,²⁰ it nonetheless does not represent a recorded sentence of imprisonment.

¹⁷ (1976) 13 SASR 516 at 527. See also Roberts & Gabor, "Living in the Shadow of Prison: Lessons from the Canadian Experience in Decarceration" (2004) 44 *British Journal of Criminology* 92 at 93-94 for a discussion on the punitive impact of the conditional sentence in Canada.

¹⁸ Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 251.

¹⁹ *The People (DPP) v Foley* [2014] IESC 2, [2014] 1 IR 360; *R v O'Keefe* (1969) 53 Cr App R 91; *R v Leigh* (1970) Cr App R 169; *Elliot v Harris* (No. 2) (1976) 13 SASR 516.

²⁰ Section 1(4) of the 1907 Act provides that "[w]here an order is made under this section by a court of summary jurisdiction, the order shall, for the purpose of revesting and restoring stolen property, and of enabling the courts to make orders as to the restitution and delivery of property to the owner and as to the payment of money upon or in connexion with the restitution or delivery, have like effect as a conviction." Section 6(12)(b) of the *Criminal Justice Act 1993*, which governs the use of compensation orders on foot of a conviction, provides that "references to conviction of a person include references to dealing with a person under section 1(1) of the *Probation of Offenders Act 1907*."

This is where the importance of applying the *O'Keefe* principle²¹ is particularly relevant not only to distinguish suspended sentences from conditional discharge, but also to locate the suspended sentence on the range of available penalties. As such, an order under section 1 of the 1907 Act should be, where relevant, preferred to a suspended sentence, which entails an immediate formal conviction and also the possibility of future imprisonment.²²

4.2.2. Suspended sentences and deferred sentences

- 4.09 Section 100 of the *Criminal Justice Act 2006* provides that a deferred sentence may be imposed provided that the offence is punishable by both a fine and imprisonment. This encompasses the vast majority of offences. Where a person is convicted of a crime, a court may defer the passing of a prison sentence for a specific period of time, not exceeding 6 months, during which the individual must keep the peace, be of good behaviour and abide by any other conditions attached by the court. The court specifies the length of the sentence that would have been imposed at the outset of the deferred sentence. The court must be satisfied that it is in the interests of justice to make a deferred sentence order.
- 4.10 The individual is required to attend a sitting of the court at a specified time or place not later than 1 month before the end of the operational period of the deferred sentence. If, at the sitting, the court is satisfied that the person has complied with the conditions, it shall not imposed the proposed term of imprisonment, but shall discharge the person forthwith. However, if the court is satisfied that the person has breached a condition of the deferment of sentence order, the court may impose the proposed term of imprisonment or such lesser term as it considers just in all of the circumstances of the case. The court may also decide that it would be unjust in all of the circumstances to impose any prison term, in which case the individual is discharged forthwith.
- 4.11 At first glance, the deferred sentence appears to be very similar to the suspended sentence. Both punishments aim to assist the offender to avoid imprisonment by requiring him or her to keep the peace and be of good behaviour (and comply with any additional conditions prescribed by the court) for a specified period of time. However, the deferred sentence and the suspended sentence are 2 distinct forms of punishment. Under a deferred sentence order, the length of the term of imprisonment is *specified* at the outset but not imposed. Instead, the sentence is deferred for a specified period of time and will only be imposed if the offender fails to comply with the conditions of the order during the operational period. Under a suspended sentence, the sentence of imprisonment is *imposed* at the outset, but the offender is only sent to prison if he or she breaches a condition of suspension during the operational period. It is also worth noting that the length of the operational period for the deferred sentence is limited to a maximum of 6 months, whereas there is no limit on the length of the operational period for a suspended sentence.

²¹ *R v O'Keefe* [1969] 2 QB 29, [1969] 2 WLR 77, (1969) 53 Cr App R 91. See paragraphs 3.05-3.06.

²² *O'Malley Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 22-08).

- 4.12 In light of the preceding discussion, *Figure 13* illustrates the perspective that the suspended sentence is a real punishment and located just below immediate imprisonment on the scale of available penalties.
- 4.13 Although an application of the principles of suspended sentences, as well as research into the perspectives of the judiciary, place the suspended sentence just below immediate imprisonment on the sentencing range, whether this is true in practice is unclear.²³
- 4.14 Research in other common law jurisdictions indicates that the suspended sentence suffers from a poor public image, as it is perceived to be a particularly lenient sanction. Critics of the suspended sentence have argued that it is inherently incongruous that a court which has decided that no penalty other than imprisonment is appropriate but ultimately decides that the individual should not go to prison.²⁴ Furthermore, the suspended sentence, it is argued, represents no real punishment, as the likelihood that the sentence will be activated is slim.²⁵ Studies conducted in England and Wales have revealed that the general public and victims of crime consider the suspended sentence to be even milder than a modest fine or probation,²⁶ while in Australia it has been argued that a combination of a rise in penal populism,²⁷ fear of crime and inaccuracy of media reports on sentencing outcomes have combined to give the suspended sentence a high public profile and a negative public image.²⁸ This perceived leniency may be one of the most difficult obstacles for the sanction to overcome.²⁹

²³ Bartels, "An Examination of the Arguments For and Against the Use of Suspended Sentences" (2010) 12 FLJ 119 at 125.

²⁴ Victorian Sentencing Advisory Council *Suspended Sentences: Final Report – Part 1* (May 2006).

²⁵ Bagaric, "Suspended Sentences and Preventative Sentences: Illusory Evils and Disproportionate Punishments" (1999) 22 UNSWLJ 535 at 536.

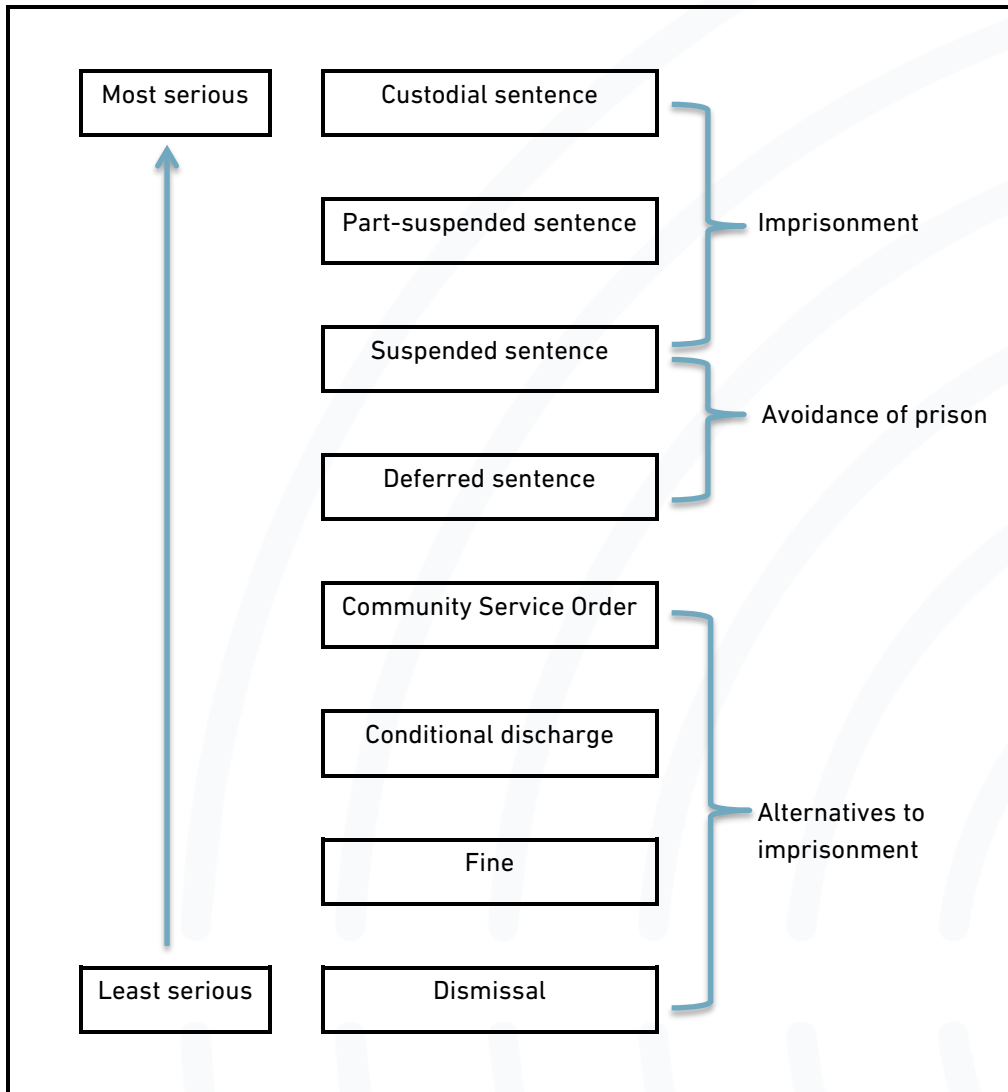
²⁶ Sebba, "Some Explorations in the Scaling of Penalties" (1978) 15 *Journal of Research in Crime and Delinquency* 247; Sebba & Nathan, "Further Explorations in the Scaling of Penalties" (1984) 24 *British Journal of Criminology* 221; Walker & Marsh, "Do Sentences Affect Public Disapproval?" (1984) 24 *British Journal of Criminology* 27.

²⁷ Penal populism has been described as the manner in which politicians exploit what they believe to be the generally punitive outlook of the public. See: Bottoms, "The Philosophy and Politics of Punishment and Sentencing" in Clarkson and Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press 1995). For a discussion on penal populism in Ireland, see: Campbell, "Criminal Justice and Penal Populism in Ireland" (2008) 28(4) *Legal Studies* 559; Hamilton, "Reconceptualising Penalty: Towards a Multidimensional Measure of Punitiveness" (2014) 54(2) *British Journal of Criminology* 321.

²⁸ Bartels, "An Examination of the Arguments For and Against the Use of Suspended Sentences" (2010) 12 FLJ 119.

²⁹ Tonry *Sentencing Matters* (Oxford University Press 1996) at 4.

Figure 13: Locating the suspended sentence on the range of available penalties – the severity of the sanction.³⁰



³⁰ The fully suspended sentence and the part-suspended sentence have been located in this figure as just below a custodial sentence. Imprisonment has been placed above the suspended sentence as it is the most severe penalty available in this jurisdiction. Furthermore, designating imprisonment as the most severe sanction is compatible with the principle of last resort (see paragraphs 1.09 – 1.18). The deferred sentence has been placed just below the fully suspended sentence, as, although both sanctions share many common characteristics, the suspended sentence can still be regarded as more punitive in light of the fact that a sentence of imprisonment is actually imposed and recorded. Community Service Orders have been placed under the suspended sentence in light of findings that, on the scale of available penalties, the Community Service Order can be placed in the upper echelons of alternatives to imprisonment (see: Maguire, “When is Prison a Last Resort? Definitional Problems and Judicial Interpretations” (2014) 24(3) *Irish Criminal Law Journal* 62 at 70). It is difficult to distinguish between the levels of seriousness between a conditional discharge and the imposition of a fine. It was decided that since conditional discharge aims to control the future behaviour of the offender that it imposed more readily identifiable positive obligations on the offender. Dismissal under section 1(1) of the *Probation of Offenders Act 1907*, is listed as the least severe penalty, as the court is empowered to dismiss the charge even if it is proven.

- 4.15 This poor public perception, coupled with the belief that the suspended sentence does not reflect “truth in sentencing,” led to the abolition of the sanction as a sentencing option in New Zealand in 2002³¹ and Victoria in 2014.³² It was abolished in New South Wales in 1974 but restored in 1999.³³ In May 2017, the New South Wales Department of Justice announced a series of criminal justice reforms including, once again, the abolition of suspended sentences.³⁴ In England and Wales, the court’s discretion to suspend a sentence of imprisonment has ebbed and flowed. In 1991 its use was significantly restricted by an “exceptional circumstances” proviso,³⁵ but this has since been repealed.³⁶ In Ireland, although the sanction has not been subjected to the same level of critical analysis as it has in other jurisdictions, it has been suggested that it is the immediacy of punishment that is the defining feature for the purpose of scaling penalties in the eyes of the Irish public.³⁷ In fact, in its 2013 *Report on Mandatory Sentences*,³⁸ the Commission also agreed that the swiftness of the punishment is a relevant factor that influences the deterrent effect of a sentence. As a result, as the suspended sentence threatens future – rather than immediate – punishment, it is likely that the low public perception of the sanction identified in other jurisdictions may also be present here.
- 4.16 It has been argued that offenders themselves do not consider the suspended sentence to represent a real punishment. It is thought certain offenders calculate the likelihood of ever having to serve the sentence of imprisonment that has been suspended, and if they believe that the chances of a breach of a condition of suspension being enforced are slim, then they can be said to have achieved a favourable outcome by having the sentence suspended.³⁹ Research into the perspectives of the judiciary on suspended sentences revealed that judges consider it to be a common perception among offenders that the suspended sentence does not constitute a real punishment.⁴⁰ However, research into the perspectives of offenders themselves is lacking. Analyses of perspectives on suspended sentences have concentrated on the views of judges, legal practitioners, academics, victims, and the

³¹ Section 21A of the *Criminal Justice Act 1985* (NZ) repealed by section 166(a) of the *Sentencing Act 2002* (NZ).

³² *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013*. The use of suspended sentences in Victoria was to be phased out in stages. The phasing out of suspended sentences in Victoria was completed on 1 September 2014.

³³ The suspended sentence was abolished after research concluded that it had had no appreciable effect on the size of the prison population. However, following its abolition, the prison population continued to increase and it was suggested that the abolition of the suspended sentence as a sentencing option contributed to this (see: Spier *Conviction and Sentencing of Offenders in New Zealand: 1987 to 1996* (Ministry of Justice 1997); Spier and Lash *Conviction and Sentencing of Offenders in New Zealand: 1994 to 2003* (Ministry of Justice 2004)).

³⁴ Department of Justice of New South Wales, *Sentencing Reform* Available at: <http://www.justice.nsw.gov.au/Pages/Reforms/Sentencing.aspx>.

³⁵ Section 5 of the *Criminal Justice Act 1991* (England and Wales)

³⁶ *Criminal Justice Act 2003* (England and Wales).

³⁷ Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 257.

³⁸ (LRC 108-2013) at paragraph 1.21.

³⁹ Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 251; Edney & Bagaric *Australian Sentencing: Principles and Practice* (Cambridge University Press 2007) at 356. During the debate on the part-suspended sentence at Westminster in 1976-1977, MR Patrick Mayhew commented: “[T]he majority of people who received a suspended sentence reckoned that they had got away with it.” (See: Hansard, *House of Commons Committee Debate, Standing Committee E* (Session 1976-1977) at 655-656). The suspended sentence was criticised again in England and Wales in as being perceived as a “let off” by offenders (see: Home Office, *Crime, Justice and Protecting the Public* (1990) at 320.)

⁴⁰ Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 258.

general public. Little is actually known about the perceptions of the offenders that receive suspended sentences.

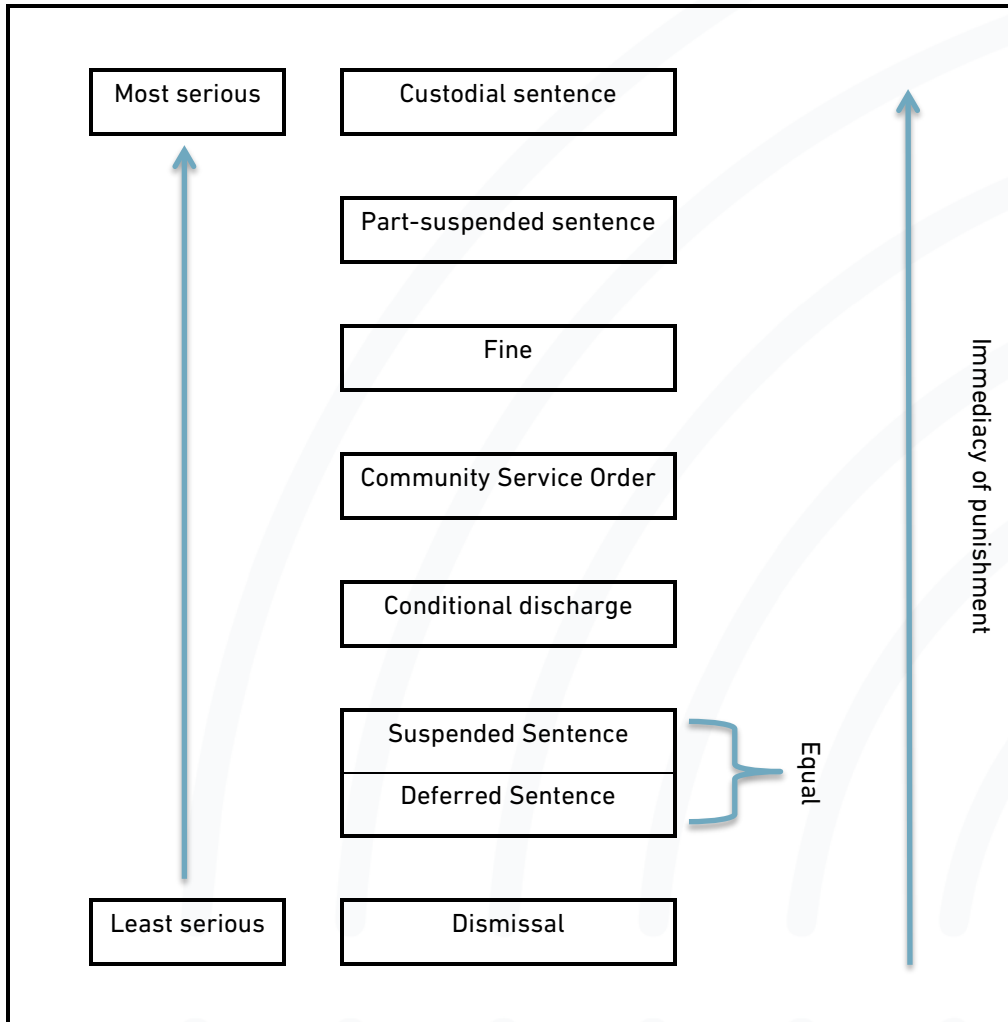
- 4.17 *Figure 14* illustrates this contrasting view of where the suspended sentence is located on the range of available penalties, with regard to the immediacy of punishment.

4.3 Monitoring and enforcement

It is clear from the preceding discussion that there are 2 contrasting perspectives on the location of the suspended sentence on the sentencing range. If viewed from a principled point of view, the suspended sentence is indeed a real punishment and located just below immediate imprisonment on the range of available penalties. However, if viewed from the point of view of the immediacy of punishment, the suspended sentence drops substantially on the sentencing range. As such, in order to merge the 2 perspectives on the suspended sentence, what may be needed is to make the deterrent and punitive elements of the suspended sentence more visible.

- 4.18 It can be argued that depending on the manner in which the suspended sentence is or is not complied with, as well as the efficacy of monitoring and enforcement procedures, the punitive and deterrent value of the suspended sentence can change.
- 4.19 For example, if a breach of a condition of suspension results in the prompt activation of the suspended sentence, then the sanction can be said to have a punitive impact on the same level as a sentence of immediate imprisonment. However, if a suspended sentence is imposed with limited or particularly lenient conditions, or breaches of a suspended sentence are not reported or enforced, then the suspended sentence could become almost indistinguishable from other alternatives to custody. This makes locating the suspended sentence on the range of available penalties, or, more precisely, merging the 2 perspectives of the location of the sanction on the sentencing range difficult in practice. Depending on the circumstances of the offender and his or her likelihood of breaching a condition of suspension, as well as the likelihood that such a breach will be brought to the attention of the courts, the suspended sentence may prove to be either a "let off" or an extremely punitive instrument of coercion and control.
- 4.20 As a result, it appears that the suspended sentence can only be accurately located on the range of available penalties with reference to the nature of the conditions attached to the suspended sentence, as well as a guarantee that the threatened punishment, namely the sentence of imprisonment, will be enforced in the event of a breach of the suspended sentence. It is important that offenders are aware that breaches of suspended sentences will be brought to the attention of the courts. This sheds further light on the importance of monitoring and enforcing suspended sentences in order to make the deterrent and punitive characteristics of the suspended sentence more visible.

Figure 14: Locating the suspended sentence on the range of available penalties – the immediacy of punishment.⁴¹



- 4.21 An individual who is subject to a suspended sentence is liable to serve that sentence where he or she reoffends or breaches a condition of suspension. However, research conducted in other jurisdictions has shown that instances in which individual are returned to the courts to have a suspended sentence activated for non-compliance with a condition of suspension are fairly low.⁴² It can be argued that if it is unlikely

⁴¹ This figure organises sanctions based on the level of punishment that is immediately perceived following their imposition. The unsuspended sentence and the part-suspended sentence remain the most severe penalties, as these involve the immediate deprivation of liberty. The imposition of a fine or community service is placed below this, as these sanctions impose immediate obligations on offenders to right the wrong caused to society. The conditional discharge is placed above the fully suspended sentence, as, although the sanctions share a lot of common characteristics, offenders subject to a conditional discharge are placed under the supervision of the Probation Service, whereas this is an optional condition of suspension. The suspended sentence and the deferred sentence are located close to the bottom of the range and have been placed on an equal footing, as the distinction between the two sanctions is not readily perceivable. Dismissal under section 1(1) of the 1907 Act remains the least severe, as the court is empowered to dismiss the charge even if it is proven.

⁴² Tasmania Law Reform Institute *Report on Sentencing* (TLRI 11-2008); Bartels *Sword of Feather? The Use and Utility of Suspended Sentences in Tasmania* (PhD Thesis, University of Tasmania 2008) at 305; Bartels, "Suspended Sentences – A Judicial Perspective"

that a suspended sentence will be activated unless the individual commits a subsequent offence, something that he or she is not entitled to do in any event, then the suspended sentence could reasonably be perceived as lenient.

- 4.22 Prior to the enactment of section 99 of the *Criminal Justice Act 2006*, judges were hesitant to impose a suspended sentence due to the lack of monitoring and enforcement mechanisms for those subject to a suspended sentence.⁴³ Although section 99 now provides for a definitive procedure for the enforcement of suspended sentences, monitoring compliance with the conditions of suspension is still difficult. Where there is a breach of a condition of suspension – other than the commission of a subsequent offence – the likelihood that the offender will have the suspended sentence activated is slim in light of structural deficiencies within the criminal justice system. In general, breaches of a suspended sentence are only brought to the attention of the courts where there has been the commission of a subsequent – or triggering – offence. Rates of enforcement for non-compliance with additional conditions such as to engage with the Probation Service, remain drug- or alcohol-free, or to stay away from certain individuals or locations are unknown but generally perceived as low.⁴⁴ Furthermore, although section 99 of the 2006 Act (as amended) provides a mechanism by which a member of An Garda Síochána, a governor of a prison, a probation officer, or the DPP may apply to have a suspended sentence activated where there has been a breach of a condition of suspension, actual rates of application under these provisions are not known.
- 4.23 Currently, there is very little known about the process of monitoring and enforcing suspended sentences in this jurisdiction. This could suggest the need for the relevant authorities, such as the Director of Public Prosecutions, the Probation Service, An Garda Síochána and the Governors of Prisons, to liaise to determine the appropriate manner in which to gather and maintain information on the monitoring and enforcement of suspended sentences. The collection, analysis and dissemination of the information provided by these authorities could possibly be conducted under the proposals in section 18 of the *Judicial Council Bill 2017*.⁴⁵ This would build on the database of the Sentencing Information System,⁴⁶ and the analyses of sentencing conducted by the Judicial Researcher's Office for specific

(2009) 9(1) QUTLJJ 44 at 59; Bartels, "Suspended Sentences in Tasmania: Key Research Findings" (2009) 377 *Trends and Issues in Crime and Criminal Justice* at 5; Bartels, "Sword or Butter Knife? A Breach Analysis of Suspended Sentences in Tasmania" (2009) 21 *Current Issues in Criminal Justice* 219 at 227.

⁴³ Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 250.

⁴⁴ Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 263.

⁴⁵ See paragraph 3.24.

⁴⁶ See paragraph 3.19 ff.

offences, such as manslaughter,⁴⁷ rape,⁴⁸ robbery,⁴⁹ and the possession or importation of drugs for sale or supply.⁵⁰

⁴⁷ Lynch, "Analysis of Manslaughter Sentencing 2007-2012" (2013) Available at: <http://www.irishsentencing.ie/en/ISIS/Pages/WP09000222>.

⁴⁸ Ó Cathaoir, "Recent Rape Sentencing Analysis: the *WD* Case and Beyond" (2012) Available at: <http://www.irishsentencing.ie/en/ISIS/Pages/WP09000222>.

⁴⁹ Butler, "Analysis of Sentencing in Robbery" (2013) Available at: <http://www.irishsentencing.ie/en/ISIS/Pages/WP09000222>.

⁵⁰ Mackey, "Analysis of Sentencing for Possession or Importation of Drugs for Sale or Supply" (2013) Available at: <http://www.irishsentencing.ie/en/ISIS/Pages/WP09000222>.

QUESTION 4

Your views are sought on the following questions:

- 4(a) Where should the suspended sentence be located on the hierarchy of penalties, assuming immediate imprisonment to be the most severe penalty?
- 4(b) Is the fully suspended sentence properly regarded as a lenient sentence?
- 4(c) Can the monitoring and enforcement of the conditions of fully suspended or part-suspended sentences (except where there is a breach by the commission of subsequent offence) be improved?
- 4(d) Which body or bodies are most appropriate or best equipped to undertake the monitoring of suspended sentences?

Please type your comments (if any)

ISSUE 5

MITIGATING FACTORS AND FACTORS JUSTIFYING SUSPENSION

5.01 In its 2013 *Report on Mandatory Sentences*,¹ the Commission discussed in detail the formulation of a proportionate sentence, which involves 3 inter-related steps.² An outline of the procedure for formulating a proportionate sentence, as discussed in the 2013 Report, is provided at paragraph 1.07 above. As part of the formulation of a proportionate sentence, the Commission outlined that a court must take into account factors that aggravate or mitigate the *seriousness of the offence* and factors that aggravate or mitigate the *severity of a sentence*. In its 1996 *Report on Sentencing*³ and its 2013 Report, the Commission underlined the importance of drawing a distinction between these 2 sets of aggravating and mitigating factors. In its 1996 Report, the Commission commented:

“The most important distinction drawn is that between factors which mitigate offence seriousness and factors which mitigate sentence.

Factors which aggravate or mitigate the offence arise for consideration when the sentencer is deciding the seriousness of the offending conduct for which the offender is to be held responsible. Although this may include a consideration of the state of mind or the culpability of the offender during the commission of the offence, the sentencer is, at this stage, primarily concerned with the offending behaviour rather than with the offender personally.

Factors which mitigate sentence arise later. When the sentencer considers these factors, he or she has decided the seriousness of the offending conduct for which the offender is responsible, but now asks if there is any reason why the offender should not suffer the full punishment which should attach to such responsibility or blameworthiness. Mitigation of the sentence is the making of a concession: the sentencer is saying ‘although you are undoubtedly responsible for the offending conduct and should be punished for it, I am letting you off a little because of your personal circumstances’.”⁴

¹ (LRC 108-2013) at paragraphs 1.45-1.101.

² *The People (DPP) v M* [1994] 3 IR 306; *The People (DPP) v Crowe* [2009] IECCA 57, [2010] 1 IR 129.

³ (LRC 53-1996).

⁴ (LRC 53-1996) at paragraphs 3.5-3.8

- 5.02 Factors justifying the suspension of a sentence of imprisonment arguably fall into the latter category, that is, factors mitigating the severity of sentence, whereas factors mitigating the seriousness of the offence are generally rewarded with a reduction from the headline sentence. As such, it can be argued that it is important that there should be a distinction between factors that mitigate the seriousness of the offence and factors that justify suspension. However, in practice, it appears that the distinction that ought to arguably be drawn between these 2 categories of factors often becomes blurred. In fact, it appears that the judiciary sometimes impose part-suspended sentences to reflect a reduction in the length of the sentence to be served.

5.1 Part-suspension as mitigation

- 5.03 Part-suspension is sometimes used to give effect to the totality principle. In *The People (DPP) v McGrath*,⁵ the Court of Criminal Appeal held that the totality principle requires the sentencing court, when imposing consecutive sentences for individual offences, to consider whether, overall, the sentences are proportionate in their totality.⁶ Suspending part of a sentence fulfils this purpose in a less than perfect manner, as the part that was suspended is liable to be activated if the individual subject to the suspended sentence reoffends or breaches a condition of suspension. In *The People (DPP) v Floyd*,⁷ it was held that, as a matter of principle, reduction, rather than part-suspension, should be the norm when giving effect to the totality principle.
- 5.04 In Ireland, the courts often suspend part of a sentence to reflect one or more mitigating factors. In contrast, in England and Wales, the *O'Keefe*⁸ test has been incorporated into the definitive guidelines on the imposition of community and custodial sentences.⁹ This ensures that distinct steps keep the factors mitigating the seriousness of the offence and the factors justifying suspension separate.¹⁰ It has been argued that although part-suspension may reflect mitigation with regard to the severity of the sentence, it must be made clear that it is not the same as a discount or reduction, which is taken into account by factors that mitigate the seriousness of the offence. This is because where an individual who is subject to a suspended sentence becomes liable to serve that sentence – either by committing a subsequent offence or breaching a condition of suspension – it can be argued that he or she has, in retrospect, received no reduction for mitigating factors. As such, it has been argued,

⁵ [2008] IECCA 27.

⁶ See also: *The People (DPP) v McDermott* [2014] IECA 14; *The People (DPP) v Farrell* [2010] IECCA 68; *The People (DPP) v McC* [2003] 3 IR 609; *The People (DPP) v B(T)* [1996] 3 IR 294. In *R v Gordan* (1994) 71 A Crim R 459, the New South Wales Court of Criminal Appeal held: "When a custodial sentence is to be imposed which will be cumulative upon, or which will overlap with, an existing custodial sentence, the judge must take into account that existing sentence so that the total period to be spent in custody adequately and fairly represents the totality of criminality in all the offences to which the total period is attributable."

⁷ [2014] IECA 39.

⁸ [1969] QB 29, [1969] 2 WLR 77, (1969) 53 Cr App R 91. See paragraphs 3.05 – 3.06.

⁹ Sentencing Council for England and Wales, *Definitive Guideline on the Imposition of Community and Custodial Sentences* (2016) (effective from 1 February 2017) at 10.

¹⁰ The Sentencing Council for England and Wales specifically outline factors that do and do not justify suspension. A realistic prospect of rehabilitation, strong personal mitigation and where immediate custody would result in significant hardship upon others, may justify the imposition of a suspended sentence. Conversely, where the offender is a risk or a danger to the public, has a poor history of compliance with court orders, or where appropriate punishment may only be achieved by immediate imprisonment, a suspended sentence may not be appropriate (see: Sentencing Council for England and Wales, *Definitive Guideline on the Imposition of Community and Custodial Sentences* (2016) at 8).

the court should give reasons for preferring suspension to reduction.¹¹

- 5.05 It can further be argued that there is a lack of clarity as to the circumstances in which a sentence should be reduced and those in which it should be part-suspended. The matter was considered briefly by the Supreme Court in *The People (DPP) v Walsh*¹² as part of an application for leave to appeal under Article 34.5.3 of the Constitution. The Court was asked whether the defendant should have been granted reduction rather than part-suspension for certain mitigating factors. The Court, in dismissing the application, held:

“The precise way in which it would be appropriate either for a sentencing judge or the Court of Appeal to impose or confirm a sentence to reflect mitigating factors is very much a function of the particular circumstances of each individual case involving not only a consideration of the offence, but also all of the circumstances of the offender.”

The Court was correct to acknowledge the discretion of judges and the importance of the principle of proportionality. Indeed, it could be argued that a certain level of flexibility regarding factors mitigating the seriousness of the offence and factors justifying suspension is desirable. However, it has been suggested that a judge should always begin by asking if there is any reason why a straight reduction would be an inappropriate means of granting mitigation.¹³

- 5.06 The approach of the Court of Appeal on this matter is somewhat unclear. In *The People (DPP) v RK*,¹⁴ the Court recognised the distinction between the two sets of factors:

“The more usual response to a plea of guilty is that a sentence is imposed which is less than would have been imposed had there not been a plea of guilty and had the case been fully contested... The court would have preferred to see the judge identify his starting point and then imposing a sentence somewhat less than that to take account of the plea and such other mitigating factors as were present at the time of sentence. When that net sentence was identified the question of whether there was an opportunity to incentivise rehabilitation in the future by suspending any element of the sentence would arise for consideration.”

- 5.07 However, in *the People (DPP) v Lee*,¹⁵ the defendant appealed against the severity of a sentence of 5 years imprisonment with the final 2 years suspended for 3 counts of burglary. The defendant was subject to the mandatory conditions to keep the peace and be of good behaviour but was also barred from entering the towns of Laytown and Barrystown and their environments for a period of 5 years from the date of sentence without written consent from the Chief Superintendent for the relevant

¹¹ O'Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 22-19.

¹² [2015] IESCDET 26.

¹³ O'Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 22-19.

¹⁴ [2016] IECA 208.

¹⁵ [2017] IECA 152.

Garda District. In particular, the defendant argued that the sentencing judge had erred in identifying 5 years as the headline sentence but not departing from that tariff having taken mitigating factors into account. The defendant argued that suspending the final 2 years of the sentence was a wholly inadequate way of reflecting the factors mitigating the seriousness of the offence, especially in a case such as this where a particularly onerous condition was attached. The defendant argued that the principle of proportionality would have required a straight discount from the headline sentence to reflect factors mitigating the seriousness of the offence and then the suspension of a further period to incentivise rehabilitation. The Court of Appeal disagreed, holding that “it is entirely a matter within the sentencing judge’s discretion as to how he or she structures their sentence, providing it is consistent with established sentencing principles.” Ultimately the Court held that using part-suspension to reflect mitigation did not constitute an error of principle.

- 5.08 As such, it is currently unclear whether or not the Court of Appeal considers there to be a distinction between factors mitigating the seriousness of an offence and factors justifying suspension. Indeed, there have been cases where the Court itself has suspended some portion of sentences to reflect mitigation.¹⁶ However, an argument may still be made in favour of providing for a distinction between these 2 categories, as highlighted by the case of *Lee* itself. The Court of Appeal went on to discuss the argument that insufficient weight was attached to the early plea of guilty and cooperation with the Gardaí. The Court held:

“It has to be borne in mind, however, that the effect of suspending two years of the 5 year headline sentence, meant that if the appellant stayed on the straight and narrow he could expect to have to serve no more than the equivalent of a 3 year custodial sentence. This amounted to a 40% discount on the headline sentence. We are not persuaded that an effective discount of that order represented an insufficient allowance for the mitigating factors that were available in this case.”

- 5.09 This reasoning flows from the Court’s previous comments regarding the use of part-suspension to reflect a reduction in sentence. However, it must be borne in mind that should the defendant breach a condition of suspension and end up serving the 2 years that were suspended, it can be said that, in hindsight, he received no discount for mitigating factors. This, it can be argued, would mean that the defendant is serving a longer sentence of imprisonment than was actually intended, which potentially breaches the principle of proportionality. It has, however, been argued that some judges consider this to be the price that an offender pays to have the sentence suspended.¹⁷ Nevertheless, it is worthwhile to further discuss factors considered to justify the suspension of a sentence of imprisonment in more detail.

¹⁶ *The People (DPP) v Cadden* [2017] IECA 58.

¹⁷ Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009).

5.2 Factors justifying suspension

5.10 In its 1996 *Report on Sentencing*,¹⁸ the Commission identified a number of factors that would mitigate the *seriousness of an offence*:

(1) Whether the offence was committed under circumstances of duress not amounting to a defence to criminal liability;

(2) Whether the offender was provoked;

(3) Whether the offence was committed on impulse, or the offender showed no sustained motivation to break the law;

(4) Whether the offender, through age or ill-health or otherwise, was of a reduced mental capacity when committing the offence;

(5) Whether the offence was occasioned as a result of strong temptation;

(6) Whether the offender was motivated by strong compassion or human sympathy;

(7) Whether the offender played only a minor role in the commission of the offence;

(8) Whether no serious injury resulted nor was intended;

(9) Whether the offender made voluntary attempts to prevent the effects of the offence;

(10) Whether there exist excusing circumstances which, although not amounting to a defence to criminal liability, tend to extenuate the offender's culpability, such as ignorance of the law, mistake of fact, or necessity;

(11) Any other circumstances which:

(a) reduce the harm caused or risked by the offender, or

(b) reduce the culpability of the offender for the offence."

5.11 Building on the Commission's previous work in this area,¹⁹ and through a combination of empirical research and case law, the following factors may also be of particular significance when calculating the *severity of the sentence*, in particular whether the imposition of a suspended sentence is justified:²⁰

1. No prior convictions;²¹

¹⁸ (LRC 53-1996) at paragraph 3.2.

¹⁹ Law Reform Commission *Report on Sentencing* (LRC 53-1996) at paragraph 3.17; Law Reform Commission *Report on Mandatory Sentences* (LRC 108-2013) at paragraph 1.90.

²⁰ The Supreme Court of Western Australia, in particular, expressly indicated a number of personal circumstances pointing to the suitability of a suspended sentence in *Long v Mayger* [2004] WASCA 41 at paragraphs 26 and 27. See also: Bartels, "To Suspend or not to Suspend: a Qualitative Analysis of Sentencing Decisions in the Supreme Court of Tasmania" (2009) 28 UTLR 23.

²¹ It is well-known that a first time offender will be treated leniently by the courts. See: Bartels, "To Suspend or not to Suspend: a Qualitative Analysis of Sentencing Decisions in the Supreme Court of Tasmania" (2009) 28 UTLR 23.

2. Guilty plea;²²
3. Remorse;²³
4. Cooperation with authorities;²⁴
5. Good character;²⁵
6. Age;²⁶
7. Illness or physical/mental disability;²⁷
8. Currently in, or good prospects of employment or education;²⁸
9. Currently undergoing, or goods prospects for rehabilitation;²⁹
10. Specific circumstances make the individual unsuitable for prison,³⁰ and
11. Family circumstances, in particular pregnant women or women with dependent children.³¹

Furthermore, the Sentencing Council for England and Wales specifically outline factors that do and do not justify suspension. The guidelines state that a realistic

²² *The People (DPP) v Ward* Court of Criminal Appeal 26 January 2009, [2011] 6 ICLMD 68; *The People (DPP) v Donohue* [2015] IECA 6. See also: Law Reform Commission *Report on Sentencing* (LRC 53-1996) at paragraph 3.17.

²³ *The People (DPP) v JM* Court of Criminal Appeal 22 February 2002. See also: Law Reform Commission *Report on Sentencing* (LRC 53-1996) at paragraph 3.17, in which the Commission identified the fact that the offender attempted to remedy the harmful consequences of his or her conduct as a factor mitigating the severity of sentence.

²⁴ *The People (DPP) v Alexiou* [2003] 3 IR 513; *The People (DPP) v Hall* [2016] IECA 11. See also: Law Reform Commission *Report on Sentencing* (LRC 53-1996) at paragraph 3.17.

²⁵ Law Reform Commission *Report on Mandatory Sentences* (LRC 108-2013) at paragraph 1.90.

²⁶ *The People (DPP) v Deady* Court of Criminal Appeal 25 January 1999; *The People (DPP) v PH* Court of Criminal Appeal 22 February 2002; *The People (DPP) v JM* Court of Criminal Appeal 22 February 2002; *DPP v Gray* Court of Criminal Appeal 16 January 2009, [2011] 6 ICLMD 75; *The People (DPP) v Craig* [2010] IECCA 27; *The People (DPP) v Bardauskas* Court of Criminal Appeal 25 January 2010, [2011] 7 ICLMD 75; *The People (DPP) v RK* [2016] IECA 208. See also: Law Reform Commission *Report on Sentencing* (LRC 53-1996) at paragraph 3.17.

²⁷ *The People (DPP) v Smith* Court of Criminal Appeal 22 November 1999; *The People (DPP) v PH* Court of Criminal Appeal 22 February 2002; *The People (DPP) v JM* Court of Criminal Appeal 22 February 2002; *The People (DPP) v NN* Court of Criminal Appeal 27 June 2005. See also: Law Reform Commission *Report on Sentencing* (LRC 53-1996) at paragraph 3.17.

²⁸ *The People (DPP) v Donovan* Court of Criminal Appeal 28 June 2010; *The People (DPP) v Donohue* [2015] IECA 6; *Long v Mayger* [2004] WASCA 41.

²⁹ *The People (DPP) v Farrell* Court of Criminal Appeal 23 July 1990; *The People (DPP) v Eccles* Court of Criminal Appeal 20 January 2003; *The People (DPP) v Young* Court of Criminal Appeal 7 November 2008, [2011] 5 ICLMD 68; *The People (DPP) v Jasalskis* Court of Criminal Appeal 4 December 2008, [2011] 2 ICLMD 82; *The People (DPP) v Gray* Court of Criminal Appeal 16 January 2009, [2011] 6 ICLMD 75; *The People (DPP) v Goodspeed* Court of Criminal Appeal 13 July 2009, [2011] 4 ICLMD 49; *DPP v Murtagh* Court of Criminal Appeal 25 January 2010, [2011] 7 ICLMD 69; *The People (DPP) v Conroy* Court of Criminal Appeal 1 March 2010, [2011] 11 ICLMD 95; *DPP v Bell* Court of Criminal Appeal 10 February 2011, [2010] 5 ICLMD 78; *The People (DPP) v Donohue* [2015] IECA 6; *The People (DPP) v Wallace* [2016] IECA 57; *The People (DPP) v O'Donovan* [2016] IECA 192; *The People (DPP) v Kelly* [2016] IECA 204; *The People (DPP) v RK* [2016] IECA 208; *The People (DPP) v Molloy* [2016] IECA 239; *Clarke v Governor of Mountjoy Prison* [2016] IECA 244. See also: Law Reform Commission *Report on Mandatory Sentences* (LRC 108-2013) at paragraph 1.90.

³⁰ Riordan *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at 239. Examples include members of An Garda Síochána, foreign nationals (see *The People (DPP) v Alexiou* [2003] 3 IR 513), and the provision of information on the workings of organised crime which might expose the individual to retributive violence that can be aggravated in a prison environment (see: *Long v Mayger* [2004] WASCA 41).

³¹ Mair, Cross & Taylor *The Community Order and the Suspended Sentence Order: the Views and Attitudes of Sentencers* (Centre for Crime and Justice Studies 2008) at 28. See also: *The People (DPP) v RK* [2016] IECA 208. See also: Law Reform Commission *Report on Sentencing* (LRC 53-1996) at paragraph 3.17, in which the Commission noted that the fact that the sentence would cause manifest hardship to the dependents of the offender could be considered a factor mitigating the severity of sentence.

prospect of rehabilitation, strong personal mitigation and where immediate custody would result in significant hardship upon others, may justify the imposition of a suspended sentence. Conversely, where the offender is a risk or a danger to the public, has a poor history of compliance with court orders, or where appropriate punishment may only be achieved by immediate imprisonment, a suspended sentence may not be appropriate.³²

- 5.12 A further factor that may justify suspension is where there is an imbalance between the gravity of the offence and the culpability of the offender, that is, where the offence is sufficiently serious to warrant a sentence of imprisonment, but the culpability of the offender is correspondingly low. In manslaughter, for example, the most serious harm has occurred, namely loss of life, but the offender's culpability may have been particularly low or diminished in some way.
- 5.13 Another example of this imbalance can be seen in serious road traffic offences.³³ In the case of careless and dangerous driving, a suspended sentence may be appropriate where the death was caused by a momentary or uncharacteristic lapse in the concentration of someone who is otherwise a careful driver. In *The People (DPP) v O'Dwyer*,³⁴ the Court of Criminal Appeal held:

"[T]here is a world of difference between a mere momentary inattention in the driving of a mechanical (sic) propelled vehicle, which unexpectedly and tragically causes a loss of a life, and grossly careless driving, which, though still short of dangerous driving, hardly surprisingly results in a fatal collision. A rigid adherence in sentencing to an approach which excludes any reference to the death in itself as an aggravating factor, despite the many various differences in the degree of careless driving, would not be proportionate."³⁵

The advantage of the suspended sentence in such cases is that the courts may mark the gravity of the offence while simultaneously making an allowance for some significant personal mitigating factors.³⁶ In *R v Foster*,³⁷ for example, the defendant received a suspended sentence on appeal for causing death by dangerous driving. At the time of the offence, the defendant had been caring for his severely ill wife. On the occasion in question, he had been driving her home from a hospital appointment where they had been informed that her treatment should no longer be continued. The Court of Appeal of England and Wales was inclined to adopt a merciful approach, as the momentary lapse of attention on the part of the defendant was due to an understandable stress on his concentration.

- 5.14 In its 2013 *Report on Mandatory Sentences*,³⁸ the Commission was of the view that it

³² Sentencing Council for England and Wales, *Definitive Guideline on the Imposition of Community and Custodial Sentences* (2016) at 8.

³³ Sentencing Advisory Panel, *Causing Death by Driving: Advice to the Sentencing Guidelines Council* (2008).

³⁴ [2005] 3 IR 134.

³⁵ See also: *The People (DPP) v Stronge* [2011] IECA 79; *The People (DPP) v Kelly* [2015] IECA 250.

³⁶ *The People (DPP) v Turner* Circuit Criminal Court *The Irish Times* 13 November 2004; *The People (DPP) v Broomfield* Circuit Criminal Court, *The Irish Times* 17 November 2005.

³⁷ [2009] EWCA Crim 1184, [2010] 1 Cr App R (S) 36.

³⁸ (LRC 108-2013) at paragraph 1.88.

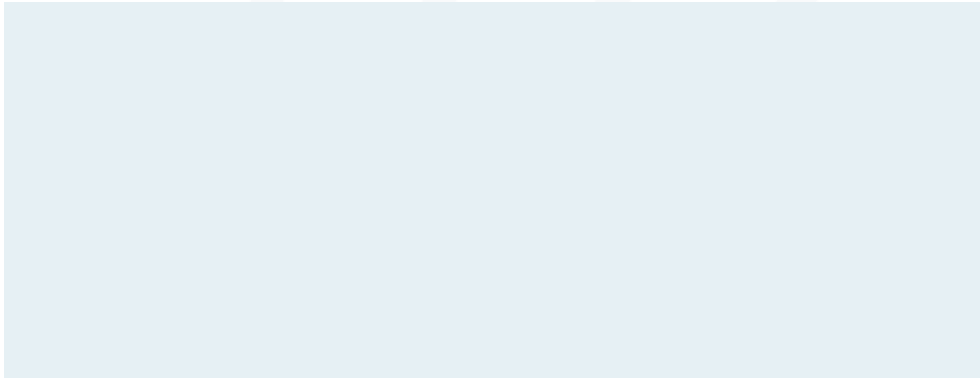
would be useful to set out the factors that aggravate and mitigate the seriousness of the offence for the purposes of developing sentencing guidance and guidelines. As such, it may, arguably, be equally be useful to set out the factors mitigating the severity of sentence and, by extension, the factors justifying the suspension of a sentence of imprisonment in order to further develop sentencing guidance and guidelines.

QUESTION 5

Your views are sought on the following questions:

- 5(a) Is full or part-suspension of a custodial sentence appropriate to reflect factors which mitigate the seriousness of an offence as well as factors which are personal to the offender at the time of sentence?
- 5(b) Are there any factors which are particularly relevant for the purpose of deciding if a custodial sentence should be fully or partly suspended?
- 5(c) Is there any merit in having an exhaustive or non-exhaustive list of factors justifying the suspension of sentence set out in legislation or in some other formal source such as a guideline?

Please type your comments (if any)



ISSUE 6

SUSPENDED SENTENCES AND CORPORATE-RELATED OFFENCES

- 6.01 The category of ‘corporate-related offences’ is difficult to define or describe. Suggested definitions have either focused on offender characteristics,¹ such as respectability and privilege (also known as the populist approach²), or on the nature of the offence itself with an emphasis on conduct³ (also known as the patrician approach⁴). Alternatively, it has been suggested that a definition of corporate-related offences should incorporate elements of both, that is, offender characteristics and the nature of the offence, thereby complying with the principle of proportionality, which requires a sentence to be proportionate to the gravity of the offence and the circumstances of the offender.⁵
- 6.1 General sentencing considerations**
- 6.02 In general, the courts have held that no special sentencing regime exists for corporate-related offences.⁶ This policy of normalisation rather than exceptionalism has long been considered to be the correct approach.⁷ As such, corporate-related offences are governed by the same sentencing principles that apply to other offences, with the obvious exception that a corporate offender cannot be imprisoned. This means that sentencing so-called white-collar offenders must comply with general sentencing considerations, namely the principles of consistency, proportionality and that imprisonment is to be the sanction of last resort.
- 6.03 The predominant sentencing aim for corporate-related offences appears to be deterrence,⁸ as corporate-related crimes are generally presumed to be the product of rational choice.⁹ Although deterrence is an acceptable sentencing aim,¹⁰ there is

¹ Sutherland *White-Collar Crime* (Dryden Press 1949) at 9 (“Any crime committed by a person of respectability and high social status in the course of his [or her] occupation.”).

² Shover & Cullen, “Studying and Teaching White-Collar Crime: Populist and Patrician Perspectives” (2008) 19 *Journal of Criminal Justice Education* 155 at 157.

³ Edelhertz, *The Nature, Impact and Prosecution of White-Collar Crime* (Department of Justice 1970) at 3 (“[A corporate-related offence is] an illegal act or series of acts committed by non-physical means and by concealment and guile, to obtain money or property, to avoid payment or loss of money or property, or to obtain business or personal advantage.”).

⁴ Shover & Cullen, “Studying and Teaching White-Collar Crime: Populist and Patrician Perspectives” (2008) 19 *Journal of Criminal Justice Education* 155 at 157.

⁵ O’Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 19-01.

⁶ *The People (DPP) v Begley* [2013] IECCA 32, [2013] 2 IR 188; *The People (DPP) v O’Brien* [2015] IECA 304; *The People (DPP) v Maguire* [2015] IECA 350.

⁷ O’Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 19-03.

⁸ *R v Hayes* [2015] EWCA Crim 1944 at paragraph 98.

⁹ Shover and Hochstetler *Choosing White-Collar Crime* (Cambridge University Press 2006) at 3.

little evidence to suggest that severe penalties deter white-collar offenders more than other offenders.¹¹ Nevertheless, it is argued that although the deterrent effect may be difficult to prove empirically, other businesses and individuals take note when severe penalties are imposed on others for conduct which they themselves may be engaged in.¹²

- 6.04 There has been some debate about sentencing white-collar offenders to immediate imprisonment. The issue centres on reconciling the principle that imprisonment should be the sanction of last resort, especially for non-violent offenders, with the principle of equality before the law, with particular reference to not discriminating between offenders based on wealth, social status, privilege or opportunity. It is argued that white-collar offenders are rarely, if ever, physically dangerous and do not represent an immediate physical threat to society.¹³ It is further argued that conviction in and of itself may have a sufficient punitive and deterrent effect on a white-collar offender. Gopalan¹⁴ considers conviction to be punishment enough for a white-collar offender. He comments:

“If the law stops at conviction, deterrent objectives can be achieved without the need for the State to bear the cost of imprisonment. The possibility of imposing consequential sanctions satisfies the retributive dimension. Lastly, the incapacitation objective is achieved by legal impediments.”¹⁵

This “criminalisation without incarceration” approach may be particularly influential when the courts decide whether or not to impose a suspended sentence in the case of a corporate-related offence.

- 6.05 Although the argument for keeping non-violent white-collar offenders out of prison is persuasive, it cannot be denied that often the harm caused by non-violent corporate-related offences, coupled with the culpability of the offender, is sufficient to cross the custody threshold.
- 6.06 Recent case law suggests that the current approach to sentencing in corporate-related offences may be changing in recognition of the harm caused by such offences. There appears to be a punitive shift away from more lenient penalties such as the *Probation of Offenders Act 1907* towards imprisonment, most notably suspended sentences. In *The People (DPP) v Whelan and McAteer*,¹⁶ for example, the defendants were convicted of being aware that their company, a bank, had provided unlawful financial assistance in contravention of section 60 of the *Companies Act 1963*. The first defendant received a 3-and-a-half year sentence of imprisonment. The second defendant was ordered to pay a fine of €3,000.
- 6.07 Below, the Commission sets out 2 case studies which illustrate a shift in the

¹⁰ See paragraph 1.19.

¹¹ Henning, “Is Deterrence Relevant in Sentencing White-Collar Defendants?” (2015) 61 *Wayne Law Review* 27.

¹² Wheeler, Mann and Serat *Sitting in Judgment: The Sentencing of White-Collar Criminals* (Yale University Press 1988) at 133.

¹³ O’Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 19-05.

¹⁴ Gopalan, “Skillings’s Martyrdom: the Case for Criminalisation without Incarceration” (2010) 44 *University of San Francisco Law Review* 459.

¹⁵ *ibid* at 504.

¹⁶ Circuit Criminal Court 17 April 2014 *The Irish Times*, 19 April 2014.

sentencing of corporate-related offences in recognition of the harm that such offences may cause, namely competition offences and health and safety offences. Although, to date, no sentences of immediate imprisonment have been imposed for competition or health and safety offences, both case studies arguably illustrate a judicial willingness to treat such offences seriously through the imposition of suspended sentences.

6.2 Case study 1: suspended sentences for competition offences

6.08 Ireland has been described as at the fore of the criminalisation of competition offences.¹⁷ Under the *Competition Act 1991*, anti-competitive practices and the abuse of a dominant position were prohibited. However, the remedies under the 1991 Act were exclusively civil in nature. The *Competition (Amendment) Act 1996* made it an offence for an undertaking, such as a corporate body, to enter into an anti-competitive agreement or engage in a concerted practice designed to prevent, restrict or distort competition. The *Competition Act 2002* repealed the 1991 and 1996 Acts and criminalised agreements between undertakings, decisions by associations of undertakings, and concerted practices which have as their object or effect the prevention, restriction or distortion of competition. The abuse of a dominant position remained an offence and the maximum penalties were also significantly increased. The maximum penalties were increased further by the *Competition (Amendment) Act 2012*. The 2012 Act also amended the 2002 Act by inserting section 8(11A), which provides that section 1 of the *Probation of Offenders Act 1907* shall not be applied to an offence under sections 6 or 7 of the 2002 Act.

6.09 In practice, there have been relatively few prosecutions for competition offences. As of 2013, there were 33 convictions on indictment for competition offences, but all of these arose from 3 cartels.¹⁸ Perhaps most significantly, a sentence of immediate imprisonment has yet to be imposed for a competition offence. Several individual offenders have received suspended sentences ranging from 3 months to 2 years. It has been argued that competition offences are an area in which the appropriateness of a suspended sentence can truly be seen and that the court is able to mark the gravity of the offence by declaring it worthy of imprisonment while simultaneously giving due credit for factors that will mitigate the severity of the sentence to be imposed.¹⁹ In light of this, it is worth analysing the facts of some of the leading cartel cases in which suspended sentences have been imposed with the aim of further extrapolating principles in order to assess the appropriateness of a suspended sentence for competition offences.

6.10 Perhaps the most significant cartel case illustrating a movement towards a real prospect of an immediate custodial sentence is *The People (DPP) v Manning*.²⁰ In this case, the defendant had been appointed as a part-time secretary to the Irish Ford

¹⁷ O'Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 19-35.

¹⁸ Gorecki & Maxwell, "Sentencing in Criminal Cartel Cases in Ireland: the Duffy Judgment" (2013) 34 *European Competition Law Review* 239.

¹⁹ O'Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 19-47.

²⁰ Central Criminal Court 9 February 2000. The discussion that follows is based on the analysis in Wade, "The Irish Competition authority: Looking Back at Some Landmark Cases as a New Era for Irish Competition Law Dawns – Part 1" (2015) 22(6) *Commercial Law Practitioner* 153.

Dealers Association (IFDA), which was set up to, among other things, assist car dealers in obtaining a reasonable profit on the sale of their cars. The scheme, labelled a “Programme for Profitability” involved the distribution of guide prices to IFDA members. All members of the IFDA were obliged to lodge a bond with it as security for fines levied as a result of any breaches of the scheme. In the event of a breach, a fine was levied on a per car basis. The IFDA engaged secret shoppers to ensure that the scheme was being complied with. While issuing pricing guidelines was legal, their enforcement was not. The effect of the enforcement mechanisms was to prevent a dealer from breaching the agreement and undercutting other dealers. It was argued that, in reality, a glass floor was put down to prevent more generous discounting while providing the illusion of competition.²¹ When the *Competition Act 2002* was enacted, the IFDA recognised the possible concerns that the scheme might raise. As a result, a consultant was hired to report on the conformity of the scheme with the 2002 Act. It was argued that the reasoning behind hiring the consultant was to give an illusion of legality to the scheme.²² This was referred to as “a form of window dressing feigning compliance.”²³

- 6.11 In 2006, proceedings were brought against the defendant on charges of aiding and abetting the IFDA and its members in implementing the agreement, the aim of which was to prevent, restrict or distort competition in the motor vehicle trade so as to directly or indirectly fix the selling price of cars contrary to sections 2, 4(1) and 6 of the *Competition Act 2002*.
- 6.12 The Central Criminal Court (McKechnie J), in rejecting the defendant’s assertion that he was merely a “conduit” following orders, highlighted the sheer sophistication and complexity of the Scheme. The Court considered the defendant’s role to have been crucial to the longevity and success of the Scheme. Perhaps most significantly, the Court was of the view that there were a variety of “very powerful reasons” to impose a custodial sentence in this case. The Court held:

“[A] sentence can operate as an effective deterrent in particular where if fines were to have the same effect they would have to be pitched at an impossibly high figure. Secondly, fines on companies might not always guarantee an adequate incentive for individuals within those firms to act responsibly. This particular point may not, in some circumstances, have the same force where individuals are concerned. Thirdly, knowledge within undertakings that courts will regularly make use of a custodial sentence may act as an incentive to people to offer greater cooperation in cartel investigations against, and quite frequently against their employers. Fourthly, prison, in particular for those with unblemished pasts, for those who are respected within the community, and for those who are unlikely to re-offend can be a very powerful deterrent and finally, the imposition of the

²¹ Curtis & McNally, “The Classic Cartel-Hatchback Sentence?” (2007) 4(1) *Competition Law Review* 41 at 42.

²² *ibid* at 42-43.

²³ Wade, “The Irish Competition authority: Looking Back at Some Landmark Cases as a New Era for Irish Competition Law Dawns – Part 1” (2015) 22(6) *Commercial Law Practitioner* 153 at 154.

sentence for the type or category of persons above described can carry a uniquely strong moral message.”

In effect, the Court laid out factors that highlighted the appropriateness of imposing a custodial sentence for competition offences. The Court held that a custodial sentence would be appropriate where:

1. There is a need to ensure effective deterrence;
2. Fines are an inadequate mechanism for ensuring compliance;
3. Knowledge that the courts are willing to impose custodial sentences will induce cooperation with ongoing cartel investigations, and
4. Imprisoning the class of individuals involved in cartels will send a “uniquely strong moral message.”

- 6.13 The Court held that the level of harm caused, which had done “a shocking disservice to the public at large”, crossed the custody threshold. It was only following an eventual guilty plea by the defendant that the Central Criminal Court imposed a 12 month sentence of imprisonment suspended for 5 years and imposed a fine of €30,000.
- 6.14 *Manning* reflected a distinct judicial recognition of the economic and social harm caused by anti-competitive practices such as price fixing. It appears that the Central Criminal Court was prepared to impose an immediate custodial sentence, but decided to suspend it in light of the guilty plea as well as the imposition of a significant fine.
- 6.15 *The People (DPP) v Duffy*²⁴ is equally important for a number of reasons. The Central Criminal Court (McKechnie J) reiterated the view expressed in *Manning* of the seriousness of competition offences and that the court would not hesitate to impose an immediate custodial sentence. The Court also distinguished the Irish competition regime from that of the EU. Finally, the Court also expressed a preference for a mixed type of sentence involving a custodial term and a fine.
- 6.16 In *Duffy*, the defendant was the treasurer of the Citroën Dealers Association (CDA), which was established to implement and maintain a scheme to achieve set prices for the maximum permissible discounts offered by retail dealers, to set recommended price lists for new vehicles, and to set prices for delivery charges, accessories, trade-ins and parts. The CDA employed secret shoppers to ensure the scheme was complied with. A breach of the scheme would attract a fine.
- 6.17 The defendant pleaded guilty to price-fixing and anti-competitive behaviour contrary to section 4(1) of the *Competition Act 1991* and section 2 of the *Competition (Amendment) Act 1996*.
- 6.18 The Court considered cartels to “operate one of the most serious forms of anti-competitive behaviour which exists, inflicting the most harm on customers,

²⁴ [2009] IEHC 208.

consumers and the public alike”²⁵ meaning that such offences are capable of passing the custody threshold. On the appropriateness of a custodial sentence, the Court distinguished the Irish system from the EU regime in so far as there was no possibility of imprisonment under EU competition law and, therefore, the Irish courts were permitted to take both aggravating and mitigating factors into account. As such, the Central Criminal Court quoted with approval the English case of *R v Whittle*,²⁶ in which the Court of Appeal of England and Wales identified a non-exhaustive list of relevant considerations to be taken into account when sentencing competition offences, namely:

1. The gravity and nature of the offence;
2. The duration of the offence;
3. The degree of culpability of the defendant implementing the cartel agreement;
4. The degree of culpability of the defendant enforcing the cartel agreement;
5. Whether the defendant’s conduct was contrary to guidelines laid down in a company compliance manual;
6. Whether the defendant cooperated with any investigation;
7. Whether or not the defendant was compelled to participate under duress;
8. Whether the offence was a first offence, and
9. Any other personal circumstances.

6.19 The Court went on to reiterate its comments from the *Manning* case, setting out the good reasons for imposing a custodial sentence in cartel cases, namely the need to ensure effective deterrence, the inadequacy of fines to ensure compliance and the need to encourage cooperation with the investigation of cartel offences.

6.20 Applying these principles in *Duffy*, the Court concluded that this was a case for imprisonment. However, the Court also had to take account of the fact that judgments had already been handed down with respect to 2 other CDA dealers. Since the circumstances of the other 2 were “virtually indistinguishable” from the current case, and the need to give effect to the principle of consistency in sentencing, the Court imposed 6- and 9 month sentences of imprisonment, suspended for 5 years and fines totalling €50,000 on the defendant. Nevertheless, the sentencing ruling in *Duffy* gave a very clear indication that the next individual to come before the courts on such a charge should expect a term of imprisonment.

6.21 Both *Manning* and *Duffy* reflect a greater emphasis being placed on the harm caused by offences of this nature. This means that competition offences, particularly cartel cases, are more likely to cross the custody threshold. However, there has yet to be a

²⁵ [2009] IEHC 208 at paragraph 22.

²⁶ [2008] EWCA Crim 2560, [2009] Lloyds Rep FC 77.

sentence of immediate imprisonment for a competition offence. To date, those sentenced to a term of imprisonment have had those sentences suspended. From *Manning* and *Duffy* it appears that a plea of guilty is a persuasive factor justifying suspension. Furthermore, the mixed approach advocated by the Central Criminal Court, that is, to impose a custodial sentence and a fine, may also play a significant role in justifying suspension. It could also be argued that although such offences are being perceived as more serious by the courts, the debate as to the appropriateness of sending non-violent white-collar offenders to prison may still hold a certain degree of sway.

6.3 Cast study 2: suspended sentences for health and safety offences

- 6.22 Similar to competition offences, no individual has, to date, been sent to prison following conviction for a health and safety offence. This is despite section 78 of the *Safety, Health and Welfare at Work Act 2005* (as amended) providing that a person found guilty of an offence under the Act is liable on summary conviction to a class A fine (maximum €5,000), a prison term not exceeding 12 months, or both, or on indictment to a maximum fine of €3 million, a prison term not exceeding 2 years, or both. The cases discussed below deal with the penalties imposed on individual offenders convicted of health and safety offences. Although corporate offenders cannot be sentenced to imprisonment – suspended or otherwise – it bears mentioning that some corporate offenders have received some very heavy fines.²⁷
- 6.23 Between 2005 and 2015, there were 292 prosecutions for health and safety offences. 226 corporate offenders and 66 individuals were prosecuted during this time period. 91% pleaded guilty. The imposition of a fine was the predominant outcome of prosecutions for health and safety offences between 2005 and 2015. Fines ranged from between €200 and €2 million. Individuals were fined between €200 and €50,000 and corporate offenders were fined between €400 and €2 million. Other sanctions imposed during this time period include 5 applications of the *Probation of Offenders Act 1907*, 3 Community Service Orders and 13 suspended sentences. There were also 2 charitable donations and a compensation order to be put on trust for the daughter of the deceased.²⁸
- 6.24 The Commission sets out below details of 4 sentencing remarks in order to identify some principles pointing to the appropriateness of a suspended sentence in health and safety cases.
- 6.25 In *The People (DPP) v Clare County Council and Scully*,²⁹ Clare County Council and a retired local authority senior executive engineer pleaded guilty to offences under the *Safety, Health and Welfare at Work Act 2005*. The case arose as a result of the death of a dumper truck driver when the dumper truck he had been operating overturned and he was thrown from it. At the time of the accident, the worker was not wearing a seatbelt.

²⁷ For example, in *The People (DPP) v Roadteam Logistics Solutions (AKA Nolan Transport)* [2016] IECA 38, a €1 million fine was upheld by the Court of Appeal.

²⁸ This information was obtained through an analysis of the Annual Reports of the Health and Safety Authority between 2005 and 2015.

²⁹ Circuit Criminal Court 16 and 17 February 2010.

- 6.26 The Circuit Criminal Court held that the death of the worker was foreseeable and preventable and would not have happened if the County Council and the engineer had enforced the wearing of seatbelts. The Court considered that the event was a dishonourable end to the engineer's exemplary career and took account of his remorse and regret. The Court imposed sentences of 12 months imprisonment to run concurrently, suspended for 2 years. The Court took into account in mitigation the fact that the engineer was hard working and diligent, he had been a friend of the deceased, and had expressed regret and genuine remorse.
- 6.27 In *The People (DPP) v Cormac Building Contractors, Kildownet Utilities, Byrne and Molloy*,³⁰ a site manager and the director of a subcontractor pleaded guilty to failing to have a safe system of work, contrary to section 6 of the *Safety, Health and Welfare at Work Act 1989*, since replaced by section 12 of the *Safety, Health and Welfare at Work Act 2005*. Both defendants were also charged with reckless endangerment under section 13 of the *Non-Fatal Offences Against the Person Act 1997* and were found guilty. The case involved a fatal accident when a truck-mounted concrete pump came into contact with 10,000 volt overhead powerlines, fatally electrocuting a worker.
- 6.28 The Circuit Criminal Court heard that the defendant's had been warned on numerous occasions about the dangers of the overhead power lines. An off-duty ESB engineer said he was passing the site when a crane caught his attention. He stopped his journey and went to the site office to warn the site manager of the dangers. He told the Court that he saw nothing on site that would have alerted workers to the danger. On another occasion a former HSA inspector twice issued directions in relation to the overhead wires at the site. On yet another occasion, a safety consultant hired by the main contractor discussed the dangers posed by the overhead lines and noted that better signage was needed. It was decided that an area of the site would be sterilised for 3 days while new signs were put up. However, on a separate occasion, the same safety consultant became extremely alarmed when he saw a mobile crane working under the high voltage wires with no goalpost warning system in place. As a result, materials that were being moved by crane were moved manually. The Court heard that both the companies and the men charged had made apologies to the deceased's family and that a trust fund had been set up for the deceased's daughter. An offer of €10,000 in compensation had also been made to the deceased's family.
- 6.29 The Court held that the defendants had made a mistake by not making sure that the work was stopped entirely until the correct measures had been put in place. The Court imposed a 3 year suspended sentence on the site manager and a 2 year suspended sentence on the director of a subcontractor indicating that both men would have to live with the fact of the worker's death.
- 6.30 In *The People (DPP) v Technical Engineering and Tooling Services Ltd, Hunt, Kelly and Sheil*,³¹ the company and its 3 directors pleaded guilty to placing at risk the safety, health and welfare of persons working at a tool milling machine, contrary to section

³⁰ Circuit Criminal Court 24 November 2006.

³¹ Circuit Criminal Court 6 March 2006.

14 of the *Safety, Health and Welfare at Work Act 2005*. The case arose in light of a fatal accident resulting from the bypassing of the interlocks on a milling machine, which meant that the machine could be operated without the guards in place. The Circuit Criminal Court heard that the break, which allowed the homemade extension bar and drill to fly out, occurred at about 10,000 rpm. There were warning labels on the machine that made it clear that extended pieces should not be operated at a speed greater than 8,000 rpm. When the accident occurred, no supervisor was present and no risk assessment for the milling machines was in place.

- 6.31 The managing director said the company had an excellent safety record. A safety management system was in place, the managing director attended monthly safety meetings, safety notices were posted in the canteen and employees' duties were explained to them and they signed the safety statement. Nevertheless, the managing director himself had no formal safety training.
- 6.32 This fatal accident came some months after a "near miss" incident in 2005 which, the Court held, should have acted as a warning. The Court considered the company's paperwork to be "sham paperwork, to show everything was correct when it was not". The Court highlighted how the company had bypassed interlocks, used a homemade extension bar, had used grub screws, ignored warnings on the machines, provided no inspection or supervision and disabled the safety system. The Court, in acknowledging the safety record as evidence of "no previous convictions" highlighted the "woeful failure to learn from the incident in 2005" and concluded that "on the contrary their record was deplorable".
- 6.33 The Court concluded that, with regard to the 3 directors, there was no need for a deterrent element in the form of a fine. The Court imposed 1 year sentences of imprisonment on each of the directors and suspended these sentences on conditions.
- 6.34 The fourth case study is *The People (DPP) v McKeown*,³² in which the defendant, a school bus owner, pleaded guilty to failing, in so far as reasonably practicable, to manage and conduct his undertaking, in particular failing to maintain a bus, so that persons not being his employees were exposed to risks to their health and safety, contrary to section 12 of the *Safety, Health and Welfare at Work Act 2005*. The case arose as a result of a bus crash in which a 15-year-old schoolboy was killed and other schoolchildren were injured.
- 6.35 Although the defendant initially pleaded not guilty, he changed his plea to guilty 3 days into the trial. In light of what it called a "dilatatory approach," the Circuit Criminal Court did not attach as much weight to the guilty plea as would usually be merited. The Court did, however note that the defendant had cooperated fully with the HSA investigation and had shown genuine remorse. The Court also accepted evidence of good character and took account of a previous conviction (for having no PSV licence and no insurance) as well as the defendant's risk of reoffending.
- 6.36 Particularly in light of the defendant's financial position, the Court considered there

³² Circuit Criminal Court July 2013.

to be little point in imposing a fine. As a result, the Court imposed a 12 month suspended sentence.

QUESTION 6

Your views are sought on the following questions:

- 6(a) Do you think a specific sentencing regime is required for those who commit corporate-related offences?
- 6(b) Do you think it is appropriate or not appropriate to send individuals convicted of corporate-related offences, who are generally non-violent and do not pose an immediate physical threat to society, to prison? Why or why not?
- 6(c) Under what circumstances do you think it is appropriate or not appropriate to impose an immediate sentence of imprisonment for corporate-related offences, including competition offences and health

Please type your comments (if any)

ISSUE 7

COMBINING SUSPENDED SENTENCES WITH OTHER ORDERS

7.1 Suspended sentences and community service orders

- 7.02 The *Criminal Justice (Community Service) Act 1983* introduced community service orders (CSO) as an alternative to imprisonment. The 1983 Act was significantly amended in 2011 to encourage the courts to substitute community service for short terms of imprisonment where appropriate.¹ The 1983 Act was further amended in 2014 to allow for the imposition of a CSO for non-payment of a fine.² A CSO may be made by any court (other than the Special Criminal Court) and in respect of a person who is 16-years-old or older who has been convicted of an offence for which, in the court's opinion, the appropriate sentence would otherwise have been one of imprisonment or detention in a relevant institution or school.³ An individual who is subject to a CSO will be required to perform unpaid work for a specified number of hours (the minimum being 40 hours and the maximum being 240.)⁴ A CSO may be combined with other orders,⁵ but may not be combined with a sentence of imprisonment. The duty to consider a CSO where the court is considering imposing a sentence of imprisonment of 12 months or less is mandatory, but the courts do not need to explicitly state that a CSO was considered or to give reasons why a short prison sentence was preferred.⁶
- 7.03 Most offences are potentially punishable by either a CSO or a suspended sentence.⁷ In *The People (DPP) v O'Reilly*,⁸ the defendant pleaded guilty to, among other things, dangerous driving causing death, which carries a maximum sentence of 10 years imprisonment. He received a 5 year suspended sentence. The Court of Criminal

¹ *Criminal Justice (Community Service) Amendment Act 2011*.

² Section 19 of the *Fines (Payment and Recovery) Act 2014*.

³ Section 2 of the *Criminal Justice (Community Service) Act 1983*, as amended by section 154 of the *Children Act 2001*.

⁴ Section 3(2) of the *Criminal Justice (Community Service) Act 1983*. Different limits apply to fine-defaulters.

⁵ Other orders include licence revocation, disqualification or endorsement, confiscation, forfeiture or restitution of property, or payment of compensation, costs or expenses. See section 3(3) of the *Criminal Justice (Community Service) Act 1983*.

⁶ *O'Brien v Coughlan* [2014] IEHC 425 and [2015] IECA 245. The Court of Appeal, although allowing the appeal on another ground, essentially agreed with the High Court with regard to the community service point. The Court held that it may be desirable in general circumstances for a judge to expressly state that a community service order was considered, but it is not an obligatory requirement in that a failure to do so will not result in the invalidation of the judgment the judge gives. The Court of Appeal also rejected the argument that the trial judge was obliged to order the preparation of a report to assess the defendant's suitability for a community service order, stating that this need only be done once the judge had decided that the case could possibly be dealt with by way of a community service order.

⁷ A CSO may not be imposed where a punishment is fixed by law or where the conviction has been in the Special Criminal Court. A suspended sentence may not be imposed where there is a mandatory penalty such as the mandatory sentence of life imprisonment for murder.

⁸ [2007] IECCA 118, [2008] 3 IR 632.

Appeal quashed this sentence and resentenced the defendant to 240 hours of community service. The Court held that the sentencing judge had erred in suspending the sentence and that in cases such as these a court must meet the requirements of both specific and general deterrence and that, on the facts of the case before it, a CSO would “constitute a plainly visible form of deterrence for other road users in the locality where this offence occurred and where all the affected parties reside.”⁹

- 7.04 The *Criminal Justice (Community Service) Act 1983* prohibits the imposition of a sentence of imprisonment, whether suspended or not, in combination with a CSO.¹⁰ The reasoning behind this is that a CSO is an alternative to custody whereas a suspended sentence is a prison sentence, albeit one that may never take effect. Arguably, it follows that a CSO and a suspended sentence should not be combined.
- 7.05 In England and Wales, an unpaid work requirement may be a condition of suspension under the *Criminal Justice Act 2003*. The unpaid work requirement has proven to be a particularly effective indicator when assessing whether a suspended sentence should be activated, and if so to what extent. In general, where an individual who is subject to a suspended sentence has completed all or a substantial portion of the unpaid work requirement, it is generally appropriate to activate the suspended sentence in part only.¹¹ However, as was held by the Court of Appeal of England and Wales in *R v Swallow*,¹² the completion of an unpaid work requirement does not automatically guarantee part-activation of a suspended sentence. The Court held that “[t]he only principle is that each case in which an offender is liable to have activated a suspended sentence of imprisonment will depend upon its individual facts.” Therefore, the court must assess the degree to which an unpaid work requirement represented a punishment for the offender and to what extent the work requirement had been completed at the time of the liability for activation of the suspended sentence.
- 7.06 There is no provision under section 99 of the *Criminal Justice Act 2006* for a condition of unpaid work. In all likelihood, this is due to the fact that unpaid work is associated with a CSO and a CSO and a sentence of imprisonment (suspended or not) should, arguably, not be combined.
- 7.07 Although a suspended sentence may never be imposed in conjunction with a CSO, the 2 penalties share some common features. Neither penalty may be imposed unless a court is satisfied that a sentence of imprisonment would otherwise be appropriate i.e. the custody threshold must be passed.¹³ However, although a court that is contemplating imposing a sentence of 12 months or less should, according to the 2011 Act, consider if a CSO would be appropriate instead, there is no such

⁹ [2007] IECCA 118, [2008] 3 IR 632 at paragraph 37.

¹⁰ Section 3(1), as substituted by section 3 of the *Criminal Justice (Community Service) (Amendment) Act 2011*.

¹¹ *R v Zeca* [2009] EWCA Crim 113, [2009] 2 Cr App R (S) 65; *R v Collins* [2012] EWCA Crim 2036, [2013] 1 Cr App R (S) 95; *R v Dervish* [2013] EWCA Crim 339; *R v Mincher* [2013] EWCA Crim 2585.

¹² [2013] EWCA Crim 719 at paragraph 13. See also: *R v Kitara* [2015] EWCA Crim 1878.

¹³ For CSOs, this is set out in the *Criminal Justice (Community Service) Act 1983*. In the case of suspended sentences, this is set out in *R v O’Keefe* [1969] QB 29 at 32. See paragraphs 3.05 – 3.06 on the *O’Keefe* principle.

requirement for suspended sentences. There is evidence from other jurisdictions that where the courts are required to consider imposing a suspended sentence where they would otherwise impose a custodial sentence of 2 years or less, there has been a significant impact on the numbers of admissions to custody.¹⁴ A CSO is supposed to operate for sentences considered too serious for a fine or the *Probation of Offenders Act 1907*, but not serious enough to merit an immediate sentence of imprisonment. It could be argued that the suspended sentence could also act as an alternative to custody where the offence is too serious for a CSO, or where the individual would not be suitable for a CSO, but the offence is not serious enough to warrant an immediate and/or lengthy prison sentence.

7.2 Suspended sentences and monetary orders

7.2.1. Fines

7.08 Section 50 of the *Criminal Justice Bill 1967* proposed the suspension of both sentences of imprisonment and fines. However, the 1967 Bill never became law and when suspended sentences were put on a statutory footing under section 99 of the *Criminal Justice Act 2006*, the section provided for the power to suspend sentences of imprisonment, but not fines. Nevertheless, there is nothing in section 99 of the 2006 Act that precludes the courts from imposing a fine together with a suspended sentence. Section 10(3) of the *Criminal Law Act 1997* provides that a person convicted on indictment may be fined in lieu of, or in addition to, another sanction, unless the offence carries a mandatory penalty. From a policy perspective, a fine and a sentence of imprisonment (suspended or not) should not conflict. Since a suspended sentence is designed to spare the individual from prison and the consequences of non-payment of a fine may be imprisonment – although this is now supposed to be the enforcement measure of last resort.¹⁵ It must also be kept in mind that a fine must always reflect an individual's means.

7.09 The issue of combining a suspended sentence with a fine arose in the English case *R v King*,¹⁶ in which a fine and a suspended sentence were imposed for burglary. The single judge granted leave to appeal due to a concern that the defendant may end up serving 2 prison sentences for the same offence. The Court of Appeal of England and Wales held:

“There is nothing in principle to prevent such a course being taken... The only warning that this court would like to give is that in imposing a fine, special care should be taken in such cases to see that it is well within the man's means to pay, otherwise if a fine is given which results in imprisonment, then the danger foreseen by the single judge might well arise.”¹⁷

¹⁴ Cid, “Suspended Sentences in Spain: Decarceration and Recidivism” (2005) 52(2) *Journal of Community and Criminal Justice* 169. See also: Seymour *Alternatives to Custody in Ireland* (IPRT 2006).

¹⁵ *Fines (Payment and Recovery) Act 2014*.

¹⁶ [1970] 54 Cr App R 362.

¹⁷ [1970] 1 WLR 1016 at 1017; [1970] 54 Cr App R 362. The same principle was applied by the Court of Appeal of England and Wales in *R v Leigh* (1970) 54 Cr app R 169.

- 7.10 Combining fines and suspended sentences may be acceptable where the fine might appropriately be imposed along with imprisonment such as where the individual has made a substantial profit from the offence.¹⁸ It also bears mentioning that issue has been raised where the coupling of a fine with a suspended sentence may result in a perception that rich defendants can buy their way out of prison.¹⁹ In Ireland, this risk is particularly plausible with the retention of the court poor box.²⁰

7.2.2. Compensation orders

- 7.11 Reparation as a sentencing aim has recently achieved greater recognition in many jurisdictions such as England and Wales,²¹ New Zealand²² and Canada.²³ In Ireland, the Supreme Court has considered reparation to be a legitimate sentencing aim.²⁴ However, with regard to the purpose or rationale of compensation orders themselves, there is no obvious consensus. Some maintain that compensation orders advance both restorative and reparative objectives and impress a sense of responsibility on offenders.²⁵ Others consider that empowering the courts to make compensation orders spares victims from having to take separate civil proceedings.²⁶ Nevertheless, there are significant differences between civil and criminal proceedings with respect to payment of compensation. For example, a court imposing a compensation order in a criminal case must have regard to the offender's means. This is an irrelevant consideration when making an award against a defendant in civil proceedings.²⁷
- 7.12 Court-ordered compensation is governed by section 6(1) and (2) of the *Criminal Justice Act 1993*. Section 6(1) provides that a court may, instead of or in addition to any other penalty, unless it considers there to be any reason to the contrary, make a compensation order in respect of any personal injury or loss resulting from the offence of which the offender has been convicted. Section 6(2) provides that the order shall be of such an amount as the court considers appropriate having regard to any evidence and/or representations made by or on behalf of the offender, the injured party or the prosecutor. The order for compensation shall not exceed the amount of damages that, in the opinion of the court, the injured party would be entitled to in a civil action against the offender.

¹⁸ *R v Ankers* [1975] Crim LR 402.

¹⁹ Wasik, "Sentencing Guidelines: The Problem of Conditional Sentences" (1994) 13 *Criminal Justice Ethics* 50.

²⁰ See the Commission's *Report on the Court Poor Box: Probation of Offenders* (LRC 75 – 2005).

²¹ Section 142 of the *Criminal Justice Act 2003* (England and Wales).

²² Section 7 of the *Sentencing Act 2007* (NZ).

²³ Section 718 of the *Canadian Criminal Code*.

²⁴ *The People (DPP) v MS* [2000] 2 ILRM 311 at 318; *The People (DPP) v Daniels* [2014] IESC 64.

²⁵ Shapland, Willore and Duff *Victims in the Criminal Justice System* (Gower 1985).

²⁶ *R v Inwood* (1974) 60 Cr App R 70 at 73.

²⁷ *R v Oddy* (1974) 59 Cr App 66.

- 7.13 In Ireland, the principle that compensation does not save a person from being imprisoned for a serious offence is well-established. In *The People (DPP) v C*,²⁸ the Court of Criminal Appeal held:

“It has never been, as far as this court is aware, a principle that a custodial sentence is to be excluded where compensation has been paid... [I]t is a mitigating factor but only one of several and does not and cannot in practice or in principle always preclude the imposition of a custodial sentence where that is otherwise the appropriate sentence to be imposed.”

The Court reiterated the same principle in *The People (DPP) v McCabe*,²⁹ stressing that there was nothing in principle or practice that precluded an offender from receiving a custodial sentence where compensation was offered and/or paid. In *The People (DPP) v Tiernan*,³⁰ the Supreme Court held that, save in exceptional circumstances, rape should attract an immediate and substantial custodial sentence, and in *The People (DPP) v McLaughlin*,³¹ the Court of Criminal Appeal held that the payment or offer of compensation, however substantial, does not qualify as an exceptional circumstance to rebut the presumption of a custodial sentence in the case of rape.

- 7.14 Although the principle that compensation does not save a person from being imprisoned for a serious offence is well-established, the payment or offer of compensation may legitimately be taken into consideration as a mitigating factor at the sentencing stage. The *Criminal Justice Act 1993* clearly allowed the courts to make compensation orders *in addition to or instead of* any other penalty. This means that, arguably, a compensation order may be imposed without any further punishment. This has been regarded as problematic, especially in the context of serious and violent offences, and for sexual offences in particular.³²
- 7.15 In *The People (DPP) v C*,³³ the offender received a suspended sentence for sexual assault for which £7,000 in compensation was paid. The Court of Criminal Appeal substituted a sentence of 12 months imprisonment. In *The People (DPP) v McLaughlin*,³⁴ the trial judge imposed a suspended sentence for rape where the victim accepted an offer of €10,000 in compensation. The Court of Appeal substituted a sentence of 4 years imprisonment with the final 3 years suspended in light of mitigating factors, including the payment of compensation. In *The People (DPP) v McCabe*,³⁵ the victim accepted an offer of €15,000 for which the offender received a suspended sentence for aggravated sexual assault. The Court of Criminal Appeal held that the trial judge had erred in principle in treating the payment of compensation as a factor justifying suspension. However, in light of various

²⁸ Court of Criminal Appeal 18 February 2002.

²⁹ [2005] IECCA 90. See also: *The People (DPP) v McLaughlin* [2005] IECCA 91, [2005] 3 IR 198.

³⁰ [1988] 1 IR 250, [1989] ILRM 149.

³¹ [2005] IECCA 91, [2005] 3 IR 198.

³² Charleton and Scott, “Throw Away the Key: Public and Judicial Approaches to Sentencing – Towards Reconciliation” (2013) 10 *Irish Probation Journal* 7.

³³ Court of Criminal Appeal 18 February 2002.

³⁴ [2005] IECCA 91, [2005] 3 IR 198.

³⁵ [2005] IECCA 90.

mitigating circumstances other than the payment of compensation, the Court decided to allow the suspended sentence to stand. In *The People (DPP) v Lyons*,³⁶ the defendant was found guilty of sexual assault that fell into the upper echelons of the scale of gravity. He was ordered to pay €75,000 in compensation to the victim and was sentenced to 6 years imprisonment with the last 5-and-a-half years suspended. The Court of Criminal Appeal substituted a sentence of 6 years imprisonment with the final 4 years suspended.

- 7.16 As such, it is clear that there is nothing prohibiting the combination of a suspended sentence with a compensation order. In fact, the payment or offer of compensation may legitimately be considered as a mitigating factor at sentencing. However, the courts have made it clear that the payment or offer of compensation does not save a person from being imprisoned for a serious offence and, in particular, compensation should not amount to the sole justification for the imposition of a suspended sentence. Nevertheless, it appears that, in practice, the fact that the payment or offer of compensation may be regarded as a mitigating factor has led to the imposition of comparatively lenient sentences, usually where a significant proportion has been suspended.

7.3 Proposed Community Sanctions Bill

- 7.17 The Commission notes that at, at the time of writing (August 2017), the government has published a *Scheme of the Criminal Justice (Community Sanctions) Bill*. The purpose of the Scheme is to replace the *Probation of Offenders Act 1907* with updated provisions on community sanctions and the role of the Probation Service in order to reflect modern thinking and best practice. In 2014, the Scheme received pre-legislative scrutiny in the Oireachtas Committee on Justice and Equality. The government legislation programme Spring-Summer Session 2017 indicates that a Community Sanctions Bill will be published in the foreseeable future. The proposed Community Sanctions Bill aims to avoid sending individuals to prison for minor offences by empowering the court with a broad range of non-custodial options. The Bill will also require the courts to have regard to the interests of victims when considering imposing a community sanction.
- 7.18 The Bill intends to provide a focused and specific restorative justice approach for dealing with minor offences. If enacted, it will place the Probation Service on a modern statutory footing. The Bill further proposes to modernise community sanctions as well as making provision for court-ordered probation assessment reports and any necessary medical or psychiatric evaluation of a defendant prior to sentencing. Furthermore, the Bill will attempt to divert individuals with mental illnesses who have committed very minor offences out of the criminal justice system while also making provision for their treatment.
- 7.19 Again, assuming its enactment, the Bill will affect many of the provisions discussed above and may also incorporate and consolidate the provisions on suspended

³⁶ [2014] IECCA 27.

sentences under section 99 of the *Criminal Justice Act 2006*. The Commission will monitor the progress of the Bill when preparing the Report on this current project.

QUESTION 7

Your views are sought on the following questions:

- 7(a) Do you think a suspended sentence can or should be capable of being combined with a community service order (CSO)?
- 7(b) Do you think a suspended sentence would be appropriate where the offence is too serious for a CSO, or the offender is not suitable for a CSO but the offence is not serious enough to warrant an immediate and/or lengthy sentence of imprisonment?
- 7(c) Do you think compensation orders should be regarded as a factor justifying suspension? Why or why not?
- 7(d) Do you think a compensation order should be capable of amounting to a factor mitigating the seriousness of an offence? Why or why not?

Please type your comments (if any)

ISSUE 8

SECTION 99 OF THE *CRIMINAL JUSTICE ACT 2006*

8.1 The *Criminal Justice Act 2006*

- 8.01 Section 99 of the *Criminal Justice Act 2006* placed the suspended sentence on a statutory footing for the first time. One important aim of the section was to provide an effective procedure for dealing with those who reoffended or breached a condition during the operational period of the suspended sentence. This has been described as a perfectly legitimate and commendable aim,¹ but unfortunately a number of the provisions of section 99, despite numerous amendments,² have proven to be quite troublesome. This culminated in a finding of unconstitutionality in *Moore v DPP*³ of subsections (9) and (10) of section 99, which provided for the activation procedure to be followed in the event that an individual who is subject to a suspended sentence commits a subsequent offence during the operational period.⁴
- 8.02 The *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017* was enacted in response to the *Moore* case. The main aim of the Act is to amend the activation procedures for suspended sentences where the individual subject to the suspended sentence has committed a subsequent – or triggering – offence. The 2017 Act itself did not formally repeal subsections (9) or (10) because a finding of unconstitutionality means that they are void *ab initio*. It is worth noting that, at the time of writing (August 2017), the 2017 Act has not yet been commenced.⁵ A consolidated version of section 99, including amendments made to it by the 2017 Act, is provided in the Appendix to this Paper.
- 8.03 It should be noted that the discussion below on the procedural aspects of section 99 refers to pre-*Moore* case law on subsections (9) and (10). This is to facilitate a comprehensive review of the procedural issues concerning section 99 between its enactment and the decision in *Moore*. As noted, the 2017 Act has inserted new subsections (8A) to (8H), which address the activation procedure to be followed where an individual who is subject to a suspended sentence commits a subsequent – or triggering – offence. These subsections also outline the appeals procedure in such instances.

¹ O'Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 22-01.

² Section 99 was amended by section 60 of the *Criminal Justice Act 2007* and by section 51 of the *Criminal Justice (Miscellaneous Provisions) Act 2009*.

³ [2016] IEHC 244.

⁴ *Moore v DPP* [2016] IEHC 244.

⁵ A commencement order under section 4(2) of the 2017 Act has not, at the time of writing (August 2017), been made.

8.2 Activation and right to appeal

8.2.1. Constitution requires that activation process must await completion of subsequent criminal charge, including appeal

- 8.04 In *Moore v DPP*, the High Court (Moriarty J) held that there was a constitutional infirmity in section 99 concerning the activation procedures, in particular where an individual is convicted of a subsequent – or triggering – offence. Prior to the decision in *Moore*, section 99(9) and (10) provided that where an individual was convicted of a subsequent offence, he or she was to be remanded to the original court to have the suspended sentence for the original offence activated *before* he or she would be sentenced for the subsequent – or triggering – offence. The High Court held that this activation procedure breached the convicted person’s right to appeal the subsequent conviction. The result was that the individual’s original suspended sentence could be converted into a sentence of immediate imprisonment before he or she had an opportunity to challenge, on appeal, the conviction for the subsequent offence. If an individual successfully challenged the subsequent conviction, then the activation process for the original suspended sentence should not have occurred, as no subsequent – or triggering – offence was committed. The amendments to section 99 made by the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017* have sought to rectify this issue by inserting subsections (8A) to (8H) into section 99. Briefly, they provide that in a case such as occurred in *Moore*, the activation process for the original offence will not occur until *after* the individual has been sentenced for the subsequent offence and, should he or she wish to appeal, after the appeals process for the subsequent offence has been fully exhausted.
- 8.05 In order to appreciate the process that led to the decision in *Moore*, the Commission describes here the prior case law on activation under section 99. Until the decision in *Moore*, an individual convicted in the District Court could appeal to the Circuit Court against conviction, sentence, or both. The appeal operated as a rehearing and a stay on the District Court order for the duration of the appeal. Yet an appeal could not be taken until sentence has been imposed, as conviction and sentence could not be severed.⁶ Under section 99(9) and (10), as they then were, where an individual that was subject to a suspended was convicted of a subsequent – or triggering – offence during the operational period, he or she was remanded back to the original court that imposed the suspended sentence for a decision on whether to activate the suspended sentence (and, if so, to what extent) *before* sentence for the subsequent – or triggering offence – could be imposed by the court the convicted the individual of the subsequent offence. Only after a decision regarding the activation of the suspended sentence was made would the individual be remanded back to the court that

⁶ Section 99(9) and (10) of the 2006 Act was thought to conflict with the principle that conviction and sentence may not be severed. The High Court dealt with this issue in *Harvey v Leonard* [2008] IEHC 209, in which the defendant argued that the District Court had no jurisdiction to remand him to the original Court, as conviction and sentence may not be severed. The High Court held that while conviction and sentence were not severable in the sense that if one fell, the other did too, in this case neither had fallen. The Court did not agree that “conviction and sentence are so inextricably linked that nothing of substance can occur between them.” (at paragraph 16). The High Court pointed out that the District Court frequently convict and then remand for sentencing to allow time for the preparation of a Probation Report for example. The Court concluded that the procedure required under section 99 occurred within the same interval between conviction and sentencing. In *Murphy v Watkin* High Court 11 July 2014, the High Court reiterated its position on the severability of conviction and sentence for the purposes of section 99(9) of the 2006 Act.

convicted him or her of the subsequent offence for sentencing. As such, where an individual that was subject to a suspended sentence was convicted of a subsequent – or triggering – offence and wished to appeal this conviction, he or she was precluded from doing so until after he or she had been sentenced for the subsequent offence, which only occurred after a decision regarding the activation of the suspended sentence was made by the original court. If the sentence were activated, in whole or in part, and the individual were committed to custody but later had the decision of the District Court in relation to the subsequent offence quashed on appeal, he or she might legitimately complain of unlawful detention.

- 8.06 In *Muintean v Hamill*,⁷ the accused was convicted of an offence in the District Court while subject to a suspended sentence. He was remanded to the original court for a hearing on activation, during which time he attempted to file an appeal against the triggering conviction. The High Court (McCarthy J) dismissed the appeal because the activation procedure had not been completed, as the District Court had not yet imposed a sentence for the subsequent offence, and as such, an appeal could not yet be brought. Similarly in *Sharlott v Collins*,⁸ the defendant was convicted of an offence by the District Court and remanded to the Circuit Court for a decision on activation of a suspended sentence. The defendant filed an appeal against the conviction and sought a prohibition to stop the activation hearing pending his appeal against the triggering offence. The High Court (Hanna J) dismissed the appeal, stating that under section 99(9) the District Court was obliged to remand the defendant to the Circuit Court and that an appeal could not be filed until sentence had been imposed by the District Court. The High Court did however acknowledge the difficulties that these procedures caused, stating: “[w]ere he ultimately to succeed and to stand innocent of the District Court charge, he would undoubtedly suffer a grave injustice were the Circuit Court sentence in the meantime activated.”⁹
- 8.07 In *The People (DPP) v Devine*,¹⁰ the defendant pleaded guilty in the District Court to an offence committed during the operational period of a suspended sentence imposed by the Court of Criminal Appeal. The District Court, after sentencing the defendant, remanded him to the next sitting of the Court of Criminal Appeal for a decision on activation of the suspended sentence. Section 99(9) of the 2006 Act, as it then was, required the individual to be remanded to the next sitting of the court that imposed the suspended sentence for a decision on activation *before* sentence was passed for the subsequent offence. This was not done in this case and therefore the District Court has no jurisdiction to remand the offender to the Court of Criminal Appeal and the Court of Criminal Appeal had no jurisdiction to decide on the activation of the suspended sentence, as the proper procedures under section 99 had not been adhered to.¹¹

⁷ [2010] IEHC 391.

⁸ [2010] IEHC 482.

⁹ [2010] IEHC 482 at paragraph 19.

¹⁰ [2011] IECCA 67.

¹¹ It is interesting to note that the procedure followed by the District Court in this case would now be considered the correct approach, as provided for by the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*.

- 8.08 In *DPP (Moloney) v O'Callaghan*,¹² it was argued that the court that had originally imposed the suspended sentence should defer a decision on activation and remand the matter back to the court that had convicted the offender of the subsequent offence so that a sentence could be imposed and an appeal taken. The High Court (Faherty J) rejected this argument as incompatible with the procedure set out in section 99(9) and (10) of the 2006 Act. The High Court held:
- “The provisions of ss. 99(9)-99(10) constitute a legislative barrier to the possibility of a person convicted while under a period of suspension being able to stave off a possible revocation of the suspension pending appeal of the triggering conviction.”¹³
- 8.09 A further complication arises from the District Court’s entitlement under section 1 of the *Probation of Offenders Act 1907* to dismiss a charge or to grant a conditional discharge notwithstanding that the court may be satisfied that the charge is proved. A literal interpretation of section 99(9) of the 2006 Act requires a remand only where there has been a subsequent conviction. This could be interpreted to mean that where the District Court applied the *Probation of Offenders Act 1907* it is not under an obligation to remand the defendant to the next sitting of the court that imposed the suspended sentence. However, the decision whether or not to apply the 1907 Act generally occurs at what may be considered the sentencing stage of a District Court hearing. Thus, if the offender is remanded to the original court and has his or her suspended sentence activated, but upon remand back to the District Court, the 1907 Act is applied and no conviction is ever recorded, then the defendant has avoided conviction for the subsequent offence, but will nonetheless serve a term of imprisonment for the original offence.¹⁴
- 8.10 The issue with the right to appeal under section 99(9) and (10) of the 2006 Act was declared unconstitutional in *Moore v DPP*.¹⁵ The case involved an appeal against the activation procedures under section 99(9) and (10) of the 2006 Act, brought by 6 defendants, on the grounds that the procedures were unfair and unconstitutional. The High Court (Moriarty J) highlighted the “chequered history” of section 99, including a number of previous cases that highlighted significant issues with the application of the section in practice.¹⁶ One of the main shortcomings of section 99 identified by the Court was that it paradoxically tried to do too much, effectively seeking to regulate every remote possibility which could arise. In finding subsections (9) and (10) of section 99 unconstitutional, the High Court commented that although the Constitution may not be invoked for reasons of expedience or popularity, it could not be ignored that judges from all jurisdictions had expressed a wariness towards section 99 and

¹² [2015] IEHC 165.

¹³ *ibid* at paragraph 31.

¹⁴ O'Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 22-35.

¹⁵ [2016] IEHC 244.

¹⁶ *The People (DPP) v Carter and Kenny* [2015] IESC 20; *Sharlott v Collins* [2010] IEHC 482; *McCabe v Ireland* [2014] IEHC 435. The High Court also referred to a detailed paper presented by District Judge Malone on the general topic of suspended sentences which commented that, whilst the concept of section 99 was to be welcomed as an effort to enshrine in statute the power to suspend sentences, “practical difficulties have caused frustration amongst all court-users and are in danger of lessening the impact of the more positive aspects of this legislation.”

that “protagonists, lay and professional, in the arena of criminal law simply do not know at present where they stand.”

- 8.11 The consequences of *Moore* were addressed in *Clarke v Governor of Mountjoy Prison*.¹⁷ The defendant appealed to the High Court under Article 40.4.2 of the Constitution for an inquiry into the lawfulness of his detention following the decision in *Moore*. The High Court (McDermott J), in refusing the application, held that the defendant’s detention was lawful and in accordance with the Constitutional provisions. The Court distinguished the case from *Moore*, in that the present defendant was not a person convicted in the District Court who wished to appeal that conviction but was debarred from doing so in light of his remand back to the court that had imposed the suspended sentence before a sentence could be imposed by the District Court: “He did not experience the prejudicial or suggested discriminatory effects of the impugned subsections found to apply to the *Moore* defendants. He was guilty and accepted his guilt.” The Court further held that the defendant could not benefit from the declaration of unconstitutionality in *Moore* as there was no evidence that he had suffered any fundamental injustice, unfairness or unfair prejudice. The Court concluded:

“He seeks the technical benefit of the declaration which has no relevance to the merits of the case. To permit the applicant release on that basis would... not [be] justified or mandated by the decisions of the Supreme Court and Court of Appeal... nor is it justified on the facts of this case... I am satisfied that the applicant is detained in accordance with law. The application is refused.”

- 8.12 The decision of the High Court was appealed to the Court of Appeal.¹⁸ The Court (Birmingham J), in dismissing the appeal, agreed with the High Court and held that the defendant had received a fair hearing with regard to the activation of the suspended sentence. The activation had not been disproportionate or unconstitutional in this particular case. The Court also commented on the broad powers afforded to the courts under section 99(17), which provides for the power to activate a suspended sentence in the event of a breach of a condition of suspension. The Court considered section 99(17) to be similar to section 99(10), except that it was more extensive and afforded the courts with a more general jurisdiction to activate a suspended sentence. Although the Circuit Court had not specified under what subsection it was activating the suspended sentence, the Court of Appeal concluded from the transcripts that the Circuit Court had moved beyond the remit of section 99(10), that is, the Circuit Court had taken a broader view to activation, as it is entitled to do under section 99(17). The reasoning of both the High Court and the Court of Appeal has been followed in subsequent cases, refusing applications for release in light of *Moore*.¹⁹
- 8.13 Section 2(c) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act*

¹⁷ [2016] IEHC 278.

¹⁸ *Clarke v Governor of Mountjoy Prison* [2016] IECA 244.

¹⁹ *Ryan v DPP* [2016] IEHC 380; *O’Sullivan (application for Habeas Corpus)* [2016] IEHC 311.

2017, which inserts subsections (8A) to (8H) into section 99 of the 2006 Act, amends the activation procedures following the commission of a subsequent offence in light of the decision in *Moore*. Sections 99(8A) to 99(8H) provide that where an individual commits an offence during the operational period of a suspended sentence, the court before which the individual is convicted of the triggering offence shall, *after* imposing sentence, remand him or her in custody or on bail to the next sitting of the court that imposed the suspended sentence for a decision on whether or not, and if so to what extent, the suspended sentence should be activated. Subsections (8D) to (8H) outline the procedures to be followed where an individual appeals against either conviction or sentence for the triggering offence. Where such an appeal is initiated, the court that originally imposed the suspended sentence may adjourn the activation proceedings to enable the individual to bring the appeal and for it to be determined. If the appeal is successful, insofar as it related to conviction, then the court that originally imposed the suspended sentence shall dismiss the activation proceedings. In all other cases, the court shall consider whether to activate the suspended sentence.

8.2.2. Activation by the Circuit Court on appeal from the District Court

- 8.14 The application of section 99 to suspended sentences that are imposed by the Circuit Court of Appeal from the District Court created another problem, as there is no right of appeal against the decision of the Circuit Court following a District Court appeal. Furthermore, according to *The People (DPP) v Foley*,²⁰ where a suspended sentence was imposed by an appellate court, it was the appellate court, and not the original court, that must deal with an activation hearing. This caused problems where the Circuit Court, on appeal from the District Court, imposed a suspended sentence and then subsequently activated that sentence. In effect, there was no right to appeal the decision of the Circuit Court to activate the suspended sentence in this instance.
- 8.15 This arose in *McCabe v Ireland*.²¹ The High Court (Hogan J) did not declare section 99 to be unconstitutional, but rather declared that the activation of a suspended sentence by the Circuit Court from a District Court appeal would be unconstitutional in the absence of a legislative provision for an appeal of that activation. The Court of Appeal disagreed, holding that section 99(12) of the 2006 Act should be interpreted as conferring a right of appeal in such circumstances.²² The Court pointed out that the activation procedure is distinct from the appeal itself, and as such there is a right to appeal the revocation decision of the Circuit Court. This may have solved the immediate issue but it may also have given rise to another, namely that a person committed to prison following the activation of a suspended sentence in the Circuit Court has no right to bail pending the determination of the Court of Appeal. Since the majority of suspended sentences are relatively short, the individual will usually have served the sentence by the time the appeal is heard.
- 8.16 Section 2(l) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*,

²⁰ [2014] IESC 2, [2014] 1 IR 360.

²¹ [2014] IEHC 435.

²² *McCabe v Governor of Mountjoy Prison* [2015] IECA 156, [2015] 3 IR 95.

which inserts subsection (22) into section 99 of the 2006 Act, clarifies the procedures where a suspended sentence is imposed on appeal. Section 99(22) provides that where a suspended sentence is imposed on appeal, the court that should deal with an activation hearing is the court from which the appeal was taken.²³

8.3 Repeal of the common law power to suspend

8.17 With the enactment of section 99 of the *Criminal Justice Act 2006*, it was unclear whether the common law power to suspend a sentence of imprisonment had been repealed, as section 99 does not explicitly repeal it. The issue came before the Court of Criminal Appeal in *the People (DPP) v Ryan*,²⁴ in which the question before the Court was whether a suspended sentence could be activated in part where it had been imposed prior to the commencement of section 99 of the 2006 Act. Under the common law power to suspend a sentence of imprisonment, a suspended sentence could only be activated in full, not in part. The prosecution argued, therefore, that the suspended sentence in issue, imposed before the commencement of section 99, was governed by common law rules and must be activated in full. The Court of Criminal Appeal disagreed, stating there was nothing in section 99 that imposed a temporal restriction so that only suspended sentences imposed after the commencement of the section could benefit from activation in part.

8.18 The issue came before the High Court in *DPP (Madden and Hynes) v Carter*,²⁵ in which the High Court (O'Malley J) held that the powers to impose and activate suspended sentences are now entirely governed by section 99. The High Court reiterated this point in *DPP (Purthill) v Murray*²⁶ in detail. The High Court (O'Malley J) noted that the presumption against implied repeal effecting changes in the common law does not apply to criminal statutes. While the statutory scheme brought in changes to the manner in which suspended sentences are imposed and activated – especially with respect to the power to activate a suspended sentence in part – it could not be said that the 2006 Act altered the legal position of the defendant in any real way. The wording of section 99 made it clear that the legislature intended to regulate the suspended sentence by placing it on a statutory footing and by providing a complete code with regard to the imposition, the conditions of suspension, the supervision of those subject to suspended sentences and enforcement in the event of a breach. As such, the High Court concluded that there was no scope for a parallel common law jurisdiction.

8.4 Term of imprisonment that may be suspended

8.19 Under section 99 of the *Criminal Justice Act 2006*, there is no limit on the term of imprisonment that may be suspended. A suspended sentence may be imposed for any term of imprisonment except mandatory penalties, such as the mandatory

²³ In effect, the procedures have reverted to how they were when *The People (AG) v Grimes* [1955] IR 315 was decided prior to the decision of the Supreme Court in *The People (DPP) v Foley* [2014] IESC 2, [2014] 1 IR 360.

²⁴ [2009] IECCA 21.

²⁵ [2014] IEHC 179.

²⁶ [2015] IEHC 782.

sentence of life imprisonment for murder. This makes the suspended sentence a particularly elastic sanction, in that it can be imposed for minor offences that merit a sentence of imprisonment as well as very serious crimes, including manslaughter. This approach contrasts with many other common law jurisdictions, in which the maximum term of imprisonment that may be suspended ranges from 14 days to 5 years.²⁷

8.5 The operational period

- 8.20 Section 99 of the *Criminal Justice Act 2006* does not specify a maximum length for the operational period of a suspended sentence. Under the common law, the operational period of a suspended sentence should not generally extend beyond the length of the sentence imposed. However, this was rarely followed in practice. In *The People (Attorney General) v McClure*,²⁸ the Court of Criminal Appeal varied a sentence of 15 months imprisonment to 9 months imprisonment suspended for 2 years. Similarly, in *The People (Attorney General) v Murphy*,²⁹ the Court of Criminal Appeal varied the sentence from 5 years imprisonment to one of 4 years suspended for 5 years. In *The People (DPP) v Hogan*,³⁰ the Court of Criminal Appeal reiterated that, in general, the operational period should not extend beyond the length of the sentence, save in exceptional circumstances. The Court did maintain that it did not wish to lay down any concrete rules on the matter, but rather sought to ensure that there was a reasonable limit on the length of the operation period of a suspended sentence.
- 8.21 These cases were decided before section 99 of the *Criminal Justice Act 2006* came into force. In *DPP (Cogavin) v Vajelukis*,³¹ the High Court (Peart J) held that nothing in section 99 prevented the courts from imposing an operational period that exceeded the length of the sentence. The High Court also held that although the District Court may never impose an immediate custodial sentence exceeding 2 years, it is not precluded from imposing a suspended sentence with an operational period of more than 2 years. Although these comments are obiter, they corroborate section 99(2), which refers to a “period of suspension” without any time limits, which is the general practice in legislation governing suspended sentences that impose a limit on the length of the operational period.³² However, the longer the operational period, the greater the risk that the individual that is subject to the suspended sentence will

²⁷ In England and Wales, the *Criminal Justice Act 2003* specifies that the maximum term of imprisonment that may be suspended is between 14 days and 2 years. Northern Ireland (*Treatment of Offenders Act (Northern Ireland) 1968*), South Australia (*Criminal Law (Sentencing) Act 1988*) and New South Wales (*Crimes (Sentencing Procedure) Act 1999*) all provide that the maximum term of imprisonment that may be suspended is 2 years. Western Australia (*Sentencing Act 1995*), Northern Territory (*Sentencing Act 1995*) and Queensland (*Penalties and Sentences Act 1992*) provide for a maximum term of imprisonment that may be suspended of 5 years. The Australian Capital Territory and Tasmania are the only other jurisdictions in which there is no maximum term of imprisonment that may be suspended.

²⁸ [1945] IR 275.

²⁹ Court of Criminal Appeal 12 December 1974.

³⁰ Court of Criminal Appeal 4 March 2002.

³¹ [2014] IEHC 265.

³² *Criminal Justice Act 2003* (England and Wales), s. 189(3); *Treatment of Offenders (Northern Ireland) Act 1968* (NI), ss. 18(1), (1A); *Sentencing Act 1995* (WA), ss. 76(1), 81(1); *Sentencing Act 1995* (NT), s. 40(6); *Criminal Law (Sentencing) Act 1988* (SA), s. 40; *Penalties and Sentences Act 1992* (Qld), ss. 144(5), (6); *Crimes (Sentencing Procedure) Act 1999* (NSW), s. 12(1).

breach a condition of suspension. Furthermore, the length of the operational period must be considered part of the punishment of the suspended sentence.³³ As such, particularly long operational periods may fall foul to the principle of proportionality.

8.6 Conditions of suspension

- 8.22 Under section 99 of the *Criminal Justice Act 2006*, an individual who receives a suspended sentence is subject to the mandatory conditions to keep the peace and be of good behaviour for the duration of the operational period. Section 99(3) and (4) provide for the imposition of additional conditions. These additional conditions generally have a deterrent or rehabilitative purpose and, as such, serve to advance the goals of public protection and crime reduction. However, courts must take care not to impose very onerous conditions that would effectively set the individual subject to the suspended sentence up to fail. The conditions of suspension must conform to the principles of legality, that is they should be expressed clearly and indicate precisely what the offender is required to do or refrain from doing.³⁴ This has also been expressed as a general principle of suspended sentences.³⁵ The discretion to tailor the conditions of suspension to a specific individual is a useful tool to assist in his or her supervision and/or rehabilitation. However, it is worth mentioning that adequate resources for the Prison and the Probation Service, as well as other organisations involved in the supervision and rehabilitation of offenders, are a condition precedent for successful supervision and rehabilitation programmes.³⁶
- 8.23 Although subsection (6) of section 99 permits the imposition of additional conditions at the request of the Probation Service at any time before the expiration of the sentence, it does not permit the extension of the original operational period imposed by the sentencing court. This is important, because section 99 does not impose any restrictions on the length of the operational period. Furthermore, it is notable in light of the procedures in other common law jurisdictions in which the operational period may be extended by the courts at a later stage.³⁷

8.7 The subsequent offence

- 8.24 Under section 99(9), as it then was, an individual who is subject to a suspended sentence was liable to have the suspended sentence activated if he or she was convicted of a subsequent offence, however minor, during the operational period of the suspended sentence. The fact that the subsequent offence could be any offence, however minor, can seem unfair where an individual who is subject to a suspended sentence commits an offence that is either not punishable by imprisonment or

³³ *The People (DPP) v Stronge* [2011] IECCA 79.

³⁴ O'Malley *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 22-26.

³⁵ See paragraph 3.09.

³⁶ Murphy, "An Analysis of Sentencing Provisions in the Criminal Justice Act 2006" [2007] 1 *Judicial Studies Institute Journal* 60 at 64; Murphy, "Sentencing Provisions in Part 10 of the Criminal Justice Act 2006" (2008) 2 *Irish Criminal Law Journal* 48 at 49.

³⁷ Section 20AA(1) and (3) of the *Crimes Act 1914* (Cth); section 43 of the *Sentencing Act 1995* (NT); section 58(3) of the *Criminal Law (Sentencing) Act 1988* (SA); Section 147(1) of the *Penalties and Sentences Act 1992* (Qld); Section 27(4C)(c) and (4E)(c) of the *Sentencing Act 1997* (Tas); section 189, schedule 12, paragraphs 8 and 16 of the *Criminal Justice Act 2003*; section 19(1) of the *Treatment of Offenders Act (Northern Ireland) 1968*.

carries a maximum sentence of only a few months in prison. It may also seem unduly harsh to activate a suspended sentence where the subsequent offence is not related to the original offence.

- 8.25 Although the courts are vested with the discretion to decide not to activate a sentence at all or to activate it in part, the problem, arguably, is only mitigated, not solved. In *The People (DPP) v Kiely*,³⁸ the defendant committed a number of serious driving offences and was sentenced to 6 years imprisonment wholly suspended. During the operational period he was convicted of public order offences and the court that imposed the suspended sentence reactivated 4 years of it. The Court of Criminal Appeal upheld the decision, as, although the initial imposition of a wholly suspended sentence had been lenient, the defendant later paid heavily for committing offences that were, by comparison fairly minor. Similarly, in the Northern Irish case of *R v Wightman*,³⁹ the offender received a suspended sentence for the larceny of a cheque and forgery, and later had the suspended sentence activated upon conviction for the theft of a fountain pen.
- 8.26 The *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017* does not address the issue of the nature of the subsequent offence. Section 2(c) of the 2016 Act, which inserts subsection (8A) into section 99 of the 2006 Act, still refers simply to conviction for “an offence,” rather than, for example, an offence that is punishable by imprisonment. Although it can be argued that in order for a suspended sentence to maintain its punitive edge, the Sword of Damocles should descend where a subsequent offence is committed, however minor, it is still worth discussing whether there should be a threshold for activation or whether judicial discretion is sufficient to guarantee against unjust activation.

8.8 Remand procedures

- 8.27 Where an individual who is subject to a suspended sentence is convicted of a subsequent offence during the operational period, section 99(9) of the 2006 Act, as it then was, required the court that convicted the individual for the subsequent offence to, before imposing sentence, remand him or her on bail or in custody to the next sitting of the court that imposed the suspended sentence. This is a mandatory provision.⁴⁰
- 8.28 Section 2(c) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, which inserts subsection (8A) into section 99 of the 2006 Act, amends these remand procedures by providing that the individual that is subject to a suspended sentence who has been convicted of a subsequent offence shall be remanded to the court that imposed the suspended sentence *after* sentence is imposed for the subsequent offence.
- 8.29 Under section 99(10), as it then was, the court that originally imposed the suspended

³⁸ Court of Criminal Appeal 19 February 2008.

³⁹ [1950] NI 124.

⁴⁰ *DPP (Maloney) v O’Callaghan* [2015] IEHC 165.

sentence had considerable discretion to decide whether or not to activate the suspended sentence, and if it decided to activate the sentence, it could choose to activate only part of it. Subsection (8C), inserted by section 2(c) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, does not change this discretionary procedure. The discretion to activate a suspended sentence in part is a welcome change from the common law procedure under which the court could either decide to ignore a *de minimis* breach, or activate the sentence in its entirety.⁴¹ When deciding whether or not to activate the suspended sentence, and if so to what extent, the court will have regard to the nature and gravity of the subsequent offence, the point in time during the operational period that the offence was committed and the extent to which the individual had, up until the commission of the offence, complied with the conditions of suspension.

8.9 Presumption of activation

8.30 The 2006 Act provides an implicit presumption of full activation in the event of a subsequent conviction or a breach of a condition of suspension. This presumption can be rebutted where the court is of the opinion that it would be unjust in all of the circumstances to activate the suspended sentence either in part or at all. In *The People (DPP) v Ryan*,⁴² the Court of Criminal Appeal commented that “[t]he object of the section as a whole is to deal with a perceived injustice where reactivation of a suspended sentence or a suspended portion of a sentence could be perceived as disproportionate in the absence of a power in the court to reactivate the sentence in part.” It would appear that the circumstances in which it would be unjust to activate a suspended sentence and require the individual to serve the entire sentence vary on a case-by-case basis.

8.10 The “next sitting”

8.31 Where an individual who is subject to a suspended sentence is convicted of a subsequent offence, he or she must be remanded to the “next sitting” of the original court. The precise meaning of “next sitting” was discussed in *DPP (Madden and Hynes) v Carter*,⁴³ in which the High Court (O’Malley J) held that suspended sentences are now governed entirely by section 99, which should be strictly adhered to. The term “the next sitting” should be interpreted literally and, therefore, the District Court in this case had no jurisdiction to deal with the defendant, as he had not been brought before it in the proper manner. The High Court pointed out that had the defendant been remanded in custody, and been required to remain there for longer than was necessary, he would have had a genuine reason to challenge the legality of his detention. The Supreme Court unanimously upheld this decision, stating that “next sitting” meant the next sitting “which is reasonably possible in the circumstances of the case,” which would ordinarily be the next full day of court hearings.⁴⁴

⁴¹ *The People (DPP) v Stewart* Court of Criminal Appeal 12 January 2004.

⁴² [2009] IECCA 21.

⁴³ [2014] IEHC 179.

⁴⁴ *The People (DPP) v Carter and Kenny* [2015] IESC 20, [2015] 3 IR 58.

- 8.32 In *Cobzaru v O'Donoghue*,⁴⁵ the High Court (Eagar J) held that section 99 of the 2006 Act refers to the next sitting of the *court* and not the courthouse. In this case the defendant was remanded to the next sitting of the Circuit Court which was to be the following day in Court 16. However, the Circuit Court was not sitting in Court 16 and was, instead, sitting in Court 5. The High Court, in refusing judicial review, commented that the inability of the prosecution to inform the defendant of the change of venue would not assist her, as the matter was adjourned so that she could be notified and cautioned to attend and this had been duly complied with.

8.11 Revisiting and varying the original sentence

- 8.33 An issue arose with regard to revisiting and varying the original sentence during the activation procedures under section 99(10). In *The People (DPP) v Kiely*,⁴⁶ at an activation hearing, the Circuit Court had activated 4 years of the 6 year suspended sentence and suspended the final 2 years. The defendant appealed the activation of the 4 years. The Court of Criminal Appeal, in dismissing the appeal, commented obiter that during the activation hearing, the original court had the right to vary the original sentence. However, in *DPP (Cogavin) v Vajeuskis*,⁴⁷ the High Court (Peart J) dismissed the defendant's argument that the original sentence was invalid because the operational period exceeded the length of the sentence. The High Court also stated that the original sentence could not be revisited during the activation proceedings. Any contention with the original sentence must be brought by way of an appeal or judicial review. *Kiely* was not discussed by the High Court in *Vajeuskis* and since the remarks were obiter, it can be assumed that the strong dictum of the High Court is illustrative of the correct approach.

8.12 Multiple activations

- 8.34 Section 99 provides the courts with the discretion to activate only a part of the suspended sentence. One could assume that the unactivated part of the sentence remains suspended, but this may not be the case. Section 99(10), as it then was, provided that the court must activate the suspended sentence unless it would have been unjust to do so, and where the court did activate it, the offender was required to serve the whole sentence or such part that the court considered just. A comparable power is found in subsection (17) of section 99 for instances in which the individual has been brought before the court with regard to a breach of a condition of suspension. Subsection (10), as it then was, and subsection (17) of section 99 of the 2006 Act suggest that the entire suspended sentence is activated but that the court can specify the amount of the sentence that the offender is required to serve. Therefore, no subsequent activation could take place because the suspended sentence in its entirety has been activated.⁴⁸

⁴⁵ [2016] IEHC 359.

⁴⁶ Court of Criminal Appeal 19 February 2008.

⁴⁷ [2014] IEHC 265.

⁴⁸ Dwyer, "99/9: Nine Issues with Section Ninety-Nine" (2015) 20(5) *The Bar Review* 105 at 108.

- 8.35 In practice, the courts have taken a different approach. In *The People (DPP) v CL*,⁴⁹ the defendant appealed against the activation of a 3 year suspended sentence. The Court of Appeal, in allowing the appeal, held that the activating judge had failed to address whether it was necessary to activate the entire suspended sentence in light of the defendant's exceptional circumstances. The Court of Appeal varied the activation to 1 year with the remaining 2 years suspended for 2 years on condition that the defendant keep the peace, be of good behaviour and comply with all of the directions of the Probation Service during the operational period. Similarly, in *The People (DPP) v Darcy*,⁵⁰ the Court of Appeal varied the activation of a 6 year suspended sentence to 4 years. The inactivated portion was to remain suspended for a period of 4 years.
- 8.36 Section 2(j) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, which inserts subsection (18A) into section 99 of the 2006 Act, clarifies the issue regarding the possibility of multiple activations. Subsection (18A) now provides that where a court activates only part of the suspended sentence, it may make an order suspending the inactivated part and such an order shall be regarded as a new suspended sentence order, as if it had been made under section 99(1) of the 2006 Act.

8.13 Activation following a breach of a condition of suspension

- 8.37 Under section 99(13) and (17) of the 2006 Act, a suspended sentence may be activated where there has been a breach of a condition of suspension. Section 99(13) provides that where a member of An Garda Síochána, or the governor of the prison to which the individual subject to a part-suspended sentence has been committed, has reasonable grounds for believing that the individual has breached the mandatory conditions of suspension, namely to keep the peace and be of good behaviour, he or she may apply to the court to have the suspended sentence activated. Under section 99(14) a probation officer may apply for activation of a suspended sentence where he or she has reasonable grounds for believing that the individual that is subject to the suspended sentence has breached an additional condition of suspension found under section 99(3) and (4). Section 99(17) provides that where the court is satisfied that a breach of a condition of suspension has occurred, it shall activate the suspended sentence, unless it considers that it would be unjust to do so. Where the court activated the suspended sentence, it shall be activated in full, unless the court considers that to do so would be unjust in all of the circumstances.
- 8.38 Under the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, the powers of the Gardaí and the governors of prisons have been enhanced by allowing them to apply for activation of a suspended sentence not just where there are reasonable grounds for believing that the individual subject to the suspended sentence has breached a mandatory condition of suspension under section 99(2), but also where they have reasonable grounds for believing that the individual has

⁴⁹ [2016] IECA 71.

⁵⁰ [2016] IECA 44.

breached an additional condition under section 99(3). This is an interesting modification, as it appears to enhance the role of the Gardaí as being concerned not only with the detection of crime but also with its prevention. This amendment could also suggest that closer cooperation between the Gardaí, the governors of prisons, and the Probation Service is needed in order to effectively monitor compliance with suspended sentences, as well as enhancing the detection of breaches. This enhanced role has also been proposed in the *Scheme of the Criminal Justice (Community Sanctions) Bill*.⁵¹

- 8.39 Section 2(g) of the 2017 Act inserts subsection (13A) which provides that the DPP may, if he or she has reasonable grounds for believing that an individual who is subject to a suspended sentence has contravened a condition imposed under section 99(3), apply to the court to initiate activation proceedings. This may, arguably, confer monitoring and investigatory powers on the DPP. Section 99(3) enables the courts to impose additional conditions, other than the mandatory conditions to keep the peace and be of good behaviour under section 99(2). Whereas it would make sense that the DPP could apply to the court to initiate activation proceedings where an individual has breached the conditions under section 99(2), which generally relate to the commission of a subsequent offence, the additional conditions under section 99(3) could be anything – drug addiction counselling, an exclusion order, or a curfew requirement for example – and may fall outside of the ambit of what the DPP can monitor and enforce. It could, however, be argued that as section 99(3) is effectively a catch-all provision, in that it encompasses all possible conditions that can be imposed, including to keep the peace and be of good behaviour, that by empowering the DPP under this subsection, the Act intends, as far as possible, to ensure that suspended sentences are being effectively monitored and breaches detected. The question remains whether the Act intends to confer a monitoring function on the DPP or whether it simply intends to ensure better monitoring and detection of breaches of suspended sentences.
- 8.40 Section 2(h) of the 2017 Act amends subsection (14) by removing the power of the Probation Service to apply to the court where it has reasonable grounds for believing that an individual who is subject to a suspended sentence has contravened a condition under section 99(3). This conflicts with the proposal under the *Scheme of the Criminal Justice (Community Sanctions) Bill*, which aims to enhance the role of the Probation Service. However, as conditions imposed under section 99(4) are directly related to the Probation Service, and considering that the powers of the Gardaí, the governors of prisons, and the DPP have been enhanced to cover breaches of conditions imposed under section 99(3), it could be argued that the Act intends to ensure that the responsibilities and resources of the Probation Service do not become overly stretched.
- 8.41 The power to activate a suspended sentence where there has been a breach of a condition of suspension has not encountered the same issues as section 99(9) and (10), as they then were, and was not subject to the declaration of unconstitutionality

⁵¹ See paragraph 7.17 ff.

in *Moore*. This means that, until the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017* is commenced, suspended sentences may still be activated where there has been a breach of a condition of suspension. Arguably, and as discussed by the Court of Appeal in *Clarke*,⁵² an individual who is subject to a suspended sentence who commits a subsequent offence could still have his or her sentence activated under the powers afforded to the courts under section 99(17). This is because every individual that is subject to a suspended sentence must comply with the mandatory conditions to keep the peace and be of good behaviour provided for under section 99(2). Committing another offence, it is argued, breaches these mandatory conditions.

8.14 Temporary release

- 8.42 Section 99(19) does not affect the powers of the Minister for Justice to make rules for the temporary release of prisoners under section 2 of the *Criminal Justice Act 1960*, nor the rules governing remission for industry and good conduct under Rule 59 of the *Prison Rules 2007*, which replaced Rule 38 of the *Rules for the Government of Prisons 1947*. Section 99(19) placed the decision in *O'Brien v Governor of Limerick Prison*⁵³ on a statutory footing. In that case, the trial judge had imposed a 10 year sentence with the final 6 years suspended. It was clear that the trial judge intended the 4 years of imprisonment to be served without remission. The Supreme Court held that the type of sentence imposed was inconsistent with the terms of the 1947 Rules, which applied at the time. Thus, such a sentence should not be imposed and the 4 years of imprisonment were to be the period in respect of which remission would be calculated.

⁵² *Clarke v Governor of Mountjoy Prison* [2016] IEHC 278. See paragraphs 8.10-8.11.

⁵³ [1997] 2 ILRM 349.

QUESTION 8

Your views are sought on the following questions:

- 8(a) Do you think that the common law power to suspend a sentence of imprisonment should be expressly repealed?
- 8(b) Do you think there should be a limit on the length of the custodial sentence that may be suspended?
- 8(c) Do you think the operational period of a suspended sentence should be limited in length to, for example, 5 years?
- 8(d) Do you think that the operational period of a suspended sentence should not exceed the length of the actual sentence of imprisonment that is imposed?
- 8(e) Do you think there should be a list of conditions of suspension set out in legislation?
- 8(f) Do you think that the subsequent – or triggering – offence should continue to be any offence or should it, at the very least, be an offence that is punishable with imprisonment?
- 8(g) Do you think that section 99(17) of the *Criminal Justice Act 2006*, which provides for the activation of a suspended sentence – in whole or in part – where the individual that is subject to the suspended sentence breaches a condition of suspension during the operational period, represents a more general power to activate a suspended sentence, in that the commission of a subsequent offence could also be activated under section 99(17)?

Please type your comments (if any)

APPENDIX

CONSOLIDATED VERSION OF SECTION 99 OF THE CRIMINAL JUSTICE ACT 2006

Below is a consolidated version of section 99 of the *Criminal Justice Act 2006*, including all amendments made up to and including those made under the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*. It should, however, be noted that amendments made by the 2017 Act have not yet been commenced at the time of writing (August 2017), as a commencement order is required under section 4(2) of the 2017 Act.

Power to suspend sentence.

99. – (1) Where a person is sentenced to a term of imprisonment (other than a mandatory term of imprisonment) by a court in respect of an offence, that court may make an order suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order.

(2) It shall be a condition of an order under *subsection (1)* that the person in respect of whom the order is made keep the peace and be of good behaviour during —

(a) the period of suspension of the sentence concerned, or

(b) in the case of an order that suspends the sentence in part only, the period of imprisonment and the period of suspension of the sentence concerned,

and that condition shall be specified in the order concerned.

(3) The court may, when making an order under *subsection (1)*, impose such conditions in relation to the order as the court considers —

(a) appropriate having regard to the nature of the offence, and

(b) will reduce the likelihood of the person in respect of whom the order is made committing any other offence,

and any condition imposed in accordance with this subsection shall be specified in that order.

(4) In addition to any condition imposed under *subsection (3)*, the court may, when making an order under *subsection (1)* consisting of the suspension in part of a sentence of imprisonment or upon an application under *subsection (6)*, impose any 1 or more of the following conditions in relation to that order or the order referred to in the said *subsection (6)*, as the case may be:

(a) that the person co-operate with the probation and welfare service to the extent specified by the court for the purpose of his or her rehabilitation and the protection of the public;

(b) that the person undergo such —

(i) treatment for drug, alcohol or other substance addiction,

(ii) course of education, training or therapy,

(iii) psychological counselling or other treatment,

as may be approved by the court;

(c) that the person be subject to the supervision of the probation and welfare service.

(5) A condition (other than a condition imposed, upon an application under *subsection (6)*, after the making of the order concerned) imposed under *subsection (4)* shall be specified in the order concerned.

(6) A probation and welfare officer may, at any time before the expiration of a sentence of a court to which an order under *subsection (1)* consisting of the suspension of a sentence in part applies, apply to the court for the imposition of any of the conditions referred to in *subsection (4)* in relation to the order.

(7) Where a court makes an order under this section, it shall cause a copy of the order to be given, by electronic or other means,¹ to —

(a) the Garda Síochána, or

(b) in the case of an order consisting of the suspension of a sentence in part only, the governor of the prison to which the person is committed and the Garda Síochána.

(8) Where a court has made an order under *subsection (1)* and imposes conditions under *subsection (4)* upon an application under *subsection (6)*, it shall cause a copy of the order and conditions to be given, by electronic or other means,² to —

(a) the probation and welfare service, and

¹ Inserted by section 2(a) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, not yet commenced: commencement order required under section 4(2).

² Inserted by section 2(b) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, not yet commenced: commencement order required under section 4(2).

- (b) (i) the Garda Síochána, or
- (ii) in the case of an order consisting of the suspension of a sentence in part only, the governor of the prison to which the person is committed and the Garda Síochána.

(8A) (a) Where a person to whom an order under *subsection (1)* applies —

- (i) commits an offence after the making of that order and during the period of suspension of the sentence concerned (in this section referred to as the “triggering offence”), and
- (ii) subject to *subsection (8B)*, is convicted of the triggering offence, the court before which proceedings for the triggering offence are brought shall, after imposing sentence for that offence, remand the person in custody or on bail to a sitting of the court that made the said order to be held—

(I) no later than 15 days after such remand, or

(II) if there is no sitting of that court within that period, to the next sitting of that court thereafter,

and, if there is no sitting of that court on the day to which that person has been remanded, he or she shall stand so remanded to the sitting of that court next held after that day.

(b) The remand of a person in custody or on bail under *paragraph (a)* to a sitting of the court that made the order under *subsection (1)* concerned applying to the person may be to a sitting of that court other than a sitting thereof referred to in *paragraph (c)*.

(c) Subject to *paragraph (b)*, references in *paragraph (a)* to a sitting of a court shall be construed as references to a sitting of the court at a place and time appointed or fixed for sittings of that court by or under statute.

(8B) *Subsection (8A)* applies to a conviction of a person for an offence if proceedings for the offence are instituted against the person during the period of suspension of the sentence concerned pursuant to the order under *subsection (1)* applying to the person and 12 months thereafter.

(8C) Subject to *subsection (8D)*, a court to which a person has been remanded under *subsection (8A)* shall revoke the order under *subsection (1)* concerned unless it considers that the revocation of that order would be unjust in all the circumstances of the case, and where the court revokes that order, the person shall be required to serve the entire of the sentence of imprisonment originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any

period of that sentence already served in prison and any period spent in custody (other than a period spent in custody by the person in respect of the triggering offence) pending the revocation of the said order.

(8D) Where a person appeals against conviction or sentence for the triggering offence, a court referred to in *subsection (8C)* may, upon application in that behalf by the person, adjourn the proceedings under that subsection for such period as the court considers appropriate to enable that person to bring the appeal and for it to be determined.

(8E) If an appeal brought by the person concerned against conviction or sentence for the triggering offence is withdrawn or abandoned, the court referred to in *subsection (8C)* shall, in accordance with that subsection, consider the revocation of the order under *subsection (1)* concerned.

(8F) On the determination of an appeal against conviction or sentence for the triggering offence brought by the person concerned —

(a) if the order of the court before which proceedings for that offence were brought is reversed insofar as it relates to the conviction for that offence or the conviction for that offence is quashed, the court referred to in *subsection (8C)* shall dismiss the proceedings under that subsection, and

(b) in all other cases, the court referred to in *subsection (8C)* shall, in accordance with that subsection, consider the revocation of the order under *subsection (1)* concerned.

(8G) When an appeal against conviction or sentence for the triggering offence is withdrawn, abandoned or determined, the person concerned shall, for the purposes of *subsections (8E)* and *(8F)*, appear before the court referred to in *subsection (8C)* whenever he or she is required to do so by that court.

(8H) In *subsections (8D)* to *(8G)*, references to an appeal against conviction or sentence for the triggering offence shall be construed as references to an appeal against conviction or sentence, as the case may be, for that offence, whether by way of rehearing, case stated or otherwise.³

~~(9) Where a person to whom an order under *subsection (1)* applies is, during the period of suspension of the sentence concerned, convicted of an offence, being an offence committed after the making of the order under *subsection (1)*, the court before which proceedings for the offence are brought shall, before imposing sentence for that offence, remand the person in custody or on bail to the next sitting of the court that made the said order.~~

~~(10) A court to which a person has been remanded under *subsection (9)* shall revoke the order under *subsection (1)* unless it considers that the revocation~~

³ Subsections (8A) to (8H) inserted by s. 2(c) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, not yet commenced: commencement order required under section 4(2).

~~of that order would be unjust in all the circumstances of the case, and where the court revokes that order, the person shall be required to serve the entire of the sentence of imprisonment originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any period of that sentence already served in prison and any period spent in custody (other than a period spent in custody by the person in respect of an offence referred to in subsection (9)) pending the revocation of the said order.~~⁴

(10A) [...] ⁵

(11) (a) Where an order under *subsection (1)* applying to a person is revoked under *subsection (8C)*, any period of imprisonment required to be served by the person as a result of that revocation shall be consecutive on any sentence of imprisonment (other than a sentence consisting of imprisonment for life) imposed on the person in respect of the triggering offence.⁶

(b) *Paragraph (a)* shall not apply if the execution of the sentence of imprisonment imposed on the person in respect of the triggering offence is wholly suspended under *subsection (1)*.⁷

(12) Where an order under *subsection (1)* is revoked in accordance with this section, the person to whom the order applied may appeal against the revocation to such court as would have jurisdiction to hear an appeal against any conviction of, or sentence imposed on, a person for an offence by the court that revoked that order.

(13) Where a member of the Garda Síochána or, as the case may be, the governor of the prison to which a person was committed has reasonable grounds for believing that a person to whom an order under *subsection (1)* applies has contravened the condition referred to in *subsection (2)* or a condition imposed under *subsection (3)*, he or she may apply⁸ to the court to fix a date for the hearing of an application for an order revoking the order under *subsection (1)*.

(13A) The Director of Public Prosecutions may, if he or she has reasonable grounds for believing that a person to whom an order under *subsection (1)* applies has contravened a condition imposed under *subsection (3)*, apply to

⁴ Subsections (9) and (10) declared unconstitutional in *Moore v DPP* [2016] IEHC 244. Subsection (9) was previously affected by section 51 of the *Criminal Justice (Miscellaneous Provisions) Act 2009* and section 60(a) of the *Criminal Justice Act 2007*. Subsection (10) was previously affected by section 60(b) of the *Criminal Justice Act 2007*.

⁵ Deleted by section 2(d) of the *Criminal Justice (Suspended Sentence of Imprisonment) Act 2017*, not yet commenced: commencement order required under section 4(2). Section 10A was previously inserted by section 60(c) of the *Criminal Justice Act 2007*.

⁶ Substituted by section 2(e) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, not yet commenced: commencement order required under section 4(2). Section 11(a) was previously substituted by section 60(d) of the *Criminal Justice Act 2007*.

⁷ Substituted by section 2(e) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, not yet commenced: commencement order required under section 4(2).

⁸ Substituted by section 2(f) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, not yet commenced: commencement order required under section 4(2).

the court to fix a date for the hearing of an application for an order revoking the order under *subsection (1)*.⁹

(14) A probation and welfare officer may, if he or she has reasonable grounds for believing that a person to whom an order under *subsection (1)* applies has contravened a condition imposed under *subsection [...]*¹⁰ (4), apply to the court to fix a date for the hearing of an application for an order revoking the order under *subsection (1)*.

(15) Where the court fixes a date for the hearing of an application referred to in *subsection (13), (13A) or (14)*,¹¹ it shall, by notice in writing, so inform the person in respect of whom the application will be made, or where that person is in prison, the governor of the prison, and such notice shall require the person to appear before it, or require the said governor to produce the person before it, on the date so fixed and at such time as is specified in the notice.

(16) If a person who is not in prison fails to appear before the court in accordance with a requirement contained in a notice under *subsection (15)*, the court may issue a warrant for the arrest of the person.

(17) A court shall, where it is satisfied that a person to whom an order under *subsection (1)* applies has contravened a condition of the order, revoke the order unless it considers that in all of the circumstances of the case it would be unjust to so do, and where the court revokes that order, the person shall be required to serve the entire of the sentence originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any period of that sentence already served in prison and any period spent in custody pending the revocation of the said order.

(18) A notice under *subsection (15)* shall be addressed to the person concerned by name, and may be given to the person in one of the following ways:

(a) by delivering it to the person;

(b) by leaving it at the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, at that address;

⁹ Inserted by section 2(g) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, not yet commenced: commencement order required under section 4(2).

¹⁰ Deleted by section 2(h) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, not yet commenced: commencement order required under section 4(2).

¹¹ Substituted by section 2(i) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, not yet commenced: commencement order required under section 4(2).

(c) by sending it by post in a prepaid registered letter to the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, to that address.

(18A) Where, under *subsection (8C) or (17)*, a court revokes an order under *subsection (1)* applying to a person and the person is required to serve a part of the sentence of imprisonment originally imposed on him or her, the court may make a further order suspending the execution of the part of the sentence of imprisonment that is not required to be served by the person and such further order shall, for the purposes of this section, be regarded as an order made under *subsection (1)* applying to the person and that subsection shall apply accordingly.¹²

(19) This section shall not affect the operation of —

(a) section 2 of the Criminal Justice Act 1960 or Rule 38 of the Rules for the Government of Prisons 1947 (S.R. & O. No. 320 of 1947), or

(b) subsections (3G) and (3H) of section 27 of the Misuse of Drugs Act 1977.

(19A) If, in relation to a person, the application of *subsection (11)* conflicts with any of the other consecutive sentencing provisions with regard to the sequence in which the following shall be served by the person, namely —

(a) a sentence of a term of imprisonment imposed on the person for the triggering offence,

(b) the period of imprisonment required to be served by the person under *subsection (8C)*, and

(c) a sentence of a term of imprisonment imposed on the person for another offence of which he or she is convicted,

the court referred to in *subsection (8C)* or any other court concerned may determine that sequence in such manner as it considers just, provided that the sentences of imprisonment referred to in *paragraphs (a) and (c)* and the period of imprisonment referred to in *paragraph (b)* shall be consecutive on each other.

(19B) Where a person is convicted of the triggering offence by the District Court and an order under *subsection (1)* applying to the person is revoked by the District Court under *subsection (8C)*, the aggregate of —

(a) a sentence of a term of imprisonment imposed on the person for the triggering offence,

¹² Inserted by section 2(j) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, not yet commenced: commencement order required under section 4(2).

(b) the period of imprisonment required to be served by the person under *subsection (8C)*, and

(c) a sentence of a term of imprisonment for any other offence imposed on the person by the District Court that is required by any of the other consecutive sentencing provisions to be consecutive on the sentence of imprisonment referred to in *paragraph (a)* or the period of imprisonment referred to in *paragraph (b)* or vice versa,

shall not exceed 2 years.¹³

(20) Where a court imposes a sentence of a term of imprisonment that is to run consecutively to a sentence of a term of imprisonment the operation of a part of which is suspended, the first-mentioned sentence shall commence at the expiration of the part of the second-mentioned sentence the operation of which is not suspended.¹⁴

(21) Where —

(a) under *subsection (8C)*, an order under *subsection (1)* applying to a person is revoked and the person is required to serve a part of the sentence of imprisonment originally imposed on him or her under that subsection, and

(b) a court imposes a sentence of a term of imprisonment on the person that is to be consecutive on the sentence of imprisonment referred to in *paragraph (a)*,

the sentence of imprisonment referred to in *paragraph (b)* shall commence at the expiration of the period of imprisonment required to be served by the person under *subsection (8C)* referred to in *paragraph (a)*.

(22) Where an order under *subsection (1)* is made by a court on appeal from another court —

(a) the reference in *subsection (8A)* to the court that made the order under *subsection (1)*,

(b) the references in *subsections (8C), (8D), (8G), (13) to (17), (18A) and (19A)* to the court that may exercise jurisdiction under each of those subsections, and

(c) the reference in *subsection (12)* to the court that revoked the order under *subsection (1)*,

shall be construed as references to the court from whose order or decision the appeal was taken.

¹³ Inserted by section 2(k) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, not yet commenced: commencement order required under section 4(2).

¹⁴ Inserted by section 60(e) of the *Criminal Justice Act 2007*.

(23) In this section the “other consecutive sentencing provisions” means—

- (a) section 5 of the Criminal Justice Act 1951,
- (b) section 13 of the Criminal Law Act 1976,
- (c) section 11 of the Criminal Justice Act 1984,
- (d) section 54A of the Criminal Justice (Theft and Fraud Offences) Act 2001, and
- (e) any other enactment that requires or permits a court to impose a consecutive sentence.¹⁵

¹⁵ Inserted by section 2(l) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, not yet commenced: commencement order required under section 4(2).

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