



The Law Reform Commission
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLI

CONSULTATION PAPER

ON

**PROSECUTION APPEALS FROM UNDULY
LENIENT SENTENCES IN THE DISTRICT COURT**

(LRC CP 33-2004)

IRELAND

The Law Reform Commission

35-39 Shelbourne Road, Ballsbridge, Dublin 4

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THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the 1975 Act.

To date, the Commission has published seventy Reports containing proposals for reform of the law; eleven Working Papers; thirty two Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and twenty four Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in Appendix B to this Consultation Paper.

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INTRODUCTION

1. On 5 February 2003 the Attorney General requested the Law Reform Commission to consider:

“The conferring of a power, on the Director of Public Prosecutions, to appeal lenient sentences from the District Court. The conferring of such a power is contained in the Agreed Programme for Government.”

2. The purpose of this paper is to examine the need for such a power, whether such a power should be vested in the Director of Public Prosecutions, and to establish what form such legislation should take, if it is to be enacted. Since approximately 95% of all criminal offences are tried summarily in the District Court,¹ the importance of this issue is clear.

3. Chapter 1 of this Consultation Paper examines the current criminal jurisdiction of the District Court, and details the types of offences which can be tried summarily.

4. Chapter 2 of the Paper looks at the sentencing jurisdiction of the District Court, and assesses the sentencing limitations of the Court. It also sets out the scope of the term “sentence” as it is to be used in the context of this Paper.

5. Chapter 3 assesses the historical development of appeals from the District Court, examining both appeals by the prosecution and by the defence. Particular attention is paid to appeals by way of case stated, an appeal procedure which is provided for under the *Summary Jurisdiction Act 1857*, and which has been used by the prosecution to appeal acquittals.

¹ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Courts Service, 2003) at 27. The Working Group is chaired by Fennelly J. Available at <http://www.courts.ie>.

6. Chapter 4 examines the *Criminal Justice Act 1993*, section 2 of which introduced appeals from unduly lenient sentences on indictment. It looks at the jurisdiction of the Court of Criminal Appeal in examining applications under the 1993 Act.

7. Chapter 5 of the Paper looks to three common law jurisdictions, namely England and Wales, Scotland and New Zealand. These three jurisdictions have approached the question of appeals from summary cases in different ways, and the possible application of these approaches to the Irish position is examined.

8. Chapter 6 assesses the arguments for and against introducing appeals from unduly lenient sentences in the District Court. It then examines reports from other bodies, and sums up the arguments for and against introducing such an appeal procedure.

9. Chapter 7 sets out the Commission's provisional recommendation that an appeal procedure be introduced to allow prosecutors appeal unduly lenient sentences from the District Court. Two separate appeal procedures are envisaged by the Commission: where the offender has been found guilty of the offence, the appeal would be to the relevant Circuit Court where the court would examine the question as to whether the District Court erred in principle when sentencing the offender. Where the offender has been acquitted of the offence in question, the continued utilisation of the case stated procedure in the *Summary Jurisdiction Act 1857* is provisionally recommended by the Commission.

10. Chapter 8 examines further possible methods of reform which the Commission believes would alleviate any real or perceived pattern of inconsistent sentencing in the District Court. To this end, the Commission examines the possibility of introducing sentencing guidelines, looks at the role of the prosecutor at the sentencing stage and asks whether the Director of Public Prosecutions should have the power to appeal what are termed "clusters" of cases.

11. Appendix A to the Paper sets out a Draft Scheme of a *Criminal Justice (Prosecution Appeals from the District Court) Bill*.

12. The Commission usually publishes in two stages: first, a Consultation Paper and then a Report. This Consultation Paper is intended to form the basis for discussion and accordingly the

recommendations, conclusions and suggestions contained herein are provisional. The Commission will make its final recommendations on this topic following further consideration of the issues and consultation, including a colloquium, which we hope will be attended by a number of interested and expert people (details of the venue and date of which will be announced later). Submissions on the provisional recommendations included in this Paper are also welcome. The Report gives an opportunity, which is especially welcome with the present subject, for further thoughts on areas covered in the Paper. In order that the Commission's Report may be made available as soon as possible, those who wish to make their submissions are requested to do so in writing or by e-mail to the Commission by **30 November 2004**.

CHAPTER 1 THE CRIMINAL JURISDICTION OF THE DISTRICT COURT

A Introduction

1.01 Article 34.3.4° of the Constitution provides that “Courts of First Instance shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law”. Article 38.2 of the Constitution states that “[m]inor offences may be tried by courts of summary jurisdiction.” The District Court is thus a court of limited and local jurisdiction, with the power to try only minor offences and in respect of which a right of appeal is “as determined by law”.

1.02 The District Court can exercise its summary jurisdiction in four situations – in relation to summary offences, indictable offences triable summarily, “hybrid offences” and guilty pleas. These four heads of jurisdiction will now be examined in turn.

B Summary Offences

1.03 Under Article 38.2 of the Constitution and section 77 of the *Courts of Justice Act 1924* the District Court has the jurisdiction to try offences summarily. Any power, authority or jurisdiction previously exercised by Justices or a Justice of the Peace sitting at Petty Sessions was vested in the District Court by section 77 of the 1924 Act. An example of an offence carried over by the 1924 Act was the offence of smuggling butter under section 186 of the *Customs (Consolidation) Act 1876*, which was the subject of a constitutional challenge in *Melling v Ó Mathghamhna*.¹

¹ [1962] IR 1. The plaintiff in the case argued that the charges under section 186 of the 1876 Act were not of a minor nature and thus could not be tried summarily. His claim was dismissed.

1.04 Since the enactment of the *Courts of Justice Act 1924*, the number of offences triable summarily has been added to by various statutes. Thus many road traffic offences under the *Road Traffic Acts 1961 – 2003* fall within the jurisdiction of the District Court. Another example is assault under section 2 of the *Non-Fatal Offences Against the Person Act 1997*.

1.05 The jurisdiction to try offences summarily is one that is entirely dependent on statute. Where a statute defines an offence as a summary one, it must be tried in the District Court.

C Indictable Offences Triable Summarily/Either Way Offences

1.06 Section 2(2) of the *Criminal Justice Act 1951*² provides that, in certain circumstances, indictable offences can be tried in the District Court. It states:

“The District Court may try summarily a person charged with a scheduled offence if—

(a) the Court is of opinion that the facts proved or alleged constitute a minor offence fit to be tried summarily,

(b) the accused, on being informed by the Court of his right to be tried with a jury, does not object to being tried summarily, and

(c) the Director of Public Prosecutions consents to the accused being tried summarily for such offence.”

1.07 Scheduled offences are contained in the First Schedule of the 1951 Act,³ and the Minister for Justice, Equality and Law Reform

² As amended by section 8 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*.

³ As amended by the *Criminal Procedure Act 1967*, the *Criminal Law (Rape) Amendment Act 1990*, the *Criminal Law Act 1997* and the *Criminal Justice (Theft and Fraud Offences) Act 2001*. Scheduled offences are: an offence in the nature of a public mischief; an indictable offence consisting of any form of obstruction of the administration of justice or the enforcement of the law; perjury; riot or unlawful assembly, where the court

is given the power under section 2(1)(b) of the Act to add to the list.⁴ The maximum term of imprisonment for any of these offences is twelve months, and the maximum fine is €1,270.⁵ What is important to note at this stage is that both the accused and the Director of Public Prosecutions must consent to the charge being tried summarily, with the approval of the judge of the District Court.

1.08 In *State (O'Hagan) v Delap*⁶ the High Court noted that in cases where the judge of the District Court has to choose between trying an indictable offence summarily and sending the accused forward for trial to the Circuit Court, “two questions must be considered by him on the facts proved or alleged, viz.:-

- (a) Do the facts proved or alleged constitute a minor offence?
- (b) Is it a minor offence which is fit to be tried summarily?”

1.09 The fundamental features of indictable offences which are triable summarily, or either way offences, are that they are set out in the schedule of the *Criminal Justice Act 1951* and that both the accused and the Director of Public Prosecutions must consent to the

is of opinion that the act constituting the offence was not done in furtherance of an organised conspiracy or, if so done, that the conspiracy is at an end; assault occasioning actual bodily harm; an offence under section 16 of the *Plate Assay (Ireland) Act 1807*; offences under section 60 of the *Offences against the Person Act 1861*; an offence under section 11 of the *Criminal Law Amendment Act 1885*; an offence under the *Forgery Act 1913*; an offence under section 24 of the *Enforcement of Court Orders Act 1926*; attempted carnal knowledge constituting an offence under section 1(2), 2(2) or 4 of the *Criminal Law Amendment Act 1935*; an offence under section 13 of the *Debtors (Ireland) Act 1872*; an offence under sections 7(2) and 8 of the *Criminal Law Act 1997*; an attempt to commit an offence which the District Court has, by virtue of any enactment, jurisdiction to try summarily.

⁴ To date, the Minister has not used this power.

⁵ Section 4(1) of the *Criminal Justice Act 1951* as amended by section 17 of the *Criminal Justice Act 1984* and converted according to the *Euro Changeover Amounts Act 2001*.

⁶ [1982] 1 IR 213.

charge being tried summarily. In this last respect, these offences differ from what are referred to as “hybrid offences”.

D “Hybrid Offences”

1.10 Increasingly, statutes provide that an offence can be tried either summarily or on indictment, depending on the nature of the offence. The main difference between these offences, referred to as “hybrid offences”, and indictable offences triable summarily or “either way offences” is that with “hybrid offences”, the consent of the accused is not required for the trying of the charge summarily.

1.11 An example of this is found in section 6 the *Child Trafficking and Pornography Act 1998* which states:

“(1) ... any person who knowingly possesses any child pornography shall be guilty of an offence and shall be liable—

(a) on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment to a fine not exceeding £5,000 or to imprisonment for a term not exceeding 5 years or both.”

1.12 Woods⁷ notes that, while such statutes will set out that the charge may be tried either summarily or on indictment, the Act will not detail the circumstances in which the charge should be prosecuted summarily rather than on indictment, or *vice versa*, meaning that the prosecutor has a wide discretion in the area. He also notes that the primary difference between this type of offence and offences detailed under section 2 of the 1951 Act is that with hybrid offences, “... it is the sole right of the prosecutor to determine whether the charge

⁷ Woods *District Court Practice and Procedure in Criminal Cases* (James V Woods 1994).

should be prosecuted summarily or on indictment and the accused has no right to insist one way or the other ...”⁸.

1.13 In *People (DPP) v O’Donnell and Kelly*⁹ Murphy J followed the judgment of O’Higgins CJ in *State (McEvitt) v Delap*¹⁰ and held that in cases involving hybrid offences it is the right of the Director of Public Prosecutions alone to determine whether a charge should be brought summarily or on indictment. He stressed that the accused has no right to contest this decision, but that the District Court Judge must decline jurisdiction if the offence is of a non-minor nature.

1.14 In summary, hybrid offences are a creature of statute whereby, with the consent of the Director of Public Prosecutions, particular offences can be tried summarily provided that the offence to be tried is of a minor nature.

E Guilty Pleas

1.15 In certain circumstances, where the accused pleads guilty to an indictable offence in the District Court, the court can deal with the offence summarily. This procedure, which applies to almost all indictable offences,¹¹ is provided for in section 13 of the *Criminal Procedure Act 1967*¹² which reads:

⁸ Woods *District Court Practice and Procedure in Criminal Cases* (James V Woods 1994) at 268.

⁹ [2003] 1 ILRM 71.

¹⁰ [1981] IR 125.

¹¹ Under section 13(1) of the Act, the section does not apply to the following offences: an offence under the *Treason Act 1939*, murder, piracy, genocide, an offence under the *Criminal Justice (United Nations Convention Against Torture) Act 2000*, the offence of murder under section 2 of the *Criminal Justice (Safety of United Nations Workers) Act 2000*, or an attempt or conspiracy to commit that offence, or a grave breach such as is referred to in section 3(1)(i) of the *Geneva Conventions Act 1962*, including an offence by an accessory before or after the fact.

¹² As amended by section 6 of the *Genocide Act 1973*, section 8 of the *Criminal Justice (United Nations Convention Against Torture) Act 2000*, section 7 of the *Criminal Justice (Safety of United Nations Workers) Act 2002*, section 10 of the *Criminal Justice Act 1999*, section 17 of the

“(2) If at any time the District Court ascertains that a person charged with an offence to which this section applies wishes to plead guilty and the court is satisfied that he understands the nature of the offence and the facts alleged, the court –

(a) may, with the consent of the prosecutor, deal with the offence summarily, in which case the accused shall be liable to the penalties provided for in subsection (3), or

(b) if the accused signs a plea of guilty, may, subject to subsection (2A), send him forward for sentence with that plea to that court to which, but for that plea, he would have been sent forward for trial.

(2A) The accused shall not be sent forward for sentence under this section without the consent of the prosecutor.

(3)(a) On conviction by the District Court for an offence dealt with summarily under subsection 2(a), the accused shall be liable to a fine not exceeding [€1,270] or, at the discretion of the Court, to imprisonment for a term not exceeding twelve months, or to both such fine and imprisonment.”

1.16 Thus, if an accused pleads guilty to an indictable offence in the District Court the court can deal with the offence summarily, subject to the prosecutor consenting to the offence being dealt with in this manner and the accused understanding the nature of the offence and the facts alleged. However, this power is subject to the usual sentencing limitations of the District Court, that is, a maximum sentence of 12 months, and a maximum fine of €1,270.

F Child Offenders

1.17 Part 7 of the *Children Act 2001* provides that when hearing charges against children, the District Court is referred to as the Children Court, and must sit in a different building or room, or on

Criminal Justice Act 1984 and section 12 of the *Broadcasting and Wireless Telegraphy Act 1988*.

different days from those in which the normal District Court proceedings are held.¹³ The court has quite a wide jurisdiction to deal with indictable offences summarily under section 75(1) of the 2001 Act which states:

“ ... the Court may deal summarily with a child charged with any indictable offence, other than an offence which is required to be tried by the Central Criminal Court or manslaughter, unless the Court is of opinion that the offence does not constitute a minor offence fit to be tried summarily, or, where the child wishes to plead guilty, to be dealt with summarily.”

1.18 Under section 75(3), the child has the right to refuse to allow the court to deal with the offence summarily, and under section 75(5), if the child wishes to plead guilty to an offence which is required to be tried by the Central Criminal Court or to manslaughter, the court may send him or her forward for sentence on a plea of guilty to that court. However, the court may not send the child forward for sentence without the consent of the Director of Public Prosecutions or, in certain circumstances, the Attorney General.¹⁴ When the child is sent forward on a plea of guilty, he or she may withdraw the plea and plead not guilty to the charge.

G Drug Court¹⁵

1.19 A pilot Drug Court was established in Dublin as part of the District Court in January 2001 as a result of a recommendation in the Fifth Report of the Working Group on a Courts Commission.¹⁶ The aim of the Court is to reduce crime by offering rehabilitation to convicted drug-addicted non-violent offenders instead of prison.

¹³ Section 71 of the *Children Act 2001* replacing section 80 of the *Courts of Justice Act 1924*.

¹⁴ Section 75(6) of the *Children Act 2001*.

¹⁵ For a detailed assessment of the first year of the operation of the Court, see Farrell Grant Sparks Consulting *Final Evaluation of the Pilot Drug Court* (Courts Service 2003). Available at <http://www.justice.ie>.

¹⁶ Working Group on a Courts Commission *Fifth Report – Drug Courts* (Courts Service 1998).

1.20 Under the scheme, where a defendant appears before the District Court and either pleads guilty or is found guilty of drug related offences which are non-violent, the defendant's solicitor can request a referral to the Drug Court.¹⁷ The programme is a voluntary one, and the offender must give consent prior to being referred to the Court. The offender then goes through an assessment process, and if and when he or she is found both eligible and suitable by the Drug Court Team, they are entered as a participant in the Programme.

1.21 An offender who is successful in completing the programme "graduates", and does not receive a prison sentence. If the offender does not graduate, then they are referred back to the original court for sentence. While charges against graduates are struck out, the State can re-enter the charges if they commit an offence, go back on drugs or fail to maintain contact with a rehabilitation officer.

1.22 The Drug Court is thus a branch of the District Court with an exceptional jurisdiction, the main aim of which is to rehabilitate offenders and re-introduce them into society free from addiction, as law-abiding citizens who have been assisted to confront and overcome their vulnerability to drug addiction.

¹⁷ The offender must meet the eligibility criteria in order to be referred to the Drug Court. These are, *inter alia*, that the person live in the catchment area, *ie* Dublin North Inner City, extended to throughout the Dublin 7 area, from the North Quays to Arbour Hill, Phibsboro and Cabra; be over seventeen years of age; and wishes to become drug free.

CHAPTER 2 SENTENCES THAT MAY BE IMPOSED BY THE DISTRICT COURT

A Introduction

2.01 In order to assess whether there should be a power to appeal “unduly lenient sentences” in the District Court, in this Chapter we review the current jurisdiction of the District Court in criminal cases.

2.02 The term “sentence” is a nebulous one. There is no definitive statutory definition of the term, perhaps due to the fact that each statute frames the definition of the term to suit the purpose of the legislation.¹ However, for the purposes of this Paper, a clear definition of the term is required.

2.03 In the *Consultation Paper on Sentencing*,² the Commission discussed the various definitions of the term “sentence” proposed in other jurisdictions and concluded that the Canadian approach³ was the most appropriate for the purposes of that Paper. Thus, the following definition was proposed in the Report⁴:

¹ For example, the definition of sentence in the *Transfer of Sentenced Persons Act 1995* defines the term as “any punishment or measure involving deprivation of liberty ordered by a court or tribunal for a limited or unlimited period of time on account of the commission of an offence” – a definition which clearly relates to the purpose of the legislation.

² Law Reform Commission *Consultation Paper on Sentencing* (March 1993).

³ As set out in Canadian Sentencing Commission *Sentencing Reform: A Canadian Approach* (1987).

⁴ Law Reform Commission *Report on Sentencing* (LRC 53 – 1996)

“Sentencing is the judicial determination of a legal sanction to be imposed on a person found guilty of an offence.”⁵

2.04 It can be noted that this definition does not require a conviction to be registered against the defendant, and focuses on the fact that there is a judicial determination of the sanction. As the Commission stated in the Consultation Paper which preceded the Report, “[n]owadays, conviction is not always a prerequisite for the imposition of a sentence; rather what is always required is a finding of guilt.”⁶ The Consultation Paper also noted:

“Sentencing involves a decision by a judge as to what the criminal justice system should do to a person found guilty of an offence. Occasionally, as we shall see, the District Court may decide simply to ‘dismiss the information or charge [under the *Probation of Offenders Act 1907* when it appears to the court that it is inexpedient to inflict any punishment].”⁷

2.05 O’Malley⁸ also adopts this broad view of the definition of sentence:

“By sentencing options we mean the range of sentences and other dispositions available to the criminal courts. The main options in Ireland nowadays are imprisonment (including suspended prison sentences), fines, community service orders, dismissal, discharge and supervised release under the *Probation of Offenders Act 1907*, deferred supervision which has been judicially invented, and a range of dispositions provided by the *Children Act 1908* [since replaced by the *Children Act 2001*] for young offenders.”⁹

⁵ Law Reform Commission *Report on Sentencing* (LRC 53-1996) at paragraph 1.1.

⁶ Law Reform Commission *Consultation Paper on Sentencing* (March 1993) at paragraph 1.2.

⁷ *Ibid* at paragraph 1.7.

⁸ O’Malley *Sentencing Law and Practice* (Round Hall Sweet and Maxwell 2000).

⁹ *Ibid* at 3-4.

O'Malley also notes that in addition to these "primary punishments", there is a "wide range of statutory provisions permitting or requiring additional penalties in the form of disqualification, forfeiture or confiscation in respect of particular offences",¹⁰ which he refers to as "ancillary penalties".

2.06 This distinction between "primary" and "secondary" sentencing options is followed by Walsh.¹¹ He places, *inter alia*, imprisonment, fines, community service orders and probation into the category of "primary sentencing options", and uses the term of "ancillary punishments and orders" to categorise O'Malley's "ancillary penalties".

2.07 The *Report of the Working Group on the Jurisdiction of the Courts*¹² did not assess what the term "sentence" means, but instead examined the jurisdictional limitations of fines and terms of imprisonment. It also discussed the power of the District Court to impose ancillary penalties¹³ and noted that when determining the minor nature of an offence, "[t]he entire gamut of a District Court judge's penalties – including fines, imprisonment and other ancillary orders – should be considered...".¹⁴

2.08 In conclusion, it can be said that terms of imprisonment, fines, community service orders, orders under the *Probation of Offenders Act 1907*, entering into a recognisance and curfew orders all come within the definition of 'sentence' as set out by the Commission.

¹⁰ O'Malley *Sentencing Law and Practice* (Round Hall Sweet and Maxwell 2000) at 323.

¹¹ Walsh *Criminal Procedure* (Thomson Round Hall 2002).

¹² Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Courts Service 2003) at 27 (The Fennelly Report). Available at <http://www.courts.ie>.

¹³ In considering "ancillary penalties", the Working Group referred to disqualification, confiscation orders and forfeiture. *Ibid* at paragraphs 199-212.

¹⁴ *Ibid* at paragraph 207.

2.09 As to ancillary orders and penalties, it is worth noting that in *People (DPP) v Finn*¹⁵ the Supreme Court stated that in enacting section 2 of the *Criminal Justice Act 1993*, which provides for appeals from unduly lenient sentences on indictment, the legislature did not intend to restrict the scope of the appeal to custodial sentences, but intended it to apply to “fines, community service orders, orders forfeiting property or providing for the payment of compensation etc.”¹⁶

2.10 Another long established jurisdiction exercised by the District Court is to order a payment to the Court Poor Box. While this type of order is generally made upon a finding of guilt and in many instances is linked to the application of the *Probation of Offenders Act 1907*, it would appear that certain District Court Judges apply the Court Poor Box without formally proceeding to establish the guilt or innocence of the party.¹⁷ Where the Court Poor Box is used in this manner, it falls outside the definition of sentence for the purposes of this Paper and must be treated as an acquittal in respect of which the case stated procedure could appropriately be used.¹⁸

2.11 There are thus three categories of dispositions that can be made in the District Court. The first is what is termed a sentence for the purpose of this paper, which includes sentences made upon conviction and what are termed “conditional acquittals”, that is, those sentences imposed upon a finding of guilt without the making of a conviction. The second form of disposition is an acquittal, which includes acquittals on the merits of the case and any order made by the court in the absence of establishing the guilt or innocence of the party. The third category of disposition is ancillary orders and penalties.

2.12 *For the purposes of this Paper the Commission defines a sentence to include all sanctions imposed by the District Court upon a finding of guilt of an individual including a term of imprisonment, a*

¹⁵ [2001] 2 IR 25.

¹⁶ *Ibid* at 43.

¹⁷ See, Law Reform Commission *Consultation Paper on the Court Poor Box* (CP 31 – 2004) and paragraphs 2.44 to 2.47 below.

¹⁸ See paragraphs 3.19 to 3.26 for a discussion of the case stated procedure.

fine, an order under the Probation of Offenders Act 1907, community service orders, curfew and exclusion orders, a payment to the Court Poor Box and entering into a recognisance. The Commission considers that any order made by a District Court in the absence of a finding of guilt should be treated as an acquittal for the purposes of this Paper.

B Sentences

(1) Term of imprisonment

(a) Imprisonment

2.13 When the District Court was established by the *Courts of Justice Act 1924*, the Act made a number of offences triable summarily.¹⁹ The maximum sentence of imprisonment available on summary conviction was six months. Up to 1951, it would appear that there was either a legislative policy or assumption that the summary jurisdiction of the District Court was generally limited to imposing a six month sentence.²⁰

2.14 In 1951, however, section 4(1) of the *Criminal Justice Act 1951* established the maximum term of imprisonment for scheduled offences at 12 months. This departure from the previous general maximum has been followed, so that since then the maximum term of imprisonment on summary conviction is generally 12 months.²¹

¹⁹ For a historical analysis of the penalties available in the summary jurisdiction prior to 1922, see Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Courts Service, 2003) (the Fennelly Report) at 32-35. Available at <http://www.courts.ie/>

²⁰ This was subject to certain exceptions, for example, section 6(6)(a) of the *Supplies and Services (Temporary Provisions) Act 1946*; section 8 of the *Emergency Powers (Continuance and Amendment) Act 1942*; and section 3 of the *Fisheries (Amendment) Act 1944*. See the Fennelly Report *ibid* at 35.

²¹ A 12 month sentence of imprisonment for conviction in the District Court was upheld as being within the scope of the summary jurisdiction in *Melling v Ó Mathghamhna* [1962] IR 1. In its *Report on Minor Offences* (LRC 69 -2003) the Law Reform Commission recommended that a term of imprisonment of between six and twelve months should only be imposed on a person following a jury trial (paragraph 2.31).

(b) *Consecutive or cumulative sentence*

2.15 The general rule that the sentencing jurisdiction of the District Court is limited to 12 months has two exceptions. Under section 5 of the *Criminal Justice Act 1951*²² the District Court has jurisdiction to impose a two year consecutive sentence as follows:

“Where a sentence of imprisonment is passed on any person by the District Court, the Court may order that the sentence shall commence at the expiration of any other term of imprisonment to which that person has been previously sentenced, so however that where two or more sentences passed by the District Court are ordered to run consecutively the aggregate term of imprisonment shall not exceed two years.”

2.16 Similarly, if a person commits an offence while serving a sentence, the cumulative total of the two sentences can extend to two years.²³

2.17 This is clearly an exceptional provision, giving to the District Court the scope to impose a cumulative sentence of two years. The constitutionality of section 5 of the 1951 Act was upheld as coming within the scope of Article 38.2 in *Meagher v O’Leary*.²⁴

(c) *Suspended sentence*

2.18 While the practice of suspending sentences has no statutory basis, it has been “enthusiastically employed by both trial courts and the Court of Criminal Appeal”²⁵ due to a long common law tradition.

2.19 The starting point for the imposition of a suspended sentence is first, whether a term of imprisonment is warranted, and then if so, whether there are any circumstances which warrant its suspension. If the convicted person breaches the terms of the

²² As amended by section 12(1) of the *Criminal Justice Act 1984*.

²³ Section 13 of the *Criminal Law Act 1976* as amended by section 12(2) of the *Criminal Justice Act 1984*.

²⁴ [1998] 4 IR 33.

²⁵ Walsh *Criminal Procedure* (Thompson Round Hall 2002) at 1032.

suspended sentence, for example to be of good behaviour, then usually the order specifies a return to court, which generally involves the prospect of the offender going to prison. As explained in *People (DPP) v Stewart*,²⁶ “There is power to activate the sentence, but it is not mandatory to do so in that a judge may decline to do so if the Court considers that the breach might be described as trivial or de minimis.”²⁷

(d) *Reasons for imposing a custodial sentence*

2.20 The Commission recommended in its *Report on Minor Offences*²⁸ that District Court Judges be required to give reasons for imposing a term of imprisonment rather than a non-custodial sentence.²⁹ The Report refers to *O’Mahony v Ballagh*³⁰ where the Supreme Court stated that “every trial judge hearing a case at first instance must give a ruling in such a fashion as to indicate which of the arguments he is accepting and which he is rejecting and, as far as is practicable in the time available, his reasons for so doing.”³¹ The Report notes that “it is only a few steps further to impose a requirement that, first, the reasons for a judge’s decision to impose a custodial sentence are recorded and secondly, that reasons are required even where there has been no such submission.”³²

2.21 The Minority Report of the Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts*³³ also recommended that “brief reasons should be given outlining the aggravating and mitigating factors influencing the decision with particular emphasis where appropriate, on why the non-custodial

²⁶ Court of Criminal Appeal 12 January 2004.

²⁷ *Ibid* at 4.

²⁸ (LRC 69 – 2003).

²⁹ *Ibid* at paragraph 3.17.

³⁰ [2002] 2 IR 410.

³¹ *Ibid* at 416.

³² Law Reform Commission *Report on Minor Offences* (LRC 69 – 2003) at paragraph 3.09.

³³ Working Group on the Jurisdiction of the Court *The Criminal Jurisdiction of the Courts* (Courts Service, 2003) at 27. Available at <http://www.courts.ie>.

options available to the judge were not appropriate.”³⁴ The Minority Report also recommended that such reasons should be recorded in a written record at the foot of the charge sheet or summons either on the charge sheet itself or on a separate sheet which would be appended with the charge sheet to the warrant.³⁵

2.22 Section 174(5) of the *Criminal Justice Act 2003* in England and Wales, which applies to both lay magistrates and District Judges (Magistrates’ Court)³⁶ provides: “[w]here a magistrates’ court passes a custodial sentence, it must cause any reason stated [that it is of that opinion and as to why it is of that opinion] to be specified in the warrant of commitment and entered on the register.”

2.23 *The Commission reiterates its recommendation in the Report on Minor Offences that District Court Judges be required to give concise written reasons for imposing a term of imprisonment rather than a non-custodial sentence.*

(2) *Fines*

2.24 The District Court is similarly confined by its jurisdiction as to the maximum amount of fine it can impose. In the 1994 edition of *JM Kelly: The Irish Constitution*³⁷ the authors were of the opinion that a fine of £1,000 [€1,270] was the maximum permissible to comply with the constitutional obligation concerning minor offences, but writing six years later, O’Malley³⁸ states, “[t]ypically, the maximum fine is specified by statute and will seldom exceed £1,500 [€1,904.61] for a summary offence.”³⁹

³⁴ Working Group on the Jurisdiction of the Court *The Criminal Jurisdiction of the Courts* (Courts Service, 2003) at 228.

³⁵ *Ibid.*

³⁶ Previously referred to as Stipendiary Magistrates.

³⁷ Kelly, Hogan and Whyte *The Irish Constitution* (3rd ed Butterworths 1994).

³⁸ O’Malley *Sentencing Law and Practice* (Round Hall Sweet and Maxwell 2000).

³⁹ *Ibid* at 313.

2.25 This maximum has increased in recent years. Thus, the *Planning and Development Act 2000* allows for a maximum fine of €1,905 on summary conviction for certain offences; the *Prevention of Corruption (Amendment) Act 2001* allows for a maximum fine of €3,000 on summary conviction and the *Competition Act 2002* and the *Fisheries (Amendment) Act 2003* allow for the same maximum fine.

2.26 In the 2003 edition of *JM Kelly: The Irish Constitution* the authors state:

“To judge from a miscellaneous variety of recently enacted legislation the Oireachtas appears to be of the view that a fine of €3,000 is the maximum which may be imposed following summary conviction.”⁴⁰

2.27 In the *Report on Minor Offences*⁴¹ the Commission questioned the ceiling figure of €3,000 for fines for minor offences. The Commission concludes that taking into account the maximum figures accepted for the 1920s and the changes in the value of money and wages in the intervening years, a maximum fine of more than €3,000 would not be unconstitutional.⁴² The Commission also recommended that to ensure equal treatment, the financial circumstances of the offender should be taken into account when establishing the level of fine to be levied.⁴³

(3) Community Service Order⁴⁴

2.28 Under the *Criminal Justice (Community Service) Act 1983* the sentencing judge is empowered to sentence convicted persons over the age of 16 to community service. This sentencing option currently applies only where the sentencing judge is of the opinion that the appropriate sentence is one of imprisonment or detention in a

⁴⁰ Hogan and Whyte *JM Kelly: The Irish Constitution* (4th edition, LexisNexis Butterworths 2003).

⁴¹ Law Reform Commission *Report on Minor Offences* (LRC 69 – 2003).

⁴² *Ibid* at paragraph 4.05.

⁴³ *Ibid* at paragraph 4.21.

⁴⁴ Hereinafter referred to as a CSO.

children detention centre and community service is imposed in lieu of the custodial sentence.⁴⁵

2.29 In order to impose a CSO there are a number of conditions that must be met:

- (a) The court must be satisfied, having considered the offender's circumstances and a report about the offender by a probation and welfare officer, that the offender is a suitable person to perform work under such an order;
- (b) Arrangements can be made for the offender to perform such work; and
- (c) The offender has consented to such an order.⁴⁶

2.30 The total number of hours to be worked cannot exceed 240 hours.⁴⁷ If the court makes a CSO in respect of two or more offences the court may direct that the number of hours to be worked in any of those orders is to run concurrently or in addition to any other orders, while not exceeding the 240 hour limit.⁴⁸ The same applies if there is already an order in force at the time the court makes the order.⁴⁹ The work must be carried out within a year of the order being made,⁵⁰ but if this period expires and it appears to the judge of the District Court that interests of justice dictate that the period should be extended, the court may extend the period of the order.

⁴⁵ Section 2 of the 1983 Act. The *Final Report of the Expert Group on Probation and Welfare Service* (Stationery Office 1999) recommended that the *Criminal Justice (Community Service) Act 1983* be amended to provide that the CSO be available both as an alternative to imprisonment and as a sanction in its own right.

⁴⁶ Section 4(1) of the Act. On the issue of consent, see *Scully v Crowley and the Director of Public Prosecutions* Supreme Court 3 May 2001.

⁴⁷ Section 5(1) of the 1983 Act.

⁴⁸ Section 5(2) of the 1983 Act.

⁴⁹ Section 5(3) of the 1983 Act.

⁵⁰ Section 7(2) of the 1983 Act.

2.31 If the offender does not comply with the terms of the order, he or she will be brought before the District Court. Not complying with the terms of the order is in itself a crime, punishable by a fine not exceeding €375.⁵¹ However, in lieu of imposing a fine, the Court may either revoke the order, or revoke it and sentence the offender for the original offence in respect of which the CSO was made. When imposing a sentence, the Court is limited to those dispositions that would have been available to it had the Court not imposed the CSO.

(4) Curfew and exclusion orders

2.32 Despite an absence of statutory authority, courts have frequently over the years imposed curfew orders as an element of sentences and as a condition of bail. O'Malley⁵² notes that a curfew order has, on occasion, been made as a condition attaching to a suspended sentence.⁵³

2.33 O'Malley⁵⁴ also notes that whereas in England, the use of curfew orders was preceded by "various pilot experiments, research and no small amount of controversy",⁵⁵ for many years in Ireland curfew orders have been imposed by the courts as a condition of the suspension of an offender's sentence despite having no statutory basis.⁵⁶

⁵¹ Section 7(4) of the 1983 Act, as converted from £300 according to the *Euro Changeover Amounts Act 2001*.

⁵² O'Malley *Sentencing Law and Practice* (Round Hall 2000).

⁵³ In 2003, Judge Ó Donnabháin of the Cork Circuit Criminal Court imposed a curfew on a man which restricted him to his farm from 10pm each night for five years as a term of his suspended sentence: *The Irish Independent* 18 February 2003. Similarly, Quirke J imposed an effective curfew on an accused as a condition of being granted bail which was presumed to be a "properly stringent condition" in the Supreme Court: *People (DPP) v Horgan* Supreme Court 21 December 2001.

⁵⁴ O'Malley *Sentencing Law and Practice* (Round Hall 2000).

⁵⁵ *Ibid* at 6.

⁵⁶ The constitutionality of such a judicially-developed sentencing measure has been questioned. O'Malley *Sentencing Law and Practice* (Round Hall 2000) notes that while the measure has been developed in good faith, "one must question whether it would not be more compatible with the principle of legality and the separation of powers for the courts to leave the development of such measures to the political branches of government."

2.34 This remains the case for adults, but section 133 of the *Children Act 2001* expressly provides for a “restriction on movement order”. This authorises the court *inter alia* to place an order on a child to be at a specified residence between specified times during a period commencing at 7pm and ending at 6am the following morning.

2.35 It was argued during the debates on what became the *Criminal Justice (Public Order) Act 2003* that curfew orders should be an option for judges to deal with persistent offenders.⁵⁷ The less restrictive option of exclusion orders was ultimately adopted. Section 3 of the *Criminal Justice (Public Order) Act 2003* provides that on conviction for an offence under sections 4, 5, 6, 7, 8, or 9 of the *Criminal Justice (Public Order) Act 1994* the District Court may prohibit the person from entering or being in the vicinity of specific catering premises, which includes licensed premises, at certain times and for a defined period of time which cannot exceed 12 months.

C Conditional Acquittals

(1) Introduction

2.36 The Commission uses the term “conditional acquittals” to refer to that type of sentence which takes the form of an acquittal, but subject to certain conditions. These conditions may be in the form of,

Ibid at 108. He goes on to note, however, that the political branches of government cannot be relied upon to take the necessary steps, “with the result that certain judicial developments are left in a constitutional twilight zone.” *Ibid*.

In Dáil Debates, the constitutionality of curfew orders for adults has been questioned on at least one occasion. In 1984, the then Minister for Justice Mr Noonan argued that a curfew order would be “another form of preventative detention and an interference with the liberty of the individual.” Volume 351 Dáil Debates Column 794 (12 June 1984).

The Commission is of the opinion that, on the contrary, where a judge decides to impose a curfew order as a condition of bail or a condition of a suspended sentence, this is in ease of the convict or the applicant for bail in that it is a part of a parcel of measures which enables their release from custody or detention. The Supreme Court decision in *People (DPP) v Horgan* 21 December 2001 seems to reflect this reality.

⁵⁷ Volume 559 Dáil Debates Columns 438-440 (11 December 2002).

for example, entering into a recognisance. While they are termed acquittals, as a conviction has not been registered against the accused, a finding of guilt must be made by the court prior to the imposition of any of these conditions. In practice, an intimation may often be given to the court that the accused intends to admit, and regrets, the offence and this indication may invite the response, perhaps after inquiry for further information from prosecution and defence, that the court may consider a consensual disposition of the matter.

(2) *Dismissal and conditional discharge under the Probation of Offenders Act 1907*

2.37 Section 1(1) of the *Probation of Offenders Act 1907* provides:

“Where any person is charged before a court of summary jurisdiction with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, *without proceeding to conviction*, make an order either –

- (a) dismissing the information or charge; or
- (b) discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order.”

2.38 Thus, there are two orders which can be made under the section – dismissal or conditional discharge. It is a distinctive feature of the application of section 1(1) of the 1907 Act that the court can dispose of a case without registering a conviction against the offender. This can only occur when the court “thinks” that the charge

has been proven against the offender. In *Mulhall v O'Donnell*⁵⁸ Murphy J interpreted this as meaning that “before the provisions of the 1907 Act can be invoked a District Justice must be satisfied that the defendant is guilty of the offence with which he is charged.”⁵⁹

2.39 In terms of the effect of the order, O'Malley⁶⁰ points out that, “[d]ismissal, for this purpose, is not to be equated with an acquittal on the merits; it is contingent on the charge having been proved.”⁶¹ Woods⁶² noted that “[w]hen a charge is dismissed under [the Act], although a conviction is not recorded against the offender, his character is not without blemish.”⁶³ Indeed, in *Mulhall v O'Donnell*⁶⁴ the High Court quashed on judicial review an order made by the District Court Judge under the 1907 Act.⁶⁵ Murphy J stated, “an order under the 1907 Act is a very serious reflection on the character of a defendant, and it is understandable that if such order is wrongly imposed that a defendant would seek to have it set aside.”⁶⁶ In the earlier case *Duffy v Sutton*⁶⁷ the Supreme Court held that a dismissal under section 1(1) of the 1907 Act amounted to a conviction

⁵⁸ [1989] ILRM 367.

⁵⁹ *Ibid* at 368.

⁶⁰ O'Malley *Sentencing Law and Practice* (Round Hall Sweet and Maxwell 2000).

⁶¹ *Ibid* at 301.

⁶² Woods *District Court Practice and Procedure in Criminal Cases* (Woods 1994).

⁶³ *Ibid* at 403.

⁶⁴ [1989] ILRM 367.

⁶⁵ The introduction of the 1907 Act, which replaced the *Probation of First Offenders Act 1887*, was not met with universal approval. Thus, in *Oaten v Auty* [1919] 2 KB 278 Darling J stated, “The words of section 1 of the *Probation of Offenders, 1907*, are unscientific, thoroughly illogical, and are merely a concession to the modern passion for calling things what they are not; for finding people guilty and at the same time trying to declare them not guilty.” Given the passage of time, however, the 1907 Act provisions have come to represent, *inter alia*, an effective means of providing an alternative to conviction for people who come into the net of the criminal justice system for the commission of less culpable offences.

⁶⁶ *Ibid* at 368.

⁶⁷ [1955] IR 248.

for the purposes of section 28 of the *Food and Drugs Act 1875*.⁶⁸ O’Byrne J stated that “[t]he plaintiff was not, in fact, convicted; but inasmuch as the District Justice applied the provisions of the Probation of Offenders Act, he must have been satisfied that the charge against the plaintiff had been proved, and, but for the said Act, he would have been compelled to convict.”⁶⁹ Thus while a dismissal under the 1907 Act amounts to an acquittal, it is not an acquittal in the usual sense of the term, because the court must have been satisfied that the accused has committed the offence in question.

2.40 When the charge is found to have been proven against the accused, the court has to be satisfied, in order to apply the 1907 Act, that it is justified in dismissing the charge, taking account of the following:

- (a) the character, antecedents, age, health or mental condition of the defendant; or
- (b) the trivial nature of the offence; or
- (c) the extenuating circumstances under which the offence was committed.⁷⁰

The purpose of the 1907 Act, it would seem, is to provide an alternative to incarceration for minor offenders, and to avoid them

⁶⁸ The section states that, “in any action brought by any person for a breach of contract on the sale of any article of food or of any drug, such person may recover alone or in addition to any other damages recoverable by him the amount of any penalty in which he may have been convicted under this Act, together with the costs paid by him upon such conviction and those incurred by him in and about his defence thereto, if he prove that the article or drug the subject of such conviction was sold to him as and for an article or drug of the same nature, substance, and quality as that which was demanded of him, and that he purchased it not knowing it to be otherwise, and afterwards sold it in the same state in which he purchased it; the defendant in such action being nevertheless at liberty to prove that the conviction was wrongful, or that the amount of costs awarded or claimed was unreasonable.”

⁶⁹ [1955] IR 248 at 250.

⁷⁰ O’Malley *Sentencing Law and Practice* (Round Hall Sweet and Maxwell 2000) at 304 notes that these three justifications are alternative rather than cumulative. In reality, often more than one of the alternatives exists.

becoming the subject of a criminal record.⁷¹ However, there is a limitation on the number of times an order under the Act can be made. In *Attorney General v Buckley and Murphy*,⁷² which involved the use of the 1907 Act in respect of two juvenile offenders to whom the benefit of the Act had been applied previously, Maguire CJ stated:

“It is strange to see when these boys were obviously heading for serious crime that they should have been treated so leniently by the Children Court. It is difficult to see why the Probation of Offenders Act was applied more than once, and if the framers of the Act were justified in allowing an opportunity to reform, and if, as in this case, an opportunity to reform was allowed, it was not availed of. That this opportunity should have been availed of is shown by the fact that these people come before the Court again. In such cases it is farcical that the Probation Act should be applied again.”⁷³

While the Chief Justice’s blunt comments were apposite, nevertheless each case has to be considered on its own particular circumstances. At times there may be excusatory or ameliorating factors or countervailing meritorious evidence which might permit a second application of the 1907 Act to be made, particularly where there is a prospect of rehabilitation and a better long term outcome for society.

2.41 When the court orders a conditional discharge with a probation order, it discharges the offender on condition of entry into a recognisance with or without sureties, to be of good behaviour and to appear for sentence when called on at any time during such period, not exceeding three years which is specified in the order.⁷⁴ The court may order probation supervision along with “such additional conditions with respect to residence, abstention from intoxicating liquor, and any other matters, as the court may, having regard to the particular circumstances of the case, consider necessary for

⁷¹ O’Malley *Sentencing Law and Practice* (Round Hall Sweet and Maxwell 2000) at 304.

⁷² [1959] Ir Jur Rep 65.

⁷³ *Ibid* at 66.

⁷⁴ Walsh *Criminal Procedure* (Thomson Round Hall 2002) at 1048.

preventing a repetition of the same offence or the commission of further offences.”⁷⁵

2.42 The duties of probation officers are set out in section 4 of the 1907 Act. These are:

- “(a) to visit or receive reports from the person under supervision at such reasonable intervals as may be specified in the probation order or, subject thereto, as the probation officer may think fit;
- (b) to see that [the probationer] observes the conditions of his recognizance;
- (c) to report to the court as to his behaviour;
- (d) to advise, assist and befriend [the probationer], and, when necessary, to endeavour to find him suitable employment.”

2.43 If an offender breaches the terms of a probation order, the court which made the binding over order or any judge of the District Court may issue a warrant for arrest or summons for the offender and his or her sureties to attend before the court. If the court is satisfied that the probationer has failed to observe any condition of the recognisance, it may then proceed to sentence the probationer for the original offence.⁷⁶

(3) Payment to the Court Poor Box⁷⁷

2.44 The Court Poor Box also provides a dispositional option to the courts where, in general, the ingredients of an offence are proved

⁷⁵ Section 2(2) of the 1907 Act as amended by section 8 of the *Criminal Justice Administration Act 1914*.

⁷⁶ Walsh *Criminal Procedure* (Thomson Round Hall 2002) at 1050. See also, Department of Justice, Equality and Law Reform *Strategy Statement 2003-2005: Community, Security and Equality*. Available at <http://www.justice.ie>

⁷⁷ For a detailed analysis of the Court Poor Box system, see the Law Reform Commission’s *Consultation Paper on the Court Poor Box* (CP 31 – 2004).

but the judge decides not to enter a conviction against the offender.⁷⁸ It is often used in conjunction with an order under the *Probation of Offenders Act 1907*, though it is notable that it is also used occasionally after a conviction has been entered.

2.45 It would appear that the Court Poor Box is usually only applied in cases where the actual offence in question is fairly minor in nature,⁷⁹ for example, offences contrary to the Road Traffic Acts; offences in relation to property; drug offences; offences in relation to animals, some offences against persons and offences under safety at work legislation.⁸⁰

2.46 While, generally speaking, the Court Poor Box is applied after a finding of guilt, on occasion, the court will indicate to accused persons that if they are willing to make a contribution to the Court Poor Box, the court will strike out the charge against them, resulting in a full acquittal.

2.47 In determining whether to apply the Court Poor Box in a particular case, the court will have regard to one or more of the following factors: whether it is a first offence; whether the accused has pleaded guilty; if there is a concern to avoid a conviction; the minor nature of the offence; a lack of proportion between a conviction and sentence and the offence unless the case is disposed of by a contribution to the court poor box; the family circumstances of the accused; a concern to avoid an injustice; the inadequacy of the maximum fine in respect of the offence because of the effects of inflation; or an anxiety to avoid a fine or imprisonment in the particular circumstances of the individual offender and of the case.

(4) *Entering into a recognisance or binding over*

2.48 The jurisdiction to bind people over to keep the peace is found in section 54 of the *Courts (Supplemental Provisions) Act 1961* which states:

⁷⁸ The Court Poor Box is also used where there has been a conviction in the case.

⁷⁹ For a detailed discussion on the types of offences in respect of which the Court Poor Box arises, see *ibid* at paragraph 1.11 – 1.20.

⁸⁰ *Ibid.*

“The jurisdiction formerly exercisable by justices of the peace to make an order binding a person to the peace or to good behaviour or to both the peace and good behaviour and requiring him to enter into a recognisance in that behalf may be exercised by—

- (a) a judge of the Supreme Court or the High Court, or
- (b) a judge of the Circuit Court within the circuit to which he is for the time being assigned, or
- (c) a justice of the District Court within the district to which he is for the time being assigned.”

2.49 O’Malley⁸¹ states that a binding over order is “sometimes equated with a suspended fine.”⁸² The essence of the jurisdiction is that, having come to the attention of the court by way of complaint or conviction, a person enters into an agreement with the court to keep the peace and be of good behaviour for a stated period of time. A person who fails to comply with the terms of the recognisance must pay a stated sum of money contained in the original order. Failure to pay the fine may result in imprisonment. While it may be considered a form of preventative detention, its constitutionality was upheld in *Gregory v Windle*.⁸³

2.50 The history of binding over to keep the peace and to be of good behaviour was detailed by O’Hanlon J in *Gregory v Windle*⁸⁴ where he stated that the origin of the jurisdiction is traced back to common law, the *Justices of the Peace Act 1360*, a statute of Edward III⁸⁵ and the Justices’ Commission. The jurisdiction is a broad one, as stated by Palles CB:

⁸¹ O’Malley *Sentencing Law and Practice* (Round Hall Sweet and Maxwell 2000).

⁸² *Ibid* at 297.

⁸³ [1994] 3 IR 613.

⁸⁴ *Ibid*.

⁸⁵ 34 Edw. 3, c. 1 (1360). Applied to Ireland by *Poynings’ Act 1495*.

“the jurisdiction [to bind to the peace] has been applied to cases in which the defendant was acquitted ... to cases in which the party had no opportunity of saying a word to object to it in cases where there was no information that a repetition of the offence was likely or was apprehended ... in cases of statutable misdemeanour, over and above the maximum penalty imposed by the statute...”⁸⁶

2.51 It remains the case that a conviction does not need to be made against a person as a prerequisite to an order being made,⁸⁷ however, it would appear that a person should consent to being bound over before an order is made.⁸⁸ In practice, this is done by the offender agreeing to being bound over in a specific sum of money.

D Orders for Specific Offenders

(1) Orders for children

2.52 If the Children Court is “satisfied” of the guilt of a child, it may either “reprimand the child” or make one or more of the following orders under section 98 of the *Children’s Act 2001*:

- (a) a conditional discharge order,
- (b) an order that the child pay a fine or costs,
- (c) an order that the parent or guardian be bound over,
- (d) a compensation order,
- (e) a parental supervision order,
- (f) an order that the parent or guardian pay compensation,
- (g) an order imposing a community sanction,

⁸⁶ *Ex parte Tanner, MP* Exchequer Division 8th August 1889, quoted in *Gregory v Windle* [1993] 3 IR 613 at 619.

⁸⁷ Walsh *Criminal Procedure* (Thomson Round Hall 2002) at 1044-1045.

⁸⁸ O’Malley *Sentencing Law and Practice* (Round Hall Sweet and Maxwell 2000) at 297.

- (h) an order ... that the child be detained in a children detention school or children detention centre,
- (i) a detention and supervision order.

2.53 If the Children Court is of the opinion that a fine is the appropriate penalty, the fine cannot exceed half the amount that the District Court could impose on a person of full age and capacity on summary conviction for such an offence.⁸⁹

(2) Orders for sex offenders

2.54 The *Sex Offenders Act 2001* provides for a number of orders that can be made in relation to certain categories of sex offenders⁹⁰ namely the obligation to notify certain information to the Garda Síochána,⁹¹ sex offenders orders⁹² and post-release supervision of sex offenders.⁹³

2.55 Part 2 of the 2001 Act provides that people who have been convicted of a sexual offence must notify the Garda Síochána of their name and home address within seven days of being convicted.⁹⁴ They must also notify the Garda Síochána if they intend to leave the State for a continuous period of seven days or more.⁹⁵ The Court of Criminal Appeal addressed the question of whether registration of sex offenders constitutes “punishment” in *People (DPP) v NY*.⁹⁶ The Court held that while registration was not a primary form of punishment, “the Courts are not prevented from taking into account all relevant circumstances when imposing sentence.”⁹⁷ Considering

⁸⁹ Section 108 of the 2001 Act.

⁹⁰ That is, those who have been convicted of a sexual offence as defined by section 3 of, and the Schedule to, the 2001 Act. There are 20 offences listed in the schedule, with two exceptions contained in section 3.

⁹¹ Part 2 of the 2001 Act.

⁹² Part 3 of the 2001 Act.

⁹³ Part 5 of the 2001 Act.

⁹⁴ Section 10(1) of the 2001 Act.

⁹⁵ Section 10(3) of the 2001 Act.

⁹⁶ Court of Criminal Appeal 19 December 2002.

⁹⁷ *Ibid* at 14.

the facts of the case, where there was very little likelihood of the offender re-offending, the Court held that “the application of the Act of 2001 constitutes a real and substantial punitive element to which the court is entitled to have regard [when sentencing the offender].”⁹⁸

2.56 Part 3 of the 2001 Act provides for sex offender orders. If it appears to the court that the convicted person has been convicted of a sexual offence and that the offender has acted in such a way as to give reasonable grounds for believing it is necessary to protect the public from the offender, the court may issue a sex offender order which can prohibit the offender from carrying out certain activities.⁹⁹

2.57 The court may also make an order for the post-release supervision of sex offenders. Where a court imposes a term of imprisonment on the offender, the judge must consider whether to impose supervision on the offender after release.¹⁰⁰ In determining whether supervision is necessary, the court has regard to the need for supervision, the need to protect the public from harm, the need to prevent the commission of further offences and the need to rehabilitate the offender.¹⁰¹

2.58 The period of supervision starts on the day the prisoner is released from prison, and during the period imposed, the offender is supervised by a probation and welfare officer.¹⁰² The total aggregate of the time spent in prison and on supervision cannot exceed the statutory maximum for the offence itself.¹⁰³ The 2001 Act also states that the sentence of imprisonment “shall not be less than the term the court would have imposed if it had considered the matter apart from the provisions of [that Part of the Act].”¹⁰⁴ Included in the order can

⁹⁸ Court of Criminal Appeal 19 December 2002 at 14.

⁹⁹ Section 16 of the 2001 Act.

¹⁰⁰ Section 28(1) of the 2001 Act.

¹⁰¹ Section 28(2) of the 2001 Act.

¹⁰² Section 29(1) of the 2001 Act.

¹⁰³ Section 29(2) of the 2001 Act.

¹⁰⁴ Section 29(3) of the 2001 Act. This order therefore differs from the rest of the Act which can be taken into account when sentencing. See *People (DPP) v NY* Court of Criminal Appeal 19 December 2002, Fennelly J discussed at paragraph 2.55.

be conditions prohibiting the offender from doing specific things if such an order is necessary to protect the public, and such orders may require the sex offender to receive counselling.¹⁰⁵

(3) Tagging

2.59 While tagging is not a form of disposition in use currently, it would appear that the Department of Justice is investigating the possibility of introducing the procedure. In a written answer in the Oireachtas, the Minister for Justice, Equality and Law Reform stated that “the use of electronic systems to monitor offenders in other jurisdictions is an issue which my Department has been examining for some time.”¹⁰⁶ He did note, however, that the usual system in operation in the United States uses GPS, a form of satellite tracing, which has a number of problems associated with it. He stated that the advice given to him was to await current developments which aim to improve the current system, and examine other options, such as lower technology and lower cost curfew tracking systems which are based on a combination of mobile phone technology and voice verification technology. He also stated that studies from other countries suggest that tagging is effective only over a three month period and only suitable for low risk offenders, whereas the needs of the Irish criminal justice system would not necessarily tally with this.

2.60 In an address to the 2003 Annual Delegate Conference of the Association of Garda Sergeants and Inspectors¹⁰⁷ the Minister noted that as technology develops, so too do the options for the criminal justice system in dealing with offenders. With regard to electronic tagging, he stated that it would be appropriate for high risk offenders such as those who have committed sexual crimes, and concluded that he was willing to make use of such technology as soon

¹⁰⁵ Section 30(2) of the 2001 Act.

¹⁰⁶ Volume 563 Dáil Debates Column 331 (11 March 2003). See also the *Final Report of the Expert Group on Probation and Welfare Service* (Stationery Office 1999) where it was recommended (at paragraph 2.12) that the introduction of electronic monitoring be deferred until such time as technology had been advanced and electronic monitoring systems in other jurisdictions assessed.

¹⁰⁷ Held on 14 April 2003. The full text of the address given by the Minister is available at <http://www.justice.ie>.

as he believed that it can make a contribution to the monitoring of offenders.¹⁰⁸ The Commission agrees that a suitable tagging system would be a useful alternative to costly incarceration.

2.61 *The Commission commends the proposed introduction of electronic tagging, involving modern systems of proven practical utility and economy suitably adapted to Irish conditions, as a useful alternative to costly incarceration.*

E Ancillary Orders and Penalties

2.62 Where a person is convicted of certain offences, ancillary orders and penalties may also be imposed by the court. These orders and penalties do not come within the definition of “sentence” as used in this paper.

(1) Disqualification

2.63 The most usual form of ancillary orders are those which are consequent upon a conviction, such as a disqualification order. The most common example of this type of order is disqualification from driving on foot of conviction under sections 26, 27 or 49 of the *Road Traffic Act 1961* or section 3 of the *Road Traffic Act 2002*.¹⁰⁹ There are two forms of disqualification order that can be made under the 1961 Act as amended: consequential disqualification orders, which are mandatory upon conviction of certain offences; and ancillary disqualification orders, which the trial judge has discretion to order upon conviction. The nature of such orders was described by the Supreme Court in *Conroy v Attorney General*:¹¹⁰

“One must not lose sight, however, of the real nature of the disqualification order that it is essentially a finding of unfitness of the person concerned to hold a driving licence

¹⁰⁸ The Director of the Irish Penal Reform Trust recently questioned the viability and efficacy of some existing electronic tagging systems either as a means of reducing prison overcrowding or of recidivism. See *The Irish Times* 8 May 2004.

¹⁰⁹ The constitutionality of the disqualification requirement was upheld in *Conroy v Attorney General* [1965] IR 411.

¹¹⁰ [1965] IR 411.

... Such disqualification is not a punishment notwithstanding that the consequence of such finding of unfitness might be both socially and economically serious for the person concerned.”¹¹¹

Thus, while disqualification is an inevitable consequence of conviction for certain offences, the Supreme Court made it clear that it is not punishment of itself, and cannot be considered as part of the sentence of the accused.

2.64 Another example of an ancillary disqualification order is that in section 160(1) of the *Companies Act 1990*, where a person who is convicted on indictment of any indictable offence in relation to a company can be disqualified from holding certain positions relating to the running of a company.

(2) Forfeiture of property

2.65 Various legislative provisions provide for the forfeiture of property on conviction, for example, section 30 of the *Misuse of Drugs Act 1977* which provides that “a court by which a person is convicted of an offence under this Act may order anything shown to the satisfaction of the court to relate to the offence to be forfeited and either destroyed or dealt with in such other manner as the court thinks fit.” In *Bowes v Devally*¹¹² a judge of the District Court had ordered the forfeiture of £890 found in the same room as a quantity of cannabis resin. The applicant had been charged and convicted with unlawful possession of drugs contrary to section 3 of the 1977 Act. She appealed the order to forfeit made under section 30(1) of the 1977 Act to the Circuit Court where her appeal was dismissed by the respondent. She then sought judicial review of the decision of the Circuit Court, and in the High Court Geoghegan J upheld her appeal. He stated:

“I find it impossible to discern any evidence on which the first respondent could have been satisfied that the money related to the offence for which the applicant was convicted. Even if the first respondent drew an inference that the

¹¹¹ [1965] IR 411 at 441-442.

¹¹² [1995] 1 IR 315.

money was intended to be used to acquire more drugs, it had no relevance to the actual offence for which the applicant was convicted.”¹¹³

2.66 Thus, to make an order to forfeit under the 1977 Act, it is necessary to connect the specific thing to be forfeited with the particular substantive offence to which it related.¹¹⁴

2.67 A more general forfeiture provision is contained in section 61 of the *Criminal Justice Act 1994*.¹¹⁵ When a person is convicted of an offence and property has been seized that the court is satisfied has either been used for the purpose of committing or facilitating the commission of any offence or was intended by the offender to be used

¹¹³ [1995] 1 IR 315 at 318.

¹¹⁴ *Ibid* at 319.

¹¹⁵ Section 61(1) states:

“(1) Subject to the following provisions of this section, where a person is convicted of an offence, and—

(a) the court by or before which he is convicted is satisfied that any property which has been lawfully seized from him or which was in his possession or under his control at the time when he was apprehended for the offence or when a summons in respect of it was issued—

(i) has been used for the purpose of committing, or facilitating the commission of, any offence, or

(ii) was intended by him to be used for that purpose,

or

(b) the offence, or an offence which the court has taken into consideration in determining his sentence, consists of unlawful possession of property which—

(i) has been lawfully seized from him, or

(ii) was in his possession or under his control at the time when he was apprehended for the offence of which he has been convicted or when a summons in respect of that offence was issued,

the court may make an order under this section (referred to in this Act as a "forfeiture order") in respect of that property, and may do so whether or not it also deals with the offender in respect of the offence in any other way.”

for that purpose, the court may make a forfeiture order in respect of the property.¹¹⁶

2.68 When deciding whether or not to make a forfeiture order, the court must have regard to the value of the property and the likely financial and other effects on the offender.¹¹⁷ Once the order is made, the offender is deprived of the property and it is taken into the possession of An Garda Síochána.¹¹⁸

(3) Compensation order

2.69 Under the *Criminal Justice Act 1993*, upon conviction the court can order the convicted person to pay compensation to the victim of the offence.¹¹⁹ This can be instead of, or in addition to, sentencing the offender. Walsh¹²⁰ notes that while, strictly speaking, such orders should not be considered as part of the punishment, “[i]n practice, they will be perceived as part of the punishment, not least because of the fact that they are ordered by the court immediately upon conviction and in the context of passing sentence.”¹²¹

2.70 The amount payable under the order is limited to the jurisdiction of the courts in tort¹²² and cannot exceed the amount of the damages that the victim of the crime would be entitled to recover in a civil action against the convicted person in respect of the injury or loss.¹²³ When determining whether to make a compensation order

¹¹⁶ Section 61(1) of the *Criminal Justice Act 1994*.

¹¹⁷ Section 61(2) of the *Criminal Justice Act 1994*.

¹¹⁸ Section 61(4) of the *Criminal Justice Act 1994*.

¹¹⁹ Section 6(1) of the *Criminal Justice Act 1993*. The definition of “conviction of a person” under the section includes a person who has been dealt with under section 1(1) of the *Probation of Offenders Act 1907*.

¹²⁰ Walsh *Criminal Procedure* (Thomson Round Hall 2002).

¹²¹ *Ibid* at 1078.

¹²² Section 6(2) of the *Criminal Justice Act 1993*. The current jurisdiction of the District Court is €6,350 while that of the Circuit Court is €38,100. This limitation was expected to increase to €20,000 and €100,000 respectively under the terms of the *Courts and Court Officers Act 2002*, but as yet, no commencement order has been made in respect of the relevant sections.

¹²³ Section 6(2) of the *Criminal Justice Act 1993*.

or the amount of the order, the court has to have regard to the means of the offender¹²⁴ and the order can provide that the compensation be paid over a period of time.¹²⁵ Where the court considers it to be appropriate to order both a fine and compensation, but the offender has insufficient means to pay both, the court may make a compensation order and after this order is complied with, may then order a fine to be paid as well.¹²⁶

¹²⁴ Section 6(5) of the *Criminal Justice Act 1993*. In cases involving a juvenile offender, section 98(f) of the *Children Act 2001* provides that the court has regard to the means of the parents or guardian of the child.

¹²⁵ Section 6(6) of the *Criminal Justice Act 1993*.

¹²⁶ Section 6(7) of the *Criminal Justice Act 1993*.

CHAPTER 3 APPEALS FROM THE DISTRICT COURT IN CRIMINAL MATTERS

A Introduction

3.01 At common law, there were no appeals from either convictions or acquittals. However, appeals from summary convictions and acquittals on a point of law by way of case stated may be brought under the *Summary Jurisdiction Act 1857*.

3.02 There are a number of appeals which may be taken from the District Court as a result of either an acquittal or a conviction. With regard to the particular issue of sentencing, the prosecution can appeal from an acquittal in limited circumstances, while the accused can appeal both a conviction and severity, on the basis that the sentence imposed is unduly harsh. There is also the possibility of bringing a case stated, a consultative case stated, or bringing an application for a judicial review of the decision of the trial judge. These various procedures are dealt with separately below.

B The Right of the Accused to Appeal

3.03 Section 18 of the *Courts of Justice Act 1928*¹ provides that appeals can be made against an “order (not being merely an order returning for trial or binding to the peace or good behaviour or to both the peace and good behaviour) for the payment of a penal or other sum or for the doing of anything at any expense or for the estreating of any recognisance or for the undergoing of any term of

¹ As amended by section 58 of the *Courts of Justice Act 1936*.

imprisonment by the person against whom the order shall have been made.”²

3.04 Walsh³ adds that while section 18(1) of the *Courts of Justice Act 1928* specifically excludes orders binding a person to the peace or to be of good behaviour or both from the right of appeal from the District Court, the *Criminal Justice Act 1951* makes provision for an application to the Circuit Court to be released from the obligations imposed by such an order.⁴

3.05 Section 50 of the *Courts (Supplemental Provisions) Act 1961* restricts the form of appeal if it is as to sentencing. It states:

“Where –

- (a) an order is made in a criminal case by a justice of the District Court convicting a person and sentencing him to pay a penal or other sum or to do anything at any expense or to undergo a term of imprisonment or to be detained in Saint Patrick's Institution, and
- (b) an appeal is taken against the order, and
- (c) either—
 - (i) the notice of appeal states that the appeal is against so much only of the order as relates to the sentence, or
 - (ii) the appellant, on the hearing of the appeal, indicates that he desires to appeal against so much only of the order as relates to the sentence,

then, notwithstanding any rule of law, the Circuit Court shall not, on the hearing of the appeal, re-hear the case

² Under section 265 of the *Children Act 2001*, an appeal lies to the Circuit Court from an order of Children Court or the District Court committing a child to a children detention school or a place of detention.

³ Walsh *Criminal Procedure* (Thomson Round Hall 2002).

⁴ *Ibid* at 1146.

except to such extent as shall be necessary to enable the court to adjudicate on the question of sentence.”

3.06 Thus, while an appeal against conviction leads to a complete rehearing of the case, if the appeal is against sentence only, the Circuit Court only re-hears the case to the extent that it is necessary for adjudication on the sentence.⁵ If the accused appeals the sentence only, the court has the discretion either to reduce *or increase* the sentence originally imposed. This discretionary power was affirmed in *State (Aherne) v Cotter*⁶ where the Circuit Court judge increased the sentence from nine months imprisonment to twelve months imprisonment.⁷

3.07 The decision of the Circuit Court on appeal is final and unappealable.⁸

3.08 Section 50 of the 1961 Act does not expressly state that it is only the accused who can appeal such sentences. However, in *People (Attorney General) v Kennedy*⁹ the question was addressed as to whether the right of appeal granted under section 29 of the *Courts of Justice Act 1924*, which provides for appeals from the Court of Criminal Appeal to the Supreme Court on a point of law of exceptional public importance, included a right of appeal for the prosecution where the Court of Criminal Appeal upheld an appeal

⁵ If the conviction is appealed, the Circuit Court has the jurisdiction to quash the conviction, uphold the conviction and the sentence, or to uphold the conviction and vary the sentence. See *State (Aherne) v Cotter* [1982] IR 188; *State (O'Rourke) v Martin* [1984] IRLM 333.

⁶ [1982] IR 188.

⁷ See also *State (O'Rourke) v Martin* [1984] IRLM 333 where the prosecutors appealed the decision of the District Court Judge to impose a fine. On appeal, the Circuit Court Judge sentenced the prosecutors to a sentence of imprisonment and they sought to establish that the imposition of a more serious penalty on appeal was an infringement of natural or constitutional justice. Gannon J held that the Circuit Court Judge was entitled to vary, including increase, the sentence on appeal in whatever way he thought proper.

⁸ Section 18(3) of the *Criminal Justice Act 1928*.

⁹ [1946] IR 517.

against conviction and ordered an acquittal. For the Supreme Court, Murnaghan J stated:

“The Court has an established rule that no appeal lies unless given by statute, and the function of the Court in this case is to see what the legislature intended when it enacted section 29 of the *Courts of Justice Act 1924* dealing with an appeal from the Court of Criminal Appeal to the Supreme Court ... It seems to me that in such a case, a prosecutor has no appealable interest, or it may be expressed as a rule of construction that mere general words are not enough to cover a disappointed prosecutor. He must be specially named.”¹⁰

Thus, even where a statute does not specify that the right of appeal by the District Court is limited to the convicted person, the prosecutor will not be entitled to appeal unless it is specified in the legislation that the right of appeal is extended to the prosecutor.

C Prosecution Appeals

3.09 In general, there is no prosecution right of appeal against either an acquittal or sentence. There are however a few particular circumstances in which the prosecution has been given a right of appeal by statute from orders, including acquittals, in the District Court.

(1) Fisheries legislation

3.10 Section 310(1) of the *Fisheries (Consolidation) Act 1959* provides that the prosecutor can appeal to the Circuit Court against an acquittal in the District Court in respect of a complaint brought on a summons in respect of prosecutions under the Act. Section 310 states:

¹⁰ [1946] IR 517 at 527-530. A similar approach was taken by the Court in *People (DPP) v O’Callaghan* [2004] 1 ILRM 438, where the Court of Criminal Appeal ordered a re-trial rather than acquittal. Head 15 of the *Criminal Justice Bill 2003* (Department of Justice) proposes to reverse, in part, the effect of the decision in *Kennedy*.

“(1) Where any proceedings in the District Court for an offence under any provision of this Act are dismissed, whether on the merits or without prejudice, the prosecutor may appeal against the order of dismissal to the Judge of the Circuit Court within whose Circuit the Courthouse in which such order was made is situate.

(2) Where by virtue of subsection (1) of this section a right of appeal against an order of the District Court in any proceedings under this Act lies to a Judge of the Circuit Court, such Judge on such appeal may vary, confirm or reverse such order, and the decision of such Judge on such appeal shall be final and conclusive and not appealable.”

3.11 In *Considine v Shannon Regional Fisheries Board*¹¹ the plaintiff argued that section 310 of the 1959 Act amounted to a violation of Article 38 of the Constitution on the basis that it contravened the principle against “double jeopardy”, that it infringed the long-established principle enshrined in the common law that no appeal shall lie from a decision dismissing a criminal charge and that a verdict of not guilty on a criminal charge is inviolable in the light of the Constitution.

3.12 The Supreme Court held that, while there was a common law rule that there should be no appeal from an acquittal, this common law rule was subject to the right of the legislature to introduce such an appeal procedure, “provided that it was in clear and unambiguous language”.¹² The Court noted that Article 34.3.4° provides that, “[t]he Courts of First Instance shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law.” Thus, the legislature is free to enact any law it sees fit as regards the appeal process, so long as that legislation is not in any way repugnant to the Constitution. The appeal provision contained in section 310 of the 1959 Act was a “right of appeal ... determined by law”, and was thus constitutional.¹³

¹¹ [1997] 2 IR 404.

¹² *Ibid* at 422.

¹³ The Court was clear in noting that this right of appeal as against a summary conviction did not extend to appeals from acquittals by juries

3.13 It would appear, then, that while there is no general right of appeal against an acquittal, there is scope for the legislature to provide for one, provided the legislation is framed in clear and unambiguous language.

(2) *Courts of Justice Act 1928*

3.14 Section 18(2) of the *Courts of Justice Act 1928* provides:

“Where immediately before the commencement of Part III of [the Courts of Justice Act 1924] an appeal lay in a criminal case at the instance of a complainant or prosecutor against an order of a District Justice appointed under the *District Justices (Temporary Provisions) Act 1923* ... an appeal of the like kind shall lie in such criminal case at the instance of a complainant or prosecutor from an order of a Justice of the District Court.”

Thus, any right of appeal which existed prior to the introduction of the 1928 Act was preserved by this section. Woods¹⁴ notes that this right exists in “excise cases, illicit distillation offences and fisheries prosecutions.”¹⁵

(3) *Appeals in probation cases*

3.15 Section 33 of the *Courts of Justice Act 1953* provides that “[a]n appeal shall lie to the Circuit Court from an order of the District Court under subsection (1) of section 1 of the *Probation of Offenders Act 1907*.” While it is not clear from the wording of the section if the appeal process is confined to the accused or open to the prosecutor, case law would suggest that the former is the correct interpretation, so that only the offender can appeal. However, it is possible for the

distinguishing the present case from *The People (DPP) v O’Shea* [1982] IR 384.

¹⁴ Woods *District Court Practice and Procedure in Criminal Cases* (James V Woods 1994).

¹⁵ *Ibid* at 450. For fisheries prosecutions, see now the 1959 Act discussed in the *Considine* case at paragraph 3.11.

prosecution to appeal an order under the *Probation of Offenders Act 1907* by way of case stated.¹⁶

(4) Safety and health at work

3.16 Section 52 of the *Safety, Health and Welfare at Work Act 1989* empowers the National Authority for Occupational Safety and Health (commonly known as the Health and Safety Authority) to appeal against acquittals in the District Court. It provides:

“Any person (including the Authority or an enforcing agency) aggrieved by an order made by the District Court on determining a complaint under this Act may appeal therefrom to a judge of the Circuit Court within whose circuit is situated the District Court in which the decision was given, and the decision of the judge of the Circuit Court on any such appeal shall be final and conclusive.”¹⁷

3.17 The Annual Report of the Health and Safety Authority 2002 reports that out of a total of 91 prosecutions brought, there were two such appeals brought by the Authority in that year.¹⁸ In the first appeal, *National Authority for Occupational Safety and Health v Y*¹⁹ the appeal by the Authority against an acquittal was dismissed and costs were awarded against it.²⁰ In the second appeal, *National Authority for Occupational Safety and Health v MacManus Plant Hire*, the District Court had dismissed a charge against the defendants under section 6(2)(e) of the 1989 Act, but had imposed a fine of £300 for breach of section 12(1) of the 1989 Act. On appeal by the

¹⁶ See *Gilroy v Brennan* [1926] IR 482, where the prosecutor successfully applied by way of case stated to have the order reviewed. It was held that the trial judge was not “right in law in applying the *Probation of Offenders Act 1907*, to the offence in question”, and the court sent the case back with orders to convict.

¹⁷ Similar legislation is found in section 50 of the *Diseases of Animals Act 1966* and section 8 of the *Equal Status Act 2000*. The Commission understands that neither of these sections has been utilised in recent years.

¹⁸ Health and Safety Authority *Annual Report 2002* at 53. Available at <http://www.hsa.ie>.

¹⁹ *Ibid.*

²⁰ *Ibid.*

Authority, the defendant was convicted under section 6(2)(e) of the 1989 Act and fined €1,500.²¹

3.18 The provisions of the 1989 Act highlight that there are no constitutional, legal or policy reasons against introducing appeals by the prosecutor against unduly lenient sentences. The operation of section 52 also shows that the Authority has used the power to appeal sparingly. This may perhaps be indicative of the manner in which the Director of Public Prosecutions would approach the question of appeals from unduly lenient sentences in the District Court.

D Case Stated

3.19 Section 2 of the *Summary Jurisdiction Act 1857*, as extended by section 51 of the *Courts (Supplemental Provisions) Act 1961* provides that a case may be stated to the High Court by a District Court Judge on a point of law at the request of any party to the proceedings heard and determined in the District Court.²² The judge may refuse to state the case to the High Court if the application is considered frivolous unless the application is made by the Attorney General, the Director of Public Prosecutions, a Minister of the

²¹ Health and Safety Authority *Annual Report 2002* at 53. The proceedings arose as a result of a fatal accident when a worker was killed while working in a trench.

²² Section 2 of the 1857 Act states:

“After the Hearing and Determination by a Justice or Justices of the Peace of any Information or Complaint which he or they have Power to determine in a summary Way, by any Law now in force or hereafter to be made, either Party to the Proceeding before the said Justice or Justices may, if dissatisfied with the said Determination as being erroneous in point of law, apply in Writing within Three Days after the same to the said Justice or Justices to state and sign a Case setting forth the Facts and Grounds of such Determination, for the Opinion thereon of One of the Superior Courts of Law to be named by the Party applying; and such Party, herein-after called “the Appellant”, shall, within Three Days after receiving such Case, transmit the same to the Court named in his Application, first giving Notice in Writing of such Appeal with a Copy of the Case so stated and signed, to the other Party to the Proceeding in which the Determination was given herein-after called the Respondent.”

Government, a Minister of State or the Revenue Commissioners, in which case the judge has no discretion to refuse.²³ The case must be stated within 14 days of the determination of the District Court Judge.²⁴ The High Court can reverse, amend or affirm the determination of the District Court Judge or may refer the matter back to the District Court Judge for determination on the basis of its ruling. The decision of the High Court can be appealed to the Supreme Court.²⁵

3.20 The application for a case stated may be made by the prosecution or the defence, and can be made in respect of an acquittal or a conviction. This would appear to include what may be termed a “conditional acquittal” whereby the case is found to have been proven against the accused but a conviction is not registered, the judge and the accused having agreed to dispose of the case by way of application of the *Probation of Offenders Act 1907*.

3.21 This occurred in *Oaten v Auty*,²⁶ where the offence of not serving with the defence forces under the Military Acts was found to have been proven against the applicant, but it was felt inexpedient to inflict any punishment, the justices preferring to dismiss the information under the *Probation of Offenders Act 1907*. The issue in the case was whether there had been any “conviction, order or determination” in the lower court. The Court found that the lower court had in fact “determined” as a matter of law that the appellant was not exempted under the Military Acts from the obligation of

²³ See *Fitzgerald v Director of Public Prosecutions* [2003] 2 ILRM 537. Section 4 of the 1857 Act states:

“If the Justice or Justices be of opinion that the Application is merely frivolous, but not otherwise, he or they may refuse to state a Case, and shall, on the Request of the Appellant, sign and deliver to him a Certificate of such Refusal; provided, that the Justice or Justices shall not refuse to state a Case where Application for that Purpose is made to them by or under the Direction of Her Majesty’s Attorney General for England or Ireland, as the Case may be.”

²⁴ The three day time limit in section 2 of the 1857 Act was extended by section 51 of the *Courts (Supplemental Provisions) Act 1951*.

²⁵ See *Attorney General (Fahy) v Bruen* [1936] IR 750.

²⁶ [1919] 2 KB 278.

serving with the forces. While the order did in fact dismiss the information, Darling J was of the opinion that “[the] order depends upon a determination which in ordinary circumstances would amount to a conviction.”²⁷ The Court held that an appeal lay in the case, and also held that the justices were wrong in applying the Probation Act in respect of the accused.

3.22 In *Director of Public Prosecutions v Nangle*,²⁸ the Director of Public Prosecutions appealed by way of case stated the acquittal in the District Court of the respondent who had been accused of assault occasioning actual bodily harm. The case stated was brought on the grounds that “on the evidence as found by the learned district justice and stated by him in the case, a decision to acquit the respondent was a perverse decision in the technical legal meaning of that term.”²⁹ Assessing the jurisdiction of the case stated procedure, Finlay P stated, “I accept the general principles stated on behalf of the appellant ... that where a district justice reaches a determination which is unsupported by any evidence before him that that constitutes good grounds for setting aside his decision on an appeal brought by way of case stated.”³⁰

On the question of whether it was possible to appeal an acquittal, rather than a conviction by way of case stated, Finlay P held that while the experience of the courts was that the case stated procedure had almost universally been confined to cases of appeals against conviction, “there can be no valid distinction in principle which could make it inapplicable to a like appeal against an acquittal.”³¹ This was, however, subject to the qualification that in the case of an appeal against an acquittal, the onus of proof beyond a reasonable doubt lay with the prosecution, an onus which included negating by the same standard of proof any defence, such as self defence, raised in the District Court. While the Court was of the opinion that there was a “clear air of implausibility” about the account given by the respondent in defence, it held that it would constitute:

²⁷ [1919] 2 KB 278 at 283.

²⁸ [1984] ILRM 171.

²⁹ *Ibid* at 171-172.

³⁰ *Ibid* at 172.

³¹ *Ibid*.

“an unwarranted interference by the court in a proceeding which is exclusively confined to correcting errors of law by an inferior court in the determination of proceedings before it, to hold that [the evidence] could not have raised a doubt in the mind of the district justice.”³²

3.23 In the more recent decision of *Fitzgerald v Director of Public Prosecutions*,³³ the Supreme Court upheld the constitutionality of section 4 of the *Summary Jurisdiction Act 1857*. The case concerned an appeal by the Director of Public Prosecutions of an acquittal in the District Court, and while the Court upheld the constitutionality of the procedure, Hardiman J found it necessary to consider the true construction of the 1857 Act. He considered the issues important as “they relate to the circumstances in which an acquittal by a court of competent jurisdiction can be suspended and perhaps overturned.”³⁴

3.24 Hardiman J pointed out that “the most salient limitation on the right to apply for a case stated is that one must be dissatisfied with the District Court decision ‘as being erroneous in point of law’.”³⁵ He noted that the *Nangle* case³⁶ held the jurisdiction is not open to “a party dissatisfied with the decision of the District Court on the grounds that the District Judge has taken one view rather than another of the evidence or has accorded credence to one witness and withheld it from another.”³⁷ He noted that if a defendant is dissatisfied on such grounds, he or she can apply to the Circuit Court for a full rehearing.³⁸

³² [1984] ILRM 171 at 173.

³³ [2003] 2 ILRM 537.

³⁴ *Ibid* at 548.

³⁵ *Ibid* at 552. Other limitations referred to by Hardiman J are that it is appellate in nature and that the procedure is by way of written statement rather than by way of rehearing. *Ibid* at 554.

³⁶ [1984] ILRM 171.

³⁷ [2003] 2 ILRM 537 at 554.

³⁸ Hardiman J did not, however, refer to any remedy the prosecution may have in similar circumstances, such as in those cases in which a right of appeal is granted in, for example, fisheries and safety at work legislation.

In terms of when the case stated procedure can be utilised to appeal an acquittal, Hardiman J agreed that “the jurisdiction to entertain a case stated by way of appeal against acquittal requires to be strictly construed.”³⁹ Referring to *People (DPP) v O’Shea*⁴⁰ he noted that “[t]he status of near inviolability classically afforded to an acquittal emphasises the need to construe the permitted scope of an attack on such acquittal strictly. I have no hesitation in finding that the scope of such challenge is strictly limited to a question of law.”⁴¹

3.25 While it may be unusual for the prosecution to use the case stated procedure to appeal an acquittal or a sentence, it is clear that the option is open if it is brought on the basis that there is an error in law in the determination of the proceedings in the District Court.

3.26 *The Commission notes the long-established use by the prosecution of appealing acquittals by way of case stated under the Summary Jurisdiction Act 1857 and stresses that this procedure, along with the relevant provisions of the Act, has been upheld as being constitutional by the Supreme Court.*

E Consultative Case Stated

3.27 Under section 52 of the *Courts (Supplemental Provisions) Act 1961*, an application may be made by any party heard in the proceedings to the District Court Judge to refer any question of law arising in the case to the High Court. This is referred to as a consultative case stated. The Report of the Working Group on the Jurisdiction of the Courts⁴² notes that one purpose of the procedure is to allow the District Court Judge to obtain the advice and opinion of the High Court in reaching the correct legal decision.⁴³ It differs in three important ways to the case stated procedure under the 1857 Act: first, the consultative case stated procedure is made by application *during* the course of the District Court proceedings; secondly, under

³⁹ [2003] 2 ILRM 537 at 554.

⁴⁰ [1982] IR 384.

⁴¹ [2003] 2 ILRM 537 at 555.

⁴² Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Courts Service 2003) (The Fennelly Report).

⁴³ *Ibid* at 86.

section 52 of the 1961 Act, the District Court Judge is obliged in all cases to make the reference to the High Court when requested; and finally, while there is an appeal from the decision of the High Court to the Supreme Court, section 52(2) provides that this is only available by leave of the High Court.

F Judicial Review

3.28 In *Meagher v O'Leary*⁴⁴ the High Court considered the circumstances in which the jurisdiction of the High Court might be utilised in order to impugn a particular sentence of such unreasonableness as to satisfy the criterion formulated by Henchy J in *State (Keegan) v Stardust Victims Compensation Tribunal*⁴⁵ of “whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense.”⁴⁶

3.29 It was suggested by Moriarty J in *Meagher v O'Leary*⁴⁷ that:

“it would require singular and striking facts, such as perhaps an immediate maximum custodial sentence being imposed following a guilty plea to shoplifting a single item, upon an elderly female first offender.”⁴⁸

3.30 In the Supreme Court, the test used was whether there “was anything in the way of an abuse of discretion or anything irrational in the course that [the sentencing judge] took.”⁴⁹ In *Meagher*, the applicant had been convicted in the District Court of 17 offences relating to possession of illegal animal growth hormones. He was sentenced to a two year term of imprisonment on 15 of the charges, the terms of which were to run concurrently. Prior to the hearing of the appeal in the Circuit Court, it was held by the Supreme Court that 12 months was the maximum sentence that could be imposed for any

⁴⁴ [1998] 4 IR 33.

⁴⁵ [1986] IR 642.

⁴⁶ *Ibid* at 658.

⁴⁷ [1998] 4 IR 33.

⁴⁸ *Ibid* at 43.

⁴⁹ *Ibid* at 48.

one summons. On appeal in the Circuit Court, the court ordered terms of eight months imprisonment to run concurrently for eleven of the summonses, and for two generically different summonses that terms of eight months imprisonment should run consecutively. The applicant sought judicial review of these decisions, arguing that a total of 16 months imprisonment was in excess of the sentencing jurisdiction of the District Court. The Supreme Court rejected this argument, holding that there had been no infringement of the constitutional rights of the applicant. The Court also held that the sentence imposed on the applicant was not so arbitrary, disproportionate or manifestly unjust as to warrant intervention.

3.31 It would thus appear that in order for a sentence to be quashed on judicial review, it would have to be so disproportionate and unreasonable as to fly in the face of common sense or of all sentencing principles. Undue leniency, without the element of unreasonableness, would not warrant interference on foot of judicial review with an order made.

3.32 Thus, while there is some scope for judicial review of sentences, given the wide margin of discretion for sentencing judges, and given the context of the limited nature of the District Court jurisdiction, it is difficult to envisage circumstances in which an application for judicial review on grounds of leniency would succeed. However, it is clear that judicial review is available in the limited circumstances set out above.

CHAPTER 4 PROSECUTION APPEALS FROM UNDULY LENIENT SENTENCES IN CASES BROUGHT ON INDICTMENT

A Introduction

4.01 Subject to the limited exceptions discussed in Chapter 3, there is no general right of the prosecution to appeal sentences imposed in the District Court. By contrast, in cases on indictment, section 2 of the *Criminal Justice Act 1993* provides that if it appears to the Director of Public Prosecutions that the sentence imposed by the trial judge in the Circuit Criminal Court, the Central Criminal Court or the Special Criminal Court is unduly lenient, the Director may apply to the Court of Criminal Appeal to review the sentence. Section 2 of the *Criminal Justice Act 1993* provides:

“(1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the ‘sentencing court’) on conviction of a person on indictment was unduly lenient, he may apply to the Court of Criminal Appeal to review the sentence.

(2) An application under this section shall be made, on notice given to the convicted person, within 28 days from the day on which the sentence was imposed.

(3) On such an application, the Court may either—

(a) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or

(b) refuse the application.”¹

4.02 Section 1 of the 1993 Act states that references to the “conviction of a person on indictment” include “references to conviction of a person after signing a plea of guilty and being sent forward for sentence under section 13(2)(b) of the *Criminal Procedure Act 1967*”, which means that the Act applies at present to proceedings in the Circuit Court, Central Criminal Court and Special Criminal Court.²

4.03 An initial point may be raised as to why appeals from the District Court were excluded from the ambit of the 1993 Act. In answering this question, some assistance can be derived from its legislative history. In 1990, a private member’s *Criminal Justice Bill* was introduced which proposed to provide for prosecution appeals in the case of unduly lenient sentences. The Bill was rejected for a number of reasons, including that the Oireachtas wished to wait for the Law Reform Commission to publish its analysis of and recommendations on sentencing, and that there were concerns raised as to the constitutionality of the 1990 Bill.³

¹ Section 2 of the 1993 Act is broadly similar to section 36 of the English *Criminal Justice Act 1988*, discussed at paragraph 5.01 below. See the comments of the Court of Criminal Appeal in *People (DPP) v Egan* [2001] 2 ILRM 299 at 306.

² The 1993 Act does not include Courts-Martial, created under the *Defence Act 1954*. This is despite the fact that under section 13 of the *Courts-Martial Appeals Act 1983* the accused can appeal a sentence to a Courts-Martial Appeals Court, which is similar in constitution to the Court of Criminal Appeal. Similarly, section 6 of the *Criminal Procedure Act 1993* includes the Courts-Martial Appeals Court in the ambit of the Act, which, *inter alia*, provides for review by the Court of Criminal Appeal of cases in which a miscarriage of justice is alleged. The exclusion of the Courts-Martial from the *Criminal Justice Act 1993* may be due to the fact that the Director of Public Prosecutions has no involvement in the prosecution of offences under the 1954 Act. However, the procedure whereby members of the defence forces are prosecuted may have to change given the judgment of the European Court of Human Rights in *Findlay v United Kingdom* (1997) 24 EHRR 221.

³ Volume 398 Dáil Debates (16 May 1990). The Commission, in its *Consultation Paper on Sentencing* (March 1993) and its *Report on Sentencing* (53-1996) recommended that such an appeal procedure be introduced. See paragraph 6.20.

4.04 Ultimately, the *Criminal Justice Act 1993* was introduced in response to the Lavinia Kerwick case.⁴ The main thrust of the Oireachtas debates was that the 1993 Act would assist consistency of sentencing in the courts, and particular emphasis was placed on the crimes of rape, incest and violent assaults.⁵ It was also noted that a similar power had existed in the UK for a number of years, having been introduced by section 36 of the *Criminal Justice Act 1988*.⁶ The Committee on Court Practice and Procedure⁷ had recommended in 1993 that the prosecution should have the right to appeal unduly lenient sentences.⁸

4.05 On the question of why appeals from District Court sentences were excluded from the ambit of the 1993 Act, the debates on the 1990 Bill also mentioned that, under section 36(3) of the *Courts (Supplemental Provisions) Act 1961*, the President of the District Court has the power to convene meetings of the Judges of the District Court “for the purposes of discussing matters relating to the discharge of the business of that Court, including, in particular such matters as the avoidance of undue divergences in the exercise by the justices of the jurisdiction of that Court and the general level of fines

⁴ Dáil Debates, Volume 427, Column 1677, 11 March 1993. Lavinia Kerwick had been raped and the accused had admitted culpability at an early stage. The trial judge, Flood J, adjourned sentencing in early 1993, indicating that a custodial sentencing might not be imposed. Ms Kerwick then chose to give a public interview, breaking her anonymity. The political response to the case included the introduction of the 1993 Act. Ultimately, the accused received a nine year suspended sentence. See, *People (DPP) v WC* [1994] 1 ILRM 321.

See also Bird *Annotation to the Criminal Justice Act 1993, Irish Current Law Statutes Annotated 1993-1994* (Round Hall Sweet and Maxwell 1993) for a detailed account of the introduction of the 1993 Act.

⁵ Volume 427 Dáil Debates Column 1688-1689 (11 March 1993).

⁶ Volume 398 Dáil Debates (8 May 1990).

⁷ Twenty-Second Interim Report of the Committee on Court Practice and Procedure *Prosecution Appeals* February 1993. Contained in *Twenty-first to twenty-fifth interim reports of the Committee on Court Practice and Procedure* (Stationery Office 1997). See further paragraphs 6.18-6.19 below.

⁸ Volume 486 Dáil Debates (28 January 1998).

and other penalties.” However, it was noted that judges of other courts also meet regularly for that purpose.⁹

4.06 It was also stated that before a sentence could be increased by the appeal court, the trial judge “would have to have made a serious error, a serious breach of accepted principles of sentencing.”¹⁰

4.07 In summary, it would appear that the reasons for excluding prosecution appeals for unduly lenient sentences in the District Court were two-fold: first, that it was envisaged that the appeal procedure was only necessary in relation to crimes of a serious nature, particularly those of a violent or sexual nature; and secondly, that there is a statutory procedure whereby judges of the District Court can meet and attempt to avoid inconsistency in sentences.

4.08 The Commission is of the opinion that these reasons should not preclude the introduction of a power to appeal unduly lenient sentences in the District Court. While trials on indictment clearly involve very serious offences, the jurisdiction of the District Court encompasses a wide range of criminal offences, from the relatively grave to the less culpable.¹¹ Indeed, for the sake of encouraging consistency of sentencing, it is difficult to see why the prosecution should not be entitled to appeal against unduly lenient sentences in the District Court.¹² Moreover, the Commission notes that judges of the courts at all levels meet to discuss sentencing issues on a regular basis and this would hardly justify repeal of section 2 of the *Criminal Justice Act 1993*.

⁹ Volume 427 Dáil Debates (11 March 1993). Indeed, since the establishment of the Judicial Studies Institute in 1994, seminars have been conducted on a wide range of topics, including sentencing, for the entire judiciary. See further, the proposed role of the Judicial Studies Committee at paragraph 8.09 to 8.10 below.

¹⁰ *Ibid* at Column 1320.

¹¹ See generally Chapter 2.

¹² See paragraph 6.21.

B The Scope of section 2 of the 1993 Act

4.09 When reviewing sentences under section 2 of the 1993 Act for undue leniency, the Court of Criminal Appeal can consider more than an unduly lenient term of imprisonment. As was stated by the Supreme Court in *People (DPP) v Finn*,¹³

“... the legislature no doubt considered it desirable to make it clear that the expression ‘sentence imposed by the court’ in s.2(1) applied, not merely to custodial sentences, but also to the wide range of other sentences available to a court in dealing with a convicted person ...”¹⁴

4.10 Thus, in *Finn*, the Court held that an order postponing sentence with a view to affording the accused an opportunity to show an intention to rehabilitate himself was a “sentence” for the purpose of the 1993 Act. However, section 1 of the Act states that the appeal process does not apply to an order under section 17 of the *Lunacy (Ireland) Act 1821*; or section 2(2) of the *Trial of Lunatics Act 1883*; or an order postponing sentence for the purpose of obtaining a medical or psychiatric report or a report by a probation officer.¹⁵

¹³ [2001] 2 IR 25.

¹⁴ *Ibid* at 43. In coming to this conclusion, Keane CJ referred to a judgment of the English Court of Appeal following a reference from the Attorney General, *Attorney General’s Reference (No 22 of 1992)* [1994] 1 All ER 105. The question in *Finn* was whether an order postponing sentence was a sentence for the purposes of the 1993 Act. The court held, by reference to the English decision in a case involving similar facts to *Finn*, that postponing sentence for the purposes of affording the convicted person an opportunity of demonstrating a *bona fide* intention of rehabilitation was a sentence for the purposes of the Act, while an order postponing sentence for the purpose of obtaining reports would not, the Court held, constitute a sentence.

¹⁵ Section 17 of the *Lunacy (Ireland) Act 1821* and the *Trial of Lunatics Act 1883* are to be repealed on the enactment and commencement of the *Criminal Law (Insanity) Bill 2002*.

C The Jurisdiction of the Appeal Court in Reviewing the Sentence under section 2 of the 1993 Act.

4.11 Unlike under section 50 of the *Courts (Supplemental Provisions) Act 1951*, where the Circuit Court conducts a re-hearing as to sentence, the Court of Criminal Appeal acts on a transcript of the trial court in exercising its appellate jurisdiction under the 1993 Act.

4.12 In the first case brought under the 1993 Act, *People (DPP) v Byrne*,¹⁶ the Court of Criminal Appeal held that the onus of proof rests on the Director of Public Prosecutions to show that the sentence called into question is “unduly lenient”. Secondly, the court pointed out that great weight should be afforded to the trial judge’s reasons for imposing the sentence that is called into question, as “he is the one that receives the evidence at first hand... [and] he may detect nuances in the evidence that may not be as readily discernible to an appellate court.”¹⁷

4.13 Thirdly, the Court held that if the trial judge has kept a balance between the particular circumstances of the commission of the offence and the relevant personal details of the person sentenced, his decision should not be disturbed. Fourthly, it held that it would be unlikely to be of help to ask whether, if a more severe sentence had been imposed, that sentence would have been upheld on appeal as being right in principle. Finally, the court noted that it was clear from the wording of section 2 of the 1993 Act that since the finding must be one of undue leniency, “nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of [the] Court.”¹⁸

4.14 In a later case, *People (DPP) v McCormack*,¹⁹ the Court elaborated on what was meant by “undue leniency”. It stated:

¹⁶ [1995] 1 ILRM 279.

¹⁷ *Ibid* at 287.

¹⁸ *Ibid*.

¹⁹ [2000] 4 IR 356.

“In the view of the Court, undue leniency connotes a clear divergence by the Court of trial from the norm, and would, save perhaps in exceptional circumstances, have been caused by an obvious error in principle. Each case must depend on its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by the accused. The range of possible penalties is dependant upon these two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered.”²⁰

4.15 The concept of an “error in principle” has guided the courts in later cases in determining whether a sentence is unduly lenient.²¹ Unless this error is present, the court will not alter the sentence imposed. This was emphasised by the Court of Criminal Appeal in *People (DPP) v McAuley*,²² where it was stated that the applicant failed to establish in the case that “the sentence actually imposed was a substantial departure from what would be regarded as the appropriate sentence.”²³

²⁰ [2000] 4 IR 356 at 359.

²¹ See *People (DPP) v Egan* [2001] 2 ILRM 299; *People (DPP) v Cunningham* [2002] 2 IR 712. In *Egan*, the Court cited with approval the similar test adopted in the High Court of Australia in *Griffiths v The Queen* (1977) 137 CLR 293. For the comparable Scottish test, see paragraph 5.08 below.

²² [2001] 4 IR 160.

²³ *Ibid* at 166.

D The Operation of Section 2 of the Criminal Justice Act 1993

(1) How often is section 2 of the Criminal Justice Act 1993 utilised?

4.16 In December 2000, in *People (DPP) v Egan*,²⁴ the Court of Criminal Appeal noted that:

“Power to seek review under s. 2 is of course a major departure from the traditional common law position. It also trenches upon the general right of a convicted person to presume that the sentence he receives from the trial judge is final unless he appeals it himself.”²⁵

Moreover, the Court noted, “... it appears that prosecution applications for review are more frequent than might have been envisaged when the section was introduced.”²⁶ As will be seen below, these comments were made at a time when appeals under the 1993 Act appeared to have reached a high level and before the publication of formal guidelines on the issue by the Director of Public Prosecutions.

4.17 The Director of Public Prosecutions’ *Statement of General Guidelines for Prosecutors*, published in October 2001,²⁷ stipulates that since the Court of Criminal Appeal will not intervene unless there is a “substantial departure from what would be regarded as the appropriate sentence”,

“... it is inappropriate to seek a sentence review because of a mere disagreement with the severity of the sentence imposed. It is necessary that there be a substantial departure from the accepted range of appropriate sentence for the offence committed in the circumstances of the case,

²⁴ [2001] 2 ILRM 299.

²⁵ *Ibid* at 308.

²⁶ Citing O’Malley *Sentencing Law and Practice* (Round Hall 2000).

²⁷ Office of the Director of Public Prosecution, *Statement of General Guidelines for Prosecutors*. Available at http://www.dppireland.ie/reports_published.htm

including the specific elements relating to the offender, or an error of principle on the way in which the trial judge approached sentencing.²⁸

4.18 The *Statement of Guidelines* is consistent with the view that the appeal power under the 1993 Act be limited to a small percentage of cases. As Table 1 shows, in the years between 1993 and 1997, no more than 4 appeals were taken annually. In 1998, this rose to 12, representing 0.8% of convictions on indictment. In 1999 and 2000 there was a significant rise to 34 and 31 respectively, representing almost 2% of convictions on indictment. This gave rise to some concern at the time that the appeal procedure was being used more frequently than anticipated.²⁹ Whatever the reasons, the figures for 2001 and 2002 indicate a fall back to 23 applications for both years, representing approximately 1.3% of convictions on indictment. It may be that the more recent figures represent the likely future use of the appeal procedure, particularly in light of the introduction of the *General Guidelines for Prosecutors* in 2001 and the greater willingness by prosecution counsel to indicate a general view on sentencing to the trial judge.³⁰ It is also worth noting that in almost 50% of cases brought under the 1993 Act, the Court of Criminal Appeal has increased the sentence involved thus indicating that, in respect of a significant number of such cases, the Court has found that

²⁸ Office of the Director of Public Prosecution, *Statement of General Guidelines for Prosecutors* at paragraph 10.6. The Guidelines cite the decision in *The People v Byrne* [1995] 1 ILRM 279 in this respect. See the discussion of *Byrne* at paragraph 4.12 above.

²⁹ In addition to the concern expressed by the Court of Criminal Appeal in the *Egan* case, see “Law Lecturer backs judge over criticism” *Irish Times* 11 July 2000. Carney J had criticised the Director of Public Prosecutions for appealing sentences imposed in the Central Criminal Court in cases in which counsel for the Director had expressed no view or indicated no anxiety, and Thomas O’Malley, the author of *Sentencing Law and Practice* (Round Hall 2000) stated “The idea behind the statute was that it was to be reserved for exceptional cases. But earlier this year there sometimes appeared to be more than one a week coming before the Court of Criminal Appeal ... It would be far better if the prosecution registered some form of submission on the sentence with the trial judge rather than sitting silent.” On the role of the prosecuting counsel at sentencing, see paragraphs 8.28 to 8.37 below.

³⁰ See paragraphs 8.28 to 8.36 below.

a substantial departure from what would be the appropriate sentence, amounting to an error in principle, has actually occurred.

TABLE 1

Results of applications made under section 2 of the *Criminal Justice Act 1993, 1994-2002*

	Convictions	Lodged	Brought forward from previous year	Refused	Varied	Struck Out
'94		2	-	1	-	1
'95		2	-	1	-	1
'96		3	-	1	1	1
'97		4	-	2	2	-
'98	1439	12	-	3	6	3
'99	1685	34		14	17	1
'00	1812	31	2	12	14	2
'01	1756	23	3	3	15	3
'02		23#	1	6	10	-

(# 7 Applications were pending at the end of 2002)

4.19 While not determinative, statistics of this kind are useful as a guide in assessing how often an appeal procedure from the District Court, if introduced, would be used. By way of analogy it can be argued that the Director of Public Prosecutions would be similarly cautious in appealing unduly lenient sentences from the District Court.

(2) *Ancillary orders and penalties are reviewable*

4.20 Ancillary orders and penalties are not part of the sentence imposed by the court, but are inextricably linked with the offence committed by the accused.³¹

³¹ For a description of the different forms of ancillary orders and penalties, see Chapter 2.

4.21 As already noted, in *People (DPP) v Finn*³² the Supreme Court stated that in enacting the legislation, the legislature did not intend to restrict the scope of the appeal to custodial sentences, but intended it to apply to “fines, community service orders, orders forfeiting property or providing for the payment of compensation etc.”³³

4.22 O’Malley³⁴ gives guidance on this point. When considering whether an ancillary order can be taken into account in sentencing, he states:

“... [O]ne must determine first of all, if they may be classified as punishment. Secondly, if they are to be so classified and consequently treated as part of the overall sentencing ‘package’, care must be taken not to allow some offenders to buy their way out of custodial punishment through confiscation or compensation orders, as these options may not be available to others who have committed equally serious offences.”³⁵

4.23 Thus, it would appear that while the court can take the ancillary orders and penalties into account when determining whether the sentence was unduly lenient, it must be careful not to rely too much at times on these ancillary orders, but instead determine if the sentence itself was unduly lenient given the circumstances.

(3) *Delay in applying for review*

4.24 Due to the limited jurisdiction of the District Court, any delay in bringing a case for review could be problematic. For example, if the sentence was a 3 month term of imprisonment it is likely that the accused would have completed the term of imprisonment before the appeal was heard. Should the accused in circumstances such as these be incarcerated, or indeed re-incarcerated?

³² [2001] 2 IR 25.

³³ *Ibid* at 43.

³⁴ O’Malley *Sentencing Law and Practice* (Round Hall Sweet and Maxwell Dublin 2000).

³⁵ *Ibid* at 130.

4.25 The delay in bringing some applications under the 1993 Act has been criticised. In *People (DPP) v Sullivan*,³⁶ a five-year suspended sentence was imposed on the accused on 16 April 1997 on four counts of sexual assault against two young girls contrary to section 2 of the *Criminal Law (Rape) Amendment Act 1990*. The appeal was heard 21 months later on 18 January 1999. The Court stated:

“That [time delay] is objectionable and the Court would desire that the word should go forth that once legislation is enacted providing for an exceptional and rather draconian measure to be placed in the hands of the prosecution that it is of the essence that the State should also provide the resources for its implementation.”

4.26 The Court recommended that appeals under section 2 of the 1993 Act should get on within “one or two or three months at the outset.” The court stated that if the case had been heard earlier, it might have had to “come to grips with the likelihood of holding that the sentence was unduly lenient”. However, it was of the opinion that it would be very harsh to impose a requirement that the offender go back to prison at that late stage, given the fact that he was rehabilitating himself well, had a job and had had another child. The Court refused the application.

4.27 *People (DPP) v Egan*³⁷ is also instructive on this point. The accused was convicted on three counts of gross indecency, one count of buggery, and one count of harassment, and was sentenced to three twelve month sentences to run concurrently, with the last nine months of each suspended, another twelve month sentence to run concurrently with the others, which was suspended fully, and a further twelve month sentence to run consecutively to the sentence, which was also suspended fully. The accused was sentenced on 24 February 2000, he was released ten weeks later, and the appeal was heard on 18 December 2000.

4.28 The Court of Criminal Appeal found that the sentence imposed by the trial judge was unduly lenient in the case, but had to

³⁶ Court of Criminal Appeal 18 January 1999.

³⁷ [2001] 2 ILRM 299.

take into account that by the time the appeal was heard, the accused had gone to prison, served the sentence and been released. The Court was of the opinion that the interests of society, as well as the accused, were best served by ensuring that the process of him rehabilitating himself should continue, and that re-incarceration would not help this objective. However, the Court did note that if the sentence were reviewed, then a further term of imprisonment of six to nine months would have been imposed. The Court noted that, while a finding of undue leniency would be compatible with the imposition of a further immediate custodial sentence, the circumstances of the case were such that the sentence imposed by the trial judge should be affirmed and not varied.

4.29 This case was applied in *People (DPP) v Doherty*³⁸ where the Court in allowing the appeal on the grounds that the sentence imposed was unduly lenient stated:

“[W]e propose to discount [the sentence to be imposed] further having regard to the fact that the respondent, albeit erroneously, did not receive a custodial sentence in the Circuit Court, and having regard to the fact that he was in a state of uncertainty since approximately December of last year when the Director put in his appeal and that the proceedings were much more prolonged than they might otherwise have been.”³⁹

This decision is significant, ensuring as it does a discount for re-incarceration or incarceration on appeal.

4.30 The European Court of Human Rights has considered the issue of delay in appeals from unduly lenient sentences in *Howarth v United Kingdom*.⁴⁰ The applicant had been sentenced to 220 hours community service in March 1995, and appealed his conviction. Shortly thereafter, the Attorney General made a section 36 reference to the Court of Appeal against leniency of sentence.⁴¹ Leave to

³⁸ Court of Criminal Appeal 29 April 2003.

³⁹ *Ibid* at 7.

⁴⁰ (2000) 31 EHRR 861.

⁴¹ Under section 36 of the *Criminal Justice Act 1988* of England and Wales. See paragraph 5.01 below.

appeal conviction was granted in December 1995, and the appeal, heard on the 20 March 1997, was dismissed. The day after this hearing, the Attorney General's reference was heard by the Court of Appeal and finding that the sentence was in fact unduly lenient, the Court substituted a sentence of 20 months imprisonment. Thus, there was no judicial activity in the case from the grant of leave to appeal in December 1995 until the time of the appeal hearing in March 1997.

4.31 The Court considered the applicant's case under Article 6.1 of the Convention which provides for a hearing "within a reasonable time" in a criminal trial, and found that there were no convincing reasons given by the United Kingdom which could justify the long period it took to hear the appeal, and accordingly the length of the proceedings failed to satisfy the reasonable time requirement set out in the Convention.

4.32 If the power to appeal sentences were vested in the Director of Public Prosecutions with respect to District Court cases, this time delay would be a factor. The Commission understands that currently, when an accused appeals a sentence or conviction from the District Court, there is quite a discrepancy as to when the appeal is heard ranging from a matter of weeks to some months.

4.33 Thus, while the courts have explicitly stated that there is no bar to re-incarceration as a result of an appeal against undue leniency under the 1993 Act, it could be argued that given the limited scope of the jurisdiction of the District Court, the issue of delay is particularly significant.

4.34 *The Commission notes that the test used by the Court of Criminal Appeal in determining whether a sentence imposed on indictment is unduly lenient, is that there must be a substantial departure from the appropriate sentence amounting to an error of principle. This has appeared to limit the number of appeals brought in such cases. The Commission also notes that the issue of delay which has been discussed in respect of cases on indictment might also become an issue in any proposed scheme of appeals from the District Court.*

CHAPTER 5 THE POSITION IN OTHER COMMON LAW JURISDICTIONS

A England and Wales

5.01 As far back as 1892, there were calls for the introduction of prosecution appeals against sentence in Britain.¹ However, it was not until the enactment of section 36 of the *Criminal Justice Act 1988* that they were introduced. Under section 36, if it appears to the Attorney General that the sentence of a person in a proceeding in the Crown Court is unduly lenient, and the offence is one triable only on indictment, he may, with the leave of the Court of Appeal, refer the case to them for review of the sentence. The Court of Appeal may:

- (a) quash any sentence passed on the convicted person in the proceeding, and
- (b) in place of it pass such sentence as they think appropriate for the case and as the court below had power to pass when dealing with the convicted person.

This provision is thus a clear analogue for the 1993 Act, in that the appeal procedure only applies to cases of an indictable nature. In applying section 36 of the 1988 Act, the Court of Appeal (Criminal Division) has applied a test of “undue leniency” which is comparable to that adopted in Ireland.² For example, in *Attorney General’s*

¹ Report of the Judges in 1892 to the Lord Chancellor 24 May 1894, Parliamentary Papers Volume 71 cited in Pattendon *English Criminal Appeals 1844-1994* (Clarendon Press 1996).

² See, Archbold (2003) at paragraphs 7-304 to 7-305.

Reference (No 4 of 1989),³ the Court of Appeal (Criminal Division) stated:

“The first thing to be observed is that it is implicit in the section that this court may only increase sentences which it concludes were *unduly* lenient. It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased – with all the anxiety that this naturally gives rise to – merely because in the opinion of this court the sentence was less than this court would have imposed. A sentence is unduly lenient, we would hold, were it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection regard must of course be had to reported cases, and in particular to the guidance given by this court from time to time in the so-called guideline cases. However it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based on law as it is in literature.”

5.02 In the Auld Report⁴ it was noted that there had been some suggestions for extending the power of the Attorney General under section 36 to appeal unduly lenient sentences to all offences triable “either-way” and those triable summarily only.⁵ The Report notes

³ [1990] 1 WLR 41 at 45-46. The principles were cited with approval by the Northern Ireland Court of Appeal (Carswell LCJ and McCollum LJ) in *Attorney General for Northern Ireland's Reference (No 3 of 2000)* [2001] NI 366.

⁴ The Auld Report *A Review of the Criminal Courts of England and Wales* (2001). Available at <http://www.criminal-courts-review.org.uk>.

⁵ This had been suggested by Darbyshire “An Essay on the Importance and Neglect of the Magistracy” [1997] Crim L R 627 at 634 where she highlights the relatively lenient sentences of a £25 fine for each charge imposed on Rosemary and Fred West for assault occasioning actual bodily harm and indecent assault on Caroline Owens in 1972. She had been abducted by the Wests, knocked unconscious, imprisoned, bound and gagged and sexually assaulted. The case was adduced as similar fact evidence more than twenty years at the trial of Rosemary West in 1995. Darbyshire states:

that the suggestion should be considered “against the Court’s criterion for intervention, namely that there should be some error of principle in the sentence such that public confidence would be damaged if it were not altered.”⁶ It also noted that regard should be had to the “significant discount that the Court allows in any sentence that it substitutes, for the ordeal to the defendant of being brought back before a court a second time.”⁷ Given the narrow range of custodial sentences available in the Magistrate’s Court, the Report doubted whether there would be much scope for the exercise of the power to increase in lesser offences, although it did note that the power might have some application to fines.⁸ It was noted, nevertheless, that as fines are always “bounded by the defendant’s ability to pay, the individual circumstances of the offender would often intrude on any exercise of comparing the fine imposed with some notional ‘right’ level of fine.”⁹

5.03 On this aspect, the Report concludes:

“It seems to me that the better course is to look to the general levels of sentencing in such cases established or approved by the Court of Appeal, to the Judicial Studies Board in its training of judges and magistrates and to the Magistrates’ Association in their sentencing guidelines to influence on a general basis any obvious under-sentencing in lesser offences. I advise strongly against any attempt to deal with the question by further statutory prescription, setting tariffs of minimum sentences and the like. Accordingly, I do not recommend extension of the Attorney

“The police prosecutor had no power of appeal from Fred and Rosemary’s £25 fines and the [Crown Prosecution Service] still has none. This highlights one of the many gaps caused by the neglect of magisterial law. Why was the Attorney-General given power, in the *Criminal Justice Act 1988*, to refer only to low sentences from proceedings in the Crown Court, when magistrates do over 95 per cent of sentencing?”

⁶ Auld Report *A Review of the Criminal Courts of England and Wales* at 638.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

General's power to refer to the Court of Appeal sentences that he considers are unduly lenient to *all* offences triable 'either-way' and/or those triable summarily-only."

5.04 Thus, the Auld Report clearly concluded against the introduction of appeals from sentences in the Magistrates' Courts, preferring instead to look to the general levels of sentencing in comparable, although more serious, cases set by the Court of Appeal together with the option of guidelines as a more effective means of achieving consistency in sentencing.

B Scotland

5.05 Under section 175(4) of the *Criminal Procedure (Scotland) Act 1995*, the prosecutor in summary cases can appeal to the High Court against a sentence passed on conviction or

“whether the person has been convicted or not, against any probation order or any community service order or against the person's absolute discharge or admonition or against any order deferring sentence if it appears to the prosecutor that, as the case may be –

- (a) the sentence is unduly lenient;
- (b) the making of the probation order or community service order is unduly lenient or its terms are unduly lenient;
- (c) to dismiss with an admonition or to discharge absolutely is unduly lenient; or
- (d) the deferment of sentence is inappropriate or on unduly lenient conditions.”

Section 108 of the 1995 Scottish Act provides for appeals on the ground of undue leniency in solemn proceedings, that is, prosecutions on indictment. This is comparable to section 3 of the *Criminal Justice Act 1988* of England and Wales, and on which section 2 of the *Criminal Justice Act 1993* was modelled.

5.06 The Commission understands that since the introduction of section 175(4) of the 1995 Act which came into force in 1998, there have been less than five appeals from summary proceedings on the grounds of undue leniency. One or two further cases were marked for possible appeal but abandoned.

5.07 This represents an exceptionally small percentage of summary cases, and would seem to assuage the fears that to introduce a similar power of appeal in this jurisdiction would overload the criminal justice system. Indeed, it would appear that appeals by the prosecutors in Scotland in cases on indictment are also quite infrequent, there being only 40 such appeals between 1993 and 2000.¹⁰ It would seem that this low level of appeals stems at least partly from the test applied in the Scottish courts which, as will become clear, is similar to the test applied in Ireland. McCluskey and McBride¹¹ state that this reluctance also results from the disinclination to interfere with the sentencing discretion of the judge of first instance, and further, “perhaps a distaste for appeals taken against a background of media-generated or politically-inspired agitation.”¹²

5.08 As indicated, the test applied by the Scottish courts in respect of appeals on indictment appeals is remarkably similar to the approach of the Irish courts under the 1993 Act and indeed by the English Court of Appeal (Criminal Division) under the *Criminal Justice Act 1988*. Thus, in *Her Majesty’s Advocate v Bell*,¹³ the Court of Session set out the test as follows:

“It is clear that a person is not to be subjected to the risk of an increase in sentence just because the appeal court considers that it would have passed a more severe sentence than that which was passed at first instance. The sentence must be seen to be unduly lenient. This means that it must

¹⁰ McCluskey and McBride *Criminal Appeals* (Butterworths 2000) at 135. The Commission understands that between January and November 2003, nine appeals against an unduly lenient sentence in solemn proceedings were taken.

¹¹ *Ibid.*

¹² *Ibid* at 135.

¹³ [1995] SCCR 244.

fall outside the range of sentences which the judge at first instance, applying his mind to all the relevant factors, could reasonably have considered appropriate ... There may also be cases where, in the particular circumstances, a lenient sentence is entirely appropriate. It is only if it can properly be said to be unduly lenient that the appeal court is entitled to interfere with it...¹⁴

5.09 The Court also gave guidance on the purpose which is sought to be achieved by declaring the sentence unduly lenient. It stated that in circumstances where the sentencing discretion of the trial judge is narrow, *ie*, that it is a matter of months rather than years that is at issue, the Court “should and will [increase the sentence] if a more severe sentence is necessary for the protection of the public, or because the offence is a very serious one and a more severe sentence is required in order to provide guidance to sentencers generally.”

5.10 This general test was applied to a summary appeal under section 175(4) of the *Criminal Procedure (Scotland) Act 1995* in *Her Majesty’s Advocate v Kirk*.¹⁵ In this case, the accused had been charged with careless driving, though the circumstances included the fact that a death had resulted. In the Sheriff’s Court, after a guilty plea, the accused was admonished (in effect a probation order) and given three penalty points, the minimum number of penalty points for the offence. The High Court concluded that, although there were mitigating factors in the case, the sentence imposed failed to take account of the gravity of the circumstances in which the accident occurred, which the Court described as involving “a significant degree of carelessness.” In these circumstances, the Court quashed the sentence and imposed an appropriate penalty.

5.11 It is also clear from this discussion that there is a great similarity between the test of undue leniency adopted in Scotland – both in cases on indictment and in summary matters – and the test applied in Ireland, which currently applies only in cases on indictment as yet. Since this test has had the effect of limiting the number of appeals taken in Scotland, both on indictment and in summary cases,

¹⁴ [1995] SCCR 244 at 250D.

¹⁵ [2003] ScotHC 62 (21 November 2003). Available at <http://www.scotcourts.gov.uk/opinions/XJ1650.html>.

it is likely that a similar effect would arise if the prosecution were to be empowered to appeal against unduly lenient sentences imposed in the District Court.

C New Zealand

5.12 There are four tiers to the courts system in New Zealand: the District Court, the High Court, the Court of Appeal and the Supreme Court.¹⁶ The summary jurisdiction of the District Court can be exercised in three ways: by a District Court Judge, by one or more Justices or by one or more Community Magistrates.¹⁷ The jurisdiction of Justices and Community Magistrates in respect of summary offences is limited by statute.¹⁸

5.13 Section 115A of the *Summary Proceedings Act 1957* as amended provides for appeals by an informant against sentences on conviction in the District Court. Section 115(1) states:

“Where on the determination by a [[District Court]] of any information the defendant is convicted and sentenced, the informant may appeal to the [[High Court]] against the sentence passed on conviction, unless the sentence is one fixed by law.”

Such an appeal cannot be brought without the consent of the Solicitor-General, and his or her consent must be lodged with the notice of appeal.¹⁹

¹⁶ The Supreme Court was established under the *Supreme Court Act 2003* which came into effect on 1 January 2004. The establishment of the new Court ends appeals to the Judicial Committee of the Privy Council, and establishes a final court of appeal in New Zealand. The New Zealand Law Commission in a recent report, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85 – 2004) recommended a restructuring of the courts system. See <http://www.lawcom.govt.nz> for a copy of the Report.

¹⁷ Section 4 of the *Summary Proceedings Act 1957*.

¹⁸ Section 9A of the *Summary Proceedings Act 1957* governs the jurisdiction of Justices in respect of summary offences; section 9B of the Act governs the jurisdiction of Community Magistrates in respect of same.

¹⁹ Section 115A(2) of the *Summary Proceedings Act 1957*.

5.14 Where the sentence involves a term of imprisonment and an appeal is lodged, if the appeal has not been heard on the date the defendant is released whether the sentence has expired or not, the appeal lapses and is deemed to have been dismissed by the High Court for non-prosecution.²⁰ Under the section, a sentence is defined as “any method of disposing of a case following conviction.”²¹

5.15 Appeals from District Court Judges and Justices are to the High Court, while an appeal from a decision of a Community Magistrate lies to a court presided over by a District Court Judge.²² Upon the hearing of such an appeal, the appeal court can confirm the sentence, or:

“[i]f the sentence ... is one which the Court imposing it had no jurisdiction to impose, or is one which is clearly excessive or inadequate or inappropriate, or if the High Court is satisfied that the substantial facts relating to the offence or to the offender’s character or personal history were not before the Court imposing sentence, or that those facts were not substantially as placed before or found by that Court...”²³

the Court can quash the sentence and substitute an appropriate sentence, quash any invalid part of the sentence or vary the sentence or any part of it.

5.16 In *R v Wihapi*²⁴ the Court considered the approach to be taken when hearing such appeals. It stated:

“[W]e think it correct to say that in practice the court requires the considerations justifying an increase in sentence to speak more powerfully than those which ordinarily might justify a reduction ... Moreover, this court must always be

²⁰ Section 115A(3) of the *Summary Proceedings Act 1957*.

²¹ Section 115A(4) of the *Summary Proceedings Act 1957*.

²² Sections 114A(1), 114A(2) and Schedule 2A of the *Summary Proceedings Act 1957*.

²³ Section 121(3)(b) of the *Summary Proceedings Act 1957*.

²⁴ [1976] 1 NZLR 422.

careful that it does not discourage the exercise of the fundamental right and responsibility of a trial judge, in appropriate cases, to allow the promptings of mercy to operate and, even in cases which normally call for a deterrent sentence, to conclude that the State is best served by taking a form of action calculated to encourage reformation.”²⁵

The principle that the discretion of the trial judge should not be interfered with unless the circumstances are exceptional is thus clearly fundamental to the appellate jurisdiction of the court when reviewing sentences.

5.17 It would appear that the New Zealand Crown Law Office is equally circumspect regarding appealing sentences as their Scottish counterpart, appeals being taken “rarely”, having regard to the need to establish that the sentence is “clearly inadequate”.²⁶

5.18 The Act also provides for an appeal on a question of law by way of case stated.²⁷ Section 107(1) states:

“Where any information or complaint has been determined by a [District Court], either party may, if dissatisfied with the determination as being erroneous in point of law, appeal to the [High Court] by way of case stated for the opinion of the Court on a question of law only.”

5.19 Similar to the procedure regarding appeals from sentences of community magistrates where the appeal lies to a judge of the District Court, where a party wishes to appeal by way of case stated from a decision of the community magistrate, the appeal is to a judge of the District Court.²⁸

²⁵ [1976] 1 NZLR 422 at 424.

²⁶ Communication dated 28 May 2004 from the New Zealand Crown Law Office.

²⁷ Section 107 of the *Summary Proceedings Act 1957*.

²⁸ Section 114A and schedule 2A of the *Summary Proceedings Act 1957*.

D Conclusion

5.20 The varying approaches to the issue of prosecution appeals from summary cases in the three jurisdictions indicate that there is no uniform approach to the question in the common law world. What is clear, however, is that where an appeal procedure is provided for, appellate courts will only interfere with the discretion of the trial judge in limited circumstances. This is consistent with the approach taken in the Irish courts exercising their current jurisdiction under the *Criminal Justice Act 1993*.

5.21 Were an appeal procedure in summary cases to be introduced, the Scottish and New Zealand schemes provide a number of significant elements of note. Thus, the New Zealand system includes a 'filter process' in which the Solicitor-General's consent is required. Secondly, in both jurisdictions, the appeal is broad enough to include not only sentences passed on conviction, but also discharges and dismissals. Finally, the New Zealand approach, where an appeal is deemed to have lapsed where the convicted person has been released from a sentence of imprisonment, also deserves attention.

5.22 *The Commission notes that the test of undue leniency applied by the Scottish Courts in relation to trials on indictment is comparable to the test applied by the Court of Criminal Appeal under the Criminal Justice Act 1993. The Commission observes that the Scottish courts have also applied this test to appeals from unduly lenient sentences in summary proceedings and this has resulted in a small number of appeals being taken. The Commission also concludes that the existence of a filter process in the comparable New Zealand system seems to have resulted in a small number of appeals being taken in summary cases.*

CHAPTER 6 SHOULD THE DIRECTOR OF PUBLIC PROSECUTIONS HAVE THE POWER TO APPEAL UNDULY LENIENT SENTENCES FROM THE DISTRICT COURT?

A Introduction

6.01 In this chapter, the Commission assesses the arguments for and against introducing appeals from unduly lenient sentences in the District Court. It then examines reports from other bodies, and sums up the arguments for and against introducing such an appeal procedure.

6.02 Pattenden¹ notes that the benefits of the English reference procedure to appeal unduly lenient sentences under section 36 of the *Criminal Justice Act 1988* are threefold:

“[I]t provides a corrective for serious under-sentencing, thereby strengthening the deterrent effect of the law and removing dangerous offenders from circulation for a longer period; it provides a lightning rod for public discontent; and it gives the CACD greater opportunity to guide the lower courts on minimum sentences within the matrix of facts presented by an actual case.”²

6.03 While this statement refers to appeals from the Crown Court, which would be comparable to appeals under section 2 of the *Criminal Justice Act 1993*, the statement could hold true for appeals from the District Court to the Circuit Court. The question as to whether “serious under-sentencing” could occur in the District Court in the first place is not one to be glossed over lightly. It could be said

¹ Pattenden *English Criminal Appeals 1844-1994* (Clarendon Press 1996).

² *Ibid* at 302.

that, given the summary nature of the District Court and its limited sentencing jurisdiction, a situation could not arise whereby a District Court Judge erred to the extent that it would amount to “serious under-sentencing”. However, since the level of discretion given to District Court Judges ranges from a conditional acquittal in the form of probation to a 12 month sentence of imprisonment, the analogy may be made. As was stated in the Commission’s *Report on Sentencing*,³ “There is an enormous difference in reality between the application of the Probation Act or the imposition of a short period of community service and a sentence of 12 months imprisonment.”⁴

6.04 The question to be addressed therefore is whether there are any justifications for introducing an appeal procedure whereby unduly lenient sentences imposed in the District Court can be challenged, and if so, whether there are any legal or policy matters to be taken into account when considering the conferring of such a power.

B Sentencing Inconsistency

6.05 One of the primary reasons suggested for introducing the power discussed in this Paper is that it would reduce sentencing inconsistency in trial courts. Two issues need to be addressed on this point; first, whether there is any evidence of sentencing inconsistency in the District Courts, and secondly, whether the introduction of section 2 of the 1993 Act reduced any perceived inconsistency in sentencing in trials on indictment.

(1) *Sentencing disparity and sentencing inconsistency*

6.06 It is important not to confuse sentencing disparity with sentencing inconsistency. Disparity may simply mean that different cases are treated differently, so that different sentencing dispositions, for example, for possession of child pornography, may be justified depending on the particular context of the offence, including the nature of the images, the injury perpetrated on the victim and the individual circumstances of the offender. Inconsistency, however,

³ Law Reform Commission *Report on Sentencing* (LRC 53 – 1996).

⁴ *Ibid* at paragraph 7.4.

goes to the fundamental question as to whether a structured set of sentencing principles or guidelines exist by which to judge whether different dispositions are justifiable given the contexts of the individual offences.⁵

6.07 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. An example of this might be where one District Court Judge consistently dismisses public order offences under the *Probation of Offenders Act 1907* regardless of the circumstances of the case, while another, in dealing with the same locality and conditions, will always convict and fine offenders for similar offences as he or she perceives public order offences to be a huge problem in society.

6.08 O'Malley comments that in the absence of a structured approach to sentencing, there is an inevitable difficulty with inconsistency. He comments:

“It is probably true to say that Ireland now has one of the most unstructured sentencing systems in the common law world ... It is inevitable that an unstructured system will produce occasional headline-grabbing inconsistencies.”⁶

6.09 While O'Malley accepts that the present system is more coherent than generally acknowledged, this should not give cause for complacency, and he argues that the constitutional values underpinning our criminal justice system demand greater efforts to ensure consistency in sentencing practice.

6.10 An example of O'Malley's headline-grabbing sentences was the sentence imposed in a case involving possession of child pornography in January of 2003. The defendant was convicted of the offence, contrary to section 6 of the *Child Trafficking and Pornography Act 1998*. Evidence was given that a number of illegal

⁵ Law Reform Commission *Consultation Paper on Sentencing* (March 1993) at paragraphs 2.25-2.27.

⁶ O'Malley *Sentencing Law and Practice* (Round Hall Ltd 2000) at 8-9.

images were recovered from his computer. The District Court Judge initially indicated that he had considered imposing a suspended sentence of nine months, but ultimately decided to sentence the defendant to 240 hours community service in lieu of imprisonment. It was also agreed that he would make a donation of €40,000 to a named charity for children, the Edith Wilkins Association, and he was required to forfeit the hard drive of his computer and any material containing pornographic images. He was also placed on the sex offenders register for five years.⁷

6.11 While there was public outcry at what was perceived to be undue leniency in the sentence, with victim support groups claiming that the offender “bought” his way out of a sentence,⁸ attention also focused on what was suggested to be inconsistency among District Court sentences imposed for possession of child pornography.⁹ It was reported that in other cases involving charges under section 6 of the 1998 Act, a former teacher in Balbriggan was jailed for nine months, and another man, a South Korean exchange student, was given a two year jail sentence, suspended for five years on condition that he return home immediately and not return to Ireland for five years.¹⁰

6.12 The media focus on different sentencing outcomes in other child pornography cases, though understandable, may have obscured the fact that these were among the first cases involving possession of child pornography to come before the courts. Because of this, the appropriate sentencing procedures and parameters had not yet become established.¹¹

⁷ Information regarding the case from *The Irish Times*, 17 January 2003 and from the District Court Office in Youghal, Co. Cork.

⁸ See *The Irish Times* 20 January 2003.

⁹ “Some are jailed and some walk free over child porn” *The Irish Times* 18 January 2003.

¹⁰ *Ibid.*

¹¹ Since the initial cases brought as a result of Operation Amethyst, which was a State-wide Garda operation concerning child pornography, the courts have developed a procedure involving adjourning decision in order to view and have regard to the category of images involved, the individual circumstances of the accused, including the aggravating or mitigating factors applicable, and also the wider interests of society in general and

6.13 In a new or developing area of sentencing policy, the traditional manner of establishing a clear precedent for sentencing courts would have been for an accused to appeal a sentence on grounds of severity. Perhaps, in some of the cases referred to in the media, it is possible that an appeal against leniency of sentence could have established some guidance in this area.

6.14 The Commission suggests that the existing arrangements - in which the various dispositions in the different cases are open to appeal by the accused only - may not fully serve the wider interests of ensuring public confidence in the sentencing system. These cases serve as examples indicating that, in appropriately defined circumstances, the prosecutor should be empowered to apply for review of a sentence.

(2) *The impact of section 2 of the Criminal Justice Act 1993 on inconsistent sentencing practices on indictment*

6.15 In *People (DPP) v Tiernan*¹² the defendant had been sentenced to 21 years imprisonment for rape, to which he had pleaded guilty. The Court of Criminal Appeal dismissed his appeal against severity of sentence. The Attorney General issued a certificate pursuant to section 29 of the *Courts of Justice Act 1924*, stating that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance, namely, “the guidelines which the courts should apply in relation to sentences for the crime of rape.”¹³ The Supreme Court noted that while the certificate referred to guidelines for sentencing in rape cases, the Court would deal only with the issues arising in the case on appeal, and “did not receive submissions nor reach any decision with regard to questions which might be applicable to cases of rape which had different facts and circumstances surrounding them.”¹⁴ It was noted by Finlay CJ that the case would be of assistance to judges when sentencing for crimes of rape, but he went on to say:

then to formulate the appropriate sentence for the particular case and the specific offender.

¹² [1988] IR 250.

¹³ *Ibid* at 252.

¹⁴ *Ibid*.

“Having regard to the absence of any statistics or information before this Court in this appeal concerning any general pattern of sentences imposed for the crime of rape within this jurisdiction, general observations on such patterns would not be appropriate. Furthermore, having regard to the fundamental necessity for judges in sentencing in any form of criminal case to impose a sentence which in their discretion appropriately meets all the particular circumstances of the case (and very few criminal cases are particularly similar), and the particular circumstances of the accused, I would doubt that it is appropriate for an appellate court to appear to be laying down any standardisation or tariff of penalty for cases.”¹⁵

One general comment made by way of guidance for sentencing judges by the Supreme Court in the *Tiernan* case was that, generally speaking, an early plea of guilty will be a mitigating factor as it relieves the victim from giving evidence, and reduces the trial period.

6.16 This general reluctance to set out guidelines indicated in *Tiernan* may have waned somewhat in recent years, and it would appear that the Court of Criminal Appeal are more willing to set out general sentencing principles when considering appeals of sentence. In *People (DPP) v Roseberry Construction Ltd*¹⁶ the court set out a detailed list of aggravating and mitigating factors in offences under the *Safety, Health and Welfare at Work Act 1989*:

“aggravating factors includ[e] death resulting in consequence of a breach, failure to heed warnings, risks run specifically to save money and mitigating factors includ[e] prompt admission of responsibility and a timely plea of guilty, steps to remedy the deficiencies and a good safety record.”¹⁷

This willingness to give guidance to lower courts on aggravating and mitigating factors may owe something to the Commission’s *Report on*

¹⁵ [1988] IR 250 at 254.

¹⁶ Court of Criminal Appeal 6 February 2003.

¹⁷ *Ibid* at 5.

*Sentencing*¹⁸ in which such factors were listed.¹⁹ However, reference to factors, mitigating or aggravating, to be taken into account if present in the circumstances of a case should not deflect attention from the doubt expressed by Finlay CJ in respect of the appropriateness of an appellate court appearing to lay down any standardisation of tariff or penalty for cases. Such prescription might be regarded by some as a recipe for injustice.

C Previous Reports

6.17 The question of introducing an appeal from unduly lenient sentences in the District Court is not a new one. Indeed, when earlier reports recommended the introduction of appeals from unduly lenient sentences on indictment, little distinction was made between appeals from indictable and summary proceedings. These earlier reports will now be examined in turn.

(1) Committee on Court Practice and Procedure: Twenty-Second Interim Report, February 1993

6.18 The Committee on Court Practice and Procedure²⁰ noted in 1993 that while there was little empirical evidence on the question, “there may be from time to time public disquiet at what are perceived to be light sentences.”²¹ Despite the fact that this disquiet may be media-driven, the Committee were of the opinion that for the small number of cases in which an accused has received an unduly lenient sentence, the prosecution should have a right of appeal.

¹⁸ Law Reform Commission *Report on Sentencing* (LRC 53 – 1996).

¹⁹ See also *People v O’Toole* Court of Criminal Appeal 25 March 2003 in which the Court expressly referred to one of the mitigating factors outlined in the Commission’s *Report on Sentencing*, *ibid*.

²⁰ Twenty-Second Interim Report of the Committee on Court Practice and Procedure *Prosecution Appeals* February 1993. Although completed in 1993 this Report was not published until 1997, as part of a collection of five Interim Reports of the Committee, *Twenty-First to Twenty-Fifth Interim Reports of the Committee on Court Practice and Procedure* (Stationery Office 1997).

²¹ *Ibid* at 33.

6.19 They concluded that “reasons of consistency dictate that the prosecution should have the same rights of appeal (or, no rights of appeal at all) in all cases, *irrespective of the level of the court of trial.*”²²

(2) The Law Reform Commission’s Report on Sentencing

6.20 In the *Consultation Paper on Sentencing*,²³ the Commission also addressed the issue as to whether the prosecution should be enabled to appeal unduly lenient sentences. Between its publication in 1993 and the publication of the *Report on Sentencing* in 1996,²⁴ section 2 of the 1993 Act was introduced.

6.21 In the Commission’s *Report on Sentencing*,²⁵ it noted that in the consultation stage the Commission was undecided as to whether there should be a prosecution appeal from the District Court, and they had sought views on the matter. The Report concluded:

“There is no logical reason why the prosecution should not be empowered to seek a review of a District Court sentence. It was suggested that the confined jurisdiction of the District Court prevented a District Court sentence from being deemed manifestly inadequate. But surely this is not the case. There is an enormous difference in reality between the application of the Probation Act or the imposition of a short period of community service and a sentence of 12 months imprisonment.

A majority of the Judges of the District Courts we consulted shared this view and expressed concern, in particular, with lenient sentencing in Road Traffic cases, e.g. of driving without insurance.”²⁶

²² Twenty-Second Interim Report of the Committee on Court Practice and Procedure *Prosecution Appeals* February 1993 [Emphasis added].

²³ Law Reform Commission *Consultation Paper on Sentencing* (March 1993).

²⁴ Law Reform Commission *Report on Sentencing* (LRC 53 – 1996).

²⁵ *Ibid.*

²⁶ *Ibid* at paragraphs 7.4-7.5.

6.22 The Commission recommended that “the prosecution should have the power to seek review of District Court sentences.”²⁷

(3) The Working Group on the Jurisdiction of the Courts

6.23 The *Report of the Working Group on the Jurisdiction of the Courts*²⁸ refers to the question of whether the Director of Public Prosecutions’ right of appeal against lenient sentences should be extended to serious cases before the District Court.²⁹ The Report took the view that serious cases, by definition, should not be dealt with in the District Court, ‘making the point somewhat moot’. The Group went on to put forward a number of arguments, “rooted both in principle and practicality” as to why no prosecution right of appeal on grounds of undue leniency should lie from a sentence imposed by the District Court.

6.24 First, the Report stated that if a case has been assigned to the District Court in the first place, this is on the basis that the Director of Public Prosecutions has decided that a relatively light sentence is appropriate, given the minor nature of the offence. Any perceived undue leniency would have to be assessed against the backdrop of the limited jurisdiction of the District Court.

6.25 Secondly, the Report stated that as the vast majority of prosecutions in the District Court are brought by members of An Garda Síochána, “it would be impracticable to require the prosecuting Garda to report any case where he or she might consider the sentence to be unduly lenient.”³⁰ Given the absence of a reporting procedure by way of a recording device or stenographic transcript in the District Court, the Report stated that there would be a possibility that the exercise would become media driven, which would be unacceptable. This argument is essentially that, given the large number of prosecutions daily in the District Court, a prosecutor would rarely

²⁷ Law Reform Commission *Report on Sentencing* (LRC 53 – 1996) at paragraph 7.6.

²⁸ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Courts Service 2003) (The Fennelly Report) at 27. Available at <http://www.courts.ie>.

²⁹ *Ibid* at paragraph 347.

³⁰ *Ibid*.

remember the details of individual cases, and it would only be high profile cases that would come to the attention of both the media and the Director of Public Prosecutions. Thus, it would only be these high profile cases that would be appealed if the sentence were thought to be unduly lenient.

6.26 Thirdly, the Report points out that if the power to appeal were introduced, there could be some confusion as to jurisdiction, as District Court cases are already subject to the defendant's right of appeal by way of a complete rehearing in the Circuit Court. The confusion would arise if the accused were to appeal the conviction and the Director of Public Prosecutions in the same case brings a concurrent appeal on the grounds of undue leniency.

6.27 Fourthly, the Report noted that as there is no recording of the proceedings or record of the reasons given for sentence in the District Court, it would be difficult to reconcile a difference of opinion as to what was said as the only record available might be notes taken by solicitor or counsel involved in the case.

6.28 Finally, the Report made the point that the resources required by the prosecution to undertake the additional responsibility suggested would be disproportionate to the minor gain likely to be achieved through the introduction of such a right of appeal.

D Arguments in Favour of Introducing the Power

6.29 Having analysed these previous reports, it is now possible to summarise the arguments for and against the introduction of such a power.

(1) *The public interest requires that the prosecution should be given the power to appeal on the grounds of undue leniency*

6.30 Under the *Prosecution of Offences Act 1974*, the function of prosecuting the vast majority of criminal offences was transferred to the newly created office of the Director of Public Prosecutions.³¹

³¹ Section 2 of the Act created the Office of the Director of Public Prosecutions; section 3 of the Act sets out the function of the Office.

Thus, when prosecuting crimes, the Director of Public Prosecutions, as his name would suggest, is prosecuting on behalf of the public, and acts in the public interest in doing so. As is stated in the *Statement of General Guidelines for Prosecutors*.³²

“There is a clear public interest in ensuring that crime is prosecuted and that the wrongdoer is convicted and punished.”³³

6.31 Furthermore, one of the general duties of the prosecutor is that the prosecutor “should remain unaffected by individual or sectional interests and public or media pressures having regard only to the public interest.”³⁴ Regarding the public interest and the decision to prosecute, the Guidelines state that, “[t]he individuals involved in a crime ... as well as society as a whole have an interest in the decision whether to prosecute and for what offence, and the outcome of the prosecution.”³⁵

6.32 The question then arises as to how the “public interest” is to be determined. A list of aggravating and mitigating factors is contained in the Guidelines as well as other matters which arise when considering the public interest,³⁶ but what is clear is that public

³² Office of the Director of Public Prosecutions *Statement of General Guidelines for Prosecutors* (2001).

³³ *Ibid* at 10.

³⁴ *Ibid* at 7.

³⁵ *Ibid* at 1.

³⁶ *Ibid* at 13-16. *Examples of aggravating factors are:*

where the accused was a ringleader or an organiser of the offence;

where the offence was premeditated;

if there is any element of corruption;

where the accused has previous convictions or cautions which are relevant to the present offence;

if the accused is alleged to have committed the offence whilst on bail, on probation, or subject to a suspended sentence or an order binding the accused to keep the peace and be of good behaviour, or released on licence from a prison or a place of detention.

opinion is not to be taken into account. This perhaps warrants the comment in passing that the clamour of the media and the public interest may not be the same. The views of victims of crimes, while not determinative in any way, are only one factor to be taken into account when making a decision on whether to prosecute, or whether to seek an appeal from an unduly lenient sentence under section 2 of the *Criminal Justice Act 1993*.³⁷

6.33 Another element of the public interest is that each offender should be sentenced appropriately in relation to the offence committed and the individual circumstances. It is also important for the public to perceive that there is consistency in sentencing, and that offenders in similar circumstances who have committed like offences should be sentenced in a like manner. Any public perception that there is inconsistency, or worse, inequality, in the criminal justice system should thus be avoided.

Examples of mitigating factors are:

where the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by an error of judgment;

where the offence is a first offence, if it is not of a serious nature and is unlikely to be repeated.

Examples of other matters which may arise when considering the public interest are:

the availability and efficacy of any alternatives to prosecution;

whether the consequences of a prosecution or a conviction would be disproportionately harsh or oppressive in the particular circumstances of the offender;

whether the offender is willing to co-operate in the investigation or prosecution of other offenders, or has already done so.

³⁷ Office of the Director of Public Prosecutions *Statement of General Guidelines for Prosecutors* (2001) at 39. For an example of a case in which the views of the relatives of the victim were taken into account in making the decision to prosecute, see *Eviston v Director of Public Prosecutions* [2002] 3 IR 260. See also, the *Victim's Charter* produced by the Office of the Director of Public Prosecutions where it is stated that a victim of crime can expect, *inter alia*, that the Director of Public Prosecutions will "appeal a sentence to a higher court, where the Director considers the sentence to be excessively lenient."

6.34 Another aspect to this argument is that the effect of allowing the accused to appeal while refusing the prosecution the same discretion may be that the appellate jurisprudence becomes lopsided. While an error in sentence will be corrected if it is too severe, an error from undue leniency will remain, perhaps leaving a sense of injustice. As stated by Pattenden on the introduction of appeals from unduly lenient sentences on indictment in England and Wales:³⁸

“The one-sided nature of sentencing appeals made the development of rational sentencing guidelines difficult. Defence appeals provided the occasion to set maximum but not minimum terms of imprisonment for particular offences and the Court rarely had the opportunity to comment on non-custodial punishments, such as the proper use of probation, which defendants tend not to appeal.”³⁹

6.35 The Commission considers that these arguments as to the public interest are particularly persuasive and compelling.

(2) *There should be consistency in District Court sentences*

6.36 As has been shown,⁴⁰ an unstructured sentencing system such as exists in Ireland may lead to inconsistency in sentencing. If the Director of Public Prosecutions were given the authority to appeal apparently unduly lenient sentences, it may well be that both the perception and any actuality of inconsistency would be reduced and the reasons for disparity would be analysed and explained.

(3) *The District Court’s jurisdiction is sufficiently wide in range of gravity to merit review*

6.37 This argument, in the Commission’s view, is compelling. As the Commission has already stated in the *Report on Sentencing*, there seems to be no sensible reason why the Director of Public Prosecutions should have the power to appeal unduly lenient sentences from cases on indictment, but that there is no similar right

³⁸ Pattenden *English Criminal Appeals 1844-1994* (Clarendon Press 1996).

³⁹ *Ibid* at 292-293.

⁴⁰ See paragraph 6.08 and paragraph 6.21.

to appeal unduly lenient sentences from the District Court. Indeed, given the range of orders available to the District Court, ranging from an acquittal on the merits, to a dismissal under the *Probation of Offenders Act 1907*, to a conditional acquittal (in the form of a conditional discharge under the *Probation of Offenders Act 1907*) and up to a sentence of 12 months imprisonment, or two consecutive 12 month sentences of imprisonment, it is arguable that there is a need for an appellate jurisdiction from District Court sentences. If, for example, the Director of Public Prosecutions agreed to a case being brought in the District Court on the basis that a significant fine or a term of imprisonment was anticipated, but the offender was given the benefit of the *Probation of Offenders Act 1907*, there is good argument for the suggestion that such a disposition should be subject to appeal. While the District Court's jurisdiction is constitutionally limited, nevertheless, the Commission is of the view that any custodial sentence is a "serious" matter for citizens, and equally the failure to impose one where it is appropriate is a serious matter for the administration of justice.

(4) *When the Director of Public Prosecutions agrees to a case being tried in the District Court, he does not implicitly assent to a light sentence being imposed*

6.38 There is no reason to believe that simply because the Director of Public Prosecutions has agreed to a trial in the District Court, there is any acceptance that the sentence will be a light one. The Director may have a number of reasons for agreeing to send a case for summary trial, and it is clear that upon so assigning the case, the expectation is that the sentence will be appropriate to the gravity of the evidence as to the offence committed. Indeed, in the 2001 *Statement of Guidelines for Prosecutors*⁴¹ it is set out that no prosecution should be brought if a conviction will not result in a significant penalty, or will only result in a very small or nominal penalty.⁴²

⁴¹ Office of the Director of Public Prosecution, *Statement of General Guidelines for Prosecutors*. Available at http://www.dppireland.ie/reports_published.htm

⁴² *Ibid* at 14. One might add that a conviction in itself for some persons, let alone any custodial sentence, may be a hugely serious matter.

(5) *Confusion need not arise as to jurisdiction where both the accused person and the prosecutor appeal*

6.39 The Working Group on the Jurisdiction of the Courts argued that confusion could arise where both the accused and the prosecutor appeal the same sentence. The Commission takes the view that this is an example of a conflict of competing jurisdictions, which may arise in many situations. It would seem fairly uncontroversial that the re-hearing should deal with the defendant's appeal against conviction first and then, if necessary, deal with the issue of undue leniency. Thus this suggested problem about conflict of precedence can be overcome.

E Arguments Against Introducing the Power

(1) *Limited nature of jurisdiction in terms of sentencing possibilities*

6.40 The *Report of the Working Group on the Jurisdiction of the Courts* noted that the summary and limited nature of the sentencing jurisdiction of the District Court means that it is unlikely that any major or "serious case" would be tried there. Either the Director of Public Prosecutions would bring the matter on indictment to the Circuit Court or the District Court would refuse jurisdiction.

6.41 The second and related point is that the Director of Public Prosecutions has, in many "either way" and especially "hybrid" offences, the option to direct a case to be tried summarily or on indictment. If the Director chooses to have the case tried summarily, this is an acceptance that the case is of a relatively minor nature and that the sentence imposed will be in the lower range of possibilities in the overall scale. As stated by O'Malley:⁴³

"It is also true that the DPP is increasingly being authorised by statute to elect for prosecution in a summary fashion or on indictment which means that the prosecution decision

⁴³ O'Malley "Sentencing and Other Sanctions for Crime in Ireland" (2003) 3(1) *Judicial Studies Institute Journal* 130.

effectively pre-determines the upper limits of the applicable punishment.”⁴⁴

6.42 The Commission acknowledges that where “hybrid” offences are dealt with in the District Court rather than on indictment, a judgment as to the minor nature of the offence has been made, but we reiterate that the jurisdiction of the District Court is nonetheless relatively wide.

(2) *The procedure would be impractical and overload the courts*

6.43 It could be argued that, given the huge number of cases heard in the District Court on an annual basis, any appeal procedure introduced would mean that the Circuit Court would be overwhelmed with cases on appeal.

6.44 The Commission is of the opinion that this is unlikely to occur. First, if a filter mechanism was included in such an appeal system, whereby the Director of Public Prosecutions would have to approve and initiate any appeal, only strongly arguable claims of undue leniency would be brought on appeal. Secondly, comparative analysis from other countries and experience of the operation of the appeals system currently in place in Ireland under the *Criminal Justice Act 1993* in indictable cases indicate that the number of appeals taken on an annual basis would be manageable. Finally, the test used by the courts in determining whether the sentence is in fact unduly lenient, namely a substantial departure from the appropriate sentence involving an error of principle will, the Commission expects, lead to a situation where only incongruously lenient sentences will be appealed.

(3) *The procedure would become media driven*

6.45 The *Report of the Working Group on the Jurisdiction of the Courts* raised the issue of such appeals being media driven. The Commission agrees that, if an appeal procedure is to be introduced, every effort should be made to ensure that its operation does not

⁴⁴ O'Malley “Sentencing and Other Sanctions for Crime in Ireland” (2003) 3(1) *Judicial Studies Institute Journal* 130 at 134.

become media driven. Certain safeguards can be introduced to avoid this. Thus, following the New Zealand model of a ‘filter process’, any appeal brought might require the approval of the Director of Public Prosecutions. The hope would be that this stratagem would ensure that only apparently meritorious claims of undue leniency will be brought before the appeal court. Another safeguard could be that all District Courts should be equipped with recording devices so that the Director of Public Prosecutions can establish whether he or she thinks there was an error in sentencing by listening to the proceedings in the District Court.⁴⁵

F Conclusion

6.46 *The Commission recommends that a procedure for appealing against unduly lenient sentences imposed in the District Court should be introduced into Irish law. In coming to this conclusion, the Commission considers that the most persuasive argument is that it is in the public interest that offenders should be sentenced appropriately in relation to the crime that they have committed, and that a procedure should be in place for rectifying any inordinately undue leniency in the sentencing process.*

6.47 *The Commission also finds the following factors persuasive: that the jurisdiction of the District Court is sufficiently wide to merit review; that there should be consistency in District Court sentences; that there would be no confusion in a situation where both prosecutor and accused appeal; and that when the Director of Public Prosecutions agrees to a case being tried in the District Court, he does not implicitly assent to a light sentence being imposed.*

6.48 *The Commission accepts that there are arguments to be made against the introduction of such an appeal procedure, but is of the opinion that such arguments are outweighed by introducing*

⁴⁵ The Commission is aware that a process is underway by which the courts will be fitted with digital electronic recording devices and has already expressed approval of such an initiative. See Law Reform Commission *Report on Judicial Review Procedure* (LRC 71 – 2004) at paragraph 3.26.

safeguards, notably the requirement to seek the consent of the Director of Public Prosecutions, into the procedure.

CHAPTER 7 THE NATURE AND SCOPE OF THE PROPOSED REGIME FOR APPEALING UNDULY LENIENT SENTENCES

A Introduction

7.01 Having concluded in Chapter 6 that the prosecution should be entitled to appeal against unduly lenient sentences in the District Court, it remains to discuss the detailed nature and scope of the proposed regime.

B Requirement for Consent and the Scope of “Sentence”

7.02 In determining the nature and scope of the appeal system, two issues deserve specific attention: first, the issue of seeking approval of the Director of Public Prosecutions for such an appeal, and secondly, the question of the range of sentencing options that should be taken into account in the legislation.

(1) *Requirement to seek consent of the Director of Public Prosecutions to bring an appeal*

7.03 Unlike the position in prosecutions on indictment, the Director of Public Prosecutions is not the only person with the authority to prosecute offences in the District Court. Gardaí and various statutory authorities regularly prosecute minor offences in the District Court, and while they would sometimes seek instructions from the Director of Public Prosecutions regarding certain matters, this is not always the case.

7.04 The Commission is of the opinion that before such an appeal is brought, the aggrieved prosecuting party should have to refer the matter to the Director of Public Prosecutions who would review the case, and the application for review of sentence would

require the consent of the Director. This would be in line with the current position in New Zealand, whereby the consent of the Solicitor-General must be lodged with the notice of appeal.¹ However, unlike the New Zealand system, the Commission recommends that the Director of Public Prosecutions take the appeal rather than merely approving and supervising the appeal.

7.05 The issue then arises as to who would make the decision to appeal and in whose name the prosecution would be brought. The Commission is of the opinion that no appeal should be brought without the consent of the Director of Public Prosecutions, and that the appeal should be brought by the Director as opposed to the original prosecutor.² Where a specific prosecuting authority already has power to appeal under statute, the proposed scheme would be without prejudice to such an existing power.³

7.06 *The Commission recommends that, without prejudice to any existing right of appeal of any prosecuting authority, where a prosecutor is of the opinion that a District Court sentence is unduly lenient, the prosecutor should refer the case to the Director of Public Prosecutions to seek approval for an appeal. Where the Director agrees that the sentence appears to be unduly lenient, given all the circumstances of the case, the appeal may then be brought by and in the name of the Director.*

(2) The scope of the term “sentence”

7.07 As has been explained in Chapter 2, there are four broad categories of dispositions that can be made by the District Court:

¹ See paragraph 5.12

² Currently, prosecutions are brought in the name of the prosecuting Garda or other authority. Section 8 of the *Garda Síochána Bill 2004* proposes that “[A]ny member of the Garda Síochána may institute and conduct proceedings in a court of summary jurisdiction, but only in the name of the Director of Public Prosecutions.”

If and when the 2004 Bill in its present form is enacted, all cases brought by the Gardaí will be brought in the name of the Director of Public Prosecutions.

³ For example, the appellate power conferred on the Health and Safety Authority under section 52 of the *Safety, Health and Welfare Act 1989*: see paragraphs 3.16 to 3.18 above.

conviction, conditional acquittal, acquittal and ancillary orders. The Commission is of the opinion that dispositions made on foot of conditional acquittals as well as convictions should be appealable.

7.08 Moreover, as also outlined in Chapter 2, the Commission recommends a broad interpretation of the term “sentence”. Thus, appeals from dispositions on conviction and any order made upon a finding of guilt should be dealt with in the same manner on appeal, being defined as “sentences” in the proposed legislation.

7.09 *The Commission recommends that the appellate jurisdiction envisaged would provide for an appeal from any sentence imposed in the District Court on conviction including fines, imprisonment, community service orders, as well as those made on foot of conditional acquittals including orders made under the Probation of Offenders Act 1907 or any other order made upon a finding of guilt without entry of a conviction.*

C Review of Sentence by way of Appeal to the Circuit Court

7.10 The first form of appeal considered by the Commission is one in which any person aggrieved by a sentence imposed in the District Court could appeal the decision to the Circuit Court where the case would be re-heard to the extent necessary to determine the appeal. The decision of the Circuit Court on appeal would be final and unappealable.⁴

7.11 This form of appeal has the advantage of being similar to that currently in place under section 52 of the *Safety, Health and Welfare at Work Act 1989*.⁵ It also has the advantage of being identical in form to the appeal procedure in place for appeals from conviction and sentence by the accused person under section 18 of the

⁴ The finality of the decision of the Circuit Court in the proposed scheme is similar to that in section 18 of the *Courts of Justice Act 1928*. This finality is subject to the power of the Circuit Court to state a case to the Supreme Court under section 16 of the *Courts of Justice Act 1947*: see Delany *The Courts Acts 1924-1991* (Round Hall 1994) at 118-122.

⁵ See paragraphs 3.16 to 3.18.

Courts of Justice Act 1928 and section 50 of the *Courts (Supplemental Provisions) Act 1961*.⁶

Such a form of appeal has the advantage of retaining the appeal process in the area in which the prosecution was brought rather than, for example, an appeal process to the High Court. In particular, it will be less of a burden on the parties involved to travel to and attend at the local Circuit Court, when their presence is required, rather than to have to travel to the High Court in Dublin.

7.12 The Commission envisages that the broad terms of the appellate scheme would be similar in wording to the current section 2 of the *Criminal Justice Act 1993* and would provide that where the Circuit Court is of the opinion that the trial judge erred in principle, it may vacate the sentence imposed and substitute an appropriate sentence.

7.13 Given the broad interpretation of the term “sentence” in the proposed legislation, the Commission considers that this form of appeal would be appropriate where a conviction has been registered against the accused person, or where the District Court Judge finds the person guilty of an offence, and, for example, applies the *Probation of Offenders Act 1907*, but does not register a conviction against the accused.

7.14 *The Commission recommends that the appeal from an unduly lenient sentence in the District Court should be brought to the Circuit Court and that such an appeal provision should reflect the terms of section 2 of the Criminal Justice Act 1993, allowing for the variation of sentence as appropriate after the hearing.*

D Case Stated

7.15 The Commission is of the view that where the accused has been acquitted on the merits of the case, the current case stated procedure should continue to be utilised as a means of providing the Director of Public Prosecutions with the opportunity to appeal what

⁶ See paragraphs 3.03 to 3.08 for details on appeals by the accused person.

the Director perceives to be an inappropriate and legally incorrect outcome.⁷

7.16 The utilisation of the case stated procedure for these purposes is by no means a novel concept. In *DPP v Nangle*⁸ the Director of Public Prosecutions appealed an acquittal by way of case stated; in *Hall v Jordan*⁹ the appeal by way of case stated was against a dismissal under the *Probation of Offenders Act 1907*. In the latter case, the appeal court held that the justices were indeed incorrect in dismissing the charge and remitted the case to the justices with a direction to convict.

7.17 The procedure envisaged would be that, where the trial judge acquits the defendant, the Director of Public Prosecutions would apply for a case stated to the High Court. If the summary proceedings were taken by another body, such as the Garda Síochána or a regulatory agency which lacks the power to appeal an acquittal to the Circuit Court,¹⁰ then they would apply to the Director for approval to seek review of the entire outcome. If the Director agrees that the outcome was of doubtful legal validity, the application would be taken in the Director's name.

7.18 If the High Court is of the opinion that there was an error in law in the conduct of the case at trial, it would remit the case back to the District Court with its directions and for further determination.

7.19 In *Fitzgerald v Director of Public Prosecutions*¹¹ the Supreme Court upheld the constitutionality of section 4 of the *Summary Jurisdiction Act 1857*. The case concerned the appeal by the Director of Public Prosecutions of an acquittal in the District Court, and in upholding the constitutionality of the procedure, Keane CJ, speaking for the Court stated:

⁷ For an examination of the mechanics of the case stated procedure, see paragraphs 3.19-3.23.

⁸ [1984] ILRM 171. For a detailed discussion of this case, see paragraph 3.22.

⁹ [1947] 1 All ER 826.

¹⁰ See paragraphs 3.09 to 3.18 for examples of such an appellate power.

¹¹ [2003] 2 ILRM 537.

“Since the legislation unarguably permits an appeal by way of case stated from an acquittal, it may be said, to a limited extent, to derogate from the rule against double jeopardy ... The legislature were entitled to proceed on the basis that the Superior Courts should be in a position to remedy an injustice which has occurred in criminal proceedings as a result of an error in law, whether it has led to a conviction or an acquittal, although in accordance with the values on which our system of law rests, the acquittal of the guilty is not of the same order of injustice as the conviction of the innocent.”¹²

7.20 The Supreme Court thus confirmed that legislation that permits an appeal by way of case stated from an acquittal is constitutional, despite this being in derogation of the rule against a person being put in double jeopardy.

7.21 *The Commission recommends that in respect of acquittals on the merits, the form of appeal should be the existing method in the Summary Jurisdiction Act 1857, namely a case stated to the High Court.*

E Legal Aid

7.22 In keeping with the general structure of the *Criminal Justice Act 1993*, the Commission is provisionally of the view that the proposed scheme should include a provision that legal aid would be automatically provided for where the Director of Public Prosecutions appeals an unduly lenient sentence or an acquittal in the District Court. This would replicate the provision under the 1993 Act which provides that a legal aid (appeal) certificate is granted under section 10 of the *Criminal Justice (Legal Aid) Act 1962*. The Commission, however, would invite views as to whether legal aid should be available as of right or on a discretionary basis.

7.23 *The Commission seeks views as to whether legal aid should automatically be granted to the person whose sentence is the subject*

¹² [2003] 2 ILRM 537 at 547-548.

of the appeal by the State or its agents, or whether it should be discretionary.

F Lapsed Appeals

7.24 The New Zealand regime allowing appeals from unduly lenient sentences provides that if the original sentence involves a term of imprisonment and the appeal has not been heard by the time that the sentence has been served, the appeal is deemed to have been dismissed by the High Court.¹³ The Commission notes that delay in hearing appeals involving the risk of an increased sentence, either in the Circuit Court or the High Court, might lead to a person being re-incarcerated following a successful appeal by the Director of Public Prosecutions, and notes that this may cause considerable hardship on such a person.

7.25 *The Commission seeks submissions on whether the proposed appeal regime should include a provision whereby if the appeal by the prosecution has not been heard by the Court at the time of the offender's release from prison, then the appeal against undue leniency should be deemed by the Court to have lapsed.*

G Prohibition on Communicating with the Office of the Director of Public Prosecutions

7.26 In keeping with the general structure of the *Criminal Justice Act 1993*, the Commission also recommends the insertion of a provision applying section 6 of the *Prosecution of Offences Act 1974* to communications made for the purpose of influencing the making of a decision to bring an appeal against an unduly lenient sentence in the District Court. Section 6(1)(a) of the 1974 Act provides:

“Subject to the provisions of this section it shall not be lawful to communicate with the Attorney General or an officer of the Attorney General, the Director or an officer of the Director, the Acting Director, a member of the Garda Síochána or a solicitor who acts on behalf of the Attorney

¹³ Section 115A(3) of the *New Zealand Summary Proceedings Act 1957*. See paragraph 5.14.

General in his official capacity or the Director in his official capacity, for the purpose of influencing the making of a decision to withdraw or not to initiate criminal proceedings or any particular charge in criminal proceedings.”

Section 6(1)(b) also states that if a person referred to in section 6(1)(a) becomes of opinion that a communication is in breach of that paragraph, “it shall be the duty of the person not to entertain the communication further.” The section does not apply to communications made by a defendant,¹⁴ nor does it apply to a person involved in the matter either personally or professionally.¹⁵

7.27 The Commission recommends the insertion of a provision analogous to section 6 of the Prosecution of Offences Act 1974 prohibiting communications, subject to similar exceptions, with the Director of Public Prosecutions in relation to the bringing of an appeal from an unduly lenient sentence imposed in the District Court.

H Draft Scheme

In light of the discussion above, the Commission has included a draft scheme in Appendix A to this Paper by way of illustrating the provisional recommendations contained in this Consultation Paper.

¹⁴ Section 6(2)(a)(i) of the 1974 Act.

¹⁵ Section 6(2)(a)(ii) of the 1974 Act.

CHAPTER 8 FURTHER POSSIBLE METHODS OF REFORM

A Introduction

8.01 While the introduction of prosecution appeals from unduly lenient sentences in the District Court might solve the problem of inconsistency in an individual case, this Chapter addresses other possible reforms in this area.

B The Introduction of Sentencing Guidelines

(1) Introduction

8.02 The introduction of sentencing guidelines has previously been recommended by the Commission in its *Report on Sentencing*¹ and this approach has recently been supported in the *Report of the Working Group on the Jurisdiction of the Courts*. This section will address the form that such guidelines might take. It will first examine the views of previous reports on the matter, and then look to two other jurisdictions for examples of the forms of guidelines in place there.

(2) *Law Reform Commission Report on Sentencing*²

8.03 In its *Report on Sentencing* in 1996, the Commission recommended that a statutory scheme of sentencing should not be introduced.³ It stated:

¹ (LRC 53 – 1996).

² Law Reform Commission *Report on Sentencing* (53-1996).

³ *Ibid* at paragraph 2.11.

“Every judge we consulted, from whatever court, advised strongly against the imposition on judges of a statutory procedure which would have to be adopted in every case. The more detailed the requirements of the procedure, the more likely it was that mistakes would arise leaving sentences open to challenge on technical grounds only. We were persuaded by the unanimity of the judges in raising this objection.”⁴

8.04 However, the Commission did recommend that a list of mitigating and aggravating factors, set out in the Report, should be reproduced in sentencing guidelines.⁵ We have noted that these guidelines are referred to by the courts and it is hoped that this list of factors has been useful.⁶

8.05 The Commission examined the possibility of introducing presumptive sentencing guidelines, such as are currently in operation in the U.S. Federal Criminal Justice System but came to the conclusion that such tariffs should not be introduced.

8.06 In the Law Reform Commission’s *Consultation Paper on Sentencing*,⁷ the following recommendations were made:

- (a) that a national agency be established for the compilation and dissemination of statistics relevant to sentencing; and
- (b) the formulation of a scheme for the provision of quantitative sentencing information to judges, in the context of a coherent sentencing policy and of sentencing guidance by appellate courts, such information to be compiled over a period after the legislative introduction of a statement of sentencing

⁴ Law Reform Commission *Report on Sentencing* (53-1996).at paragraph 2.11.

⁵ *Ibid* at paragraph 3.18. The factors to be taken into account are found at paragraph 3.2.

⁶ See paragraph 6.16 above.

⁷ Law Reform Commission *Consultation Paper on Sentencing* (March 1993).

policy. Information should be provided on sentences resulting from different combinations of material case factors.⁸

8.07 The *Report on Sentencing* notes that during the consultation stage it appeared that while judges of the Circuit Court thought that the information would be of great benefit to them:

“The judges of the District Court felt less need for information, firstly because their sentencing jurisdiction was limited and, secondly, because in Dublin in any event they have little difficulty in keeping up with the sentencing norm for different offences.”⁹

8.08 The point was also made by the judges of the District Court that the perception of judicial inconsistency was essentially media inspired, and that in fact, judicial inconsistency was “an indication of health in the system as each case was different and was being given individual consideration.”¹⁰ The Commission accepted that sentencing practice was more consistent than its portrayal in the media would suggest, but nonetheless noted that the “provision of information and of further education can never be unhelpful.”¹¹ The Commission therefore concluded on this point:

“We recommend the creation of a centrally located criminal justice data base as provisionally recommended. In addition to quantitative data, qualitative data should be assembled to the greatest extent possible and the judiciary, court registrars and clerks should be encouraged and given every necessary facility to provide qualitative material.”¹²

⁸ Law Reform Commission *Report on Sentencing* (53-1996) at paragraph 4.9.

⁹ *Ibid* at paragraph 4.22.

¹⁰ *Ibid* at paragraph 4.23.

¹¹ *Ibid* at paragraph 4.25.

¹² *Ibid* at paragraph 4.13.

(3) *The Report of the Committee on Judicial Conduct and Ethics*

8.09 The *Report of the Committee on Judicial Conduct and Ethics*¹³ proposed the replacement of the Judicial Studies Institute by a Judicial Studies Committee, one of the components of a proposed Judicial Council. In addition to the work being carried out by the Institute, the Report states that the Committee should undertake other activities that are of an educational nature and beneficial to the judiciary.¹⁴ This would include the distribution of “bench books” which would act as reference works for judges and also the establishment of a sentencing information system. The Committee based this proposal on the system currently in place in New South Wales, which takes the form of a computerised data base containing legally and statistically relevant information on sentencing.¹⁵

8.10 Some basic bench books have been available to the judiciary for a number of years including relevant passages from leading judgments and practical comments. The Commission endorses the views of the Committee on Judicial Conduct and Ethics, which echo the approach of the Commission in its *Report on Sentencing*. The Commission notes that improved bench books could be produced by researchers working with the advice of a judge under the auspices of the future Judicial Studies Committee or present Judicial Studies Institute.

(4) *The Report of the Working Group on the Jurisdiction of the Courts: The Criminal Jurisdiction of the Courts*¹⁶

8.11 The *Report of the Working Group on the Jurisdiction of the Courts* noted that the vast bulk of criminal offences are dealt with in the District Court which has a wide range of sentencing options at its

¹³ *Report of the Committee on Judicial Conduct and Ethics* (Stationery Office 2000).

¹⁴ *Ibid* at 56.

¹⁵ *Ibid* at 57. A *Judicial Conduct and Ethics Bill*, to give effect to the recommendations of the Report, is expected to be published by the end of 2004: *The Irish Times* 27 May 2004.

¹⁶ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Courts Service 2003) (The Fennelly Report).

disposal. It recommended that “[c]onsideration should ... be given to the possibility of having general guidelines or principles to govern sentencing in the District Court.”¹⁷

8.12 It suggested that, for example, guidance could be given regarding the circumstances in which a custodial sentence as opposed to a community based measure or a financial penalty should be imposed. It stressed that what was proposed was not quantitative guidelines, but guidelines of a more general nature.

(5) *United States Sentencing Commission Federal Sentencing Guidelines*

8.13 The United States Sentencing Commission has produced a definitive set of sentencing guidelines to determine what sentence an individual offender should receive. Each offence is categorised and placed into one of four zones which cumulatively contain 43 offence levels. On sentencing, the judge establishes the offence level of the crime and the criminal history category of the accused, and the sentence to be imposed is determined by reference to a sentencing table. There is little discretion in determining the sentence, but there are detailed grounds of departure set out in the guidelines at §5K.2, where the judge can grant an upward or downward departure from the guidelines.¹⁸

8.14 It is likely that this form of sentencing, referred to as “presumptive sentencing guidelines” in the Commission’s *Report on Sentencing*,¹⁹ would be regarded as too rigid for the Irish criminal justice system. The Commission is of the opinion that it would be inimical to and inconsistent with the principles in respect of sentencing developed and enunciated by the Irish Supreme Court and Court of Criminal Appeal.²⁰

¹⁷ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Courts Service 2003) (The Fennelly Report) at paragraph 669.

¹⁸ *Federal Sentencing Guidelines Manual*, 2000: United States Sentencing Commission (Federal Sentencing Guidelines Manual 2000/2001).

¹⁹ (LRC 53 – 1996).

²⁰ Indeed, the mandatory nature of the sentencing guidelines in the United States have been the subject of recent judicial condemnation. In an

8.15 Historically, and as a policy matter, in Ireland judges are left with a very wide discretion regarding sentences so as to allow them to assess the different circumstances in each case, with the aim of deciding on a sentence which not only fits the crime and local conditions, but also the history, personality and character of the offender, including prospects of rehabilitation for the benefit of the offender and for the longer term good of society. Such discretion has to be exercised with a sense of proportion, of fairness to all concerned and a feeling for justice.

8.16 *The Commission reiterates its recommendation in the Report on Sentencing that presumptive sentencing guidelines should not be introduced in this jurisdiction as they would be inconsistent with the discretionary nature of Irish sentencing policy.*

(6) Sentencing guidelines in England and Wales

(a) Magistrates' Court sentencing guidelines

8.17 The Magistrates' Association of England and Wales have produced a set of sentencing guidelines. At the outset of the guidelines, it is stated that:

“The sentencing guidelines provide a method for considering individual cases and a Guideline from which discussion should properly flow, but **they are not a tariff and should never be used as such.**”²¹

8.18 Each offence for which a sentence can be imposed in the Magistrates' Court is set out individually in the Guidelines. There are five distinct steps to the sentencing decision:

editorial in the New York Times, former Federal District Judge John S. Martin criticised the operation of the USSC guidelines, stating, “For a judge to be deprived of the ability to consider all of the factors that go into formulating a just sentence is completely at odds with the sentencing philosophy that has been a hallmark of the American system of justice.” *New York Times*, 24 June 2003.

²¹ Magistrates' Association *Magistrates' Court Sentencing Guidelines* available at <http://www.magistrates-association.org.uk>, at (v). [Emphasis in original].

- (a) Consider the seriousness of the offence. Here, there are four possibilities:
 - a. Is discharge or fine appropriate?
 - b. Is it serious enough for a community penalty?
 - c. Is it so serious that only custody is appropriate?
 - d. Are Magistrates' sentencing powers appropriate?
- (b) Consider aggravating and mitigating factors. Each offence has different aggravating and mitigating factors, but it is made clear that these lists are not exhaustive.
- (c) Take a preliminary view of seriousness, and then consider offender mitigation. Examples of these are genuine remorse, co-operation with police, age, health etc.
- (d) Consider the sentence.
- (e) Decide the sentence.

8.19 For each offence, a guideline starting point is indicated: for example, for affray, (d) is the guideline, while for speeding (a) is the guideline starting point.

8.20 Because these guidelines are truly "guidelines", as opposed to formalistic rules that leave little discretion to the trial judge, they may be a useful analogue in this jurisdiction as a means of combating inconsistency in District Court sentences. The trial judge is still left with a large amount of discretion at the time of sentencing, while there are some guidelines to assist the judge as to what the starting point for each offence would be before adding in other ingredients such as aggravating and mitigating factors.

8.21 While it could be argued that such guidelines would be unnecessary in this jurisdiction, where District Court Judges are professional members of the judiciary, while the vast majority of Magistrates are lay people, the guidelines are also applicable to the

professional Judges of the District Courts (Magistrates' Court)²² in England and Wales.

(b) *The Sentencing Guidelines Council*

8.22 The Sentencing Guidelines Council of England and Wales was established in 2004 under the *Criminal Justice Act 2003* to establish sentencing and allocation guidelines. It is assumed that the Council will liaise with the Magistrates' Association to update such guidelines. The Council comprises 12 people and is chaired by the Lord Chief Justice of England and Wales.²³ It has seven judicial members drawn from every level of court that deals with sentencing in criminal cases, and four non-judicial members with experience of policing, criminal prosecution, criminal defence and the interests of victims.²⁴ The Home Secretary also appoints an observer who has experience of sentencing policy and the administration of justice.²⁵

8.23 The Council will be responsible for producing guidelines that will apply to all courts for the full range of criminal offences. When deciding to frame or revise guidelines, it must have regard to:

- (a) the need to promote consistency in sentencing,
- (b) the sentences imposed by courts in England and Wales for offences to which the guidelines relate,
- (c) the cost of different sentences and their relative effectiveness in preventing re-offending,
- (d) the need to promote public confidence in the criminal justice system, and
- (e) the views communicated to the Council by the Sentencing Guidelines Panel.²⁶

²² Formerly known as "stipendiary judges".

²³ Section 167(1) of the *Criminal Justice Act 2003*.

²⁴ Section 167(1) and 167(4) of the *Criminal Justice Act 2003*.

²⁵ Section 167(9) of the *Criminal Justice Act 2003*.

²⁶ Section 170(5) of the *Criminal Justice Act 2003*.

8.24 In every individual case, the judge or magistrate will continue to make his or her own decision as to sentence, but will be required to have regard to any guidelines which are relevant to the offender's case when sentencing, and when exercising any other function relating to the sentencing of offenders, have regard to any guidelines which are relevant to the exercise of that function.²⁷

(7) Conclusion

8.25 The Commission is of the opinion that the introduction of sentencing guidelines might alleviate both the reality and the perception of inconsistent sentencing practices in the District Court. It agrees that such guidelines should not be prescriptive, but should give indications, first, as to what the recommended sentence would be for each offence, and secondly, the aggravating and mitigating factors that should apply generally in sentencing, and thirdly, those factors which should apply to specific offences.

8.26 The Commission is also of the opinion that such guidelines should not be devised by the legislature. Such a venture could amount to a violation of the doctrine of the separation of powers as an intrusion by the legislature into the jurisdiction of the courts.²⁸

8.27 *The Commission supports the views of the Committee on Judicial Conduct and Ethics that sentencing bench books be prepared by the proposed Judicial Studies Committee, an approach which is consistent with the views expressed by the Commission in its Report on Sentencing.*

²⁷ Section 172(1) of the *Criminal Justice Act 2003*.

²⁸ In *Mistretta v United States* 488 US 361 (1989), the constitutionality of the sentencing guidelines as promulgated by the United States Sentencing Commission was assessed. The petitioner first argued that Congress had granted the Commission excessive legislative discretion. This argument was rejected by the court, and it also found that Congress had not violated the doctrine of the separation of powers in establishing the Commission.

C The Role of the Prosecutor at Sentencing

(1) Introduction

8.28 Traditionally, the prosecutor's role at the sentencing hearing has involved summarising the facts of the case or calling a witness to give a synopsis or to deal with aspects of the circumstances of the matter. Often the role adopted is objective and careful in describing the case or in adducing factual evidence. Occasionally, defence evidence may be challenged by cross-examination or by calling evidence in chief or in rebuttal. In recent years, however, the courts have been open to expanding the role of the prosecutor at the sentencing stage in two ways. The first is where the prosecutor treats the sentencing hearing as an element of the trial, approaching it in an adversarial manner; the second is where the prosecutor makes recommendations or suggestions to the trial judge regarding the sentence that should be imposed on the defendant.

(2) The role of the prosecutor during the sentencing hearing

8.29 In *People (DPP) v Furlong*,²⁹ the Court of Criminal Appeal stated that on occasion, the Director of Public Prosecutions should provide assistance to the court at sentencing. The Director of Public Prosecution's *Statement of General Guidelines for Prosecutors*,³⁰ published in 2001, set out the role of the prosecutor in the sentencing process. It states that when prosecutors appear at a hearing in relation to sentence, they have the following duties:

- (a) To ensure that the court has before it all available evidence relevant to sentencing;
- (b) To ensure that the court has before it all available relevant evidence and appropriate submissions concerning the impact of the offence on its victim;

²⁹ Court of Criminal Appeal 3 July 2000.

³⁰ Director of Public Prosecutions *Statement of General Guidelines for Prosecutors* (2001). Available at http://www.dppireland.ie/reports_published.htm.

- (c) To ensure that the court has before it all available relevant evidence concerning the accused's circumstances, background, history and previous convictions;
- (d) To ensure that the court is aware of the range of sentencing options available to it;
- (e) To refer the court to any relevant authority or legislation that may assist in determining the appropriate sentence;
- (f) To assist the court to avoid making any appealable error, and to draw the court's attention to any error of fact or law which the court may make when passing sentence.³¹

8.30 The Guidelines go on to note that the prosecutor must make the court aware of any legal limitations on sentence,³² and that where there is a significant difference between the factual basis on which an accused pleads guilty and the case contended for by the prosecution, the prosecution must adopt an adversarial role and establish the facts upon which the court should base its sentence.³³ Additionally, where the defence advances matters in mitigation which the prosecution can prove to be wrong, and which if accepted are likely to lead the court to proceed on an incorrect factual basis, and, after being informed by the prosecutor that the mitigating factor is not accepted, the defence persists in the matter, the prosecutor must invite the court to put the defence on proof of the disputed matter and if necessary to hear prosecution evidence either in chief or in rebuttal.³⁴ Finally, where the accused pleads guilty, the prosecutor must ensure that the facts which are then placed before the court support each and every

³¹ Director of Public Prosecutions *Statement of General Guidelines for Prosecutors* (2001) at paragraph 7.09. Available at http://www.dppireland.ie/reports_published.htm.

³² *Ibid* at paragraph 7.10.

³³ *Ibid* at paragraph 7.11.

³⁴ *Ibid* at paragraph 7.12.

ingredient of the charges laid which are necessary to provide a sufficiently comprehensive factual basis for sentencing.³⁵

8.31 The potential for a change in approach in the role of prosecutors appeared to be raised in the comments made by the current Director of Public Prosecutions in his opening address to the Fourth National Prosecutors' Conference³⁶ where he stated:

“Often it seems that prosecuting counsel do not see their role as more than to put up the Garda witness and to call evidence in relation to the impact of the crime on the victim where the statute requires this to be done. The result of this is that it is quite common for matters to be referred to by defence counsel in mitigation which have not in fact been proved at all and for this not even to be commented upon, much less challenged, by counsel for the prosecution. *It is not clear to me why our trial system which is adversarial up until the point of conviction should then enter a phase where it seems, by some at any rate, to be regarded as unsporting to challenge or contradict assertions made by the defence, no matter how unproven or lacking in reality they may be.*”³⁷

In *People (DPP) v Keegan*,³⁸ the Court of Criminal Appeal held that if counsel representing the Director realises that there is an error in principle being made in the course of the sentencing process, counsel must inform the court of that fact, or the Court of Criminal Appeal may be unprepared to find that the sentence was unduly lenient. In that case, the Court stated:

“If appeals are to be conducted or applications for review of this sort are to be conducted on a proper basis, it appears to

³⁵ Director of Public Prosecutions *Statement of General Guidelines for Prosecutors* (2001) at paragraph 7.13. Available at

http://www.dppireland.ie/reports_published.htm.

³⁶ Opening Address by James Hamilton, Director of Public Prosecutions at the Fourth National Prosecutors' Conference 24 May 2003.

³⁷ *Ibid* at page 5 of the speech. [Emphasis added].

³⁸ Court of Criminal Appeal 28 April 2003.

us that some greater formality, both from the prosecution and the defence in the presentation of evidence in relation to sentence is necessary.”³⁹

8.32 At a recent symposium,⁴⁰ Hardiman J stated that he was of the opinion that the usefulness of the appeal procedure under section 2 of the *Criminal Justice Act 1993* has been undermined by the reluctance of the prosecution to give “suitable assistance” to the trial court at sentencing. He referred to *People (DPP) v Botha*⁴¹ in which the trial judge asked for assistance in the form of information regarding the sentences imposed in similar cases. Counsel first raised an objection to the question, stating that the Director of Public Prosecutions would not enter in to the arena of sentencing. On being pressed, however, counsel provided anecdotal evidence based on his own experience. The Court of Criminal Appeal stated:

“In our opinion a trial judge is entitled to make of both sides, but perhaps particularly of the prosecution, the inquiry which was made here. It is to be regretted that he received so little assistance, even after an adjournment.”⁴²

Agreeing with this statement, Hardiman J stated:

“In my view it is anomalous that a trial judge, whose decision may be appealed on grounds either of undue severity or undue leniency, should not receive at least on request assistance of this kind, especially from the Director who, since he is a participant in all of these cases, is uniquely able to tender it.”⁴³

8.33 The Commission commends the introduction of the Director of Public Prosecutions’ *Guidelines for Prosecutors* and encourages

³⁹ Court of Criminal Appeal 28 April 2003 at 6-7.

⁴⁰ *Criminal Justice – Criminal Chaos: A System under Fire* King’s Inns 28 February 2004.

⁴¹ Court of Criminal Appeal 19 January 2004.

⁴² *Ibid* at 6.

⁴³ *Criminal Justice – Criminal Chaos: A System under Fire* King’s Inns 28 February 2004.

those involved in the sentencing process to explore the extent to which prosecuting counsel should assist a trial court in the sentencing process.

(3) *Prosecutorial recommendations as to sentence*

8.34 The Director of Public Prosecutions' *Statement of General Guidelines for Prosecutors*⁴⁴ refers to prosecutorial recommendations at sentencing. It notes that "The prosecutor must not seek to persuade the court to impose an improper sentence nor should a sentence of a particular magnitude be advocated."⁴⁵ This approach is consistent with the Code of Conduct for the Bar of Ireland⁴⁶ which states:

"Prosecuting counsel should not attempt by advocacy to influence the Court in regard to sentence. If, however, an accused person is unrepresented it is proper for prosecuting counsel to inform the Court of any mitigating circumstances as to which he is instructed."⁴⁷

8.35 The Director of Public Prosecution's *Statement of General Guidelines* adds:

"If the court seeks the view of the Director of Public Prosecutions as to whether he considers that a custodial sentence is required, the prosecutor should not express his or her own views in relation to the matter but rather the views of the Director. If the court seeks the Director's views counsel should offer to seek instructions on the question. It should be made clear to the Court that in order to give instructions in such a case the Director would require sight of all relevant material before the Court,

⁴⁴ Director of Public Prosecutions *Statement of General Guidelines for Prosecutors* (2001). Available at

http://www.dppireland.ie/reports_published.htm.

⁴⁵ *Ibid* at paragraph 7.14.

⁴⁶ The Bar Council of Ireland Code of Conduct for the Bar of Ireland.

⁴⁷ *Ibid* at paragraph 9.20.

including all reports and transcripts of relevant evidence, and adequate time to give a properly considered view.”⁴⁸

8.36 Speaking at a recent conference Hardiman J also referred to this issue. He stated that while the provision of information regarding sentences in similar cases raises no problems, he accepted that “the question of submissions on sentence may give rise to difficulties in principle.”⁴⁹

8.37 *The Commission invites views as to the present and future scope of prosecuting counsel’s role in the sentencing process, including counsel’s role in expressing a view as to the merits or otherwise of a particular sentencing disposition.*

D Clusters of Cases Appealed Simultaneously

8.38 A further option would be to consider whether the Director of Public Prosecutions could appeal clusters of similar cases together, in a string of appeals where similar cases are dealt with consecutively.⁵⁰ Thus, if the Director became aware of a particularly lenient sentencing policy in a specific District, appeals could be brought in a number of similar cases for guidance. The Circuit Court, or perhaps the High Court or the Court of Criminal Appeal could then set out principles in its judgments from which guidelines may be adduced as to what the sentencing policy should be with regard to the particular crime. Such principles and factors to be taken into account as appropriate would encourage consistency in the consideration of the relevant circumstances, albeit the prevalence of a particular offence in an area and differing character and records of offenders may produce a diversity of sentences, all of which may be appropriate to the particular circumstances and the individual offender.

⁴⁸ Director of Public Prosecutions *Statement of General Guidelines for Prosecutors* (2001) at paragraph 7.15.

⁴⁹ Speaking at *Criminal Justice – Criminal Chaos: A System under Fire* King’s Inns 28 February 2004.

⁵⁰ The Commission is aware that, from time to time, appeals in similar indictable cases are listed for hearing at the same time in the Court of Criminal Appeal on an administrative basis. The English Court of Appeal (Criminal Division) regularly hears such clustered appeals.

8.39 A particular difficulty with such a procedure would be the time limit on bringing such an appeal. The Commission's proposed scheme envisages that notice of an appeal against an unduly lenient sentence must be served within 28 days from the day on which the sentence was imposed. Whether the Director would have the resources and information to establish that a number of similar sentences were imposed in cases with similar fact patterns is unclear. However, the procedure might perhaps be utilised to establish the sentencing parameters of a new offence, or one in which a number of prosecutions were brought over a short period of time, such as happened in the aftermath of "Operation Amethyst" where a large number of prosecutions were brought in a short space of time under section 6 of the *Child Trafficking and Pornography Act 1998*. If the Director were of the opinion that the sentences imposed for such a new type of offence were generally unduly lenient, the Director could appeal a cluster of such cases to be heard consecutively at the same sitting in an effort to establish appropriate sentencing principles in respect of the category of offence.

8.40 *The Commission seeks views on whether "clusters of appeals" by the prosecution would be a useful way of allowing a court to give judgment on appeal on a range of seemingly similar types of offences. The Commission also seeks views as to the court to which such appeals should be brought if this procedure is to be introduced.*

CHAPTER 9 SUMMARY OF RECOMMENDATIONS

9.01 For the purposes of this Paper the Commission defines a sentence to include all sanctions imposed by the District Court upon a finding of guilt of an individual including a term of imprisonment, a fine, an order under the *Probation of Offenders Act 1907*, community service orders, curfew and exclusion orders, a payment to the Court Poor Box and entering into a recognisance. The Commission considers that any order made by a District Court in the absence of a finding of guilt should be treated as an acquittal for the purposes of this Paper. [Paragraph 2.12]

9.02 The Commission reiterates its recommendation in the *Report on Minor Offences* that District Court Judges be required to give concise written reasons for imposing a term of imprisonment rather than a non-custodial sentence. [Paragraph 2.23]

9.03 The Commission commends the proposed introduction of electronic tagging, involving modern systems of proven practical utility and economy suitably adapted to Irish conditions, as a useful alternative to costly incarceration. [Paragraph 2.61]

9.04 The Commission notes the long-established use by the prosecution of appealing acquittals by way of case stated under the *Summary Jurisdiction Act 1857* and stresses that this procedure, along with the relevant provisions of the Act, has been upheld as being constitutional by the Supreme Court. [Paragraph 3.26]

9.05 The Commission notes that the test used by the Court of Criminal Appeal in determining whether a sentence imposed on indictment is unduly lenient, is that there must be a substantial departure from the appropriate sentence amounting to an error of principle. This has appeared to limit the number of appeals brought in such cases. The Commission also notes that the issue of delay which has been discussed in respect of cases on indictment might also

become an issue in any proposed scheme of appeals from the District Court. [Paragraph 4.34]

9.06 The Commission notes that the test of undue leniency applied by the Scottish Courts in relation to trials on indictment is comparable to the test applied by the Court of Criminal Appeal under the *Criminal Justice Act 1993*. The Commission observes that the Scottish courts have also applied this test to appeals from unduly lenient sentences in summary proceedings and this has resulted in a small number of appeals being taken. The Commission also concludes that the existence of a filter process in the comparable New Zealand system seems to have resulted in a small number of appeals being taken in summary cases. [Paragraph 5.22]

9.07 The Commission recommends that a procedure for appealing against unduly lenient sentences imposed in the District Court should be introduced into Irish law. In coming to this conclusion, the Commission considers that the most persuasive argument is that it is in the public interest that offenders should be sentenced appropriately in relation to the crime that they have committed, and that a procedure should be in place for rectifying any inordinately undue leniency in the sentencing process. [Paragraph 6.46]

The Commission also finds the following factors persuasive: that the jurisdiction of the District Court is sufficiently wide to merit review; that there should be consistency in District Court sentences; that there would be no confusion in a situation where both prosecutor and accused appeal; and that when the Director of Public Prosecutions agrees to a case being tried in the District Court, he does not implicitly assent to a light sentence being imposed. [Paragraph 6.47]

The Commission accepts that there are arguments to be made against the introduction of such an appeal procedure, but is of the opinion that such arguments are outweighed by introducing safeguards, notably the requirement to seek the consent of the Director of Public Prosecutions, into the procedure. [Paragraph 6.48]

9.08 The Commission recommends that, without prejudice to any existing right of appeal of any prosecuting authority, where a prosecutor is of the opinion that a District Court sentence is unduly

lenient, the prosecutor should refer the case to the Director of Public Prosecutions to seek approval for an appeal. Where the Director agrees that the sentence appears to be unduly lenient, given all the circumstances of the case, the appeal may then be brought by and in the name of the Director. [Paragraph 7.06]

9.09 The Commission recommends that the appellate jurisdiction envisaged would provide for an appeal from any sentence imposed in the District Court on conviction including fines, imprisonment, community service orders, as well as those made on foot of conditional acquittals including orders made under the *Probation of Offenders Act 1907* or any other order made upon a finding of guilt without entry of a conviction. [Paragraph 7.09]

9.10 The Commission recommends that the appeal from an unduly lenient sentence in the District Court should be brought to the Circuit Court and that such an appeal provision should reflect the terms of section 2 of the *Criminal Justice Act 1993*, allowing for the variation of sentence as appropriate after the hearing. [Paragraph 7.14]

9.11 The Commission recommends that in respect of acquittals on the merits, the form of appeal should be the existing method in the *Summary Jurisdiction Act 1857*, namely a case stated to the High Court. [Paragraph 7.21]

9.12 The Commission seeks views as to whether legal aid should automatically be granted to the person whose sentence is the subject of the appeal by the State or its agents, or whether it should be discretionary. [Paragraph 7.23]

9.13 The Commission seeks submissions on whether the proposed appeal regime should include a provision whereby if the appeal by the prosecution has not been heard by the Court at the time of the offender's release from prison, then the appeal against undue leniency should be deemed by the Court to have lapsed. [Paragraph 7.25]

9.14 The Commission recommends the insertion of a provision analogous to section 6 of the *Prosecution of Offences Act 1974* prohibiting communications, subject to similar exceptions, with the Director of Public Prosecutions in relation to the bringing of an

appeal from an unduly lenient sentence imposed in the District Court. [Paragraph 7.27]

9.15 The Commission reiterates its recommendation in the Report on Sentencing that presumptive sentencing guidelines should not be introduced in this jurisdiction as they would be inconsistent with the discretionary nature of Irish sentencing policy. [Paragraph 8.16]

9.16 The Commission supports the views of the Committee on Judicial Conduct and Ethics that sentencing bench books be prepared by the proposed Judicial Studies Committee, an approach which is consistent with the views expressed by the Commission in its Report on Sentencing. [Paragraph 8.27]

9.17 The Commission invites views as to the present and future scope of prosecuting counsel's role in the sentencing process, including counsel's role in expressing a view as to the merits or otherwise of a particular sentencing disposition. [Paragraph 8.37]

9.18 The Commission seeks views on whether "clusters of appeals" by the prosecution would be a useful way of allowing a court to give judgment on appeal on a range of seemingly similar types of offences. The Commission also seeks views as to the court to which such appeals should be brought if this procedure is to be introduced. [Paragraph 8.40]

**APPENDIX A DRAFT SCHEME OF CRIMINAL JUSTICE
(PROSECUTION APPEALS FROM THE
DISTRICT COURT) BILL**

**Draft Scheme of Criminal Justice (Prosecution Appeals from
the District Court) Bill**

Introduction

This scheme is modelled largely on the *Criminal Justice Act 1993*.

Head 1 Sentence

Provide that in this Act, unless the context otherwise requires—

“sentence” includes any sentence of imprisonment or fine imposed or any other order made by a District Court Judge in dealing with a person found guilty of an offence including dismissal or discharge under the *Probation of Offenders Act 1907* and any order made upon a finding of guilt under the *Children Act 2001* but not including—

(a) an order under section 17 of the *Lunacy (Ireland) Act, 1821*, or section 2(2) of the *Trial of Lunatics Act 1883*, or

(b) an order postponing sentence for the purpose of obtaining a medical or psychiatric report or a report by a probation officer;

(2) This Act shall not apply to sentences imposed on persons found guilty before its commencement.

Note: This provides for a wide definition of the term “sentence” as recommended in paragraphs 7.07 to 7.09.

Head 2 Review of District Court sentence by Director of Public Prosecutions

Provide that without prejudice to any existing right of appeal of any statutory authority, regulatory agency or any other body,* where it appears to the Director of Public Prosecutions that any sentence of the District Court was unduly lenient, he or she may apply to the Circuit Court for review of that sentence. No such appeal may be brought without the consent of the Director of Public Prosecutions, and such an application shall be brought in the name of the Director of Public Prosecutions.

Note: This provides for the consent of the Director of Public Prosecutions: see paragraphs 7.03 to 7.06.

Head 3 Powers of Circuit Court

Provide that on such an application, the Circuit Court may either:

- (a) refuse the application, or
- (b) if the accused person was convicted, the court shall proceed to examine whether the trial judge erred in principle in imposing an unduly lenient sentence under section 5 of this Act; or
- (c) if the accused person was found guilty of the offence but the trial judge did not proceed to a conviction, the court shall proceed to examine the appeal under section 6 of this Act.

Note: This is based on section 2 of the *Criminal Justice Act 1993*.

Head 4 Time Limit

Provide that notwithstanding anything contained in section 2 of the *Summary Jurisdiction Act 1857*, any appeal or application to

* For example under section 310 of the *Fisheries (Consolidation) Act 1959*; section 50 of the *Diseases of Animals Act 1966*; or section 52 of the *Safety, Health and Welfare at Work Act 1989*.

state a case under this Act must be lodged within 28 days after the hearing and final determination of the case.

Note: This is based on section 2 of the *Criminal Justice Act 1993*.

Head 5 Review of Sentence

Provide that (1) Where the accused was convicted of the offence charged in the District Court and the Director of Public Prosecutions appeals the case on grounds of undue leniency, notwithstanding any rule of law, an appeal shall lie to the Judge of the Circuit Court within whose circuit the District or any part of the District of such Judge of the District Court lies.

(2) On the hearing of such an appeal, the Circuit Court shall not, on the hearing of the appeal, re-hear the case except to such extent as shall be necessary to enable the court to adjudicate on the question of sentence.

(3) If it appears to the Court that the trial judge erred in principle and imposed an unduly lenient sentence on conviction, it may quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him or her by the Judge of the District Court.

Note: This is based on section 18 of the *Courts of Justice Act 1928* and the *Criminal Justice Act 1993*.

Head 6 Review of Disposition not Involving Conviction

Provide that (1) If the accused person was found guilty of the offence and charges against him or her were dismissed under the *Probation of Offenders Act 1907* or a conditional discharge was ordered under the *Probation of Offenders Act 1907*, or any other order was made in respect of the accused and the Director of Public Prosecutions is of the opinion that the trial judge erred in not convicting the accused, an appeal shall lie to the Judge of the Circuit Court within whose circuit the District or any part of the District of such Judge of the District Court lies.

(2) On the hearing of such an appeal, the Circuit Court shall re-hear the case to the extent that shall be necessary to enable the court to adjudicate on the question of whether a conviction should have been made against the defendant.

(3) If it appears to the Court that the trial judge erred in not convicting the accused person of the charge, it may enter a conviction against the accused and impose such sentence as it considers appropriate, being a sentence which could have been imposed on him or her by the District Court Judge.

Note: This is based on section 2 of the *Criminal Justice Act 1993*.

Head 7 Case Stated following an Acquittal

Provide that if the person accused was acquitted, and in the opinion of the Director of Public Prosecutions the trial judge erred in law in acquitting, he or she may state a case to the High Court under section 2 of the *Summary Jurisdiction Act 1857*. Having considered the application, if the High Court is of the opinion that the trial judge erred in law in striking out the charges, it may return the case to the District Court with an order to reconsider the matter in the light of the findings of the High Court.

Note: This is based upon section 2 of the *Summary Jurisdiction Act 1857*: See paragraphs 7.15 to 7.21.

Head 8 Communications with Director of Public Prosecutions

Provide that section 6 of the *Prosecution of Offences Act 1974* (which prohibits certain communications in relation to criminal proceedings), shall apply, with any necessary modifications, to communications made to the persons mentioned in that section for the purpose of influencing the making of a decision in relation to an application under this Act as it applies to such communications made for the purpose of making a decision to withdraw or not to initiate criminal proceedings or any particular charge in criminal proceedings.

Note: This is based on section 6 of the *Prosecution of Offences Act 1974* as applied by section 2(4) of the *Criminal Justice Act 1993*: see paragraph 7.26.

Head 9 Legal Aid

Provide that where an application has been made to the Circuit Court or the High Court under this Act —

- (a) a legal aid (appeal) certificate or a legal aid (case stated) certificate, as the case may be, shall be deemed, for the purposes of the *Criminal Justice (Legal Aid) Act 1962*, to have been granted in respect of the person whose sentence is the subject of the application or appeal, and
- (b) the person shall be entitled to free legal aid in the preparation and conduct of his or her case before the Circuit Court or High Court and to have a solicitor and counsel assigned to him or her for that purpose in the manner prescribed by regulations under section 10 of that Act.

Note: This is based on section 4(2) of the *Criminal Justice Act 1993*: see paragraph 7.22.

**APPENDIX B LIST OF LAW REFORM COMMISSION
PUBLICATIONS**

First Programme for Examination of Certain Branches of the Law with a View to their Reform (December 1976) (Prl 5984)	€0.13
Working Paper No 1-1977, The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977)	€1.40
Working Paper No 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (November 1977)	€1.27
Working Paper No 3-1977, Civil Liability for Animals (November 1977)	€3.17
First (Annual) Report (1977) (Prl 6961)	€0.51
Working Paper No 4-1978, The Law Relating to Breach of Promise of Marriage (November 1978)	€1.27
Working Paper No 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harboring of a Spouse (December 1978)	€1.27

Working Paper No 6-1979, The Law Relating to Seduction and the Enticement and Harbours of a Child (February 1979)	€1.90
Working Paper No 7-1979, The Law Relating to Loss of Consortium and Loss of Services of a Child (March 1979)	€1.27
Working Paper No 8-1979, Judicial Review of Administrative Action: the Problem of Remedies (December 1979)	€1.90
Second (Annual) Report (1978/79) (Prl 8855)	€0.95
Working Paper No 9-1980, The Rule Against Hearsay (April 1980)	€2.54
Third (Annual) Report (1980) (Prl 9733)	€0.95
First Report on Family Law – Criminal Conversation, Enticement and Harbours of a Spouse or Child, Loss of Consortium, Personal Injury to a Child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC 1-1981) (March 1981)	€2.54
Working Paper No 10-1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (September 1981)	€2.22
Fourth (Annual) Report (1981) (Pl 742)	€0.95

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Report on Defective Premises (LRC 3-1982) (May 1982)	€1.27
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Fifth (Annual) Report (1982) (PI 1795)	€0.95
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Working Paper No 11-1984, Recognition of Foreign Divorces and Legal Separations (October 1984)	€2.54

Seventh (Annual) Report (1984) (PI 3313)	€1.27
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