



The Law Reform Commission  
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

# REPORT

**THE COURT POOR BOX: PROBATION OF OFFENDERS**

**(LRC 75-2005)**

**IRELAND**

**The Law Reform Commission  
35-39 Shelbourne Road, Ballsbridge, Dublin 4**

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An Taoiseach Bertie Ahern TD  
Department of the Taoiseach  
Government Buildings  
Upper Merrion Street  
Dublin 2

12 September 2005

**Report on The Court Poor Box: Probation of Offenders**

Dear Taoiseach

I enclose a copy of the Commission's **Report on The Court Poor Box: Probation of Offenders (LRC 75-2005)** which will be published in the near future.

Yours sincerely

  
**Catherine McGuinness**  
**President**



## 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 Act.

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

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Full responsibility for this publication, however, lies with the Commission.

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## INTRODUCTION

1 This Report, which follows a Consultation Paper published in 2004,<sup>1</sup> has been prepared under the Commission's Second Programme for Law Reform.<sup>2</sup>

2 This Report examines the common-law disposition known as the Court Poor Box with particular reference to the *Probation of Offenders Act 1907*. In the Consultation Paper, the Commission examined the Court Poor Box in some detail, tracing its history and development as a sentencing disposition in this jurisdiction. The Court Poor Box system has operated on an informal basis for many years resulting in some debate as to its use in a modern sentencing framework. Concern was expressed by the Public Accounts Committee of the Oireachtas in 2001 in its consideration of the *Annual Report of the Comptroller and Auditor General 1999* that the Court Poor Box operated in a manner which may deprive the Exchequer of funds because it is used in place of imposing a criminal fine.<sup>3</sup> The matter was also considered by the Board of the Courts Service in 2000, which expressed the view that the Court Poor Box system was open to misunderstanding and that it should be put on a legislative footing if it was to be retained. The Commission provisionally recommended in the Consultation Paper that the Court Poor Box should be replaced with a statutory disposition based on the positive elements of the current regime while omitting its negative elements.

3 In the Report, the Commission has moved towards building this statutory framework for a reformed Court Poor Box in the context of the dismissal of a charge under the *Probation of Offenders Act 1907*. The Commission envisages that a statutory disposition modelled on the Court Poor Box could be incorporated into a fully reformed Probation Act, thereby expanding the range of options open to the court in sentencing less culpable offenders.

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<sup>1</sup> Law Reform Commission *Consultation Paper on The Court Poor Box* (LRC CP 31-2004) (hereinafter referred to as 'the Consultation Paper').

<sup>2</sup> *Second Programme for Examination of Certain Branches of the Law with a View to their Reform 2000-2007* (PN 9459) (December 2000).

<sup>3</sup> A transcript of the meeting is available at [www.irlgov.ie/committees-01/c-publicaccounts/010329/page1.htm](http://www.irlgov.ie/committees-01/c-publicaccounts/010329/page1.htm).

4 In Chapter 1, the Commission examines the role of the Court Poor Box in current sentencing practice, addressing both the positive and negative aspects of its use as a sentencing disposition. This Chapter is intended to provide a broad overview of the operation of the Court Poor Box system with a view to its reform and indeed, the need to update the *Probation of Offenders Act 1907*. The need to update the 1907 Act was acknowledged by the Expert Group on the Probation and Welfare Service in its Final Report which was published in 1999.<sup>4</sup>

5 Chapter 2 analyses the *Probation of Offenders Act 1907* in detail with particular reference to the provisions for the dismissal of a charge under the Act. Here, the Commission highlights the importance of retaining the provision which allows a court to dismiss a charge against an offender despite being satisfied of the offender's guilt. Chapter 2 also examines the out-dated aspects of the 1907 Act with a view to their reform and integration in a modern sentencing framework.

6 Chapter 3 sets out in detail the Commission's proposal for reform of the *Probation of Offenders Act 1907*, principally sections 1(1) and 1(3). Chapter 3 proposes the introduction of a disposition which allows for the payment of a sum of money to a centralised statutory fund where the court has ruled that the imposition of a criminal conviction would be unduly harsh in the circumstances. This disposition would replace the current Court Poor Box system. Chapter 3 also proposes significant changes to the jurisdiction under which an offender can enter into a recognizance with the court to keep the peace and to be of good behaviour. It also addresses the issue of compensation for victims of crime and the power a court to order an offender to pay the costs of the court proceedings.

7 Chapter 4 addresses the issue of the administration and management of the centralised fund which is to replace the current Court Poor Box system.

8 Chapter 5 is a summary of the Commission's final recommendations for the integration of a reformed Court Poor Box system into a fully reformed *Probation of Offenders Act 1907*.

9 Appendix A contains a draft Probation of Offenders Bill to give effect to the Commission's recommendations.

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<sup>4</sup> See *Final Report of the Expert Group on the Probation and Welfare Service*, Government of Ireland, 1999.

## CHAPTER 1 REFORM OF THE COURT POOR BOX

### A Introduction

1.01 In this Chapter, the Commission focuses on the fundamental issue as to whether the Court Poor Box should be retained or replaced in a reformed mode. In Part B, the positive and negative aspects of the Court Poor Box are set out. Part C recommends reform of the Court Poor Box while Part D recommends that reform of the Court Poor Box should be integrated into a general reform of the *Probation of Offenders Act 1907*.

### B Application of the Court Poor Box

1.02 The 'Court Poor Box' describes the disposition in which the court, on occasion, will require the defendant in a criminal case to make a payment to a charity, generally on the basis that no conviction will be recorded against that defendant. In some cases the payment is made into the court for distribution to various charities at a later date. In other cases, the money is paid directly to a charity by the defendant. The Court Poor Box is most frequently applied in respect of public order offences and, in particular, offences under the *Criminal Justice (Public Order) Act 1994*. The most frequent offences in this regard are breach of the peace and offences contrary to the following sections of the 1994 Act: section 4 (intoxication in a public place), section 5 (disorderly conduct in a public place), section 6 (threatening, insulting or abusive behaviour in a public place) and section 8 (failure to comply with a direction by a member of the Garda Síochána).<sup>1</sup> The Commission notes however that the Court Poor Box has been used to deal with a greater range of offences in recent times.<sup>2</sup>

1.03 The amounts which are paid into the Court Poor Box in specific cases vary greatly. To a large extent, the amounts depend on the gravity of the offence, the means of the offender and the practice of the judge. For

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<sup>1</sup> See Report by the Institute of Criminology, *Public Order Offences in Ireland*, University College Dublin for the National Crime Council (2003) which considers the breakdown of court disposals of public order offences at pages 74-75. See also the *Annual Report of the Courts Service 2004* which contains details on the use of the Court Poor Box in relation to certain offences.

<sup>2</sup> See paragraphs 3.11-3.17 below.

example, some judges have adopted the practice of directing the payment of a particular sum in all cases, irrespective of the means of the accused. Other judges direct the payment of a sum within a defined range, for example €50-€300. Other judges determine a payment without reference to any particular range but, rather, in view of the gravity of the offence and in accordance with the means of the offender. In practice, most payments are less than €1,000.

1.04 The following is an overview of the total amounts which were paid into the Court Poor Boxes of the District Court and Circuit Court for the years 1999-2004.<sup>3</sup> This information was provided by the Courts Service.

<b>Year Ending</b>	<b>District Court</b>	<b>Circuit Court</b>
1999	£369,029.00	£20,928.00
2000	£413,733.00	£14,565.00
2001	€577,374.56	€151,007.43
2002	€903,826.13	€34,581.99
2003	€980,330.79	€2,700.00
2004	€916,672.18	€11,659.34

1.05 As is clear, payments made to the Court Poor Box have totalled about €1 million annually. The total amount imposed in fines annually is approximately €16 million.

1.06 The manner in which Court Poor Box funds are administered and distributed varies from court to court. In some cases, payments are made directly to a particular charity, and thus the money in question does not pass through court channels. In such cases, a receipt for payment is generally submitted to the court. In other cases payments are made through the Probation and Welfare Service or through the Gardaí. In most cases however, it appears that payments are made to an officer of the court, for example the District Court clerk, who ultimately distributes the monies to various charitable organisations in accordance with the judge's directions.

1.07 The following is an overview of the total amounts which were paid out of the Court Poor Boxes for the years 1999-2004. This information was also provided by the Courts Service.

<b>Year Ending</b>	<b>District Court</b>	<b>Circuit Court</b>
1999	£338,500.00	£8,405.00
2000	£408,734.00	£26,964.00
2001	€518,537.24	€18,014.72
2002	€891,157.77	€44,681.73
2003	€980,196.85	€4,491.55
2004	€1,000,430.98	€11,350

<sup>3</sup> The figures for the years 1999-2003 are available in Appendices B-E of the Consultation Paper.

**(1) Overview**

1.08 In many instances, the Court Poor Box payment is accompanied by a dismissal of the charge under section 1 of the *Probation of Offenders Act 1907*. The effect of a dismissal under section 1 (1) of the 1907 Act is that no criminal conviction is entered against the defendant. The Court Poor Box is used primarily in relation to public order offences and largely in respect of first-time offenders, although its use is not strictly confined to such situations.

1.09 This outline describes the general application of the Court Poor Box and in this respect, its use as a disposition has a number of positive features which were acknowledged by the Commission in the Consultation Paper.<sup>4</sup> First, when used in conjunction with section 1(1) of the *Probation of Offenders Act 1907*, it avoids the imposition of a conviction in situations where the relatively trivial nature of the offence and the circumstances of the defendant would involve disproportionate use of criminal sanctions. Second, it is consistent with the underlying principles of restorative justice in which the payment may be made to a charity which has a connection to the offence.

1.10 However, these general features must be seen in the context of the negative aspects of its use as a disposition which were also discussed by the Commission in the Consultation Paper.<sup>5</sup> First, the Court Poor Box is used by a number of judges in conjunction with a conviction so that the rationale for using it as a means of avoiding a conviction is absent. Second, a number of judges appear to use the disposition as a means of ‘topping-up’ the level of fines that might apply where the relevant fine under the legislation has not been updated. While understandable as a human reaction in a difficult situation, the Commission has concluded that this is not the appropriate response to the problem.<sup>6</sup> Third, where the Court Poor Box is applied, the payments are made to charity rather than the Exchequer. In the Consultation Paper,<sup>7</sup> the Commission agreed with the concerns expressed by the Oireachtas Public Accounts Committee that this diversion of funds from the Exchequer was inappropriate.

1.11 Fourth, the Court Poor Box requires the courts to administer the receipt and payment of the funds in question. Because the Court Poor Box is not administered under statutory guidelines, there is no standard basis on which the Court Poor Box is audited and managed. Currently, some

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<sup>4</sup> See paragraphs 2.02-2.41 of the Consultation Paper.

<sup>5</sup> *Ibid* at paragraphs 2.43-2.97.

<sup>6</sup> See further Law Reform Commission *Report on the Indexation of Fines: A Review of Developments* LRC 65-2002 (July 2002).

<sup>7</sup> See paragraph 2.97 of the Consultation Paper.

payments are made directly to the charity in question, not all of which may be charitable entities for tax or other purposes. Other payments are made to the Court and then distributed by that court on an annual basis. In the Consultation Paper, the Commission concluded that this lack of uniformity was inappropriate. Further, there is a perception that the Court Poor Box may be used by some defendants to ‘buy their way out of a conviction’ by offering to make a significant contribution to a charity (or to the court for distribution to charities at a later date). In the Consultation Paper, the Commission did not accept that people of means can *actually* buy their way out of a conviction but it concluded that *the perception* that the disposition was used in such a way was problematic. The Commission also noted that the Court Poor Box is used by some judges while others refuse to apply it in any case. The Commission concluded that the absence of universal applicability was another serious deficiency in the use of the Court Poor Box. Having considered the position in light of the positive and negative aspects of this disposition, the Commission provisionally recommended that the Court Poor Box disposition should be discontinued and replaced with a disposition which retained its positive aspects while removing its negative aspects.

**(2) Recent Developments**

**(a) Proposed ‘Fixed Charge Notices’ for public order offences**

1.12 The *Criminal Justice Bill 2004*, currently before the Oireachtas, proposes to alter the manner in which some public order offences are dealt with and are relevant to the current Court Poor Box system. As already mentioned, a significant number of less serious public order offences which arise before the District Court result in a payment by the offender to the Court Poor Box or directly to a charity. Offences under section 4 (intoxication in a public place), section 5 (disorderly conduct in a public place) and section 6 (threatening, insulting and abusive behaviour in a public place) of the *Criminal Justice (Public Order) Act 1994* are most likely to attract this particular sanction.

1.13 Sections 23 A and 23 B of the *Criminal Justice Bill 2004* propose to amend the *Criminal Justice (Public Order) Act 1994* by the introduction of fixed charge notices (commonly, but inaccurately, referred to as ‘on-the-spot fines’) for two offences under the 1994 Act namely, intoxication in a public place under section 4 and disorderly conduct in a public place under section 5 of the 1994 Act.

1.14 As with other fixed charge notice provisions, the 2004 Bill provides that where the amount in the notice is paid within 28 days, no prosecution under sections 4 or 5 of the 1994 Act would be brought. A prosecution could also be avoided if, within a further 28 days, the fixed

charge plus 50% is paid by the person. In default of such payment, the person will be prosecuted for the offence.

1.15 The changes being proposed in the 2004 Bill are significant for a number of reasons. The Bill marks a shift in the manner in which less serious offences such as public order offences are to be dealt with. Rather than pursuing a prosecution in the courts in every case, offenders may be punished by way of a fixed charge notice which does not involve a court appearance, and most importantly, does not involve a criminal conviction. The Bill could be interpreted as an acceptance of the view that it is not always appropriate or necessary to punish an individual by way of a criminal conviction and that, in certain cases, a lesser sanction such as a financial penalty may be appropriate. Under the proposals in the 2004 Bill, offenders would be penalised rather than criminalised.

1.16 The 2004 Bill also represents an effort by the legislature to assist in reducing waiting times in the District Court where a high number of public order offences are heard, at significant cost to the State in terms of time and money. When an individual is served with a fixed charge notice, the matter is disposed of once the offender pays the penalty, without the need to resort to a court. Of course, the offender may choose not to pay the fixed charge and instead choose to defend the charges in court in which case the offence must be proven before a conviction is recorded.

1.17 Currently, a great number of minor public order offences which arise before the courts result in the offender making a contribution to charity or to the Court Poor Box, often avoiding a criminal conviction in the process. If the provisions of the 2004 Bill are enacted into law, a large proportion of cases that would have been dealt with by way of the Court Poor Box will be diverted away from the courts entirely. Consequently, the amount of money paid to the Court Poor Box would be significantly reduced.

## **C Summary of the Positive and Negative Elements of the Court Poor Box System**

1.18 Without wishing to reiterate the detailed consideration which the Commission gave to each of the positive and problematic aspects of the disposition in the Consultation Paper, it is appropriate to give a brief synopsis of each issue in below.

### ***(1) Positive Aspects***

#### ***(a) Using the Court Poor Box avoids imposing a conviction***

1.19 A key reason for using the Court Poor Box is to avoid imposing a conviction on an individual, the effects of which may far out-weigh the

gravity of the offence.<sup>8</sup> In some cases, a dismissal, without any accompanying sanction under section 1(1) of the *Probation of Offenders Act 1907* may be justified.<sup>9</sup> Situations may arise however, where a judge is satisfied that a conviction is not merited but feels that a sanction of some variety is warranted. In such situations, in the absence of a conviction, a contribution to the Court Poor Box or directly to a charity by the offender has been applied as a sanction.

1.20 In the Consultation Paper, the Commission accepted the general principle that enabling an offender of previous good character to avail of a ‘second-chance’ was desirable in certain circumstances. Of particular concern in this regard is the permanency of a criminal conviction once imposed and the future impact that such a record could have on the offender. The Commission noted in the Consultation Paper that a great number of Court Poor Box applications arise in relation to young persons who have committed a minor public order offence in a moment of exuberance or while under the influence of alcohol.<sup>10</sup> In particular, the ability to obtain employment or travel to some countries could be hampered by the presence of a criminal conviction.

1.21 In the Consultation Paper, the Commission discussed the possibility of introducing a general ‘spent convictions’ law in this country whereby a ‘clean-slate’ would apply relation to certain offences after a number of years. Such a ‘clean-slate’ law currently applies only to those under 18 years of age under the *Children Act 2001*. Since the publication of the Consultation Paper, a Report has been published by the Department of Justice, Equality and Law Reform which examined the issue of spent convictions from the perspective of extending the grounds of discrimination under employment equality legislation to cover discrimination on the basis of previous criminal convictions.<sup>11</sup> The Report contains a review of ‘spent conviction’ regimes in other jurisdictions similar to the analysis in Chapter 5 of the Consultation Paper. In light of these developments, the Commission has concluded that a full examination of the complex range of issues should be carried out in a separate Consultation Paper. For this reason, the Commission does not deal with this matter in this Report.

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<sup>8</sup> See paragraphs 2.02-2.05 of the Consultation Paper.

<sup>9</sup> Section 1(1) of the *Probation of Offenders Act 1907* is analysed in detail in Chapter 2.

<sup>10</sup> See paragraphs 1.37-1.42 of the Consultation Paper.

<sup>11</sup> Report on *Extending the Scope of Employment Equality Legislation- Comparative Perspectives on the Prohibited Grounds of Discrimination*, (Government of Ireland, 2004). The Report was commissioned by the Department of Justice, Equality and Law Reform and was prepared by a research team at University College Cork.

**(b) *The Court Poor Box is a proportionate disposition***

1.22 In the Consultation Paper, the Commission noted that, where relevant, the Court Poor Box disposition enables the court to apply a disposition that is appropriate to the circumstances of the case.<sup>12</sup> It also ensures that the offender receives a sentence that is proportionate to the relatively trivial nature of the offence. This reflects a fundamental principle of sentencing that a penalty should have regard to “not only...to the particular crime but also...to the particular criminal.”<sup>13</sup>

**(i) *Factors which influence a decision to apply the Court Poor Box***

1.23 The Consultation Paper identified a number of factors which influence the court in its decision to apply the Court Poor Box to a particular offender.<sup>14</sup> These include: the circumstances of the commission of the offence, the personal circumstances of the offender, including character, age, health, family circumstances and means, the trivial nature of the offence, whether the offender had previously committed the offence in question (or any other offence), whether the offender made an early admission and pleaded guilty to the offence, whether the offender is genuinely remorseful and whether the age of a person justifies a reduced punishment.

1.24 In the Consultation Paper, the Commission noted that in particular, in relation to personal circumstances, the financial situation of the offender is usually taken into account. Consequently, the amount of the contribution to the Court Poor Box is usually proportionate to the offender’s means.<sup>15</sup>

**(c) *Restorative Justice Principles***

1.25 In the Consultation Paper, the Commission highlighted that the Court Poor Box is consistent with the principles of restorative justice, which the Commission generally supports.<sup>16</sup> The Court Poor Box has offered assistance to both victims and offenders on a regular basis. In many cases, the beneficiary of the offender’s contribution will be connected in some way

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<sup>12</sup> For a detailed discussion of this area, see paragraphs 2.06-2.33 of the Consultation Paper.

<sup>13</sup> See *People (Attorney General) v O’Driscoll* (1972) 1 Frewen 351, cited in the Consultation Paper at paragraph 2.10.

<sup>14</sup> See paragraphs 2.18-2.32 of the Consultation Paper.

<sup>15</sup> *Ibid* at paragraphs 2.14-2.17.

<sup>16</sup> Restorative Justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future. See generally Von Hirsch et al *Restorative Justice and Criminal Justice* (Hart 2003), Barton *Restorative Justice The Empowerment Model* (Hawkins Press 2003).

to the offence that has taken place. For example, in a case involving animal cruelty, the contribution may be to the Irish Society for the Prevention of Cruelty to Animals. Similarly, a contribution to an organisation engaged in the support of victims of crime may be appropriate in particular cases. In dealing with the offence in this manner, the victim involved to a greater extent in the criminal justice process. In addition, where the offender is confronted with the consequences of his or her wrongdoing, the chances of re-offending may be reduced.<sup>17</sup>

1.26 In a situation where the community as a whole, rather than a single identifiable victim, can be said to suffer as a result of the offender's actions, a donation to a charity working within the locality may be regarded as an appropriate outcome. In some cases the donation could be used to fund offender rehabilitation and support, and in particular, drug rehabilitation programmes. In appropriate circumstances, the offender may receive a donation from the Court Poor Box where it is obvious to the court that poverty was a factor in the commission of the offence.<sup>18</sup>

1.27 The Commission acknowledged in the Consultation Paper that the positive aspects of the Court Poor Box disposition indicate that, where it is applied appropriately, the Court Poor Box is a proportionate disposition which contains important elements of restorative justice. However, the Consultation Paper also identified a number of negative aspects, to which the Commission now turns.

**(2) *Negative Aspects***

**(a) *Ratio of fines to contributions to the Court Poor Box***

1.28 In 2003, revenue from fines collected by the State amounted to approximately €16 million while payments to the Court Poor Box in the same period amounted to almost €1 million.<sup>19</sup> The sums involved, therefore, are not trivial. In March 2001, the Oireachtas Public Accounts Committee, in its consideration of the 1999 *Annual Report of the Comptroller and Auditor General*, expressed concern that the Court Poor Box system was operating in a manner which may deprive the Exchequer of funds that would

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<sup>17</sup> The success of restorative justice programmes in reducing re-offending is discussed in paragraphs 4.24-4.30 above.

<sup>18</sup> See paragraph 2.37 of the Consultation Paper.

<sup>19</sup> Figures supplied by the Court Service.

arise from the imposition of fines.<sup>20</sup> The Commission agrees that this is a matter of concern to the operation of the Court Poor Box.<sup>21</sup>

**(b) Use of the Court Poor Box ‘post-conviction’**

1.29 One of the principle reasons already mentioned for using the Court Poor Box is the concern to avoid imposing a conviction on the offender. Despite this, a significant number of contributions to the Court Poor Box are, in fact, made post-conviction. In this context, the Public Accounts Committee suggested that where an offender is convicted of an offence and a monetary penalty is imposed, that penalty should take the form of a fine and the revenue transferred to the Exchequer. Where an offender is convicted of an offence and the penalty imposed is a contribution to the Court Poor Box (or directly to a charity), the Exchequer is thus deprived of revenue.

1.30 The Commission considers that application of the Court Poor Box in cases where a conviction has been recorded is inconsistent with the fundamental philosophy underpinning this disposition, namely the concern to avoid imposing a conviction in appropriate cases.<sup>22</sup> The Commission also supports the general proposition stated by the Public Accounts Committee that penalties imposed in the context of a criminal case, whether fines or otherwise, should, in general be made payable to the Exchequer.

**(c) Extent to which the Court Poor Box is applied<sup>23</sup>**

1.31 The Court Poor Box disposition is not applied by all judges in the State.<sup>24</sup> It appears to be used regularly by some judges, infrequently by others and not at all by others. The result is that an extra sentencing option (with the likelihood of non-conviction) is available for some offenders and not for others depending entirely on geographical location and the particular preference of the judge.<sup>25</sup>

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<sup>20</sup> Under section 51 of the *Court Officers Act 1926*, fines are payable to the Exchequer unless an order has been made directing payment to another body.

<sup>21</sup> A transcript of the meeting of the Public Accounts Committee of the Oireachtas is available at [www.irlgove.ie/committees-01/c-publicacccounts/010329/page1.htm](http://www.irlgove.ie/committees-01/c-publicacccounts/010329/page1.htm).

<sup>22</sup> See paragraph 6.15 of the Consultation Paper.

<sup>23</sup> *Ibid* at paragraphs 2.66-2.71.

<sup>24</sup> Appendices B-E of the Consultation Paper document the approximate figures for payments made to the Court Poor Box in the various District Courts between the years 1999-2003. The figures demonstrate a clear disparity as to the use of this disposition between the different Districts.

<sup>25</sup> See Consultation Paper at paragraphs 2.66 and 2.67. See also Irish Penal Reform Trust, *Research Brief: Sentencing in the District Courts, 2003* available at [www.irpt.ie/irpt/print/1144](http://www.irpt.ie/irpt/print/1144).

1.32 In the Consultation Paper, the Commission acknowledged that the constitutional guarantee of equality is not necessarily breached if persons who have committed the same offence are given different sentences.<sup>26</sup> Nonetheless, in the application or non-application of the Court Poor Box, there is a disparity in the treatment of offenders whose circumstances are effectively identical, depending on whether they are sentenced by a judge who applies the Court Poor Box or one who does not. The Commission noted in the Consultation Paper that if the Court Poor Box was placed on a statutory footing, it would have the benefit of making it universally available.

**(d) Perception that the Court Poor Box operates as a means of buying one's way out of a conviction or term of imprisonment.<sup>27</sup>**

1.33 In the Consultation Paper, the Commission noted that there was a perception that the Court Poor Box disposition operates as a means of buying one's way out of a conviction. Thus, it has been argued that an affluent offender, who can afford to make a substantial contribution to the Court Poor Box, is more likely to avoid a conviction than a less well-off offender who bears the consequences of having a criminal conviction recorded against them. In the Consultation Paper, the Commission did not accept this argument and concluded that the majority of judges who apply this disposition do not apply it in a discriminatory fashion. Nonetheless, the Commission was concerned that the mere *perception* that a contribution to the Court Poor Box was the primary, or indeed, the sole factor which caused the offender to escape a conviction or term of imprisonment, may damage public confidence in the administration of justice which can be summed up in the well-known phrase that '*justice should not only be done but be seen to be done*'.<sup>28</sup> The Commission reaffirms the importance of this principle and accepts that a difficulty arises in relation to the perception that the Court Poor Box disposition may appear to favour people from an affluent background.

**(e) Difficulties in the administration of the Court Poor Box<sup>29</sup>**

1.34 In the Consultation Paper, the Commission acknowledged that the receipt, administration and distribution of Court Poor Box funds are problematic on a number of levels. At present, the administration of the Court Poor Box in the various District Courts is entirely at the discretion of

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<sup>26</sup> See paragraph 2.68 of the Consultation Paper.

<sup>27</sup> *Ibid* at paragraph 2.43-2.62.

<sup>28</sup> The Commission also expressed concerns that use of the Court Poor Box post-conviction lends itself to arguments that the offender is buying his or her way out of a prison sentence. See paragraphs 1.15 and 1.21 of the Consultation Paper.

<sup>29</sup> *Ibid* at paragraphs 2.83-2.90.

the judge of that court. Consequently, where payments are not made directly to a charity, but are instead lodged in the Court, the relevant District Court judge decides which charities should benefit from Court Poor Box donations.<sup>30</sup> Figures detailing payments to and from the various Court Poor Boxes nationwide are contained in the Appendices to the Consultation Paper, and these demonstrate clearly that some charities are, in fact, preferred for receipt of Court Poor Box funds.

1.35 The Commission concluded that it was undesirable that there was a perception that some charities may be favoured over equally, or indeed more deserving charities.

1.36 Of relevance also is the lack of formal accounting mechanisms in place in most of the District Courts which operate the Court Poor Box. Indeed, it is only since 1999 that approximate figures have been available through the Courts Service. In the Consultation Paper, the Commission concluded that this aspect of the Court Poor Box jurisdiction was also open to misinterpretation and misunderstanding and lacked clear elements of transparency which should be obviously present in the case of funds managed or administered by the courts.

1.37 In light of the foregoing, the Commission expressed the opinion that the receipt, administration, and distribution of Court Poor Box funds are liable to compromise the independence of the judiciary.

***(f) The Court Poor Box may operate in a manner which is not tax-compliant***

1.38 In the Consultation Paper, the Commission also considered in detail the charitable and revenue implications of the Court Poor Box system.<sup>31</sup> A number of difficulties were identified with regard to the manner in which funds are distributed from the Court Poor Box. The Commission concluded that the current operation of the system may not comply with all relevant revenue legislation, principally in relation to the Capital Acquisitions Tax code (CAT). Many payments to the Court Poor Box would be classified as gifts pursuant to the CAT code since such payments are generally made on a once-off basis. Only gifts taken for a charitable purpose are exempted from this tax code and it is necessary to apply to the Revenue Commissioners for a charity (CHY) number in order to avail of this exemption. Given the varieties of persons and organisations which benefit from Court Poor Box contributions, the Commission is concerned that the system is operating in a manner which may not be tax-compliant. Indeed, in

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<sup>30</sup> A list of organisations which benefited from such funds in 2002 and 2003 is contained in Appendices D and E of the Consultation Paper.

<sup>31</sup> Paragraphs 3.03-3.48 of the Consultation Paper discuss the tax and revenue implications of the Court Poor Box system.

the absence of comprehensive regulation of the charity sector in Ireland, there is a risk that some recipients of the fund which may appear to be bona fide, may lack the certainty of purpose which is required. Many of these concerns could be addressed by the introduction of a standard audit, accounting and distribution procedure for dealing with Court Poor Box contributions.

## **D Discussion**

1.39 In the Consultation Paper, the Commission having considered the positive and negative features of the Court Poor Box, recommended that the Court Poor Box disposition be reformed in order to avoid its inappropriate features while preserving its positive and important aspects.

1.40 The Commission also recommended that the Court Poor Box system be replaced by a statutory scheme based on the *Probation of Offenders Act 1907*. This connection with the 1907 Act arose directly from the common use of the Court Poor Box in conjunction with a dismissal under the 1907 Act. During the consultation period after the publication of the Consultation Paper, a number of submissions received by the Commission suggested retention of the Court Poor box in its present form. Other submissions suggested reform of the Court Poor Box. The Commission acknowledges that a number of practitioners and judges regard the Court Poor Box disposition as being appropriate in its application to particular cases.

1.41 The Commission accepts that, in principle, some form of disposition akin to the Court Poor Box, in conjunction with the *Probation of Offenders Act 1907*, should be available to sentencing judges. In that respect, the Commission reaffirms its view that certain aspects of the current Court Poor Box disposition, in particular its use in appropriate cases to avoid a permanent criminal record and its consistency with the principles of restorative justice, should be preserved.

1.42 However, the Commission also reiterates that, as currently constituted, the Court Poor Box is hampered by a number of problematic aspects, most notably that it is, in fact, used post-conviction in some cases. It is sometimes used as a 'shadow fine' system with the consequence that the Exchequer may be deprived of funds, and its administration lacks the uniformity and transparency which would normally be associated with funds which are administered by the Courts. Additionally, there is a perception that affluent persons can buy their way out of a conviction (though the Commission accepts that this is a perception and not the actual practice). The Commission accepts that the Court Poor Box is not universally available because those judges who refuse to apply it as a disposition regard these negative aspects as particularly problematic. Consequently, the Commission

has concluded that the recommendation made in the Consultation Paper that the Court Poor Box be reformed in order to avoid these problematic aspects, remains valid.

1.43 *The Commission recommends that the Court Poor Box disposition be reformed in order to avoid its inappropriate features, while preserving its positive aspects.*

## **E Basis of Reform**

1.44 In the Consultation Paper, the Commission recommended that the Court Poor Box be replaced by a statutory scheme based on the *Probation of Offenders Act 1907*. During the consultation process after publication of the Consultation Paper, it became clear that reform of the Court Poor Box should include a consideration of full reform of the 1907 Act.<sup>32</sup> Indeed, the Commission noted in the Consultation Paper that reform of the 1907 Act had been recommended in 1999 under the Report of the Expert Group on the Probation and Welfare Service.<sup>33</sup>

1.45 The Commission also noted that the increased use of the Court Poor Box disposition is indicative of the limited sentencing options available to the courts when sentencing minor offenders. In preparing this Report therefore, the Commission has been conscious of the need to place reform of the Court Poor Box firmly in the context of reform and updating of the 1907 Act. The Commission has also taken account of the views expressed by the Expert Group on the Probation and Welfare Service and of the National Crime Council that a greater range of sentencing options<sup>34</sup> should be available in a reformed Probation of Offenders Act. The Commission accordingly reiterates the recommendation in the Consultation Paper that reform of the Court Poor Box be based on the *Probation of Offenders Act 1907*, in particular in relation to the sentencing options available when sentencing minor offenders. This would also ensure that the circumstances in which the reformed Court Poor Box is to be applied is integrated into the general context of Probation of Offenders legislation.

1.46 *The Commission recommends that reform of the Court Poor Box be based on the Probation of Offenders Act 1907 and that this should include general reform of the 1907 Act to ensure that existing arrangements*

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<sup>32</sup> See in particular Lysaght “The Court Poor Box” (2004) 9 *Bar Review* 124.

<sup>33</sup> See *Final Report of the Expert Group on the Probation and Welfare Service*, Government of Ireland, 1999.

<sup>34</sup> See Report on ‘*A Crime Prevention Strategy for Ireland: Tackling the Concerns of Local Communities*’, National Crime Council, 2003.

*are integrated into the general context of the Probation of Offenders legislation.*

1.47 The Commission now turns in Chapter 2 to an analysis of the *Probation of Offenders Act 1907* and the reform proposals which follow from this. In Chapter 3, the Commission discusses consequent aspects of reform of the 1907 Act, in particular the detailed factors to be taken into account in applying the reformed Court Poor Box disposition. In Chapter 4, the Commission discusses the manner in which payments to the reformed Court Poor Box can be administered in a way which avoids the problematic aspects of the current Court Poor Box system.

## CHAPTER 2 REFORM OF THE COURT POOR BOX AND PROBATION OF OFFENDERS ACT 1907

### A Introduction

2.01 In this Chapter, the Commission discusses reform of the Court Poor Box in the context of the *Probation of Offenders Act 1907*.

### B Dismissal and Conditional Discharge under the Probation of Offenders Act 1907

#### (1) Introduction

2.02 The *Probation of Offenders Act 1907*<sup>1</sup> has remained substantially unchanged since its enactment.<sup>2</sup> Section 1(1) 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*,<sup>3</sup> make an order either-

(i) dismissing the information or charge; or

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<sup>1</sup> The *Probation of Offenders Act 1907* replaced the *Probation of First Offenders Act 1887*. The 1907 Act was amended in minor respects under the *Criminal Justice (Administration) Act 1914*.

<sup>2</sup> The *Final Report of the Expert Group on the Probation and Welfare Service* (Government of Ireland, 1999) recommended the general replacement of the 1907 Act with a new legislative framework which would incorporate a new structure for the Probation and Welfare Service in addition to introducing of a range of sentencing options for the courts. The Commission is aware that that this is a matter which remains under review by the Department of Justice, Equality and Law Reform. The Commission, in this Report focuses on reform of section 1 of the 1907 Act and in particular the provisions which deal with the dismissal of a charge.

<sup>3</sup> Emphasis added.

(ii) 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.”<sup>4</sup>

2.03 Thus, two orders may be made under section 1(1) of 1907 Act: a dismissal and a conditional discharge. By contrast, section 1(2) of the 1907 Act, which applies to persons *convicted on indictment*, provides for a conditional discharge only. Section 1 (2) provides:

“Where any person *has been convicted on indictment of any offence punishable with imprisonment*, and the court is of opinion that, having regard to the character, antecedents, age, health, 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, in lieu of imposing a sentence of imprisonment, make an order discharging the offender conditionally on his entering into a recognizance, 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, as may be specified in the order.”<sup>5</sup>

2.04 Section 1(1) may be applied both to summary offences and to indictable offences tried summarily in the District Court. An example is assault causing harm under section 3 of the *Non-Fatal Offences Against the Person Act 1997* which reads:

“(1) A person who assaults another causing him harm shall be guilty of an offence.

(2) A person found guilty of an offence under this section shall be liable-

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

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

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<sup>4</sup> Section 1(1) *Probation of Offenders Act 1907*.

<sup>5</sup> Emphasis added.

2.05 Accordingly, a person charged with assault causing harm under the 1997 Act may receive the benefit of section 1 of the *Probation of Offenders Act 1907* where the case is tried summarily in the District Court.

2.06 Section 1(3) of the 1907 Act provides that where an offender is dealt with under section 1(1), the offender may be ordered to pay damages for injury or compensation for loss up to a maximum of €12 and to pay the costs of the proceedings as the court, in its discretion, thinks reasonable.<sup>6</sup> It is clear, therefore, that the 1907 Act allows for the imposition of financial sanctions on offenders who have been dealt with under section 1(1) of the 1907 Act.

2.07 A conditional discharge under section 1(1)(ii) of the 1907 Act has the same effect as a dismissal, that is, non-conviction subject to the fulfilment of a number of conditions. These conditions include entering into a recognizance to be of good behaviour and to keep the peace for a period not exceeding three years. Under section 2(1) of the 1907 Act, an offender who has entered into such a recognizance may be subject to the supervision of a person named in the order (usually a Probation Officer). Section 2(2) of the 1907 Act, as amended, sets out a number of additional conditions which the court may attach to a recognizance:

“A recognisance under this Act may contain such additional conditions with respect to residence, abstention from intoxicating liquor, and any other such matters, as the court may, having regard to the particular circumstances of the case, consider necessary for preventing a repetition of the same offence or the commission of other offences.”<sup>7</sup>

2.08 Section 5 of the 1907 Act, as amended by section 9 of the *Criminal Justice Administration Act 1914*, provides for the variation or discharge of the terms of the recognizance on application to the court. Section 6 provides that the court may issue a warrant for the arrest or summons of the offender where a breach of a term of the recognizance is alleged to have occurred. If the court is satisfied that the offender has failed to observe the conditions of the recognizance, the offender may then be convicted of and sentenced for the original offence.

## **(2) Without Proceeding to Conviction**

2.09 A distinctive feature of the 1907 Act is that it allows a court to dispose of a case *without* imposing a conviction on the offender. In order to

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<sup>6</sup> Section 1(3) of the *Probation of Offenders Act 1907* is discussed in detail in paragraphs 2.24-2.26 above.

<sup>7</sup> See section 2(2) of the 1907 Act as amended by section 8 of the *Criminal Justice (Administration) Act 1914*.

reach this point, however, the court must first be satisfied that the charge has been proven against the offender. In *Mulhall v O'Donnell*<sup>8</sup> Murphy J stated:

“It is undoubtedly the case that before the provisions of the 1907 Act can be invoked a [judge of the District Court] must be satisfied that the defendant is guilty of the offence with which he has been charged.”<sup>9</sup>

2.10 O'Malley notes that a dismissal under section 1(1) (i) of the 1907 Act, as distinct from an acquittal on the merits of a case, “...is contingent on the charge having been proved.”<sup>10</sup> It is thus clear that a dismissal or conditional discharge under section 1(1) of the 1907 Act, while achieving the same result as an acquittal, cannot be correctly described as an acquittal in the normal sense of the term. Nonetheless, in order to indicate its effect, it is useful to refer to it as ‘a dismissal under the Probation Act’.

2.11 Where a case is dismissed under section 1(1) of the 1907 Act, although no conviction is recorded against the offender, his or her character is not without blemish.<sup>11</sup> In *Mulhall v O'Donnell*,<sup>12</sup> the High Court quashed an order made by the District Court under the 1907 Act. Murphy J stated:

“...an order under the 1907 Act is a serious reflection on the character of a defendant, and it is understandable that if such an order is wrongly imposed a defendant should seek to have it set aside.”<sup>13</sup>

### **(3) Factors which Justify Application of the 1907 Act**

2.12 In the Commission's *Consultation Paper on Appeals from Unduly Lenient Sentences in the District Court*,<sup>14</sup> it was noted that the purpose of the 1907 Act “...is to provide an alternative to incarceration for minor offenders, and to avoid them becoming the subject of a criminal record.”<sup>15</sup> In order to

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<sup>8</sup> [1989] ILRM 367.

<sup>9</sup> *Ibid* at 368.

<sup>10</sup> O'Malley *Sentencing Law and Practice*, (Round Hall Sweet and Maxwell 2000) at 301.

<sup>11</sup> Woods *District Court Practice and Procedure in Criminal Cases* (James V Woods 1994) at 403.

<sup>12</sup> [1989] ILRM 367.

<sup>13</sup> *Ibid* at 368.

<sup>14</sup> LRC CP 33-2004.

<sup>15</sup> See O'Malley *Sentencing Law and Practice* (Round Hall Sweet and Maxwell 2000) at 304) cited in the Law Reform Commission's *Consultation Paper on Appeals from Unduly Lenient Sentences in the District Court* (LRC CP 33-2004).

justify dismissal of a charge, even where the court is satisfied that the charge has been proved, section 1 (1) of the 1907 Act provides that the court must take account of the following considerations:

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

2.13 In *McClellan v Brady*,<sup>16</sup> Campbell CJ stated that the grounds on which the 1907 Act may be applied are alternative rather than cumulative. In many cases, however, a number of grounds will exist on which a dismissal could be based. In addition, Campbell CJ held that in dismissing a charge under section 1 of the 1907 Act a judge must have, either in the nature of the offence, or the facts established in evidence before him, the materials entitling him to apply the section.<sup>17</sup> An order dismissing a charge under the 1907 Act should also specify the particular ground relied on for the application of the Act.<sup>18</sup>

2.14 The Commission accepts that the presence of one or a number of the factors contained in the 1907 Act is often indicative of a less culpable offender and may justify a dismissal in the circumstances. But of the various factors mentioned, it is arguable that the ‘trivial nature of the offence’ is pivotal in deciding whether a dismissal under the 1907 Act is justified, given that it is rarely applied in relation to more serious offences.

#### **(4) Exclusion of the 1907 Act in relation to Certain Offences**

2.15 A number of provisions enacted since 1907 prohibit the use of section 1(1) of the 1907 Act for certain offences.<sup>19</sup>

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<sup>16</sup> [1918] 2 IR 63.

<sup>17</sup> Woods *District Court Practice and Procedure* (James V Woods 1994) at 404.

<sup>18</sup> *Glasgow v O'Connor* (1911) 45 ILTR 5 and *Gilroy v Brennan* [1926] IR 482.

<sup>19</sup> The sections to which section 1(1) of the 1907 Act cannot be applied are:

section 35 *Intoxicating Liquor Act 1927*, section 49 *Road Traffic Act 1961* (as amended), section 16 *Fisheries (Amendment) Act 1962*, section 34 *Finance Act 1963*, section 16 *Air Navigation and Transport Act 1973*, section 6 *Air Navigation and Transport Act 1975*, section 2 *Road Transport Act 1978*, section 78 *Finance Act 1984*, section 217 *Social Welfare (Consolidation) Act 1993*, section 1078 *Taxes Consolidation Act 1997*, section 128 *Finance Act 2001*, *Social Welfare (Rent Allowance) (Amendment) Regulations, 1992*, *European Communities (Community Transit) Regulations, 1992*, *European Communities (Tir Carnet and Ata Carnet - Transit) Regulations, 1993*, *European Communities (Counterfeit and Pirated Goods) Regulations 1996*.

For example, section 49(5) of the *Road Traffic Act 1961*, as substituted by section 10 of the *Road Traffic Amendment Act 1978*, prohibits the use of section 1(1) in connection with the offence of driving or attempting to drive a vehicle while under the influence of an intoxicating liquor or drug.

2.16 Thus, a person charged with an offence under section 49 of the 1961 Act, as amended, may not receive the benefit of section 1 of the *Probation of Offenders Act 1907* and must be disqualified from driving for a minimum period of two years (one year where the accused can prove that a special reason exists).<sup>20</sup>

2.17 In *Director of Public Prosecutions v Maughan*,<sup>21</sup> the defendant had been charged with a drink driving offence contrary to section 49 of the *Road Traffic Act 1961* as amended. The defendant received an urgent call while at home in bed indicating that his father was seriously ill in hospital and that he should attend there immediately. He was arrested on suspicion of drink driving by Gardaí while driving to the hospital. The trial judge, taking into account the circumstances of the commission of the offence, struck out the charge against the offender on the condition that he paid €200 to Victim Support. This was a clear example of the use of the Court Poor Box. The order was challenged on judicial review by the Director of Public Prosecutions.

2.18 In the High Court, Ó Caoimh J stated that merely because the defendant's father was in hospital at the time of the commission of the offence was no defence to the offence under section 49 and concluded that while the trial judge was entitled to take these factors into consideration, he had nonetheless acted in excess of his jurisdiction in striking out the charge. It is important to note that counsel for the notice party conceded that the judge had, in fact, acted in excess of jurisdiction. The case was therefore argued purely on a procedural point of delay in bringing the application for judicial review. Counsel for the notice party argued that the court should, in its discretion, refuse the relief sought however the court rejected this argument.

2.19 In quashing the acquittal, Ó Caoimh J stated:

“I am furthermore satisfied that the order made by the respondent was made in excess of jurisdiction as he was obliged at the time to determine the case before him and to proceed in accordance with the law to enter a conviction and to impose a penalty as required by law.”<sup>22</sup>

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<sup>20</sup> See section 26 *Road Traffic Act 1994*.

<sup>21</sup> High Court, 3<sup>rd</sup> November 2003.

<sup>22</sup> *DPP v Maughan*, High Court, 3<sup>rd</sup> November 2003.

2.20 While the judgment did not expressly decide that the Court Poor Box could not be used in light of the exclusion of the *Probation of Offenders Act 1907* from section 49 offences, this appears to be an inescapable conclusion. The Commission considers that since the Oireachtas expressly legislated to preclude a dismissal under section 1(1) of the 1907 Act in such a case, it would be entirely inappropriate for a court to use the Court Poor Box to achieve this prohibited outcome. To that extent, the Commission considers that this is the effect of the decision in *Director of Public Prosecutions v Maughan*. By the same token, the Commission considers that any reform of the Court Poor Box in the context of a reformed and updated 1907 Act should equally provide that its application should be excluded in those circumstances on which the Oireachtas has expressed a view since the enactment of the 1907 Act.

**(5) ‘Conviction’ for Certain Purposes**

2.21 To underline the unusual nature of a dismissal or conditional discharge under section 1(1) of the *Probation of Offenders Act 1907*, the Commission notes that such outcomes are often classified as a conviction for certain purposes. Indeed, section 1(4) of the 1907 provides:

“Where an order is made under this section by a court of summary jurisdiction, the order shall, for the purpose of revesting and restoring stolen property, and of enabling the courts to make orders as to the restitution and delivery of property to the owner and as to the payment of money upon or in connexion with the restitution or delivery, *have like effect as a conviction.*”<sup>23</sup>

2.22 Similarly, section 6(12)(b) of the *Criminal Justice Act 1993*, which governs the use of compensation orders on foot of a conviction, provides that:

“references to conviction of a person include references to dealing with a person under section 1(1) of the Probation of Offenders Act 1907”.

**C Reform of the Probation of Offenders Act 1907**

2.23 In the Consultation Paper, the Commission concluded that while the utility of the *Probation of Offenders Act 1907* is clear, certain aspects of the Act were in need of reform.<sup>24</sup> In particular, the Commission focused on section 1(3) of the 1907 Act, which empowers the sentencing court to

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<sup>23</sup> Section 1(4) *Probation of Offenders Act 1907*, emphasis added.

<sup>24</sup> See paragraphs 2.103-2.104 of the Consultation Paper.

impose a financial order on an offender in respect of whom a dismissal or conditional discharge has been entered by the court.

**(1) Limitations of Compensation Orders under section 1 of the 1907 Act**

2.24 Section 1(3) of the 1907 Act, provides:

“The court may, in addition to any such order, order the offender to pay such damages for injury or compensation for loss (not exceeding in the case of a court of summary jurisdiction [€12]<sup>25</sup> or, if a higher limit is fixed by any enactment relating to the offence, that higher limit) and to pay such costs of the proceedings as the court thinks reasonable...”<sup>26</sup>

2.25 The Commission suggested in the Consultation Paper that the increased use of the Court Poor Box as a disposition in conjunction with section 1(1) of the 1907 Act coincided with the diminishing practical value of section 1(3). It was noted also that section 1(3) appears to allow at least in principle, for payments of compensation to be made in cases where no single ‘victim’ or instances of physical loss or damage were caused. The Commission considered that the term ‘compensation for loss’ appears to place no limit on the type of loss for which damages, albeit limited to €12, can be awarded.

2.26 It is notable that the limit of €12 no longer applies where the court, in dealing with the offender under section 1(1) of the 1907 Act, orders that an offender pay compensation to an identifiable victim. A compensation order in this context is governed by the *Criminal Justice Act 1993*, under which the amount of the order is limited to €6,350, the courts jurisdiction in tort.<sup>27</sup>

**(2) General Reform of the 1907 Act**

2.27 By reforming the Court Poor Box jurisdiction in the context of a fully reformed *Probation of Offenders Act 1907*, the Commission has focused on expanding the options open to the court on the dismissal of a charge. Thus, the Commission’s principal recommendations will centre on section 1(1) of the 1907 Act.

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<sup>25</sup> The figure of €12 was inserted by the *Euro Changeover (Amounts) Act 2001*, updating the £10 in the 1907 Act as originally enacted.

<sup>26</sup> Section 1(3) *Probation of Offenders Act 1907*.

<sup>27</sup> This figure may rise to €20,000, if the provision of the *Court and Court Officers Act 2002* is brought into force. Compensation orders under the 1993 Act are discussed in detail at paragraphs 3.72-3.80 below.

2.28 The Commission is however aware that the 1907 Act could benefit from general reform as recommended by the Expert Group on the Probation and Welfare Service<sup>28</sup> and in particular, in relation to the range of options available to the court when sentencing offenders. The Expert Group recommended that a comprehensive range of non-custodial sanctions should be introduced in this jurisdiction, including but not limited to Reparation Orders, Counselling Orders, Mediation Orders, Treatment Orders, Probation Orders and Combination Orders.<sup>29</sup>

2.29 The Commission also notes the recommendations of the National Crime Council<sup>30</sup> and the National Economic and Social Forum<sup>31</sup> in relation to expanding the use of non-custodial sanctions which the Commission notes reflects international developments in this area.

2.30 The Commission is of the view that reform of the *Probation of Offenders Act 1907* should involve the introduction of a wide range of non-custodial sanctions consistent with a policy of imposing a sentence of imprisonment as a sanction of last resort. The Commission also considers that the restructuring of the Probation and Welfare Service envisaged by the Expert Group on the Probation and Welfare Service would facilitate the successful operation of a new sentencing structure as well as establishing greater integration and co-ordination between the various agencies within the criminal justice system. Non-custodial sanctions should, in line with an approach that is broadly consistent with the principles of restorative justice, address both offending behaviour and the underlying causes of criminal behaviour as well as targeting offenders who present a higher risk of recidivism.

2.31 *The Commission recommends that consideration should be given to the introduction of a comprehensive range of non-custodial sanctions in this jurisdiction. These non-custodial sanctions should include those orders recommended by the Final Report of the Expert Group on the Probation and Welfare Service 1999.*

### **(3) Basis for Statutory Reform**

2.32 The Commission now turns to the issue of reforming the Court Poor Box in the context of the *Probation of Offenders Act 1907*. Despite the

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<sup>28</sup> See *Final Report of the Expert Group on the Probation and Welfare Service*, Government of Ireland, 1999.

<sup>29</sup> These orders are discussed in detail in paragraph 3.58 above.

<sup>30</sup> See Report on '*A Crime Prevention Strategy for Ireland: Tackling the concerns of local communities*', National Crime Council, 2003.

<sup>31</sup> See *Fourth Periodic Report on the Work of the National Economic and Social Forum*, Report No. 30, November 2004. See further paragraphs 3.50-3.57 below.

significant limitations of the 1907 Act, the Commission concluded in the Consultation Paper that the 1907 Act could form the basis for reform of the Court Poor Box system.

2.33 In the Consultation Paper, the Commission recommended that a form of financial contribution could be made under a reformed *Probation of Offenders Act 1907* as an indication of the offender's remorse and earnest of intention not to re-offend. The Commission considered that this would be particularly useful in dealing with minor crimes where no identifiable victim can be found for example in relation to the large number of 'drunk and disorderly' public order offences to which the Court Poor Box is most often applied.<sup>32</sup> The Commission also recommended that greater use could also be made of the existing provisions for direct offender-victim compensation in section 6 of the *Criminal Justice Act 1993*. A financial contribution in this context could take the form of a direct payment to the victim by the offender under the 1993 Act. An obvious limitation of the 1993 Act, by contrast with section 1 (3) of the 1907 Act which is of course limited in monetary terms, is that an identifiable victim must exist before a compensation order can be made.

2.34 Accordingly, the Commission recommended in the Consultation Paper that the Court Poor Box jurisdiction be replaced by a statutory scheme based on the *Probation of Offenders Act 1907* and the *Criminal Justice Act 1993* which would provide for a revised method of avoiding a conviction for minor offences while introducing an appropriate system allowing for the making of a financial contribution.

## **D Discussion and Overview of Reform Proposal**

2.35 The Commission sees no reason to depart from the view expressed in the Consultation Paper concerning the replacement of the Court Poor Box by a statutory scheme based on the 1907 Act, and that section 1 (3) of the 1907 which deals with compensation orders should be reformed along the lines of the model for compensation orders in the *Criminal Justice Act 1993*. The Commission sets out its detailed proposals in this respect in Chapter 3.

2.36 The Commission considers that in light of the discussion of the 1907 Act earlier in this Chapter, and of the decision in *Director of Public Prosecutions v Maughan*,<sup>33</sup> another important aspect of nay reformed 1907 Act would be to ensure that the exclusions from its application enacted by the Oireachtas should be incorporated into the reformed Probation

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<sup>32</sup> See paragraph 1.02 above.

<sup>33</sup> High Court, 3 November 2003, discussed at paragraphs 2.17-2.20 above.

legislation. The Commission recommends that this form part of the combined Court Poor Box and 1907 Act reform.

*2.37 The Commission recommends that the reformed Court Poor Box and Probation of Offenders legislation should incorporate the exclusions from the scope of the Probation of Offenders Act 1907 that have been enacted by the Oireachtas.*

2.38 The Commission now turns to discuss the detailed elements of the combined Court Poor Box and the 1907 Act reform legislation which it recommends be enacted.



## CHAPTER 3 DETAILED ELEMENTS OF REFORM PROPOSAL

### A Introduction

3.01 This Chapter outlines the Commission's recommendations for reform of the Court Poor Box and the *Probation of Offenders Act 1907*. The recommendations are intended to preserve a number of important features of the Court Poor Box as a sentencing disposition and also to reform and update in appropriate respects the 1907 Act. In Part B the Commission discusses the use of the proposed disposition without entering a conviction, whether it should apply post-conviction and the factors to be considered in its application. Part C outlines the procedure for enforcement of orders under the proposed legislation as well as the situation in relation to the exclusion of certain offences from its application.

### B General Scope

#### (1) 1907 Act

3.02 As noted in Chapter 2, section 1(1) of the *Probation of Offenders Act 1907* enables the District Court as a court of summary jurisdiction, being satisfied that the charge has been proven against the defendant, to dismiss or conditionally discharge the charge taking account of a number of factors such as the age, character or mental condition of the defendant.

3.03 A distinctive feature of the 1907 Act is that it allows the District Court to dismiss a case against an offender despite being satisfied that the charge has been proven against that offender. It is therefore a prerequisite to the application of the provisions that the offence has been proven or admitted by the offender. Where the offence has not been proven, the result is an acquittal and not a dismissal under the 1907 Act. Under the current regime, a contribution to the Court Poor Box may be suggested as an appropriate sanction by the judge, by counsel for the accused, by the prosecuting Garda or even by the offender.

3.04 Currently, it appears that the Court Poor Box disposition is often applied without formally proceeding to establish the guilt of the defendant. This most often occurs where the Court Poor Box is *not* used in conjunction with section 1 of the *Probation of Offenders Act 1907*. Instead, the court

will strike out the charge against the defendant on the payment of a sum of money to a particular charity or to the Court Poor Box. The Commission considers that this approach would not be appropriate in the context of a reformed Court Poor Box.

**(2) *Scope of Reformed Legislation***

**(a) *Satisfied that the charge has been proved***

3.05 In line with the 1907 Act, the Commission proposes that the court must be satisfied of the offender's guilt before the reformed Court Poor Box jurisdiction can be applied. The Commission has noted previously that:

“[n]owadays, conviction is not always a prerequisite for the imposition of sentence; rather what is always required is a finding of guilt.”<sup>1</sup>

3.06 The Commission considers that it would be fundamentally unjust to impose a sentence or other disposition on an individual whose guilt has not been established to the satisfaction of the court. It is, therefore, a prerequisite to the application of the reformed Court Poor Box that the guilt of the offender is established or admitted to the court. The court may then decide, at its discretion, to dismiss the charge against the offender, or to dismiss the charge subject to the fulfilment of one or a number of conditions. In practice, it is often the case that defending counsel will indicate to the court that the offender is willing to plead guilty, should the court consider applying the Probation Act. This indication is without prejudice to the subsequent contesting of the case, should the court be disinclined to dismiss the charge under the 1907 Act. The Commission sees no reason to deviate from current practice in relation to the running of a plea for the application of the proposed statutory scheme. As noted by the Commission, application of the 1907 Act and its replacement is a serious reflection on the character of the defendant, given that the court must be satisfied of the defendant's guilt before the section can be applied.<sup>2</sup> In line with current practice under the 1907 Act, it would remain open to the defendant to appeal the application of the new legislation where that person is contesting the finding of guilt. The Commission therefore envisages that any orders which are attached to a conditional dismissal under the proposed new Act may, therefore, be appealed to the Circuit Court.

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<sup>1</sup> Law Reform Commission *Consultation Paper on Prosecution Appeals from Unduly Lenient Sentences in the District Court* (LRC 33-2004) at paragraph 2.04 quoting the Law Reform Commission's 1993 *Consultation Paper on Sentencing* at paragraph 1.2.

<sup>2</sup> See *Mulhall v O'Donnell* [1989] ILRM 367. For further discussion see paragraph 2.09 above.

3.07 *The Commission recommends that the reformed Court Poor Box and Probation legislation should retain the requirement in the 1907 Act that the guilt of the offender must be proved or admitted to the court before its terms can be applied.*

**(b) Without Proceeding to Conviction**

3.08 The Commission considers that another important feature of the 1907 Act should be carried forward in the new legislation namely that the conditions which the court may attach to a conditional dismissal (including payment to a statutory version of the Court Poor Box), will only be available where the offender has *not* been convicted of the offence in question.<sup>3</sup> The Commission has adopted this approach for a number of reasons.

**(i) Permanency of criminal conviction once imposed**

3.09 The *Probation of Offenders Act 1907* has operated for many years as an effective means of providing an alternative to conviction for offenders who come in contact with the criminal justice system for less culpable offences. Indeed, the positive features of the Court Poor Box disposition which have been identified by the Commission are consistent with this. The permanency of a criminal conviction once imposed is a significant factor in this context.

3.10 It is important to bear in mind that no general provision exists in the State under which certain offences may be expunged from the record after a period of time. A ‘spent conviction’ approach applies to persons under 18 years of age in accordance with the *Children Act 2001*.<sup>4</sup> The Commission addressed this issue in the Consultation Paper but concluded that, due to the complex range of issues involved, the matter warranted full consideration in a separate consultation paper. The Commission remains of that view.<sup>5</sup>

**(ii) Use of the Court Poor Box post-conviction**

3.11 The Commission has already noted that the Court Poor Box is most often used to avoid the permanent consequences of a conviction. But, contrary to this purpose, it has at times been used after conviction.

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<sup>3</sup> The issue of whether the provision can be applied to an individual who has *previously* been convicted of an offence is discussed in paragraphs 3.98-3.103 below.

<sup>4</sup> Section 258 *Children Act 2001*.

<sup>5</sup> For further discussion, see Chapter 5 of the Consultation Paper. The Commission notes the views of the National Economic and Social Forum on the issue of criminal records and discrimination where it was recommended that criminal records should be expunged after a period of time, bar certain exceptions necessitated by public safety concerns. See *Fourth Periodic Report on the Work of the NESF*, Report 30, November 2004 at 6.25.

3.12 For example, a person who pleaded guilty in the District Court to possessing child pornography contrary to section 6 of the *Child Trafficking and Pornography Act 1998* was convicted of the offence, ordered to complete 240 hours of community service in addition to being ordered to pay €40,000 to the Court Poor Box.<sup>6</sup> Section 6 of the 1998 Act provides that a person found guilty of the offence of possession of child pornography is liable on summary conviction to a fine not exceeding €1,906 or to imprisonment for a term not exceeding 12 months or to both. The Commission considers that where a court intends to impose a financial penalty in addition to community service (which is imposed as an alternative to imprisonment), that financial penalty should take the form of a fine as prescribed by the relevant legislation. The Commission notes that the appropriate maximum fine in the above case, €1,906, is payable to the Exchequer.

3.13 A contribution to the Court Poor Box is often sought in addition to dealing with the offender in another manner, for example where the offender is bound to the peace for a period of time. In a recent case tried on indictment in the Circuit Court, three men were convicted of violent disorder and were given three year suspended sentences.<sup>7</sup> In addition, they were each ordered to enter a bond of €1,000 to keep the peace for three years and to make a contribution of €2,500 to Victim Support. A fourth man was convicted of affray and given a 12 month suspended sentence and ordered to pay €2,500 to Victim Support.

3.14 Under section 15(4) of the *Criminal Justice (Public Order) Act 1994*, a person found guilty of the offence of violent disorder is liable on conviction on indictment to a fine or to imprisonment for a term not exceeding 10 years or to both. A person found guilty of the offence of affray under section 16 of the 1994 Act is liable on conviction on indictment to a fine or to imprisonment for a term not exceeding 5 years or to both. The use of the phrase ‘a fine’ in the 1994 Act indicates that no limit exists on the amount of a fine that an individual who is convicted of these offences on indictment can be ordered to pay. Accordingly, a fine in these circumstances can be adjusted to reflect the gravity of the offence as well as the means of the offender.<sup>8</sup>

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<sup>6</sup> See *Irish Times*, *Irish Independent*, and the *Irish Examiner* on 17 January 2003.

<sup>7</sup> See *Irish Times* and *Irish Independent* on 16 March 2005.

<sup>8</sup> The Commission noted in paragraphs 1.28 and 1.30 above, that the Public Accounts Committee of the Oireachtas in its consideration in March 2001 of the *Annual Report of the Comptroller and Auditor General for 1999*, expressed concerns that the Court Poor Box may be operating in a manner which deprives the Exchequer of revenue which would otherwise be imposed in the form of fines. A transcript of the Public Accounts Committee hearing is available at [www.irlgov.ie/committees-01/c-publicaccounts/010329/page1.htm](http://www.irlgov.ie/committees-01/c-publicaccounts/010329/page1.htm).

3.15 It is often argued that the Court Poor Box provides a mechanism for countering the effects of inflation on fines. For example if convicted of an offence under section 4 of the *Criminal Justice (Public Order) Act 1994* (intoxication in a public place), the maximum fine which may be imposed is €127 (£100). Certain judges may, therefore, have used the Court Poor Box system to impose a penalty in excess of this maximum rule.

3.16 While the Commission agrees that the statutory fines for certain offences may be set too low to have any real impact on the offender, it considers that the appropriate manner to address this problem is to introduce a standard fine system which would maintain the value of fines by reference to a fine index, in line with the recommendations of the Commission's *Report on The Indexation of Fines – A Review of Developments*.<sup>9</sup> The Commission considers that it is inappropriate that the courts engage in a process of 'topping-up' fines provided for by the legislature through the Court Poor Box.<sup>10</sup>

3.17 The Commission has accordingly concluded that where an offender is convicted of a criminal offence and the court rules that a financial penalty is the appropriate punishment, that financial penalty should be in the form of a fine which is payable to the Exchequer. The Commission is also strongly of the view that payments to the Court Poor Box (or its statutory replacement) should **not** be made post-conviction. The Commission recommends that this approach should be incorporated into the reformed Court Poor Box and Probation legislation.

3.18 *The Commission recommends that the reformed Court Poor Box and Probation legislation should provide that payments made by way of contribution to a reformed Court Poor Box should not be made after a conviction is entered.*

**(c) Factors to be taken into account by the court**

3.19 Section 1(1) of the *Probation of Offenders Act 1907* states that in deciding to dismiss or conditionally discharge a person, a court must have regard to the following factors:

“...the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the

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<sup>9</sup> See Law Reform Commission *Report on The Indexation of Fines – A Review of Developments* (LRC 65-2002).

<sup>10</sup> The Commission agrees with the view that:

“...[A]s a matter of principle, it cannot be right that maximum fines should be circumvented. If they are too low, the answer is to introduce legislation increasing them.”

See Lysaght “The Court Poor Box” (2004) 9 *Bar Review* 124.

extenuating circumstances under which the offence was committed...”<sup>11</sup>

Although couched in part in outdated language, the 1907 Act extends significant discretion to the District Court as to when section 1(1) can be applied. It is also consistent with the principle of proportionality by taking account of both the circumstances of the offender and of the offence.

3.20 The Commission considers that the broad discretion afforded in the 1907 Act should be retained in any reformed probation legislation. The considerations which the court may have regard to should, the Commission considers, be expanded to include those factors identified in the Consultation Paper<sup>12</sup> as influencing the court in its decision to apply the Court Poor Box, which indeed broadly reflect those which are contained in the 1907 Act. The factors identified in the Consultation Paper based on an analysis of the application of the Court Poor Box, were as follows:

- (a) The nature of the offence and in particular,
  - (i) whether having regard to all the relevant circumstances, the offence is trivial in nature,
  - (ii) whether the offender caused any injuries to other persons and if so, the nature and extent of such injuries,
  - (iii) whether the offender caused any injuries to animals and if so, the nature and extent of such injuries,
  - (iv) whether the offender caused any damage to property,
  - (v) whether there are extenuating circumstances under which the offence was committed; and
- (b) The personal circumstances of the offender and, in particular, his or her:
  - (i) character,
  - (ii) family circumstances,
  - (iii) age,
  - (iv) health; and
- (c) The need to avoid an injustice, whether to the offender or to the victim.

3.21 Under the reformed Court Poor Box and probation legislation, the court would have extensive discretion to apply a sentence which fits both the

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<sup>11</sup> Section 1(1) *Probation of Offenders Act 1907*.

<sup>12</sup> See paragraphs 1.21-1.32 of the Consultation Paper.

nature and circumstances of the offence and the personal circumstances of the offender. The Commission considers that the flexible range of sanctions which would thus be available would ensure that the disposition is tailored to ensure that the offender receives the appropriate admonishment for the offence committed.

3.22 *The Commission recommends that the factors to be taken into account in the application of a reformed Court Poor Box and probation legislation reflect a combination of those which currently form the basis of the Court Poor Box disposition and those set down in the 1907 Act, namely:*

*(a) The nature of the offence and in particular,*

*(i) whether having regard to all the relevant circumstances, the offence is trivial in nature,*

*(ii) whether the offender caused any injuries to other persons and if so, the nature and extent of such injuries,*

*(iii) whether the offender caused any injuries to animals and if so, the nature and extent of such injuries,*

*(iv) whether the offender caused any damage to property,*

*(v) whether there are extenuating circumstances under which the offence was committed; and*

*(b) The personal circumstances of the offender and, in particular, his or her:*

*(i) character,*

*(ii) family circumstances,*

*(iii) age,*

*(iv) health; and*

*(c) The need to avoid an injustice, whether to the offender or to the victim.*

## **C Forms of Dismissal and Orders available under the proposed legislation**

### **(1) Summary of the Current Position**

3.23 The limited sentencing options open to the District Court where the decision is made to deal with an offender under section 1(1) of the 1907 Act have been discussed in detail in Chapter 2. In summary, the court may make either an order under section 1(1)(i) of the 1907 Act dismissing the information or charge or an order under section 1(1)(ii) discharging the offender conditionally on his entering into a recognizance to be of good behaviour and keep the peace for a period not exceeding three years. Section 1(3) of the 1907 Act enables the court to order that the offender pays the costs of the proceedings and to impose a financial penalty in the form of damages for injury or compensation for loss, subject to a limit of €12 which was set in the 1907 Act and has not been amended since.

3.24 The €12 limit in the 1907 Act has, to some extent, been overtaken by section 6 of the *Criminal Justice Act 1993* which established a system of compensation orders including where section 1(1) of the 1907 Act is applied. In the case of the District Court, the amount of a compensation order is limited to €6,350 (the jurisdiction in tort of that court).<sup>13</sup> It is important to note however that compensation orders are only available under the 1993 Act where an identifiable victim exists. Where no identifiable victim exists, for example in cases involving animal neglect or cruelty, the amount of compensation payable where section 1(1) is applied still stands at €12.

### **(2) Full Dismissal and Conditional Dismissal**

3.25 The changes being recommended by the Commission aim to establish a comprehensive system for dealing with less culpable offenders by incorporating a more diverse range of sentencing options tailored to suit the particular offences as well as the particular offender.

3.26 Under the scheme which the Commission proposes should replace section 1(1) and 1(3) of the 1907 Act, the court may make one of the following orders:

- i) **Full Dismissal** (comparable to a dismissal under section 1(1)(i) of the 1907 Act); or
- ii) **Conditional Dismissal** (comparable to conditional discharge under section 1(1) (ii) of the 1907 Act).

3.27 The Commission considers that the powers of the court under section 1(3) of the 1907 Act should, for the most part, be retained in the new

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<sup>13</sup> This may rise to €20,000 if the relevant provisions of the *Court and Court Officers Act 2002* are brought into force by a commencement order.

legislation. It is important to note that the dismissal or conditional discharge of an offender under section 1(1) of the 1907 Act is *not conditional* on the fulfilment of any order made under section 1(3), in other words, the orders under section 1(3) are not equivalent to conditions. The Commission is of the view that this feature should be retained in the proposed new scheme.

3.28 Where a ‘conditional dismissal’ is ordered, the Commission envisages that the power to order that the defendant pay the costs of the proceedings (as under section 1(3) of the 1907 Act) and make a compensation order (which would not be limited to €12 as is the case under the 1907 Act), would remain. In addition, the Commission proposes that the new legislation would empower the court to order the person to enter into a recognizance to be of good behaviour and to keep the peace for a period of time, with or without sureties (similar to the 1907 Act) and also to make a payment to a reformed Court Poor Box. The Commission moves now to discuss each of these elements.

**(3) Full Dismissal**

3.29 The Commission considers it appropriate to put in place the power to order the full dismissal of a charge with no conditions attached. The Commission considers that it is essential that a clear distinction be drawn between a full dismissal and a dismissal involving conditions which must be fulfilled before the dismissal becomes final.

3.30 Under the reformed Probation Act which is proposed by the Commission, the provision for a ‘full dismissal’ would remain. This allows the court, being satisfied that the charge has been proven against the offender, to dismiss the charge *unconditionally* with the result that no conviction is recorded against that offender. The Commission considers that the full dismissal may not be used with particular regularity, given that the proposed ‘conditional dismissal’ (discussed below) would allow for greater flexibility with regard to the conditions which may be imposed. Nonetheless, the Commission has concluded that it is necessary to distinguish between a ‘full dismissal’, to which no conditions may be attached, and a ‘conditional dismissal’, in respect of which conditions must be fulfilled before the charge is dismissed.

*3.31 The Commission recommends that the reformed Court Poor Box and probation legislation should include provision for the full dismissal of a charge with no conditions attached.*

**(4) Conditional Dismissal**

3.32 As already mentioned, the Commission aims to introduce a range of flexible conditions which may be applied to a dismissal and which can be tailored to suit the particular offender as well as the particular offence which would integrate the current Court Poor Box into the reformed Probation

legislation. Before examining these conditions, the Commission considers whether the Court Poor Box should be renamed in light of this broader context. The conditions which may be attached to a dismissal are examined in detail below.

**(a) *Financial Reparation Order replacing the Court Poor Box***

3.33 This Commission now turns to the issue of whether the Court Poor Box disposition should be renamed in light of the context in which it is to be reformed. The Commission believes that the title of the disposition should reflect the purpose for which the disposition is applied, namely to impose a financial sanction on certain offenders for whom the consequences of a conviction may be unduly harsh. In many circumstances, the monetary contribution by the offender is by way of reparation for the harm caused by the offending behaviour.<sup>14</sup> Thus the Commission considers that ‘Financial Reparation Order’ would be a suitable title for the disposition which is to be incorporated into a reformed *Probation of Offenders Act*. Furthermore, the Commission is of the opinion that the centralised statutory fund into which all ‘Financial Reparation Orders’ are to be paid, should be called the ‘Reparation Fund’. The administration and management of the fund is dealt with in Chapter 4.

3.34 *The Commission recommends that an order for payment to the reformed Court Poor Box should be renamed a ‘Financial Reparation Order’. The Commission also recommends that the fund into which all ‘Financial Reparation Orders’ are to be paid should be named the ‘Reparation Fund’.*

**(i) *Circumstances in which an offender may be ordered to pay a Financial Reparation Order***

3.35 A payment to the proposed Reparation Fund may arise where the court decides that it would be inappropriate, having regard to the circumstances, to convict the offender of the offence in question. The Court however, must be satisfied of the offender’s guilt before the matter can be conditionally dismissed under the terms of the Commission’s proposed reformed Court Poor Box and probation legislation.

3.36 In certain cases, it may be appropriate to impose a monetary sanction on an offender, even where no single victim of the offence exists. Under the current Court Poor Box system, a judge may ask a defendant to make a contribution to a particular charity, and to produce a receipt in court, in which case the case would then be struck out against the offender. In others cases, the defendant may be asked to pay the money into the court for distribution by the court to various charities at a later date. The Commission

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<sup>14</sup> See paragraph 4.11 below.

proposes that a statutory Reparation Fund be set up into which all such payments would be made.<sup>15</sup>

**(ii) Amount to be paid to the Reparation Fund**

3.37 The Commission considers that no minimum amount should be set for payments to the Reparation Fund. The Commission considers that the decision of the court to deal with an offender under the reformed Court Poor Box and probation legislation should not be influenced in any way by an offender's ability to make a substantial contribution. Taking account of the circumstances of the offender as well as the offence, the Commission notes that the court, in its discretion, may decide that a payment of €20 would be an appropriate sanction in a particular case. On the other hand, where the offender has the means to make a more substantial contribution, it may be appropriate to order that the offender contribute say, €1,000.

3.38 The Commission considers that a maximum figure should be placed on the amount of money that an offender can be ordered to contribute. In the Consultation Paper, the Commission provisionally recommended that the maximum amount which may be paid by an offender should not be greater than the jurisdiction in tort of the court in question, in this case, the District Court. This figure currently stands at €6,350, but may rise to €20,000 if the relevant provisions of the *Court and Court Officers Act 2002* are brought into force.

3.39 Having considered the matter further, the Commission has concluded that the figure should be set *below* the tort jurisdiction. There are a number of reasons for this. Firstly, the provisions of the proposed legislation would only apply where the decision is made *not to convict* the offender. It will also only be applied in the District Court and will, therefore, only be applied in relation to offences of a less serious nature and never to those offences which warrant a significant fine or imprisonment. Thus, when dealing with a minor offence, it could be considered unduly harsh to order that the offender pay up to €6,350 (a figure which may rise to €20,000 if the relevant provisions of the *Court and Court Officers Act 2002* are commenced). The Commission has therefore concluded that a maximum payment of €5,000 should be specified in the reformed Court Poor Box and probation legislation. The Commission recommends that this amount should be index-linked at 5 year intervals.<sup>16</sup>

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<sup>15</sup> The administration and management of this statutory fund is discussed in Chapter 4 below.

<sup>16</sup> See recommendations on index-linking in the Commission's *Report on a Revenue Court and Fiscal Prosecutor* (LRC 73-2004) as implemented in the 5 year index-linking provision in section 143 of the *Finance Act 2005*.

3.40 The second reason for this view is that the Commission is anxious to ensure that payments to the Reparation Fund are not linked or likened in any way to the payment of compensation. Where the court is of the opinion that compensation should be paid by the offender, the order is governed by the *Criminal Justice Act 1993* thereby limiting payment to the victim of the offence only. A payment to the Reparation Fund should not be equated with the payment of compensation and should not, therefore, be governed by the same rules. Additionally, the consequences of failing to pay the compensation due and failing to pay the amount owed to the Reparation Fund are different. In the latter case, the offender will be prosecuted for the original offence.<sup>17</sup>

3.41 *The Commission recommends that a limit of €5,000 (index-linked at 5 year intervals) should be placed on the amount that an offender can be ordered to contribute to the Reparation Fund but that no minimum figure should be prescribed.*

**(b) ‘Binding over’ the offender subject to expanded range of conditions**

3.42 The power of the courts to bind an offender to the peace and to be of good behaviour has long been a useful and flexible sentencing tool in this jurisdiction, particularly in relation to less serious offences. Typically, the offender is ordered to enter into a bond (known as a recognizance) with the court to be of good behaviour and to keep the peace for a period of time which is specified in the order. Thus, section 1 (1)(ii) of the *Probation of Offenders Act 1907* provides that an offender may be discharged conditionally on his entering into a recognizance to be of good behaviour for a period not exceeding three years.

3.43 Certain conditions may be attached to a recognizance under section 2(2) of the 1907 Act as amended, which may require the offender to provide a surety or which place restrictions on the areas which the offender may frequent or ordering that the individual obey a curfew.<sup>18</sup>

3.44 The common law power to bind to the peace was carried over in section 54 of the *Courts (Supplemental Provisions) Act 1961*.<sup>19</sup> In *Gregory*

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<sup>17</sup> Part D below sets out the situation with regard to non-compliance with the conditions of a conditional dismissal.

<sup>18</sup> See paragraph 2.07-2.08 above.

<sup>19</sup> Section 54 of the *Courts (Supplemental Provisions) Act 1961* provides:

“The jurisdiction formerly exercised by the justices of the peace to make an order binding the person to the peace or to be of good behaviour or to both...and requiring him to enter a recognizance in that behalf may be exercised by...a [judge] of the District Court...”

*and Ors v Windle*,<sup>20</sup> the High Court rejected a constitutional challenge to section 54 of the 1961 Act. In this case, the plaintiffs had been found guilty of using threatening or abusive or insulting behaviour with intent to provoke a breach of the peace or whereby a breach of the peace might be occasioned, contrary to section 14, of the *Dublin Police Act 1842* (since replaced by section 6 of the *Criminal Justice (Public Order) Act 1994*). They were ordered to keep the peace and be of good behaviour for six months, with the requirement that they provide a surety of £1,000 in the case of two plaintiffs and £500 in the case of the third. A term of imprisonment was specified in the case of each defendant in default. Each plaintiff subsequently failed to enter the recognizance and a warrant was issued for their arrest and imprisonment.

3.45 The plaintiffs submitted that the orders provided for preventative detention, which was repugnant to the provisions of the Constitution and that the common law power of the magistrates to bind over to the peace had not survived the enactment of the Constitution. O’Hanlon J rejected this argument and concluded that the power vested in the courts to bind persons to keep the peace or to be of good behaviour and to require them to enter bonds or to provide sureties for that purpose was beneficial and necessary which, if exercised prudently and with discretion, did not conflict with the constitutional guarantee of personal liberty, and had therefore, survived the enactment of the Constitution. He also held that an order binding a person to keep the peace might be quashed if its conditions were unnecessarily harsh, unreasonable having regard to the situation and circumstances of the individual concerned, or represented a clear misuse of the authority of the judge.

**(i) Power to bind over under a reformed Court Poor Box and Probation legislation**

3.46 The Commission considers that a power to bind the offender to keep the peace and be of good behaviour for a period of time should form an integral part of the reformed Court Poor Box and Probation legislation. The Commission proposes some minimal changes to the power to ‘bind over’ under the proposed legislation.

3.47 Under the Commission’s proposal, the decision to bind the offender to the peace will be reached having regard to the factors and circumstances set out in the proposed legislation, rather than on the basis of a conviction for the offence in question. Where an offender enters such a recognizance, the offence is considered to be conditionally dismissed and once the period of the recognizance has expired and its conditions abided by, the offence becomes fully dismissed. Where a breach of the terms of the

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<sup>20</sup> [1994] 3 IR 613.

recognizance has taken place, the offender may be prosecuted for the original offence.

3.48 The Commission considers that the jurisdiction which allows offenders to be bound to the peace is particularly useful for dealing with less serious offenders where minimal supervision may be necessary to ensure that re-offending does not occur. In many cases, it will be sufficient to simply bind the offender to the peace for a period of time. In certain situations however it may be necessary to add an extra element to the recognizance.<sup>21</sup> Recognising the need to tailor punishment to fit the particular offender as well as the offence, the Commission proposes that a recognizance under the reformed legislation be entered into as an agreement between the offender and the court with specific conditions added if necessary to suit the particular offender. For example, where the offence is one which was committed while under the influence of alcohol, or which involves the abuse of alcohol, the court may make it a condition of the recognizance that the offender attends an alcohol awareness programme (as is the case under the 1907 Act). Similarly the recognizance may provide that the offender refrain from frequenting certain areas, or that a curfew be obeyed. The Commission notes that, in practice, many of these conditions are used on a regular basis by the courts in dealing with offenders.

(I) *Non-custodial sanctions*

3.49 The Commission notes that some progress has been made as regards the development a comprehensive national strategy towards the greater use of non-custodial and community based sanctions,<sup>22</sup> which the Commission notes is consistent with international developments. Innovations such as Reparation Programmes, Rejuvenation Projects and other community –based initiatives which operate in certain areas throughout the country have had a significant impact on communities in which they operate. In addition, certain practices have developed in the courts which aim to keep the offender out of custody, such as supervision during deferment of penalty. Despite these efforts however, there is a lack, at least on a practical level, of any concerted drive towards adopting this proven sentencing approach.

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<sup>21</sup> Certain conditions may be attached to a recognizance under section 2(2) of the *Probation of Offenders Act 1907*. These are outlined at paragraphs 2.07 and 2.08 above.

<sup>22</sup> In a Value for Money Report on the Probation and Welfare Service, the Comptroller and Auditor General commented on the lack of developments regarding the use of non-custodial sanctions. See *Comptroller and Auditor General, Report on Value for Money Examination: The Probation and Welfare Service*, Department of Justice, Equality and Law Reform, Government of Ireland, 2004 at 59.

3.50 Research has shown that even established non-custodial sanctions such as Community Service Orders<sup>23</sup> are under-used penalties, principally due to a lack of resources for implementing them.<sup>24</sup> The *Children Act 2001*,<sup>25</sup> where restorative justice concepts are a central theme, is a prominent example of a criminal justice policy based on the lowest level of intervention to aid better reintegration of young offenders, with cautioning, diversion programmes<sup>26</sup> and family conferencing the preferred methods of dealing with young offenders. In practice, however, the Commission accepts that a lack of resources has deeply affected operation of these aspects of the Act.

(II) *The Report of the Expert Group on the Probation and Welfare Service*

3.51 The Expert Group on the Probation and Welfare Service was established by the Department of Justice, Equality and Law Reform to examine the role, needs and organisational status of the Probation and Welfare Service.<sup>27</sup> The Expert Group reported in 1999 and concluded that there are significant reasons for enhancing the role of non-custodial sanctions in Irish criminal justice policy.

“The Group is of the view that in the context of a falling crime rate, an increasing detention rate and an increase in custodial

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<sup>23</sup> The Expert Group on the Probation and Welfare Service recommended that the Community Service Order should be available both as an alternative to imprisonment and as a sanction in its own right. The Expert Group qualified this by suggesting that the imposition of a Community Service Order as a sanction in its own right should be considered at the higher end of the hierarchy of non-custodial sanctions and should be used with discretion. See *Final Report of the Expert Group on the Probation and Welfare Service*, Government of Ireland, 1999 at 2.4.

<sup>24</sup> Research by the Irish Penal Reform Trust on sentencing in the District Court found that community service orders were under-used sanctions. The Trust noted that:

“The fullest possible use should be made of existing measures such as community service orders (CSOs) and probation orders. This should be facilitated by increased resourcing of the Probation and Welfare Service.”

See Irish Penal Reform Trust: *Research Brief: Sentencing in the District Courts, 2003* available at [www.iprt.ie/iprt/print/1144](http://www.iprt.ie/iprt/print/1144).

<sup>25</sup> See *Children Act 2001*, parts 2 and 4.

<sup>26</sup> Section 19 (1) of the *Children Act 2001* states that the objective of the diversion programme is “to divert from committing further offences any child who accepts responsibility for his or her criminal behaviour.”

<sup>27</sup> *Final Report of the Expert Group on the Probation and Welfare Service*, Government of Ireland, 1999.

sanctions, an opportunity now exists to develop and enhance the established credibility of non-custodial sanctions.”<sup>28</sup>

3.52 The Group identified a number of purposes of non-custodial sanctions namely, the deterrence of offenders, rehabilitation of offenders, protection of the community, benefiting the community and the offender through interaction and providing cost effective<sup>29</sup> alternatives to imprisonment. The Group recommended that the *Probation of Offenders Act 1907* be repealed and new legislation be enacted which would provide for inter alia, a range of non-custodial sanctions such as Treatment Orders, Mediation Orders, Reparation Orders, Counselling Orders and Combination Orders.<sup>30</sup>

3.53 The Commission supports the view of the Expert Group and believes that reform of section 1(1) of the 1907 Act as proposed in this Report would be consistent with the approach adopted by the Group in relation to reform of the *Probation of Offenders Act 1907*.

3.54 The Expert Group noted that non-custodial sanctions allow for a system of graduated punishments which may be more appropriate than either probation or prison for some offenders. The Group also noted that many non-custodial sanctions maintain a higher level of offender restraint and accountability as well as providing enhanced levels of treatment or services for problems that are common among offenders such as drug abuse, low education levels and unemployment. The issue of ‘net-widening’ was also addressed in the Report of the Expert Group. It was noted that, where applied incorrectly, for example to offenders who would otherwise have received a lesser sentence such as a fine, non-custodial sanctions can have:

“...[T]he effect of escalating some offenders up the sentencing tariff and widening the net of the criminal justice system to bring more people into the correctional system and ultimately into prison.”<sup>31</sup>

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<sup>28</sup> See *Final Report of the Expert Group on the Probation and Welfare Service*, Government of Ireland, 1999 at 1.6.

<sup>29</sup> With regard to the cost of implementing non-custodial sanctions, the Expert Group cautioned that;

“...[W]hat can appear to be highly cost effective in non-custodial projects can often be difficult to replicate in mainstream delivery, because they depend on highly motivated individuals with substantial voluntary input which is not included in the cost analysis.”

See *Final Report of the Expert Group on the Probation and Welfare Service* at 1.7.

<sup>30</sup> *Ibid* at paragraph 2.3.

<sup>31</sup> See *Final Report of the Expert Group on the Probation and Welfare Service*, Government of Ireland, 1999 at 1.8.

3.55 The Group cautioned that such sanctions cannot be effective at achieving their objectives if introduced in isolation; rather they must be accompanied by a coherent sentencing strategy on a national and local level. Non-custodial sanctions will only be effective in the long term if applied appropriately. The Group was of the view that appropriately targeted, focused, structured and implemented programmes can work with some offenders. The Commission supports this view and reiterates the need for the development sentencing approach which aims to achieve a rational, efficient and cost-effective criminal justice system

3.56 The Commission notes that other jurisdictions such as England and Wales operate a range of non-custodial sanctions including community service, drug or alcohol treatment, residential orders or curfew orders which aim to punish the offender while reducing re-offending and addressing offending behaviour. The National Crime Council, in a Report published in 2003, included a recommendation in relation to the expansion of non-custodial options, both for adult and juvenile offenders alike.<sup>32</sup> A Report by the National Economic and Social Forum in 2004<sup>33</sup> also recommended that a range of actions should be taken to increase awareness and use of non-custodial sanctions.

**(ii) Conditions of a Recognizance under the proposed legislation<sup>34</sup>**

The Commission considers that a recognizance under the proposed legislation should, where appropriate, take account of more recent developments in the area of non-custodial sanctions including those orders referred to in the *Final Report of the Expert Group on the Probation and Welfare Service* namely, counselling orders, exclusion orders, mediation orders, reparation orders, residence orders, treatment orders<sup>35</sup> and a

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<sup>32</sup> See Report on 'A Crime Prevention Strategy for Ireland: Tackling the concerns of local communities', National Crime Council, 2003.

<sup>33</sup> *Fourth Periodic Report on the Work of the National Economic and Social Forum*, Report No. 30, November 2004.

<sup>34</sup> See *Final Report of the Expert Group on the Probation and Welfare Service*, Government of Ireland, 1999.

<sup>35</sup> The Commission notes the views of the National Economic and Social Forum with regard to health and treatment services for offenders. The NESF recommends that:

“A strategic plan for the treatment of prisoners with mental health problems and substance abuse and/or alcohol problems should be designed and implemented, in the context of sentence planning.”

The Commission considers that the strategic plan referred to above should be implemented in relation to all offenders. See *Fourth Periodic Report on the Work of the National Economic and Social Forum*, Report No 30, November 2004 at 3.23.

combination of these orders.<sup>36</sup> A counselling order would be an order which requires a person to undergo and complete a course of counselling which would, in the opinion of the court, facilitate the rehabilitation of the offender or reduce the likelihood of the commission of further offences by the offender. An exclusion order is an order which prohibits a person from entering or being in the vicinity of a specified area or individual between such times, and during such period as the court may specify.<sup>37</sup> A mediation order is an order under which the court would nominate a mediator who provides a means of communication between those affected by crime and the offender. A reparation order is an order which requires a person to enter into an arrangement with the court or the Probation and Welfare Service to perform certain services or to act or make such payments which, in the opinion of the court, will have the effect of making good any harm that has been caused by the offender. A residence order is an order under which a person would be required to be at a specified residence between specified times during a specified period not longer than 12 months in duration.<sup>38</sup> A treatment order is an order which would require a person to undergo treatment including, but not limited to, treatment for drug and alcohol addictions.<sup>39</sup>

3.57 The Commission recognises that many of these orders are used in practice by the courts, and supporting the view of the Expert Group, recommends their formal integration into the criminal justice system. The Expert Group recommended that such orders should be in the form of a “Probation Order” and should only be made with the agreement of the offender. It was further recommended that the offender should be under the supervision of the Probation and Welfare Service at all times and that such orders be treated as final orders of the court resulting in the court having no further role in the matter unless the offender is brought back to court by way of a summons.<sup>40</sup>

3.58 The term ‘Probation Order’ which is used by the Expert Group describes an order which is made under the *Probation of Offenders Act 1907* requiring the offender to be under the supervision of the Probation and

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<sup>36</sup> Such orders are, in fact, being used in practice by the courts and placing such orders on a statutory footing as recommended in the *Final Report of the Expert Group on the Probation and Welfare Service* (Government of Ireland, 1999) would simply have the effect of clarifying current practice.

<sup>37</sup> Exclusion orders are defined in section 3 of the *Criminal Justice (Public Order) Act 2003*.

<sup>38</sup> Residence orders are defined in section 133 of the *Children Act 2001*.

<sup>39</sup> Treatment orders are defined in section 28 of the *Misuse of Drugs Act 1977*.

<sup>40</sup> See *Final Report of the Expert Group on the Probation and Welfare Service*, Government of Ireland, 1999 at 2.9.

Welfare Service for a period of not more than 3 years.<sup>41</sup> The term ‘Probation Order’ therefore refers to the recognizance which is entered into by the offender under either section 1(1) or section 1(2) of the 1907 Act. The principle difference between these two orders is that a recognizance under section 1(1) once fulfilled does not attract a criminal conviction, whereas a recognizance entered into under section 1(2) may only be entered post-conviction.<sup>42</sup> It would appear then that where the Expert Group refers to a ‘Probation Order’, it means an order in the context of both conviction and dismissal. For the purpose of this Report, the Commission focuses on the development and use of recognizances and indeed, non-custodial sanctions in the context of an offender who has been *dismissed* under the proposed new scheme.

3.59 *The Commission recommends that the reformed Court Poor Box and Probation legislation should include the orders referred to in the Final Report of the Expert Group on the Probation and Welfare Group namely, counselling orders, mediation orders, reparation orders, treatment orders, and combination orders.*

**(iii) Supervision of the Probation and Welfare Service**

3.60 The Commission fully supports the recommendations of the Expert Group with regard to the development and integration of a range of non-custodial sanctions. However the Commission is of the view that it may not be necessary to engage the services of the Probation and Welfare Service in all cases where the Court is minded to impose a non-custodial sanction. In particular, where an offence is dealt with by way of a conditional dismissal under the proposed reformed section 1 (1), the Commission considers that the involvement of the Probation and Welfare Service should be a matter for the discretion of the court. Where the offence is a minor one and the offender has shown genuine remorse and willingness to change, the supervision of the Probation and Welfare may be excessive and unnecessary. On the other hand where an offender has been convicted of an offence, the Commission believes that the direction of the Probation and Welfare Service is necessary in order to ensure that a suitable non-custodial sanction is imposed.

3.61 *The Commission recommends that where the court imposes a sanction on an offender conditionally dismissed under the proposed reformed Probation legislation, the question of whether the offender should be placed under the supervision of the Probation and Welfare Service should be a matter for the discretion of the court.*

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<sup>41</sup> See *Final Report of the Expert Group on the Probation and Welfare Service*, Government of Ireland, 1999 at paragraph 2.6.

<sup>42</sup> See paragraph 2.03 above.

**(iv) Reasonable and appropriate conditions**

3.62 The conditions of a recognizance must, at all times, be reasonable having regard to the situation and circumstances of the accused. Indeed, as O’Hanlon J noted in *Gregory v Windle*<sup>43</sup>, an order binding a person to the peace where the conditions are unnecessarily harsh or unreasonable is liable to be quashed on judicial review. When attaching conditions to a recognizance, the court must take account of the nature of the offender and the offence and apply an appropriate sanction having regard to these factors. The sanction should at all times reflect the seriousness of the offence. In its 1999 Report, the Expert Group cautioned that non-custodial sanctions can only be successful in addressing offending behaviour if applied appropriately.

3.63 In this regard, the Commission considers it is important that an appropriate time limit be set on the duration of the recognizance and it should be made clear that to the offender that breach of the recognizance will result in prosecution for the original offence. Section 2(3) of the 1907 Act already requires the court to bring the specific conditions of the recognizance to the notice of the offender. This important feature would be carried forward in the legislation which is proposed by the Commission. Furthermore, in line with the 1907 Act, the court may vary or discharge the terms of a recognizance on the application by the offender where the court considers it expedient to do so.

**(v) Conclusion**

3.64 The Commission recommends that the reformed legislation which would include a provision whereby an offender can, in appropriate circumstances, avoid a conviction by agreeing to be bound to the peace for a period of time, must be open to all who appear before the courts, regardless of their financial status. The Commission considers that in line with the 1907 Act, a recognizance under the reformed legislation may be entered into *with or without sureties*. This would take account of the perception that the Court Poor Box operates in a manner that makes it more accessible to those with the means to make a contribution, rendering it less accessible to those of limited means. Where the court makes the decision that the offender should be bound to the peace for a period of time, it will remain at the discretion of the court whether or not the offender should enter into a surety to that effect. The Commission accordingly recommends that the reformed Court Poor Box and probation legislation should include the option of imposing non-financial sanctions on minor offenders.

3.65 *The Commission recommends that the reformed Court Poor Box and Probation legislation should include a provision which enables the*

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<sup>43</sup> [1994] 3 IR 613.

*court to bind an offender to the peace and to be of good behaviour for a period of time, with or without sureties, and which also empowers the court to additional relevant conditions including counselling orders, exclusion orders, mediation orders, reparation orders, residences orders, treatment orders and combination orders.*

**(5) Further Orders: Costs and Compensation Orders**

3.66 The Commission considers that the powers which are available to the court under section 1(3) of the 1907 Act should be carried forward in proposed amended Probation legislation.<sup>44</sup> The Commission proposes that an offender dealt with by way of a full dismissal or conditional dismissal under the proposed legislation, should be liable to pay the costs of the proceedings or compensation to an identifiable victim, where the court thinks it reasonable and appropriate to do so. In line with current practice, the Commission considers that such orders would exist as separate and final orders of the court but not as conditions to the dismissal of a charge. Therefore, should an individual default in the payment of the costs or compensation, the enforcement procedures will not involve prosecution for the original offence as is the situation with non-fulfilment of a condition of a conditional dismissal.<sup>45</sup> Instead, the order will be enforced in the same manner as any other order of the court. The Commission now turns to examine each of the orders in detail.

**(a) Costs of the proceedings**

3.67 As mentioned, section 1(3) of the 1907 Act already allows the court to order that the offender “pay such costs of the proceedings as the court thinks reasonable”. However, this provision is rarely used and the Commission is of the opinion that it is undervalued as an effective sanction for dealing with less culpable offenders.

3.68 Over 90% of criminal prosecutions are dealt with in the District Court. In 2003, this amounted to 385,375 criminal cases. Statistics reveal that 247,894 of those criminal matters were disposed of by way of “probation, peace bond, strike out, adjourn generally, taken into consideration and dismiss”.<sup>46</sup> Where an offender is dealt with in these ways, it would appear to indicate that, having regard to all the circumstances, the offence is of a less serious nature and, therefore, one which warrants a modest sanction. Regardless of the sanction imposed in an individual case,

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<sup>44</sup> Section 1(3) of the 1907 Act is analysed in detail in paragraphs 2.24-2.26 above.

<sup>45</sup> The consequences of non-compliance with the conditions of a conditional dismissal are discussed in Part D below.

<sup>46</sup> All statistical information is taken from the *Annual Report of the Courts Service 2003*, available at [www.courts.ie](http://www.courts.ie).

significant financial costs are incurred by the Exchequer on behalf of all taxpayers in processing such criminal matters.

3.69 The Commission considers that it is important that the offender should be confronted with the consequences of their actions from the point of view of cost in terms of time and money. The Commission considers that the power to order that the offender pay the costs of the prosecution should be available on the dismissal or conditional dismissal of a case under reformed Court Poor Box and probation legislation. Under the proposed new legislation, the court may decide, having regard to the circumstances of the offender and the offence, to order that the costs of the proceedings are paid by the offender. The costs must be of such an amount that the court thinks reasonable in the circumstances and in making such an order, the court must have regard to the means of the offender. The amount, so ordered, may be appealed to the Circuit Court.

3.70 *The Commission recommends that where the circumstances allow and the court sees fit to do so, offenders dismissed under a reformed Court Poor Box and probation legislation, should be ordered to pay such costs of the proceedings as the court thinks reasonable.*

**(b) Compensation orders<sup>47</sup>**

3.71 The Consultation Paper examined the issue of compensation orders under section 6 of the *Criminal Justice Act 1993* and their connection to the *Probation of Offenders Act 1907*.<sup>48</sup> As noted previously, a provision for compensation already exists in section 1(3) of the *Probation of Offenders Act 1907*, but is limited to €12. This limit has been amended to some extent by the subsequent introduction of a scheme for compensation orders under section 6 of the 1993 Act, but this limits payments to situations where an identifiable victim exists. Under section 1(3) of the 1907 Act by contrast, the court may order that the offender pay damages for injury or compensation for loss, with no stipulation that the compensation be paid to an identifiable victim.

3.72 While the 1907 Act is, in this respect, more wide-ranging in scope than the 1993 Act, the €12 limit on the 1907 Act has, in the Commission's view, rendered it obsolete and may also have contributed to the increased use of the Court Poor Box. The Commission has concluded that the principle in

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<sup>47</sup> See further *Order 33, District Court Rules 1997* which deals with compensation orders.

<sup>48</sup> See paragraphs 2.98-2.105 of the Consultation Paper. The provisions in section 6 of the 1993 Act replaced more limited provisions in the *Criminal Damage Act 1991*, which were introduced on foot of the Law Reform Commission's *Report on Malicious Damage* (LRC 26-1988).

the 1907 Act should be retained in the reformed Court Poor Box and probation legislation, without the €12 limit of the 1907 Act.

**(i) Compensation orders under the Criminal Justice Act 1993**

3.73 The payment of compensation under the 1993 Act is limited to persons who have been convicted of a criminal offence, though section 6 (12) (b) of the 1993 Act<sup>49</sup> states that this includes person dealt with under section 1(1) of the 1907 Act.

3.74 Under the 1993 Act, a compensation order may be made instead of, or in addition to, dealing with an offender in any other way and is made in respect of any injury or loss resulting from the offence *to any person who has suffered such injury or loss*.<sup>50</sup> A compensation order may be of such amount as the court considers appropriate having regard to any evidence or representations made on behalf of the convicted person or the injured party, and may not exceed the amount of damages that, in the opinion of the court, the injured party would be entitled to recover in a civil action against the accused.<sup>51</sup> Where such an order is made in the District Court, the amount of the order may not exceed the jurisdiction in tort of that court.<sup>52</sup>

3.75 Under section 6(5) of the 1993 Act, the court must have regard to the means of the convicted person as they appear or are known to the court and that person may give evidence as to his means or financial commitments. Compensation may also be paid in instalments in which case payments are made to the District Court clerk for transmission to the injured party.<sup>53</sup> Section 7 of the 1993 Act provides for the use of attachment of earning orders under Part III of the *Family Law (Maintenance of Spouses and Children) Act 1976* in order to secure payment of the compensation.

3.76 The amount of a compensation order may be varied on application by the injured party (where the convicted person has been given the opportunity to make representations), if it appears to the court that there has been a substantial increase in the means of the convicted person.<sup>54</sup> The convicted person may also apply to have the amount of the order reduced where it can be shown that his means are insufficient to satisfy the order in

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<sup>49</sup> Section 6 (12)(b) of the *Criminal Justice Act 1993* provides:

“reference to the conviction of a person include references to dealing with a person under section 1(1) of the Probation of Offenders Act 1907.”

<sup>50</sup> *Ibid* at section 6(1).

<sup>51</sup> *Ibid* at section 6(2).

<sup>52</sup> *Ibid* at section 6(2).

<sup>53</sup> *Ibid* at section 6(6).

<sup>54</sup> Section 6(8) (b) *Criminal Justice Act 1993*.

full.<sup>55</sup> In any subsequent civil action by the injured party against the convicted person, the amount of the compensation order and the amount paid to date will be taken into account by the court. Where the amount paid under the compensation order exceeds the damages awarded, the court may order that the amount of the excess be repaid to the person against whom the order was made.<sup>56</sup>

**(ii) *Extent of use of compensation orders***

3.77 The Commission is aware that despite their existence in Irish law for almost 12 years, compensation orders under the 1993 Act have, for the most part, been little used. Data contained in the Annual Reports of the Courts Services for the last number of years confirm this trend. It was suggested however during the consultation process that compensation does, in fact, feature quite regularly in the court and in particular, in the District Court.<sup>57</sup> However, such orders are made on an informal basis and outside the provisions of the 1993 Act.

3.78 The Commission considers that direct victim-offender compensation has an important role to play in the dealing with offenders and may be especially useful in dealing with less culpable offenders. In particular, the Commission is of the view that the scheme for compensation orders under the Criminal Justice Act 1993 can be used effectively in dealing with less culpable offenders in the context of reformed Court Poor Box and probation legislation and recommends that it be incorporated into the proposed reforms.

3.79 *The Commission recommends that greater use should be made of compensation orders under the Criminal Justice Act 1993 in the context of the proposed reformed Court Poor Box and probation legislation.*

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<sup>55</sup> See section 6(8) (c) *Criminal Justice Act 1993*.

<sup>56</sup> *Ibid* at section 9.

<sup>57</sup> For example, in a case before the District Court in Cork, a man was ordered to pay €1,000 in compensation after he admitted smashing the windscreen of another car with a golf club in a road rage incident. The judge convicted the man of assault and criminal damage and ordered him to pay €500 for the broken windscreen as well as €500 “as a gesture of apology for the road rage incident”. See *Irish Times* 27 January 2005.

**D Consequences of Non-Compliance with Conditions of a Conditional Dismissal**

**(1) Enforcement of Conditions of a Recognizance under the Probation of Offenders Act 1907<sup>58</sup>**

3.80 The *Probation of Offenders Act 1907* is unusual in that breach of a condition of a recognizance entered into with the court is not an offence in itself. Instead, the offender is prosecuted for the original offence under section 6(1) of the 1907 Act which provides:

“If the court before which an offender is bound by his recognizance under this Act to appear for conviction or sentence...is satisfied by information on oath that the offender has failed to observe any of the conditions of the recognizance, it may also issue a warrant for his apprehension, or may, if it thinks fit, instead of issuing a warrant in the first instance, issue a summons to the offender and his sureties (if any) requiring him or them to attend at such court and at such time as may be specified in the summons.”<sup>59</sup>

3.81 Section 6(5) of the 1907 Act states that:

“A court before which a person is bound by his recognizance to appear for conviction and sentence, on being satisfied that he failed to observe any condition of the recognizance, may forthwith, without further proof of his guilt, convict and sentence him for the original offence...”<sup>60</sup>

3.82 Thus, a person charged under section 4 of the *Criminal Justice (Public Order) Act 1994* (intoxication in a public place) may, under section 1 (1) (ii) of the 1907 Act, be discharged conditionally on entering into a recognizance to be of good behaviour and to keep the peace. If the offender fails to keep the peace, the person may be prosecuted for the original offence under section 4 of the *Criminal Justice (Public Order) Act 1994*.

**(2) Enforcement of Conditions under the Reformed legislation**

3.83 Under the Commission’s proposals for reformed Court Poor Box and probation legislation, an offender can avoid a conviction for a minor

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<sup>58</sup> See further *Order 28, District Court Rules 1997* which deals with recognizances under the *Probation of Offenders Act 1907*.

<sup>59</sup> Section 6(1) *Probation of Offenders Act 1907*.

<sup>60</sup> *Ibid* at section 6(5).

offence by agreeing to complete one or more of the conditions which may be attached to a 'conditional dismissal'.<sup>61</sup>

3.84 In the event of failure by the offender to comply with the conditions of the dismissal, the proposed new legislation would set out the procedures which may be adopted by the court.<sup>62</sup> Where the conditional dismissal involved the payment of a sum to the Reparation Fund, or involved the offender entering into a recognizance to be of good behaviour and to keep the peace (including any of the conditions which may be attached to a recognizance), and this condition is not complied with, the offender may be prosecuted for the original offence. The Commission envisages that the offender would be brought back before the court by way of summons to face prosecution and sentence for the offence. Alternatively, where the court sees fit to do so, a warrant may be issued for the arrest of the offender.

### **(3) Enforcement of Further Orders**

3.85 It has been emphasised that further orders under the proposed new Probation Act, namely an order for costs and a compensation order, are distinct from any conditions which may be attached to a dismissal under the proposals. The distinction rests on two main grounds. First, a costs or compensation whether fulfilled or not will have no bearing on the outcome of a case. Where an offender is dealt with by way of a full dismissal and ordered to pay the costs of the case, should the offender refuse to pay costs, the offence will be recorded as dismissed and no conviction will be entered against the offender. The second ground of distinction between an order and a condition is that, in the event of non-compliance, the order will be enforced in the same manner as any other order of the court whereas non-fulfilment of a condition of a conditional dismissal will result in the offender being prosecuted for the original offence. Thus, an order that the offender should pay the costs of the proceedings will be enforced in the same manner as any other order of the court.

3.86 The situation as regards compensation orders is different.<sup>63</sup> Section 7 of the *Criminal Justice Act 1993* provides that payments under a compensation order shall be made to the District Court Clerk for transmission to the injured party concerned. For the purpose of ensuring compliance with a compensation order, sections of the *Family Law (Maintenance of Spouses and Children) Act 1976* were amended so as to make its provisions applicable to the enforcement of compensation orders.

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<sup>61</sup> See paragraphs 3.32-3.57 above for the conditions which may be attached to a dismissal under the proposed new scheme.

<sup>62</sup> The procedure as regards failure to comply with the conditions of a recognizance is set out in *Order 28, Rules of the District Court*.

<sup>63</sup> Compensation Orders are discussed in detail in paragraphs 3.74-3.79 above.

3.87 Section 6 of the 1993 Act also provides that references to an order in the *Enforcement of Orders Act 1940* include references to a compensation order. The result is that a second set of enforcement procedures are in place if the methods set out in the 1993 Act fail to ensure the payment of the compensation order.

3.88 In summary, the consequences of non-compliance with the conditions of a ‘conditional dismissal’ under the Commission’s proposed legislation would vary according to the specific condition which must be satisfied. Where the condition involves a payment to the statutory Reparation Fund or involves the offender entering into a recognizance to keep the peace and be of good behaviour and the offender fails to meet the condition, that offender may be prosecuted for the original offence. If the condition of the dismissal involves the payment of the costs of the proceedings by the offender or the payment of compensation to the victim, and the condition is not fulfilled, payment will be enforced in the same manner as an order of the court. In this instance, the offender may not be prosecuted for the original offence.

3.89 *The Commission recommends that the reformed Court Poor Box and probation legislation provide for the prosecution of the offender for the original offence where that offender has either breached a condition of a recognizance entered into with the court or failed to pay the amount due to the Reparation Fund. In the event of non-payment of the costs of the proceedings where ordered by the court or non-payment of a compensation order, the Commission recommends that the order may be enforced in the same manner as any other order of the court and in that case, the offender may not be prosecuted for the original offence.*

## **E Exclusions**

### **(1) Under the Probation of Offenders Act 1907**

3.90 The present arrangements which exclude certain offences from the application of the *Probation of Offenders Act 1907* have been already been discussed. Section 1(1) of the 1907 Act may only be applied to a person charged before a court of summary jurisdiction with an offence punishable by such court. Consequently, section 1(1) may only be applied to summary offences and indictable offences which are tried summarily before the District Court. Subsequent legislation has specifically excluded the application of section 1(1) to certain offences.<sup>64</sup>

3.91 The 1907 Act sets out the criteria which the court may have regard to in its decision to apply section 1(1), including the trivial nature of

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<sup>64</sup> See paragraph 2.19 above.

the offence or the extenuating circumstances under which the offence was committed. It is often the case that the circumstances of the offence or the offender dictate whether the offence is treated as a minor one by the courts. In any event, the wording of section 1(1) clearly indicates that it is intended to apply to less serious offences only.

**(2) Offences to which the Court Poor Box is Applied**

3.92 Where the Court Poor Box is applied in conjunction with section 1(1) of the 1907 Act, its appears to be confined, for the most part, to less serious infringements such as public order offences, property offences, offences relating to animals, minor drugs offences and less frequently so in relation to road traffic offences and offences against persons.<sup>65</sup>

3.93 However, the disposition has been used on occasion in relation to offences of a more serious nature.<sup>66</sup> It is clear, therefore, that significant inconsistencies exist with regard to the manner in which the Court Poor Box is applied by the various District Courts and in particular with regard to the range of offences to which the disposition is applied. Certain judges, for example, appear to apply the Court Poor Box almost exclusively in relation to public order offences while others never appear to use it to deal with such offenders. Use of violence by the offender (however minor) has been referred to by some judges as a bar to its use, whereas others viewed a payment to the Court Poor Box as appropriate to deal with some assault charges.<sup>67</sup> Prior to the introduction of the mandatory penalty points system in the *Road Traffic Act 2002*, certain road traffic offences were, at times, dealt with using the Court poor Box.

3.94 The Consultation Paper also noted that the Court Poor Box is used on occasion in respect of offences which are not trivial in nature and which arguably merit a conviction and in some cases a significant fine or term of imprisonment. The increased use of the Court Poor Box post-conviction has also been discussed in this Report.<sup>68</sup> On some occasions, the offender has

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<sup>65</sup> For further discussion, see Consultation Paper at paragraphs 1.11-1.19.

<sup>66</sup> In one case, a young man who was charged with possession of a quantity of cannabis resin sufficient to make 248 rolled cigarettes was ordered to pay €250 to the Court Poor Box. The judge took account of the fact that the offender has no previous convictions, had co-operated fully with the Gardai and had apologised for the incident. See *Limerick Post* 16 July 2004.

<sup>67</sup> For example in a case involving a former All Star hurler who was charged with assault arising from an on-the-pitch altercation in which the jaw of a rival team member was broken, the District Court judge took account of the previous good character of the defendant. He also noted that the consequences of a criminal conviction would be visited more heavily on the defendant than on other citizens. A donation of €10,000 to Portlaoise Lions Club was ordered in lieu of conviction. See *Irish Times*, *Irish Independent* and *Irish Examiner* on 22 November 2004.

<sup>68</sup> See paragraphs 3.11-3.17 above.

been convicted of the offence in question, had a sanction imposed by the court and been penalised financially by way of the Court Poor Box.<sup>69</sup>

**(3) Exclusion of Certain Offences under the Reformed Probation Act**

3.95 The Commission is strongly of the view that the application of a reformed version of section 1(1) of the 1907 Act should be restricted to less serious offences. Bearing in mind that the reformed legislation would enable certain offenders to avoid a conviction despite having been proven to have committed the offence, the Commission considers that its use should be confined to minor offences which come before the District Court. As a result, the Commission has concluded that all summary offences except those excluded by statute,<sup>70</sup> as is the case currently under the 1907 Act. In addition to all indictable offences which are tried summarily in the District Court may be dealt with under the proposed new legislation.

3.96 *The Commission recommends that all summary offences, subject to those specifically excluded and all indictable offences which are tried summarily should be eligible for dismissal or conditional dismissal under the reformed Court Poor Box and probation legislation.*

**(4) Types of Offenders to which the Reformed Act may be Applied**

3.97 Section 1(1) of the *Probation of Offenders Act 1907* can only be applied to offences tried in the District Court, thereby limiting its application to less serious offences only. The Commission has already recommended that the same limitations should remain under the proposed new legislation. The matters which the court may have regard to in applying the new scheme would also dictate that the offences must be of less serious nature for the section to apply.

3.98 The wording of section 1(1) of the 1907 Act places no restriction on the types of *offenders* to which the section may be applied. Thus it is not limited to first time offenders only nor does it place any restriction on the number of times that section 1(1) can be applied to an individual. In *Attorney General v Buckley and Murphy*<sup>71</sup> the Supreme Court held that the 1907 Act could *not* be applied to the applicants on more than one occasion.

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<sup>69</sup> The Consultation Paper noted the case of a man who was convicted of injecting slurry into his cattle in order to obtain €29,000 in compensation from the TB eradication scheme. He was convicted of the offence and given a four month prison sentence suspended on the condition that he should pay £1,000 to the Court Poor Box and €250 to the ISPCA. See *Irish Times* 1 December 2000.

<sup>70</sup> See paragraph 2.19 above.

<sup>71</sup> [1959] Ir Jur Rep 65.

In this case, one offender had been the benefit of the 1907 Act on a previous occasion while the other has received the benefit of the Act in relation to numerous previous offences. Maguire CJ stated:

“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 for reform, and if, in this case, an opportunity for 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.”<sup>72</sup>

3.99 The comments of Maguire CJ cannot, however, be said to reflect the current approach with regard to application of the 1907 Act. Information provided to the Commission by the Probation and Welfare Service indicates that individuals often get the benefit of the 1907 Act on more than one occasion.

3.100 The Commission considers that a previous conviction on the part of the offender should not be an automatic bar to the application of the 1907 Act. The Commission accepts, for example, that where a convicted person who had abided by the terms of a suspended sentence commits a minor offence which would result in the activation of the original prison sentence, it would be unfair to preclude the application of the 1907 Act to that person.

3.101 The inherent flexibility afforded to the sentencing court under section 1(1) of the 1907 Act has ensured its use as an instrument to temper justice in appropriate circumstances. The position was summarised succinctly by Alverstone J in *Dunning v Turner*<sup>73</sup> where he stated that “the Act is not to be too strictly or narrowly construed”. The Commission considers that the broad discretionary features of the 1907 Act in addition to the flexible aspects of the current Court Poor Box be retained in the proposed reformed legislation. Accordingly, the Commission has concluded that it is preferable to clarify, for the avoidance of doubt, that the reformed legislation should not be limited in its application to first-time offenders or as to the number of times that it may be applied to an individual. The Commission considers that the general criteria to be taken into account by the court in the application of the legislation will be sufficient to ensure that, although a person may receive the benefit if a conditional dismissal on more than one occasion, it will only be applied in appropriate cases.

3.102 *The Commission recommends that the reformed Court Poor Box and probation legislation should not be limited in its application to first-time*

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<sup>72</sup> [1959] Ir Jur Rep 65.

<sup>73</sup> (1909) 73 JP 400.

*offenders only and that no restriction should be placed on the number of times that the provision may be applied to an individual.*



## **CHAPTER 4     ADMINISTRATION OF THE REPARATION FUND**

### **A            Introduction**

4.01        In the Consultation Paper, the Commission identified a number of difficulties with the management of the Court Poor Box. This remains a matter of concern to the Commission. In particular, is the absence of formal audit and accounting procedures whose presence would ensure greater transparency in the management of Court Poor Box funds. In this Chapter, the Commission discusses reform of the administrative and management aspects of the current Court Poor Box disposition which the Commission has recommended should be renamed the ‘Financial Reparation Order’. Part B of this Chapter examines the need for administrative reform of the current system. Part C sets out the detailed aspects of the statutory Reparation Fund which the Commission proposes should replace the current system. Part C also discusses the purposes for which the fund is applied.

### **B            Management of the current Court Poor Box system**

#### **(1)        Current System**

4.02        In the Consultation Paper, the Commission examined the administration and distribution of Court Poor Box funds.<sup>1</sup>

4.03        The Commission provisionally recommended that consideration be given to establishing a ‘ring-fenced’ fund which would be held within a government department. The Department of Community, Rural and Gaeltacht Affairs was suggested for this purpose as it is the Department with responsibility for charities, which are the principal beneficiaries of the current system.

4.04        In the Consultation Paper,<sup>2</sup> the Commission expressed concern at the active participation of members of the judiciary in the administration of Court Poor Box funds and in particular in the distribution of money from the fund. It is clear that certain charities benefit to a greater extent than others

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<sup>1</sup>        See Consultation Paper at paragraphs 1.43-1.47.

<sup>2</sup>        *Ibid* at paragraphs 2.88-2.90 and 2.93-2.95.

from current Court Poor Box contributions.<sup>3</sup> The Commission concluded that it was inappropriate for the judiciary to be involved in the allocation of essentially public funds in this manner and provisionally recommended that a centralised fund be established into which all Court Poor Box contributions would be paid. This proposed arrangement would also provide for the distribution of funds from the Court Poor Box.

**(2) Discussion**

4.05 The Commission remains of the view that the current arrangements for the administration and management of the Court Poor Box are unsatisfactory. There are a number of reasons for this.

4.06 The amount paid through contributions to the Court Poor Box has reached almost €1 million annually in recent years, though this may represent only about 0.05% of the total ‘value’ of the charity sector which, in 2003, was estimated to be worth €20 billion.<sup>4</sup> The figure of €1 million may include both contributions made by offenders to the Court Poor Box, which is managed by the courts, and ‘direct payments’ to charity by offenders. In a ‘direct payment’ situation, the court will order that the offender contribute a sum to a named charity and that a receipt be produced in court as evidence of compliance. It may often be the case that such payments are recorded as Court Poor Box payments although the actual money does not pass through the court system. Given that many direct payments are not processed by the courts, it is difficult to be entirely confident about the accuracy of the specific figures mentioned in this Report. However, the Commission considers that the figures are broadly correct in relation to the overall amounts involved.

4.07 The Commission considers that payments to the Court Poor Box should be accounted for and subjected to the same reporting procedures as any other public fund. The Commission has concluded that a fully transparent accounting and auditing system is essential to the proper administration of any judicially ordered payment. By establishing a centralised statutory fund into which all such payments would be made, the issue of the lack of uniformity in accounting and record-keeping would be eliminated. Further, the Commission remains concerned that the current system involves the judiciary in the administration of funds, the distribution

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<sup>3</sup> See Appendix B of the Consultation Paper.

<sup>4</sup> See *Submission from the Charities Regulation Study Group to the Department of Community, Rural and Gaeltacht Affairs on the Consultation Paper on Establishing a Modern Statutory Framework for Charities*, May 2004. For a number of reasons including the lack of an agreed definition of charity and the lack of a charities registration system, this figure can only be taken as a guide. Contributions from the Court Poor Box to charities amounting to approximately €1 million per year may thus account for 0.05% of the total worth of the charity sector.

of which are a matter of discretion. The Commission considers it undesirable that there is any perception that the distribution of such funds could be lacking in transparent principles consistent with the essential nature of the judicial function.

**(3) Reform**

4.08 The Commission sees no reason to depart from the key recommendation in the Consultation Paper, namely that a statutory fund would be set up into which all Court Poor Box contributions and ‘direct payments’ would be paid. A centralised fund would eliminate many of the concerns as to the management of the current system. In particular it would remove from the courts the decision as to the precise beneficiaries of Court Poor Box contributions and would create a more transparent and accountable system.

*4.09 The Commission recommends the establishment of a statutory fund into which all Financial Reparation Order payments (replacing payments currently made under the Court Poor Box disposition) would be made.*

**C Detailed aspects of the proposed statutory scheme**

**(1) A Statutory Reparation Fund**

4.10 The Commission has already recommended that the current Court Poor Box be integrated into a fully reformed *Probation of Offenders Act 1907*. In line with its recommendation that the Court Poor Box disposition be renamed a ‘Financial Reparation Order’, the Commission recommends that the new statutory fund would be known as the ‘Reparation Fund’.<sup>5</sup>

4.11 The Reparation Fund which is proposed by the Commission is comparable to the Victim Fund which is due to be established in England and Wales by section 14 of the *Domestic Violence Crime and Victims Act 2004* which inserted section 161A into the *Criminal Justice Act 2003*. Once commenced, the relevant provisions will introduce a scheme of surcharges which will be added on to all fines and fixed penalty offences. The amount of the surcharge will vary according to the amount of the fine or fixed penalty notice. Surcharges will also be applied to community sentences. Thus, where a person is issued with a fixed penalty notice of £80, a further £5 must be paid by the offender which will then be transferred to a Victim Fund. The purpose of the surcharge is to ensure that offenders contribute to victim services as part of their reparation. The measures are due to be introduced in response to the under-use by the courts of compensation orders

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<sup>5</sup> See paragraph 3.34 above.

in favour of victims of crime.<sup>6</sup> The purpose of the Victim Fund is to provide a range of support services for the victims of crime and the Fund is to be administered by the Home Office. Similar schemes operate in Canada, the United States, and Sweden where money collected from the imposition of surcharges is used to provide services, support and assistance for the victims of crime as well as for funding victim-related research. Many of the reparative features of the Victim Fund are similar to the Reparation Fund which is proposed by the Commission, although it is not proposed that the Reparation Fund should be applied solely for the benefit of victims of crime.

4.12 A centralised fund established under statute would have numerous advantages. As noted previously, the proposed system would have the effect of securing the disposition which the Commission proposes should replace the Court Poor Box, that is, the Financial Reparation Order, on a uniform basis throughout the State. This is not to say that the Financial Reparation Order would be applied to all offences to which the reformed probation legislation could be applied. Since the Commission proposes that it would be incorporated into a reformed *Probation of Offenders Act 1907*, its application will remain at the discretion of the court.

4.13 Under the reformed Probation legislation proposed by the Commission, the court may order that an offender make a contribution to the Reparation Fund only where that offender has *not been convicted* of the offence in question. The amount of the order will remain at the discretion of the court subject to a maximum payment of €5,000, which will be index-linked.<sup>7</sup>

4.14 Concerns regarding proper accounting and reporting procedures would also be addressed by the creation of a centrally administered fund. Furthermore, as a statutory fund, the proposed Reparation Fund would be subject to audit by the Comptroller and Auditor General. Finally, concerns regarding the distribution of Court Poor Box funds would also be addressed by the creation of a single fund.

4.15 *The Commission recommends that the statutory fund into which all Financial Reparation Order payments would be made should be named the 'Reparation Fund'.*

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<sup>6</sup> See *Compensation and Support for the Victims of Crime (A Consultation Paper on proposals to amend the Criminal Injuries Compensation Scheme and provide a wider range of support for victims of crime)*, Home Office/CJS, (January 2002).

<sup>7</sup> See paragraph 3.40 above

**(2) *Ring-fencing of the Fund***

4.16 The Commission see no reason to depart from the view expressed in the Consultation Paper<sup>8</sup> that the Reparation Fund should be ‘ring-fenced’ and contained within a government department. The Commission’s proposed reformed probation legislation would provide for the transfer of Financial Reparation Order payments into the ring-fenced statutory fund. Financial Reparation Order payments would be collected by the courts in the same manner as fines and transferred to the statutory fund within the Department of Justice, Equality and Law Reform for distribution.<sup>9</sup>

4.17 The Commission has already pointed out that the current Court Poor Box payments and distribution system broadly adheres to the principles of restorative justice because it provides reparation to the community and in some instances to the victims of crime, albeit on an indirect basis.<sup>10</sup> Ring-fencing of the statutory fund would ensure that the proposed Financial Reparation payments are maintained separately from general Exchequer funds thus ensuring its application for approved purposes. As the Commission noted in the Consultation Paper,<sup>11</sup> this arrangement is analogous to the Environment Fund<sup>12</sup> which was established to collect revenue from the imposition of the levy on plastic bags. The Environment Fund is administered by the Department of the Environment, Heritage and Local Government which receive the funds via the designated collection authority, in this case, the Revenue Commissioners. The specific purposes for which the Environment Fund can be applied are set out in the legislative provisions which established the fund.<sup>13</sup> The proposed Reparation Fund could operate on a broadly similar basis by using the funds collected for stated purposes. These purposes are stated below.

4.18 *The Commission recommends that the proposed Reparation Fund should be ‘ring-fenced’ separately from general Exchequer funds.*

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<sup>8</sup> See Consultation Paper at paragraphs 6.32-6.33.

<sup>9</sup> On the general procedure for the collection of fines, see [www.courts.ie](http://www.courts.ie).

<sup>10</sup> See paragraphs 1.25-1.27 above.

<sup>11</sup> See Consultation Paper at paragraphs 3.25-3.31.

<sup>12</sup> The Environment Fund was set up under section 73 of the *Waste Management Act 1996* as inserted by section 12 of the *Waste Management Amendment Act 2001*. The Fund is administered by the Department of the Environment, Heritage and Local Government.

<sup>13</sup> The purposes for which the fund can be applied are set out in the *Waste Management Act 1996*. For further discussion, see paragraphs 3.26-3.31 of the Consultation Paper.

### (3) *Purpose of the Fund*

4.19 The Commission has considered the purposes for which the proposed Reparation Funds would be applied. The Commission has concluded that the fund should remain linked to the criminal justice process from which it is derived. To apply the fund in this way would broadly adhere to the principles of restorative justice which are an important aspect of the current Court Poor Box system.

4.20 Firstly, the Commission considered the context in which the proposed statutory fund is to operate. Contributions to the fund would arise when an offence has been conditionally dismissed under the proposed reformed Probation Act. In order to apply the provision, the court must be satisfied that the offender is guilty of the offence in question. Thus, the Court Poor Box fund would consist of money paid by offenders as a form of reparation for the harm caused by their offending behaviour.<sup>14</sup> This is an important aspect of the current Court Poor Box jurisdiction which the Commission has already recommended should be retained in the reformed statutory scheme.<sup>15</sup> The Commission has concluded therefore that the fund should be used to assist programmes aimed at preventing offending behaviour since these would be of benefit to the offender and the victim in this specific case and to assist potential offenders and potential victims in society. In this respect, the Commission recommends that the fund should be applied for general public benefit and should not be confined to charitable organisations.

4.21 The Commission believes that the fund could be applied in a strategic and targeted manner to address the root causes of offending behaviour such as lack facilities for education and training or lack of adequate investment in particular areas which leaves them at an elevated risk of developing a crime problem. The RAPID (Revitalising Areas by Planning, Investment and Development) Programme which is overseen by the Department of Community, Rural, and Gaeltacht Affairs is a focussed Government initiative which targets the 45 of the most disadvantaged urban areas and provincial towns in the country. The Clár (Ceantair Laga Árd-Riachtanais) Programme operates on a broadly similar basis in disadvantaged rural areas. Both programmes provide funding to accelerate investment in selected priority developments which have been identified by the communities.<sup>16</sup> Similarly, area-based Partnership Companies consisting

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<sup>14</sup> Where an identifiable victim exists, the Commission has already recommended that a compensation order under the *Criminal Justice Act 1993* would be appropriate. See paragraphs 3.74-3.80 above.

<sup>15</sup> See paragraph 1.46 above.

<sup>16</sup> The RAPID and CLÁR programmes are managed by Area Development (ADM) Ltd on behalf of the Department of Community, Rural and Gaeltacht Affairs.

of Government Departments, statutory agencies, voluntary bodies non-governmental organisations, and business and community representatives, have developed programmes targeted at countering disadvantage and social exclusion.

4.22 The Commission considers that the community and social concerns highlighted by the disadvantaged communities under these programmes could benefit from an injection of funds from the Reparation Fund. The Commission notes that the National Crime Council in its Report entitled *A Crime Prevention Strategy for Ireland* considers these local responses to crime prevention to be significant contributors to the drive towards developing a crime prevention strategy for Ireland and towards addressing the concerns of local communities.<sup>17</sup> The Commission agrees with the view of the National Crime Council that the emphasis should be on appropriate early intervention in developing a crime prevention strategy. The Commission also notes the recommendations of the National Economic and Social Forum that greater recognition should be given to the role of voluntary and community organisations and that the further development of this sector should be encouraged.<sup>18</sup>

4.23 The Commission now turns to outline some examples of restorative justice projects which might also benefit from such a fund.

**(a) Restorative Justice projects in this jurisdiction**

**(i) The Nenagh Community Reparation Project<sup>19</sup>**

4.24 A number of community-based reparation projects are currently in operation in the state. One example is the Nenagh Community Reparation Project which was established in 1999 as a pilot project in restorative justice.<sup>20</sup> The Project is funded by the Probation and Welfare Service and has a number of key aims. The first is to provide an alternative to the present court system for dealing with adult offenders. Another is to confront the offender with the impact of his or her offending behaviour thereby ensuring that the offender accepts responsibility for their actions. It is also

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<sup>17</sup> See Report on *A Crime Prevention Strategy for Ireland, Tackling the Concerns of Local Communities*, National Crime Council, 2003 at 2.3.

<sup>18</sup> See *Fourth Periodic Report on the Work of the NESF*, Report 30, November 2004 at 3.49. The NESF also points to the work of ADM in developing:

“...[a] practical model of how a partnership approach involving the community, state organisations and social partners might work at a local level and in turn link into national level organisational and policy making arenas.”

<sup>19</sup> See *Nenagh Community Reparation Project, Baseline Study 2002*.

<sup>20</sup> The Nenagh Project was modelled on a similar project operating in Timaru in New Zealand. In Timaru, offenders are given the opportunity of making reparation to their victim or to the community.

hoped that by confronting the offender in this way the risk of repeat offending is significantly reduced. Finally, the Reparation Project provides the community with an input into the manner in which offenders are brought to justice.

4.25 By enlisting the help and advice of statutory and local organisations, the Nenagh Community Reparation Project offers an alternative method of dealing with some offenders by offering the offender the opportunity of making reparation to the victim of their crime or to the community. The reparation process usually involves a meeting between the offender, the victim and project panel members in order to draw up the reparation contract which is agreed to by both the victim and the offender. Victim participation in the reparation process is voluntary. Where the victim chooses not to be involved, a reparation contract is agreed between the panel and the offender. Each contract is developed to address the issue of reparation and to promote the personal development of the offender. For this reason, the specific elements of every reparation contract vary according to a number of factors including the nature of the offence, the circumstances of the offender and impact on the victim. In some cases, offenders are ordered to make financial reparation, in others they are ordered to attend addiction counselling while in others they are asked to monitor and assess their own social behaviour. Once agreed, the contract is presented to the District Court judge who agrees to adjourn the case for the implementation of the contract. The case is usually dismissed on the successful completion of the reparation contract.

4.26 The Project has reported a very high success rate in its activities with more than 75% of offenders completing their reparation in full and with only one incidence of re-offending over the 6 month period of the study.<sup>21</sup>

**(ii) *The Offender Reparation Programme (Tallaght)***<sup>22</sup>

4.27 The Offender Reparation Programme was established as a pilot project in January 2004 by Restorative Justice Services in partnership with the Probation and Welfare Service and Tallaght District Court. The Court makes the decision as to whether the Offender Reparation Programme will be offered to the offender and in this pilot programme the option was only available to offenders charged with public order offences. The Report on the Offender Reparation programme which was published in 2005 noted that consumption of alcohol was a contributing factor in many of the cases referred to the Programme. Thus many reparation contracts will involve

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<sup>21</sup> See *Nenagh Community Reparation Project, Baseline Study*, 2002 at 19.

<sup>22</sup> See *Report on The Offender Reparation Programme*, Restorative Justice Services in association with the Probation and Welfare Service and Tallaght District Court (2005).

undertaking some form of ‘alcohol awareness’ activity. The elements of the reparation contract may include the offender offering a written apology to the victim, making a contribution to charity, or giving an undertaking to be of good behaviour. An assessment of compliance with the terms of the contract is made by the Reparation Panel before the matter is referred back to the court for final determination. The court will have the final say in the disposition of the case.

4.28 Results from the first year of operation of the Offender Reparation Project have been very positive. Completion rates were very high with only three offenders failing to complete their contracts. Additionally, the vast majority of those individuals who have completed the Programme have not re-offended.<sup>23</sup>

**(iii) The Juvenile Diversion Programme**

4.29 An Garda Síochána have been operating a juvenile diversion programme since 1963. The *Children Act 2001*<sup>24</sup> secured the Programme on a statutory footing and a number of restorative justice initiatives have been established within the framework of the Juvenile Diversion Programme.<sup>25</sup> The ethos of the programme is to provide an opportunity to divert juvenile offenders from criminal activity by cautioning rather than prosecuting offenders where certain criteria are met and by providing suitable activities to facilitate personal development, encourage civic responsibility and work towards improving the long term employability prospects of the participants. A juvenile offender may only be cautioned for an offence if he or she accepts responsibility for their behaviour.<sup>26</sup> Cautioning often involves the offender making a direct apology to a victim and possibly carrying out some form of reparation. The juvenile is then subject to a period of supervision by a trained Juvenile Liaison Officer (JLOs) who ensures that contact is maintained between the juvenile, the family and the JLO. Family conferencing also occurs in this context with the dual aims of addressing the

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<sup>23</sup> See *Report on the Offender Reparation Programme*, Restorative Justice Services in association with the Probation and Welfare Services and Tallaght District Court (2005) at 12.

<sup>24</sup> See Part 4, *Children Act 2001*.

<sup>25</sup> See Business 2000 Case Study: *An Garda Síochána- Community Policing - Putting People First*, 5<sup>th</sup> Edition, 2001 available at [www.business2000.ie/cases/cases/cases2.htm](http://www.business2000.ie/cases/cases/cases2.htm).

<sup>26</sup> The following conditions must be met before a young offender is cautioned; the offender must be under 18 years at the time of the commission of the offence, the offender must accept responsibility for their behaviour; the offender must not have been cautioned previously or having been cautioned, the circumstances are such that it would be deemed appropriate to administer a further caution; and the parent or guardian must agree to co-operate with the Gardaí by accepting any advice about the juveniles future. See section 23(1) *Children Act 2001*.

underlying reasons for the offending behaviour and drawing up an action plan to avoid a recurrence of the behaviour.

4.30 The Juvenile Liaison Programme has been very successful in achieving its aim of diverting young offenders away from further criminal activity with an average of 89% of participants in 1999 reaching their 18<sup>th</sup> birthday without being prosecuted for a criminal offence. In terms of the overall success of restorative justice events under the Juvenile Liaison Programme, JLOs and independent observers rated 79% of cases to be highly successful.<sup>27</sup>

**(iv) Conclusion**

4.31 The Nenagh Community Reparation Project and the Tallaght Offender Reparation Programme are just two examples of the successful operation of a restorative justice sentencing model in this jurisdiction. The Garda Juvenile Liaison Programme has demonstrated clearly that targeted early intervention can work to reduce re-offending in the context of young offenders. The Nenagh and Tallaght programmes demonstrate that the goal of reducing re-offending can also be achieved in relation to adult offenders. In this regard, the Commission notes the views of the National Economic and Social Forum that:

“The Department of Justice, Equality and Law Reform should continue to support and expand the number and range of restorative justice projects, subject to evaluation findings.”<sup>28</sup>

4.32 While both projects have operated on a pilot basis dealing with a small number of offenders, participation in the projects provided an opportunity for individuals who come before the courts to take responsibility for their behaviour, repair the harm that they have caused and make positive choices for the future. Restorative justice programmes therefore enable the victim, the offender and the affected members of the community to be directly involved in responding to the crime. The Commission considers that funds from the Reparation Fund could be used to provide *additional*

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<sup>27</sup> See Kieran O’Dwyer *Restorative Justice Initiatives in the Garda Síochána: Evaluation of the Pilot Programme*, Garda Research Unit, Research Report No. 4/01, November 2001.

<sup>28</sup> See *Fourth Periodic Report on the Work of the NESF*, Report 30, November 2004 at 4.26. It is important to note that restorative justice measures success in terms of how many harms are repaired or prevented, rather than how much punishment is inflicted. The outcome sought to be achieved in any restorative justice process is reparation and peace.

funding (not replacement funding) to such projects which assist the victims of crime while also aiming to prevent offending behaviour.<sup>29</sup>

4.33 *The Commission recommends that the Reparation Fund should be used to assist programmes aimed at preventing offending behaviour and for the purpose of assisting victims of crime.*

**(4) *Appropriate Government Department in which to Establish the Fund***

4.34 In the Consultation Paper,<sup>30</sup> the Commission provisionally recommended that the Reparation Fund be established within a government department. The Consultation Paper suggested that the Department of Community, Rural and Gaeltacht Affairs, being the department with responsibility for charities, would be appropriate for this purpose. After consultation and in light of submissions received, the Commission remains of the opinion that the fund should be contained within an existing State body and that it would be inappropriate and administratively costly to set up a separate body to administer the fund. However, the Commission has concluded that the fund should not be administered by the Department of Community, Rural and Gaeltacht Affairs as suggested in the Consultation Paper. There are a number of reasons for this.

4.35 The Commission's proposal in the Consultation Paper was based on the view that since charitable organisations were the principle beneficiaries of current Court Poor Box contributions, the government department with responsibility for charities would be an appropriate custodian of the fund. The Commission has concluded that this view places too much emphasis on the connection between the current Court Poor Box and its beneficiaries. The Commission has already recommended that the beneficiaries of the proposed Reparation Fund should not be confined to charitable purposes.

4.36 The Commission's proposal seeks to establish the Reparation Fund clearly within the criminal justice system, and the Commission believes that the purposes for which the Reparation Fund would be applied should reflect this approach. The Commission notes that the Court Poor Box disposition developed as a method of tempering justice to avoid imposing a

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<sup>29</sup> The Commission is aware that a Commission for the Support of Victims of Crime has recently been established by the Department of Justice, Equality and Law Reform. The remit of the Commission is two-fold; to devise an appropriate support framework for the victims of crime into the future; and to disburse funding for victim support measures. While some degree of overlap may occur between the work of the Reparation Fund and the Commission for the Support of Victims of Crime, any overlap would be minimal due to the broad purposes for which the Reparation Fund would be applied.

<sup>30</sup> See Consultation Paper at paragraph 6.33.

criminal conviction on offenders in appropriate circumstances. The Commission thus considers that the criminal justice context of the Court Poor Box is particularly important, and that will be of even greater significance in the context of its proposed integration into the reformed Probation legislation. The Commission has therefore concluded that it is appropriate that the Reparation fund be connected in some way to the government department with responsibility for matters of criminal justice, namely the Department of Justice, Equality and Law Reform.

4.37 The Commission also considers that the principles of restorative justice, which are an important aspect of the current Court Poor Box system, would be better served by containing the proposed Reparation Fund within the Department of Justice, Equality and Law Reform. The Commission considers that this Department would be best placed to provide information and administrative support to a statutory fund which contains the proceeds of monetary sanctions applied in relation to criminal offences.

4.38 *The Commission recommends that the Reparation Fund should be administered by the Department of Justice, Equality and Law Reform.*

**(5) *Advisory Committee to Distribute the Fund***

4.39 The Commission now turns to the question of distribution of monies from the Reparation Fund. In the Consultation Paper,<sup>31</sup> the Commission suggested that the fund would be distributed with the benefit of advice from relevant bodies such as the National Crime Council. Having reflected further on the issue, the Commission has concluded that an Advisory Committee could be established under the auspices of the Department to administer the fund.

4.40 The Commission envisages that this Advisory Committee would comprise a number of experienced professionals working in diverse areas of the criminal justice process. The Commission considers it essential to the good management of the fund that members of the Advisory Committee should be drawn from across the spectrum of the criminal justice system in order to ensure that a fair balance is achieved in the disbursement of the fund. Thus, the Commission recommends that two members of the Advisory Committee should be drawn from the judiciary. The Commission suggests that these members would be nominated by the President of the District Court and the President of the Circuit Court. Members of the judiciary and in particular members of the District Court and Circuit Court would provide insights into the most appropriate purposes for which the fund could be applied.

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<sup>31</sup> See Consultation Paper at paragraph 3.55.

4.41 Similarly, the Commission recommends that an experienced member of the Probation and Welfare Service should be nominated by the Director of the Probation and Welfare as a member of the Advisory Committee. The Probation and Welfare Service would be in a position to provide insights and advice as to the issues facing offenders and thus the causes of offending behaviour. The Commission also recommends that a member of the Board of the National Crime Council be appointed to the Advisory Committee. A member of the board of the National Crime Council would be in a position to identify to the Committee appropriate programmes which would assist in the prevention of offending behaviour and to assist the victims of crime. The Commission also recommends that the Department of Justice, Equality and Law Reform be represented on the Advisory Committee.

4.42 The Commission considers that these proposals would ensure that the Advisory Committee is composed of persons with a variety of backgrounds in the field of criminal justice. The Commission also recommends that the members of the Committee be appointed for a specific term of office of up to five years. The Commission envisages that the Committee would meet no more than four times annually to decide on the appropriate application of the fund. Payments made under the auspices of the Advisory Committee would, the Commission recommends, be audited by the Department of Justice, Equality and Law Reform and an annual report would be published and presented to the Courts Service and the Oireachtas. This would also facilitate transparency and accountability in the use of these funds. The Reparation Fund, as a public fund, would be subject to audit by the Comptroller and Auditor General and would also be eligible for examination by the Public Accounts Committee of the Oireachtas. It may be recalled that the Public Accounts Committee has in the past expressed concerns regarding the administration and management of Court Poor Box funds and in particular, a concern that the system may be operating in a manner which deprives the Exchequer of funds in the form of revenue from fines.<sup>32</sup>

4.43 *The Commission recommends that an Advisory Committee be established to administer payments from the Reparation Fund. Two members would be drawn from the judges of the District Court and Circuit Court, one from the Probation and Welfare Service, one from the board of the National Crime Council and one from the Department of Justice, Equality and Law Reform. Members would be appointed for a term of office of up to five years.*

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<sup>32</sup> See paragraphs 1.29- 1.30 above.



## CHAPTER 5 SUMMARY OF RECOMMENDATIONS

### A Chapter 1: Reform of the Court Poor Box

5.01 The Commission recommends that the Court Poor box disposition be reformed in order to avoid its inappropriate features, while preserving its positive aspects. [Paragraph 1.43]

5.02 The Commission recommend that reform of the Court Poor Box be based on the *Probation of Offenders Act 1907* and that this should include general reform of the 1907 Act to ensure that existing arrangements are integrated into the general context of the Probation of Offenders legislation. [Paragraph 1.46]

### B Chapter 2: Reform of the Court Poor Box and Probation of Offenders Act 1907

5.03 The Commission recommends that consideration be given to the introduction of a comprehensive range of non-custodial sanctions in this jurisdiction. These non-custodial sanctions should include those orders recommended by the *Final Report of the Expert Group on the Probation and Welfare Service* (1999). [Paragraph 2.31]

5.04 The Commission recommends that the reformed Court Poor Box and Probation of Offenders legislation incorporate the exclusions from the scope of the *Probation of Offenders Act 1907* that have been enacted by the Oireachtas. [Paragraph 2.37]

### C Chapter 3: Detailed Elements of Reform Proposal

5.05 The Commission recommends that the reformed Court Poor Box and Probation legislation should retain the requirement in the 1907 Act that the guilt of the offender must be proved or admitted to the court before its terms can be applied. [Paragraph 3.07]

5.06 The Commission recommends that this approach should be incorporated into the reformed Court Poor Box and Probation legislation. The Commission recommends that the reformed Court Poor Box and Probation legislation should provide that payments made by way of

contribution to a reformed Court Poor Box should not be made after a conviction is entered. [Paragraph 3.18]

5.07 The Commission recommends, that the factors to be taken into account in the application of a reformed Court Poor Box and Probation legislation reflect a combination of those which currently form the basis of the Court Poor Box disposition and those set down in the 1907 Act, namely:

- (a) The **nature of the offence** and in particular,
  - (i) whether having regard to all the relevant circumstances, the offence is trivial in nature.
  - (ii) whether the offender caused any injuries to other persons and if so, the nature and extent of such injuries.
  - (iii) whether caused any injuries to animals and if so, the nature and extent of such injuries.
  - (iv) whether the offender caused any damage to property.
  - (v) whether there are extenuating circumstances under which the offence was committed; and

(b) The **personal circumstances of the offender** and, in particular, his or her:

- (i) character
- (ii) family circumstances
- (iii) age
- (iv) health; and

(c) The need to avoid an injustice, whether to the offender or to the victim. [Paragraph 3.22]

5.08 The Commission recommends that the reformed Court Poor Box and probation legislation should include provision for the full dismissal of a charge with no conditions attached. [Paragraph 3.31]

5.09 The Commission recommends that an order for payment to the reformed Court Poor Box should be renamed a 'Financial Reparation Order'. Furthermore, the Commission recommends that the fund into which all Financial Reparation Orders are to be paid should be named the 'Reparation Fund'. [Paragraph 3.35]

5.10 The Commission recommends that a limit of €5,000 (index-linked at 5 year intervals) should be placed on the amount that an offender can be ordered to contribute to the Reparation Fund but that no minimum figure should be prescribed. [Paragraph 3.42]

5.11 The Commission recommends that the reformed Court Poor Box and Probation legislation should include the orders referred to in the *Final*

*Report of the Expert Group on the Probation and Welfare Service* namely, reparation orders, counselling orders, mediation orders, treatment orders, probation orders and combination orders. [Paragraph 3.60]

5.12 The Commission recommends that where the court imposes a sanction on an offender conditionally dismissed under the proposed reformed Probation legislation, the question of whether the offender should be placed under the supervision of the Probation and Welfare Service should be a matter for the discretion of the court. [Paragraph 3.62]

5.13 The Commission recommends that the reformed Court Poor Box and Probation legislation should include a provision which enables the court to bind an offender to the peace and to be of good behaviour for a period of time, with or without sureties, and which also empowers the court to additional relevant conditions including treatment orders, curfew orders, mediation orders and counselling orders. [Paragraph 3.66]

5.14 The Commission recommends that where the circumstances allow and the court sees fit to do so, offenders dismissed under a reformed Court Poor Box and probation legislation should be ordered to pay such costs of the proceedings as the court thinks reasonable. [Paragraph 3.70]

5.15 The Commission recommends that the reformed Court Poor Box and probation legislation incorporate the provisions for compensation orders contained in the *Criminal Justice Act 1993*. [Paragraph 3.80]

5.16 The Commission recommends that the reformed Court Poor Box and probation legislation provide for the prosecution of the offender for the original offence where that offender has either breached a condition of a recognizance entered into with the court or failed to pay the amount due to the Reparation Fund. In the event of non-payment of the costs of the proceedings as ordered by the court or non-payment of a compensation order awarded under the proposed new legislation, the Commission recommends that the order may be enforced in the same manner as any other order of the court and in this case, the offender may not be prosecuted for the original offence. [Paragraph 3.90]

5.17 The Commission recommends that all summary offences (except those specifically excluded by statute) and all indictable offences which are tried summarily should be eligible for consideration under the reformed Court Poor Box and probation legislation. [Paragraph 3.97]

5.18 The Commission recommends that the reformed Court Poor Box and probation legislation should not be limited in its application to first-time offenders only and, that no restriction should be placed on the number of times that the provision may be applied to an individual. [Paragraph 3.103]

## **D Chapter 4: Administration of the Reparation Fund**

5.19 The Commission recommends the establishment of a statutory fund into which all Financial Reparation Order payments (replacing payments currently made under the Court Poor Box disposition) would be made. [Paragraph 4.09]

5.20 The Commission recommends that the statutory fund into which all 'Financial Reparation Order' payments would be made should re-named the 'Reparation Fund'. [Paragraph 4.15]

5.21 The Commission recommends that the proposed Reparation Fund should be 'ring-fenced' separately from general Exchequer funds. [Paragraph 4.18]

5.22 The Commission recommends that the Financial Reparation Fund should be used to assist programmes aimed at preventing offending behaviour and for the purpose of assisting victims of crime. [Paragraph 4.33]

5.23 The Commission recommends that the Financial Reparation Fund should be administered by the Department of Justice, Equality and Law Reform. [Paragraph 4.38]

5.24 The Commission recommends that an Advisory Committee be established to administer payments from the Financial Reparation Fund. Two members would be drawn from the judges of the District Court and Circuit Court, one from the Probation and Welfare Service, one from the board of the National Crime Council and one from the Department of Justice, Equality and Law Reform. Members would be appointed for a term of office of up to 5 years. [Paragraph 4.43]

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**DRAFT PROBATION OF OFFENDERS BILL 2005**

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ARRANGEMENT OF SECTIONS

Section

1. Short Title
2. Definitions
3. Dismissal of offence tried summarily
4. Factors to be taken into consideration in dismissal of offence tried summarily
5. Conditional dismissal
6. Costs of proceedings
7. Reparation Fund
8. Non-application of Act
9. Repeals and consequential provisions

ACTS REFERRED TO

Air Navigation and Transport Act 1973	1973, No. 29
Air Navigation and Transport Act 1975	1975, No. 9
Criminal Justice (Administration) Act 1914	1914, c.85
Finance Act 1963	1963, No. 23
Finance Act 1984	1984, No. 9
Finance Act 2001	2001, No. 7
Fisheries (Amendment) Act 1962	1962, No. 31
Intoxicating Liquor Act 1927	1927, No. 15
Probation of Offenders Act 1907	1907, c.17

Road Traffic Act 1961	1961, No. 24
Road Transport Act 1978	1978, No. 8
Social Welfare (Consolidation) Act 1993	1993, No. 27
Taxes Consolidation Act 1997	1997, No. 39

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**DRAFT PROBATION OF OFFENDERS BILL 2005**

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**BILL**

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*entitled*

AN ACT TO PROVIDE FOR THE DISMISSAL OF CERTAIN CHARGES TRIED SUMMARILY, INCLUDING DISMISSAL SUBJECT TO CONDITIONS UNDER THE SUPERVISION OF THE PROBATION AND WELAFRE SERVICE, TO PROVIDE FOR THE ESTABLISHMENT OF A REPARATION FUND, TO PROVIDE FOR THE AMENDMENT OF THE PROBATION OF OFFENDERS ACT 1907 AND FOR THE REPLACEMENT OF THE COURT POOR BOX AND TO PROVIDE FOR RELATED MATTERS

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:-

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**Short Title**

1.—This Act may be cited as the Probation of Offenders Act 2005.

**Definitions**

2.—In this Act:

“counselling order” means an order which requires a person to undergo and complete a course of counselling which would, in the opinion of the court, facilitate the rehabilitation of the offender or reduce the likelihood of the commission of further offences by the offender;

“court” means the District Court;

“exclusion order” means an order which prohibits a person from entering or being in the vicinity of a specified area or individual between such times, and during such period as the court may specify;

“mediation order” means any order in which the court nominates a mediator who provides a means of communication between those affected by crime and the offender;

“reparation order” means an order which requires a person to enter into an arrangement with the court or the Probation and Welfare Service to perform certain services or to act or make such payments which, in the opinion of the court, will have the effect of making good any harm that has been caused by the offender;

“residence order” means an order which requires a person to be at a specified residence between specified times during a specified period not longer than 12 months in duration.

“treatment order” means an order which requires a person to undergo treatment including, but not limited to, treatment for drug and alcohol addictions.

*Explanatory Note*

*[These orders are based on those referred to in the Final Report of the Expert Group on the Probation and Welfare Service. See paragraph 2.31]*

**Dismissal of offence tried summarily**

3.—(1) Where a person is charged before a court of summary jurisdiction with an offence which is punishable by such court and the court is satisfied that the charge has been proved, the court may decide, having regard to any matter specified in section 2, and without proceeding to record a conviction, to make an order either-

(a) dismissing the charge (in this Act called a “full dismissal”) or,

(b) dismissing the charge subject to the conditions set out in this Act (in this Act called a “conditional dismissal”).

*Explanatory Note*

*[This section repeals and replaces section 1(1) of the Probation of Offenders Act 1907. See paragraphs 1.46 and 3.31]*

**Factors to be taken into consideration in dismissal of offence tried summarily**

4.—(1) In a decision to apply section 1, the court may have regard to the following matters;

(a) the nature of the offence and in particular,

- (i) whether, having regard to all the relevant circumstances, the offence is trivial in nature,
- (ii) whether, the offender caused any injuries to other persons and if so, the nature and extent of such injuries,
- (iii) whether, the offender caused any injuries to animals and if so, the nature and extent of such injuries,
- (iv) whether, the offender caused any damage to property,
- (v) whether there are extenuating circumstances under which the offence was committed; and

(b) The personal circumstances of the offender and, in particular, his or her:

- (i) character,
- (i) family circumstances,
- (iii) age,
- (iv) health; and

(c) The need to avoid an injustice, whether to the offender or to the victim.

*Explanatory Note*

*[This section reflects a combination of those factors and considerations which currently form the basis of the many Court Poor Box applications and those factors set down in the Probation of Offenders Act 1907. See paragraph 3.22]*

**Conditional Dismissal**

5.—(1) Where a Conditional Dismissal under section 3(1) (b) is ordered, the court may attach one or more of the following conditions to the dismissal;

- (a) that the offender pays a Financial Reparation Order to the Reparation Fund, the amount of which shall not exceed €5,000.
- (b) that the offender enters into a recognizance to keep the peace and to be of good behaviour for a period not exceeding 3 years and to

appear for conviction and sentence when called upon at any time during that period.

(2) The court may, at its discretion, order that conditions be attached to the recognizance under subsection 1 (b) including, but not limited to any of the following or a combination of any of the following;

(i) an order excluding or restricting the offender from frequenting certain defined areas, the details of which shall be specified in the recognizance,

(ii) an order requiring the offender to obey a residence requirement,

(iii) an order requiring the offender to undertake and complete a Treatment Programme including, but not limited to, treatment for addictions and psychiatric conditions (“Treatment Order”),

(iv) an order requiring the offender to undertake and complete a Counselling Programme (“Counselling Order”),

(v) an order requiring the offender to undertake and complete a Reparation Programme (“Reparation Order”),

(vi) an order requiring the offender to undertake and complete a Mediation Programme (“Mediation Order”),

(vii) any other order or condition which the Court may consider necessary for preventing the repetition of the same offences or the commission of other offences.

(3) Where the court makes an order under subsection (1) (a) and the offender fails to comply with the order, that offender may be prosecuted for the original offence and the case shall be returned to the court by way of summons.

(4) Where the court makes an order under subsection (1) (b) and the offender fails to comply with the order, that offender may be prosecuted for the original offence and the matter shall be returned to the court by way of summons.

(5) Where the court orders the conditional dismissal of a charge, the court may, at its discretion, order that the offender is placed under the supervision of the Probation and Welfare Service,

(6) A recognizance shall specify any conditions which are attached to it.

(7) The duration of a recognizance shall not exceed 3 years.

(8) The offender shall be notified in writing of the conditions and duration of the recognizance.

(9) The conditions which may be attached to a conditional dismissal shall be reasonable and shall reflect the nature and seriousness of the offence.

(10) Where a disposition under this section has been made by the District Court, the person charged may appeal against the disposition to the Circuit Court and the Circuit Court may exercise the same jurisdiction as the District Court.

(11) The sum mentioned in subsection (1) (a) shall be indexed at intervals of 5 years by order of the Minister for Justice, Equality and Law Reform by reference to the Consumer Price Index.

*Explanatory Note*

*[This section replaces the conditional discharge under section 1(1) of the 1907 Act. This section introduces a range of conditions and orders which may be attached to the conditional dismissal of a charge, including payment of a Financial Reparation Order which replaces the Court Poor Box. See paragraphs 3.35-3.66]*

**Costs of the Proceedings**

6.—(1) The court may, in addition to any order under section 3(1) (a) or 3(1) (b), order that the offender pay such costs of the proceedings as the court thinks reasonable.

(2) Where an offender fails to comply with an order under subsection (1), the amount of the order shall be enforced in the same manner as any other order of the court.

*Explanatory Note*

*[This section replaces section 1(3) of the 1907 Act. This section empowers the court on dismissal or conditional dismissal of a charge, to order that the offender pays the costs of the proceedings in addition to dealing with that offender in any other way. See paragraph 3.70]*

## **Reparation Fund**

7.—(1) The Reparation Fund is hereby established.

(2) Payments made under a Financial Reparation Order under section 5(1) (a) shall be transferred to the Reparation Fund.

(3) The Reparation Fund shall be established, managed and controlled by the Minister for Justice, Equality and Law Reform and shall be applied for the following purposes:-

- (a) to provide reparation and assistance for the victims of crime,
- (b) to address the causes of and assist in the prevention of offending behaviour.

(4) The Reparation Fund shall be administered by an Advisory Committee, which shall pay out such sums of money as it considers appropriate for the purposes specified in subsection (3).

(5) The Advisory Committee shall be under a duty to keep records and to file annual accounts with the Courts Service.

(6) The Reparation Fund shall be subject to audit by the Comptroller and Auditor General.

(7) The Advisory Committee shall comprise 5 members;

- (a) a judge of the District Court nominated by the President of the District Court;
- (b) a judge of the Circuit Court nominated by the President of the Circuit Court;
- (c) a member of the Probation and Welfare Service,
- (d) a member of the Board of the National Crime Council and;
- (e) a member nominated the Department of Justice, Equality and Law Reform.

(8) Members shall be appointed to the Advisory Committee for a term of up to 5 years.

*Explanatory Note*

*[This section establishes the Reparation Fund into which all payments under a Financial Reparation Order are to be paid. This section replaces the Court Poor Box fund with a centralised statutory fund. See paragraphs 4.09-4.43]*

**Non-Application**

8.—(1) This Act shall not be applied to offences specified in Schedule 1.

*Explanatory Note*

*[This section specifies the offences to which the disposition cannot be applied. This reflects current practice in relation to the 1907 Act. See paragraph 2.37]*

**Repeals and Consequential Provisions**

9.—(1) The enactments specified in Schedule 2 are repealed to the extent specified in column 3 of that Schedule.

(2) The disposition commonly known as the ‘Court Poor Box’ is abolished and for this purpose, the term ‘Court Poor Box’ includes all direct and indirect payments to charitable organisations, non-profit-making organisations, and other persons or bodies which have been ordered by the court as a form of sanction for offences committed.

*Schedule 1*

Non-application

**Section 1** shall not apply to offences under the following:

Section 35 Intoxicating Liquor Act 1927

Section 49 Road Traffic Act 1961 (as amended)

Section 16 Fisheries (Amendment) Act 1962

Section 34 Finance Act 1963

Section 16 Air Navigation and Transport Act 1973

Section 6 Air Navigation and Transport Act 1975  
 Section 2 Road Transport Act 1978  
 Section 78 Finance Act 1984  
 Section 217 Social Welfare (Consolidation) Act 1993  
 Section 1078 Taxes Consolidation Act 1997  
 Section 128 Finance Act 2001  
 Social Welfare (Rent Allowance) (Amendment) Regulations 1992 (S.I. No. 178 of 1988)  
 European Communities (Community Transit) Regulations 1988 (S.I. No. 422 of 1992)  
 European Communities (TIR Carnet and ATA Carnet – Transit) Regulations 1993 (S.I. No. 61 of 1993)  
 European Communities (Counterfeit and Pirated Goods) Regulations 1996 (S.I. No. 148 of 1996)

*Schedule 2*

Enactments Repealed

Session and Chapter or Number and Year	Short Title	Extent of Repeal
7 Ewd 7, ch. 17	Probation of Offenders Act, 1907	Sections 1(1) and 1(3)
4&5 Geo.5, ch 85	Criminal Justice Administration Act, 1914	Sections 8 and 9



**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 Harboursing of a Spouse (December 1978)	€1.27
Working Paper No 6-1979, The Law Relating to Seduction and the Enticement and Harboursing 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) (PrI 8855)	€0.95
Working Paper No 9-1980, The Rule Against Hearsay (April 1980)	€2.54
Third (Annual) Report (1980) (PrI 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
Report on Civil Liability for Animals (LRC 2-1982) (May 1982)	€1.27
Report on Defective Premises (LRC 3-1982) (May 1982)	€1.27
Report on Illegitimacy (LRC 4-1982) (September 1982)	€4.44
Fifth (Annual) Report (1982) (Pl 1795)	€0.95

Report on the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5-1983) (April 1983)	€1.90
Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6-1983) (November 1983)	€1.27
Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983) (December 1983)	€1.90
Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983) (December 1983)	€3.81
Sixth (Annual) Report (1983) (PI 2622)	€1.27
Report on Nullity of Marriage (LRC 9-1984) (October 1984)	€4.44
Working Paper No 11-1984, Recognition of Foreign Divorces and Legal Separations (October 1984)	€2.54
Seventh (Annual) Report (1984) (PI 3313)	€1.27
Report on Recognition of Foreign Divorces and Legal Separations (LRC 10-1985) (April 1985)	€1.27
Report on Vagrancy and Related Offences (LRC 11-1985) (June 1985)	€3.81
Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters (LRC 12-1985) (June 1985)	€2.54
Report on Competence and Compellability of Spouses as Witnesses (LRC 13-1985) (July 1985)	€3.17

Report on Offences Under the Dublin Police Acts and Related Offences (LRC 14-1985) (July 1985)	€3.17
Report on Minors' Contracts (LRC 15-1985) (August 1985)	€4.44
Report on the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (LRC 16-1985) (August 1985)	€2.54
Report on the Liability in Tort of Minors and the Liability of Parents for Damage Caused by Minors (LRC 17-1985) (September 1985)	€3.81
Report on the Liability in Tort of Mentally Disabled Persons (LRC 18-1985) (September 1985)	€2.54
Report on Private International Law Aspects of Capacity to Marry and Choice of Law in Proceedings for Nullity of Marriage (LRC 19-1985) (October 1985)	€4.44
Report on Jurisdiction in Proceedings for Nullity of Marriage, Recognition of Foreign Nullity Decrees, and the Hague Convention on the Celebration and Recognition of the Validity of Marriages (LRC 20-1985) (October 1985)	€2.54
Eighth (Annual) Report (1985) (PI 4281)	€1.27
Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries (LRC 21-1987) (September 1987)	€5.71
Consultation Paper on Rape (December 1987)	€7.62

Report on the Service of Documents Abroad re Civil Proceedings -the Hague Convention (LRC 22-1987) (December 1987)	€2.54
Report on Receiving Stolen Property (LRC 23-1987) (December 1987)	€8.89
Ninth (Annual) Report (1986-1987) (PI 5625)	€1.90
Report on Rape and Allied Offences (LRC 24-1988) (May 1988)	€3.81
Report on the Rule Against Hearsay in Civil Cases (LRC 25-1988) (September 1988)	€3.81
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