

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ
(LRC 53-1996)

REPORT
ON
SENTENCING

IRELAND
The Law Reform Commission
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THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the *Law Reform Commission Act, 1975* on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commissioners at present are:

The Hon. Anthony J. Hederman, former Judge of the Supreme Court, President;
John F. Buckley, Esq., Judge of the Circuit Court;
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Simon P. O'Leary, Esq., B.A., Barrister-at-Law.

John Quirke is Secretary to the Commission.

The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General fifty two Reports containing proposals for the reform of the law. It has also published eleven Working Papers, nine Consultation Papers and Annual Reports. Details will be found on pp.79-84.

The post of Research Counsellor to the Commission is vacant at present.

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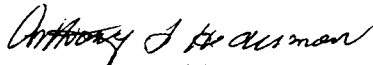
An Taoiseach John Bruton, T.D.,
Office of the Taoiseach,
Government Buildings,
Dublin 2.

Dear Taoiseach,

Pursuant to the provisions of the *Law Reform Commission Act, 1975*, I have the honour to transmit to you herewith the Commission's Report on **Sentencing** (LRC 53-1996).

The Commission proposes to publish this Report in the near future.

Yours sincerely,



ANTHONY J. HEDERMAN
PRESIDENT

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INTRODUCTION

1. Among the topics referred by the Attorney General to the Commission for examination, research and the preparation of proposals for reform under s.4(2)(c) of the *Law Reform Commission Act, 1975*, was "sentencing policy". The Commission's First Programme also included for examination "the law on matters proper to be taken into account in sentencing convicted persons".

2. As a first step, the Commission published a Consultation Paper on Sentencing in March 1993. The Consultation Paper defined sentencing and set out the present law and practice in Ireland and in other jurisdictions. It examined the full range of sanctions available to Irish Courts and the philosophy underlying different approaches to sentencing. It reviewed reforming measures taken in other jurisdictions. It concluded, provisionally, that a coherent sentencing policy was needed and that this should be given statutory form. This was the central recommendation among 40 provisional recommendations in the Paper.

3. The Commission sought and received written submissions on the Paper. We are particularly grateful for a written submission from the Judges of the High Court. We held meetings with groups of Judges from the Circuit Court and District Court. Finally, we held a Seminar with invited experts at the Commission's premises.

4. We are very grateful to all who contributed in any way to the debate and discussion on our Consultation Paper. We have learned much in the course of consultation and as has happened in the preparation of other Reports, our minds have changed individually or collectively on certain matters. Lists of those from whom submissions were received and of those who attended the seminar are to be found in Appendices A and B.

5. This Report is intended to be read in conjunction with our Consultation Paper and is not intended as a ‘stand alone’ text on sentencing reform. The law and background material are set out in the Consultation Paper and will not be repeated here except as is absolutely necessary.

CHAPTER 1: TERMS OF REFERENCE AND SCOPE

1.1 In Chapter 1 of the Consultation Paper, various definitions of sentencing were examined. We felt that the most cogent formulation was that of the Canadian Sentencing Commission:

"Sentencing is the judicial determination of a legal sanction to be imposed on a person found guilty of an offence."¹

We favoured this formulation because it highlighted the most important element of sentencing: *judicial determination*.

Whitaker Committee

1.2 The Whitaker Committee of Inquiry into the Penal System was established on 31st January 1984. The bulk of the terms of reference related to prison accommodation and the prison regime. The terms of reference were as follows:

- "(a) to examine the law in regard to imprisonment and related areas with a view to establishing whether (i) a reduction in the number of persons being committed and (ii) a shortening of the periods of committal generally and/or the periods served can be achieved,
- (b) to evaluate the adequacy in capacity and range of the existing accommodation for prisoners, particularly for female prisoners and juvenile detainees, and the planned additions and

improvements to it,

- (c) to examine all aspects of the régimes observed in the institutions and the facilities available to prisoners and detainees on their release from custody,
- (d) to consider
 - (i) the number and deployment of Prison Service staff,
 - (ii) the management structure relating to the operation of institutions,
 - (iii) the recruitment and training of Prison Service staff,
 - (iv) staff/management relations in the prison system,
- (e) to make recommendations.

The Committee should have regard in particular to the increase in the number of persons being committed to the prisons and places of detention and to the escalating costs of providing and maintaining those institutions."

This last paragraph and term (a) have most relevance to our deliberations.

1.3 The Whitaker Report reviews, *inter alia*, the growth and the causes of crime, reform of the criminal law, imprisonment as a sanction and alternatives to imprisonment. Section 2 of the Information Section of the Report comprises an "overview" of the criminal justice system by David Rottman and Philip Tormey, an invaluable and unique piece of research and analysis. Chapters 3 to 6 of the Report, which cover, "Society and Crime", "Imprisonment in the Penal System", "Alternatives to Prison Sentences" and "Revision of the Criminal Law" are highly relevant to sentencing policy.

1.4 In the context of reform of the criminal law, the Report recommends as follows:

"While the primary concern of this Committee is to examine the law in relation to imprisonment, it is not practical or desirable to consider imprisonment in isolation from the criminal justice system which produces imprisonment. As to the corpus of the criminal law, we do not consider, having regard to our terms of reference or our personnel, that we are the appropriate body to enter on any detailed investigation of it or to make precise recommendations as to its reform. This particular area of law has not received enough critical attention and it would impose too heavy a burden on the Law Reform Commission to ask it to give it priority. We recommend, therefore, that the task of making

recommendations for the reform of criminal law and practice be entrusted without delay to a special Criminal Law Reform Commission. The fact that the present system of criminal law represents the accretion over centuries of judge-made rules and of sporadic legislative reform, and the fact that since the establishment of a native Government in 1922 there has been no large-scale attempt to reform or modernise the criminal law, would seem to make the case for such a Commission almost self-evident. Apart from the need to end the anomalies that are inevitable in a system that has developed largely on a case-by-case basis, and to rationalise the consequences of the many isolated criminal law statutes, matters such as the complexities and innovations of modern technology, the changed standards and requirements of modern society, and the insights into behaviour that have been developed by modern medicine and psychiatry call out for reform of the kind that can come only from such a Commission. We append to our recommendation for the establishment of such a Commission a proviso that its adoption should not have the effect of delaying action on any other recommendations in this report."²

The Committee singled out the law relating to violence to the person, dishonesty and sex offences for immediate reform.

1.5 No Criminal Law Commission has been established, but this Commission has already reported, *inter alia*, on all three areas³ and in addition on the Indexation of Fines⁴ and the Confiscation of the Proceeds of Crime,⁵ matters with a direct application to sentencing.

1.6 In our Consultation Paper we noted⁶ that in criminal cases justice is to be administered, under Article 34.1 of the Constitution, *only* in courts. As the Attorney General made the reference of "sentencing policy" to the Commission shortly after the Whitaker Committee had reported, the Commission has assumed that the Government and Attorney General would wish the Commission to address the sentencing policy of the courts in the context of the administration of justice and not to cover again the areas dealt with in detail by the Whitaker Committee.

1.7 Because of the close inter-relationship of sentencing and penal policy, the Commission made the following provisional recommendations on penal policy in the Consultation Paper:

"... that the legislature undertake a comprehensive review of the law and

2 Whitaker Report, para. 6.2.

3 Cf. Commission's Reports on *Rape* (LRC 24-1988), *Child Sexual Abuse* (LRC 32-1990), *Sexual Offences Against the Mentally Handicapped* (LRC 33-1990), *Dishonesty* (LRC 43-1992) and *Non-Fatal Offences Against The Person* (LRC 45-1994).

4 LRC 37-1991.

5 LRC 35-1991.

6 Para. 3.7.

procedure in relation to the present range of sentencing options with a view to better co-ordination of penal and sentencing policy. The recommendations of the Committee of Inquiry into the Penal System in this regard should be given special consideration.

... that penal servitude and imprisonment with hard labour be abolished and imprisonment substituted in their place.

... that the legislature undertake a detailed review of the law and procedure governing the administration of sentence with a view to ensuring close co-ordination with sentencing policy. Particular attention should be paid to the provision of express guidelines on commutation and remission of sentence and temporary release."⁷

1.8 *These recommendations gave rise to no controversy and we repeat them.*

1.9 Judges must assume that the executive will provide the necessary facilities for implementing sentencing decisions. The sentencing policy of the courts should not be influenced by prison capacity. When penal policy and sentencing policy are at cross purposes, the situation is intolerable. If the courts and the Government are pulling in different directions from case to case, the situation will be extremely demoralising for the courts and the public. While the exercise of Ministerial discretion is not strictly within the terms of reference of the Commission, the Commission in the course of its researches and in particular in its discussions with judges has noted grave disquiet with the early release of prisoners, the revision of monetary penalties, the non-execution of warrants and the unavailability of appropriate places of detention for the young. The public cannot reasonably expect a coherent approach to sentencing to emerge as long as the sentencing decisions of the courts are not being implemented by the authorities.

1.10 In *Brennan v. Minister for Justice and ors.*⁸ Geoghegan J. held that while the Minister's power to remit fines under Section 23 of the *Criminal Justice Act 1951*, was not unconstitutional on the grounds argued, it was not being properly exercised i.e. sparingly and for special reasons, e.g. a change of circumstances, with proper maintenance of records. This decision, which was not appealed, should, effectively, put an end to use of the petition to the Minister as a parallel appeal mechanism.

7 Consultation Paper on Sentencing (March 1993), (hereinafter referred to as the Consultation Paper), Provisional Recommendations 36-38, Chapter 17, at p.381.

8 [1995] 2 ILRM 206.

CHAPTER 2: THE OBJECTS OF SENTENCING

2.1 In Chapter 4 of the Consultation Paper we started by considering the *justifying aims* of sentencing and divided them, in the traditional manner, into two broad categories:

- (i) the *moral* approach, with which retributivism is traditionally associated, which concentrates on *past* activity, arguing that justice requires retribution to be exacted for blameworthy conduct; and
- (ii) the *utilitarian* approach, with which rehabilitation, deterrence and incapacitation are associated, which concentrates on the *future* beneficial consequences of the imposition of sanctions, justifying them in terms of their social utility such as crime prevention or crime control.

2.2 The Commission dismissed an approach based on functional objectives, believing that it would be incompatible with the nature and function of sound sentencing policy if sentences were to be regulated by reference to the availability of prison places. Rather, the Commission focused its attention first, on attempting to elucidate the prevailing views of *utility*, that is, why offenders are sentenced and the purpose of sentencing and secondly, on the principles of distribution underlying the imposition of sentences and their effect on the impact of sentences.

2.3 The Commission's examination of the objects of sentencing led to the following conclusion:

"Our examination of the way in which the traditional objects of sentencing answer the question *"why* does the criminal justice system

sentence offenders?" leads us to a number of conclusions. The capacity of the utilitarian concepts of *rehabilitation*, *deterrence*, *incapacitation*, and *compensation* (in so far as it is utilitarian) to achieve their objectives has been thrown into doubt by the results of research. On the other hand retributive justifications for the imposition of criminal sanctions do not rest on a secure foundation. What we are left with are doubts about the traditional, utilitarian justifications for sentencing, one weak moral justification the success of which cannot be appraised and a general feeling, which cannot be substantiated, that the imposition of criminal sanctions may have some effect on crime prevention and crime control because of deterrent or incapacitative effects. We know a lot about what punishment cannot achieve, but we know a lot less about what it can achieve. There is no simple answer to the question "why does the criminal justice system sentence offenders?". It is in this context that decisions about the distribution of sentence will have to take place.

These conclusions suggest restraint in the distribution of sentence. Since criminal sanctions involve pain and deprivation, they should be used all the more sparingly if we are uncertain of their benefits either to society or to its individual members".¹

2.4 The Commission was not alone in having reached such a bleak and unsatisfactory conclusion. The Canadian Sentencing Commission concluded that "uncertainty is not the exception but rather the general rule in attempting to solve penal problems. We are not in a state of ignorance but we lack fundamental certitudes: this is the context in which decision-making will have to occur".²

2.5 The Commission reached no conclusions as to what the object or objects of sentencing should be. Its conclusions concentrated on the issue of distribution and in this respect recommended the just deserts principle. Under this principle, the sentence to be imposed must be proportionate to the seriousness of the offending behaviour. The seriousness of the behaviour is measured in turn by reference to the harm caused or risked by the offender and his culpability. The Commission noted that the deserts approach had become influential in sentencing reform in the U.S.A., Canada, the Australian Federal jurisdiction, Victoria, Sweden, Finland and Britain.

2.6 The requirement to incorporate consideration of the *culpability* of the accused in the deserts calculation ensures that the deserts approach does not operate as an objective, blunt instrument but is tailored to punish the accused only for actions he freely chose to perform and for which he must properly take responsibility.

2.7 Accordingly, in Chapter 5 of the Consultation Paper, we set out the factors which may aggravate or mitigate offence seriousness in the deserts

¹ Consultation Paper paras. 4.67, 4.68.

² Report of the Canadian Sentencing Commission [1987] p.144.

calculation. We will return to these later.³

Provisional Recommendations

2.8 Despite the bleak conclusions reached on the traditional utilitarian objectives, the Commission did not exclude them altogether from its provisional recommendations which were:

"Severity of Sentence"

3. We provisionally recommend that the legislature set out by way of statute a clear statement that the sentence to be imposed on an offender be determined by reference to the "just deserts" principle of distribution whereby the severity of the sentence be measured in proportion to the seriousness of the offending behaviour, and the sentence not be more severe than the sentence for more serious offending behaviour nor less severe than the sentence for less serious offending behaviour. The legislative statement should highlight the following concerns:

- (1) The severity of the sentence to be imposed on a person found guilty of an offence should be measured in proportion to the seriousness of the offending behaviour.
- (2) The seriousness of offending behaviour should be measured by reference to:
 - (a) The harm caused or risked by the offender in committing the offence; and
 - (b) The culpability of the offender in committing the offence.
- (3) The sentencer should not have regard to:
 - (a) The rehabilitation of the offender; or
 - (b) The deterrence of the offender or others from committing further crime; or
 - (c) The incapacitation of the offender from committing further crime;

when determining the severity of the sentence to be imposed.

Type of Sentence

4. We provisionally recommend that the statutory statement of the principles of distribution of sentence implement a "choice of method hybrid" for the determination of which of two or more competing sanctions of equal severity should be imposed in individual cases. The statement should highlight the following concerns:

(1) A sentencer, in choosing between two sanctions of equal severity, may have regard to:

- (a) the rehabilitation of the offender;
- (b) the deterrence of the offender or others from committing further crime;
- (c) the incapacitation of the offender from committing further crime;
- (d) providing redress to the victims of the offence or to the community;

and should choose the sanction which is more likely to achieve rehabilitation, deterrence, incapacitation or redress as the case may be.

(2) In all cases, a sentence of imprisonment should be regarded as a sanction of last resort, and should only be imposed:

- (a) when no other form of sentence, being equal in severity, would incapacitate sufficiently the offender from committing further crime; or
- (b) when there is no other form of sentence which is equal in severity and which would reflect the seriousness of the offending behaviour; or
- (c) when the offender has shown wilful non-compliance with the terms of another form of sentence and there is no other form of sentence which, being equal in severity, would compel compliance."⁴

2.10 Many of the experts consulted found aspects of these recommendations,

or the way we presented them, confusing. Without necessarily disputing our analysis e.g. of the efficacy of rehabilitation as an objective, certain experts disliked what they perceived to be our dismissal of the traditional objectives. Some found the necessity to identify and choose between sanctions of equal severity before considering traditional objectives, at the least, off-putting. In addition, we are satisfied that some disliked the expression "just deserts"⁵ itself as having unduly censorious overtones. The expression could be substituted by "commensurate deserts" or "proportionality", appropriately defined.

2.11 *The Commission has decided, unanimously, that a statutory scheme of sentencing should not be introduced.* Every judge we consulted, from whatever court, advised strongly, against the imposition on judges of a statutory procedure which would have to be adopted in every case. The more detailed the requirements of the procedure, the more likely it was that mistakes would arise leaving sentences open to challenge on technical grounds only. We were persuaded by the unanimity of the judges in raising this objection. We were encouraged, however, by the fact that many judges found the material in our Consultation Paper provided them with a helpful set of sentencing guidelines.

A. THE VIEW OF THE MAJORITY: COMMISSIONERS BUCKLEY, GAFFNEY AND O'LEARY

2.12 Some Commissioners would adopt the moral approach to sentencing, summarised in para. 2.1 above: others, the utilitarian approach. A majority of the Commission, Commissioners Buckley, Gaffney and O'Leary, having considered the written submissions received and the views expressed at the Seminar, and having reconsidered the arguments in Chapter 4 of the Consultation Paper, is satisfied that a retributive objective can provide a secure and valid foundation for the imposition of sanctions and would subscribe to the following general statements of principle:

- (a) It is important that a system of sanctions should exist to demonstrate society's rejection of certain types of social behaviour. The existence of a system of sanctions should be part of the social environment in which society creates and reinforces its sense of social values.
- (b) Punishment of wrongdoing must in some sense be proportionate to the harm done or risked. The law must communicate a rank-order of social wrongdoing, roughly in accordance with the scale of damage or potential damage involved.
- (c) The criminal justice system exists primarily to afford protection to members of society both in general and individually and punishment is one of the principal means used to achieve this end.

⁵ We emphasise that the expression 'just deserts' was not invented by the Commission but is an expression commonly used in academic writing to describe this approach to sentencing.

- (d) Punishment must have an objective, such as a demonstration of society's rejection of criminality, and must not be inflicted for its own sake.
- (e) It is a fundamental principle of justice that punishment should bear some relationship to the person's physical and mental capacity to control his or her behaviour.

2.13 The State's retributive response to wrongdoing is not simply an expression of denunciation but it also operates to protect society against unofficial retaliation⁶ and to provide a safety-valve for victims who feel they can only be satisfied by vengeance. These considerations were expressed as follows in the Whitaker Report on the Penal System.

"Prevailing attitudes and preoccupations may shift the emphasis from one objective to another but the *punishment* concept tends to remain foremost in the public mind. The argument is that imprisonment marks society's right to penalise anti-social conduct, satisfies, however indirectly, the victim's need for redress, and is a symbolic instrument in promoting respect for the law. There is, however, as we have seen, another side to this in the long-term damage liable to be inflicted on the prisoner and his family, even possibly on those whose task it is to enforce the sentence, and in the burden, often not assessed or adverted to, which imprisonment imposes on the taxpayer. The victim, moreover, rarely receives any compensation under the present system. As a corrective to the punishment idea, the warning is constantly voiced that offenders are sent to prison *as* punishment and not *for* punishment. It is a warning we wish to repeat because of the insidious danger that attitudes and practice may erode this distinction, which is so vital to a fair, non-vindictive and humane administration of justice. The idea of vengeance, as distinct from legitimate and limited punishment, should be totally excluded. Those incarcerated by society as a mark of its disapproval and to put them out of harm's way for a time should have their dignity respected, should have caring and developmental as well as custodial attention, and should be acknowledged by society as, at least in part, evidence of its own failure. It is essential that the punishment concept be qualified in this way; otherwise a dangerous route is opened which could lead to intolerable injustice. The Committee would, for instance, view with horror, as would most Irish citizens, a system of imprisonment which, in pursuit of economy, security or the semblance of peace, withdrew prison officers and guards to the perimeter, leaving day-to-day administration to the prisoners themselves, thus exposing the weaker and more sensitive prisoners to intimidation, abuse and virtual slavery."⁷

2.14 The just deserts approach is not simply a theory of punishment but is

⁶ See Consultation Paper, para. 4.15.

⁷ Whitaker Report, para. 4.5.

equally a theory of proportionality which sets upper and lower limits to sentences.⁸ It is the philosophy underpinning the approach to sentencing in jurisdictions whose laws frequently inform the recommendations of the Commission e.g. Britain, the U.S.A., Canada, the Australian Federal Jurisdiction and Victoria. Sweden and Finland, hardly regarded as having harsh law and order regimes, also espouse a just deserts approach.

2.15 Blumstein⁹ summarises the "just deserts" approach well:

"We pursue retribution in some cases, even if no crimes are reduced thereby, because we wish to display society's contempt for certain acts. For example, the spouse-killer deserves punishment, even if all such killings unambiguously were acts of momentary passion and hence undeterrable, and even if the spouse-killer could somehow be personally incapacitated by preventing him from acquiring another spouse. Nevertheless, a moral outrage must be articulated, and punishment for retributive purposes alone performs that role.

Much of the legal literature, especially that concerned with the principle of "just deserts," is aimed at the retributive objective. If one were restricted to just a single objective for guiding the imposition of all sentences, then retribution is probably the most reasonable one to employ. It reflects the fact that one primary consideration in choosing a penalty is the seriousness of the offense: the more serious an offense, the more serious the penalty it merits".¹⁰

The Traditional Objectives

2.16 To seek to incapacitate by imprisonment must be an exercise in preventative justice and as such must therefore be unconstitutional under present law. The Consultation Paper clearly demonstrates that efforts to deter by sentencing to long periods of imprisonment are both ineffective and unacceptable. When a court is sentencing to imprisonment it does not have to consider rehabilitation as it is a matter for the prison authorities.

2.17 While the traditional objectives are all inappropriate for the sentencing decision in custody cases, they are inherent in the system of sanctions in general. Every sentence, except perhaps a fine, is restrictive on liberty to some extent and is to that extent incapacitatory. The very existence of the system must prevent many *first* offences. Considerations of rehabilitation must inform the choice of many non-custodial sentences. However, the existence of a system of sanctions is a proclamation that if you commit a wrong you will be punished -not that you will be incapacitated or rehabilitated. If one commits a wrong, one has not been

8 In paras. 4.80 to 4.84 of the Consultation Paper, the distinction between cardinal and ordinal proportionality is discussed.

9 Blumstein, *The Search for the Elusive Common "Principle"*, Northwestern University Law Review, Vol. 82, No. 1, p.43.

10 *Id.* at p.44.

deterred.

2.18 As we noted above, many of those we consulted seemed uncertain as to quite what was intended by the hybrid mechanism provisionally recommended by means of which the traditional objectives would be introduced into the sentencing decision. This required the court to be faced with a choice between competing sanctions of equal severity before regard could be had to these objectives.

2.19 The majority will not pursue this provisional recommendation for two reasons. Firstly, they do not consider it possible to arrive at an exact equivalence of sanctions of a different nature e.g. that x months of community service is equal to a suspended sentence of x months. Secondly, for the reasons advanced above, they do not consider it necessary or desirable specifically to import the traditional objectives into the sentencing decision.

Conclusion

2.20 To adopt a deserts approach does not imply a requirement that all convicted persons should be sent to prison. *The Commission is unanimous in recommending that a sentence of imprisonment should only be regarded as a sanction of last resort.* The deserts approach only requires a sentence of imprisonment when considerations of the harm done and the culpability attached warrant it. Most sentences imposed by courts are for minor offences and are dealt with by fine, probation, suspended sentence or community service order. A deserts approach would not change this.

2.21 Those of us who would adopt the deserts approach would recommend that the Government introduce non-statutory guidelines on the lines of our provisional recommendations.

2.22 *The Commission, by a majority, recommends that the Government introduces non-statutory guidelines to the effect that:*

- (1) The severity of the sentence to be imposed on a person found guilty of an offence should be measured in proportion to the seriousness of the offending behaviour.*
- (2) The seriousness of offending behaviour should be measured by reference to:*
 - (a) The harm caused or risked by the offender in committing the offence; and*
 - (b) The culpability of the offender in committing the offence.*
- (3) The sentencer should not have regard:*
 - (a) to the deterrence of the offender or others from*

committing further crime; or;

(b) *to the incapacitation of the offender from committing further crime; or*

(c) *when a sentence of imprisonment is warranted under (1) and (2) to the rehabilitation of the offender.*

when determining the severity of the sentence to be imposed.

B. THE VIEW OF THE MINORITY: THE PRESIDENT AND COMMISSIONER DUNCAN

(B)(1) The determination of sanctions

2.23 Within the apparatus of the State, there are in general two levels at which questions pertaining to criminal sanctions arise for determination. At one level the questions arise in the context of the criminalisation of conduct; at the other, in the context of the criminalisation of an individual.

2.24 First, there is the level (which we shall call Level 1) at which the types and quantum of sanction appropriate to a particular type of offence are determined.¹¹ The decision having been taken to criminalise certain conduct, it is then necessary to consider what sanctions are appropriate, including both the type and quantum of any sanction. The choice of sanction(s) can be expected to reflect the objectives sought to be achieved thereby.¹² The determination of sanctions at this level is largely a matter for the legislature,¹³ although when the types and quantum of sanction are not legislatively regulated, as in the case of some common law offences, these may be matters for the judiciary.¹⁴

2.25 Secondly, there is the level (which we shall call Level 2) at which the appropriate sanction in a particular case is determined. Determination at this level is exclusively a matter for the judiciary. Where the sanction(s) for an

11 See generally paras. 1.78-1.136 of the Consultation Paper on the options as to the nature and extent of sentence.

12 For example, probation and imprisonment might both feature among the permitted sanctions, the former to cater for cases where rehabilitation was thought appropriate and the latter for cases where incapacitation was preferred.

13 For example, under s.102 of the *Road Traffic Act, 1961*, the sanction for jay-walking is a fine not exceeding £20 for a first offence, and for a second or subsequent offence a fine not exceeding £50, except that, where the offence is a third or subsequent offence in any period of 12 consecutive months, the sanction is a fine not exceeding £50 or, at the discretion of the court, a term of imprisonment not exceeding three months or both such fine and imprisonment; under s.3(3)(a)(i) of the *Wireless Telegraphy Act, 1926*, as substituted by s.12(1)(a) of the *Broadcasting and Wireless Telegraphy Act, 1988*, the sanction for possession of a television set without a licence, is a fine not exceeding £500 for a first offence and not exceeding £1,000 for a second or subsequent offence; and under s.23A(4) of the *Larceny Act, 1916*, inserted by s.6 of the *Criminal Law (Jurisdiction) Act, 1976*, the sanction for burglary is a term of imprisonment not exceeding 14 years.

14 For example, public nuisance is a common law offence for which there are no statutorily-prescribed sanctions. The sanctions for some common law offences are prescribed by statute. For example, under s.42 of the *Offences Against the Person Act, 1861*, as amended by s.11 of the *Criminal Justice Act, 1951*, a person convicted on summary trial of common assault is liable to a fine of £50 and/or 6 months in prison, and a person convicted on indictment of the same offence is liable, under s.47 of the 1861 Act, to 1 year in prison: see the Commission's *Report on Non-Fatal Offences Against the Person* (LRC 45-1994), para. 1.26.

offence are legislatively prescribed, the sentencing judge must choose from among the types and quantum of sanction prescribed that sanction which, in the judge's view, is appropriate in the particular case. The choice must be made by reference to the circumstances of the offence in the particular case and to the circumstances of the offender.¹⁵ The exercise of judicial discretion occurs within defined limits in that where only a particular type of sanction (such as a fine) and a minimum and/or a maximum sentence have been laid down by the legislature for the offence, the judge may not impose a sanction outside these limits. Only rarely is all discretion removed from the judge, as presently in the case of the mandatory sanction of life imprisonment for murder and treason.¹⁶ Where the sanction(s) for an offence are not legislatively prescribed, it would seem that the sanction is within the discretion of the sentencing judge, subject to any limitations imposed by statute (e.g. the prohibition of the death penalty) and the Constitution (e.g. cruel and inhuman punishment).

2.26 It is important to appreciate that the considerations which are relevant to the determination of sanctions at each level are not identical. Although some will be the same, others will be relevant at one level only. The determination of the types and quantum of sanction appropriate to a particular type of offence occurs at a level of generality since it is concerned with the nature of the crime, its relationship to other crimes and the social evil which it is sought to address by criminalising the behaviour in question. The focus is on the behaviour to be criminalised, that is, the crime itself. In contrast, the determination of the appropriate sanction in a particular case involves consideration not only of a specific instance of the crime but also of the circumstances of the offender. It is a much more tightly focused and applied exercise in which a range of factors other than those considered at Level 1 come into play. Conversely, not all factors which may have been relevant at Level 1 are also necessarily relevant at Level 2.

2.27 For example, at Level 2, the sentencing judge should not ignore the effect of a particular sanction in the particular case. So, while the seriousness of the offender's behaviour may suggest a heavy fine within the scale permitted for the offence, the judge should not altogether ignore the financial resources available to the offender in deciding the actual fine to impose. While fines will have been considered at Level 1 and chosen as appropriate for the offence in question, the impact which a fine may have in a particular case will not usually have been addressed at this level. Rather this is a matter more pertinent to Level 2, to be taken into account by the sentencer along with other factors in determining the amount of fine to impose.

2.28 General deterrence is an example of a consideration which may be relevant at Level 1 but will not apply as such at Level 2. General deterrence is

15 See, e.g. *People (D.P.P.) v. Tieman*, [1988] I.R. 250 at 254 (S.C.), and *People (D.P.P.) v. M.*, Supreme Court, unreported, 26th July, 1994.

16 Section 2 of the *Criminal Justice Act, 1990*. Under s.4(2) of this Act there is also a mandatory term of 20 years imprisonment for attempt to commit certain murders. The Commission recommends that mandatory sentences for indictable offences should be abolished: see paras. 4.4-4.12 of the Report.

widely accepted at a legitimate objective for the consideration of particular behaviour and sanctions may be chosen at Level 1 for their perceived deterrent effect. However, general deterrence as a legitimate objective of a sentence in a particular case poses problems at Level 2. The imposition of a particular sanction on an offender in order to deter others from engaging in the offending behaviour is incompatible with notions of human dignity and worth since it is to treat the offender as an instrument or tool of social engineering, as a means to an end rather than an end in herself or himself. It is to impose a sanction on a person not because of what that person has done or might do, but because of what others might do. Evidently, the objective pursued at Level 1 of general deterrence has failed in the particular case which is being examined at Level 2, and reference must be had to other objectives at the second level in determining the appropriate sanction. Given that one of the objectives at Level 1 is general deterrence, then, at Level 2, one of the considerations in the imposition of sentence may be deterrence of the particular offender from the behaviour concerned in the future, but other objectives may be appropriate in the circumstances of the particular case either in addition to or in preference to specific deterrence.

2.29 The determination of criminal sanctions whether at Level 1 or Level 2 occurs within the overall context of a criminal justice system which, in reflecting the social values of the day, utilises certain sanctions and not others. In the Ireland of to-day certain forms of sanction are no longer regarded as acceptable. Resort is, for example, no longer had to flogging because it is regarded as inconsistent with respect for human dignity and worth, values which are afforded a high priority in democratic societies such as Ireland.¹⁷ The abolition of the death penalty in 1990 is another recent example.¹⁸

Critique of just deserts

2.30 In the Consultation Paper, the Commission was primarily concerned with the judicial determination of the sanction, if any, to be imposed on a person found guilty of an offence, that is, with Level 2. In particular it was concerned with the attainment of greater coherence and consistency in the exercise of judicial discretion. To this end it provisionally recommended that the legislature set out by way of statute a clear statement that the sentence to be imposed on an offender be determined by reference to the "just deserts" principle of distribution. In accordance with this principle, the severity of the sentence should be measured in proportion to the seriousness of the offending behaviour; and the seriousness of the offending behaviour should be measured by reference to (i) the harm caused or risked by the offender in committing the offence and (ii) the culpability of the offender in committing the offence. In the light of comments made at the Seminar and of written submissions received subsequent

¹⁷ Note, however, that a small number of statutes still authorise a sentence of whipping for adult males pursuant to a court order. In practice though, the corporal punishment of prisoners is obsolete. See further, Law Reform Commission Report on Non-Fatal Offences Against the Person (LRC 45-1994), at paras. 1.88-1.89, and Ryan & Magee, *The Irish Criminal Process* (Mercier, 1983), at p.401.

¹⁸ By section 1 of the *Criminal Justice Act, 1990*.

to the publication of the Consultation Paper, and upon reflection, we are opposed to this recommendation as well as to the associated recommendation that a choice of method hybrid should be used for the determination of which of two or more competing sanctions of equal severity should be imposed. There are three main reasons for our opposition to the adoption of "just deserts" as the basis of Irish sentencing policy. Indeed we would recommend that it not be adopted even as a basis for guidelines, and we are strengthened in this view by a number of subsidiary considerations.

(a) *Main reasons*

2.31 First, it is claimed by some theorists that just deserts is concerned merely with the allocation or distribution of sanctions and, as such, is compatible with any of the traditional objectives of sentencing: that it is concerned with the question of how much sentence to impose and does not address the issue of why a sentence is imposed. Both at the Seminar and in written submissions to the Commission, considerable criticism was voiced of the supposed neutrality of the principle in relation to the justification for sanctions. In particular, it was said that just deserts is in fact retribution in disguise, and we think that some of this criticism is well-founded.

2.32 While we do not regard the principle as necessarily satisfying a desire for vengeance, we do think that it necessarily involves an expression of moral disapproval. The two bases on which the seriousness of the offending conduct and hence the severity of the sanction are calculated are the culpability of the offender and the harm caused or risked by commission of the offence. Culpability involves an assessment of blame, and harm an assessment of damage. In that the severity of the sanction is linked to the degree of blame attaching to the offending behaviour, the sanction operates, at least in part, as a form of moral condemnation. There is therefore a retributive element in the operation of the principle.¹⁹ Moreover, one of the leading advocates of the principle, Andrew von Hirsch, has stated:

"Desert theorists' crucial claim is that punishment is, and ought to be, a blaming institution - and hence that penalties should be distributed according to the degree of blameworthiness of criminal conduct."²⁰

On the other hand, harm as a basis for the calculation of a sanction does not necessarily entail any expression of disapproval. It may indeed be that in linking a sentence to the harm caused or risked by an offender, the offender is being punished because the causing or risking of the harm is in itself disapproved of. Certainly the quantification of sanction by reference to the amount of harm is

19 The term 'retribution' is being used here in the sense that the purpose of the sanction is to mark society's disapproval of the conduct in question as an infringement of community values.

20 'Equality, 'Antisociality', and Justice,' (1984) 82 *Michigan Law Review* 1093, reprinted in A. von Hirsch and A. Ashworth, eds., *Principled Sentencing*, Edinburgh University Press, 1992, p.207 at p.214. See also A. Ashworth, *Sentencing and Criminal Justice*, (Weidenfeld and Nicolson, London, 1992) at p.66, where the author describes desert theory as 'a modern form of retributive philosophy.'

suggestive of an "eye for an eye" and a "tooth for a tooth" perspective on sanctions. Where the only objective of the sentence imposed is to mark society's condemnation of the offending behaviour, then just deserts serves solely as a vehicle for retribution. But harm as the basis for the calculation of a sanction is compatible with other objectives of sentencing. For example, it may be intended that the offender compensate the individual victim for the harm in proportion to the damage resulting from or risked by the offender's conduct. In such cases just deserts may serve as a vehicle for both moral disapproval (retribution) and compensation.

2.33 As an exercise in the allocation of sanctions, therefore, just deserts is not completely independent from the objective(s) being pursued by such allocation. In fact it is intrinsically retributive, but not necessarily exclusively so, since, in applying the principle, a sentencer may seek to achieve other objectives in addition to retribution. Nevertheless, just deserts seems to us to prioritise retribution as an objective of sentencing or at least necessarily to encompass retribution among the objectives sought to be achieved by a particular sentence.

2.34 We do not agree with this prioritisation or necessary inclusion of retribution as an aim of a particular sentence in all cases. Furthermore, in our view, rarely is retribution on its own sufficient justification for the imposition of a criminal sanction.²¹

2.35 At Level 1, a number of different sanctions may be chosen as appropriate for a particular type of offence, some being chosen in order to register moral disapproval of the conduct concerned, and some in pursuit of other objectives. At Level 2, the circumstances of a particular case may suggest that one of these other objectives should be afforded priority or even that another objective should be exclusively pursued. For example, where an offender has been found guilty of a number of burglaries which were committed in order to finance a drug addiction, supervised medical treatment may be a more appropriate sanction in the particular case than a term of imprisonment, and where both forms of sanction are available to the sentencing judge, the judge may well decide to impose the former with the objective that the offender be weaned from the drug addiction and be less likely to burgle again. In this case, the objective of the sanction imposed is exclusively rehabilitative. If however there was no evidence of drug addiction, the judge may opt to impose a term of imprisonment by reference to other objectives such as denunciation and incapacitation. In our view, in this case, it should be open to the judge to afford equal weight to both objectives or to prioritise incapacitation in the light of the particular circumstances of the case and of the offender.

21 Nor should it be overlooked that a finding of guilt itself operates as a form of social condemnation. Therefore, quite apart from the sentence, if any, imposed in a particular case, society has expressed its disapproval of the offender's conduct by labelling the accused as a criminal. Resort to retribution as an objective of a sentence is to carry the process of disapproval further. Logic does not require coincidence between the objective of a verdict in a criminal trial and the objective of a sentence. Whether or not there is such coincidence is a matter of social policy.

2.36 Moreover, while we accept that denunciation may be one of the objectives of a sentence in a particular case, in general we do not accept that denunciation should be the sole objective. Crime is not merely a matter of individual responsibility. Individuals, by reason of their membership of society, should as a general rule comply with the law of that society, including its criminal law, but society also has obligations towards the individual. In time of increasing crime, particularly crime involving harm to the person and property, it is reasonable that members of the public should be apprehensive about their personal safety and the safety of their property. At such times, however, there is a danger of over-reaction in the attitude of the general public towards offenders, with adverse consequences for the treatment of offenders. At such times society's obligations towards offenders may be overlooked or even dismissed, and the temptation to lay blame solely at the door of the offender may be very strong.

2.37 There is now substantial evidence that much crime is associated with certain social conditions. The incidence and type of crime in a society has been linked to, among other things, unemployment, poverty, a culture of violence, inadequate schooling, the wide availability and consumption of drugs, and changes in traditional institutions of social control such as the family and established religion. These are not conditions for which any individual is responsible.²² Of course not all the individuals react to such conditions by engaging in crime, but the incidence of crime would appear to be in some way related to the existence of these conditions. In our view, society bears a responsibility for such conditions and, as a corollary, has obligations towards offenders whose personal history or whose offence suggests a link between the offending conduct and the presence of such conditions. We do not mean to convey the impression that we espouse a deterministic view of crime. We believe in individual autonomy and that individuals must bear responsibility for the exercise of their choice, including a choice to break the law. We do however believe that the exercise of choice is often influenced by social factors, and in its treatment of offenders, including its sentencing policy, society should recognise some responsibility for the social environment in which much crime is committed.

2.38 In addition, no humane and caring society will turn its back on persons whose criminal behaviour was prompted by addiction to alcohol or other drugs or stemmed from mental illness or a personality disorder. It has been estimated that a large percentage of crime in Ireland is drug-related, and a sentencing policy, especially at Level 1, which does not seriously address this phenomenon but rather is satisfied by the imposition of sanctions on the basis of individual culpability and harm caused by an offender is, in our opinion, seriously deficient. Nor will such a society turn its back on persons who strayed or were led onto the path of crime while young. It will not regard its responsibility towards a young offender as being discharged simply by a reduction in the severity of the sanction in acknowledgement of the fact that the culpability of a juvenile in respect of

22 Nor should one ignore the alleged criminogenic effect of some conditions and regimes, for which likewise no individual alone is responsible.

criminal conduct will generally not be as great as that of an adult.

2.39 We are not suggesting that society's ills can be cured by the adoption of a socially-concerned sentencing policy, or even that all offenders may be weaned from future criminal conduct by an individually-targeted sentencing policy at Level 2. All we are saying is that retribution on its own can rarely afford sufficient justification for the imposition of a particular sentence. Society must bear a degree of responsibility for the incidence of crime, and this responsibility does not end upon a finding of guilt at the close of a criminal trial.

2.40 Our second reason for rejecting just deserts as the overriding principle for the distribution of sentences in particular cases is allied to the first. It is that the principle is not in fact entirely compatible with all the traditional aims of sentencing. In particular, the principle may conflict with that of rehabilitation, an objective the importance of which in Ireland has been recognised by the Court of Criminal Appeal²³ and addressed by the Supreme Court.²⁴ Moreover, we note that espousal of the principle of just deserts has occurred in the context of disillusionment with rehabilitation as a ground for choosing a particular sanction, and would regard it as far from proven that the failure of efforts at rehabilitation is inherent in the objective itself rather than attributable to the ways in which it has been implemented. It may be that other reasons such as cost will preclude rehabilitation in that society may not be willing to direct the necessary resources to this end, but such reasons do not bear upon the merits or otherwise of the objective itself.

2.41 Five traditional objectives of sentencing were identified in the Consultation Paper.²⁵ The first of these was retribution and, as we have already stated, we are of the view that just deserts accords most fully with this objective.

2.42 The second objective was rehabilitation. In essence, rehabilitation seeks to turn the offender into a law-abiding member of society. Any one or more of a wide range of measures may be employed to achieve this goal. Therapy may be appropriate for the sex offender, psychiatric help for the mentally ill, supervised probation for the juvenile offender. Some of these measures may be implemented within or outside a custodial setting, and there is no necessary connection between them and the seriousness of the offending behaviour. Rehabilitation clearly conflicts on occasion with the principle of just deserts and is not harmonisable with it. For example, if the deserts principle is applied to the case of an offender who is mentally disturbed where the offending behaviour has been very serious, a term of imprisonment may be imposed. Yet imprisonment may be counter-productive in the particular case in terms of rehabilitation and may even in some cases reinforce criminal tendencies.

23 See, e.g. *People (A.G.) v. O'Driscoll* (1972) 1 Frewen 351 at 359.

24 See, e.g. *People (D.P.P.) v. Conroy (No 2)* [1988] I.R. 160 at 165, and *People (D.P.P.) v. M.*, Supreme Court, unreported, 26th July 1994.

25 See, paras. 4.10-4.66.

2.43 The third objective was deterrence. We are concerned here only with individual deterrence, that is, where the objective in choosing a specific sanction is to deter the particular offender from engaging again in the offending conduct. By definition the offender has not been deterred from the conduct since she or he has been found guilty of an offence involving the conduct. The question is whether the offender may be deterred in the future by means of a sanction from engaging in the conduct. Furthermore, as we indicated above, general deterrence as an aim of sentencing in a particular case (Level 2) is not acceptable in Ireland, whereas it is acceptable at Level 1 in criminalising particular behaviour and in choosing the sanctions appropriate thereto. Again, there is no necessary connection between deterrence and the principle of just deserts. Any concordance is purely fortuitous. For example, in a case where the offending behaviour has been very serious, a long term of imprisonment may be appropriate, and this may indeed have a deterrent effect on the particular offender. On the other hand, this sentence may have no deterrent effect at all on the offender. Conversely, a very short prison sentence or even a non-custodial sentence may have a deterrent effect even when the offending behaviour has been very serious. Individual deterrent effect depends upon identifying what is likely to deter the *particular offender*; and there is the possibility of conflict between just deserts and deterrence in that what may be appropriate in a particular case by way of deterring the offender from the behaviour in question may be quite different to a sentence based on the culpability of the offender and the harm caused or risked by commission of the offence.

2.44 The fourth objective was incapacitation. The principle of just deserts is compatible with incapacitation as an aim of a sentence. In accordance with the principle, one of the bases on which the seriousness of the offending behaviour is calculated is the harm caused or risked by the offender. Since the purpose of incapacitation is to prevent the offender from causing further harm, determining the amount or extent of incapacitation by reference in part to any harm caused or risked is compatible with just deserts. It should be noted however that incapacitation is only relevant in certain cases, most notably where the conduct has been of the more serious kind and a term of imprisonment is contemplated. It does not generally apply to the less serious offence where imprisonment would be regarded as excessive and incapacitation in other forms (e.g. amputation of hands) is totally unacceptable in Ireland.

2.45 The fifth and last objective considered in the Consultation Paper was compensation. The Commission was concerned principally with sentencing as a means of securing reparation by the offender to the victim(s) of the offence. Compensation may also be general or social, that is, the offender may be required to make reparation to society for the wrong to it. A fine may be viewed as a form of financial reparation to society. Similarly, work exacted from the

offender by way of a community service order may be another form.²⁶ The principle of just deserts is also compatible with compensation in the sense as an objective of a sentence. Again, since, under the principle, one of the bases on which the seriousness of the offending behaviour is calculated is the harm caused or risked by the offender, determining the amount of compensation, if any, to be paid by reference in part to this harm is compatible with just deserts.

2.46 The principle is therefore only fully compatible with three of the five objectives dealt with in the Consultation Paper, that is, with retribution, incapacitation and compensation, and will at times conflict with the other two, that is, rehabilitation and individual deterrence. Just deserts theorists have recognised that the principle may conflict with some of the traditionally accepted objectives of sentencing and that, in dealing with such conflicts, it is necessary to decide what priority should be given to the principle.²⁷ Von Hirsch has stated that the principle should be given priority over other objectives in decisions about how much to punish, arguing that the principle is a requirement of justice, whereas other objectives such as deterrence and rehabilitation are essentially strategies for controlling crime.²⁸ As shall become apparent, we are not convinced that the principle does in fact always work justice. Moreover, we agree with comments made at the Seminar that the consequent "downgrading" by just deserts of some objectives of sentencing is undesirable, and we do not accept that, where the conflict is irreconcilable, preference should automatically be given to just deserts. Where the principle conflicts with the objectives of rehabilitation or individual deterrence, it is surely of greater social value that these objectives be pursued if there is a reasonable likelihood of their being attained than that the offender simply be punished in proportion to the degree of his or her culpability in committing the offence and harm caused or risked thereby?

2.47 A third reason for rejecting just deserts is that we are sceptical of the claim made for it that it is necessarily egalitarian and non-discriminatory, that it treats everyone alike without reference to race, colour, culture, religion, etc.²⁹ It is true that in focusing on culpability and harm, the principle does treat all offenders the same, while allowing some pertinent difference to be taken into account via the test of culpability. Thus a juvenile offender may be regarded as less culpable than an adult for harm caused and hence as deserving of a less severe sanction. However, in that the principle does not take account of the impact of a sanction on a particular offender, and possibly on other persons, it may, in our view, be unjust in its operation. The same sanction may have a differential impact on persons who have caused the same harm and who are

26 Community service has also often been viewed as a method of rehabilitation. Before making a community service order, a court in Britain is required to explain to the offender in ordinary language the purpose and effect of the order: s.14(2)(a) of the *Powers of Criminal Courts Act 1973*. Cf. s.4(2)(a) of the *Criminal Justice (Community Service) Act, 1983* in Ireland. Both fines and community service are compatible as sanctions with retribution as an objective of a sentence.

27 See, A.G., A. von Hirsch, *Doing Justice: The Choice of Punishment*, Hill and Wang, New York, 1976, ch. 8, reprinted in A. von Hirsch and A. Ashworth, *op cit.*, f.n. 19 at p.194.

28 *Ibid.* This theorist's position is perhaps weakened somewhat by his acknowledgement that the priority afforded just deserts need not be absolute and that there are some cases ("unusual cases") where it will be necessary to vary from the deserved sentence.

29 See, e.g. A. Ashworth, in A. von Hirsch and A. Ashworth, *op cit.*, f.n. 19 at p.186.

equally culpable, and not to allow for this in sentencing would, we believe, be unfair and on occasion inhumane. For example, a term of imprisonment would in fact be a much harsher sanction for an offender who is claustrophobic than for one who is not. Similarly, it may be a harsher sanction for a member of the travelling community than a member of the settled community. The individual circumstances of an offender may also be relevant to the choice of appropriate sanction. For example, where more than one type of sanction is available to the sentencing judge, the choice of sanction may be influenced by the fact that the offender has three young children who are solely dependant upon him or her. Likewise, a fine of £200 may mean little to a person of wealth but be a significant burden to a person of low income. Yet neither claustrophobia, life-style based on a specific culture, child dependency nor financial means bear any relationship to the harm caused or risked by the offender or the offender's culpability. In short, it seems to us that in some cases just deserts provides too crude a yardstick for the determination of the appropriate sanction since it fails to take account of personal characteristics of the offender and circumstances which may be relevant in sentencing.³⁰

2.48 These are the three main grounds upon which we object to the adoption of the principle of just deserts as the linchpin of sentencing in Ireland. There are, however, a number of other features of the operation of the principle which also cause us concern and which strengthen our reservations with respect to adoption of the principle.

(b) *Subsidiary reasons*

2.49 The principle requires that sanctions be graded in terms of severity, and while in theory sanctions could be graded for severity separately by type, with each type occupying a different section on the general scale of severity, in practice equations are drawn between different types of sanction, and this is the case for the hybrid model which the Commission provisionally recommended in the Consultation Paper.³¹ Thus it is assumed, for example, that X amount of fine equals Y amount of imprisonment, or that A amount of work by way of a community service order equals B amount of imprisonment. While equivalencies could be agreed, it seems to us that there is an element of artificiality about the exercise since it is like comparing apples and oranges, that is, it involves comparison of things (different types of sanction) which may not be truly comparable.

2.50 Indeed some types of sanction are linked to specific objectives and would be inappropriate if other objectives are being pursued. Probation is targeted at

³⁰ The Commission dealt with such matters in the Consultation Paper under the heading of mitigation of sentence as distinct from mitigation of the offence: see paras. 5.72-5.116. Acceptance of some factors in mitigation of sentence as distinct from the offence necessarily entails recognition that the principle of just deserts on its own is inadequate at Level 2 for the determination of a sentence in a particular case. The minority of the President and Commissioner Duncan believe that it may signal not merely that the principle is inadequate but that it is inappropriate as the basis of a sentencing policy.

³¹ See para. 4.110.

the rehabilitation of the offender³²; an order for payment of a sum of money by the offender to the victim may be intended to compensate for the harm caused to the victim. Conversely a fine is not designed to secure incapacitation. The objective(s) pursued in imposing sentence should logically determine the type of sanction chosen in the particular case. It seems to us that, to some extent, the theory of just deserts elides the question of the appropriate type of sanction and conflates it with the question of the appropriate amount of the chosen sanction.³³

2.51 Also the principle involved assessment of the degree of culpability and of the extent of harm caused or risked. As to culpability, there is at present no agreement on the determinants of culpability; and as to harm, there is likewise as yet no agreement on the quantification of harm and, in addition, offences exist which do not have specific victims (e.g. membership of an illegal organisation or treason), and the quantification of harm can be particularly difficult in such cases. There is also the issue of the relative weights to be afforded culpability and harm in the assessment of the seriousness of the offending behaviour. The literature on just deserts provides little guidance as to how these issues should be resolved.

Conclusion

2.52 There are therefore substantial reasons why we are opposed to the adoption of the principle of just deserts as the basis of sentencing policy in Ireland. Our rejection of the principle should not however be taken to mean that we necessarily reject culpability and harm as important considerations in the determination of a sanction in a particular case. Culpability and harm afford reasons for criminalising behaviour, and may be relevant, indeed important, considerations at both Levels 1 and 2 in the determination of sanctions. To make of them the determining considerations in all cases would however, in our view, be misguided and could on occasion cause injustice to be perpetrated in the name of justice. Nor do we altogether reject proportionality between the seriousness of the offending behaviour and the severity of the sanction as a relevant consideration but again it should never of itself be determining. We accept parsimony as a general principle which may mitigate the severity of sanctions: the sanction need be no more severe than is required to attain the objective(s) pursued.³⁴

(B)(2) The formulation of sentencing policy and guidelines for the exercise of judicial discretion

2.53 In this Report and in our Consultation Paper, the Commission's concerns

32 The Commission addresses probation services at Ch. 6 of the Report.

33 The objective(s) pursued in imposing a particular sentence will likewise have a bearing on the quantum of sanction, and, as I argue above, just deserts is only fully compatible with some of the traditional aims of sentencing.

34 For example, if the sole objective of the sanction imposed is to deter the offender from the offending conduct, the sanction should be no more severe than is required to achieve this objective.

were largely related to sentencing policy at Level 2. Sentencing at this level does not occur in isolation. If there is disparity and inconsistency in the choice and purpose of sanctions at Level 1, then no clear direction is afforded the judiciary for the exercise of their discretion in Sentencing at Level 2. Moreover, if judges are afforded minimal guidance by the legislature as to the parameters within which to exercise their discretion, they are relatively free, on an individual basis, subject to any constraints imposed by precedent, in their choice of objective(s) to be pursued in a particular case as well as in their identification and evaluation of circumstances which are relevant to the choice of a particular sanction. It is therefore highly desirable that in the criminalisation of behaviour and in the determination of sanctions appropriate to the criminalised behaviour, the Oireachtas carefully consider the purpose(s) to be attained by the imposition of sanctions, the type and range of sanctions suited to the attainment of these ends and the quantum (the maximum and, possibly, the minimum) of any one sanction which would be appropriate for the offence. It is as important that there be a high degree of coherence and consistency at this level as it is at Level 2. Furthermore, if the public is to have confidence in the criminal justice system, it is important that this coherence and consistency be maintained over a reasonable period of time and that the criteria or policy by reference to which decisions are taken about sanctions remain fairly constant and do not change with, or at least do not depend substantially upon, whatever Government is in power at any one time.

2.54 It is clear that there is still relatively little criminological expertise in this State. The universities have contributed some excellent work on this subject but the number of people engaged professionally on criminological research and analysis is still modest. We are of the view that the State should invest in the development of further expertise in this area from which it can draw when formulating policy at the legislative level in relation to sentencing and we so recommend. We do not consider it our function to prescribe specifically how that expenditure should be directed. There are several obvious ways in which it could be done. They include the recruitment of additional qualified personnel by the Department of Justice, the financing by the Government of scholarships, fellowships and research assignments at university level. We would also encourage the establishment of an institute of criminology and sentencing whose function it would be to carry out research and analysis on an ongoing basis. Sensible investment in the development of resources such as these would undoubtedly assist the executive and legislature in formulating a more informed sentencing policy at Level 1.

2.55 Identification at Level 1 of the type, number and quantum of sanction which would be available for an offence as well as an indication of the objectives pursued thereby would set parameters and guidelines for the exercise at Level 2 of judicial discretion in the determination of the appropriate sanction in a particular case. Within these parameters and guidelines there would nevertheless remain considerable scope for the exercise of judicial discretion since the multitude of individual circumstances of an offender and of particular instances of an offence in respect of which the sanctions have to be applied will only be

addressed at this level. There is therefore room for further identification and refinement of the criteria by which judicial discretion should be exercised. We are of the opinion that this task should continue to be entrusted to the judiciary itself. Because of the above reasoning, while we must dissent from the Commission's approach and conclusions in Chapter 2, we nevertheless endorse the recommendations in Chapter 4.

CHAPTER 3: AGGRAVATING AND MITIGATING FACTORS

3.1 In the previous chapter,¹ reference was made to the factors set out in the Consultation Paper which may aggravate or mitigate offence seriousness in the deserts calculation.

3.2 These factors were:

Aggravating factors

1. Whether the offence was planned or premeditated;
2. Whether the offender committed the offence as a member of a group organised for crime;
3. Whether the offence formed part of a campaign of offences;
4. Whether the offender exploited the position of a weak or defenceless victim or exploited the knowledge that the victim's access to justice might have been impeded;
5. Whether the offender exploited a position of confidence or trust, including offences committed by law enforcement officers;
6. Whether the offender threatened to use or actually used violence, or used, threatened to use, or carried, a weapon;
7. Whether the offender caused, threatened to cause, or risked the death or serious injury of another person, or used or threatened

¹ In para. 2.7.

to use excessive cruelty;

8. Whether the offender caused or risked substantial economic loss to the victim of the offence;
9. Whether the offence was committed for pleasure or excitement;
10. Whether the offender played a leading role in the commission of the offence, or induced others to participate in the commission of the offence;
11. Whether the offence was committed on a law enforcement officer;
12. Any other circumstances which:
 - (a) increase the harm caused or risked by the offender, or
 - (b) increase the culpability of the offender for the offence.

Mitigating factors

1. Whether the offence was committed under circumstances of duress not amounting to a defence to criminal liability;
2. Whether the offender was provoked;
3. Whether the offence was committed on impulse, or the offender showed no sustained motivation to break the law;
4. Whether the offender, through age or ill-health or otherwise, was of reduced mental capacity when committing the offence;
5. Whether the offence was occasioned as a result of strong temptation;
6. Whether the offender was motivated by strong compassion or human sympathy;
7. Whether the offender played only a minor role in the commission of the offence;
8. Whether no serious injury resulted nor was intended;
9. Whether the offender made voluntary attempts to prevent the effects of the offence;
10. Whether there exist excusing circumstances which, although not amounting to a defence to criminal liability, tend to extenuate

the offender's culpability, such as ignorance of the law, mistake of fact, or necessity.

11. Any other circumstances which:

- (a) reduce the harm caused or risked by the offender, or
- (b) reduce the culpability of the offender for the offence.

3.3 The reasons underlying the choice of these particular factors are fully set out in Chapter 5 of the Consultation Paper and will not be repeated here. In the course of our consultations, some judges informed us that they already found these lists helpful in arriving at their sentences.

3.4 Those Commissioners who support a deserts approach to sentencing would reiterate certain points made in Chapter 5 of the Consultation Paper which, in their view, help to explain why certain sentencing decisions continue to be controversial.

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

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

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

3.8 If there is confusion between the two types of factors a problem arises. If the confused sentencer takes factors which mitigate sentence into account at the "determination of seriousness" stage then the offender will be found to be less responsible or blameworthy than he or she actually is and the sentence may well give rise to controversy.

3.9 The distinction between factors which aggravate or mitigate the offence and factors which mitigate sentence must be clearly maintained when considering their respective roles in a deserts sentencing system. The determination of sentence following rehabilitative, deterrent or incapacitative principles does not

require any consideration of the seriousness of the offending behaviour - and, thus, does not involve any consideration of factors which aggravate or mitigate the offence - since these types of sentence are based on the likelihood of the offender or others re-offending rather than on the gravity of the offence.

3.10 In a deserts system, the principle of proportionality between offence and sentence serves as the *foundation* of every sentence. Thus, factors which aggravate or mitigate *the offence* logically have a prior claim on the sentencer's attention since they form part of the determination of proportionality itself. If a factor which aggravates or mitigates the offence is not taken into consideration by the sentencer the oversight should form a valid ground for appeal against sentence because of disproportionality - either by the offender where the sentence is disproportionately severe because a factor which mitigates the offence has been excluded, or by the prosecution where the sentence is disproportionately lenient because a factor which aggravates the offence has been excluded. There would be much benefit in some sort of guideline which would make it clear to sentencers that consideration of the factors which aggravate or mitigate the offence is *essential in every sentencing decision* and that allowance for these factors is not at the discretion of the sentencer.

3.11 Different considerations apply to factors which mitigate *sentence*. Since they are not concerned with the offending behaviour but rather with the offender's personal characteristics or circumstances, then, ostensibly, they are of no relevance in a deserts system where sentence is determined by reference to the offence rather than the personal circumstances of the offender.

3.12 The net result of this conclusion is that factors such as pleading guilty, showing remorse, attempting to make redress to the victim or even the fact that the sentence will have very adverse consequences on others dependent on the offender should not have any effect on sentence.

3.13 As this was thought to be undesirable, we provisionally recommended that factors which mitigate sentence could be incorporated into a "just deserts" system if they could be explained on the grounds of humane considerations or sound penal policy. In other words, some of the factors which are personal to the offender could still be taken into account in determining sentence severity, *by way of exception* to the "just deserts" principle of proportionality between offence and sentence, if it were thought that they were desirable because they promoted expediency or the smooth running of the sentencing system or because there might be a need to show mercy in the circumstances.

3.14 It was stressed that factors which mitigate sentence, if they are to be retained in a deserts system, should be given very careful consideration. Since they are exceptions to proportionality, they carry with them the danger that proportionality might be ousted in favour of utilitarian considerations. For example, if the likelihood of successful re-integration into society is seen to be a good reason for allowing mitigation of sentence then deserts is replaced at the mitigation stage by rehabilitative principles and the whole point of having a

deserts sentencing system is overturned.

3.15 In considering which factors may be relied on in mitigation of sentence, therefore, we must be certain that there are very good grounds for making an exception to the overall policy of proportionality between the offence and the sentence. Not only must there be sound logical arguments in their favour, but also, where allowance is made in order to provide some other benefits, such as expediency or the smooth running of the criminal justice system, there should be satisfactory evidence that those benefits will result.

3.16 Since factors which mitigate sentence are not inherent elements in the determination of a sentence proportionate to the offence but are *exceptions*, then the question arises as to whether they should be an entitlement of the offender in every case, or whether they remain at the discretion of the sentencer. If they are discretionary then it is all the more important that sentencers should not confuse factors which aggravate or mitigate the offence with them because inherent elements of the offence may be excluded.

3.17 In the Consultation Paper we listed the following factors which normally mitigate sentence in Ireland and the reasons for their inclusion:

1. The offender has pleaded guilty to the offence;
2. The offender has assisted in the investigation of the offence or in the investigation of other offences;
3. The offender has attempted to remedy the harmful consequences of the offence;
4. The sentence, whether by reason of severe personal injury suffered by the offender in consequence of the offence, age, ill-health, or otherwise, would result in manifest hardship or injustice to the offender or his or her dependents.

3.18 No person took issue with our classification of the factors which should aggravate or mitigate offence seriousness or with our list of factors which may mitigate sentence. *Accordingly, we recommend that all these factors be reproduced in sentencing guidelines.*

3.19 In Chapter 6 of the Consultation Paper we singled out for special attention the role of previous convictions in the sentencing decisions, because of the prominent position it occupies. We noted that whereas, at first sight, previous history seemed irrelevant to offence seriousness, it was certainly relevant to culpability, in that exposure on a previous occasion to the system of sanctions should have brought home to the offender dramatically and personally that his or her criminal conduct was offensive to society. We also noted that this

accorded with the approach of the Supreme Court in *Tieman*.²

3.20 We were satisfied, however, that only a limited number of factors emerged as being of relevance in the context of previous offending. We provisionally recommended that:

"a statutory provision which confines the role of prior criminal record in the determination of the severity of sentence to situations in which it aggravates the culpability of the offender in committing the offence. The provision should highlight the following concerns:

- (a) The sentencer, in determining the severity of the sentence to be imposed on an offender, may have regard to any offences of which the offender has been found guilty in the past which may be considered to increase the culpability of the offender.
- (b) In considering whether such prior offences aggravate the culpability of the offender for the offence for which he or she is being sentenced the sentencer should have regard to:
 - (i) the time which has elapsed between the prior offence or offences and the offence for which the offender is being sentenced;
 - (ii) the age of the offender at the time of commission of the prior offence;
 - (iii) whether the prior offence or offences are similar in nature to the offence for which the offender is being sentenced;
 - (iv) whether the prior offence or offences are similar in seriousness to the offence for which the offender is being sentenced."³

3.21 No person voiced an objection to these proposals and *we would now recommend that guidelines should be introduced to the same effect and regularly reviewed in consultation with the judiciary*. We sought views on an approach based on "progressive loss of mitigation" under which whereas a person without a previous record would gain substantial mitigation, a person would progressively lose this remission as he or she re-offended.

² *People (D.P.P.) v. Tieman* [1988] I.R. 250; [1989] ILRM 149.
³ Consultation Paper, Provisional Recommendation 11, Chapter 17 at p.378.

CHAPTER 4 : THE USE AND APPLICATION OF STATISTICS AND INFORMATION : SENTENCING STUDIES

4.1 In Chapter 9 of the Consultation Paper, we examined methods of implementing sentencing policy, on the assumption that a coherent statutory sentencing policy would be in place. Two approaches were identified.

- (a) *the presumptive guideline approach*, an American initiative and
- (b) *the approach based on sentencing starting points and informed judicial discretion* which originated in Europe.

Both approaches have their roots in proportionality and just deserts.

Presumptive Guidelines

4.2 The typical scheme involves:

- (a) a sentencing commission;
- (b) presumptive sentencing guidelines;
- (c) appellate sentence review.

4.3 To describe the system in crude terms, the Commission, as in Minnesota for example, would draw up a table with two axes,

- (i) offences, divided into categories based on levels of seriousness;
- (ii) offenders, grouped in accordance with their criminal histories.

The figure at the intersection of the axes would be the presumptive sentence for the particular crime. Only substantial and compelling circumstance would allow

a court to depart from the presumptive sentence. Judgments would be written and either defence or prosecution could appeal. While the scheme in Minnesota achieved consistency in the short term, it was confined to felonies and did not differentiate sufficiently between the gravity of different felonies. As a result, charging and plea bargaining practice came to play too significant a role.

4.4 The U.S. Federal Guidelines, which issued in 1987, acknowledged a difficulty in choosing between objectives of sentencing and in essence based the guidelines on an averaging out of existing sentencing practice.

4.5 *In our Consultation Paper we provisionally recommended against the introduction of presumptive guidelines and we adhere to that recommendation.*

Starting Points And Informed Judicial Discretion

4.6 This is a method which sets out to influence judicial sentencing discretion while leaving that discretion intact. A data base is compiled based on past sentencing practice which identifies the most important elements in the sentencing decision. The data base provides the starting point from which the ultimate sentencing choice is made in the judge's discretion. It is an aid to the conscientious judge who wishes his or her sentencing to conform to the practice of his or her colleagues. The hope is that a measure of consistency would be achieved as a result of the exercise of informed discretion.

4.7 While the Commission found the starting points approach more attractive, it has its problems also, the biggest problem being the collection of the necessary information from judges. To arrive at a sentencing starting point, one needs to ascertain an accurate profile of sentences imposed so one can subtract aggravating, mitigating or other factors and arrive at the essential kernel of the sentence. If judges delivered a written judgment in every case, this would be ideal, but in general, judges do not do so, or do so in the necessary detail.

It is also unrealistic to expect judges to fill up any detailed form after imposing sentence, particularly after a long day in a busy Court, concentrating on all the facts of varied cases.

4.8 It would be a reasonable compromise to marshal, somehow, in a simple format an account of past disposals in apparently similar cases. A combination of a coherent sentencing policy, appellate guidance and relevant information would be sufficient in a small jurisdiction like Ireland to ensure that judicial discretion is exercised in an informed and consistent manner. Legislation for prosecution appeals is already in place. As we will no longer be recommending the imposition of a sentencing policy by statute, it will be left to the Courts to devise one, perhaps by adopting the compromise suggested above.

4.9 We made the following provisional recommendations regarding information in our Consultation Paper:

- (i) that a national agency be established for the compilation and dissemination of statistics relevant to sentencing.¹
- (ii) the formulation of a scheme for the provision of quantitative sentencing information to judges, in the context of a coherent sentencing policy and of sentencing guidance by appellate courts, such information to be compiled over a period after the legislative introduction of a statement of sentencing policy. Information should be provided on sentences resulting from different combinations of material case factors.²

4.10 In the Introduction to our Consultation Paper, we noted the conclusion in the Whitaker Report that "complexities" are the reality of the criminal justice system but that given the present state of criminal justice statistics, their frequency cannot be measured.

"This lack of information is not merely a nuisance which hinders research. It is a feature of the criminal justice system that decisions are taken at one stage in ignorance of what is occurring elsewhere in the system".

4.11 In his judgment in *Tiernan*, the Chief Justice comments on the absence before the Court of "statistics or information ... concerning any general pattern of sentences imposed for the crime of rape within this jurisdiction".³

4.12 We also sought views on the design of a sentencing information system. Only one expert gave us views in writing.⁴ This expert noted that data are collected for specific use by three different organisations within the system i.e. the Garda Síochána, the Prison System and the Probation and Welfare Services and observed that these data seemed to be collected, analyzed and reported separately, possibly using different units of analysis. It was not surprising, therefore, that statistics giving a complete picture of the operation of the entire system, from the macro perspective (e.g. giving data about levels of crime and types of sentences) to the micro perspective (e.g. information on an offender's 'career') did not exist. There was a need for a centrally located criminal justice data base, similar to those in many other jurisdictions, with a single unit of analysis - the offender. Units of analysis of relevance to the different bodies operating within the system would not be lost by adopting this strategy if care were taken in collecting the data. Meticulous data collection and equally meticulous data analysis should be the standard for the suggested data base. If this was in the hands of a staff of well-trained analysts under the guidance of a criminologist/sociologist, analysis for specific purposes or to answer specific questions would be readily available.

1 Consultation Paper, Provisional Recommendation 1, Chapter 17 at p.373.
 2 *Ibid.*, Provisional Recommendation 14, Chapter 17 at pp.378-9.
 3 *People (D.P.P.) v. Tiernan* [1989] ILRM 149 at 152.
 4 Dr. Francesca Lundström.

This strategy would be invaluable to:

- Government ministers or the Department of Justice: to answer questions in the Dáil, to formulate social policy or to compile statistics for cross-cultural comparisons (e.g., for the UN).
- The Courts and the Judiciary: to give information on recent sentencing practices in general or in relation to specific crimes, to monitor the effectiveness of certain sentences vis á vis recidivism or any of the other sentences criteria.
- The Garda Síochána: to monitor crime hot spots, crime trends and construct profiles of criminals' *modus operandi*.
- The Probation and Welfare Services: to classify offenders most likely to break parole, default on other non-custodial sentences within their jurisdiction or to assess the most successful strategies for monitoring the various types of sanctions this Service administers.
- The Prison Service: to monitor trends in incarceration, to plan for fluctuations in the intake of different types of offenders and monitor their accommodation needs.

All the above mentioned information and much more would be possible from a single criminal justice data base. All the services could be engaged in providing and receiving information to create a dynamic data base capable of frequent evaluations to identify strengths and weaknesses. In addition, the data base could be designed with automatic feedback loops to all parts of the system creating a cooperative venture in the control and reduction of crime.

4.13 Because quantitative data generally are reported in numerical form and because figures are devoid of nuances which are important in the administration of justice, information based solely on quantitative (numerical) data would produce a mechanistic, sterile information system incapable of indicating anything but a monochromatic aggregate picture of sentencing practice suitable for gross statistical reporting but of no value to judges who might want to know *why* a particular sentence rather than some other was chosen as a sanction for a specific crime.

This view was also given emphasis at the Commission's seminar.

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

The View From The Bench: Sentencing Studies

4.14 In the Consultation Paper, we provisionally recommended that organised judicial studies in sentencing be initiated by a body charged with the development and supervision of judicial education, and with the compilation and publication of sentencing statistics and other information and materials.

4.15 We sought views on the composition of such a body, and on the precise ambit of the responsibilities and function which it should undertake. A governing condition of the proposals was that judicial independence not be undermined.

4.16 The judges of the High Court, in their submission supported the view that scientific research into sentencing by the courts would be of considerable assistance.⁵ They say that such research would not only be of assistance in a consideration of the need for legislation but it would also be of help to the judiciary and in particular to appellate courts when considering the need for judicial guidelines in sentencing matters.

4.17 Warning that research is not an end in itself, that its results must be carefully analysed and that informed consideration should be given as to how best to respond to the lessons taught, they nevertheless point out that all judges would welcome assistance in the complex task of sentencing and would welcome, in particular, the help given by such research.

4.18 The Judges of the High Court also informed us that they were giving consideration to the establishment of a Standing Committee which might be called the "Chief Justice's Committee on Sentencing". It would be concerned solely with sentencing matters and could originally consist of the Chief Justice and the Presidents of the High, Circuit, and District Courts with power to add to its members (from both inside and outside the judiciary). Information obtained from research would be forwarded to the Committee and in the light of that information and its knowledge of experience in our courts, the Committee would be in a position to advise on many of the important matters discussed in the Paper including:

- (a) whether the matters currently taken into account by sentencing either generally or in respect of particular crime should be changed,
- (b) whether changes should be made by legislation or by informal guidelines or by appellate courts,
- (c) whether guidelines relating to mitigating and aggravating factors in sentencing decisions should be made by legislation or by appellate courts or by informal guidelines,
- (d) the use of records of previous crimes when making sentencing decisions,

5 The judges drew attention to similar views in the Report of the Commission on the Status of Women (Paragraph 1.6.7).

- (e) whether sentencing judges should give reasons, and
- (f) whether current sentencing procedures should be changed and, if so, how.

4.19 They envisage the Committee not only reporting when it considers it appropriate to do so to the Minister for Justice but also informally conveying its views to judges and to appellate courts. They would envisage the Committee holding seminars and conferences of judges on sentencing matters and consulting outside experts when necessary. By drawing the attention of Appellate Courts to the need for judicial guidelines in definite areas, the Committee could initiate action to obviate the danger of disparity in sentencing.

4.20 Consideration was also given by the judges of the High Court to the establishment of some type of agency outside the judicial system composed of experts in the field of penal policy as well as members of the judiciary, which might be called a "Sentencing Council". It would, broadly speaking, have responsibilities similar to those of the Sentencing Committee just referred to.

4.21 The judges of the Circuit Court thought that the provision of sentencing information would be of the greatest value to them as they tended to become more isolated than judges in the other courts. Some of them expressed interest in judicial "in-training" where this might become necessary to study new developments.

4.22 The judges of the District Court felt less need for information, firstly because their sentencing jurisdiction was limited and, secondly, because in Dublin in any event they have little difficulty in keeping up with the sentencing norm for different offences. The Commission feels that this was, perhaps, very much a Dublin Metropolitan perspective.

4.23 The President of the District Court expressed interest in training for new judges based on the approach in England and Scotland. While there was general support at the Commission's seminar for the provision of better information, the point was made that perhaps, as turned out to be the case in Canada, the perception of judicial inconsistency was essentially media inspired. The point was also made that judicial inconsistency was an indication of health in the system as each case was different and was being given individual consideration.

4.24 A point emphasised by several speakers was the fact that the media tended only to report the opening day and more sensational or newsworthy parts of cases and not all the evidence relevant to sentence.

4.25 The provision of information and of further education can never be unhelpful. Better information is sought eagerly by judges, at least of the High and Circuit Courts. As in Canada, the Commission is satisfied that sentencing is in fact more consistent than its portrayal in the media would suggest.

4.26 While we would welcome the establishment of the proposed Chief Justice's Sentencing Committee and indeed of similar Committees of judges of other courts, *we would adhere to our recommendations as set out at para. 4.13 above.*

CHAPTER 5: **MAXIMUM, MINIMUM AND MANDATORY PENALTIES**

5.1 In the Consultation Paper, we provisionally recommended that the legislature undertake a review of the set of maximum penalties which currently exists in Ireland, and rescale the levels in accordance with modern perspectives on offence seriousness and in accordance with the view that custodial sentences should be regarded as sanctions of the last resort. We provisionally recommended that the set of maximum penalties be diminished - between six and eight levels of maximum penalty would be sufficient.

5.2 We also provisionally recommended that the proposals in our Report on the Indexation of Fines¹ be implemented.

5.3 *These recommendations were universally accepted and we adhere to them.*

5.4 We went on to recommend that minimum and mandatory sentences be abolished. The only minimum sentence of imprisonment we have is that of 40 years for capital murder, introduced specifically to have a deterrent effect.² In that it was introduced to replace the death penalty, the provision was understandable in political terms.³ The only mandatory sentence of imprisonment on conviction on indictment, is life, for murder and treason.

5.5 We will not repeat the entire discussion of the matter in this Report. We were satisfied that it was perfectly proper for the legislature to by-pass the *audi alteram partem* rule in circumstances such as conviction for murder where there was considered to be no "*alteram partem*" to be heard.

¹ L.R.C. 37-1991.

² See Consultation Paper, para. 1.131.

³ A recent survey conducted by Gallup for the American Bar Association disclosed that 90% of Federal and State judges considered mandatory minimum sentences for federal drug offences a bad idea. A.B.A. Journal, October, 1993, p.78.

5.6 We were however influenced to a greater extent by criticism such as the following:

"it is impossible at the legislative level to foresee and provide in adequate detail either for the multitudinous variety of circumstances under which serious crimes are committed or for the sometimes considerable differences of personality, background and intelligence between people who commit them. What is virtually certain is that legislatively imposed fixed penalties for serious crimes will require the frequent intervention of executive clemency".⁴

We also noted the central objection of the Supreme Court to the mandatory life sentence for murder, as enunciated by Finlay C.J. and the majority of the Court in *The People (D.P.P.) v. Conroy (No. 2)*, i.e.

"there would not appear to me to be any grounds for a general presumption that the crime of manslaughter may not, having regard to its individual facts and particular circumstances be in many instances, from a sentencing point of view, as serious as, or more serious than, the crime of murder".⁵

In the light of the Minister for Justice's power and practice of release after 8 to 10 years, the mandatory life sentence is illusory.

5.7 We provisionally concluded that a mandatory sentence on conviction on indictment was a blunt instrument which would not be tolerated in any sentencing scheme with the slightest sensitivity to a "just deserts" approach.

5.8 We acknowledged the great emotional appeal of the mandatory sentence to the public, noting that what Lord Hailsham described as "the hairy heel of populism" had prevented its abolition in the House of Commons.

5.9 In spite of public awareness of the early release policy for persons sentenced to life imprisonment, we remarked that there is continued support for mandatory or minimum sentences as we have seen in the reaction to recent sentences for rape and sexual abuse. This is fuelled by distrust of judges, whose sentencing practice is perceived to be preoccupied to such an extent with mitigating factors that the deserts element, merited in the light of the offences committed, is significantly displaced in the sentences ultimately imposed. This is a particularly galling perception for rape victims who undergo the ordeal of a rape trial in order to ensure that rapists are seen to get the sentence they deserve.

5.10 Does the fact that we are no longer recommending a *statutory* just

4 Howard, *An analysis of Sentencing Authority in Reshaping the Criminal Law*, Essays in Honour of Glanville Williams (Glazebrook ed.), 1978, p.406.

5 [1989] I.R. 160 at p.163.

deserts policy affect our original conclusion? A deserts approach, envisaging controlled variation of sentence, is inimical to mandatory and minimum sentences. As a majority favours employing the deserts approach in a set of non-statutory guidelines, our original approach is unaffected. This approach is also consistent with the views of the minority as expressed in Chapter 2, paras. 2.23 to 2.55.

5.11 Opinion was divided at our Seminar. Some thought that, murder being usually considered the most serious crime, this was properly marked by the mandatory life sentence and that removal of the mandatory element would lead to a reduction in respect for the law. Others considered it an inflexible, blunt instrument not worthy of respect. The fact that there is no mandatory sentence for rape has not prevented it being perceived as a very serious offence. Nobody spoke in favour of minimum sentences.

5.12 Whether or not individual Commissioners favour a deserts approach, we are unanimous, in sharing the view of the Supreme Court, echoed by the other judges we consulted, that there are degrees of seriousness even in the most serious of crimes such as murder and manslaughter.

Accordingly, we recommend that mandatory and minimum sentences of imprisonment for indictable offences be abolished.

Mandatory Sentences For Summary Offences

5.13 We provisionally recommended that the question of mandatory sentences for minor crimes be examined in more detail with a view to improving the efficiency of the administration of justice in the District Court. Logically, if a mandatory sentence is not proper for an indictable offence it should not be proper for a summary offence either, even though the ceiling is necessarily lower. The judges of the District Court were all opposed to mandatory sentences and in particular to the mandatory endorsement of a driving licence for the offence of careless driving.

5.14 However, disqualification from driving was held not to be a sentence by the Supreme Court in *A.G. v. Conroy*.⁶

5.15 The Commission is aware that there are many mandatory penalties for revenue offences and we would not recommend their abolition without a thorough review of the matter of revenue penalties.

5.16 *We recommend against the introduction of mandatory or minimum sentences of imprisonment for summary offences.*

CHAPTER 6: PLEAS OF GUILTY

6.1 We examined in some detail in the Consultation Paper the question of plea agreements or bargains. We had no problem in accepting them as an integral part of the prosecution system as they embody both efficiency and restraint. A plea of guilty not only saves time, promoting a reduction in delay for the disposal of other cases, but can also spare a complainant, e.g. of rape, the ordeal of giving evidence. These undoubted benefits should be reflected in an appropriate amelioration of the penalty imposed.

6.2 This principle was recently re-affirmed by the Supreme Court, not without controversy, in *D.P.P. v. G.*¹ In delivering judgment in *G.*, the Chief Justice repeated the following passage from his judgment in *People (D.P.P.) v. Tiernan*²:

"I have no doubt, however, that in the case of rape an admission of guilt made at an early stage in the investigation of the crime which is followed by a subsequent plea of guilty, can be a significant mitigating factor. I emphasise the admission of guilt at an early stage because if that is followed with a plea of guilty it necessarily makes it possible for the unfortunate victim to have early assurance that she will not be put through the additional suffering of having to describe in detail her rape and face the ordeal of cross-examination".³

The Chief Justice goes on to say:

"I am quite satisfied that that statement is correct and complete and that

1 [1994] I.R. 587.

2 [1988] I.R. 250; [1989] ILRM 149.

3 *Ibid.*, at p.591.

it is a matter of very considerable importance that it should be consistently applied by the courts. The fact that it will be applied must, it seems to me, be of importance in the process of trying to secure a situation in which ... victims of rape and, indeed, other crimes of violence as well, may be spared the additional trauma and distress of giving evidence in court".⁴

6.3 The Chief Justice proceeded to describe the ruling of the trial judge, Carney J., who had imposed the maximum sentence in a case while unequivocally accepting the importance and genuineness of the admission of guilt by the accused, as "an error in the application of the principles applicable to sentencing, particularly in a case of rape".

6.4 We query whether the judgement in *Tiernan* is, in fact, complete in the context of pleas of guilty. The Court laid down that a plea of guilty "can" be a significant factor, not that it should *always* be a significant factor. Neither in *Tiernan* nor in *G.* are examples given of cases where a plea of guilty would *not* be considered a significant factor. Faced as the trial judge was with the wording of *Tiernan* and with pleas of guilty to a dozen rapes, it was surely infelicitous, if not harsh, of the Supreme Court in *G.* to describe the carefully reasoned sentencing judgement of Carney J. as having been "in error". Whether or not *Tiernan* is said to lay down "principles" or "guidelines", given the absence of words like "will", "should" or "shall", surely these do not have to be followed in every case?

6.5 If the sentencing principles of the Court of Criminal Appeal or the Supreme Court on sentencing are to be interpreted as absolute requirements by trial courts, such a situation would be indistinguishable in effect from the situation which would emerge after the imposition of a statutory sentencing policy by the legislature. As we noted above, no judge we consulted was in favour of such a policy and the Commission has decided not to recommend one. It would be inconsistent for judges to favour absolute sentencing rules laid down by courts of appeal.

6.6 In a subsequent case, *D.P.P. v. J.R.*,⁵ the accused pleaded guilty, *inter alia*, to ten counts of rape. Because of his pleas, Carney J., who had been found "in error" in *D.P.P. v. G.*, felt constrained not to impose the life sentence he wished to impose because of the decision in *G.* and, instead, imposed a sentence of 15 years imprisonment.

6.7 The Commission feels that Carney J. was not necessarily obliged to follow the *G.* decision and, in the light of the wording in the *Tiernan* judgement, might have imposed a life sentence. *Nevertheless, the situation is confused and should be clarified as soon as possible by the Supreme Court.* It would be

4 *Ibid.*

5 Central Criminal Court, 5th December 1995.

ridiculous if the Oireachtas had to legislate to the effect that a guideline is a guideline.

6.8 Whereas the Commission is satisfied that existing plea-negotiation practice should continue, we also explored whether the procedure might be refined by introducing the judge into the procedure to indicate the sentence he or she has in mind in the event of a plea. We sought views on this question.

6.9 Our consultations, in particular with the judges of the Circuit Court, revealed, to our surprise, that such indications are sought and obtained from judges in chambers more frequently than we had thought.

6.10 If sentencing became more predictable as a result of the judiciary being better informed in general and having available a series of headline judgments of the Court of Criminal Appeal in different cases, there would be no need for such negotiations in chambers. Again, as the virtual inevitability of a discount after a plea is well established at this stage, it should be possible to obtain an indication in open court - even of the *range* of the sentence which would be imposed and of the discount which could be anticipated - *without consideration of aggravating or mitigating circumstance or of previous convictions*. This procedure would also tend to ensure that a judge would not go back on an indication given in public, albeit in the absence of the jury or jury panel.

6.11 The Commission and those consulted have serious misgivings about the constitutionality of the chamber procedure and, indeed, of its necessity but *we make no recommendation for legislation in the area of plea negotiations*.

CHAPTER 7: PROSECUTION APPEALS

7.1 In the Consultation Paper, we provisionally recommended the introduction of a prosecution right of appeal against sentence, noting the review provisions in s.2 of the *Criminal Justice Bill, 1992*. These provisions have now become law and s.2 of the *Criminal Justice Act, 1993* provides, *inter alia*, that:-

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

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

(3) on such an application, the Court may either -

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

(b) refuse the application.

..."

7.2 The Commission welcomes the legislation and hopes that it will lead to the creation of less lop-sided sentencing precedents as appeals will now seek to review both severe and lenient sentences. Noting that it would involve a change

in prosecution practice, we also provisionally recommended that prosecution counsel be permitted at the sentencing stage to make submissions to the court not just on the facts of the case, but also on relevant legal principles and precedents. We recommended against the making of specific submissions on the appropriateness of a particular sentence.

The facts of the case, the sentencing precedents and guidelines, if any, and the aggravating or mitigating factors should all speak for themselves and it should be quite unnecessary for prosecuting counsel to *demand* or seek a particular sentence (unless asked to do so by the sentencing judge). It would be perverse of the Court of Criminal Appeal to criticise the prosecution for not demanding a particular sentence provided all relevant facts and sentencing information had been furnished to the sentencing court.

7.3 There was general agreement with this proposal. The more information on sentencing becomes available and the more sentencing precedents are set by the Court of Criminal Appeal, the more necessary and valuable will this new practice become. As it is a matter of practice, no fresh legislation would be necessary.

Prosecution Appeal From The District Court

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

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

7.6 *We recommend that the prosecution should have power to seek review of District Court sentences.*

Sentencing Procedure

7.7 In Chapter 11 of the Consultation Paper we provisionally recommended:

- (a) the adoption of a code of procedure and evidence for the sentencing hearing, on Canadian lines;¹

¹ Consultation Paper, para. 11.19.

and

- (b) judicial scrutiny of the accuracy and completeness of evidence agreed by both parties at the sentencing hearing, on US lines.²

We sought views on:

- (i) the desirability of applying restrictive and exclusionary rules of evidence to factual disputes at the sentencing hearing;³

and

- (ii) the most appropriate standard of proof for the resolution of factual disputes at the sentencing hearing.⁴

7.8 Response was disappointing and we will not make any recommendations in this area in this Report. Guidelines can be drawn up in the future in the light of greater experience of the more active role of the prosecution in the sentencing process.

² *Ibid.*, para. 11.20.

³ *Ibid.*, para. 11.21.

⁴ *Ibid.*, para. 11.22.

CHAPTER 8: VICTIM IMPACT STATEMENTS

8.1 The Commission made no provisional recommendation in the Consultation Paper on the matter of mandatory victim impact statements. It set out the arguments for and against and sought views. At the outset, let us emphasise that the Commission agrees on the importance of evidence of victim impact, where it divides is on whether or not a particular type of evidence or statement of evidence should be given or furnished in every single case in particular categories. We do not propose to set out again all the arguments for or against the mandatory impact statement. The statement is to enable a judge pass an appropriate sentence which takes into account to an appropriate degree the effect of the crime on the victim and to ensure that where the impact is severe, this is reflected in the sentence. Those who advocate the mandatory statement do not trust judges properly to exercise their discretion in seeking such evidence.

8.2 The judges we consulted said that they would always seek relevant evidence of victim impact as a matter of course where it was helpful, particularly in cases of sexual assault. They were opposed to *mandatory* statements in all cases involving victims. Opinion was divided at the Commission's seminar, except that there was a general feeling that victim impact evidence was most appropriate in cases of sexual offences. The tone of those in favour of mandatory evidence was retributive, to the extent that although severe impact was felt to warrant a more severe sentence than the norm, the sentence was not to be reduced from the norm for minimal impact. Against that the view was expressed that the criminal justice system had already decided at an abstract level that certain conduct is unacceptable in society. A ranking in order of gravity is already decided regardless of how the victim himself or herself ranks the crime. The need was to restore the faith of the public rather than of the victim in the criminal justice system. The view was expressed that in the end, the victim impact statement might be more trouble than its worth and it also might run

counter to the State's view of the crime. It might reintroduce the view that the victim is entitled to a pound of flesh, a view which goes back to the idea of individual retribution.

8.3 Again, opinion was divided as to the appropriate source of victim impact evidence, some favouring psychologists, others the Gardaí, others an independent service attached to the Court.

8.4 The Commission subsequently received a written submission from the Irish Association for Victim Support (I.A.V.S.) advocating that the statement should be prepared and furnished by the Gardaí and enclosing a suggested form for such a statement.¹ The Commission is satisfied that if such a statement were to become mandatory, it should be prepared by the Gardaí.

8.5 The *Criminal Justice Act, 1993* is now law. Section 5 of that Act provides that in determining sentence for sexual offences or offences involving violence, the court *shall* take into account and may, where necessary, receive evidence or submissions concerning *any* effect on the victim. Except in the most trivial cases, where the evidence of the crime itself will also disclose the effect on the victim to the extent necessary, the Court will *have to* hear appropriate evidence from the Gardaí or other source of evidence to fulfil its statutory duty. The prosecution will have to ensure that this evidence is available. The I.A.V.S. sample statement is no more than should be on any properly prepared prosecution file. No additional legislation is necessary.

8.6 The protection of the interests of the victim should be a more central concern of the criminal justice process as a whole, not simply the sentencing process. If society is genuinely concerned about improving the lot of victims, more thought should be given to identifying and meeting their specific needs - the need for vindication, for protection, for support, and in some cases for compensation. We should avoid the facile assumption that society's responsibilities to the victim are best discharged through the imposition of heavily retributive sentences.

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See Appendix C.

CHAPTER 9: COMMUNITY SERVICE ORDERS

9.1 Community Service Orders (C.S.O.s) are made under the *Criminal Justice (Community Service) Act, 1983* where a person has been convicted of an offence for which, in the court's opinion, the appropriate sentence would, but for the Act, be penal servitude, imprisonment or detention in St. Patrick's Institute.¹ Hence the Act equates C.S.O.s to imprisonment in terms of severity: if the conduct does not merit a prison sentence it does not merit a C.S.O.. Of the 1,745 C.S.O.s made in 1992 (some 57% being in the Dublin Metropolitan area)² the types of offences with regard to which they were most regularly made were assault, burglary and larceny, car theft, driving offences and malicious damage.³ Notably, 36% of C.S.O.s were made with regard to crimes involving violence. The average number of hours stipulated in C.S.O.s has climbed from 83 in 1985 to 150 hours in 1992 and so it appears that, at least to some degree, the judiciary are more willing to impose C.S.O.s with regard to graver matters now than they were in 1985. While these offences by their nature cover activities of varying degrees of seriousness, one would expect from the wording of the Act that C.S.O.s be made with regard to matters going beyond the trivial, and at the very least these facts do not contradict that expectation.

9.2 While the Act may assimilate C.S.O.s and terms of imprisonment, the two measures do not share much in common. C.S.O.s generally require unpaid work involving the maintenance and improvement of property, with an average of 8 to 10 hours being served by the offender per week. Unlike other punishments, C.S.O.s tend to be fully performed (in 83% of cases to date). They are perceived by the judges we consulted as having a more rehabilitative and less

1 Section 2.

2 All statistical information in this document is, unless otherwise stated, from the submission of Martin Tansey, Principal Probation and Welfare Officer, 28/7/93.

3 i.e. over 350 orders made in each case in 1992.

retributive role than a prison term, being favoured in cases where rehabilitation is seen as more feasible, and have been praised for the access to care they provide.

9.3 The role of the Probation and Welfare Service officers is to report to the court on whether arrangements can be made for the offender to perform work,⁴ to report on the suitability of the offender with regard to community service⁵ and to supervise the offender's work.⁶ Failure to comply with the order can result in a fine⁷ or the replacement of the C.S.O. with the prison term which would otherwise have been appropriate.⁸

Use Of C.S.O.s For Minor Offences

9.4 As noted above, the 1983 Act only makes C.S.O.s available when a term of imprisonment would be, but for the Act, appropriate. The Commission is satisfied that this deprives the courts of what is a useful and important sentence in cases where a term of imprisonment would not be appropriate. The Probation and Welfare Service has advised us that some judges already seem to be using C.S.O.s in circumstances in which they would never previously have sentenced the accused to imprisonment.⁹

Offences Of Intermediate Seriousness: Maintaining The Current Usage Of The C.S.O. System And Possible Judicial Reasoning

9.5 The equation of a term of imprisonment and C.S.O.s in the 1983 Act indicates that, for offences which come within the Act, C.S.O.s are a direct and genuine alternative in the present view of the Legislature, wherever the maximum limit of 240 hours of community service would still be appropriate.

9.6 At present the availability of C.S.O.s in cases of intermediate severity is facilitated by the legislative view that they can be equated to terms of imprisonment: the two penalties are explicitly designed to overlap in the type of behaviour to which they apply (once the maximum limit of 240 hours of community service remains appropriate), even though they have a very different level of severity.

9.7 Technically, as the Act only makes C.S.O.s available when a term of imprisonment would, in the court's opinion, be appropriate, C.S.O.s should *only* be imposed for offences of intermediate seriousness. However, arguably the courts at the moment are taking a wider view.

9.8 Some judges of the Circuit Court indicated that C.S.O.s are seen as

4 Section 4(1)(a) of the 1983 Act.

5 *Ibid.*

6 Section 7(1)(b).

7 Section 7(4).

8 Section 8.

9 Submission of Martin Tansey, Principal Probation and Welfare Officer, *op cit.*, f.n. 2

suitable for offences such as minor assaults or malicious damage, where it was a first offence and rehabilitation was likely. Another judge expressed the view that they ought to be considered in intermediate cases where there was a guilty plea and the possibility of rehabilitation. Due to the dearth of information, the least that one can say is that the statistics available do not disprove the contention that C.S.O.s are currently being imposed in some cases of intermediate seriousness.

Operational Problems In The C.S.O. System

(i) Maximum sentences

9.9 In provisional recommendation 20 the Commission suggested rescaling maximum penalties, reflecting modern views of the seriousness of various offences and that prison is a last resort.¹⁰ It therefore seems in accord with the reasoning of Chapter 10 of the Consultation Paper that the number of hours (240)¹¹ which a court may impose be increased, thereby increasing the range of circumstances in which the C.S.O. penalty could be used. At present 150 hours is the average length of order,¹² however one judge has suggested that the upper limit can trap a judge into imposing a term of imprisonment where otherwise a longer C.S.O. would have been preferable. Clearly, very long C.S.O.s would be inappropriate in many cases, only imprisonment reflecting the seriousness of the offending behaviour. However, that is a consideration appropriate to the trial judge. Similarly, the Act places a *prima facie* limit of one year on the duration of a C.S.O..¹³ By the same logic, it is submitted, this limit ought be discarded.

9.10 While it is submitted that the blanket maximum limit in the 1983 Act be discarded, it may be viewed as appropriate with regard to specific offences to lay down maxima for the length of any C.S.O. imposed for the offence in question. However, at a practical level, if a maximum penalty is specified in another form - i.e. in terms of another type of sanction - that probably provides sufficient guidance, by giving some idea of how serious the legislature views the behaviour in question, as to the maximum number of hours which ought be imposed.

9.11 Although it would be preferable, with regard to the setting of maximum duration figures generally, to retain the flexibility of the C.S.O. sanction, especially given the desire that imprisonment be the sanction of last resort, by avoiding setting any such figures, administrative considerations, especially the difficulty in making work available for very long C.S.O.s, may make a maximum, or maxima, desirable. The administrative burden involved would, however, have to be quite unreasonable indeed in order to justify the imposition of a custodial sanction instead of a long period of community service.

10 Consultation Paper, Chapter 17 at p.379.

11 Section 3, 1983 Act.

12 Submission of Martin Tansey, Probation and Welfare Service Principal Officer, *op cit.*, f.n. 2.

13 Section 7 (2).

(ii) **Minimum sentences**

9.12 The Commission has recommended above the abolition of minimum sentences. The Probation and Welfare Service recommends the doubling of C.S.O. minima from 40 to 80 hours. The 1983 Act's minimum figure and minimum sentences attached to specific offences by legislation are not comparable, as clearly the 1983 Act is not suggesting that a minimum of 40 hours community service is the least severe penalty to be imposed upon conviction for specified offences. However, the minimum does reflect the equation of imprisonment and C.S.O.s in the Act.

9.13 As has been suggested, the C.S.O. naturally lacks any real equality, as a general rule, with imprisonment in terms of severity. Once the false equation of the two sanctions in the 1983 Act is broken, there seems less basis for setting down any minimum number of hours which a C.S.O. must prescribe. Removing any minimum would instead increase the flexibility of this sanction.

9.14 An arguable basis for the retention of a minimum duration for C.S.O.s is the administrative burden involved in setting up and supervising community service programmes. The attraction of a small number of C.S.O. hours over another, similarly small, penalty (e.g. a moderate fine) may be outweighed by the disproportionate administrative burden imposed thereby on the State in arranging the availability of short-term work.

9.15 However, as stated above, the Probation and Welfare Service Officer usually reports to the court, prior to sentence, on whether work arrangements can be made,¹⁴ which presumably includes the question of availability of work, and so it should be left to the Service to determine, on a case-by-case basis, if it is administratively possible to make work available for a small number of hours in the light of the prevailing circumstances of the programmes.

(iii) **Follow-up reports**

9.16 Some suggestions have been made that a follow-up report be made to the judge on the operation of the C.S.O. in each case. Given that a mechanism and penalties already exist to deal with failure to comply with a C.S.O. and, furthermore, that the C.S.O. Regulations provide for certificates of satisfactory completion of work being forwarded to the Court when appropriate, the basis for seeking such a report is probably so that the judge can get some indication as to whether his or her aims in selecting a C.S.O. were borne out. We suggest that this aim could be achieved by the gathering of information centrally on the operation of the C.S.O. system in the context of our earlier recommendation on information.¹⁵

9.17 It has been suggested¹⁶ that a need exists for more meaningful and

14 Section 4(1)(a).

15 *Supra.*, para. 4.13.

16 Submission of Martin Tansey, Principal Probation and Welfare Officer, *op cit.*, f.n. 2.

precise legislation dealing with community-based sanctions in general, especially to assist the Probation and Welfare Service and to deal with the public view of such sanctions as a "let-off". The content of penalties is, however, beyond the ambit of this Report.

9.18 The Probation Service observes that supervision of community service is very exacting and that the maximum of 240 hours has not been imposed to any significant degree.

9.19 *We recommend the most extensive use possible of C.S.O.s.* However, to put the matter in context, even if the available hours were increased, say to 500, one is only talking about 100 days of 5 hours service a day. This comes nowhere near the level of severity appropriate to realistically acceptable sentences for rape, incest, child-abuse or fatal road traffic offences. It must be acknowledged that community service *per se* is peripheral to our main concern, i.e. the achievement of consistency in sentencing in general, particularly in the most serious cases.

9.20 *We recommend that C.S.O.s ought always to be available on conviction for any offence.*

CHAPTER 10: THE PROBATION SERVICE¹

10.1 Apart from the Community Service Order, the administration of which is provided by the Probation Service, that service provides 3 other alternatives to prison:

- (1) Probation
- (2) Adjourned Supervision
- (3) The Intensive Probation Scheme

10.2 The primary objective of these forms of probation is rehabilitation. Offenders are confronted with the consequences of their behaviour and are asked and encouraged to take responsibility for it. They are confronted with the destructive patterns in their lives, such as an addictive or violent disposition, and are asked to acknowledge and change them. The Probation Officers negotiate with the offenders and seek their co-operation with programmes designed to change their destructive disposition, advising them that if they do not co-operate they will be returned to court for a sentence of greater severity.

Probation Orders

10.2 Probation orders are made by courts when offenders are discharged conditionally on entering into a recognisance to keep the peace and be of good behaviour while under the supervision of a Probation Officer for a fixed period, not exceeding 3 years. Additional conditions may also be included e.g. attendance at a particular treatment centre.

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This Chapter is grounded on an address given by Emer Hanna, Senior Probation and Welfare Officer, Department of Justice, to the Dublin Solicitor's Bar Association on 15.4.94.

In 1990 1,322 people were placed on probation.

10.4 Probation is most suitable for people who have problems like addiction or life-skills problems and who wish to bring about some change in their offending behaviour. A person is usually placed on probation subsequent to a Social Enquiry Report being prepared for the courts in the light of which Probation Officers make an assessment of the offender's willingness to change and, therefore, his/her suitability for Probation.

10.5 While research has not been carried out, to the Commission's knowledge, in Ireland on the effectiveness of probation, the experience of officers working in the courts is that a significant number of people who are placed on probation do not make further court appearances.

Adjourned Supervision

10.6 Under this sentencing option, the judge postpones a final penalty decision and requests the Probation Officer to supervise the offender and return to Court with regular progress reports. Referrals come from both the District and Circuit Courts for this form of supervision.

1,423 people had their sentence deferred and were under supervision during 1990.

10.7 This form of probation has frequent court appearances built into it and appears to concentrate the offender's mind. It is an option frequently and beneficially adopted in the Circuit Court for quite serious offences.

Intensive Probation Scheme

10.8 The Probation Service was at the forefront of the planning and implementation of the Intensive Probation Scheme (I.P.S.) in the early 1990s. The Probation Service runs this scheme along with a board of Management which has representatives from the Congress of Trade Unions, the Judiciary, Gardaí, FAS, VEC and the Irish Youth Foundation.

10.9 Despite the best efforts of the Probation Service under the preceding headings, certain offenders continued to appear before the courts. The effectiveness of the existing sanctions had to be examined. Research findings became available, notably from Canada and, to a lesser extent, from Britain, on a reduction in recidivism as a result of offenders being placed on intensive probation schemes.

10.10 In Ireland, the Intensive Probation Scheme gets the majority of its referrals from Circuit Court Orders. The others who avail of the service are prisoners who get temporary release while participating. It works with serious, persistent offenders. Phase one of the scheme is a detailed assessment period. Phase two is a four-month, group work programme. While on the programme,

participants are encouraged to explore, identify and change their patterns of offending behaviour. They are also encouraged to accept responsibility for their behaviour and thereby begin to exercise more control over their lives so that they can make positive choices in future situations. As part of the programme they also consider the consequences of their offending on the victims of crime. Participants get an opportunity to deal with personal problems, to undertake work training courses and to follow through on job opportunities. While the main focus of the programme is to challenge offenders to look at their offending behaviour, it also provides a broad rehabilitative and social education programme.

10.11 Phase three is a follow-up period in which continuing, individual supervision focusing on areas like employment and training is undertaken with the client. This can go on for varying lengths of time depending on the offender's needs and the judge's view of his or her progress.

10.12 Independent research has been built into the I.P.S. scheme from the start and preliminary results are very encouraging.

The scheme operates at present in Dublin and Cork only.

10.13 If, as it appears, intensive probation provides an effective means of encouraging offenders to desist from offending, the necessary resources should be allocated to it, at the very least an amount equal to the estimated savings from not having to keep offenders in custody. The scheme combines rehabilitation with the incapacitation provided by the very intensity of the supervision itself. Whereas rehabilitation or incapacitation do not constitute satisfactory objects of sentencing *in isolation*, the combination works well. The Commission is absolutely satisfied that even the most rudimentary cost-benefit analysis would indicate that *the Probation Service should be a primary target for additional resources in the area of sentencing*.

General

10.14 Research from Britain and Canada suggests that the success of Community-based sentencing alternatives is likely to rest on their ability to target those offenders who will benefit from the particular method or approach involved. One needs to be able to match programmes to offenders and research could guide the development and optimal delivery of programmes.

10.15 Community involvement and Community-based programmes in areas with high crime rates have succeeded in bringing together divergent interest groups and have engaged young people in local projects, diverting them from a criminal life-style. The Probation Service must move towards being involved in these types of community projects and also use them as a valuable resource. Probation Officers would also have a role in advising sentencers of such projects.

10.16 Probation, particularly intensive probation, is not a soft option for

offenders. It is difficult and painful to change life-patterns and the service has been informed by certain offenders that they would prefer to go to prison than partake in a particular programme of intensive probation.

CHAPTER 11: THE SUSPENDED SENTENCE

11.1 A suspended sentence is imposed by prescribing a custodial sentence and then suspending its operation on condition that the offender enters into a recognisance, with or without sureties, to keep the peace and to be of good behaviour for a specified period. Further conditions may be imposed, at the court's discretion, such as an obligation to pay compensation, or to stay away from a certain person or place.

11.2 Unlike England, there is no statutory authority in Ireland for the suspension of a prison sentence.¹

11.3 The Whitaker Committee of Inquiry into the Penal System said of suspended sentences:

"Suspended sentences are unsatisfactory as alternatives because they lack a clear status. There is no mechanism by which non-compliance with the court's conditions is automatically brought to the attention of the court ..."²

11.4 The Commission omitted to make any recommendation relating to suspended sentences in its Consultation Paper.

11.5 There is no limit to the length of sentence which can be suspended. Instancing a 10 year suspended sentence for manslaughter and noting that ten years would be an extremely long sentence for that crime, Tom O'Malley has

¹ Although this was countenanced by s.50 of the *Criminal Justice Bill, 1967* which proposed the introduction of the suspended fine or sentence of imprisonment. The bill encountered opposition and lapsed.

² Para. 5.9.

asked:³

- (a) whether its length was influenced by the fact that it was going to be suspended and
- (b) whether there would any reality in expecting a Court to implement the sentence for a breach of the peace, say, seven years later.

11.6 These points are well taken. In England, it is well settled that the Court should determine the length of a sentence of imprisonment before deciding whether to suspend it; the fact that a sentence is to be suspended does not justify passing a sentence longer than would be imposed if the sentence were to be served immediately. As Griffiths L.J. put it in *R. v. Mah Wing*, "[w]hen the court passes a suspended sentence of imprisonment, its first duty is to consider what would be the appropriate immediate custodial sentence, pass that and then go on to consider whether there are grounds for suspending it. What the court must not do is pass a longer sentence than it would otherwise do, because it is suspended".⁴

11.7 The *Powers of Criminal Courts Act, 1973*, s.22, provides that no sentence exceeding 2 years can be suspended in England. S.22(2) (as substituted by s.5 of the *Criminal Justice Act, 1991*) now provides:

"A court shall not deal with an offender by means of a suspended sentence unless it is of the opinion -

- (a) that the case is one in which a sentence of imprisonment would have been appropriate even without the power to suspend the sentence; and
- (b) that the exercise of that power can be justified by the exceptional circumstances of the case".

11.8 In *R v. Fitton*,⁵ the Court of Appeal considered the extent to which an offender who committed a further offence close to the end of the operational period of a suspended sentence could reasonably expect some mitigation on that account. Otton J. said that it should not be thought that because a person had reached the end, or close to the end, of an operational period, the suspended sentence would be automatically reduced, or that he could expect any mathematical reduction in the sentence. If a further offence was committed during the operational period then the whole of the sentence would be activated. The reason was obvious; the longer the sentence has been in operation, the more

3 Sentencing: A Balanced Approach. A paper given to The Dublin Solicitors Bar Association on 15 April 1994.

4 5 Cr. App. R. (S.) 347; see Thomas, *Encyclopedia of Current Sentencing Practice*, (Sweet & Maxwell), Part D, para. 5.5(a).

5 11 Cr. App. R. (S.) 350.

likely it was that the resolution of a person who was minded to revert to previous criminal activity might weaken. This situation must be dealt with by the court, based on the circumstances of the particular case, when considering whether to activate a suspended sentence and, if so, whether to order it to run consecutively or concurrently with the original sentence.

11.9 The Court had suggested earlier that where the later offence is significantly less serious than the offence for which the suspended sentence was passed, but not so trivial that it would be unjust to activate the suspended sentence at all, it may be appropriate to activate the suspended sentence with the term reduced.⁶

11.10 In England, it has long been a general principle to avoid the situation where an offender is simultaneously serving a sentence and is subject to a suspended sentence. In *R v. Sapiano*,⁷ the Court of Appeal held it was wrong to effect such a situation. With effect from October 1, 1992, the power to suspend a sentence in part in England was abolished by the *Criminal Justice Act, 1991* s.5(2), which repealed s.42 of the *Criminal Law Act, 1977*.

11.11 The practice of reviewing the latter part of a sentence with a view to suspending it is one which has ebbed and flowed in Irish Courts and has caused no little concern to the prison authorities. The Irish Court of Criminal Appeal considered the question of a review of sentence in *Cahill*.⁸

11.12 In that case, the order made by the Central Criminal Court on the 27th April, 1979, stated: "... the Court doth order that accused be imprisoned for 7 years but doth direct that when 36 months served accused is to be brought back before the Court and if in the meantime he has obeyed normal prison discipline and has shown a willingness to co-operate in preparing himself for integration into normal society the Court will consider suspending the then balance of said sentence ...". The Court held that this was an undesirable sentence and followed similar decisions in *Fagan*⁹ and *O'Toole*.¹⁰ The reasons given were:

- (a) A judge's jurisdiction in the Central Criminal Court is limited to the time for which he or she is appointed there by the President of the High Court. So for both legal and practical reasons, the retention by a judge of seisin of a case for sentencing purposes may be rendered incapable of operation.¹¹
- (b) A sentence which is subject to review lacks finality. The time to appeal dates from the close of the trial and the appellate

6 *R v. Cline*, 1 Cr. App. R.(S)40; *R v. Joshua*, 2 Cr. App. R.(S)287.

7 52 Cr. App. R. 6784.

8 *The People (D.P.P.) v. Cahill* [1980] I.R. 8.

9 *The People (D.P.P.) v. Fagan*, Court of Criminal Appeal, 7th November 1977, ex tempore.

10 *The People (D.P.P.) v. O'Toole*, Court of Criminal Appeal, 26th May 1978, ex tempore.

11 [1980] I.R. 8, at pp.10-11.

system postulates a trial that comes to a close with a final order which identifies once and for all the particular conviction and sentence.¹²

- (c) Such a sentence appears to intrude on the functions of the executive in that the power to commute or remit a sentence and to administer the prisons is vested in the Minister for Justice and logically these powers should rest in the same person.¹³
- (d) This form of sentence does not accord with correct principles of penology as both the authorities and the prisoner should be able to prepare for the prisoner's release.¹⁴

11.13 In *D.P.P. v. Aylmer*¹⁵ a majority of the Court refrained from giving a decision on the validity of the reviewable sentence as they said the matter was not before the Court.

11.14 In *Gallagher v. D.P.P.*,¹⁶ the question of executive discretion was examined in the context of the detention of the insane after a special verdict of guilty but insane under s.2 of the *Trial of Lunatics Act, 1883*. The central question for decision was whether the role of the Court was at an end once the special verdict was returned. The judgement of the Supreme Court was delivered by McCarthy J. and held, *inter alia*, that:

"When the special verdict is returned, the court has no function of inquiry into the then mental state of the former accused; that role is given to the executive. Pursuant to subs. (2), the only order that could lawfully be made was an order that the accused be kept in custody as a criminal lunatic in such place and in such manner as the court should direct; immediately after the making of the order or 'thereupon' as stated in the subsection, the role of the executive arose - to provide an appropriate place for the safe custody of the accused in such place and in such manner as the executive thought appropriate, until such time as the executive was satisfied that having regard to the mental health of the accused it was, for both public and private considerations, safe to release him."¹⁷

The executive is said to be carrying out its "role in caring for society and the protection of the common good", "armed with both the knowledge and resources to deal with the problem".¹⁸

12 *Ibid.*, at p.11.

13 *Ibid.*, at pp.11-12.

14 *Ibid.*, at p.12.

15 Supreme Court, December 1986.

16 1991 I.R. 31.

17 At p.38.

18 At p.37.

11.15 This seems to a majority of the Commission to be an equally apt description of the executive's role in dealing with any person sentenced to imprisonment. The behaviour of a prisoner is a matter which falls within the domain of the prison authorities and not of the Courts.

11.16 The practice in the Courts would suggest that judges are evenly divided between those who impose a reviewable sentence and those who do not. In the opinion of the majority of the Commission, the requirement of fair procedures dictates that all sentences should be reviewable by the Courts or none. Imposing the reviewing function on the Courts in all cases would place on them an inappropriate and unnecessary burden. Accordingly, *a majority of the Commission would remove the reviewing role from the Courts.*

11.17 A minority, the President and Commissioner Duncan, believe that the case against reviewable sentences is not conclusive. They are not convinced that such sentences involve intrusion on the function of the executive. They are regarded by some judges as helpful in the context of rehabilitation. Judicial review of sentencing also carries the guarantee of objectivity.

11.18 *All Commissioners, however, agree and recommend that a detailed examination should be undertaken of sentencing review procedures so as to ensure that they operate on the basis of clearly articulated goals and fair, objective and acceptable criteria.*

11.19 The aborted *Criminal Justice Bill* of 1967 contained the following section which would have given the suspended sentence a statutory basis.

- "(1) Where a sentence of imprisonment or fine (other than a sentence or fine which the Court is required by law to impose) is imposed on a person on his being convicted of an offence -
- (a) the Court shall, subject to *section 49(4)(b)* of the Act, have power to suspend the sentence or fine on such conditions (other than a condition restricting the person's choice of a country of residence) as it thinks proper,
 - (b) in the event of a breach of any such condition, the Court, if it thinks proper so to do, may
 - (i) permit the breach to be disregarded and the suspension to continue, or
 - (ii) in lieu of the sentence or fine substitute, in the case of a sentence, such reduced sentence or such fine, and, in the case of a fine, such reduced fine, as the Court may consider appropriate having regard to all the circumstances of the case.

- (2) Where a sentence has remained suspended under this section for three years it shall then cease to be enforceable except in the event of a breach during that period of a condition subject to which it was suspended."

11.20 While we would incorporate in the section an express provision to the effect that the full sentence suspended could be imposed for breach of a condition, nevertheless *we would recommend the introduction of a similar provision today.*

11.21 *We recommend a limit of three years on the length of the sentence which could be suspended.*

CHAPTER 12: SUMMARY OF RECOMMENDATIONS

1. The legislature should undertake a comprehensive review of the law and procedure in relation to the present range of sentencing options with a view to better co-ordination of penal and sentencing policy. The recommendations of the Committee of Inquiry into the Penal System in this regard should be given special consideration. (Chapter 1)
2. A sentence of imprisonment should be regarded as a sanction of last resort. (Chapter 1)
3. Penal servitude and imprisonment with hard labour should be abolished and imprisonment substituted in their place. (Chapter 1)
4. The legislature should undertake a detailed review of the law and procedure governing the administration of sentence with a view to ensuring close co-ordination with sentencing policy. Particular attention should be paid to the provision of express guidelines on commutation and remission of sentence and temporary release. (Chapter 1)
5. A statutory scheme of sentencing should not be introduced. (Chapter 2)
6. Non-statutory guidelines should be introduced to the effect that:
 - (1) The severity of the sentence to be imposed on a person found guilty of an offence should be measured in proportion to the seriousness of the offending behaviour.
 - (2) The seriousness of offending behaviour should be measured by reference to:

- (a) The harm caused or risked by the offender in committing the offence; and
 - (b) The culpability of the offender in committing the offence.
- (3) The sentencer should not have regard:
- (a) to the deterrence of the offender or others from committing further crime; or
 - (b) to the incapacitation of the offender from committing further crime; or
 - (c) when a sentence of imprisonment is warranted under (1) and (2) to the rehabilitation of the offender;

when determining the severity of the sentence to be imposed. (Chapter 2)

7. Sentencing guidelines should identify the following aggravating and mitigating factors:

Aggravating factors

- (1) Whether the offence was planned or premeditated;
- (2) Whether the offender committed the offence as a member of a group organised for crime;
- (3) Whether the offence formed part of a campaign of offences;
- (4) Whether the offender exploited the position of a weak or defenceless victim or exploited the knowledge that the victim's access to justice might have been impeded;
- (5) Whether the offender exploited a position of confidence or trust, including offences committed by law enforcement officers;
- (6) Whether the offender threatened to use or actually used violence, or used, threatened to use, or carried, a weapon;
- (7) Whether the offender caused, threatened to cause, or risked the death or serious injury of another person, or used or threatened to use excessive cruelty;
- (8) Whether the offender caused or risked substantial economic loss to the victim of the offence;

- (9) Whether the offence was committed for pleasure or excitement;
- (10) Whether the offender played a leading role in the commission of the offence, or induced others to participate in the commission of the offence;
- (11) Whether the offence was committed on a law enforcement officer;
- (12) Any other circumstances which:
 - (a) increase the harm caused or risked by the offender, or
 - (b) increase the culpability of the offender for the offence.

Mitigating factors

- (1) Whether the offence was committed under circumstances of duress not amounting to a defence to criminal liability;
- (2) Whether the offender was provoked;
- (3) Whether the offence was committed on impulse, or the offender showed no sustained motivation to break the law;
- (4) Whether the offender, through age or ill-health or otherwise, was of reduced mental capacity when committing the offence;
- (5) Whether the offence was occasioned as a result of strong temptation;
- (6) Whether the offender was motivated by strong compassion or human sympathy;
- (7) Whether the offender played only a minor role in the commission of the offence;
- (8) Whether no serious injury resulted nor was intended;
- (9) Whether the offender made voluntary attempts to prevent the effects of the offence;
- (10) Whether there exist excusing circumstances which, although not amounting to a defence to criminal liability, tend to extenuate the offender's culpability, such as ignorance of the law, mistake of fact, or necessity.
- (11) Any other circumstances which:

- (a) reduce the harm caused or risked by the offender, or
- (b) reduce the culpability of the offender for the offence.

(Chapter 3)

8. The following factors which normally mitigate sentence in Ireland should be reproduced in guidelines:
 1. The offender has pleaded guilty to the offence;
 2. The offender has assisted in the investigation of the offence or in the investigation of other offences;
 3. The offender has attempted to remedy the harmful consequences of the offence;
 4. The sentence, whether by reason of severe personal injury suffered by the offender in consequence of the offence, age, ill-health, or otherwise, would result in manifest hardship or injustice to the offender or his or her dependents. (Chapter 3)
9. Guidelines should confine the role of prior criminal record in the determination of the severity of sentence to situations in which it aggravates the culpability of the offender in committing the offence. They should highlight the following concerns:
 - (a) The sentencer, in determining the severity of the sentence to be imposed on an offender, may have regard to any offences of which the offender has been found guilty in the past which may be considered to increase the culpability of the offender.
 - (b) In considering whether such prior offences aggravate the culpability of the offender for the offence for which he or she is being sentenced the sentencer should have regard to:
 - (i) the time which has elapsed between the prior offence or offences and the offence for which the offender is being sentenced;
 - (ii) the age of the offender at the time of commission of the prior offence;
 - (iii) whether the prior offence or offences are similar in nature to the offence for which the offender is being sentenced;
 - (iv) whether the prior offence or offences are similar in

seriousness to the offence for which the offender is being sentenced."

These guidelines should be regularly reviewed in consultation with the judiciary. (Chapter 3)

10. Presumptive sentencing guidelines should not be introduced. (Chapter 4)
11. We recommend the creation of a centrally located criminal justice data base for the compilation and dissemination of statistics relevant to sentencing. In addition to quantitative data, qualitative data should be assembled to the greatest extent possible and the judiciary, court registrars and clerks should be encouraged and given every necessary facility to provide qualitative material. (Chapter 4)
12. Mandatory and minimum sentences of imprisonment for indictable offences should be abolished. (Chapter 5)
13. Mandatory or minimum sentences of imprisonment for summary offences should not be introduced. The legislature should undertake a review of the set of maximum penalties which currently exists in Ireland, and rescale the levels in accordance with modern perspectives on offence seriousness and in accordance with the view that custodial sentences should be regarded as sanctions of last resort. Between six and eight levels of maximum penalty would be sufficient. (Chapter 5)
14. The proposals in the Commission's Report on the Indexation of Fines should be implemented. (Chapter 5)
15. If it has not already done so, the Supreme Court should clarify whether it wishes courts to reduce sentence after a plea of *guilty in all circumstances*. (Chapter 6)
16. The prosecution should have power to seek review of District Court sentences. (Chapter 7)
17. Community service orders should be made to the greatest extent possible. (Chapter 9)
18. It should be possible for a court to order community service in all circumstances and not simply in substitution for a sentence of imprisonment. (Chapter 9)
19. The Probation Service should be the primary target for additional resources in the area of sentencing. (Chapter 10)
20. A detailed examination should be undertaken of sentencing review

procedures so as to ensure that they operate on the basis of clearly articulated goals and fair, objective and acceptable criteria. (Chapter 11)

21. There should be statutory provision for suspended sentences. (Chapter 11)
22. Courts should not impose reviewable sentences. (Chapter 11)
23. No sentence of longer than 3 years imprisonment should be suspended. (Chapter 11)

APENDIX A

List Of People Who Attended Sentencing Seminar

Ciaran Bishop
Olive Braiden, Rape Crisis Centre
Jerome Connolly, Irish Commission for Justice & Peace
Ben Fahy, Solicitor
Declan Fahy, I.C.C.L.
Caroline Fennell, U.C.C.
David Gormley, Office of the D.P.P.
Brendan Grogan
Ernie Hanahoe
Justin Harmon
Mary Harney, T.D.
Brian Hutchinson
David Keane, Solicitor
Eamon Leahy, Barrister
Francesca Lundström
Charles Lysaght
Patrick Marrinan, Barrister
Joe Matthews
Barry McAuley
Frank McDonald, Law Society
Ann Meehan, Irish Association of Social Workers
Shane Murphy
Derek Nally, Irish Association for Victim Support
Una Ní Raifeartaigh
Fergus O'Callaghan, B.C.L., Department of Justice
Dr. Art O'Connor
Roderick O'Hanlon
Dr. Paul O'Mahony, Trinity College
Noel E O'Sullivan, Garda Headquarters
Mary Ellen Ring, Barrister
Alan Shatter, T.D.
Garrett Sheehan
Martin N. Tansey, Probation and Welfare Service
Denis Vaughan-Buckley
Anthony Whelan

APPENDIX B

Submissions In Response To The Consultation Paper Were Received From:

The Hon. Mr. Justice Robert Barr
Ciaran Bishop
Judge P.J. Brennan
The Hon. Mr. Justice Declan Costello
D.P.P.
Justin Harmon, C.A.D.D.D.
Senator Mary Henry
Department of Justice
Clare Leonard
Francesca Lundström
Judge James P. McDonnell
Brother Louis McGinley, O.Cist.
Kieran McGrath, Senior Social Worker
Judge A.G. Murphy
Derek Nally, Chairman, Irish Association for Victim Support
Judge Liam O. McMenamin
Probation & Welfare Services
Ann Scannell
Mary Scannell
Judge Peter A. Smithwick, President of the District Court
The Hon. Mr. Justice Francis R. Spain, President of the Circuit Court
T.K. Whitaker Esq.

APPENDIX C

VICTIM IMPACT STATEMENT

Submission to the Law Reform Commission

Definition: As illustrated in our draft (see attached).

Note

It should under no circumstances whatsoever involve the victim being asked or in any way becoming involved in deciding on the punishment or the extent/level of sentence in any particular case.

Type: The Victim Impact Statement should be in written format of a uniform nature on a standard form with pre-determined criteria to be addressed.

It is important that these should be consistent in each case. (Please see attached draft statement).

Author: The Victim Impact Statement should be prepared by the Garda investigating officer.

It should have attached relevant Medical/Psychological and Psychiatric Reports where these are available.

Note

Under no circumstances should the victim be liable to cross examination in relation to the content of such statements or reports.

Victim Impact Statements should be mandatory and a basic victim's right, with the victim having the absolute right of veto as to whether it should be prepared and submitted to the court.

It goes without saying that Victim Impact Statements will not be presented to the court in cases where an accused person pleads guilty or is found guilty by the court.

In practice the court should request the preparation of the Victim Impact Statement after a plea of guilty or finding of guilty and *prior* to sentencing.

In what cases should this Victim Impact Statement be prepared?

Assault; Aggravated Burglaries; Rape; Incest; Kidnapping; Robbery and other cases where the presiding Judge(s) would feel it as being helpful to the court in arriving at a decision on punishment.

In particular the families of murder victims should be considered in this regard.

THE VICTIM IMPACT STATEMENT SHOULD BE A CONFIDENTIAL DOCUMENT AND AVAILABLE ONLY TO THOSE MENTIONED IN OUR ATTACHED DRAFT.

Irish Association for Victim Support
29/30 Dame Street Dublin 2.

DRAFT COPY

Please return this

Date: ____ / ____ / ____

Special Notes:

To:

Signature: _____

Rank: _____

Official Stamp
and Date

VICTIM IMPACT STATEMENT

How it is used:

This Victim Impact Statement form gives the victim or others affected by the crime(s) the opportunity to have expressed in writing, the impact of this/these crime(s) on the victim(s). Victim details should include age, gender, occupation, living arrangements, marital status, relationship to offender (if any), ethnic origin.

Physical injuries should include type and extent of the injuries, whether treatment or hospitalisation was required and whether absence from work occurred. Dental and Medical Reports should be attached (if any).

Where property has been stolen or damaged a full description including value of such property should be included. Financial Costs listed should include costs of all medical treatment and

replacement or repair costs of property and loss of wages/income and all incidental losses.

Emotional and Psychological effects should be included such as changes in behaviour and lifestyle. Details of all treatment and counselling should be included with the relevant psychological or other such reports.

Any other effects of the offence on the victim's life style should also be included.

A copy of this Impact Statement can be made available to the State's Solicitor's Office if required and to the defence counsel prior to sentencing, if so requested.

INSTRUCTIONS

- * Complete those sections that apply and add additional sheets if required remembering to sign all additional sheets. This document will be filled out by a member of the Garda Siochana.
- * Write neatly or type.
- * All financial losses as a result of crime(s) should be itemised and documented.
- * Remember to sign and date this Impact Statement.

**THIS VICTIM IMPACT STATEMENT IS A CONFIDENTIAL
FORM**

**VICTIM IMPACT STATEMENT
CONFIDENTIAL DOCUMENT**

PLEASE COMPLETE ALL PARTS OF THIS FORM WHICH APPLY IN THIS CASE

ADD ADDITIONAL PAGES IF NECESSARY

NAME OF VICTIM _____ NAME OF OFFENDER(S) _____

I ECONOMIC LOSS

(A) Financial Loss

1. Property Loss

*List the property lost as a result of this/these crime(s).
This is property that has not been and is not likely to be
recovered. (Attach all relevant receipts)*

<u>Item</u>	<u>Make</u>	<u>Model</u>	<u>Cost</u>
-------------	-------------	--------------	-------------

Total Cost £ _____

2. Property Damage

*List property damage as a result of this crime (Attach
estimates/bills for repair)*

<u>Item</u>	<u>Make</u>	<u>Model</u>	<u>Cost</u>
-------------	-------------	--------------	-------------

Total Cost £ _____

3. Medical/Hospital Costs (Attach copies of all accounts)

Total Cost £ _____

4. *Other Economic Losses/Cost (Lost Wages and or income)*

Total Cost £ _____

Please specify type of loss _____

Grand Total (*Property Loss + Property Damage + Medical/Hospital Bills + Other*)

GRAND TOTAL of economic loss £ _____

II PHYSICAL INJURIES

- (A) Did the victim suffer any physical effects as a result of the crime?

Yes/No

- (B) If yes, describe the physical injuries and any medical treatment the victim received, and attach relevant medical reports.

THE LAW REFORM COMMISSION

Ardilaun Centre
111 St Stephen's Green
Dublin 2

Telephone: 671 5699

Fax No.: 671 5316

LIST OF LAW REFORM COMMISSION'S PUBLICATIONS

First Programme for Examination of Certain Branches of the Law with a View to their Reform (Dec 1976) (Prl. 5984) [out of print] [photocopy available]
[10p Net]

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)
[£ 1.50 Net]

Working Paper No. 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (Nov 1977) [£ 1.00 Net]

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Working Paper No. 6-1979, The Law Relating to Seduction and the Enticement and Harboursing of a Child (Feb 1979) [£ 1.50 Net]

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