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LAW REFORM COMMISSION

REPORT

# SUSPENDED SENTENCES

(LRC 123-2020)



LAW REFORM  
COMMISSION/COIMISIÚN UM  
ATHCHÓIRIÚ AN DLÍ



**Report**

**Suspended Sentences**

(LRC 123 – 2020)

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## OVERVIEW AND EXECUTIVE SUMMARY

1. The objective of this Report, which forms part of the Commission's *Fourth Programme of Law Reform*,<sup>1</sup> is to examine the applicable principles governing the operation of the suspended sentence in Ireland, as developed through the case law of the Irish courts. The recommendations in this Report seek to complement and improve these principles. The procedural elements of the suspended sentence in this jurisdiction are now regulated by section 99 of the *Criminal Justice Act 2006*, as amended. In this regard, this Report also considers some of the problems associated with this legislative framework and makes some recommendations as to how it could be improved upon, both from a practical and procedural perspective.
2. Following the publication of the Issues Paper on this project,<sup>2</sup> the Commission received many submissions from individuals and bodies with an interest in this area, and we very much appreciate those contributions. These submissions greatly assisted the Commission in its deliberations and were highly influential in shaping the recommendations contained in this Report.
3. **Chapter 1** traces the origin and development of the suspended sentence, both in Ireland and other European jurisdictions. The first section of the chapter outlines the development of the suspended sentence in England and Wales and briefly discusses some of the problems that have been encountered in that jurisdiction. The second section of the chapter focuses on the suspended sentence in some European civil-law jurisdictions, namely Germany, France and Italy. The third section deals with the origins and historical development of the suspended sentence, as a judicially developed sanction, in Ireland. This section also briefly maps out the current statutory framework governing the suspended sentence, following the enactment of section 99 of the *Criminal Justice Act 2006*, as well as the fundamental guiding principles as formulated by the Irish appellate courts.
4. **Chapter 2** discusses where the suspended sentence should rank on the hierarchy of criminal penalties. The first section outlines and discusses the conditional discharge and the dismissal under the *Probation of Offenders Act 1907*, the Community Service Order, and the deferred sentence. While acknowledging the international literature which indicates that the public perceive the penalty as a "let-off" for the offender,<sup>3</sup> the

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<sup>1</sup> Law Reform Commission, *Report on Fourth Programme of Law Reform* (LRC 110-2013), Project 5.

<sup>2</sup> Law Reform Commission, *Issues Paper on Suspended Sentences* (LRC IP 12-2017).

<sup>3</sup> Some of the reasons potentially contributing to this poor public perception are discussed in chapter 8 of this Report.

Commission recommends that the part-suspended sentence should rank just below an immediate custodial sentence and just above the fully suspended sentence on the scale of severity; with the fully suspended sentence just below the part-suspended sentence and just above the deferred sentence.

5. **Chapter 3** considers the compatibility of the suspended sentence with the main purposes of punishment that are recognised in Irish law, namely retribution, deterrence (specific and general) and rehabilitation. Through an analysis of the case law of the Irish appellate courts, in particular that of the Court of Appeal, this chapter demonstrates that the suspended sentence is an inherently flexible sanction, capable of serving the aims of retribution and deterrence (general and specific) as well as promoting rehabilitation. The Commission recommends that the extent to which these sometimes competing sentencing aims are represented by the decision to suspend should ultimately be a matter for the discretion of the individual sentencing court, based on the particular facts before it.
6. This chapter also discusses a sentencing rationale which has not received direct attention in an Irish (judicial or legislative) context: the avoidance of prison. While the Commission considers the potential issues with introducing this measure as a means of controlling the prison population (as it has been in other jurisdictions), it recommends that it may legitimately be considered when sentencing a first time offender, with a low risk of re-offending, so as to avoid sending him or her to prison. However, the Commission also recommends that, in cases where the offender is a repeat offender or is convicted of an offence in respect of which there is a presumption of an immediate custodial sentence, this sentencing rationale should be carefully weighed up against competing punitive rationales (that is, general deterrence and retribution).
7. **Chapter 4** discusses the general principles governing the suspended sentence in this jurisdiction. The chapter opens with a discussion of two general principles of Irish sentencing law which are of particular relevance to the area of suspended sentences, namely the distributive principle of proportionality and the principle of imprisonment as a last resort. The chapter then examines the applicable principles governing the suspended sentence specifically: the *O'Keefe* principle<sup>4</sup> and the *Mah-Wing* principle.<sup>5</sup> This section outlines how, before imposing a suspended sentence, a sentencing court should first (1) satisfy itself that the offence is sufficiently serious to merit a custodial sentence and then (2) determine the length of that custodial sentence. Having

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<sup>4</sup> Established by the Court of Appeal of England and Wales in *R v O'Keefe* [1969] QB 29.

<sup>5</sup> Established by the Court of Appeal of England and Wales in *R v Mah-Wing* [1983] 5 Cr App R (S) 347.

completed the first two steps, a sentencing court should then (3) consider whether the circumstances of the case are such that the custodial sentence should be suspended.

8. Finally, having determined that a suspended sentence is justified, a sentencing court should then, in imposing conditions of suspension, ensure that these conditions are proportionate and provide the offender with a reasonable opportunity of compliance, based on his or her personal circumstances. The third section of this chapter outlines and discusses the statistical analysis conducted by the Commission, which examined the Courts Service Annual Reports for the years 2006 to 2017. The section concludes with a discussion on the extent (if any) to which this data demonstrate adherence to *O'Keefe* and *Mah-Wing* by Irish sentencing courts.
9. This chapter also discusses the extent to which these principles have been accepted as forming part of Irish sentencing law. While the *O'Keefe* principle and the *Mah-Wing* principle have been – both implicitly<sup>6</sup> and more recently expressly<sup>7</sup> – approved of by the Irish courts, very little judicial guidance has been given as to the factors relevant to each stage of the inquiry. Therefore, the Commission identifies and discusses the various factors which may be relevant to sentencing courts when (1) determining whether a custodial sentence is justified, (2) fixing the length of the custodial sentence and (3) deciding whether the custodial sentence may be suspended. The Commission recommends that the newly established Sentencing Guidelines and Information Committee (SGIC)<sup>8</sup> might usefully consider whether the factors identified in this chapter should form the basis of any future sentencing guidance in this area. The Commission also makes some recommendations regarding the need for further examination, by the SGIC, of some of the conceptual and practical difficulties identified in the chapter. These difficulties relate to (a) a potential blurring of the lines between determining the type of punishment (step 1) and setting the appropriate quantum of punishment (step 2), and (b) the same personal mitigating factor being “double-counted” at both steps (2) and (3) of the process. The Commission makes some recommendations as to how these issues may be resolved.
10. **Chapter 5** considers the part-suspended sentence and discusses the distinction between this sanction and the fully suspended sentence. The fully suspended sentence

<sup>6</sup> The *O'Keefe* principle received implicit approval from the Irish courts in *The People (DPP) v Slattery* [2017] IECA 90 at para 34; *Moore v Brady* [2006] IEHC 434 at para 36; *The People (DPP) v Kavanagh* [2020] IECA 13 at para 24 *The People (DPP) v Loving* [2006] IECCA 28, [2006] 3 IR 355 and *The People (DPP) v Floyd* [2014] IECA 39. The *Mah-Wing* principle impliedly endorsed in *The People (DPP) v Loving* [2006] IECCA 28, [2006] 3 IR 355 and *The People (DPP) v Floyd* [2014] IECA 39.

<sup>7</sup> Both the *O'Keefe* principle and the *Mah-Wing* principle were expressly endorsed in the recent Court of Appeal decision of *The People (DPP) v DW* [2020] IECA 145 at paras 36 – 39.

<sup>8</sup> Pursuant to section 23(1) of the *Judicial Council Act 2019*.

can be defined as a non-immediate custodial sentence of imprisonment. A custodial sentence has been imposed but has simultaneously been suspended in full on certain conditions. Therefore, the offender may not have to serve any of the custodial sentence if he or she complies with the conditions of suspension. In contrast, the part-suspended sentence is a two-phased sentence: the immediate custodial sentence followed by the suspended custodial sentence. Having served the initial custodial element of the sentence, the offender is released from prison but will then be required to adhere to any of the conditions of suspension imposed by the original sentencing court. There is therefore an important difference between the two sanctions in terms of their punitive impact and the sentencing aims that they represent.

11. However, although the part-suspended sentence and the fully suspended sentence differ in their structure and may also differ in terms of the penal objectives they aim to advance, the Commission is of the view that the principles governing the fully suspended sentence, discussed in chapter 4, should broadly apply to the part-suspended sentence. In other words, before considering whether to impose a part-suspended sentence, the sentencing court should first (1) determine that the offending behaviour is sufficiently serious so as to merit the imposition of a custodial sentence and then (2) set the appropriate custodial sentence. The only point of distinction, in the Commission's view, is that, in deciding on step (3), a sentencing court may impose a part-suspended sentence if satisfied that, while the circumstances of the case are such that the initial portion of the custodial sentence ought to be served immediately, there are also personal mitigating factors relevant to the offender such that the latter portion of the custodial sentence should be suspended.
12. The chapter also outlines some of the circumstances in which the imposition of a part-suspended sentence is deemed appropriate by the Irish courts, in particular (1) as a tool for incentivising rehabilitation and (2) as a means of reflecting an offender's personal mitigation. The Commission views the use of the part-suspended sentence as a means of incentivising an offender's rehabilitation as a commendable use of this sanction and one that is in compliance with the applicable principles. It therefore recommends its continued use in this regard. In respect of the use of the sanction as a means of reflecting an offender's personal mitigation, the Commission is of the view that, ultimately, it should remain a matter for the individual sentencing judge as to how personal mitigation is accounted for. However, the Commission also highlights the potential for injustice inherent in this approach in that, in the event of an activation of the custodial element of the sentence, an offender will retrospectively have received no discount for his or her personal mitigation. Such an eventuality is difficult to reconcile with the principle of proportionality. The Commission therefore recommends that a sentencing court should always begin by asking itself whether the justice of the case requires that personal mitigation be reflected by a reduction from the headline

sentence, as opposed to part-suspension. This view is broadly consistent with the current position of the Court of Appeal on this issue.<sup>9</sup>

13. **Chapter 6** considers the categories of offences which are the subject of a presumption of an immediate custodial sentence and the circumstances in which it may be appropriate for this presumption to be rebutted and a fully suspended sentence imposed. The first section of this chapter considers the presumptions of an immediate custodial sentence provided for under statute, namely the presumptive minimum sentences provided for under the *Firearms Acts* and the *Misuse of Drugs Act 1977*, as amended. The second section outlines the categories of offences which are the subject of a judicially-developed presumption of an immediate custodial sentence, namely: manslaughter, rape, causing serious harm and serious fraud offences. The third section of this chapter discusses what factors may constitute “wholly exceptional circumstances” sufficient to rebut the presumption.
14. The Commission recommends that the categories of offences that currently attract the presumption of immediate custody under Irish sentencing law should continue to operate. However, the Commission also recommends that research be conducted by the SGIC to ascertain the extent to which the presumption, and the accompanying threshold tests as developed by the Irish appellate courts, are being adhered to in practice. Finally, in terms of the factors that may constitute “wholly exceptional circumstances” sufficient to rebut the presumption, the Commission recommends that this should be a matter for the discretion of the individual sentencing judge, based on a consideration of the totality of the facts, including the harm caused and the moral culpability of the offender.
15. **Chapter 7** discusses the suspended sentence in the context of sentencing child offenders. In the *Issues Paper on Suspended Sentences*,<sup>10</sup> the Commission considered that it would deal solely with the issue of suspended sentences of imprisonment imposed on adults. It did not propose to deal with the suspension of sentences of detention imposed on child offenders. However, in light of the submissions received on the Issues Paper, it was decided that this matter merited some discussion in this Report. Subsequently, the Commission held a special consultation attended by members of the judiciary, lawyers, Garda representatives, non-governmental organisations and academics and it found the contributions made at that consultation to be most valuable in its deliberations on this topic.

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<sup>9</sup> *The People (DPP) v O’Sullivan* [2019] IECA 250; *The People (DPP) v Folan* [2019] IECA 361; *The People (DPP) v Broe* [2020] IECA 140.

<sup>10</sup> Law Reform Commission, *Issues Paper on Suspended Sentences* (LRC IP 12-2017) at para 1.

16. The judgment of the Court of Appeal in *The People (DPP) v AS*,<sup>11</sup> made it clear that the suspension of a sentence of detention is not permissible under the current legislative framework. In light of the need for a strong temporal nexus between offence and punishment in the context of child offenders, and the particular and unique aims of the juvenile justice system, the Commission recommends that legislative provision should not be made for the suspension of sentences of detention, either in Part 9 of the *Children Act 2001* or in section 99 of the *Criminal Justice Act 2006*.
17. However, the Commission acknowledges the merit in sentencing judges having at their disposal a sentencing option that is similar to a part-suspended sentence of detention, particularly in the case of serious offending behaviour. The Commission notes that the detention and supervision order pursuant to section 151 of the *Children Act 2001* could, in principle, serve as an appropriate approximation of the part-suspended sentence. However, it also recommends that consideration be given to the fact that, currently, a detention and supervision order cannot be used in circumstances where the child offender will turn 18 during the currency of the sentence. This has the effect of rendering this sentencing option effectively inapplicable for sentencing courts sentencing children to lengthy sentences on foot of serious offending behaviour. The Commission recommends that, in any general review of the *Children Act 2001*, consideration be given to addressing the issues identified in this chapter, both in respect of section 151 and the deferred detention order under section 144.
18. The Commission also discusses in **Chapter 7** the practice of reviewable sentences of detention, both in terms of its merits as a sentencing option for child offenders, and its uncertain legal basis in light of the Supreme Court decision in *The People (DPP) v Finn*.<sup>12</sup> In this regard, the Commission recommends that the practice of reviewable sentences of detention be continued, but that it be put on a statutory footing so as to bring clarity and certainty as to the legal basis of this sentencing option.
19. **Chapter 8** outlines and discusses the procedural and practical issues associated with section 99 of the *Criminal Justice Act 2006*, as amended. The first section of this chapter includes a discussion on the offences for which a suspended sentence may be imposed and the term of imprisonment that may be suspended. The second section discusses the period of time for which a suspended sentence may be in operation (“the operational period”) and the conditions of suspension which may be imposed under subsections (3) and (4) of section 99 of the 2006 Act.
20. The third section discusses the procedures surrounding the activation of the suspended sentence, either on foot of a conviction for a subsequent offence (“the

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<sup>11</sup> [2017] IECA 310.

<sup>12</sup> [2000] IESC 75, [2001] 2 IR 25.



triggering offence”) during the operational period, or a breach of one of the other discretionary conditions of suspension imposed on the offender. Most of this section of the chapter is devoted to the substantial amount of litigation that arose in the lead up to the finding of unconstitutionality of sections 99(9) and (10) in *Moore v DPP*<sup>13</sup> and the case law which dealt with the fallout from that decision. The post-*Moore* case law centred on whether or not an offender who, pre-*Moore*, had the custodial element of his or her suspended sentence activated under sections 99(9) and (10), could retrospectively rely on the finding of unconstitutionality in *Moore*.

21. The fourth section of this chapter discusses some of the practical issues associated with the suspended sentence, in particular the monitoring and enforcement of conditions of suspension. This discussion takes place within the context of broader structural deficiencies within the Irish criminal justice system, namely: delays in the criminal process, the lack of an inter-agency collaborative approach and the current data-deficit across all stages of the criminal process. While acknowledging some of the improvements made in respect of the above issues in recent years, the Commission discusses the urgent need for the concretisation and ultimate implementation of these, at present, largely aspirational proposals. In the context of the suspended sentence, this section discusses how the lack of data on the operation of the suspended sentence renders it very difficult to definitively ascertain whether the largely anecdotal view – that the monitoring and enforcement of the suspended sentence is sub-optimal – stands up to empirical scrutiny. However, the Commission expresses the view that inefficiencies in the criminal process more generally may be hindering the efficacy of the suspended sentence and, in particular, the extent to which the sanction may be effectively monitored and enforced.
22. The Commission makes a number of recommendations in this chapter. Most notably, it is recommended that the current broad statutory discretion afforded to sentencing judges in choosing the conditions of suspension, as well as the length of the operational period of the suspended sentence, be maintained. However, the Commission also recommends that this discretion be constrained by the principle that the operational period and the conditions of suspension be proportionate – both in the distributive sense and in terms of infringing upon the offender’s rights to the least extent possible<sup>14</sup> – and afford the offender with a reasonable prospect of compliance, based on his or her personal circumstances.<sup>15</sup> The Commission also recommends that this inquiry involve, where practicable, an

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<sup>13</sup> [2016] IEHC 244, [2018] 2 IR 170.

<sup>14</sup> *The People (DPP) v DW* [2020] IECA 145.

<sup>15</sup> *The People (DPP) v Broe* [2020] IECA 140.

assessment as to whether or not the offender consents to the conditions of suspension.

23. The Commission also makes two recommendations in respect of some of the amendments to section 99 of the 2006 Act. Firstly, it is recommended that the word "may" be substituted for the word "shall" in section 99(8A)(a) of the *Criminal Justice Act 2006*, as inserted by section 2(c) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*. This recommendation is made so as to avoid the current situation whereby offenders who, subsequent to committing a triggering offence and having been remanded back to the original court for the activation hearing, may be remanded in custody for a considerable time (in the event that they are refused bail) while awaiting the outcome of an appeal in respect of the triggering offence. The Commission also recommends that, in the interests of all involved, section 99 of the *Criminal Justice Act 2006*, including all existing amendments, and any further amendments that may be required, be consolidated into a single piece of legislation.
24. Finally, the Commission makes two recommendations so as to ensure the effective and efficient operation of the suspended sentence in this jurisdiction and, in particular, the monitoring and enforcement of conditions of suspension. While again acknowledging the progress made in recent years, the Commission recommends that consideration be given to providing each relevant agency within the criminal justice system the necessary resources for the establishment of dedicated data management and analysis units. This would, in the Commission's view facilitate the collection, collation and dissemination of data in relation to the criminal justice system generally, and the operation of the suspended sentence in particular. The Commission also recommends that the Information and Communications Technology (ICT) architecture underpinning court processes be examined, and that consideration be given to streamlining and modernising the ICT systems in each agency of the criminal justice system, and ensuring their interoperability, so as to facilitate a collaborative and efficient approach to the operation of the criminal justice system.
25. In **Chapter 9**, while acknowledging that the term "white-collar offending" covers a wide array of offending behaviour, the Commission focuses largely on the Irish case law in the areas of competition offences and health and safety offences. The Irish case law has established that the sentencing of white-collar offences should be governed by ordinary sentencing principles. The Commission accepts that white-collar offenders, by virtue of their social position, may be able to rely on strong personal mitigation to a much greater extent than "conventional" offenders. It also acknowledges the difficult balance between ensuring that the gravity of white-collar offending is marked by an appropriately severe sanction, while at the same time ensuring that this category of offender receives due credit for personal mitigating factors. However, the Commission is of the view that the best mechanism to achieve this balance lies within the current

parameters of Irish sentencing law. As such, the Commission recommends that sentencing courts, when sentencing white-collar offenders, should, as well as giving due weight to personal mitigation, always properly assess the gravity of the offence, particularly the societal (and individual) harm caused by white-collar offending.

26. The Commission also identifies a number of factors which may be relevant to the question of whether a custodial sentence (immediate or suspended) is warranted in the case of competition offences and health and safety offences. The Commission recommends that any future sentencing guidelines formulated in these areas have regard to the various factors identified in this chapter. The Commission also recommends that the various discrete types of offending behaviour, which were not discussed in this chapter but which fall within the scope of the broad term "white collar crime", be examined by the SGIC with a view to ascertaining whether these categories of white-collar offending would benefit from the formulation of sentencing guidance.
27. **Chapter 10** considers the use of the suspended sentence of imprisonment in combination with other types of orders. The first section of this chapter outlines the law governing the Community Service Order (CSO) in this jurisdiction, compares this sanction to the suspended sentence, and discusses the current legislative prohibition on combining both of these sanctions. The Commission is of the view that the current statutory position in this regard is well founded for two reasons. Firstly, the Commission considers it important, from a policy perspective, that the line between non-custodial sanctions (that is, the CSO) and custodial sanctions (including suspended prison sentences) not be blurred. Secondly, the broad statutory discretion afforded to sentencing judges, in choosing the appropriate conditions of suspension, allows for the imposition of community-based conditions. The Commission is of the view, therefore, that there is little need from a practical perspective to make provision for the combination of these sanctions. The Commission therefore recommends that no provision be made for the combining of the suspended sentence and CSOs.
28. The second section analyses the circumstances in which it is appropriate to combine a suspended sentence with both the fine and the compensation order. In respect of combining the suspended sentence with a fine, the Commission recommends that, when imposing a fine upon an offender in combination with a suspended sentence, the sentencing court should always be careful to ensure that the fine is proportionate and gives the offender a reasonable prospect of payment. Finally, the Commission recommends that the payment of compensation may be taken into account as a mitigating factor when assessing the severity of the sentence. However, the Commission also recommends that this mitigating factor should not, in the absence of exceptional circumstances, justify the imposition of a fully suspended sentence.

29. **Appendix A** contains a summary of the recommendations in the Report.
30. **Appendix B** contains a summary of the guiding principles governing the suspended sentence in this jurisdiction.

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# CHAPTER 1 THE HISTORY AND DEVELOPMENT OF THE SUSPENDED SENTENCE

## 1. Introduction

- [1.1] A suspended sentence is a sentence of imprisonment, the operation of which is suspended for a defined period on condition that the person on whom it is imposed abides by the conditions on which it has been suspended. A prison sentence may be either fully or partly suspended. A person who receives a fully suspended sentence may never have to undergo custody if he or she abides fully by the conditions. A part-suspended sentence is a two-phased penalty consisting of a term of immediate imprisonment followed by a period of conditional liberty during which the terms of the part-suspension must be observed. There is therefore an important difference between the two sanctions in terms of their punitive impact.<sup>1</sup>
- [1.2] The suspended sentence is an important and beneficial sentencing option in Ireland. As will be discussed throughout this Report, one of its main advantages as a penalty lies in its capacity to advance the (sometimes conflicting) purposes of criminal punishment recognised in Irish law. Nevertheless, there are some conceptual uncertainties surrounding some of the fundamental principles governing the use of the suspended sentence in this jurisdiction. There are also some practical and procedural issues that may potentially diminish the efficacy of the suspended sentence as a genuinely punitive measure under Irish law. All of these issues will be explored and discussed throughout this Report. This first chapter places the topic in a historical context by tracing the origins and development of the suspended sentence in Ireland and other European jurisdictions.
- [1.3] The first section of the chapter outlines the development of the suspended sentence in England and Wales and briefly discusses some of the problems that have been encountered in that jurisdiction. The second section of the chapter focuses on the suspended sentence in some European civil-law jurisdictions, namely Germany, France and Italy. The third section turns its attention to the origins and historical development of the suspended sentence in Ireland. This section also briefly maps out the current statutory framework governing the suspended sentence, following the enactment of section 99 of the *Criminal Justice Act 2006*, as well as the fundamental guiding principles as formulated by the Irish appellate courts.

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<sup>1</sup> This will be discussed in more detail in chapters 3 and 5 of this Report.

## 2. The suspended sentence in England and Wales

- [1.4] In England and Wales, unlike Ireland, there was no recognised common law power to suspend a sentence of imprisonment. Section 39(1) of the *Criminal Justice Act 1967*<sup>2</sup> permitted the suspension of a sentence of imprisonment of two years or less. The operational period under the 1967 Act was for a period of not less than one year or more than three years. In the decades following the 1967 Act, the Court of Appeal of England and Wales established two fundamental guiding principles governing the use of the suspended sentence in England and Wales. These principles have subsequently been endorsed by the Irish courts.<sup>3</sup> Two years after the enactment of the 1967 Act, the Court of Appeal of England and Wales, in *R v O'Keefe*,<sup>4</sup> held that a court should not consider imposing a suspended sentence unless satisfied that the offence was sufficiently serious to merit a custodial sentence. A decade-and-a-half later, in *R v Mah-Wing*, the same court established that a sentencing court should not increase the length of the custodial sentence merely on the basis that it is going to be suspended.
- [1.5] Along with these judicial developments, O'Malley notes that the suspended sentence in England and Wales has "undergone many statutory changes, some restricting its application, others extending it".<sup>5</sup> Section 5 of the *Criminal Justice Act 1991* significantly curtailed the use of the suspended sentence by limiting its application to situations where "the exercise of that power can be justified by the exceptional circumstances of the case".<sup>6</sup> This high threshold was exacerbated by the judicial interpretation of the provision that "conventional" mitigating factors could not constitute exceptional circumstances,<sup>7</sup> and that the circumstances in which the imposition of a suspended sentence would be appropriate would be "few and far between".<sup>8</sup> Four years into the operation of this provision, one sentencing judge, writing extra-judicially, lamented that the onerous requirements of section 5 had brought the suspended sentence to near-extinction.<sup>9</sup>

<sup>2</sup> See generally Bottoms, "The Suspended Sentence in England, 1967 – 1978" (1981) 21 *British Journal of Criminology* 1; Sparks, "The Use of Suspended Sentences" [1971] *Criminal Law Review* 384.

<sup>3</sup> For an in-depth discussion on this, see chapter 4 of this Report.

<sup>4</sup> [1969] QB 29.

<sup>5</sup> O'Malley, "'That Measure of Wise Clemency' – Defending the Suspended Sentence" (2018) 28 *Irish Criminal Law Journal* 39 at page 39.

<sup>6</sup> This provision was consolidated in the *Criminal Courts (Sentencing) Act 2000*.

<sup>7</sup> *R v Okinikan* [1993] 1 WLR 173.

<sup>8</sup> *R v Robinson* [1993] 14 Cr App R (S) 559.

<sup>9</sup> Campbell, "A Sentencer's Lament on the Imminent Death of the Suspended Sentence" [1995] *Criminal Law Review* 293.

- [1.6] The “exceptional circumstances” criterion was abolished by section 189 of the *Criminal Justice Act 2003*, which allowed a court to suspend a sentence of imprisonment of less than one year. The primary restriction on the use of suspended sentences thus became the length of the sentence, rather than the circumstances of the case. The length of sentence that could be subject to suspension was increased from one year to two years by section 68 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*. Under the 2003 Act, it was mandatory to stipulate that the offender comply with one or more of the conditions outlined in section 190 of the same Act.<sup>10</sup> This was changed from a mandatory provision to a discretionary one by the 2012 Act, and thus suspended sentences that made no reference to the conditions under section 190 would not be unlawful.<sup>11</sup>
- [1.7] The use of suspended sentences in England and Wales increased significantly following the abolition of the “exceptional circumstances” condition. Suspended sentences were imposed in only two per cent of Crown Court cases in 2004, but in 27 per cent of cases in 2014. The actual figures are even more striking. In 2003, 2,055 offenders convicted of an indictable offence received a suspended sentence. In 2014, the equivalent figure was 40,000.<sup>12</sup>
- [1.8] Ashworth has observed that the suspended sentence has not been an “unmitigated success” in English and Welsh law.<sup>13</sup> When the conditions precedent necessary for its imposition were restrictive and onerous, it was hardly used at all, as the figures above demonstrate. However, the changes brought about by the *Criminal Justice Act 2003* and the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* gave rise to some unintended consequences. The conditions of suspension under section 190 of the 2012 Act are effectively the same as the conditions that may be imposed as part of a

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<sup>10</sup> There are a total of 14 requirements outlined in section 190 of the *Criminal Justice Act 2003*, including a requirement that the offender: perform unpaid work during the supervision period, attend certain meetings for the purpose of rehabilitation, partake in certain accredited programmes, and refrain from participating in certain activities during a specified period. For a full discussion on these 14 requirements, see Ashworth, *Sentencing and Criminal Justice* 6th ed (Cambridge University Press 2015) at pages 360 – 367.

<sup>11</sup> That a suspended sentence imposed under section 189 of the 2003 Act would be unlawful for not referring to the section 190 conditions was confirmed by the Court of Appeal in *Lees-Wolfenden* [2007] 1 Cr App R (S) 730.

<sup>12</sup> Roberts and Ashworth, “The Evolution of Sentencing Policy and Practice in England and Wales, 2003-2015” in Tonry (ed), *Sentencing Policies and Practices in Western Countries: Comparative and Cross-National Perspectives* Vol.45 of *Crime and Justice: A Review of Research* (Blackstone Press 2016) at pages 316 – 326.

<sup>13</sup> Ashworth, *Sentencing and Criminal Justice* 6th ed (Cambridge University Press 2015) at page 319.

community sentence.<sup>14</sup> Ashworth notes that, in light of this legislative change, the suspended sentence is often used instead of a community sanction. He articulates the problem as follows:

“All the indications are that this malfunction (using the [suspended sentence] in place of community sentences, and not always in place of immediate custody) has re-emerged. ... For adult males, suspended sentences went from 2000 in 2004 to 25,000 in 2006 and 37,000 in 2013. While the number of adult male indictable offenders sent to prison remained fairly constant at 75,000 throughout that period, the numbers given community sentences declined from 98,000 in 2004 to under 70,000 in 2013. It is clear that suspended sentences have replaced community sentences much more than custodial sentences.”<sup>15</sup>

[1.9] The use of suspended sentences in lieu of a community sanction, where a community sanction would be more appropriate, is problematic. It gives rise to what is known in the literature as “net-widening”, whereby an offender (in the event of a breach) may be liable to serve a custodial sentence in respect of an offence which was not sufficiently serious to merit a custodial sentence in the first place. This practice is also in breach of the *O’Keefe* principle – outlined above – which was intended, it is reasonable to infer, to prevent this practice from developing. The Sentencing Council for England and Wales has taken cognizance of this problem, and its most recent sentencing guidance on suspended sentences makes clear that a suspended sentence is not to be viewed as a more severe form of community order.<sup>16</sup> These guidelines have also interpreted the *O’Keefe* and *Mah-Wing* principles as requiring a sentencing court, before imposing a suspended sentence, to ask itself the following sequence of questions:

- 1) Has the custody threshold been passed?
- 2) If so, is it unavoidable that a custodial sentence be imposed?

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<sup>14</sup> See *Criminal Justice Act 2003*, sections 147 – 151 on community sentences, which comprise “community orders” and “youth rehabilitation orders”.

<sup>15</sup> Ashworth, *Sentencing and Criminal Justice* 6th ed (Cambridge University Press 2015) page 321. These statistics were sourced from the Ministry of Justice’s *Sentencing Statistics Report* (2008).

<sup>16</sup> Sentencing Council for England and Wales, *Definitive Guideline on the Imposition of Community and Custodial Sentences* (2016) at page 7.



- 3) What is the shortest term of imprisonment commensurate with the seriousness of the offence?
- 4) If so, can that sentence be suspended?

[1.10] These guidelines serve an important function to ensure that the suspended sentence is imposed only when it is appropriate to do so. The exact extent to which these guidelines are adhered to is unclear. Research conducted before the guidelines were introduced found that between 40% and 55% of those given a suspended sentence would probably have been given immediate imprisonment if the suspended sentence had not been available.<sup>17</sup> As discussed in chapter 4 of this Report, the formulation of a similar set of guidelines, by the newly established Sentencing Guidelines and Information Committee (SGIC)<sup>18</sup> may be useful in an Irish context.

### 3. The suspended sentence in continental Europe

[1.11] Around the same time as the probation order was developing in England and the United States in the late 19th and early 20th centuries, some civil law jurisdictions also began to introduce the suspended sentence. The suspended sentence was first introduced in Continental Europe in the Belgian *Lejeune Act of 1888* and the French *Bérenger Bill in 1891*.<sup>19</sup>

#### (a) France

[1.12] In France, the suspended sentence was introduced as a measure to reduce reliance on short prison sentences for first-time offenders. There are now three types of suspended sentence available under French criminal law, namely a "simple" suspended sentence (*le sursis tout court*), suspension with probation (*le sursis avec mise à l'épreuve*), and a suspended sentence combined with a community service order (*le sursis assorti d'une peine de travail d'intérêt général*).<sup>20</sup> All penalties, except a prison sentence of over five years, may be suspended.

[1.13] The "simple" suspended sentence provides for no conditions other than to be of good behaviour. It is available to offenders who have not received a custodial sentence in the last five years. Suspension with probation and the suspended sentence combined with a community service order are available, regardless of an offender's prior record.

<sup>17</sup> Sparks, "The Use of Suspended Sentences" [1971] *Criminal Law Review* 384.

<sup>18</sup> Pursuant to section 23(1) of the *Judicial Council Act 2019*.

<sup>19</sup> Ancel, *Suspended Sentence: A Report Presented by the Department of Criminal Science of the Institute of Comparative Law, University of Paris* (Heinemann 1971) at page 11.

<sup>20</sup> See Frase, "Sentencing Laws and Practices in France" (1995) 7 *Federal Sentencing Reporter* 275.

Suspension combined with probation is one of the more frequently used measures.<sup>21</sup> The offender must comply with general and specific conditions that are imposed by the court based on the nature of the offence and the circumstances of the offender.<sup>22</sup>

**(b) Germany**

- [1.14] In Germany, Article 56 of the *Criminal Code (Strafgesetzbuch StGB)* provides for a suspended sentence with probation (*Strafaussetzung zur Bewährung*). Sentences of 12 months or less must be suspended unless it is necessary for the offender to serve the sentence in order to protect the public. Sentences between one and two years' imprisonment may be suspended if an overall assessment of the crime and the circumstances of the offender indicate that special circumstances exist justifying suspension.<sup>23</sup> The maximum sentence that may be suspended is two years' imprisonment, while the operational period is between two and five years' imprisonment.<sup>24</sup> The court may impose conditions (*Auflagen*), such as the payment of compensation, payment of money for the benefit of a non-profit organisation or the State, or community service.<sup>25</sup> If it seems necessary to change the offender's future behaviour (i.e. specific deterrence) the court may also impose directives (*Weisungen*) with regard to his or her residence, training, work or leisure time. With the agreement of the offender, the court may direct that he or she stay in a (medical) treatment institution or live in a hostel.<sup>26</sup>
- [1.15] The longer the prison sentence, the more stringent the conditions of suspension will be. The offender is under the supervision of a probation officer for the duration of the sentence. The main task of the probation officer is to assist, guide and supervise the offender.<sup>27</sup> For those sentenced to a term of immediate imprisonment and who have served at least two thirds of that sentence, the remaining period may be suspended and

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<sup>21</sup> Pelissier and Perrier, "France" in van Kalmthout and Durnesca (eds), *Probation in Europe* (Wolf Legal Publishers 2008).

<sup>22</sup> A full list of general and specific conditions can be found under Articles 132 – 145 of the French *Code of Criminal Procedure*.

<sup>23</sup> Article 55 of the *Criminal Code (Strafgesetzbuch StGB)*.

<sup>24</sup> Article 56 of the *Criminal Code (Strafgesetzbuch StGB)*.

<sup>25</sup> Article 56(b) of the *Criminal Code (Strafgesetzbuch StGB)*.

<sup>26</sup> Article 56(c) of the *Criminal Code (Strafgesetzbuch StGB)*.

<sup>27</sup> Article 56(d) of the *Criminal Code (Strafgesetzbuch StGB)*.

probation imposed.<sup>28</sup> In exceptional cases, the remainder of a prison sentence can be suspended and probation imposed at an earlier stage.<sup>29</sup>

- [1.16] The German suspended sentence may be revoked where the offender reoffends, or demonstrates that he or she is unwilling or unable to be of good behaviour, or where the offender persistently or grossly fails to comply with the conditions or directives, or persistently rejects the supervision of the probation officer, leading to the conclusion that he or she is likely to reoffend. However, the court will not revoke the suspended sentence where it considers that an extension of the operational period or the imposition of further conditions or directives would be more suitable.
- [1.17] Since the early 1970s, the proportion of sentences that are suspended in Germany has significantly increased, and from the mid-1980s, suspended sentences amounted to two thirds of all prison sentences.<sup>30</sup>

### **(c) Italy**

- [1.18] In Italy, Articles 163 – 169 of the *Codice Penale* provide for a “simple” suspended sentence and a “conditional” suspended sentence. The maximum sentence that may be suspended in the case of a simple suspended sentence is two years. The operational period is five years for a criminal offence and two years for a minor offence. For offences committed due to an offender’s addiction to drugs or alcohol, the court may suspend a sentence of imprisonment not exceeding four years for a maximum of five years, provided that the offender is already undergoing therapy or a social rehabilitation programme.<sup>31</sup> The simple suspended sentence does not provide for any involvement by the Probation Service.
- [1.19] A conditional suspended sentence is a mechanism by which, at the request of the offender serving an immediate custodial sentence, the remaining part of that sentence (if there is two years or less of the sentence remaining and the offender has served at least half of the custodial sentence) may be suspended for a period of five years.<sup>32</sup> These offenders are subject to certain conditions, namely to: report to a police station on a stated day and time, not to leave his or her habitual place of residence, and, as far as

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<sup>28</sup> This may be done so long as the offender agrees and the interests of public safety have been considered.

<sup>29</sup> See Mutz, “Germany” in van Kalmthout and Durnesca (eds), *Probation in Europe* (Wolf Legal Publishers 2008).

<sup>30</sup> Jehle, *Criminal Justice in Germany* 6th ed (Federal Ministry of Justice and Consumer Protection 2015) at page 34.

<sup>31</sup> Articles 163 – 166 of the *Codice Penale*.

<sup>32</sup> Articles 167 – 169 of the *Codice Penale*.

possible, comply with the obligations stated in the “Assignment to the Probation Service” Order.<sup>33</sup>

**(d) *The Criminal Justice (Mutual Recognition of Probation Judgments and Decisions) Act 2019***

- [1.20] Probation measures and non-custodial sanctions imposed in other EU countries, including suspended sentences, may be enforced in Ireland under the *Criminal Justice (Mutual Recognition of Probation Judgments and Decisions) Act 2019*, which was commenced in September 2019.<sup>34</sup> The Act transposes into Irish law an EU Framework Decision<sup>35</sup> that provides for reciprocal recognition of probation measures between EU Member States. The 2008 Framework Decision applies the principle of mutual recognition to judgments and probation decisions in order to supervise probation measures and alternative sanctions if the offender does not reside in the Member State where the measures were issued. The 2019 Act applies to post-trial, non-custodial penalties and to measures facilitating early release from prison such as suspended sentences, community service orders and supervision orders. The 2019 Act sets out the procedure for enforcement in Ireland of a suspended sentence imposed in another Member State.<sup>36</sup> It also, in line with the Framework Decision, provides that measures can be adapted in order to make sanctions compatible with the national legislation of the enforcing country, while ensuring that they remain consistent with the original measure imposed by the sentencing country.<sup>37</sup>

<sup>33</sup> Gandini and Zinna, “Italy” in van Kalmthout and Durnesca (eds), *Probation in Europe* (Wolf Legal Publishers 2008).

<sup>34</sup> *Criminal Justice (Mutual Recognition of Probation Judgments and Decisions) Act 2019 (Commencement) Order 2019* (SI No 469 of 2019), Article 2.

<sup>35</sup> Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions [2008] OJ L 337/102.

<sup>36</sup> Section 25 of the *Criminal Justice (Mutual Recognition of Probation Judgments and Decisions) Act 2019*.

<sup>37</sup> Section 24 of the *Criminal Justice (Mutual Recognition of Probation Judgments and Decisions) Act 2019*. It should be noted, however, that Ireland was the last Member State to implement the 2008 Framework Decision, the deadline for which was 6 December 2011. This failure to implement drew criticism from the High Court (Hunt J) in *The Minister for Justice and Equality v Teelin* [2015] IEHC 310, where the Court (at page 15) held that it was “as a matter of regret that neither [Ireland or the United Kingdom] has seen fit to implement the Framework Decision on probation matters within the specified time limit ... the respondent is precisely the kind of person who could have benefited by a transferred probation arrangement”.

## 4. The suspended sentence in Ireland

### (a) Historical development: a judicially-developed penalty

- [1.21] The suspended sentence in Ireland is quite unique in that, in contrast with England and Wales, it emerged as a creature of the common-law. Osborough, while noting that there “is not one shred of contemporary evidence” to support the assertion that the suspended sentence was widely used in 19th century Ireland,<sup>38</sup> also points to some examples of the sporadic use of sanctions similar to the suspended sentence during this period. For instance, Baron McClelland at the Cork Special Commission of 1822, having sentenced 35 persons to death, ordered that a number of these death sentences be suspended, with the offender’s respective fates being dependent “on the future conduct of the peasantry.”<sup>39</sup> However, it is generally accepted that the suspended sentence began to be widely used in the Irish criminal courts from the 1920s onwards. In this regard, Osborough refers to a survey, conducted in 1967, in which some older judges and barristers expressed the view that the practice of imposing suspended sentences had been used by WH Dodd, a Judge of the King’s Bench in Dublin from 1907 to 1924. This view was supported by the Northern Ireland Court of Criminal Appeal in 1951 in the decision of *R v Wightman*.<sup>40</sup> Hardiman J, writing extra-judicially, attributes the formal introduction of suspended sentences in this jurisdiction to Sir Thomas O’Shaughnessy, Recorder of Dublin between 1905 and 1924 who, during that period, formulated “a probation system of his own” whereby “the prisoner is not asked to serve [his or her sentence] unless and until he [or she] breaks the law again.”<sup>41</sup>
- [1.22] From the 1920s onwards, criminal courts in both jurisdictions on the island of Ireland utilised the suspended sentence on a frequent basis. In *R v Wightman*,<sup>42</sup> Lord Chief Justice Andrews recognised the inherent power of the criminal courts in Northern Ireland to record a sentence against a convicted offender and to bind him over on recognisance to attend for judgment on notice. In terms of the Irish Free State, Osborough points to the widespread use of the sanction in the Circuit Criminal Court from the 1920s onwards.<sup>43</sup> Further, Judge Riordan, writing extra-judicially, notes that, as early as 1928, “District

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<sup>38</sup> Osborough, “A Damocles’ Sword Guaranteed Irish: The Suspended Sentence in the Republic of Ireland” (1982) 17 *Irish Jurist* 221 at page 227.

<sup>39</sup> *Ibid* at page 226.

<sup>40</sup> [1950] NI 124 at page 127.

<sup>41</sup> Hardiman, *The Suspended Sentence in Ireland* (paper delivered to the Middle Temple Colloquium 24 April 2004) at page 5.

<sup>42</sup> [1950] NI 124.

<sup>43</sup> Osborough, “A Damocles’ Sword Guaranteed Irish: The Suspended Sentence in the Republic of Ireland” (1982) 17 *Irish Jurist* 221 at page 222.

Justices in the newly established District Court commenced the use of the suspended sentence on a systematic basis.”<sup>44</sup>

[1.23] Throughout the course of the twentieth century, the Irish courts consistently upheld the validity of the suspended sentence as a legitimate sentencing option under Irish sentencing law.<sup>45</sup> For instance, in *The People (AG) v McClure*,<sup>46</sup> the Court of Criminal Appeal reduced an 18 month custodial sentence to a six month suspended sentence on the condition that the appellant be of good behaviour for a period of two years from the date of re-sentencing. In coming to the conclusion that the sentence imposed was unduly severe, the Court had regard to the fact that: apart from the present offending behaviour (indecent exposure), the offender was a “man of exceptionally high character”,<sup>47</sup> the medical evidence that the offence was “an isolated aberration and that there is a promising prospect that it will not be repeated”,<sup>48</sup> and some extenuating family circumstances. As Osborough notes, the fact that the decision was “deemed worthy of inclusion in the *Irish Reports*... [is] timely proof that within the system of criminal justice administration in modern Ireland the suspended sentence now occupied an honoured, possibly even an impregnable, position.”<sup>49</sup>

[1.24] More recently, in *O'Brien v Governor of Limerick Prison the Supreme Court*<sup>50</sup> the Supreme Court (O’Flaherty J) stated that:

“the development of the suspended sentence was an invention of the Irish judiciary ... The use of a straight-forward suspended sentence is so well established in our legal system as not to require any elaboration here except to note that it is obviously a very beneficial jurisdiction for judges to possess”.<sup>51</sup>

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<sup>44</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 222.

<sup>45</sup> See *Re McIlhagga* (Supreme Court, 29 July 1971), where the Supreme Court described the suspended sentence as a valid and proper form of sentence.

<sup>46</sup> [1945] IR 275.

<sup>47</sup> *Ibid* at page 277.

<sup>48</sup> *Ibid* at page 277.

<sup>49</sup> Osborough, “A Damocles’ Sword Guaranteed Irish: The Suspended Sentence in the Republic of Ireland” (1982) 17 *Irish Jurist* 221 at page 229.

<sup>50</sup> [1997] 2 ILRM 349.

<sup>51</sup> *Ibid* at page 353.

- [1.25] The jurisdiction of Irish courts to impose a suspended sentence is clearly longstanding and indisputable.<sup>52</sup> However, the journey of the suspended sentence, in particular the part-suspended sentence, has not been without its complications. Towards the end of the 20th century, the Central Criminal Court and the Circuit Court began to impose reviewable sentences that were, in essence, part-suspended sentences. Under a reviewable sentence, a determinate prison sentence was imposed with the direction that, if the offender was returned to the court on a specified date, the court would then review the sentence with a view to suspending the balance. If the offender had engaged positively with prison services and complied with prison discipline in the interim, then the court would invariably suspend the remainder of the sentence from the date of review. The “Butler Order”, as it became known,<sup>53</sup> survived two constitutional challenges<sup>54</sup> before the Court of Criminal Appeal (Henchy J) in *The People (DPP) v Cahill*<sup>55</sup> outlined four fundamental objections to the reviewable sentence, namely that the practice was: incompatible with the powers of the President of the High Court to allocate cases, incompatible with the offender’s right of appeal, in conflict with the principles of penology, and most significantly, an encroachment on the power of the Executive to commute or remit a sentence pursuant to Article 13.6 of the Constitution of Ireland.
- [1.26] However, despite Henchy J’s “demolishing of the practice of part-suspension” in *Cahill*,<sup>56</sup> the reviewable sentence continued to be used by Irish sentencing courts. Indeed, the Supreme Court in *The People (DPP) v Aylmer*<sup>57</sup> refused to quash the “Butler Order” imposed in that case, or indeed to comment on its desirability more generally. However, in *The People (DPP) v Finn*<sup>58</sup> the Supreme Court held that reviewable sentences were undesirable and should be discontinued on the basis that this judicially developed practice constituted an undue interference with the express statutory power of the Executive to commute or remit punishment under section 23 of the *Criminal Justice Act 1951*.<sup>59</sup> While the Supreme Court expressly stated that its remarks were *obiter* and should

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<sup>52</sup> See also *The People (DPP) v Foley* [2014] IESC 2, [2014] 1 IR 360 at para 48; *The People (DPP) v DW* [2020] IECA 45 at para 42.

<sup>53</sup> As noted by the Supreme Court in *O’Brien v Governor of Limerick Prison the Supreme Court* [1997] 2 ILRM 349 at page 354, Butler J of the Central Criminal Court is widely regarded as having initiated the practice of the reviewable sentence.

<sup>54</sup> *The State (P v Woods) v AG* [1969] IR 385, and *The State (Morris) v Governor of Mountjoy Prison* (Supreme Court, 16 December 1970).

<sup>55</sup> [1980] IR 8.

<sup>56</sup> Osborough, “A ‘Damocles’ Sword Guaranteed Irish: The Suspended Sentence in the Republic of Ireland” (1982) 17 *Irish Jurist* 221 at page 250.

<sup>57</sup> [1995] 2 ILRM 624.

<sup>58</sup> [2000] IESC 75, [2001] 2 IR 25.

<sup>59</sup> For a more detailed discussion of the Court’s reasoning in this case, see chapter 7 of this Report.

not be seen as invalidating any reviewable sentence in operation, the case law in this area<sup>60</sup> is now well settled that this type of part-suspended sentence is only permissible where there is an express statutory power to do so.<sup>61</sup>

- [1.27] It should also be noted that the “conventional” part-suspended sentence, namely where the sentencing court announces both the custodial part of the sentence and the suspended period of the sentence on the date of sentence, also ran into difficulty in *O’Brien v Governor of Limerick Prison*<sup>62</sup> for unduly interfering with the statutory framework governing automatic remission. This difficulty was quickly resolved by a legislative amendment<sup>63</sup> following the decision in *O’Brien* and the conventional part-suspended sentence has since been an ever-present in the Irish sentencing system.<sup>64</sup>

### **(b) The current statutory framework**

- [1.28] It was not until the 1960s that the Oireachtas first contemplated the idea of legislating for the suspended sentence. Section 50 of the *Criminal Justice Bill 1967* first proposed to put the court’s jurisdiction to suspend a sentence of imprisonment (and the suspension of a fine) on a statutory footing. It is also interesting to note that section 50(2) of the 1967 Bill provided for a three-year limit on the length of time for which a sentence might be suspended (“the operational period”). As will be discussed below, no such limit was provided for in section 99 of the *Criminal Justice Act 2006*. Riordan speculates that the draftsman of the 2006 Act decided against inserting a similar provision in deference on the part of the legislature to what has traditionally been regarded as an exclusively

<sup>60</sup> *The People (DPP) v Dunne* [2003] 4 IR 87 at page 92.

<sup>61</sup> Section 27(3J) of the *Misuse of Drugs Act 1977*, as substituted by section 33 of the *Criminal Justice Act 2007*, allows the sentencing court to review a sentence with a view to suspending the remaining portion from the review date, provided that the court is satisfied that the offender, at the time of the offence, was addicted to one or more controlled drugs and that the addiction was a significant factor in the commission of the specific offence under section 15(a). However, as clarified by the Court of Criminal Appeal in *The People (DPP) v Dunne* [2003] 4 IR 87, this statutory power to impose a reviewable sentence is confined to circumstances in which the court has, at least, imposed the presumptive minimum sentence of 10 years’ imprisonment, as the review power is only exercisable after the offender has served five years of the sentence. One exception to this rule is the practice of reviewable sentences of detention permitted for child offenders being sentenced to lengthy sentences on foot of serious indictable offences, as established in *The People (DPP) v DG* [2005] IECCA 75. Chapter 7 of this Report contains a detailed discussion as to the legal basis for this judicially-developed practice.

<sup>62</sup> [1997] ILRM 349.

<sup>63</sup> Section 23 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*.

<sup>64</sup> Section 99(19) of the *Criminal Justice Act 2006* places the decision of the Supreme Court in *O’Brien v Governor of Limerick Prison* on a statutory footing. Subsection 19 provides that section 99 shall not affect the law on remission of sentence. For a detailed discussion of this decision and the part-suspended sentence more generally, see chapter 5 of this Report.



judicial function.<sup>65</sup> However, upon the dissolution of the Dáil in June 1969, at which stage the Bill was at the committee stage (as of May 7 1969), the 1967 Bill never became law.<sup>66</sup> More than 40 years were to elapse before the idea of legislating for the suspended sentence was reactivated. In the intervening period, the 1985 *Report of the Committee of Inquiry into the Penal System* (the Whitaker Committee) expressed concern about the status of suspended sentences, noting in particular that the sanction lacked the legislative clarity that the 1967 Bill would have given it.

- [1.29] The suspension of a sentence of imprisonment (but not of fines) was eventually legislated for in section 99 of the *Criminal Justice Act 2006*. Section 99 greatly expanded the regulation of suspended sentences by comparison with the provisions as originally set out in the 1967 Bill. The core aim of section 99 was to set out the precise procedures for dealing with those who reoffended or breached a condition of suspension during the operational period of the suspended sentence. However, the legislative provision also placed other aspects of the operation of the suspended sentence on a statutory footing. Section 99(1) provides that a suspended sentence may be imposed for any offence that is punishable by a term of imprisonment, except where that term of imprisonment is mandatory. As noted above, section 99 does not provide any limit on the operational period. In terms of the conditions of suspension that may be imposed, section 99(2) of the 2006 Act provides that it will be a mandatory condition of suspension that the offender enters into a bond to keep the peace and be of good behaviour for a specified period of time. Subsections (3)<sup>67</sup> and (4)<sup>68</sup> afford the sentencing court with a wide discretion to impose any other conditions of suspension that it deems appropriate in the circumstances of the case.<sup>69</sup>
- [1.30] In terms of the revocation procedures mentioned above, section 99(13) of the 2006 Act, as amended, provides that where a member of An Garda Síochána, or the governor of the prison to which an offender subject to a part-suspended sentence has been committed, has reasonable grounds for believing that the offender has breached the mandatory conditions of suspension, namely to keep the peace and be of good behaviour, he or she

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<sup>65</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 375.

<sup>66</sup> See TK Whittaker, *Report of the Committee of Inquiry into the Penal System* (Stationery Office 1985).

<sup>67</sup> Section 99(3) of the 2006 Act may only be imposed in respect of any suspended sentence (suspended in part or in full).

<sup>68</sup> The conditions outlined in section 99(4) of the 2006 Act may only be imposed in cases of part-suspended sentences.

<sup>69</sup> As noted by the Court of Appeal in *The People (DPP) v DW* [2020] IECA 145 at para 61.

may apply to the court to have the suspended sentence activated.<sup>70</sup> Under section 99(14), as amended, the assigned probation officer may apply for activation of a suspended sentence where he or she has reasonable grounds for believing that the offender that is subject to the suspended sentence has breached one or more of the discretionary conditions of suspension imposed pursuant to subsection (4).<sup>71</sup> Section 99(10) provides that where an offender has been convicted of a triggering offence during the operational period, the sentencing court, at the activation hearing, shall revoke the suspended element of the sentence, “unless it considers it unjust to do so in the circumstances of the case.” Subsection 10 also provides that a sentencing court, having decided to revoke the suspended element of the sentence, may activate the “entire of the sentence originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case”. Section 99(17) of the 2006 Act contains an identical provision in respect of breaches of conditions of suspension.<sup>72</sup> Therefore, as Riordan notes, both sections 99(10) and 99(17) provides the sentencing court with a “double discretion to disregard the breach having regard to all the circumstances of the

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<sup>70</sup> Section 2(f) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017* enhanced the powers of the Gardaí and the governors of prisons to apply for an activation of a suspended sentence not just where there are reasonable grounds for believing that the individual subject to the suspended sentence has breached a mandatory condition of suspension under section 99(2), but also where they have reasonable grounds for believing that the individual has breached an additional condition under section 99(3). Section 2(g) of the 2017 Act inserts subsection (13A), which provides that the Director of Public Prosecutions may, if he or she has reasonable grounds for believing that an individual who is subject to a suspended sentence has contravened a condition imposed under section 99(3), apply to the court to initiate activation proceedings.

<sup>71</sup> Under section 99(14), as originally enacted, a probation officer could apply for activation of a suspended sentence where he or she had reasonable grounds for believing that the offender that is subject to the suspended sentence breached one or more of the conditions of suspension imposed under subsections (3) or (4). Section 2(h) of the 2017 Act amends section 99(14) of the 2006 Act, by removing the power of the relevant probation officer to apply to the court where it has reasonable grounds for believing that an offender has breached a condition of suspension under section 99(3). However, they may still make applications to the court for breaches of conditions under subsection (4), namely the conditions that may be imposed in respect of part-suspended sentences only.

<sup>72</sup> It should be noted that the Court of Appeal in *Clarke v Governor of Mountjoy Prison* [2016] IECA 244 confirmed that section 99(17) is a standalone power of revocation and may be invoked by sentencing courts to revoke a suspended sentence on foot of *any* breach of condition, including the mandatory condition to keep the peace and be of good behaviour during the operational period. Thus, the Court held that, section 99(17) may be used by sentencing courts to revoke a suspended sentence, both for a breach of the discretionary conditions under sections 99(3) and 99(4), and upon conviction for a triggering offence, on the basis that this triggering offence also constitutes a breach of the condition of suspension to keep the peace and be of good behaviour. See chapter 8 for a further discussion of this decision.

case and even if moved to activate the sentence the court may impose a lesser sentence than that originally specified.”<sup>73</sup>

- [1.31] The main aim of section 99 of the 2006 Act was to provide an effective mechanism for dealing with those who reoffended or breached a condition of suspension during the operational period of the suspended sentence. This, as O’Malley notes, was undoubtedly a legitimate and commendable ambition.<sup>74</sup> However, despite a number of amendments,<sup>75</sup> section 99 has proven to be problematic. In 2016, in *Moore v DPP*<sup>76</sup> the High Court declared subsections (9) and (10) of section 99 of the 2006 Act to be unconstitutional. These subsections concerned the activation of a suspended sentence in the event of the commission of a triggering offence and set out the procedures to be followed in such circumstances. In response to the decision in *Moore*, the Oireachtas enacted the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, which not only amended subsections (9) and (10) of section 99 but clarified a number of other procedural issues identified in the section.<sup>77</sup>

### (c) Guiding principles

- [1.32] In *The Director of Public Prosecutions (Purtill) v Murray*<sup>78</sup> the High Court (O’Malley J) held that the former common-law power to suspend a sentence of imprisonment did not survive the enactment of section 99 of the *Criminal Justice Act 2006*. However, while the procedural elements of the suspended sentence are now exclusively governed by statute, the legislation does not – with the exception of subsection 1, which provides that any sentence of imprisonment, apart from a mandatory sentence, may be suspended – provide any guidance to sentencing courts as to the circumstances in which the imposition of a suspended sentence may be appropriate. Therefore, the decision as to whether suspension is appropriate still falls to be considered by the particular sentencing court. However, despite repeated endorsements regarding the legitimacy of the suspended sentence by the Irish courts, as discussed above, a substantive set of principles

<sup>73</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 372.

<sup>74</sup> O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 22.01.

<sup>75</sup> Section 99 has been amended by section 60 of the *Criminal Justice Act 2007*; section 51 of the *Criminal Justice (Miscellaneous Provisions) Act 2009*, and most recently, by section 2 of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*.

<sup>76</sup> [2016] IEHC 244, [2018] 2 IR 170.

<sup>77</sup> See chapter 8 for a detailed discussion on section 99 of the 2006 Act.

<sup>78</sup> [2015] IEHC 782.

governing the suspended sentence has not been forthcoming.<sup>79</sup> Nevertheless, some fundamental guiding principles have emerged from the case law. These guiding principles (and some of the conceptual problems that they pose) are discussed in detail in chapter 4 of this Report. However, for the sake of completeness they are set out in brief below.

- [1.33] In the first instance, a sentencing court should not impose a suspended sentence of imprisonment unless it is satisfied that the gravity of the offence is sufficiently serious to merit a custodial sentence.<sup>80</sup> Having decided that the offence, as committed by the offender, cannot be disposed of by way of a non-custodial sanction, the sentencing court should then determine the length of the custodial sentence, by reference to the overarching distributive principle of Irish sentencing law – the principle of proportionality.<sup>81</sup> This requirement is to ensure that, in the event that the court ultimately determines that a suspended sentence is appropriate, it does not pass a longer custodial sentence than would otherwise be appropriate merely on the basis that the sentence is going to be suspended.<sup>82</sup> Subsequent to (1) determining that the offence merits a custodial sentence and (2) setting the length of the custodial sentence, the sentencing court should then consider whether the circumstances of the case (usually the offender’s personal mitigation) are such that the custodial sentence should be suspended.<sup>83</sup>
- [1.34] Having decided that a suspended sentence is appropriate in the circumstances of the case, a sentencing court may then impose conditions of suspension. As outlined above, sections 99(3)<sup>84</sup> and 99(4)<sup>85</sup> of the 2006 Act provide the court with a wide discretion as to

<sup>79</sup> See Osborough, “A Damocles’ Sword Guaranteed Irish: The Suspended Sentence in the Republic of Ireland” (1982) 17 *Irish Jurist* 221 at pages 237 – 239; Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 234.

<sup>80</sup> *The People (DPP) v Slattery* [2017] IECA 90 at para 34; *Moore v Brady* [2006] IEHC 434 at para 36; *The People (DPP) v Kavanagh* [2020] IECA 13 at para 24; Most recently, the Court of Appeal in *The People (DPP) v DW* [2020] IECA 145 at paras 36 – 39 expressly endorsed the O’Keefe principle, discussed above, as forming part of Irish sentencing law.

<sup>81</sup> For a detailed discussion on the principle of proportionality, see chapter 4 of this Report.

<sup>82</sup> This principle derives from the decision of the Court of Appeal in England and Wales in *R v Mah-Wing* [1983] 5 Cr App R (S) 347 and was implicitly endorsed as forming part of Irish sentencing law in *The People (DPP) v Loving* [2006] IECCA 28, [2006] 3 IR 355 and *The People (DPP) v Floyd* [2014] IECA 39 at para 12, prior to being expressly approved by the Court of Appeal in the recent decision of *The People (DPP) v DW* [2020] IECA 145 at paras 36 – 39.

<sup>83</sup> *The People (DPP) v Slattery* [2017] IECA 90 at para 34; *Moore v Brady* [2006] IEHC 434 at para 36; *The People (DPP) v Kavanagh* [2020] IECA 13 at para 24; Most recently, the Court of Appeal in *The People (DPP) v DW* [2020] IECA 145 at paras 36 – 39 expressly endorsed the O’Keefe principle as forming part of Irish law.

<sup>84</sup> For any suspended sentence (in full or in part).

<sup>85</sup> In the case of part-suspended sentences only.

the conditions of suspension that it may impose upon a particular offender. This area is therefore largely governed by statute. However, the Irish courts have established that the conditions of suspension form part of the overall punishment and must therefore be proportionate and afford the offender with a reasonable prospect of compliance, based on his or her personal circumstances.<sup>86</sup> Furthermore, while section 99 does not place any limitation on the length of the operational period, the Courts have also stressed that the length of the operational period also forms part of the overall punishment – in that it represents the period of time during which the offender is liable to be imprisoned in the event of a breach<sup>87</sup> – and it must therefore be proportionate (both in the distributive sense and to the extent that it impairs the offender’s individual rights).<sup>88</sup>

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<sup>86</sup> *The People (DPP) v Broszczack* [2016] IECA 121; *The People (DPP) v Lee* [2017] IECA 152; *The People (DPP) v Broe* [2020] IECA 140 at paras 82 – 83; *The People (DPP) v DW* [2020] IECA 145.

<sup>87</sup> *The People (DPP) v Stronge* [2011] IECCA 79.

<sup>88</sup> *The People (DPP) v DW* [2020] IECA 145 at paras 92 – 96.



## CHAPTER 2 LOCATING THE SUSPENDED SENTENCE ON THE HIERARCHY OF CRIMINAL PENALTIES

### 1. Introduction

- [2.1] This chapter considers where the suspended sentence is located on the hierarchy of criminal penalties available under Irish law. As discussed in chapter 1, the suspended sentence is a non-immediate custodial sentence. Therefore, in principle at least, the suspended sentence should be located immediately below the immediate custodial sentence on the scale of severity. It is important, however, to reiterate the distinction between the fully suspended sentence and the part-suspended sentence. The fully suspended sentence is a non-immediate custodial sentence of imprisonment. A custodial sentence has been imposed but has simultaneously been suspended in full on certain conditions. Therefore, the offender will not have to serve any of the custodial sentence if he or she complies with the conditions of suspension.<sup>1</sup> In contrast, the part-suspended sentence is a two-phased sentence: an immediate custodial sentence followed by a suspended custodial sentence. Having served the initial custodial element of the sentence, the offender is released from prison but is required to comply with any of the conditions of suspension imposed by the sentencing court. There is therefore an important difference between the two sanctions in terms of their punitive impact and, by extension, their respective location on the hierarchy of criminal penalties.<sup>2</sup>
- [2.2] The first section gives a brief overview of the three other penalties available under Irish sentencing law that bear some similarities to the suspended sentence, namely the application of the *Probation of Offenders Act 1907* (both the dismissal and the conditional discharge), the Community Service Order and the deferred sentence. The second section discusses where both the part-suspended sentence and the fully suspended sentence, in the view of the Commission, rank on the scale of severity. The next section discusses the contrast between where the suspended sentence ranks on the scale of gravity and the apparently poor public perception of the penalty.
- [2.3] The concluding section of this chapter recommends that the part-suspended sentence should rank just below an immediate custodial sentence and just above the fully suspended sentence on the scale of severity; with the fully suspended sentence just below the part-suspended sentence and just above the deferred sentence.

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<sup>1</sup> As noted in chapter 8, even when there is non-compliance with conditions, it is by no means automatic that the suspended sentence will be activated.

<sup>2</sup> This is discussed in greater detail in chapters 3 and 5 of this Report.

- [2.4] At the outset, however, the Commission acknowledges the difficulties surrounding any effort to compare or rank the severity of penalties. Imprisonment, for example, might be widely, if not universally, regarded as the most severe penalty available in a jurisdiction such as Ireland where the death penalty has been abolished. Yet, there have been studies, admittedly in other countries and in different social contexts, showing that some offenders regard a term of imprisonment, especially if reasonably short, as less severe than, say, a lengthy term of intensive probation supervision. Indeed, judges, other criminal justice professionals and members of the public are also known to have differed, sometimes to a marked degree, in their assessment and perception of penal severity. Efforts to establish penal equivalence between a given term of imprisonment and community-based penalties further illustrate the difficulty (though not necessarily the impossibility) of achieving some degree of commensurability between qualitatively different sentencing options.
- [2.5] In this chapter, however, the Commission is not attempting to establish or indicate any kind of penal equivalence between a suspended sentence and any other sentencing measure. Indeed, as already indicated and as will be discussed further in later chapters, the punitive impact or weight of a suspended sentence in any given case depends on a number of variables, most notably the conditions attached to it pursuant to section 99 of the *Criminal Justice Act 2006*. All the Commission is attempting to do here is locate the suspended sentence on the overall scale of penal severity, but in general terms only. Naturally, in the context of specific cases, the comparative severity of the available penalties may depend on many factors, mostly connected with the personal circumstances of the offender.

## **2. Some of the other criminal penalties available under Irish law**

### **[2.6] (a) Probation**

Under section 1 of the *Probation of Offenders Act 1907*, two types of order may be made: a dismissal – where the charge is proved but it would be inappropriate to enter a formal conviction or punish the offender, and a conditional discharge – where the charge is proved but the offender will be sentenced for that offence only if he or she reoffends or breaches a condition of discharge within a period of time not exceeding three years. Section 1(2) of the 1907 Act, which applies to offenders convicted on indictment, provides only for a conditional discharge. Section 1(1) of the 1907 Act provides for both a dismissal and a conditional discharge both in respect of summary offences and indictable offences tried summarily in the District Court.

- [2.7] While a conditional discharge under section 1 of the 1907 Act may, on its face, appear very similar to a suspended sentence, they are nonetheless distinct penalties. As discussed above, a suspended sentence is a non-immediate custodial sentence, whereas a conditional discharge under section 1 of the 1907 Act may be imposed in lieu of a



sentence of imprisonment (that is, as a direct alternative to imprisonment). A conditional discharge does not involve the recording of a formal conviction, unless and until the offender breaches one of the conditions, in which case he or she may be brought back to court and only then be subject to conviction and sentence. Although there are instances in which section 1(1) of the 1907 Act may be classified as a conviction,<sup>3</sup> it nonetheless does not represent a recorded sentence of imprisonment. On the other hand, before imposing a suspended sentence, a sentencing court must first be satisfied that the offence is sufficiently serious to merit a custodial sentence. Furthermore, a suspended sentence automatically results in a recorded conviction. It is clear, therefore, that a suspended sentence ranks higher on the scale of severity in that it represents both an immediate formal conviction and the imposition of a custodial (albeit non-immediate) sentence.<sup>4</sup>

#### **(b) Deferred sentences**

- [2.8] Section 100 of the *Criminal Justice Act 2006* provides that a deferred sentence may be imposed provided that the offence is punishable by both a fine and imprisonment.<sup>5</sup> Under section 100(2) of the 2006 Act, a sentencing court may defer imposing a sentence of imprisonment if the offender consents to the making of the order and undertakes to comply with any of the conditions of deferment imposed by the court, and the court is satisfied that it would be in the interests of justice to do so, having regard to the nature of the offence and all of the circumstances of the case. The sentence may not be deferred for a period exceeding six months,<sup>6</sup> during which time the offender must keep the peace, be of good behaviour and abide by any other conditions attached by the court.<sup>7</sup> At the initial sentencing hearing, the court must specify the length of the sentence that would have been imposed had the sentence not been deferred.<sup>8</sup>

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<sup>3</sup> Section 1(4) of the 1907 Act provides that "[w]here an order is made under this section by a court of summary jurisdiction, the order shall, for the purpose of re-vesting and restoring stolen property, and of enabling the courts to make orders as to the restitution and delivery of property to the owner and as to the payment of money upon or in connexion with the restitution or delivery, have like effect as a conviction." Section 6(12)(b) of the *Criminal Justice Act 1993*, which governs the use of compensation orders on foot of a conviction, provides that "references to conviction of a person include references to dealing with a person under section 1(1) of the *Probation of Offenders Act 1907*."

<sup>4</sup> O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 22.08.

<sup>5</sup> Section 100(1) of the *Criminal Justice Act 2006*.

<sup>6</sup> Section 100(3)(a) of the *Criminal Justice Act 2006*.

<sup>7</sup> Section 100(3)(b) of the *Criminal Justice Act 2006*.

<sup>8</sup> Section 100(1)(b)(ii) of the *Criminal Justice Act 2006*.

- [2.9] The offender is required to attend a sitting of the court at a specified time or place not later than one month before the end of the operational period of the deferred sentence.<sup>9</sup> If, at that sitting, the court is satisfied that the offender has complied with the conditions, it shall not impose the specified term of imprisonment but shall discharge the offender forthwith.<sup>10</sup> However, if the court is satisfied that the offender has breached a condition of the deferred sentence order, the court may impose the specified term of imprisonment or such lesser term as it considers just in all of the circumstances of the case.<sup>11</sup> The court may also decide that it would be unjust in all of the circumstances to impose any prison term, in which case the offender is discharged forthwith.<sup>12</sup>
- [2.10] At first glance, the deferred sentence appears to be very similar to the fully suspended sentence. Both punishments aim to assist the offender to avoid imprisonment by requiring him or her to keep the peace and be of good behaviour (and comply with any additional conditions prescribed by the court) for a specified period of time. However, again, the deferred sentence and the suspended sentence are two distinct forms of punishment. Under a deferred sentence order, the length of the term of imprisonment is specified at the outset but not imposed. Rather, the sentence is deferred for a specified period of time and it will only be imposed if the offender fails to comply with the conditions of the order during the operational period. Under a suspended sentence, the sentence of imprisonment is imposed at the outset, but the offender is only sent to prison if he or she breaches a condition of suspension during the operational period. It is also worth noting that the length of the operational period for the deferred sentence is limited to a maximum of six months, whereas there is no limit on the length of the operational period for a suspended sentence. In light of this, the Commission is of the view that the suspended sentence should also be located higher than the deferred sentence on the hierarchy of penalties.

### **(c) Community Service Order**

- [2.11] The *Criminal Justice (Community Service) Act 1983* introduced the community service order (CSO) as an alternative to imprisonment. It is clear from the 1983 Act that the CSO serves as an alternative to custody. A CSO may be made by any court (other than the Special Criminal Court) in respect of an offender who has been convicted of an offence for which, in the court's opinion, the appropriate sentence would otherwise have been one of imprisonment.<sup>13</sup> The *Criminal Justice (Community Service) Amendment Act 2011*, which

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<sup>9</sup> Section 100(5) of the *Criminal Justice Act 2006*.

<sup>10</sup> Section 100(11) of the *Criminal Justice Act 2006*.

<sup>11</sup> Section 100(12) of the *Criminal Justice Act 2006*.

<sup>12</sup> Section 100(12) of the *Criminal Justice Act 2006*.

<sup>13</sup> Section 2 of the *Criminal Justice (Community Service) Act 1983*.

significantly amended the 1983 Act, provides that, if the sentencing court is of the opinion that the offence merits a sentence of imprisonment of 12 months or less, it *shall* consider whether the imposition of a CSO in lieu of a sentence of imprisonment is appropriate in the circumstances of the case.<sup>14</sup> If the sentencing court is of the opinion that the offence merits a sentence of imprisonment of more than 12 months, it *may* consider whether the imposition of a CSO in lieu of a sentence of imprisonment is appropriate in the circumstances of the case.<sup>15</sup> The punishment available under the 1983 Act is the requirement to perform unpaid work for a specified number of hours – the minimum being 40 hours and the maximum being 240.<sup>16</sup>

- [2.12] A CSO may be combined with other orders,<sup>17</sup> but the legislative framework prohibits the imposition of a sentence of imprisonment, whether suspended or not, in combination with a CSO.<sup>18</sup> The reasoning behind this is that a CSO is expressly set out in section 3(1) of the 1983 Act, as amended, as an alternative to custody. On the other hand, the suspended sentence is better defined as a non-immediate custodial penalty. However, although a suspended sentence may never be imposed in conjunction with a CSO, the two penalties share some common features. Neither penalty may be imposed unless a court is satisfied that a sentence of imprisonment would otherwise be appropriate i.e. the custody threshold must be deemed to have been passed. The legislation governing both penalties also provides for potentially similar consequences in the event of a breach of conditions. Both penalties can also be said to cater for broadly similar sentencing aims.<sup>19</sup>
- [2.13] It should be noted, however, that there are crucial differences between both penalties. The custodial / non-custodial distinction has already been noted above. In this regard, the suspended sentence is generally the more appropriate penalty in cases of more serious offending behaviour. After all, apart from mandatory terms of imprisonment, there is no limit to the length of a sentence of imprisonment that may be suspended under section 99(1) of the *Criminal Justice Act 2006*. In contrast, as noted the maximum punishment under a CSO is 240 hours of unpaid work. Finally, the conditions of suspension have the

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<sup>14</sup> Section 3(1)(a) of the *Criminal Justice (Community Service) Act 1983* as substituted by section 3(a) of the *Criminal Justice (Community Service) Amendment Act 2011*.

<sup>15</sup> Section 3(1)(b) of the *Criminal Justice (Community Service) Act 1983* as substituted by section 3(a) of the *Criminal Justice (Community Service) Amendment Act 2011*.

<sup>16</sup> Section 3(2) of the *Criminal Justice (Community Service) Act 1983*.

<sup>17</sup> Other orders include licence revocation, disqualification or endorsement, confiscation, forfeiture or restitution of property, or payment of compensation, costs or expenses. See section 3(3) of the *Criminal Justice (Community Service) Act 1983*.

<sup>18</sup> Section 3(1) as substituted by section 3 of the *Criminal Justice (Community Service) (Amendment) Act 2011*.

<sup>19</sup> For a detailed discussion on similarities between both sanctions, see chapter 10 of this Report.

potential to be significantly more onerous than the conditions that the offender must adhere to in the case of a CSO.<sup>20</sup>

**(d) Discussion**

[2.14] In light of the preceding discussion, the Commission is of the view that the hierarchy of criminal punishment under Irish law is as follows:

- **Immediate imprisonment:** An immediate custodial sentence undoubtedly constitutes the most severe penalty under Irish law. The principle of prison as a last resort, discussed in chapter 4 of this Report, attests to this.
- **The part-suspended sentence:** As noted above, this penalty is best viewed as a two-phased sentence: an immediate custodial sentence followed by a further term during which the offender is at conditional liberty under the terms of the part-suspension. Therefore, as this penalty still involves an immediate deprivation of liberty, it ranks just below the immediate custodial sentence on the scale of severity.
- **The fully-suspended sentence:** As noted above, when a sentence of imprisonment has been fully suspended, the custodial sentence has been imposed but has simultaneously been suspended in full on certain conditions. The stigma of a criminal conviction, the obligation to adhere to the conditions of suspension and the accompanying threat of imprisonment during the operational period of a fully suspended sentence undoubtedly carry a certain punitive impact.<sup>21</sup> On the other hand, the offender will undergo actual imprisonment only if he or she breaches one or more of the conditions of suspension. Therefore, the Commission ranks the fully suspended sentence just below the part-suspended sentence on the scale of severity.
- **The deferred sentence:** While both the deferred sentence and the fully suspended sentence share some common characteristics, the latter form of punishment may be regarded as more severe because a sentence of imprisonment is actually imposed on the date of sentence. In contrast, in the case of a deferred sentence, the sentence is specified but not imposed unless and until the offender breaches one of the conditions of deferral. Furthermore, the operational period for a suspended sentence is unlimited, whereas the maximum operational period for a deferred sentence is six months.

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<sup>20</sup> For a detailed discussion on the crucial differences between both penalties, see chapter 10 of this Report.

<sup>21</sup> O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2006) at paras 22.03 – 22.05.

- **Community Service Order:** Again, this sanction bears some similarities to the suspended sentence in that both cater for similar purposes of punishment, aimed at controlling the future behaviour of the offender. However, as noted, a sentence of imprisonment of any length (apart from mandatory sentences) may be suspended and the court retains a discretion as to the length of the operational period and the conditions attaching to the suspended sentence. In contrast, there are only a limited range of relatively undemanding conditions that may attach to a CSO, and there is a limit of 240 hours on the unpaid work requirement that may be imposed. Further, the legislative provisions and the judicial authorities expressly frame the suspended sentence as a non-immediate custodial sentence, whereas the CSO is expressed as an alternative to prison. In light of the above, the Commission is of the view that the CSO should rank just below the deferred sentence on the hierarchy of criminal penalties.
- **Fine:** A sentencing court may impose a fine in respect of any criminal offence which is punishable by a fine or imprisonment, or both. While a failure to pay may result in imprisonment, section 2A the *Courts (No 2) Act 1986*, as amended,<sup>22</sup> expressly provides that imprisonment in default of payment of a fine should be a last resort once all other options have been exhausted. A fine may be, and often is, imposed in conjunction with other sanctions.<sup>23</sup> However, it should be noted that the imposition of a heavy fine has the potential, in and of itself, to have a significant punitive impact on the offender, notwithstanding the requirement that the court should take into account the offender's financial means<sup>24</sup> and, of course, the principle of proportionality, when setting the amount of the fine. Therefore, depending on the gravity of the particular offence, and the maximum fine permitted by the particular statutory provision governing the offence, assessing the punitive value of a fine, and, by extension, its place on the hierarchy of criminal sanctions, is difficult. Nevertheless, the Commission is of the view that, given its potential punitive value, the fine should rank above the conditional discharge on the scale of severity. Further, it may occasionally rank higher than the CSO in circumstances where the amount of the fine is particularly high.
- **Conditional discharge:** A conditional discharge aims to control the future behaviour of the offender and, as such, does impose identifiable positive

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<sup>22</sup> As inserted by section 20 of the *Fines (Payment and Recovery Act) 2014*.

<sup>23</sup> See chapter 10 for a discussion of the circumstances in which a fine may be imposed in combination with a suspended sentence. See chapter 9 for a discussion of the Irish case law in which suspended sentences have been handed down, in tandem with significant fines, in the area of competition offences.

<sup>24</sup> As per section 5 of the *Fines (Payment and Recovery) Act 2014*.

obligations on the offender. Given this, the Commission considers that a conditional discharge ranks just above the dismissal.

- **Dismissal:** A dismissal order under section 1(1) of the *Probation of Offenders Act 1907* may be regarded as the least severe measure where a person is adjudged guilty of a criminal offence, as the court is empowered to dismiss the charge even if it is proven.

### 3. Public perceptions of the suspended sentence

[2.15] Placing the suspended sentence just below an immediate custodial sentence is consistent with judicial views on the severity of the sanction, both in Ireland and other common law jurisdictions. For instance, in *Elliot v Harris (No 2)*,<sup>25</sup> the Supreme Court of South Australia held that:

“So far as being no punishment at all, a suspended sentence is a sentence of imprisonment with all of the consequences such a sentence involves on a defendant’s record and his future, and it is one which can automatically be called into effect on the slightest breach of the terms of the bond during its currency.”<sup>26</sup>

[2.16] Similarly, as will be discussed in chapter 4 of this Report, the Irish courts have consistently held that the suspended sentence is a custodial sentence of imprisonment and, coupled with the conditions of suspension, represents a real punishment.<sup>27</sup> Further, Riordan’s study found that most judges perceived the suspended sentence as being next below immediate imprisonment in terms of penal severity.<sup>28</sup> However, research in other common law jurisdictions indicates that the suspended sentence suffers from a poor public image and is perceived as a particularly lenient sanction. Critics of the suspended sentence have argued that it is inherently incongruous that a court would determine that the offence is sufficiently serious to merit a custodial sentence while simultaneously deciding that the offender should not go to prison.<sup>29</sup> Studies conducted in the United States have revealed that the general public and victims of crime consider the suspended sentence to be even

<sup>25</sup> [1976] 13 SASR 516.

<sup>26</sup> *Ibid* at page 527. See also Roberts and Gabor, “Living in the Shadow of Prison: Lessons from the Canadian Experience in Decarceration” (2004) 44 *British Journal of Criminology* 92 at pages 93 – 94 for a discussion on the punitive impact of the conditional sentence in Canada.

<sup>27</sup> *The People (DPP) v Slattery* [2017] IECA 90 at para 34; *Moore v Brady* [2006] IEHC 434 at para 36; *The People (DPP) v Kavanagh* [2020] IECA 13 at para 24; Most recently, the Court of Appeal in *The People (DPP) v DW* [2020] IECA 145 at paras 36 – 39; *The People (DPP) v Stronge* [2011] IECCA 79.

<sup>28</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 251.

<sup>29</sup> Victorian Sentencing Advisory Council, *Suspended Sentences: Final Report – Part 1* (May 2006).

milder than a modest fine or probation,<sup>30</sup> while in Australia it has been argued that a combination of a rise in penal populism,<sup>31</sup> fear of crime and inaccuracy of media reports on sentencing outcomes have combined to give the suspended sentence a highly negative public image.<sup>32</sup>

- [2.17] This poor public perception, coupled with the belief that the suspended sentence does not reflect “truth in sentencing,” led to the abolition of the sanction as a sentencing option in New Zealand in 2002<sup>33</sup> and the Australian state of Victoria in 2014.<sup>34</sup> Similarly, it was abolished in New South Wales in 1974, restored in 1999<sup>35</sup> and abolished again in 2017.<sup>36</sup> In Ireland, although the sanction has not been subjected to the same level of critical analysis as it has in other jurisdictions, Riordan argues that, due to the fact that “the suspended sentence is attenuated and contingent, it appears to recede rapidly down the scale of severity in the view of the public.”<sup>37</sup>
- [2.18] While no research into the perspectives of offenders in Ireland as to the severity of the suspended sentence has been carried out, international studies have found that offenders

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<sup>30</sup> Sebba, “Some Explorations in the Scaling of Penalties” (1978) 15 *Journal of Research in Crime and Delinquency* 247; Sebba and Nathan, “Further Explorations in the Scaling of Penalties” (1984) 24 *British Journal of Criminology* 221; Walker and Marsh, “Do Sentences Affect Public Disapproval?” (1984) 24 *British Journal of Criminology* 27.

<sup>31</sup> Penal populism has been described as the manner in which politicians exploit what they believe to be the generally punitive outlook of the public. See Bottoms, “The Philosophy and Politics of Punishment and Sentencing” in Clarkson and Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press 1995). For a discussion on penal populism in Ireland, see Campbell, “Criminal Justice and Penal Populism in Ireland” (2008) 28(4) *Legal Studies* 559; Hamilton, “Reconceptualising Penalty: Towards a Multidimensional Measure of Punitiveness” (2014) 54(2) *British Journal of Criminology* 321.

<sup>32</sup> Bartels, “An Examination of the Arguments For and Against the Use of Suspended Sentences” (2010) 12 *Flinders Law Journal* 119.

<sup>33</sup> Section 21A of the *Criminal Justice Act 1985* (NZ) repealed by section 166(a) of the *Sentencing Act 2002* (NZ).

<sup>34</sup> *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013*. The use of suspended sentences in Victoria was to be phased out in stages. The phasing out of suspended sentences in Victoria was completed on 1 September 2014.

<sup>35</sup> The suspended sentence was abolished after research concluded that it had had no appreciable effect on the size of the prison population. However, following its abolition, the prison population continued to increase and it was suggested that the abolition of the suspended sentence as a sentencing option contributed to this (see Spier, *Conviction and Sentencing of Offenders in New Zealand: 1987 to 1996* (Ministry of Justice 1997); Spier and Lash, *Conviction and Sentencing of Offenders in New Zealand: 1994 to 2003* (Ministry of Justice 2004).

<sup>36</sup> *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017*.

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

consider the suspended sentence to be a “let off” in that they believe that the chances of ever having to serve an immediate sentence of imprisonment, on foot of a breach of a condition of suspension, is slim.<sup>38</sup> One Australian study found that a \$250.00 fine was considered by offenders to be six times more severe than a suspended sentence.<sup>39</sup> Indeed, during the debate on the part-suspended sentence at Westminster in 1976 – 1977. MP Patrick Mayhew commented that “[T]he majority of people who received a suspended sentence reckoned that they had got away with it.<sup>40</sup> However, this is just a perception which does not necessarily reflect the attitude of offenders generally. The Commission understands from discussions with practitioners in this jurisdiction that that view is not necessarily shared here: the point was made that prior to the enactment of section 99 of the *Criminal Justice Act 2006* there were greater grounds for such a perception, as the chances of re-entry were relatively slim. Now, however, breaches of conditions frequently result in the Probation Service making an application for activation, and conviction for a triggering offence almost guarantees an activation hearing.

[2.19] Tonyr asserts that this perceived leniency may be one of the most difficult obstacles for the sanction to overcome.<sup>41</sup> Indeed, the efficacy of the suspended sentence as a punitive sanction is largely dependent on the likelihood that a breach of a condition of suspension will result in a re-activation of the custodial element of the sentence. As Roberts puts it:

“If violation of the [conditions of suspension] results in expeditious committal to custody, the sanction carries the penal value of a term of custody. On the other hand, if the conditions imposed on the offender are fairly minimal and courts react to breaches of those conditions with indulgence, the [suspended] sentence may be no more severe than a term of probation. In short a [suspended] sentence can only be fixed on a scale of penal severity by considering the nature of the

<sup>38</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 251 discussed a number of these studies. See, for instance: Sebba and Nathan, Further Explorations in the Scaling of Penalties (1984) 24 *British Journal of Criminology* 221; Sebba, Some Explorations in the Scaling of Penalties (1978) 15(2) *Journal of Research in Crime and Delinquency* 247 at page 247; Edney and Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press 2007) at page 356; Bagaric, “Suspended Sentences and Preventative Sentences: Illusory Evils and Disproportionate Punishments” (1999) 22 *UNSWLJ* 535 at page 536.

<sup>39</sup> Sebba, “Some Explorations in the Scaling of Penalties” (1978) 15(2) *Journal of Research in Crime and Delinquency* 247 at page 247 as cited in Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 251.

<sup>40</sup> Hansard, *House of Commons Committee Debate, Standing Committee E* (Session 1976-1977) at pages 655-656, see also the Home Office, *Crime, Justice and Protecting the Public* (1990) at pages 320 where the suspended sentence was again criticised for being perceived as a “let off” for the public and offenders.

<sup>41</sup> Tonyr, *Sentencing Matters* (Oxford University Press 1996) at page 4.



conditions imposed on the offender, and the threatened punishment that will be imposed in the event that these conditions are breached.”<sup>42</sup>

- [2.20] The Commission acknowledges this disparity between where the suspended ranks, in principle, on the scale of severity and public perceptions of its punitive value, at least in other jurisdictions. In chapter 8 of this Report, the Commission discusses some of the practical and procedural difficulties associated with the operation of the suspended sentence in this jurisdiction which may contribute to the apparently prevailing public perception of the suspended sentence as an unduly lenient sanction.

#### **4. Conclusion and recommendations**

- [2.21] In its Issues Paper, the Commission sought views on the following question:

(1) where the suspended sentence should be located on the hierarchy of sentences.

- [2.22] The submissions were in agreement with the Commission’s analysis in this chapter that the fully suspended sentence should rank just below the immediate custodial sentence; with the part-suspended sentence located just below the fully suspended sentence and just above the deferred sentence.

**R. 2.01** The Commission recommends that the part-suspended sentence should rank just below an immediate custodial sentence and just above the fully suspended sentence.

**R. 2.02** The Commission also recommends that the fully suspended sentence be located just below the part-suspended sentence and just above the deferred sentence.

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<sup>42</sup> Roberts and Gabor, “Living in the shadow of the prison: Lessons from the Canadian Experience in Decarceration” (2004) 44 *British Journal of Criminology* 92 at pages 93 – 94.



## CHAPTER 3 THE COMPATIBILITY OF THE SUSPENDED SENTENCE WITH THE PURPOSES OF PUNISHMENT

### 1. Introduction

- [3.1] This chapter considers the extent to which the suspended sentence is compatible with the sentencing aims recognised under Irish law, namely: retribution; deterrence (general and specific), incapacitation and rehabilitation. The first section of this chapter gives a brief outline of the theoretical underpinnings of the predominant general purposes of punishment. The next section considers the extent to which the suspended sentence may be compatible with, or advance, the general purposes of retribution, deterrence and rehabilitation. The case law of the Court of Appeal has demonstrated how the suspended sentence is a flexible sentencing option which is capable of simultaneously serving the competing punitive aims of retribution and general deterrence, as well as the individual desistance based aims of specific deterrence and rehabilitation. However, this section also highlights how the extent to which these aims are represented is dependent on the nature of the suspended sentence (i.e. whether the sentence is suspended in whole or in part), and the conditions of suspension imposed (i.e. whether the conditions of suspension are particularly onerous and punitive).
- [3.2] The chapter then discusses a sentencing aim which has not received direct attention in an Irish (judicial or legislative) context: the avoidance of prison. The Commission discusses how this sentencing aim has been established as a key rationale underpinning the decision to suspend in other jurisdictions. While the Commission outlines the potential issues with introducing this measure as a means of controlling the prison population (as it has been in other jurisdictions) it considers that it may legitimately be considered when sentencing a first time offender, with a low risk of re-offending, as has been highlighted in some recent decisions of the Court of Appeal.
- [3.3] The final section outlines the recommendations of the Commission. While specific deterrence and rehabilitation are the more pertinent sentencing aims underpinning the decision to fully suspend a sentence of imprisonment, the Commission acknowledges that the suspended sentence is ultimately capable of fulfilling, to varying degrees, all of the recognised purposes of punishment under Irish law. As such, the Commission recommends that the decision as to which sentencing aims are represented in any one case should ultimately be a matter for the discretion of the individual sentencing court, based on the particular facts before it. Secondly, the Commission recommends that the avoidance of prison should be a legitimate factor bearing on the decision to suspend in certain circumstances. However, in cases where the offender is a repeat offender or is

convicted of an offence that is the subject of the presumption of an immediate custodial sentence, this sentencing rationale should be carefully weighed up against competing punitive rationales (i.e. general deterrence and retribution).

## 2. General aims of sentencing

- [3.4] The general aims of sentencing form the theoretical foundation on which the institution of sentencing is based, providing moral justification for the State's authority to punish those who transgress the criminal law. These theories of punishment are rarely expressly adverted to by sentencing judges in practice on a day-to-day basis. However, O'Malley neatly articulates the position as follows:

"Punishment theorists usually advance and defend their preferred justifications with great conviction and tenacity. Legislators, judges and lawyers, by contrast, seldom devote much thought to the matter, at least in the abstract. Yet, every time a judge imposes a sentence for an offence, whatever its nature or gravity, he or she is motivated, consciously or subconsciously by some purpose."<sup>1</sup>

- [3.5] It is therefore important to set out the theories underpinning the purposes of punishment before examining the extent to which these purposes of punishment form part of Irish sentencing law. Accordingly, this section will outline the five main purposes of punishment, namely: deterrence; rehabilitation; punishment; reparation, and incapacitation.

### (a) Deterrence

- [3.6] Deterrence is consequentialist or "forward-looking" in nature in that it seeks to prevent the commission of future offences. A distinction is drawn between specific deterrence and general deterrence. Specific deterrence aims to prevent the particular offender from reoffending.<sup>2</sup> General deterrence endeavours to dissuade potential offenders and wider society from engaging in criminal conduct.<sup>3</sup> Both forms of deterrence have been criticised on the basis that evidence as to their efficacy as a crime desistance strategy is unconvincing.<sup>4</sup> Further, deterrence, and general deterrence in particular, has also been subjected to criticism at the level of principle. Deterrence theory is grounded on the premise that all human beings are rational actors with the capacity to weigh up the likely

<sup>1</sup> O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 2.24. This statement was cited with approval by the Court of Appeal in *The People (DPP) v WD* [2018] IECA 143 at para 75.

<sup>2</sup> O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paras 2.12.

<sup>3</sup> *Ibid.*

<sup>4</sup> For a discussion of some of these studies, see Ashworth, *Sentencing and Criminal Justice* 6th ed (Cambridge University Press 2015) at pages 83 – 88.

costs and benefits of engaging in criminal behaviour. By extension, if these rational actors are made aware of the “costs” of transgressing the criminal law – in the form of punishment imposed by the State – then he or she will be dissuaded from engaging in future criminal behaviour.<sup>5</sup>

- [3.7] Therefore, according to deterrence theory, punishing an offender disproportionately to the gravity of the offending is arguably justifiable on the basis that it serves to dissuade wider society from future criminal behaviour. In this regard, the main criticism levelled at the aim of general deterrence is that it treats human beings as a means to an end (i.e. the end being to create a safer society) as opposed to an end in and of themselves.<sup>6</sup> Criticism has also been levelled on the basis that the premise – that human beings are rational actors who, when engaging in criminal behaviour, are exercising choice and free-will – is misconceived.<sup>7</sup> Again, these principled objections are particularly pronounced in the case of general deterrence. While specific deterrence justifies the imposition of punishment (severe if necessary) on the particular offender so as to deter him or her from future criminal behaviour, general deterrence justifies severe punishment on the particular offender so as to deter society more generally from future criminal behaviour. Thus, while general deterrence is, strictly speaking, a desistance strategy, the fact that general deterrence may justify a greater than usual punishment to be imposed on the offender means that general deterrence may be more properly seen as being grouped together with other punitive sentencing aims, such as retribution.
- [3.8] As a result of these criticisms, some “mixed model” theories of punishment have emerged which attempt to retain crime prevention (deterrence) as the main justifying aim of criminal law, while proposing that the question of who and how much to punish be decided by retributive considerations.<sup>8</sup>

### **(b) Rehabilitation**

- [3.9] Rehabilitation, like deterrence, is aimed at encouraging or incentivising offenders to desist from further criminal conduct.<sup>9</sup> However, whereas deterrence views individuals as rational actors who will react appropriately to the negative incentives set by criminal punishment,

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<sup>5</sup> See Bentham, “An Introduction to the Principles of Morals and Legislation” in Mack (ed) *A Bentham Reader* (Pegasus 1969) at pages 85 – 89.

<sup>6</sup> Murphy, *Marxism and Retribution* (1973) 2 *Philosophy and Public Affairs* 217 at page 219.

<sup>7</sup> Robinson, *Distributive Principles of Criminal Law: Who Should be Punished how Much?* (Oxford University Press 2008) at page 70; Sylvestre, *Re-thinking Criminal Responsibility for Poor Offenders: Choice, Monstrosity and the Logic of Practice* (2010) 55 *McGill Law Journal* 771; Murphy, *Marxism and Retribution* (1973) 2 *Philosophy and Public Affairs* 217 at page 232.

<sup>8</sup> See, for instance, Hart, *Punishment and Responsibility* (Oxford University Press 2008).

<sup>9</sup> Ashworth, *Sentencing and Criminal Justice* 6th ed (Cambridge University Press 2015) at page 91.

rehabilitation considers transgressors of the criminal law to be in need of help and support to conduct themselves in conformity with the law.<sup>10</sup> A sentence is rehabilitative where it aims to reintegrate the offender back into society.<sup>11</sup> Rehabilitative programmes, such as treatment programmes, counselling and vocational training, aim to address the underlying causes of the offender's criminal behaviour.<sup>12</sup>

- [3.10] Up until the 1970s, the rehabilitative ideal was the predominant sentencing aim underpinning many western criminal justice systems.<sup>13</sup> However, this commitment to treating the offender began to wane in popularity after this period, where the more punitive aims of retribution and general deterrence came to prominence.<sup>14</sup> This decline was partly due to the emergence of empirical research which asserted that penal regimes implementing treatment programmes were no more successful at reducing rates of re-offending than other non-rehabilitative programmes.<sup>15</sup> Another reason for the decline of rehabilitation during this period was that these treatment models often led to indeterminate sentences, with persons only being released when, in the opinion of the experts, he or she had been "cured".<sup>16</sup> Therefore, in many instances, offenders were deprived of the right not to be subjected to compulsory state intervention against their will. Furthermore, the length or nature of this state intervention was oftentimes disproportionate to the gravity of the offending.<sup>17</sup> However, notwithstanding this decline, rehabilitation remains an important purpose of punishment in many modern criminal justice systems, including Ireland.<sup>18</sup>

<sup>10</sup> For an in-depth discussion of the theory underpinning this sentencing aim, see Von Hirsch, Ashworth and Roberts, *Principled Sentencing: Readings on Theory and Policy* 3rd ed (Hart Publishing 2009) chapter 1.

<sup>11</sup> Ashworth, *Sentencing and Criminal Justice* 6th ed (Cambridge University Press 2015) at pages 91 – 93.

<sup>12</sup> MacKenzie, "What Works. What Doesn't work. What's Promising" in Priestly and Vanstone (eds), *Offenders or Citizens? Readings in Rehabilitation* (Willan 2010) at page 245.

<sup>13</sup> O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 2.18.

<sup>14</sup> *Ibid.*

<sup>15</sup> Martinson, "What works? Questions and answers about prison reform" (1974) *The Public Interest* 22; Rotman, *Beyond Imprisonment: A New View of the Rehabilitation of Offenders* (Westport 1990).

<sup>16</sup> See Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (New Haven 1981).

<sup>17</sup> Ashworth, *Sentencing and Criminal Justice* 6th ed (Cambridge University Press 2015) at page 92.

<sup>18</sup> *The People (Attorney General) v O'Driscoll* [1972] 1 Frewen 351 at page 16; *The People (DPP) v WD* [2018] IECA 143 at para 78.

### (c) Punishment

[3.11] The general aim of punishment comprises two core elements: (1) punishment for wrongdoing (retribution),<sup>19</sup> and (2) formal condemnation of the offending behaviour (denunciation).<sup>20</sup> Retribution asserts that punishment is imposed because it is deserved. As the Court of Appeal put it recently, “retributivism is centred around a perceived moral imperative that wrong doing or evil committed should result in a response that involves the offender suffering in some way.”<sup>21</sup> Once thought to be a defunct theory of punishment, retribution theory witnessed a revival from the 1960s and 70s onwards.<sup>22</sup> Previously associated with the archaic rhetoric of “an eye for an eye” punishment, much of this revival has been attributed to the more neutrally sounding rhetoric of “just-deserts”.<sup>23</sup> Desert theory contains many strands, all of which converge on the proposition that an offender should only be punished to the extent to which it is deserved. For instance, Von Hirsch and Ashworth emphasise the centrality of blameworthiness in their version of desert theory,<sup>24</sup> noting that the moral justification of imposing punishment on retributive grounds is:

“derived directly from the censuring implications of the criminal sanction. Once one has created an institution with the condemnatory implications that punishment has, then it is a requirement of justice, not merely of efficient crime

<sup>19</sup> O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 2.07; Department of Justice, Equality and Law Reform, *White Paper on Crime, Discussion Document No. 2: Criminal Sanctions* (February 2010); Walker, *Why Punish?* (Oxford University Press 1991) at page 69.

<sup>20</sup> O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 2.23.

<sup>21</sup> *The People (DPP) v WD* [2018] IECA 143 at para 73.

<sup>22</sup> Armstrong, ‘The Retributivist Hits Back’ (1961) 70 *Mind* 471; McCloskey, ‘A non-utilitarian Approach to Punishment’ (1965) 8 *Inquiry* 249. Haist, “Deterrence in a sea of ‘just-deserts’: are utilitarian goals achievable in a world of ‘limiting retributivism?’” (2009) 99(3) *The Journal of Criminal Law and Criminology* 789 at pages 799 – 804.

<sup>23</sup> Haist, “Deterrence in a sea of ‘just-deserts’: are utilitarian goals achievable in a world of ‘limiting retributivism?’” (2009) 99(3) *The Journal of Criminal Law and Criminology* 789 at page 800.

<sup>24</sup> According to this sub-theory, punishment serves a dual purpose; firstly, desert is “an integral part of every-day judgments of praise and blame. Thus, punitive sanctions serve a censuring function – it communicates to the offender, victim and society at large the wrongful and blameworthy nature of the conduct engaged in. However, this theory also posits that a subsidiary purpose of punishment is to deter the individual wrongful conduct. For an account of this, see Von Hirsch, *Censure and Sanctions* (Oxford University Press 1993); see also Ashworth and Von Hirsch, *Proportionate Sentencing, Exploring the Principles* (Oxford University Press 2005) at pages 131 – 165.

prevention, to punish offenders according to the degree of reprehensibility of their conduct.”<sup>25</sup>

- [3.12] Another strand of desert theory is that of the “benefits and burdens” school of thought. This view posits that punishment is a just and proper response to a past offence, since it restores that fair balance of benefits and burdens in society. According to this logic, when a person commits a crime, he or she disturbs the equal rights and responsibilities imposed upon each member of society; he or she also benefits from others not committing crimes. Further, society is burdened at the hand of the criminal act. Punishment is, thus, society’s way of restoring the “social equilibrium”.<sup>26</sup>
- [3.13] What all of these variants of retribution theory have in common is the view that sentences should be proportionate to the seriousness of the offending conduct.<sup>27</sup> Given Ireland’s unwavering commitment to the principle of proportionality,<sup>28</sup> desert theory or retribution may be seen as a key moral justification underpinning the legitimacy of the Irish sentencing system.<sup>29</sup>
- [3.14] Denunciation involves a formal condemnation of an offender’s behaviour.<sup>30</sup> According to this theory, punishment performs an important symbolic function through the formal designation of conduct as wrongful by a state institution (a court). It communicates to the offender, the victim and society at large the wrongful and blameworthy nature of the conduct engaged in.<sup>31</sup> The Canadian Supreme Court put it well, stating:

“The objective of denunciation mandates that a sentence should communicate society’s condemnation of that particular offender’s conduct. In short, a sentence with a denunciatory effect represents a symbolic, collective statement that the

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<sup>25</sup> Ashworth and Von Hirsch, *Proportionate Sentencing, Exploring the Principles* (Oxford: Oxford University Press, 2005) at page 134.

<sup>26</sup> Murphy, “Marxism and Retribution” (2013) *Philosophy and Public Affairs*, 2(3) 218 at page 228; see also Morris, “Persons and Punishment” (1968) *The Monist* 52 (4) 475 at page 479.

<sup>27</sup> Ashworth and Von Hirsch, *Proportionate Sentencing, Exploring the Principles* (Oxford University Press 2005) at page 134.

<sup>28</sup> As will be discussed in detail in chapter 4 of the Report.

<sup>29</sup> Although it should be noted that Ireland’s version of the proportionality principle requires that the personal circumstances of the offender are also taken into account. This is why, as will be discussed below, other utilitarian purposes of punishment enjoy currency in the Irish sentencing system.

<sup>30</sup> O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 2.23.

<sup>31</sup> Ashworth and Von Hirsch, *Proportionate Sentencing, Exploring the Principles* (Oxford University Press 2005) at pages 131 – 65; see generally: Von Hirsch, *Censure and Sanctions* (Oxford University Press 1993).



offender's conduct should be punished for encroaching on our society's basic code of values as enshrined in our substantive criminal law."<sup>32</sup>

#### **(d) Reparation**

- [3.15] A reparative sentence requires the offender to rectify the harm done by his or her offending.<sup>33</sup> This can be done directly or indirectly to the victim, or where the victim is unwilling to accept reparation from the offender or there is no readily identifiable victim, then reparation can be made to the community as a whole through the performance of community service or payment into a public fund for example.<sup>34</sup>

#### **(e) Incapacitation**

- [3.16] An incapacitative sentence prevents an offender from committing further offences, within the community at least, where the sentence is a custodial one. Capital punishment is the ultimate example of incapacitation. However, in jurisdictions in which the death penalty is not applicable, life imprisonment and lengthy prison sentences have an incapacitative effect.<sup>35</sup> Less severe examples include disqualification from driving or from acting as the director of a company, or a prohibition from working with children.<sup>36</sup> Incapacitation on the basis of predicted future offending was deemed to conflict with the constitutionally-protected right to personal liberty and the presumption of innocence in *The People (Attorney General) v O'Callaghan*.<sup>37</sup> Incapacitation must, therefore, be done on the basis of proven, rather than anticipated, offending.

<sup>32</sup> *R v M(CA)* [1996] 1 SCR 500 at para 81.

<sup>33</sup> Department of Justice, Equality and Law Reform, *White Paper on Crime, Discussion Document No. 2: Criminal Sanctions* (February 2010); Cavadino and Dignan, *The Penal system – An Introduction* 3rd ed (Sage Publications 2002) at pages 44 – 45; Ashworth, *Sentencing and Criminal Justice* 6th ed (Cambridge University Press 2015) at pages 98 – 100.

<sup>34</sup> Cavadino and Dignan, *The Penal system – An Introduction* 3rd ed (Sage Publications 2002) at pages 44 – 45; Ashworth, *Sentencing and Criminal Justice* 6th ed (Cambridge University Press 2015) at pages 98 – 100.

<sup>35</sup> O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 2.21.

<sup>36</sup> O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paras 2.21 – 2.22.

<sup>37</sup> [1996] IR 501 at pages 508-509. See also *The People (DPP) v Carmody* [1988] ILRM 370 at page 372; *The People (DPP) v Jackson* (Court of Criminal Appeal, 26 April 1993); *The People (DPP) v GK* [2008] IECCA 110; *Caffrey v Governor of Portlaoise Prison* [2012] IESC 4; *Minister for Justice and Equality v Nolan* [2012] IEHC 249. It has also been compellingly argued that imposing an incapacitative sentence on the basis of predicted future offending is undesirable, as making accurate predictions regarding future behaviour is exceedingly difficult, see O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 2.22; Ashworth, *Sentencing and Criminal Justice* 3rd ed (Butterworths 2000) at page 69.

### 3. The compatibility of the suspended sentence with the purposes of punishment

[3.17] The preceding discussion focused on the theory underpinning each of the purposes of punishment. This section will focus on the manner in, and the extent to, which these moral justifications of punishment inform everyday sentencing decisions in the Irish courts in the context of the suspended sentence. However, firstly it is necessary to consider more generally the manner in which these sentencing aims fit into the parameters of Irish sentencing law.

#### (a) The balancing of penal aims

[3.18] The case law has established that retribution,<sup>38</sup> deterrence (general and specific)<sup>39</sup> and rehabilitation<sup>40</sup> are the three main sentencing aims in Irish law. However, the question arises as to what weight is to be given to each of these sentencing objectives in individual cases? Put another way, is there a hierarchy of sentencing aims in Irish law? Initially, the position was that put forward by the Court of Criminal Appeal in *The People (DPP) v GK*,<sup>41</sup> where it was held that the sentencing court should:

"examine the matter from three aspects in the following order of priority: rehabilitation of offender, punishment and incapacitation from offending and, individual and general deterrence".<sup>42</sup>

[3.19] However, this approach has been rejected by the Court of Appeal, which was established in 2014. In *The People (DPP) v O'Brien*,<sup>43</sup> the Court, in commenting on the above statement of principle in *GK*, stated that:

<sup>38</sup> *The People (DPP) v WD* [2018] IECA 143; *The People (DPP) v O'Brien* [2018] IECA 2.

<sup>39</sup> See *The People (DPP) v Hughes* [2012] IECCA 85 at para 36, [2013] 4 IR 69 at page 79. In *The People (DPP) v Daly* [2011] IECCA 104 [2012] at para 49, 1 IR 476 at page 498, the Court held that "in these circumstances and in the light of the gravity of the offence (tax fraud), it is legitimate to consider the principle of deterrence as relevant to the sentence handed down to the applicant". See also *People (DPP) v Duffy* [2009] IEHC 208. Most recently, in *The People (DPP) v Aylmer* [2020] IECA 106, the Court of Appeal held that, in sentencing offenders for the offence of participating in the activities of a criminal organisation, contrary to sections 72(1)(b)(ii) and 72(2) of the *Criminal Justice Act 2006*, as amended, considerations of general deterrence are relevant to the fixing of the headline sentence.

<sup>40</sup> *The People (Attorney General) v O'Driscoll* [1972] 1 Frewen 351 at page 16; *The People (DPP) v WD* [2018] IECA 143 at para 78.

<sup>41</sup> [2008] IECCA 11

<sup>42</sup> *Ibid* at para 53.

<sup>43</sup> [2018] IECA 2.

“while we do not now think that this is necessarily a correct statement of principle, and prefer an approach in which the correct prioritisation of penal objectives is to be determined by the circumstances of the particular case based on the evidence, we readily accept that in many cases it may indeed be appropriate to prioritise the penal objective of rehabilitation. There will, however, be other cases where it may be appropriate to prioritise deterrence, or retribution and incapacitation.”<sup>44</sup>

[3.20] The Court elaborated on this issue in *The People (DPP) v WD*.<sup>45</sup> In this case, the appellant appealed against his sentence on various grounds, one of which was that the sentencing court had breached the principle of proportionality by placing undue emphasis on the penal goals of retribution and deterrence, at the cost of rehabilitation.<sup>46</sup> The Court of Appeal confirmed that the three goals of retribution, deterrence (general and specific), and rehabilitation are the main penal objectives in Irish sentencing law.<sup>47</sup> However, it declined to order these principles. Instead, the Court took the view that:

“the appropriate balancing of the accepted penal objectives of retribution, deterrence and rehabilitation are, in the absence of statutory guidance, uniquely matters for the exercise of judicial discretion and the required balancing exercise is fully capable of being conducted by ordinary judges on the basis of their colloquial or quotidian understanding of the concepts at issue[.]”<sup>48</sup>

[3.21] It is clear therefore that the manner in which the above penal aims are catered for in each individual case is a matter for the discretion of the individual sentencing court based on the particular facts.<sup>49</sup> This is consistent with the view in other common law jurisdictions, such as Canada, where the process has been described as “the wise blending of the deterrent and reformative, with the retributive not totally disregarded”.<sup>50</sup> The next section of this chapter will discuss the extent to which this balancing exercise is compatible with the suspended sentence in Ireland.

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<sup>44</sup> *Ibid* at para 46.

<sup>45</sup> [2018] IECA 143.

<sup>46</sup> *Ibid* at para 60.

<sup>47</sup> *Ibid* at para 61.

<sup>48</sup> *Ibid* at para 78.

<sup>49</sup> Edwards, *Sentencing Methodology – Towards Improved Reasoning in Sentencing* (2019) 3 *Irish Judicial Studies Journal* 40 at page 40.

<sup>50</sup> *R v Willaert* (1953) 105 CCC 172 at page 176. For a discussion, see Brown, *Criminal Sentencing as Practical Wisdom* (Hart Publishing 2017) at pages 25 – 28.

**(b) The suspended sentence as a flexible sentencing option: the Irish case law**

[3.22] A major advantage of the suspended sentence lies in the fact that the sanction is potentially compatible (or, at the very least, not incompatible) with the three main sentencing objectives of Irish sentencing law, namely retribution, deterrence (general and specific) and rehabilitation.<sup>51</sup> Judge Riordan's extensive empirical study into the suspended sentence in this jurisdiction found that the judges interviewed identified the suspended sentence as serving a number of penal objectives, namely specific deterrence, rehabilitation, a symbolic gesture, and a mechanism for avoiding prison.<sup>52</sup> The case law of the Court of Appeal largely supports this assertion. In *The People (DPP) v Independent News and Media*,<sup>53</sup> it was held that:

"The same sanction may sometimes serve all desired objectives. For example, in the case of an individual offender a suspended sentence pitched at the right level so as to operate both as the proverbial "carrot and stick" may concurrently serve the objectives of retribution (in terms of censure and communication of denunciation), deterrence, and rehabilitation."<sup>54</sup>

[3.23] The decision of *The People (DPP) v Comey*<sup>55</sup> is also instructive. This case concerned an application brought by the Director of Public Prosecutions pursuant to section 2 of the *Criminal Justice Act 1993*, on the grounds that the sentence imposed was unduly lenient. The respondent had pleaded guilty to one count of assault causing harm contrary to section 3 of the *Non-Fatal Offences against the Person Act 1997*, one count of unlawful seizure of a vehicle contrary to section 10 of the *Criminal Law (Jurisdiction) Act 1976*, and one count of possessing a syringe with intent to injure or to threaten or intimidate, contrary to sections 7(1) and (7)(7) of the 1997 Act. The facts of the case were quite serious and there were numerous aggravating factors present,<sup>56</sup> including the fact that the respondent had numerous previous convictions, some of which were similar to the present offences before the court. On the other hand, since the offending behaviour, the respondent had shown great signs of willingness to rehabilitate himself. In order to further incentivise this rehabilitation, the sentencing judge backdated the sentence to the date at which the respondent entered into custody, and suspended the remainder of the

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<sup>51</sup> O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 22.07.

<sup>52</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at pages 241 – 247.

<sup>53</sup> [2018] IECA 301.

<sup>54</sup> *Ibid* at para 73.

<sup>55</sup> [2018] IECA 161.

<sup>56</sup> *Ibid* at paras 5 – 11.

custodial sentence of three-and-a-half years.<sup>57</sup> The Court of Appeal held that the sentence imposed was unduly lenient, stating that:

“Whatever about favouring rehabilitation over retribution in the determination of the ultimate sentence [i.e. the imposition of a suspended sentence], that fixing of an appropriate headline sentence would have served to promote the objective of deterrence, and particularly general deterrence, and was something that we consider was required in this case.”<sup>58</sup>

- [3.24] In *The People (DPP) v Kavanagh*<sup>59</sup> the Court, in refusing an undue leniency application brought by the DPP, held that the sentencing judge was entitled to seek to serve the aims of general deterrence and retribution, by setting out a custodial sentence of three years, while simultaneously catering for the competing desistance aims of specific deterrence and or rehabilitation by suspending half of the three year sentence. Similarly, in *The People (DPP) v Smith*,<sup>60</sup> the Court of Appeal was asked to consider whether or not a fully suspended sentence of three years’ imprisonment, handed down for the offence of causing serious harm contrary to section 4 of the *Non-Fatal Offences against the Person Act 1997*, was unduly lenient. The Court held that, while the full-suspension of the sentence served the penal aim of rehabilitation, the setting of a headline sentence of five years was appropriate and commented that “general deterrence is pursued in all cases through the setting of an appropriate headline sentence.”<sup>61</sup>
- [3.25] The above decisions suggest that the Court of Appeal regards the suspended sentence to be “an extremely versatile and valuable tool for any sentencer to have in his or her toolbox”<sup>62</sup> in terms of its capacity to cater concurrently for multiple sentencing aims. The setting of an appropriate custodial sentence can serve the punitive aims of retribution and general deterrence,<sup>63</sup> while specific deterrence and rehabilitation, which have as their primary function encouraging the particular offender to desist from future criminal

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<sup>57</sup> *Ibid* at para 3.

<sup>58</sup> *Ibid* at para 61.

<sup>59</sup> [2020] IECA 13 at para 15.

<sup>60</sup> [2019] IECA 1.

<sup>61</sup> *Ibid* at para 18. Similar sentiments were expressed by the Court of Appeal in *The People (DPP) v Maguire* [2018] IECA 310 at para 110. See also *The People (DPP) v Murray* [2019] IECA 187 at para 58.

<sup>62</sup> *The People (DPP) v DW* [2020] IECA 145 at para 35.

<sup>63</sup> As mentioned at the outset of this chapter, general deterrence is, strictly speaking, a desistance strategy. However, the fact that general deterrence apparently justifies a greater than usual punishment to be imposed on the actual offender, on the basis that it may deter society at large from future criminal behaviour, means that general deterrence may be more properly seen as being grouped together with the other punitive purposes of punishment.

behaviour, may be furthered by the decision to suspend the sentence of imprisonment. However, as will be discussed in detail in chapter 5 of the Report, the flexibility inherent in the suspended sentence is most pronounced in the case of a part-suspended sentence. As will be elaborated upon in that chapter, the part-suspended sentence is a two-phased sentence – an immediate custodial sentence followed by a suspended custodial sentence. Therefore, the competing punitive aims of retribution and general deterrence, on the one hand, and the desistance strategies of specific deterrence and rehabilitation are given similar weighting in the decision to part-suspend, with the custodial element serving the punitive aims and the suspended element serving specific deterrence and/or rehabilitation.

- [3.26] In contrast, in the case of a fully suspended sentence, the sentencing judge has determined that the case is sufficiently serious to merit a custodial sentence, but that, usually on account of strong personal mitigating factors, the custodial sentence should be suspended in its entirety.<sup>64</sup> It is thus clear that the manner in which the penal aims are given effect differs between the two sanctions. Granted, the stigma of a criminal conviction, the obligation to adhere to the conditions of suspension and the accompanying threat of imprisonment during the operational period of a fully suspended sentence, do undoubtedly carry a certain punitive value.<sup>65</sup> This is particularly the case<sup>66</sup> when the conditions of suspension are especially onerous.<sup>67</sup> However, it is important to note that, in cases of full suspension, an offender will not actually be imprisoned unless he or she breaches one or more conditions of suspension and the suspended portion of the sentence is activated. As the Court of Appeal put it in the recent decision of *The People (DPP) v Broe*:<sup>68</sup>

“It is well established that a wholly suspended sentence is still a sentence... However, it cannot be gainsaid that where a court sees fit to suspend a sentence in whole or in part, it involves a more lenient sanctioning or punishment of the offender than would be the case where a sentence is required to be served in full. The imposition of the suspended portion still communicates society’s deprecation of, and desire to censure, the offending conduct, while sparing the offender (providing he/she adheres to the conditions on which the sentence was

<sup>64</sup> For a detailed discussion of the principles governing the use of the fully suspended sentence, see chapter 4 of this Report.

<sup>65</sup> O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2006) at paras 22.03 – 22.05.

<sup>66</sup> Pursuant to either section 99(10) or 99(17) of the *Criminal Justice Act 2006*, as amended.

<sup>67</sup> As will be discussed in detail in chapter 4 of this Report, the Irish case law has established that conditions of suspension must be reasonable and proportionate and give the offender a reasonable opportunity at compliance.

<sup>68</sup> [2020] IECA 140.

suspended) the 'hard treatment' that would otherwise have to be endured if the suspended portion were required to be served."<sup>69</sup>

- [3.27] Consequently, the punitive aims of retribution and general deterrence, while undoubtedly present in the case of a fully suspended sentence, are somewhat subservient to specific deterrence and / or rehabilitation, which may be seen as the decisive sentencing aims. The use of a suspended sentence as a specific deterrent has been widely recognised.<sup>70</sup> Furthermore, research suggests that the sanction has a marginally better deterrent effect than imprisonment.<sup>71</sup> The use of the suspended sentence as a means of furthering specific deterrence and / or rehabilitation has found favour in other jurisdictions. For instance, in *R v Zamagias*<sup>72</sup> the New South Wales Court of Criminal Appeal held that a suspended sentence can be a sufficiently severe form of punishment to act as a deterrent to both the general public and the particular offender. However, the Court in this case went on to hold that, in certain cases, the overarching purpose of punishment in that jurisdiction – the protection of the community – may best be served by prioritising the rehabilitation of the offender. In such cases, the Court held that the penal aim of specific deterrence should yield to that of rehabilitation.<sup>73</sup>
- [3.28] There is also authority in the Irish case law for the proposition that specific deterrence and / or rehabilitation are the primary (but not the sole) considerations informing the decision to suspend. For instance, in *The People (DPP) v Murray*,<sup>74</sup> an undue leniency application was brought by the DPP under section 2 of the *Criminal Justice Act 1993*. The Director argued that, in suspending two-thirds of the post-mitigation figure of three-years' imprisonment – so as to incentivise the respondent's continued rehabilitation – the

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<sup>69</sup> *Ibid* at para 74.

<sup>70</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 264; Bartels, "An Examination of the Arguments For and Against the Use of Suspended Sentences" (2010) 12 FLJ 119 at page 127; Tait, "The Invisible Sanction: Suspended Sentences in Victoria 1985-1991" (1995) 28 *Australian and New Zealand Journal of Criminology* 143 at page 145; Ashworth, *Sentencing and Penal Policy* (Weidenfeld and Nicolson 1983) at page 243; Wasik, "Sentencing Guidelines: the Problem of Conditional Sentences" (1994) 13 *Criminal Justice Ethics* 50 at page 53.

<sup>71</sup> Weatherburn and Bartels, "The Recidivism Rates of Offenders Given Suspended Sentences in New South Wales, Australia" (2008) 48 *British Journal of Criminology* 667; Bartels, "The Weight of the Sword of Damocles: A Reconviction Analysis of Suspended Sentences in Tasmania" (2009) 42 *Australian and New Zealand Journal of Criminology* 72; Lulham, Weatherburn and Bartels, "The Recidivism of Offenders Given Suspended Sentences: A Comparison with Full-Time Imprisonment" (2009) *Crime and Justice Bulletin* No. 136.

<sup>72</sup> [2002] NSWCCA 17.

<sup>73</sup> *Ibid* at para 32.

<sup>74</sup> [2019] IECA 187.

sentencing judge had given insufficient weight to the penal aim of deterrence. In dismissing the application, the Court had the following to say:

“There are two aspects to deterrence. One is specific deterrence and the other is general deterrence. Both forms of deterrence and rehabilitation are desistance strategies. If the respondent could be directed away from crime by a measure intended to secure his rehabilitation, then the objective of ensuring his desistance would be achieved and there would be no need for specific deterrence.”<sup>75</sup>

[3.29] In *Smith*, mentioned in the previous section of this chapter, the Court held that the imposition of a fully suspended sentence was justified on the basis that the sentencing judge legitimately came to the view that the offender had turned his life around since the offence.<sup>76</sup> Therefore, the Court held, it was clear that the sentencing judge was of the view that there was “little need for specific deterrence in the circumstances of the case and that the focus of any desistance message should instead be on incentivising continued rehabilitation.”<sup>77</sup> The decision of the Court of Criminal Appeal in *The People (DPP) v Alexiou*<sup>78</sup> is also instructive. This case concerned another undue leniency application brought by the DPP. The sentencing judge had imposed a fully suspended sentence on the respondent for an offence committed under section 15A of the *Misuse of Drugs Act 1977*, which carries a presumptive minimum sentence of ten years’ imprisonment.<sup>79</sup> The Court dismissed the application, primarily on the basis that the condition of suspension – that the offender leave the State and return to his country of origin – was not meaningless and sufficiently served the purpose of ensuring that the offender did not commit any further offences in Ireland (i.e. specific deterrence).<sup>80</sup>

[3.30] The case law also supports the assertion that a decision to suspend a sentence will often be underpinned by the rehabilitative rationale. For instance, in *Cash v Halpin*,<sup>81</sup> the High Court (Baker J), while noting that other sentencing aims may be important when considering whether to impose a suspended sentence, was of the view that the primary

<sup>75</sup> *Ibid* at para 58.

<sup>76</sup> In *Smith*, the evidence was that the respondent was now in stable employment, in a stable relationship and was a father to a young child. He expressed remorse and offered to pay the victim €1,000 in compensation. Finally, three years had passed between the offence and sentencing, during which time he had not re-offended.

<sup>77</sup> [2019] IECA 1 at para 18.

<sup>78</sup> [2003] 3 IR 513.

<sup>79</sup> The circumstances in which a court may depart from a presumptive minimum sentence under the *Misuse of Drugs Act 1977* and the *Firearms Acts* and then also suspend the lesser sentence is discussed in chapter 6 of this Report.

<sup>80</sup> [2003] 3 IR 513 at page 526.

<sup>81</sup> [2014] IEHC 484, [2014] 1 IR 328.



purpose of the suspended sentence is that of rehabilitation. In *Clarke v Governor of Mountjoy Prison*,<sup>82</sup> the Court of Appeal reiterated the importance of the suspended sentence as a vital tool in promoting rehabilitation. Indeed, as will be discussed in detail in chapter 5 of the Report, the Court of Appeal primarily resorts to the part-suspended sentence as a means of adhering to the now well-established principle that sentencing courts should, where possible, strive to incentivise the offender's rehabilitation.<sup>83</sup> The very recent decision of the Court of Appeal in *The People (DPP) v DW*<sup>84</sup> clearly highlights the rehabilitative value of the suspended sentence. In this regard, the Court noted that:

"Suspended sentences are frequently used to help break cycles of crime or patterns of recidivism associated with problems like addictions; psychological, psychiatric and psycho-social issues; and offender susceptibilities and vulnerabilities towards becoming involved in crime. ... A sentencer may consider that, on the evidence before him or her, if the cycle is to be broken, either a completely new approach may be required, or a redoubling of previous efforts aimed at rehabilitation with perhaps better and additional supports. Strategically, the required approach will be positivistic and aimed at future behaviour modification through a combination of carrot and stick, prudential incentive and Damoclean sword, and the provision where possible of necessary or at least desirable rehabilitative programs, aids and supports."<sup>85</sup>

- [3.31] However, while the above decisions demonstrate how *either* specific deterrence or rehabilitation may be seen as the primary sentencing aim in the decision to suspend a sentence, the earlier decision of *The People (DPP) v O'Reilly*,<sup>86</sup> demonstrates how the suspended element of the sentence may also serve both sentencing objectives simultaneously. This case concerned another undue leniency application brought by the DPP. The respondent had been sentenced to three years' imprisonment with the final 18 months suspended, having pleaded guilty to two counts of possession of an imitation firearm with intent to commit an indictable offence (attempted robbery) contrary to section 27B of the *Firearms Act 1964*. One of the key conditions of the suspended element of the sentence was that the respondent participate in a drug and alcohol treatment programme as he was a chronic drug addict. Having served the custodial element of the sentence, the respondent was released. However, the suspended element

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<sup>82</sup> [2016] IECA 244.

<sup>83</sup> See, for instance: *The People (DPP) v Flynn* [2015] IECA 290; *The People (DPP) v O'Brien* [2015] IECA 304; *The People (DPP) v Lawlor* [2016] IECA 23; *The People (DPP) v Crilly* [2019] IECA 143; *The People (DPP) v DM* [2019] IECA 147; *The People (DPP) v Sloyan* [2019] IECA 242.

<sup>84</sup> [2020] IECA 145.

<sup>85</sup> *Ibid* at para 66.

<sup>86</sup> [2015] IECA 21.

of the sentence was activated on foot of an application by the Probation Service on the grounds that he did not comply with one of the conditions of suspension. In dismissing the application, the Court of Appeal gave significant weight to the fact that the sentencing judge was entitled to come to the view that the public interest<sup>87</sup> would be better served if the sentence was structured in such a way so as to tackle the respondent's drug problems. Thus, the Court described the sentence in the following terms:

“the sentence may thus be said to offer an example where rehabilitative considerations were properly to the fore. The suspended element of the sentence was [also] designed to operate – and did in fact operate – as a real deterrent to the offender, as the subsequent re-activation of the sentence in the days leading up to this appeal plainly shows.”<sup>88</sup>

- [3.32] This line of case law demonstrates how the decision to suspend a sentence of imprisonment, particularly the decision to fully suspend, represents a (conscious or unconscious) decision on the part of the sentencing court to give priority to the aims of specific deterrence and/or rehabilitation which, in turn, are intended to promote desistance. Further, it is clear that the statutory framework in which the suspended sentence operates in this jurisdiction is based on the premise that the suspended sentence primarily serves as a mechanism to control the offender's future behaviour by way of rehabilitation and / or specific deterrence.<sup>89</sup> Section 99(2) of the *Criminal Justice Act 2006* provides that “it shall be a condition of an order under *subsection (1)* that the person in respect of whom the order is made keep the peace and be of good behaviour.” It is clear that this mandatory condition is underpinned by a specific deterrence rationale, with the key aim being to prevent the offender from committing any further offences during the period of suspension.
- [3.33] Furthermore, section 99(3)(b) of the 2006 Act provides that the sentencing court may impose such additional conditions as it considers will “reduce the likelihood of the person in respect of whom the order is made committing any other offence.” It is clear that the discretionary conditions available under section 99(3)(b) of the 2006 Act may be in furtherance of either of the penal aims of specific deterrence (e.g. a condition to abide by a curfew or to stay away from certain persons or a certain area)<sup>90</sup> or rehabilitation (a

<sup>87</sup> Section 27B(6)(b) of the *Firearms Act 1964*, as amended, provides that a court sentencing an offender for an offence under any of the *Firearms Acts* may have regard to “whether the public interest... would be served by the imposition of a lesser sentence [than the mandatory minimum sentence of five years' imprisonment pursuant to section 27B(4) of the 1964 Act, as amended]”.

<sup>88</sup> [2015] IECA 21 at para 23.

<sup>89</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at pages 235, 368

<sup>90</sup> See, for instance: *The People (DPP) v Lee* [2017] IECA 152.

condition to attend addiction treatment or counselling).<sup>91</sup> In the recent Court of Appeal decision of *The People (DPP) v DW*,<sup>92</sup> the Court noted that section 99(3)(b) can be satisfied by one or more conditions that seek to modify future behaviour either by deterrent or coercive effect, or alternatively by reform or rehabilitation through positivistic intervention.<sup>93</sup> Finally, section 99(4) of the 2006 Act permits the sentencing court to attach a number of conditions of suspension to a part-suspended sentence only, all of which are aimed at changing the future behaviour of the offender, either by way of deterrence and / or rehabilitation.<sup>94</sup>

### **(c) The sentencing aim of the avoidance of prison**

- [3.34] The foregoing discussion demonstrates that the Irish appellate courts view the desistance strategies of rehabilitation and / or specific deterrence as the decisive sentencing aims underpinning the decision to suspend, particularly in the case of the fully suspended sentence. However, one sentencing aim which has been largely absent from the discussion in the case law is that of the avoidance of prison. The Commission acknowledges that the “last chance” principle<sup>95</sup> is a well-established general principle of Irish sentencing law. However, the penal aim of the avoidance of prison has not been (judicially or legislatively) expressed to be a core consideration informing the decision to suspend, at least to the extent that it has in other jurisdictions. For instance, in England and Wales, section 11(3) of the *Criminal Justice Act 1973* provides that the rationale underpinning the use of suspended sentences in England and Wales was the avoidance of immediate imprisonment. The former Home Secretary, Roy Jenkins, commented in the House of Commons that the main range of penal provisions for the *Criminal Justice Bill*, enacted as the *Criminal Justice Act 1967*, revolved around the avoidance of immediate imprisonment. The suspended sentence was introduced as a mechanism to achieve this. In this regard, Jenkins noted “by this means, we shall substantially avoid sending people to prison for the first time unnecessarily.”<sup>96</sup> Similar sentiments were expressed by the Court of Appeal of England and Wales in *R v Sapiano*,<sup>97</sup> where it stated that “the main object of a suspended sentence is to avoid sending an offender to prison at all.”<sup>98</sup>

<sup>91</sup> See, for instance: *The People (DPP) v O'Reilly* [2015] IECA 21.

<sup>92</sup> [2020] IECA 145.

<sup>93</sup> *Ibid* at para 64. See also paras 68 – 69.

<sup>94</sup> For a discussion, see chapter 5 of this Report.

<sup>95</sup> As established in *The People (DPP) v Jennings* (Court of Criminal Appeal, 15 February 1999).

<sup>96</sup> House of Commons Debates 12 December 1966 vol 738 at pages 65 – 66.

<sup>97</sup> (1968) 52 Cr App R 674.

<sup>98</sup> *Ibid* at page 674.

- [3.35] The principle of the avoidance of prison is also stated as being the core rationale for the introduction of the power to suspend in many civil law jurisdictions.<sup>99</sup> In Germany, for example, the suspended sentence was designed for the specific purpose of avoiding imprisonment and thereby reducing the size of the prison population.<sup>100</sup> However, the Commission notes that, while it is well established that short prison sentences increase the size of the prison population,<sup>101</sup> research into the effect of the suspended sentence on reducing the prison population is somewhat inconclusive. In New South Wales, the introduction of the suspended sentence saw an increase in the use of imprisonment in the higher courts, while it remained steady in the local courts.<sup>102</sup> However, in Victoria, prior to the introduction of the suspended sentence, 53% of offenders were sentenced to imprisonment. This fell to 43% following the introduction of the suspended sentence but rose again to 53% in 2004.<sup>103</sup> In New Zealand, research found that suspended sentences had little to no effect on the size of the prison population, which in turn led to the abolition of the suspended sentence in that jurisdiction. However, subsequently, the prison population continued to rise and it was suggested that the abolition of the suspended sentence contributed to this.<sup>104</sup>
- [3.36] In England and Wales, although one study indicated that suspended sentences reduced the prison population,<sup>105</sup> the majority of research was less optimistic.<sup>106</sup> It is also worth

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<sup>99</sup> The stated purpose of the draft Bill put before the French Senate in 1884 proposing to introduce suspended sentences as a sentencing option was “[t]o mitigate the punishment sufficiently to avoid the dangers of imprisonment while preserving the painful aspect of a penalty.” See Ancel, *Suspended Sentence: A Report Presented by the Department of Criminal Science of the Institute of Comparative Law, University of Paris* (Heinemann 1971) at page 18.

<sup>100</sup> Weigend, “Sentencing and Punishment in Germany” in Tonry and Frase (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press 2001).

<sup>101</sup> Warner, “Sentencing Review 2002-2003” (2003) 27 *Criminal Law Journal* 325; Sentencing Council of New South Wales, *Report on Abolishing Prison Sentences of Six Months or Less* (2004); Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103-2006).

<sup>102</sup> Brignell and Poletti, “Suspended Sentences in New South Wales” (2003) *Sentencing Trends and Issues* No. 29.

<sup>103</sup> Victorian Sentencing Advisory Council, *Suspended Sentences: Discussion Paper* (April 2005).

<sup>104</sup> Spier, *Conviction and Sentencing of Offenders in New Zealand: 1987 to 1996* (Ministry of Justice 1997); Spier and Lash, *Conviction and Sentencing of Offenders in New Zealand: 1994 to 2003* (Ministry of Justice 2004).

<sup>105</sup> Oatham and Simon, “Are Suspended Sentences Working?” (1972) 21 *New Society* 233.

<sup>106</sup> Sparks, “The Use of Suspended Sentences” (1971) *Criminal Law Review* 384; Advisory Council on the Penal System, *Sentences of Imprisonment: A Review of Maximum Penalties* (1978).

noting that the suspended sentence is by no means the only factor influencing the size of the prison population.<sup>107</sup>

- [3.37] The Commission, in its 1996 *Report on Sentencing*, dismissed the idea of imposing sentences by reference to the availability of prison places on the basis that such considerations would be incompatible with the nature and function of sound sentencing policy.<sup>108</sup> The Commission endorses this view again here. Although the size of the prison population and the capacity of prisons are important practical concerns, they should not regulate or substantially influence sentencing policy. To do otherwise would run counter to the constitutional requirement that each individual penalty should be proportionate to the gravity of the offence and the personal circumstances of the offender.<sup>109</sup> Therefore, it may be that this sentencing aim would be an inappropriate consideration in an Irish context, given the imperative of individualised justice and judicial sentencing discretion.<sup>110</sup>
- [3.38] None of this is intended to call into question the legitimacy of the general policy that imprisonment should be a measure of last resort. Indeed, it has been compellingly argued that adherence to the penal aim of avoidance of prison is appropriate when sentencing first-time offenders who have good prospects of desisting from criminal behaviour.<sup>111</sup> Viewed from this perspective, the avoidance of prison is similar in terms of its aims to the desistance based penal aims of specific deterrence and rehabilitation. Riordan, writing relatively soon after section 99 of the *Criminal Justice Act 2006* was enacted, made the point that:

“the combined effect of the discretionary practices [vested in sentencing courts in section 99] .... points to a significant degree attrition upon the likelihood of anybody ever receiving the original custodial sentence. Thus, the avoidance of

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<sup>107</sup> Research conducted in Victoria found that other factors that influence the size of the prison population include law enforcement practices, legislative provisions such as mandatory minimum sentences and sentence length, crime rates, the criminal history of offenders and the use of parole and supervision orders. See Freiberg, *Sentencing Review: Discussion Paper* (Department of Justice 2001).

<sup>108</sup> (LRC 53-1996) at para 2.2.

<sup>109</sup> The Supreme Court held, in *State (Healy) v Donoghue* [1976] IR 325 at page 353, that Articles 38.1, 40.3.1°, 40.3.2° and 40.4.1 cumulatively implied a guarantee that “a citizen shall not be deprived ... where guilt has been established or admitted, of receiving a sentence appropriate to his degree of guilt and his relevant personal circumstances”. See also the statement of the former Court of Criminal Appeal in *The People (DPP) v McCormack* [2000] 4 IR 356 at page 359, that “[t]he sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused”.

<sup>110</sup> For a full discussion, see chapter 4 of this Report.

<sup>111</sup> Bartels, “An Examination of the Arguments For and Against the Use of Suspended Sentences” (2010) 12 *Flinders Law Journal* 119 at page 131.

custody may in practice become a significant by-product of the new statutory arrangement".<sup>112</sup>

- [3.39] Some recent decisions of the Irish Court of Appeal demonstrate that a desire to keep a first time offender, or an offender who poses a low risk of re-offending, out of prison, may be a legitimate basis upon which to impose a suspended sentence. In *The People (DPP) v Maguire*<sup>113</sup> the Court carried out a comprehensive review of many fraud sentencing cases and handed down guidance for sentencing this type of offending behaviour. During the course of this judgment, the Court observed that:

"Although rehabilitation in the narrow sense of addressing personal issues such as addiction, so as to break a cycle of criminal recidivism, may not have been required in the majority of these cases, it is also reasonable to infer that many of the judges concerned were anxious to incentivise rehabilitation in the broader sense, by the showing of a degree of leniency, particularly by generous use of the option of partially suspending a sentence, with the objective of getting the offender to resume making a positive contribution to society and his/her community."<sup>114</sup>

- [3.40] This comment was made in the context of an earlier observation of the Court that, in nearly all of the cases examined, the offender in question had no previous convictions, co-operated fully and was of previous good character.<sup>115</sup> Similarly, in *The People (DPP) v Kavanagh*,<sup>116</sup> the Court, in holding that the decision of the sentencing judge to suspend 50% of the custodial sentence of three years' imprisonment did not amount to an error of principle, commented that:

"Although the sentencing judge spoke in terms of rehabilitation, this was not in truth a case in which rehabilitation, in the positivist sense, was required. The respondent had no underlying condition, or addiction or problem which required to be treated or addressed and which if treated or addressed would enable him to avoid committing crime in the future. Rather, the sentencing judge's objective was to facilitate the reformation of the respondent in the interests of society...to promote desistance and incentivise the respondent to stay out of trouble in the

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<sup>112</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 278.

<sup>113</sup> [2018] IECA 310.

<sup>114</sup> *Ibid* at para 112.

<sup>115</sup> *Ibid* at para 111.

<sup>116</sup> [2020] IECA 13.

future in circumstances where there were grounds to be hopeful that if given a further chance to turn away from crime that he would do so.”<sup>117</sup>

- [3.41] Central to the Court’s reasoning in *Kavanagh* was the fact that there were several testimonials before the sentencing court, all of which noted that that the respondent had a good work record, a stable family environment, only one previous conviction (which was committed 13 years before this offence and was disposed of non-custodially), and that the current offence was out of character for the respondent.<sup>118</sup> Therefore, while the rationale of the avoidance of prison has not been expressly articulated by the Irish courts, the above decisions suggest that imposing a suspended sentence may be deemed as particularly appropriate so as to avoid imprisoning a first time offender with a low risk of re-offending. In such cases, while giving weight to the traditional desistance aims of specific deterrence and rehabilitation may not be necessary (on the basis that there is a low risk of re-offending), the offender is still being encouraged to desist from future criminal behaviour.

#### 4. Conclusion and recommendations

- [3.42] In its Issues Paper, the Commission sought views on the following questions:
- (1) Since the suspended sentence is compatible with a number of sentencing aims, do you think that the suspended sentence should primarily serve one sentencing aim (such as specific deterrence, avoidance of prison or rehabilitation) or should the suspended sentence continue to serve a broader range of sentencing aims?
  - (2) To what extent, do you think, the principle of avoidance of prison is an appropriate factor to be taken into consideration when deciding whether to impose a suspended sentence?
- [3.43] As the discussion throughout this chapter makes clear, the suspended sentence is a flexible sentencing option. This flexibility is particularly evident in the case of a part-suspended sentence, as the competing punitive aims of retribution and general deterrence, on the one hand, and the desistance based rationales of specific deterrence and rehabilitation, on the other, are concurrently catered for by virtue of the two-pronged nature of this sentencing option. In contrast, specific deterrence and / or rehabilitation are more prominent in the case of a fully suspended sentence. While the fully suspended sentence, particularly one accompanied by onerous conditions of suspension, undoubtedly carries a certain punitive value, it still must be acknowledged that this

<sup>117</sup> *Ibid* at para 15. See also *The People (DPP) v DW* [2020] IECA 145 at paras 52 – 53.

<sup>118</sup> *Ibid* at para 22.

punitive element, in the sense of imprisonment, is only contingent on the offender breaching one or more of the conditions of suspension imposed by the court.

- [3.44] Nevertheless, both variations of the suspended sentence are, to differing degrees, capable of serving, and indeed do serve, the various purposes of punishment simultaneously. Therefore, the Commission is in agreement with the majority view expressed in the submissions that the suspended sentence should continue to cater for the various sentencing aims recognised under Irish sentencing law, with the decision as to which penal aim(s) should take priority being a matter for the discretion of the individual sentencing judge.

**R. 3.01** The Commission recommends that the suspended sentence should continue to be treated as compatible with the sentencing aims of retribution, deterrence (general and specific) and rehabilitation. The precise manner by, and the extent to, which these aims are given effect should be a matter for the discretion of the individual sentencing judge.

- [3.45] Responses to the second question described above represented a more cautious embrace of avoidance of prison as an appropriate penal aim influencing the decision as to whether to impose a suspended sentence. While the merits of this sentencing aim were recognised, particularly as an appropriate corollary of the principle of prison as a last resort (to be discussed in detail in chapter 4), the majority of the submissions expressed the view that this sentencing aim should not be considered to the exclusion of the other sentencing aims, particularly the punitive aims of retribution and general deterrence. As some of the submissions pointed out, this could result in injustice, particularly in circumstances where the court is sentencing a repeat offender or an offender who has committed a serious offence which carries the presumption of an immediate custodial sentence.

- [3.46] The Commission agrees with this majority view as expressed in the submissions. However, the penal aim of avoidance of prison may be relevant in certain circumstances. As the decisions of the Court of Appeal in *Maguire* and *Kavanagh* demonstrate, imposing a suspended sentence may be appropriate so as to avoid sending a first-time offender, with a low risk of re-offending, to prison. However, in cases of serious offending behaviour, or persistent offending, the aim of avoidance of prison should be weighed up against the considerations of general deterrence and retribution.

**R. 3.02** The Commission recommends that the general penal aim of avoidance of prison (in the sense of treating immediate imprisonment as a measure of last resort) should be taken into account when considering whether to impose a suspended sentence. However, this sentencing aim should not be considered in isolation and it must always be weighed against competing factors that tend to justify immediate imprisonment.



## CHAPTER 4 PRINCIPLES GOVERNING THE USE OF THE SUSPENDED SENTENCE

### 1. Introduction

- [4.1] This chapter discusses the general principles governing the fully suspended sentence in this jurisdiction. It is important to emphasise at the outset that this chapter will deal with the applicable principles as they apply to the fully suspended sentence. The governing principles, insofar as they relate to the part-suspended sentence, will be discussed in detail in the next chapter of this Report.
- [4.2] The first section of this chapter outlines two general principles of Irish sentencing law which are of particular relevance to the area of suspended sentences, namely the distributive principle of proportionality and the principle of imprisonment as a last resort. The chapter then examines the applicable principles governing the suspended sentence: the *O'Keefe*<sup>1</sup> and the *Mah-Wing* principle.<sup>2</sup> This section outlines how, before imposing a suspended sentence, a sentencing court should first (1) satisfy itself that the offence is sufficiently serious to merit a custodial sentence and then (2) determine the length of that custodial sentence. Having done this, a sentencing court should proceed to (3) consider whether the circumstances of the case are such that the custodial sentence may be suspended. Finally, having determined that a suspended sentence is justified, a sentencing court should then, in imposing conditions of suspension, ensure that these conditions are reasonable and proportionate and provide the offender with a reasonable opportunity of compliance, based on his or her personal circumstances. This section of the chapter also discusses the extent to which these principles have been accepted as forming part of Irish sentencing law. While the *O'Keefe* principle and the *Mah-Wing* principle have been (both implicitly and more recently expressly) approved of by the Irish appellate courts, very little guidance has been given as to the factors relevant to each stage of the inquiry. In the absence of such guidance, the section also outlines some of the factors that may be relevant to each stage of the process.
- [4.3] The third section of this chapter outlines and discusses the statistical analysis conducted by the Commission, which examined the Courts Service Annual Reports for the years 2006 to 2017. The section concludes with a discussion on the extent (if any) to which this data demonstrate adherence to *O'Keefe* and *Mah-Wing* by Irish sentencing courts.

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<sup>1</sup> Established by the Court of Appeal of England and Wales in *R v O'Keefe* [1969] QB 29.

<sup>2</sup> Established by the Court of Appeal of England and Wales in *R v Mah-Wing* [1983] 5 Cr App R (S) 347.

- [4.4] The final section of this chapter outlines the Commission’s recommendations. Firstly, the Commission recommends that further research be conducted by the newly established Sentencing Guidelines and Information Committee (SGIC)<sup>3</sup> in order to obtain a more comprehensive picture as to the extent to which these principles are being complied with. The Commission also recommends that some of the factors identified in this chapter as potentially relevant to (1) determining whether a custodial sentence is justified, (2) fixing the length of the custodial sentence and (3) whether the custodial sentence should be suspended, should be set out clearly and coherently but also in a manner that respects the constitutional imperative of judicial sentencing discretion. The Commission recommends that this should be done by way of a sentencing guideline issued by the SGIC rather than by legislation. The Commission also makes some recommendations regarding the need for further examination by the SGIC of the conceptual difficulties identified in the chapter. These difficulties relate to a potential blurring of the lines between determining the type of punishment (i.e. step 1) and setting the appropriate quantum of punishment (step 2); and the same personal mitigating factor being “double-counted” at both steps (2) and (3) of the process. The Commission makes some recommendations as to how these issues may be resolved.

## 2. General principles

### (a) Competing values: consistency v individualised justice

- [4.5] The need for greater consistency in sentencing has been a recurring theme of the past three decades.<sup>4</sup> As O’Malley notes, “media criticism of apparent inconsistencies in sentencing has been unrelenting, if not always well-informed”.<sup>5</sup> The type of inconsistency occasionally referred to in media commentary,<sup>6</sup> and highlighted in some of the Irish

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<sup>3</sup> Section 23(1) of the *Judicial Council Act 2019*.

<sup>4</sup> O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 1.07.

<sup>5</sup> *Ibid* at para 1.10.

<sup>6</sup> See, for instance: Gallagher, “Vast majority of offences still have no sentencing guidelines” *The Irish Times* (10 January 2018) <<https://www.irishtimes.com/news/crime-and-law/vast-majority-of-offences-still-have-no-sentencing-guidelines-1.3350342>> accessed on 10 March 2020; Ó Laoghaire, “Time to help make judges’ sentences more consistent” *The Irish Examiner* (10 May 2018); <<https://www.irishexaminer.com/breakingnews/views/analysis/time-to-help-make-judges-sentences-more-consistent-841935.html>> accessed on 4 August 2020; Fitzgerald, “There’s an element of a lottery in the Irish criminal justice system, we need sentencing guidelines” *The Journal* (10 March 2018) <<https://www.thejournal.ie/readme/sentencing-guidelines-lottery-3867865-Mar2018/>> accessed on 20 April 2020.

academic studies on the issue,<sup>7</sup> relates to inconsistency of outcome. Inconsistency of outcome describes a situation where similarly situated offenders convicted of similar offences receive wholly different sentences.<sup>8</sup> While grossly inconsistent outcomes should not be tolerated,<sup>9</sup> it is generally accepted that at least the more extreme attempts at eradicating this type of inconsistency, namely the grid-centred or mandatory minimum systems favoured in the United States<sup>10</sup> would be constitutionally questionable, if not unacceptable,<sup>11</sup> in the Irish sentencing system. As will be discussed in detail below, the overarching distributive principle of Irish sentencing law – the principle of proportionality – requires sentencing judges, when determining the appropriate punishment, to have regard to both the gravity of the particular offence and the personal circumstances of the offender. At the heart of this principle is judicial discretion and individualised justice. As noted by the Supreme Court in *The People (DPP) v M*,<sup>12</sup> “the essence of the discretionary nature of sentencing is that the personal situation of the appellant must be taken into consideration by the Court”.<sup>13</sup> It is also well settled that the distributive principle of proportionality has a constitutional foundation. In *State (Healy) v Donoghue*, Henchy J observed that, cumulatively Article 38.1, Article 40.3.1°, Article 40.3.2° and Article 40.4.1° of the Constitution of Ireland necessarily imply:

“at the very least, a guarantee that a citizen shall not be deprived of his liberty...where guilt has been established or admitted, of receiving a sentence appropriate to his degree of guilt and his relevant personal circumstances.”<sup>14</sup>

[4.6] As such, the individualisation of sentence and judicial discretion may also be seen as constitutional requirements,<sup>15</sup> at least in circumstances where the offence for which the offender is being sentenced is subject to discretionary, as opposed to mandatory,

<sup>7</sup> Maguire, “Consistency in Sentencing” (2010) 2 *Judicial Studies Institute Journal* 14; Hamilton, “Sentencing in the District Court: ‘Here Be Dragons’” (2005) 15(3) *Irish Criminal Law Journal* 9; O’Donnell, “A Comment on Sentencing” (2000) 10(3) *Irish Criminal Law Journal* 2.

<sup>8</sup> O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 1.07.

<sup>9</sup> *Ibid* at para 1.07.

<sup>10</sup> For a discussion on the various problems associated with mandatory minimum sentencing regimes, see O’Malley, *Sentencing: Towards a Coherent System* (Round Hall 2011) at pages 64 – 106; Brown, *Criminal Sentencing as Practical Wisdom* (Hart Publishing 2017) at pages 69 – 76.

<sup>11</sup> O’Malley, *Sentencing Law and Practice* 2nd ed (Round Hall 2006) at para 3.07.

<sup>12</sup> [1994] IR 306.

<sup>13</sup> *Ibid* at page 316.

<sup>14</sup> *Ibid* at page 353. See also *The People (Attorney General) v O’Driscoll* (1972) 1 Frewen 351 at page 359; *The People (DPP) v WC* [1994] 1 ILRM 321.

<sup>15</sup> Maguire, “Consistency in Sentencing” (2010) 2 *Judicial Studies Institute Journal* 14 at page 19.

punishment.<sup>16</sup> From this perspective, any attempts to generate a uniformity of outcome, at the expense of individualised justice, may be constitutionally suspect.<sup>17</sup> Furthermore, given the myriad factors which may be relevant in assessing the gravity of the offence and also in evaluating the relevant personal circumstances of the offender, sentencing systems that become overly preoccupied with achieving a uniformity of outcome may actually exacerbate rather than diminish it.<sup>18</sup> Indeed, the Irish courts have often recognised that achieving consistency of outcome is a largely impossible task in the context of the Irish sentencing system.<sup>19</sup> Most recently, in *The People (DPP) v Casey*,<sup>20</sup> the Court of Appeal put the matter as follows:

“While a consistency of approach to sentencing is highly desirable, it is not to be expected that there will be a uniformity in terms of the actual sentences that are imposed. There are just too many variables in terms of the circumstances of individual offences, but even more so in terms of the circumstances of individual offenders, for that to happen.”<sup>21</sup>

[4.7] Nevertheless, even in a sentencing system in which individualised justice is constitutionally protected, competing concepts of justice, equality and fairness dictate that unwarranted disparity (i.e. differences in the penalties imposed on two or more offenders which cannot be attributed to legitimate sentencing factors)<sup>22</sup> is not tolerated.<sup>23</sup> As O’Malley puts it:

“[In order] to comply with other important [sentencing] values including procedural fairness, equality and the rule of law, judicial sentencing must reform itself in order to produce consistency of approach [and] reduce (if not eliminate)

<sup>16</sup> *Lynch and Whelan v Minister for Justice* [2010] IESC 34, [2012] 1 IR 1.

<sup>17</sup> Edwards, “Sentencing Methodology – Towards Improved Reasoning in Sentencing” (2019) 3 *Irish Judicial Studies Journal* 40 at page 43.

<sup>18</sup> See the discussion in O’Malley, *Sentencing: Towards a Coherent System* (Round Hall 2011) at pages 5 – 6.

<sup>19</sup> See, for instance: *The People (DPP) v Daly* [2011] IECCA 104 at para 77, [2012] 1 IR 476 at page 505.

<sup>20</sup> [2018] IECA 121, [2018] 2 IR 337.

<sup>21</sup> [2018] IECA 121 at para 49, [2018] 2 IR 337 at page 354.

<sup>22</sup> O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 1.07.

<sup>23</sup> For a discussion on some of the improper factors which may influence sentencing judges, see Ashworth, *Sentencing and Criminal Justice* 3rd ed (Butterworths 2000) at pages 35 – 36.

unwarranted disparity ... to link individualised sentencing with the demands of justice is not, of course, to deny that justice calls for distributional equity".<sup>24</sup>

- [4.8] It is clear, therefore, that the challenge is to ensure that a balance is struck to ensure that the ideal of individualised justice does not serve as a cloak for unwarranted disparity. It is generally accepted that the consistent application of the relevant sentencing principles, as opposed to consistent outcomes, is the most desirable and feasible option in sentencing systems in which judicial discretion is important. As the Halliday Report notes:

"The variety of circumstances in criminal cases .... can result in undesirable priority being given to apparently uniform outcomes, regardless of the circumstances. A better approach is to seek consistent application of explicit principles and standards, recognising that these may result in justifiably disparate outcomes."<sup>25</sup>

- [4.9] The consistency of approach model in Ireland has thus far taken the form of judicially developed guidance. As will be discussed in detail below, the Court of Appeal has, since its establishment in 2014, laid out in detail what it considers to be the "best practice" approach of constructing a proportionate sentence under Irish sentencing law. Furthermore, that Court,<sup>26</sup> as well as its predecessor, the Court of Criminal Appeal<sup>27</sup> and, most recently, the Supreme Court,<sup>28</sup> have, since 2014, handed down a number of offence-specific guideline judgments. Both of these developments may be seen as attempts to enhance consistency in sentencing. Furthermore, the Commission notes that an unprecedented development in the Irish sentencing landscape has been brought about by the recently commenced *Judicial Council Act 2019*.<sup>29</sup> Pursuant to the 2019 Act, the

<sup>24</sup> O'Malley, *Sentencing: Towards a Coherent System* (Round Hall 2011) at page 5.

<sup>25</sup> Making Punishments Work – Report of a Review of the Sentencing Framework for England and Wales (Home Office 2001) at para 2.21.

<sup>26</sup> *People (DPP) v Casey and Casey* [2018] IECA 121, [2018] 2 IR 337 (residential burglary offences); *The People (DPP) v Byrne* [2018] IECA 120 (robbery and aggravated burglary); *The People (DPP) v Samuilis* [2018] IECA 316 (largescale cultivation of cannabis where the charge is one of possessing a controlled drug for sale or supply); *The People (DPP) v Siobhan Maguire* [2018] IECA 310 (certain types of fraud offences); *The People (DPP) v Independent News and Media Plc and Ors* [2018] IECA 301 (contempt of court by publication).

<sup>27</sup> *The People (DPP) v Ryan* [2014] 2 ILRM 98 (firearms offences); *The People (DPP) v Fitzgibbon* [2014] 2 ILRM 116 (causing harm contrary to section 4 of the *Non-Fatal Offences against the Person Act 1997*).

<sup>28</sup> *The People (DPP) v Mahon* [2019] IESC 24; [2019] 2 ILRM 81 (manslaughter); *The People (DPP) v FE* [2019] IESC 85 (rape).

<sup>29</sup> *Judicial Council Act 2019 (Commencement) Order 2019* (SI No 457 of 2019) and *Judicial Council Act 2019 (Commencement) (No 2) Order 2019* (SI No 640 of 2019).

Judicial Council<sup>30</sup> established the Sentencing Guidelines and Information Committee (SGIC)<sup>31</sup> on 30 June 2020.<sup>32</sup> The SGIC will be responsible for the collation and dissemination of information on sentences imposed by the courts to the judiciary and other interested persons<sup>33</sup> and, significantly, to prepare and monitor the operation of sentencing guidelines in this jurisdiction.<sup>34</sup>

- [4.10] As the SGIC is still very much in its infancy, the precise impact that its establishment will have on the nature of the Irish sentencing system and, in particular, on the relationship between consistency and individualised justice, remains to be seen. Edwards J, writing extra-judicially, has previously highlighted that any Irish statutory sentencing commission which was unduly preoccupied with generating consistency at the expense of individualised justice may be constitutionally problematic.<sup>35</sup> Concerns have also been expressed regarding the stage of the legislative process in which the provisions related to sentencing guidelines were introduced, the speed with which they passed both stages of the Dáil, and the lack of prior consultations or deliberations as to the suitability of a guideline system in Ireland.<sup>36</sup> However, the statutory mandate of the SGIC largely mirrors that of the Sentencing Council of England and Wales<sup>37</sup> which, as O'Malley observes, has managed "remarkably well to accommodate the competing values of consistency and individualisation."<sup>38</sup> Indeed, it is clear that the Oireachtas was conscious of the need to retain an equilibrium between these two competing values. Section 91(3)(b) of the *Judicial Council Act 2019* provides that one of the matters to which the SGIC shall have regard when preparing draft guidelines is "the need to promote consistency in sentences imposed by the courts". By the same token, section 93 of the 2019 Act provides that

<sup>30</sup> The Judicial Council was established on 7 February 2020 pursuant to section 6 of the *Judicial Council Act 2019*.

<sup>31</sup> Section 23(1) of the *Judicial Council Act 2019*.

<sup>32</sup> On 22 July 2020, the newly appointed lay members of the SGIC were announced. See <[https://merrionstreet.ie/en/News-Room/Releases/Minister for Justice Helen McEntee announces appointments of Lay Members to Judicial Council Committees.html](https://merrionstreet.ie/en/News-Room/Releases/Minister%20for%20Justice%20Helen%20McEntee%20announces%20appointments%20of%20Lay%20Members%20to%20Judicial%20Council%20Committees.html)> accessed 4 August 2020.

<sup>33</sup> Sections 23(2)(d) and 23(2)(e) of the *Judicial Council Act 2019*.

<sup>34</sup> Section 23(2) of the *Judicial Council Act 2019*. In its 2013 *Report on Mandatory Sentences* (LRC 108-2013) at para 6.02, the Commission recommended the establishment of a Judicial Council to develop and publish sentencing guidance or guidelines.

<sup>35</sup> Edwards, "Sentencing Methodology – Towards Improved Reasoning in Sentencing" (2019) 3 *Irish Judicial Studies Journal* 40 at page 43.

<sup>36</sup> O'Malley, "Sentencing: Guidance and Guidelines" *Annual National Prosecutors' Conference* (7 December 2019) at pages 2, 13.

<sup>37</sup> *Ibid* at pages 12 – 13.

<sup>38</sup> *Ibid* at page 14.

nothing in this Act shall be construed as operating to interfere with (a) the performance by the courts of their functions, or (b) the exercise by a judge of his or her judicial functions.

**(b) The principle of proportionality**

*(i) The construction of a proportionate sentence: the staged process*

[4.11] The principle of proportionality is the cornerstone of Irish sentencing law. The case law has established that sentencing judges are constitutionally mandated to pass a sentence that is proportionate to the gravity of the offence and the personal circumstances of the offender. This section will outline the process by which a proportionate sentence is constructed under Irish sentencing law.

[4.12] It is now well established that the construction of a proportionate sentence is a staged process.<sup>39</sup> The foundational case in this regard is *The People (DPP) v M*,<sup>40</sup> in which the Supreme Court (Egan J) stated that:

“One should look first at the range of penalties applicable to the offence and then decide whereabouts on the range the particular range should like. The mitigating circumstances should then be looked at and appropriate reduction made.”<sup>41</sup>

[4.13] In the *People (DPP) v Farrell*,<sup>42</sup> the Court of Criminal Appeal described the process in the following manner:

“A sentencing court must first establish the range of particular penalties available for the type of offence and then the gravity of the particular offence, where on the range of penalties it would lie, and thus the level of punishment to be imposed in principle. Then, having assessed what is the appropriate notional sentence for the particular offence, it is the duty of the sentencing court to consider the circumstances particular to the convicted person. It is within that ambit that the mitigating factors fall to be considered.”<sup>43</sup>

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<sup>39</sup> See, for instance: *The People (DPP) v Renald* (Court of Criminal Appeal, 23 November 2001); *The People (DPP) v Kelly* [2005] 2 IR 321.

<sup>40</sup> [1994] 3 IR 306.

<sup>41</sup> *Ibid* at page 315. See also the judgment of Denham J (as she then was) at page 317.

<sup>42</sup> [2010] IECCA 116.

<sup>43</sup> *Ibid* at para 4.

[4.14] It is clear therefore that the construction of a proportionate sentence under Irish sentencing law is a two (or more) staged process,<sup>44</sup> depending on whether or not the identification of the range of available penalties is seen as a separate and discrete step from the assessment of the gravity of the offence.<sup>45</sup> Since its establishment in 2014, the Court of Appeal<sup>46</sup> has given further guidance as to what exactly is involved at both stages of the process.

*(ii) Stage one: the headline sentence*

[4.15] The first stage of the process involves the identification of the range of available penalties for the offence in question. This is done primarily by reference to the maximum sentence legislated for by the Oireachtas for the particular offence, and, if applicable, the sentence ranges set out in any of the appellate guideline judgments mentioned earlier in this chapter.<sup>47</sup> Having done this, the sentencing court should then proceed to determine what has become known as the “headline sentence”. Assessing the headline sentence involves an assessment of the gravity of the offence. The two components of offence gravity under Irish law are (1) the harm caused, or risked, by the offending behaviour and (2) the moral culpability of the offender. In respect of the harm component, while there has been very little judicial discussion on this topic,<sup>48</sup> it is generally accepted that the reasonably foreseeable consequences of the offender’s conduct should be taken into account at this stage in the process.<sup>49</sup> However, the Court of Appeal has recently given guidance as to how the offender’s moral culpability should be assessed. It has been held that this element of offence gravity consists of both the offender’s intrinsic moral culpability and

<sup>44</sup> As noted by the Court of Appeal in *The People (DPP) v Independent News and Media* [2018] IECA 301 at para 58, the staged approach can be characterised as a “two or more staged process, depending on how you break it down.”

<sup>45</sup> The Commission, in its 2013 Report on Mandatory Sentences deemed the identification of the available range of applicable penalties as a separate step in and of itself. See Law Reform Commission, *Report on Mandatory Sentences* (LRC 108-2013) at paras 1.45 – 1.67. The Court of Appeal, as will be seen in the below discussion, deems the identification of the available range as forming part of the assessment of gravity. However, the Commission notes that nothing of note turns on this point, as long as sentencing judges identify the range of applicable penalties before going on to assess the gravity of the particular offence.

<sup>46</sup> *The People (DPP) v Molloy (Raymond)* [2018] IECA 37; *The People (DPP) v Flynn* [2015] IECA 290; *The People (DPP) v Kelly* [2016] IECA 204; *The People (DPP) v Molloy (Richard)* [2016] IECA 239; *The People (DPP) v Lynch* [2018] IECA 1.

<sup>47</sup> See (n 26 – 28).

<sup>48</sup> See Law Reform Commission, *Report on Mandatory Sentences* (LRC 108-2013) at paras 1.72 – 175.

<sup>49</sup> O’Malley, *Sentencing Law and Practice* 2nd ed (Round Hall 2006) at para 5.15. See also O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paras 4.15 – 4.16 for a discussion as to the problems that may arise when the harm caused was significantly worse than what was intended by the offender.



actual moral culpability. In *The People (DPP) v Shaun Kelly*,<sup>50</sup> the Court elaborated on these concepts, stating that:

“The intrinsic moral culpability of an offender for an offence depends on the offender's criminal intention at the time he or she committed the offence. The matter is well put in the following passage from O'Malley on *Sentencing*, 2nd ed, at para 5-15, of which we approve:

‘When assessing culpability, it is generally useful to have regard to the nature of the *mens rea* which the offender is found, or appears, to have had when committing the act constituting the crime. Intention to cause harm clearly represents the highest level of culpability and the more harm intended, the greater the blameworthiness. Recklessness, in the sense of a conscious disregard of an unjustifiable risk, comes next, and again the greater and more dangerous the risk, the greater the culpability. Negligence would rank as the lowest form of culpability, which is not to say that it should be met with impunity if it has produced serious harm.’

It is at this point that aggravating factors come into play. Having had regard to the general nature of the offence and the intrinsic moral culpability of the offender for that offence based on the nature of his *mens rea*, a sentencing judge is then obliged at this point to take account of the offender's actual behaviour at the time of committing the offence, and arrive at an overall view of his actual moral culpability. What is meant by the offender's actual behaviour is not the fact that he or she committed the various ingredients of the offence, but mitigating or aggravating behavioural factors.”<sup>51</sup>

- [4.16] Therefore, in assessing the offender's moral culpability, a sentencing court should have regard in the first instance to the offender's intrinsic moral culpability, namely his criminal intention at the time of the commission of the offence. Having considered whether the offence was committed intentionally, recklessly or negligently, a sentencing court should also, when assessing intrinsic moral culpability, take into account other factors relevant to the offender's state of mind, such as whether the offence was premeditated or whether it was committed opportunistically.<sup>52</sup> Secondly, and in order to ascertain what the offender's overall actual moral culpability is, a sentencing court should then take into account any

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<sup>50</sup> [2016] IECA 204.

<sup>51</sup> *Ibid* at paras 35-36.

<sup>52</sup> See *The People (DPP) v McMulkin* [2016] IECA 335 at paras 27 – 31.

behavioural or circumstantial factors tending to aggravate<sup>53</sup> or mitigate<sup>54</sup> the offender's moral blameworthiness for the offence, and, by extension, impact upon the gravity of the offence.<sup>55</sup>

*(iii) Stage two: personal mitigating factors*

- [4.17] Having assessed the gravity of the offence, by reference to the offender's (intrinsic and actual) moral culpability and the harm caused, the first stage in the process has been completed and the headline sentence has been set. The second stage then requires the sentencing judge to make an appropriate reduction from the headline sentence to reflect the offender's mitigating circumstances. However, in this regard, the Commission notes that the case law of the Court of Appeal has also stressed the need to ensure that mitigating factors are taken into account at the correct stages of the sentencing process. As noted above, there are behavioural factors which may be seen as mitigating the offender's actual moral culpability and, by extension, lessening the gravity of the offence. As these mitigating factors have (or should have) already been factored into fixing the headline sentence, they should not be again taken account at the second stage of the process. Only personal mitigating factors not already taken into account at this stage should be accounted for at the second stage of the process. This important distinction

<sup>53</sup> In *The People (DPP) v Shaun Kelly* [2016] IECA 204 at para 39, the Court of Appeal listed some of the behavioural factors which may serve to aggravate an offender's actual moral culpability, namely: a breach of trust, the gratuitous causing of especial harm, damage, degradation or suffering, the carrying or use of a weapon, premeditation and planning, feuding, a racist or other discriminatory motivation, the violation of a dwelling, participation in organised criminal activity, previous convictions for the same type of offending, and committing an offence for profit or commercial gain.

<sup>54</sup> The case law has given numerous examples of factors tending to reduce the moral culpability of an offender. In *The People (DPP) v Shaun Kelly* [2016] IECA 204 at para 37, the Court of Appeal held that evidence that an offender committed the offence under duress, provocation (not of a severe enough nature to attract the defence to criminal liability) or, under the compulsion of an addiction may, depending on the exact circumstances of the case, serve to reduce his or her actual moral culpability. See also *The People (DPP) v Byrne* [2018] IECA at para 63, the Court held that the offender's chronic drug and alcohol addiction contributed to the commission of the offence (robbery) and therefore served to reduce his moral culpability. See also *The People (DPP) v Comey* [2018] IECA 161 at para 60. *The People (DPP) v McMulkin* [2016] IECA 335 established that a medical condition (backed up by satisfactory expert evidence) may also diminish an offender's actual moral culpability.

<sup>55</sup> The Commission notes that the term "actual moral culpability" is essentially the same as the "offender behaviour" leg of the gravity assessment outlined by the Commission in its 2013 *Report on Mandatory Sentences* (LRC 108-2013) at paras 1.76 – 1.88.

has been highlighted in a number of decisions of the Court of Appeal.<sup>56</sup> For instance, in *The People (DPP) v Molloy*,<sup>57</sup> the Court put the matter as follows:

“while it is obviously necessary in performing [the] assessment [of gravity] to take into account the general circumstances of the crime, it is also necessary to take into account any circumstances, bearing on moral culpability, that are personal or particular to the offender. These can be either aggravating or mitigating factors. Mitigating factors that do not bear on culpability such as a plea, previous good character, remorse, co-operation and so on are not for consideration at this stage as the Court is, for the moment, only concerned with fixing a headline sentence.”<sup>58</sup>

[4.18] This distinction between offence-related mitigation and personal mitigation was highlighted by the Commission in its 1996 *Report on Sentencing*,<sup>59</sup> where it stated:

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

Factors which aggravate or mitigate the offence arise for consideration when the sentence is deciding the seriousness of the offending conduct for which the offender is to be held responsible

...

Factors which mitigate sentence arise later. When the sentence considers these factors, he or she has decided the seriousness of the offending conduct for which the offender is responsible, but now asks if there is any reason why the offender should not suffer the full punishment which should attach to such responsibility or blameworthiness. Mitigation of the sentence is the making of a concession: the sentence 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.’<sup>60</sup>

[4.19] The Commission welcomes this development in the Court of Appeal case law. As well as encouraging a consistency of approach on the part of sentencing judges, this distinction

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<sup>56</sup> For instance, see *The People (DPP) v Shaun Kelly* [2016] IECA 204 at para 33; *The People (DPP) v Byrne* [2017] IECA 97 at para 25; *The People (DPP) v Jesenak* [2017] IECA 263 at para 31.

<sup>57</sup> [2016] IECA 239.

<sup>58</sup> *Ibid* at para 38.

<sup>59</sup> (LRC 53-1996).

<sup>60</sup> *Ibid* at paras 3.5 – 3.8.

is particularly important in the context of suspended sentences, as will be discussed later in this chapter.

*(iv) The staged approach as “best practice”*

[4.20] The Court of Appeal has consistently stated that the above staged approach is what it considers to be “best practice”. In other words, and as the Court has repeatedly emphasised, non-adherence to this two-tiered approach will not, in and of itself, render a sentence untenable.<sup>61</sup> As the Court noted in *The People (DPP) v Davin Flynn*:<sup>62</sup>

“sentencing should be about substance over form. The mere fact that best practice has not been followed in terms of adequately stating the rationale behind the sentence does not imply an error of principle. At the end of the day if the final sentence imposed was correct and there was no obvious error of principle the sentence may be upheld.”<sup>63</sup>

[4.21] The reluctance on the part of the Court of Appeal to frame the staged approach in more prescriptive terms stems from a concern that to do so would unduly inhibit the exercise of judicial sentencing discretion.<sup>64</sup> However, it is clear that the Court views this approach as optimal for a number of reasons. As noted in *Molloy*, adherence to the staged approach helps to enhance the general proportionality of sentences because it “focus[es] judges at first instance on the overriding criterion of ensuring that sentences are proportionate both to the gravity of the offence and the circumstances of the offender”.<sup>65</sup> Secondly, in *Molloy*, the Court held that adherence to this approach leads to better reasoned judgments which are more amenable to review at appellate level.<sup>66</sup> Indeed, despite the general principle that a failure to adhere to the “best-practice” approach will not automatically lead to an error of principle, the Court has held on a couple of occasions that a failure to nominate a headline sentence before applying personal mitigation amounted to an error of principle, in circumstances where the core of the offender’s case was that the sentencing judge had failed to give adequate weight to his or her personal

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<sup>61</sup> *The People (DPP) v O’Brien* [2016] IECA 164; *The People (DPP) v Independent News and Media* [2018] IECA 301; *The People (DPP) v Comey* [2018] IECA 161.

<sup>62</sup> [2015] IECA 290.

<sup>63</sup> *Ibid* at para 19.

<sup>64</sup> *The People (DPP) v Molloy* [2018] IECA 37 at para 14.

<sup>65</sup> *Ibid* at para 20.

<sup>66</sup> *Ibid* at para 20.

mitigating factors.<sup>67</sup> As the Court noted in *Flynn*, if the sentencing judge's failure to adhere to best practice means that the Court of Appeal cannot:

"readily discern the trial judge's rationale or how he or she ended up where they did...then it may not be possible to uphold the sentence under review even though the trial judge may have had perfectly good, but unspoken reasons, for imposing the sentence in question."<sup>68</sup>

[4.22] The Commission endorses the staged approach articulated by the Court of Appeal and notes that it is largely consistent with the proposed three-staged approach set out in the Commission's 2013 *Report on Mandatory Sentences*.<sup>69</sup> As well as the advantages alluded to by the Court in *Molloy*, as outlined above, the Commission notes that the staged approach also serves an instrumental value as a legitimacy-enhancing exercise by ensuring the offender, and indeed the public, that all relevant factors have been taken into account and that all irrelevant considerations have been disregarded.<sup>70</sup> Finally, the Commission is of the view that the staged process is in aid of the consistent application of the proportionality principle by sentencing courts in this jurisdiction.

### **(c) The principle of last resort**

[4.23] The basic premise of the principle of last resort is that a custodial sentence should not be imposed unless no other penalty or sanction would be sufficient to reflect the seriousness of the offending behaviour. The development of this principle has received much less attention in the Irish courts than other sentencing principles, such as proportionality.<sup>71</sup> However, it has been suggested that the constitutional principle of proportionality implies that prison should only be used as a last resort. As all sentences must be proportionate to the gravity of the offence and the personal circumstances of the offender, it therefore follows that, in order for this principle to be observed, the most serious form of

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<sup>67</sup> See, for instance: *The People (DPP) v Lynch* [2018] IECA 1; *The People (DPP) v FB* [2016] IECA 187; *The People (DPP) v TB* [2016] IECA 250; *The People (DPP) v Scanlon* [2016] IECA 189.

<sup>68</sup> [2015] IECA 290 at para 18.

<sup>69</sup> The only difference between the two approaches being that the Commission deemed the identification of the available penalties as a separate step in and of itself, whereas the Court of Appeal deems this to be a part of the assessment of gravity. However, the Commission notes that this is largely a matter of semantics, as long as sentencing courts identify the range of available penalties before assessing the gravity of the offence. See Law Reform Commission, *2013 Report on Mandatory Sentences* (LRC 108-2013) at paras 1.45 – 1.101.

<sup>70</sup> O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 4.18.

<sup>71</sup> O'Malley, "Comments on the White Paper on Crime" [2010] 2 *Judicial Studies Institute Journal* 1, at page 8.

punishment available under Irish criminal law – the deprivation of personal liberty – should only be reserved for the most serious offending behaviour.<sup>72</sup>

- [4.24] Despite the lack of judicial guidance on the principle, it has received widespread and longstanding support in Ireland. As far back as 1985, the Committee of Inquiry into the Penal System (Whitaker Committee)<sup>73</sup> concluded that there was little justification for the use of imprisonment and that the costs outweighed the benefits. It therefore recommended that prison be used only as a last resort. The Committee stated that: “imprisonment should be imposed only if the offence is such that no other form of penalty is appropriate.”<sup>74</sup> In its 1996 *Report on Sentencing*,<sup>75</sup> the Commission unanimously endorsed the recommendation of the Whitaker Committee, recommending that imprisonment should be regarded as a sanction of last resort. The Irish Penal Reform Trust also recommended the adoption of the principle of last resort, noting the cost, ineffectiveness and social harm of imprisonment, as well as the threat to human dignity as a result of prison overcrowding.<sup>76</sup> The Department of Justice in its 2014 *Report of the Penal Policy Review Group* similarly recommended that imprisonment be regarded as the sanction of last resort and that this principle be incorporated into statute.<sup>77</sup>
- [4.25] There have also been numerous legislative initiatives to put the principle of last resort with regard to custody generally into practice. Section 96 of the *Children Act 2001* provides that a sentencing court should have regard to the fact that “a period of detention should be imposed only as a measure of last resort”. Section 143 of the 2001 Act reinforces this by providing that a sentencing court should not impose a sentence of detention on a child offender “unless it is satisfied that detention is the only suitable way of dealing with the child”. The *Fines (Payment and Recovery) Act 2014* encourages judges to use prison more sparingly for fine defaulters.<sup>78</sup> Section 3(1)(a) of the *Criminal Justice*

<sup>72</sup> O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 21.04.

<sup>73</sup> TK Whittaker, *Report of the Committee of Inquiry into the Penal System* (Stationery Office 1985) at page 45.

<sup>74</sup> *Ibid* at page 45.

<sup>75</sup> (LRC 53-1996) at para 2.20.

<sup>76</sup> Irish Penal Reform Trust, *Position Paper 5 – Penal Policy with Imprisonment as a Law Resort* (2009) at paras 2.1 – 2.4.

<sup>77</sup> Penal Policy Review Group, *Strategic Review of Penal Policy* (2014) at pages 91 – 92. The latest implementation report for this review suggests that there has been little progress on this recommendation to date: Penal Policy Review Group, *Seventh Report of the Implementation Oversight Group to the Minister for Justice and Equality* (2019).

<sup>78</sup> The Act requires judges to take an individual's financial circumstances into account when imposing a fine, provides for the payment of fines by instalment or attachment of earnings, and also provides for alternatives to imprisonment for non-payment of fines including Community Service Orders (CSO) and Recovery Orders.

*(Community Service Order) Act 1983*<sup>79</sup> provides that, if a sentencing court is of the opinion that the appropriate sentence in a specific case would be a sentence of imprisonment of 12 months or less, it shall consider imposing a community service order (CSO) instead. Furthermore, the Community Return Scheme<sup>80</sup> shifts the emphasis away from prison and toward community-based sanctions.

[4.26] The principle is also enshrined in legislation in several common law jurisdictions.<sup>81</sup> For instance, the *Crimes (Sentencing Procedure) Act 1999* of New South Wales<sup>82</sup> provides that

“a court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.”

[4.27] In England and Wales, the latest legislative iteration of the principle of last resort can be found in section 152(2) of the *Criminal Justice Act 2003*,<sup>83</sup> which provides that:

“The Court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence.”<sup>84</sup>

[4.28] The figures on imprisonment rates in Ireland suggest that judges do not fully apply the principle in practice. While the figures in relation to Ireland’s prison population per

<sup>79</sup> As substituted by section 3(a) of the *Criminal Justice (Community Service) Amendment Act 2011*.

<sup>80</sup> The Community Return Scheme involves the supervised release of qualifying prisoners to complete unpaid community work as a condition of their early release. Prisoners are assessed for suitability by both the Irish Prison Service and the Probation Service. It is available to prisoners serving between one- and eight-years’ imprisonment who have served at least 50% of their sentence. See <<http://www.justice.ie/EN/PB/WebPages/WP16000037>> accessed on 18 August 2020.

<sup>81</sup> Sections 718(2)(d) and (e) of the *Canadian Criminal Code* 1985 provides that an offender should not be deprived of his or her liberty where less restrictive alternatives may be appropriate.

<sup>82</sup> Section 5. There is also a similar provision in section 17A of the *Commonwealth Crimes Act 1914*; see also Edney and Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press 2007) at pages 297 – 298.

<sup>83</sup> Section 1(2) of the *Criminal Justice Act 1991* also enshrined the principle of last resort but was repealed by sections 165 and 168(1) of the *Powers of Criminal Courts (Sentencing) Act 2000*. Section 79 of the *Powers of Criminal Courts (Sentencing) Act 2000*, which also contained a similar provision, was repealed by section 336(3)(4) of the *Criminal Justice Act 2003*.

<sup>84</sup> See the Sentencing Guidelines Council, *Overarching Principles: Seriousness* (2004) at para 1.32, where it is stated that the “clear intention of the statutory test” laid down in section 152(2) of the *Criminal Justice Act 2003* “is to reserve prison as a punishment for the most serious offences.”

100,000 are relatively low in comparison to other European neighbours,<sup>85</sup> this is offset by a relatively high frequency of prison use. For instance, comparative statistics for Europe highlight that, in 2009, the number of persons committed to prison under sentence in Ireland was 349 per 100,000 of the population. This figure was significantly higher than the average of 255 per 100,000 of the population for other European countries.<sup>86</sup> As noted by Maguire:

“[this] contradiction between our relatively low rate of imprisonment and high rate of frequency of prison use can be explained by the fact that the majority of those sentenced to prison each year tend to receive short prison sentences.”<sup>87</sup>

[4.29] In 2011, out of the total committals to prison under sentence (12,990), 62% (8070) were for sentences of less than three months.<sup>88</sup> In 2016, out of the total committed to prison under sentence (12,163), 73% (8,820) were for sentences of less than three months.<sup>89</sup> In 2017, out of the total committed to prison under sentence (6,037), 48% (2897) were for sentences of less than three months.<sup>90</sup> The latest available figures show that, out of the total committed to prison under sentence in 2019 (5034), 31% (1552) were for sentences of less than three months.<sup>91</sup> These figures are strongly suggestive of non-adherence by sentencing judges to the principle of prison as a last resort. Indeed, a 2014 study published by Maguire<sup>92</sup> suggests that, while sentencing judges approve of the principle in a general sense, the precise parameters of the principle are “malleable and open to

<sup>85</sup> Maguire, “When is Prison a Last Resort? Definitional Problems and Judicial Interpretations” (2014) 24(3) *Irish Criminal Law Journal* 62 at page 63; O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 21.02. As of February 2020, the prison population per 100,000 stood at 84, see World Prison Brief, *International Prison Populations* (2020) <<https://www.prisonstudies.org/country/ireland-republic>> accessed on 22 May 2020.

<sup>86</sup> Maguire, “When is Prison a Last Resort? Definitional Problems and Judicial Interpretations” (2014) 24(3) *Irish Criminal Law Journal* 62 at page 63.

<sup>87</sup> *Ibid.*

<sup>88</sup> Irish Prison Service, *Annual Report 2011* (Stationery Office 2011) at page 20.

<sup>89</sup> Irish Prison Service, *Annual Report 2016* (Stationery Office 2016) at page 32.

<sup>90</sup> Irish Prison Service, *Annual Report 2017* (Stationery Office 2017) at page 36.

<sup>91</sup> Irish Prison Service, *Annual Report 2019* (Stationery Office 2019) at page 29. However, it should be noted that, while, as the above figures demonstrate, a large number of persons are sentenced to very short terms of imprisonment each year. The “snapshot” figures for the total number of persons in custody on a certain date each year suggest that prisoners, including prisoners sentenced to short term sentences, rarely serve the full sentence. For instance, the 2019 Annual Report (at page 27) noted that, on 30 November 2019 there were 4017 prisoners in custody. This is around 100% less than the total amount of committals for that year.

<sup>92</sup> See Maguire, “When is Prison a Last Resort? Definitional Problems and Judicial Interpretations” (2014) 24(3) *Irish Criminal Law Journal* 62.



judicial reinterpretation.”<sup>93</sup> This research adopted a qualitative approach, using both in-depth interviews and sentencing vignettes. District and Circuit Court judges were asked about the circumstances in which they would impose a sentence of imprisonment and whether or not they agreed with the statement that “prison should be used sparingly and only for the most serious cases where no other sanctions are appropriate.” District and Circuit Court judges were also asked to “pass sentence” on a number of sentencing vignettes designed to straddle the threshold between custodial and non-custodial sentences. The judges were encouraged to “think out loud” while doing so.<sup>94</sup>

- [4.30] While approving of the principle in theory, a majority of judges identified three sets of circumstances in which they would perceive prison not to be a last resort: (1) for serious offences, (2) for persistent offenders, and (3) when no other sanctions are appropriate. In such circumstances, the interviewed judges would start from the assumption that imprisonment is the appropriate sanction, in essence reversing the principle.<sup>95</sup> In particular, the issue of persistence was generally seen as sufficient to displace the principle. The overarching rationale for this view was that non-custodial options had not worked in the past and that, consequently, imprisonment was the only option.<sup>96</sup>
- [4.31] The preceding discussion highlights how the principle of prison as a last resort has been sporadically approved as forming part of Irish sentencing law – both at a legislative and a judicial level. At a general level, the Commission reiterates the recommendation made in its 1996 *Report on Sentencing* that prison should be used only as a last resort.<sup>97</sup> In the context of the present Report, the Commission considers that this principle is particularly relevant in relation to suspended sentences. As will be discussed in detail below, the principles governing the use of the suspended sentence dictate that the sanction may only be imposed when the offence is sufficiently serious to merit a custodial sentence but the circumstances of the case are such that the custodial sentence need not be served immediately. The Commission is of the view that the principle should form a central part of the sentencing judge’s inquiry in this regard.

### 3. Principles governing the suspended sentence

- [4.32] As outlined in the introductory chapter of this Report, the power to suspend a sentence of imprisonment was well-established at common law in Ireland prior to the enactment of section 99 of the *Criminal Justice Act 2006*. Therefore, the governing principles have,

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<sup>93</sup> *Ibid* at page 77.

<sup>94</sup> *Ibid* at page 73.

<sup>95</sup> *Ibid* at pages 73 – 81.

<sup>96</sup> *Ibid* at page 76.

<sup>97</sup> (LRC 53-1996) at para 2.20.

ostensibly at least, developed by way of case law. However, as Osborough has noted “[t]he jealousy with which the Irish sentencer has viewed, and thus sought to protect, his individual prerogatives, has not helped to create a climate of opinion favourable to the emergence of agreement on principles of sentencing”.<sup>98</sup> The Commission notes that this assertion is particularly apt in the context of the principles governing the suspended sentence. As Judge Riordan, writing extra-judicially, notes, the Irish case law has predominantly dealt with the particular circumstances in which the imposition of a suspended sentence is appropriate, as opposed to the principles governing the suspended sentence more generally.<sup>99</sup> Nevertheless, this section of the chapter will attempt to map out some of the fundamental principles which are applied by Irish sentencing courts when deciding whether or not to impose a suspended sentence.

**(a) The O’Keefe principle**

[4.33] It is well accepted that a suspended sentence is to be considered a sentence of imprisonment. Therefore, in the first instance, a suspended sentence should be imposed only if the sentencing court is satisfied that the offence is sufficiently serious to merit a custodial sentence. In *R v O’Keefe*,<sup>100</sup> the Court of Appeal of England and Wales established this principle in the following terms:

“After all, a suspended sentence is a sentence of imprisonment....[B]efore one gets a suspended sentence at all, the Court must first go through the process of eliminating other possible courses, such as absolute discharge, conditional discharge, probation order, fines, and then say to itself: this is a case for imprisonment, and the final question, it being a case for imprisonment, should be: is immediate imprisonment required, or can a suspended sentence be given?”<sup>101</sup>

[4.34] From this principle, a two-part test may be formulated. Before a sentencing court may impose a suspended sentence, it must first be satisfied that:

- i. The offence is sufficiently serious so as to merit a custodial sentence
- and

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<sup>98</sup> Osborough, “A Damocles’ Sword Guaranteed Irish: The Suspended Sentence in the Republic of Ireland” (1982) 17 *Irish Jurist* 221 at page 237.

<sup>99</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 234.

<sup>100</sup> *R v O’Keefe* [1969] QB 29.

<sup>101</sup> *Ibid* at page 32.

- ii. The circumstances of the case are such that the custodial sentence need not be served immediately.

[4.35] There has been no formal recognition of the *O’Keefe* principle in Irish legislation. However, it could be argued that the reference to “a term of imprisonment” in section 99(1) of the *Criminal Justice Act 2006*<sup>102</sup> permits a sentencing judge to consider the question of suspension only after having determined that a custodial sentence is merited. Until very recently,<sup>103</sup> the Irish courts had not expressly approved the *O’Keefe* principle as governing the suspended sentence in this jurisdiction. However, some earlier decisions did, by implication at least, acknowledge the basic premise underlying *O’Keefe*. Most notably, in *The People (DPP) v Slattery*,<sup>104</sup> the Court of Appeal held that:

“The issue of a suspended sentence is entirely distinct from the passing of a custodial sentence. The decision to issue a suspended sentence must take place only after a headline custodial sentence has been decided.”<sup>105</sup>

[4.36] Similarly, in *Moore v Brady*,<sup>106</sup> the High Court (Feeney J) also impliedly endorsed the *O’Keefe* principle, commenting that “a suspended prison sentence is to be treated in the first instance as a recognition that an offence has been committed which would warrant an immediate custodial sentence.”<sup>107</sup> In *The People (DPP) v Kavanagh*<sup>108</sup> the Court of Appeal emphasised that “a sentence of imprisonment suspended in whole or in part is still a sentence of imprisonment, albeit that the term to be actually spent in custody is less than it otherwise would be (assuming the beneficiary keeps the conditions of the suspension).”<sup>109</sup>

[4.37] While not expressly referred to, it is clear that these decisions accepted the basic premise underpinning *O’Keefe*. However, in *The People (DPP) v DW*,<sup>110</sup> the Court of Appeal for the first time expressly endorsed the *O’Keefe* principle as forming part of Irish sentencing

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<sup>102</sup> “Where a person is sentenced to a term of imprisonment . . . that court may make an order suspending the execution of the sentence in whole or in part”.

<sup>103</sup> *The People (DPP) v DW* [2020] IECA 145 at paras 36 – 39.

<sup>104</sup> [2017] IECA 90.

<sup>105</sup> *Ibid* at para 34.

<sup>106</sup> [2006] IEHC 434.

<sup>107</sup> *Ibid* at para 36.

<sup>108</sup> [2020] IECA 13.

<sup>109</sup> *Ibid* at para 24.

<sup>110</sup> *The People (DPP) v DW* [2020] IECA 145.

law.<sup>111</sup> However, to date, no consideration in an Irish context (judicial or otherwise) has been given as to the factors relevant to each stage of the inquiry. This will be the focus of the next section of this chapter.

(i) *The first limb of the O’Keefe principle: lessons from England and Wales*

[4.38] As noted, the first stage of the *O’Keefe* principle requires that, before imposing a suspended sentence, a sentencing court should first be satisfied that the offence is sufficiently serious as to merit a custodial sentence. While this principle has been incorporated into Irish law, the question arises as to precisely how a sentencing court is expected to approach the first limb of the *O’Keefe* principle? As noted, this question has not received any attention in an Irish context. However, the sentencing guidelines in England and Wales<sup>112</sup> have interpreted the *O’Keefe* principle as requiring sentencing courts to ask itself the following sequence of questions:

- (a) Has the custody threshold been passed?
- (b) If so, is it unavoidable that a custodial sentence be imposed?
- (c) If so, can that sentence be suspended?<sup>113</sup>

[4.39] It is clear that both steps (a) and (b) are relevant to the first stage of *O’Keefe*. In terms of step (a), section 152(2) of the (English) *Criminal Justice Act 2003* provides that:

“The Court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence.”

[4.40] The “custody threshold” statutory test inherent in section 152(2) of the 2003 Act has been the subject of much academic criticism, primarily on the basis that it is overly simplistic,

<sup>111</sup> *Ibid* at paras 36 – 39.

<sup>112</sup> Sentencing Guidelines Council, *New Sentences: Criminal Justice Act 2003* (December 2004) <[https://consult.justice.gov.uk/digital-communications/imposition-consultation/supporting\\_documents/SGC%20New%20Sentences%20CJA%202003%20PDF%201.pdf](https://consult.justice.gov.uk/digital-communications/imposition-consultation/supporting_documents/SGC%20New%20Sentences%20CJA%202003%20PDF%201.pdf)> accessed on 10 March 2020. This three-part process has been reaffirmed by the Sentencing Guidelines Council in the *Definitive Guideline on the Imposition of Community and Custodial Sentences* (2016) <<https://www.sentencingcouncil.org.uk/wp-content/uploads/Imposition-definitive-guideline-Web.pdf>> accessed 10 March 2020 at page 7.

<sup>113</sup> Sentencing Guidelines Council, *New Sentences: Criminal Justice Act 2003* (December 2004) <[https://consult.justice.gov.uk/digital-communications/imposition-consultation/supporting\\_documents/SGC%20New%20Sentences%20CJA%202003%20PDF%201.pdf](https://consult.justice.gov.uk/digital-communications/imposition-consultation/supporting_documents/SGC%20New%20Sentences%20CJA%202003%20PDF%201.pdf)> accessed on 10 March 2020 at para 2.2.11.

open to subjective interpretation and therefore inconsistently applied.<sup>114</sup> The elusive nature of the concept is also evident in the case law of the English and Welsh Court of Appeal. Initially, in *R v Bradbourn*<sup>115</sup> the Court (Lawton J) interpreted section 1(4) of the *Criminal Justice Act 1982*<sup>116</sup> (which dealt with the sentencing of young offenders) as meaning:

“the kind of offence which when committed by a young person would make right-thinking members of the public, knowing all the facts, feel that justice had not been done by the passing of any sentence other than a custodial one”<sup>117</sup>

- [4.41] In *R v Cox*,<sup>118</sup> the “right thinking members of the public” test was confirmed as being the applicable custody threshold test in relation to all offenders, following the enactment of section 1 of the *Criminal Justice Act 1991*.<sup>119</sup> However, subsequently, in *R v Howells*,<sup>120</sup> this test was abandoned by the same court on the basis that it:

“cannot be said that the ‘right-thinking members of the public’ test is very helpful since the sentencing court has no means of ascertaining the views of right-thinking members of the public and inevitably attributes to such right-thinking members its own views.”<sup>121</sup>

- [4.42] The Court went on to state that it would be useful for sentencing courts to approach the issue by taking into account the nature and extent of the offender’s criminal intention and the nature and extent of any injury or damage caused to the victim<sup>122</sup> As Roberts notes, the Court of Appeal of England and Wales has not refined or expanded upon this test

<sup>114</sup> See Padfield, “Time To Bury The Custody Threshold?” [2011] *Criminal Law Review* 593 at page 610. For a useful discussion of these criticisms, see Roberts and Harris, “Reconceptualising the Custody Threshold in England and Wales (2017) 28 *Criminal Law Forum* 477 at pages 477 – 490.

<sup>115</sup> [1985] 7 Cr App R 180.

<sup>116</sup> This statutory provision limited the use of custody for youth offenders to cases which were “so serious that a non-custodial sentence cannot be justified”

<sup>117</sup> [1985] 7 Cr App R 180 at page 183.

<sup>118</sup> [1993] 1 WLR 188; (1993) 14 Cr. App. R. (S.) 479 CA (Crim Div).

<sup>119</sup> Section 1 provided that “the court shall not pass a custodial sentence on the offender unless it is of the opinion (a) that the offence, or the combination of the offence and one or more offences associated with it, was so serious that only such a sentence can be justified for the offence; or (b) where the offence is a violent or sexual offence, that only such a sentence would be adequate to protect the public from serious harm.”

<sup>120</sup> [1999] 1 WLR 307, CA (Crim Div).

<sup>121</sup> *Ibid* at page 311.

<sup>122</sup> *Ibid* at page 311.

since *Howells*.<sup>123</sup> Therefore, the first limb of the *O'Keefe* principle in England and Wales requires sentencing courts, in the first instance, to have regard to the moral culpability of the offender and the harm caused by the offending conduct.<sup>124</sup>

- [4.43] Turning then to step (b) of the guidelines in England and Wales, as outlined above, this step in the process requires a sentencing judge to consider whether, having decided that the gravity of the offence merits a custodial sentence, the imposition of a custodial sanction is unavoidable. In this regard, the Sentencing Guidelines Council of England and Wales provides further guidance,<sup>125</sup> stating that:

“passing the custody threshold does *not* mean that a custodial sentence should be deemed inevitable, and custody can still be avoided in the light of personal mitigation or where there is suitable intervention in the community.”<sup>126</sup>

- [4.44] *R v Cox*,<sup>127</sup> is instructive in this regard. In this case, the Court of Appeal determined in the first instance that the gravity of the offence was such as to merit a custodial sentence. However, having taken into account the offender’s personal mitigating circumstances (his young age and the fact that he only had one previous conviction) it imposed a sentence of probation. Wasik states that, since the decision in *Cox*, “offence seriousness may propel the offender over the custody threshold for a custodial sentence, while personal mitigation may have the effect of pulling him back.”<sup>128</sup>

(ii) *The first limb of the O'Keefe principle in an Irish context*

- [4.45] The “custody threshold” question has only received very limited, offence-specific, attention in an Irish sentencing context.<sup>129</sup> Nevertheless, in light of the fact that *O'Keefe*

<sup>123</sup> Roberts and Harris, “Reconceptualising the Custody Threshold in England and Wales (2017) 28 *Criminal Law Forum* 477 at page 485.

<sup>124</sup> This is reflected in the Sentencing Council’s most recent guidance on the custody threshold. See Sentencing Council, *Imposition of Community and Custodial Sentences Definitive Guideline* (2016) <<https://www.sentencingcouncil.org.uk/wp-content/uploads/Imposition-definitive-guideline-Web.pdf>> accessed on 10 March 2020 at page 7.

<sup>125</sup> Sentencing Guidelines Council, *Overarching Principles: Seriousness* (December 2004) <<https://www.sentencingcouncil.org.uk/wp-content/uploads/Seriousness-guideline.pdf>> accessed on 14 April 2020.

<sup>126</sup> *Ibid* at para 1.32.

<sup>127</sup> [1993] 1 WLR 188; (1993) 14 Cr. App. R. (S.) 479 CA (Crim Div).

<sup>128</sup> Wasik, “What Guides Sentencing Decisions?” in Bottoms, Rex and Robinson (eds), *Alternatives to Imprisonment: Options for an Insecure Society* (Willan 2004) at page 291.

<sup>129</sup> In *The People (DPP) v Loving* [2006] IECCA 28 at para 59, [2006] 3 IR 355 at page 366, the Court of Criminal Appeal gave some limited guidance as to the factors relevant to the custody threshold question in the context of child pornography offences.

forms part of Irish sentencing law, the Commission is of the view that at least some of the guidance on the first limb of the *O'Keefe* principle in England and Wales could usefully be applied in an Irish context. However, it should be noted that the Court of Appeal in England and Wales in *Howells* expressed the view that it would be "dangerous and wrong" for the Court to lay down prescriptive rules in respect of the custody threshold test.<sup>130</sup> Indeed, similar concerns were expressed by the Court in *Bradburn*, where the Court noted that "this court and other courts can recognise an elephant when they see one, but may not find it necessary to define it".<sup>131</sup> Having outlined the "right-thinking members of the public" test, the Court then stated that:

"we think that is as good guidance as we can give to courts and that any attempt to be more specific would only add to the difficulties of the courts and not help them."<sup>132</sup>

[4.46] The Commission is of the view that these concerns apply with equal force to the Irish sentencing system, in light of the constitutional requirements of judicial discretion and individualised justice. Therefore, the Commission is of the view that the ultimate decision as to whether the custody threshold has been crossed should be one for the judgment of the court, based on the individual facts before it. Nevertheless, as outlined at the outset of this chapter, there must be an appropriate balance struck between individualised justice and consistency so as to ensure that the former does not serve as a cloak for unwarranted sentencing disparities. Therefore, the following guiding principles may be useful for an Irish sentencing court to consider when determining if the first stage of the *O'Keefe* inquiry has been met:

- i. In the first instance, a sentencing court should have regard to the *inherent* gravity of the offence, by reference to:
  - a. the legal ingredients involved in the commission of the offence;<sup>133</sup>
  - b. the statutory maximum and occasional minimum sentence<sup>134</sup> set by the Oireachtas for the offence; and
  - c. whether the Irish case law has determined that, by virtue of the inherent gravity of the offence in question, any sentence imposed for that offence

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<sup>130</sup> [1999] 1 W.L.R. 307, CA (Crim Div) at page 311.

<sup>131</sup> [1985] 7 Cr App R 180.

<sup>132</sup> *Ibid* at page 183.

<sup>133</sup> O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 21.04.

<sup>134</sup> For a detailed discussion of minimum (presumptive and mandatory) sentences under Irish law, see chapter 6 of this Report.

should be the subject of a presumption of an immediate custodial sentence.<sup>135</sup>

- ii. However, while certain offences (e.g. robbery) are inherently serious and punishable with a sentence of up to life imprisonment, this does not mean that all robberies merit a custodial sentence. Therefore, having ascertained the inherent seriousness of the offence, a sentencing court should then proceed to look at the *actual* gravity of the offence. In this regard, the moral culpability of the offender and the harm caused by the offence are the key determinants,<sup>136</sup> with the main question being whether “the nature of the harm which the offender knowingly inflicted, intended to cause or risked causing”<sup>137</sup> is sufficiently serious to merit a custodial sentence.
- iii. Finally, a sentencing court should always be cognisant of the principle of prison as a last resort and the fact that the constitutional principle of proportionality requires that the personal circumstances of the offender are always taken into account. Therefore, in the event that a sentencing court has decided that the gravity of the offending behaviour is sufficiently serious to merit a custodial sentence, it should then consider whether or not the offender’s personal mitigation brings the case back below the custody threshold.

[4.47] Having taken into account the above factors, and in the event that the sentencing court determines that a custodial sentence is justified, it should then turn its attention to setting the length of this custodial sentence. It is here where the two-staged proportionality principle, as well as another fundamental principle governing the suspended sentence – the *Mah-Wing* principle – come into play.

**(b) The *Mah-Wing* principle**

[4.48] Another fundamental principle governing the suspended sentence is that established by the Court of Appeal of England and Wales in *R v Mah Wing*,<sup>138</sup> where the Court of Appeal stated:

“When the court passes a suspended sentence, its first duty is to consider what would be the appropriate immediate custodial sentence, pass that and then go on to consider whether there are grounds for suspending it. What the court must

<sup>135</sup> As will be discussed in detail in chapter 6 of this Report.

<sup>136</sup> O’Malley, *Sentencing: Towards a Coherent System* (Round Hall 2011) at page 194.

<sup>137</sup> *Ibid.* See also pages 195 – 197.

<sup>138</sup> [1983] 5 Cr App R (S) 347.



not do is pass a longer custodial sentence than it would otherwise do, because it is suspended.”<sup>139</sup>

- [4.49] This principle was first considered by the Irish Court of Criminal Appeal in *The People (DPP) v Loving*.<sup>140</sup> In this case, the appellant pleaded guilty to making a gain by deception contrary to section 6 of the *Criminal Justice (Theft and Fraud Offences) Act 2001* and to possession of child pornography contrary to section 6 of the *Child Trafficking and Pornography Act 1998*. On the child pornography count, the appellant was sentenced to five years’ imprisonment – the statutory maximum for a conviction on indictment – with the final two years suspended on the condition that he avail of the psychiatric services available within the Prison Service and place himself under the supervision of the Probation Service on his release from prison. The offender appealed against the severity of the sentence imposed on him. He argued that, despite the suspension of the final two years of the sentence on the child pornography count, the sentence imposed by the trial judge should be treated as a sentence of five years, as opposed to three years, for the purpose of the appeal. The Court of Criminal Appeal agreed with this argument on behalf of the appellant.<sup>141</sup>
- [4.50] As outlined in the judgment, during the course of the appeal, counsel for the appellant put forward the *Mah Wing* principle as authority for the proposition that the child pornography count was to be judged as one of five years’ imprisonment.<sup>142</sup> Therefore, the Court’s acceptance of the appellant’s argument could also be seen as an acceptance of the *Mah-Wing* principle into Irish law. However, the Commission notes that the Court’s reasoning in this case is somewhat unclear. While expressly accepting the appellant’s argument, the Court also stated in the same paragraph of the judgment that it “did not think that the trial judge had offended this proposition in this case.”<sup>143</sup> If the Court accepted the appellant’s argument on some basis other than the *Mah-Wing* principle having been breached, then it is also unclear whether the Court was accepting this

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<sup>139</sup> *Ibid* at page 348.

<sup>140</sup> [2006] IECCA 28, [2006] 3 IR 355.

<sup>141</sup> On this basis, the Court was satisfied that the trial judge had erred in imposing the maximum sentence permitted by law, namely a sentence of five years’ imprisonment, notwithstanding that five years had been suspended. The Court held that the decision to impose the maximum sentence implied that the actual offence was at the highest level of seriousness in light of both the intrinsic quality of the offence and the personal circumstances of the offender. It also failed to allow for the basic mitigating factors of a guilty plea and previous good character.

<sup>142</sup> [2006] IECCA 28 at para 49, [2006] 3 IR 355 at para 33.

<sup>143</sup> [2006] IECCA 28 at para 49, [2006] 3 IR 355 at para 33. This point was also made by Judge Riordan. See Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 232.

principle into Irish sentencing law. On this view, it is unclear whether *Loving* did in fact endorse the *Mah-Wing* principle as forming part of Irish sentencing law.

- [4.51] Notwithstanding the uncertainty in *Loving*, the *Mah-Wing* principle was more definitively (albeit implicitly) endorsed in Ireland in *The People (DPP) v Floyd*.<sup>144</sup> In this case, the Court of Appeal held that the sentencing judge had erred as, having decided that the appropriate sentence was one of five years' imprisonment, then proceeded to impose a six year sentence with one year suspended. The Court substituted a sentence of five years with one year suspended and, in so doing, commented that:

"it has to be recognised that the suspended sentence is a real sentence and one has to consider this. Suppose it were the situation that in the future for some reason, the suspended portion were to be reactivated, if that was the case, then the effect of this would be that the individual would find themselves serving a sentence longer than the sentence that had been identified as the appropriate one and, in the Court's view that cannot be correct."<sup>145</sup>

- [4.52] While not referring expressly to *Mah-Wing*, the Court of Appeal in *Floyd* was clearly in agreement with the rationale underpinning this principle, namely that a sentencing court should not pass a longer sentence than it otherwise would merely on the basis that the sentence is going to be suspended, either in full or in part. Furthermore, the recent decision of *The People (DPP) v DW*<sup>146</sup> expressly approves the *Mah-Wing* principle as forming part of Irish law.

- [4.53] In light of the above discussion, it is clear that, before considering whether a sentence should be suspended, a sentencing court should first:

(1) as *per* the first limb of *O'Keefe*, determine that a custodial sentence is justified, and then

(2) set the length of the custodial sentence (as *per Mah-Wing*). In setting the length of the custodial sentence, the sentencing court should adhere to the two-staged proportionality test as outlined earlier in this chapter.

- [4.54] Only having completed these two steps, should the sentencing court then proceed to step (3) and consider whether the circumstances of the case justify the suspension of the sentence. The factors relevant to step (3) in the process will be discussed in part (d) of this

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<sup>144</sup> [2014] IECA 39.

<sup>145</sup> *Ibid* at para 12.

<sup>146</sup> [2020] IECA 145 at paras 36 – 39.

section. However, the immediately succeeding section discusses a potential overlap or conflation of the factors relevant to both steps 1 and 2 in the process.

**(c) A distinction without a difference?**

- [4.55] In light of the preceding discussion, it is clear that the first stage of the *O’Keefe* inquiry (step 1) is concerned with the *type* of punishment: i.e. answering the binary question of custody / no custody, while the *Mah-Wing* principle and the distributive principle of proportionality (step 2) are concerned with the *quantum* of punishment i.e. the length of the custodial sentence. Whether the custody threshold has been passed should be considered before the length of the custodial sentence is determined.<sup>147</sup> Viewed from this perspective it is clear that there is an important distinction, at least at the level of principle, to be drawn between these steps along the process.
- [4.56] However, the Commission also notes that the inquiry at both steps (1) and (2) in the process are, in many respects, very similar. After all, both inquiries involve an assessment of the gravity of the offence, followed by the application of personal mitigating factors. As such, it is possible that these theoretically distinct steps may, in practice, become conflated. In the context of England and Wales, Roberts and Harris put forward a model to address this conceptual difficulty. They propose that certain factors should be relevant solely to the determination of the type of punishment (step 1) while other factors remain exclusively relevant to determining the quantum of punishment (step 2).<sup>148</sup> According to this model, all factors relevant to offence gravity (harm caused and the culpability of the offender), along with the mitigating factor of lack of prior convictions, are only relevant to step (1) while all other aggravating and mitigating factors may only be taken into account at step (2) of the process.<sup>149</sup>
- [4.57] While attractive in theory, the Commission is of the view that this suggestion would not fit easily into the current framework of Irish sentencing law. In light of the constitutional requirement that the personal circumstances of the offender are always relevant to sentence, there is a strong argument to say that precluding a sentencing court from taking into account certain personal mitigating factors at the first stage of the *O’Keefe* inquiry would be problematic from a constitutional perspective. As O’Malley notes:

“the grant of credit for mitigating factors should be key to the determination of sentence before any question of suspension arises. Once all the relevant matters

<sup>147</sup> O’Malley, “Sentencing: Towards a Coherent System” (Round Hall 2011) at pages 185 – 210.

<sup>148</sup> Roberts and Harris, “Reconceptualising the Custody Threshold in England and Wales (2017) 28 *Criminal Law Forum* 477

<sup>149</sup> *Ibid* at pages 496 – 498.

are considered a court may decide ... especially in light of personal mitigation, that a non-custodial measure is more appropriate.”<sup>150</sup>

- [4.58] More generally, the Commission is of the view that any prescriptive attempt to distinguish between the factors relevant to steps (1) and (2) respectively may serve as an undue interference with the constitutional requirements of individualised justice and judicial sentencing discretion, as outlined at the outset of this chapter. Nevertheless, the Commission is of the view that, in the formulation of any sentencing guidelines on the issue of suspended sentences in this jurisdiction, consideration should be given to whether the theoretical distinction between the type of punishment and the quantum of punishment should be observed in practice and, if so, what factors should be relevant to each stage of the process.

**(d) The second stage of the *O’Keefe* principle: the suspension question**

- [4.59] As discussed above, a sentencing court, having (1) decided that the offence is sufficiently serious to merit a custodial sentence and (2) set the appropriate length of the custodial sentence, should only then proceed to consider whether the circumstances of the case are such that the custodial sentence should be suspended. Given the highly individualised nature of the Irish sentencing system, there are many factors which may lead a sentencing judge to suspend a sentence of imprisonment. However, in general a suspended sentence will be appropriate in light of strong personal mitigation on the part of the offender. As Wasik notes, the main argument in favour of the suspended sentence is that it enables the court to mark the gravity of the offence by the setting of an appropriate custodial sentence, while at the same time catering for the personal mitigation of the offender by suspending the sentence.<sup>151</sup>
- [4.60] However, at this juncture it is important to recall the distinction outlined in the first section of this chapter between factors mitigating the gravity of the offence (offence-related mitigation), on the one hand, and those factors mitigating the severity of the sentence (personal mitigation), on the other. This distinction is particularly important in the context of the suspended sentence. Offence-related mitigation should never be factored into the decision to suspend. This is because this category of mitigation is exclusively relevant to the first stage of the proportionality test, namely the assessment of the gravity of the offence. By extension, offence-related mitigation is crucial in determining the headline sentence. As outlined in detail earlier in this chapter, fixing the headline sentence is the first step in determining the length of the custodial sentence (step 2), which must be fixed before the suspension question is considered (step 3). It

<sup>150</sup> O’Malley, “‘That Measure of Wise Clemency’: Defending the Suspended Sentence” (2018) 28(2) *Irish Criminal Law Journal* 39 at page 46.

<sup>151</sup> Wasik, “Sentencing: The Last Ten Years” [2014] *Criminal Law Review* 477 at page 482.

therefore follows that factors relevant to step (2) must never be considered at step (3) of the process. In its 1996 *Report on Sentencing*,<sup>152</sup> the Commission identified a number of factors that tend to mitigate the gravity of the offence. In light of the above discussion, the following factors should never be factored into the question of suspension:

- (1) Whether the offence was committed under circumstances of duress not amounting to a defence to criminal liability;<sup>153</sup>
- (2) Whether the offender was provoked;<sup>154</sup>
- (3) Whether the offence was committed on impulse, or the offender showed no sustained motivation to break the law;
- (4) Whether the offender, through age or ill-health or otherwise, was of a reduced mental capacity when committing the offence;<sup>155</sup>
- (5) Whether the offence was occasioned as a result of strong compulsion.<sup>156</sup>
- (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;

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<sup>152</sup> (LRC 53-1996) at paragraph 3.2.

<sup>153</sup> In *The People (DPP) v Shaun Kelly* [2016] IECA 204 at para 37, the Court of Appeal held that evidence that an offender committed the offence under duress may, depending on the exact circumstances of the case, serve to reduce his or her actual moral culpability.

<sup>154</sup> In *The People (DPP) v Shaun Kelly* [2016] IECA 204 at para 37, the Court of Appeal held that evidence that an offender acted under provocation may, depending on the precise circumstances of the case, serve to reduce his or her actual moral culpability. See also *The People (DPP) v O'Toole* (Court of Criminal Appeal, 25 March 2003).

<sup>155</sup> In *The People (DPP) v McMulkin* [2016] IECA 335 at para 31, the Court of Appeal stated that "if the evidence established the existence of a medical condition tending to significantly diminish the accused's responsibility for the offending behaviour" that this may serve to reduce his moral culpability for the offence.

<sup>156</sup> In *The People (DPP) v Kelly* [2016] IECA 204 at para 37, the Court of Appeal held that evidence that an offender committed the offence under the compulsion of an addiction may, depending on the exact circumstances of the case, serve to reduce his or her actual moral culpability. See also *The People (DPP) v Leon Byrne* [2018] IECA at para 63, the Court noted that the offender's chronic drug and alcohol addiction contributed to the commission of the offence (robbery) and therefore served to reduce his moral culpability. See also *The People (DPP) v Comey* [2018] IECA 161 at para 60 and *The People (DPP) v Hehir* [2018] IECA 244.

- (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.

[4.61] Any of the above offence-related mitigating factors should be taken into consideration when fixing the headline sentence. The position in relation to personal mitigating factors, however, is a little less clear cut. Personal mitigation is potentially relevant to determining the length of the custodial sentence, on the one hand, or the question of suspension, on the other. This is borne out by an examination of the international literature<sup>157</sup> and the Irish case law. Building on its previous work in this area,<sup>158</sup> the Commission notes that there is a very wide range of potentially mitigating factors, including the following, that have been recognised as relevant in determining the length of a custodial sentence or in deciding if a sentence should be suspended:

- (1) An absence of prior convictions;<sup>159</sup>

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<sup>157</sup> Bartels, "To Suspend or not to Suspend: a Qualitative Analysis of Sentencing Decisions in the Supreme Court of Tasmania" (2009) 28 *University of Tasmania Law Review* 23; see also Hough, Jacobson and Millie, *The Decision to Imprison: Sentencing and the Prison Population* (Penal Reform Trust 2003).

<sup>158</sup> Law Reform Commission, *Report on Sentencing* (LRC 53-1996) at para 3.17; Law Reform Commission, *Report on Mandatory Sentences* (LRC 108-2013) at para 1.90.

<sup>159</sup> It is a well-established principle of Irish sentencing law that the absence of previous convictions is a significant factor mitigating the severity of the sentence. In *The People (DPP) v Perry* [2009] IECCA 161 at para 5, the Court of Criminal Appeal described it as "the single best recognised mitigating factor" in Ireland. Furthermore, the international research suggests that it is often a significant factor in the decision to impose a fully suspended sentence. An Australian study examined all sentences imposed in the Tasmanian Supreme Court between 1 July 2002 and 30 June 2004. Out of the 246 fully suspended sentences handed down, the lack of previous convictions was mentioned as a reason for full suspension in 110 cases. See Bartels, "To Suspend or not to Suspend: A Qualitative Analysis of Sentencing Decisions in the Supreme Court of Tasmania" (2009) 28 *University of Tasmania Law Review* 23 at page 29. Indeed, in *The People (DPP) v Byrne* [2017] IECA 97 and *The People (DPP) v Smith* [2019] IECA 1, the Court of Appeal held that the lack of previous convictions, along with other strong personal mitigating factors, justified the imposition of a fully suspended sentence, notwithstanding that the gravity of the offence (causing serious harm contrary to section 4 of the *Non-Fatal Offences against the Person Act 1997*) was particularly high.

- (2) Entry of a guilty plea;<sup>160</sup>
- (3) Remorse;<sup>161</sup>
- (4) Co-operation with authorities;<sup>162</sup>
- (5) Subsequent good character;<sup>163</sup>

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<sup>160</sup> Law Reform Commission *Report on Sentencing* (LRC 53-1996) at para 3.17. The subsequent case law has confirmed that a guilty plea will mitigate the severity of the sentence. See, for instance: *The People (DPP) v Ward* (Court of Criminal Appeal, 26 January 2009); *The People (DPP) v Donohue* [2015] IECA 6. Indeed, in the recent Court of Appeal decision of *The People (DPP) v RK* [2016] IECA 208 at para 23, the Court noted that the trial judge was correct to attach “considerable weight” to the plea of guilty. However, it is also accepted that the value of this mitigating factor is dependent on the facts of the case. If the plea is entered at an early stage in the process, then the offender will be entitled to significant mitigation. However, if he or she has been caught “red-handed” then the extent of the mitigation due will be less than would otherwise be the case. See *The People (DPP) v Farrell* [2010] IECCA 116 at para 21. In contrast, in *The People (DPP) v Cambridge* [2019] IECA 133 at para 8, the Court of Appeal stated that the furnishing of a guilty plea at the earliest opportunity should, notwithstanding the weight of the evidence against the offender, normally result in a discount of about one-third from the headline sentence. See also *The People (DPP) v O’Callaghan* [2020] IECA 172 at para 16.

In *The People (DPP) v Byrne* [2017] IECA 97 and *The People (DPP) v Smith* [2019] IECA 1, the Court of Appeal held that an early plea of guilty, along with other strong personal mitigating factors, justified the imposition of a fully suspended sentence, notwithstanding that the gravity of the offence (causing serious harm contrary to section 4 of the *Non-Fatal Offences against the Person Act 1997*) was particularly high. Bartels found that a guilty plea was a contributing factor to the imposition of a fully suspended sentence in 10% of examined cases. See Bartels, “To Suspend or not to Suspend: A Qualitative Analysis of Sentencing Decisions in the Supreme Court of Tasmania” (2009) 28 *University of Tasmania Law Review* 23 at page 27.

<sup>161</sup> In the Commission’s *Report on Sentencing* (LRC 53-1996) at para 3.17, the Commission identified the fact that the offender attempted to remedy the harmful consequences of his or her conduct as a factor mitigating the severity of sentence. The Court of Appeal has stated that a trial judge is entitled to discount for mitigation as long as there is a sound evidential basis for concluding that the remorse was genuine. See *The People (DPP) v JC* [2014] IECA 1 at para 30. In *The People (DPP) v Byrne* [2017] IECA 97 and *The People (DPP) v Smith* [2019] IECA 1, the Court of Appeal held that the evidence of genuine remorse, along with other strong personal mitigating factors, justified the imposition of a fully suspended sentence, notwithstanding that the gravity of the offence (causing serious harm contrary to section 4 of the *Non-Fatal Offences against the Person Act 1997*) was particularly high. Bartels found that genuine remorse was a contributing factor to the imposition of a fully suspended sentence in 10% of cases. See Bartels, “To Suspend or not to Suspend: a Qualitative Analysis of Sentencing Decisions in the Supreme Court of Tasmania” (2009) 28 *University of Tasmania Law Review* 23 at page 27.

<sup>162</sup> See Law Reform Commission *Report on Sentencing* (LRC 53-1996) at para 3.17. See also *The People (DPP) v Alexiou* [2003] 3 IR 513; *The People (DPP) v Hall* [2016] IECA 11.

<sup>163</sup> Law Reform Commission, *Report on Mandatory Sentences* (LRC 108-2013) at para 1.90. The case law of the Court of Appeal has established that an offender who refrains from offending between

- (6) If imprisonment would, by reason of old age<sup>164</sup> illness, or physical/mental disability<sup>165</sup> result in manifest subjective hardship to the offender.<sup>166</sup>
- (7) To reward efforts at rehabilitation to date and/or to incentivise further rehabilitation.<sup>167</sup>
- (8) Specific circumstances make the individual unsuitable for prison,<sup>168</sup> and

the commission of the offence and sentencing should be entitled to mitigation on that account. See, for instance: *The People (DPP) v Hegarty* [2013] IECCA 67. In *The People (DPP) v Cotter* [2014] IECA 40 at para 6, the Court noted that the trial judge was entitled to take account of the fact that, since the offending behaviour, the appellant had lived a responsible and constructive life with a good work record. Similarly, in *The People (DPP) v Smith* [2019] IECA 1 the fact that the offender had, since the offence, changed the course of his life – he was now in stable employment, in a stable relationship and was a father to a young child, afforded him significant mitigation. Bartels found that good character was a contributing factor to the imposition of a fully suspended sentence in 18% of cases. See Bartels, “To Suspend or not to Suspend: A Qualitative Analysis of Sentencing Decisions in the Supreme Court of Tasmania” (2009) 28 *University of Tasmania Law Review* 23 at page 27.

<sup>164</sup> See, for instance: *The People (DPP) v Deady* (Court of Criminal Appeal, 25 January 1999); *The People (DPP) v PH* (Court of Criminal Appeal, 22 February 2002); *The People (DPP) v JM* (Court of Criminal Appeal, 22 February 2002); *The People (DPP) v Gray* (Court of Criminal Appeal, 16 January 2009); *The People (DPP) v Craig* [2010] IECCA 27; *The People (DPP) v Bardauskas* (Court of Criminal Appeal, 25 January 2010); *The People (DPP) v RK* [2016] IECA 208.

<sup>165</sup> See, for instance: *The People (DPP) v Smith* (Court of Criminal Appeal, 22 November 1999); *The People (DPP) v PH* (Court of Criminal Appeal, 22 February 2002); *The People (DPP) v JM* (Court of Criminal Appeal, 22 February 2002); *The People (DPP) v NN* (Court of Criminal Appeal, 27 June 2005).

<sup>166</sup> Subjective hardship caused by imprisonment was previously identified by the Commission as a factor which should mitigate the severity of the sentence. See Law Reform Commission, *Report on Sentencing* (LRC 53-1996) at para 3.17.

<sup>167</sup> The sentencing guidelines in England and Wales explicitly state that a realistic prospect of rehabilitation may justify a suspended sentence. See Sentencing Council for England and Wales, *Definitive Guideline on the Imposition of Community and Custodial Sentences* (2016) at page 8. Chapter 5 of this Report discusses in detail the Irish case law on this issue in the context of the part-suspended sentence.

<sup>168</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 239. Examples include members of An Garda Síochána, foreign nationals – see *The People (DPP) v Alexiou* [2003] 3 IR 513 – and offenders who have provided information on the workings of organised crime, which might in turn expose the individual to retributive violence while in prison – see *Long v Mayger* [2004] WASCA 41.



- (9) Family circumstances, in particular pregnant women or women with dependent children.<sup>169</sup>

[4.62] It is clear from the above that personal mitigation is relevant to both fixing the length of the custodial sentence (step 2) and the question of suspension (step 3). This poses a potential problem. Are sentencing judges permitted to take the same personal mitigating factor into account at both stages of the process? Or does this “double-counting” result in an unfair discount being afforded to the offender? Ashworth recognised this problem in the context of the *O’Keefe* principle, which, as discussed earlier, has been enshrined in a three step process by the Sentencing Guidelines Council for England and Wales, as outlined above.<sup>170</sup> In this regard, he observes that:

“in taking step (b) the court must take account of all aggravating and mitigating factors – once. Then in deciding step (c) whether there are any factors justifying the suspension of a sentence that merits a custodial sentence, the court must consider the same aggravating and mitigating factors – again”.<sup>171</sup>

[4.63] The Commission notes that a similar problem may arise in an Irish context if sentencing judges were permitted to take into account personal mitigation at both stages of the process. Granted, this line of argument assumes that each inquiry along the sentencing process must be evaluated with evidence exclusive to that particular inquiry. Indeed, the same criticism could be levelled at the process outlined above where the sentencing court is taking into account largely the same factors when considering whether a custodial sentence is justified (step 1) and, if answered in the affirmative, setting the appropriate length of the custodial sentence (step 2). However, the crucial distinction here is that these two inquiries are concerned with the distinct issues of the type of punishment and the quantum of punishment respectively. While as discussed above, this distinction may be more theoretical than practical, there is no distinction to be drawn, theoretical or

<sup>169</sup> In its 1996 *Report on Sentencing* (LRC 53-1996) at para 3.17, the Commission noted that the fact that a sentence of imprisonment would cause manifest hardship to the dependents of the offender should be considered as a factor mitigating the severity of sentence. In the decision of *The People (DPP) v Lawlor* [2018] IECA 243, the Court of Appeal held that a fully suspended sentence was justified, notwithstanding the gravity of the offence, on the basis that imprisonment of the offender would have an extremely adverse impact on his sisters, both of whom were disabled and heavily dependent on him for care. The sentencing guidelines in England and Wales explicitly state that the hardship that imprisonment may inflict on others may justify a suspended sentence. See Sentencing Council for England and Wales, *Definitive Guideline on the Imposition of Community and Custodial Sentences* (2016) at page 8.

<sup>170</sup> The three-step process is as follows: (a) Has the custody threshold been passed? (b) If so, is it unavoidable that a custodial sentence be imposed? (c) If so, can that sentence be suspended? See Sentencing Guidelines Council *New Sentences: Criminal Justice Act 2003* (2004) at para 2.2.11.

<sup>171</sup> Ashworth, *Sentencing and Criminal Justice* 6th ed (2015 Cambridge University Press) at page 320.

practical, between the setting of an appropriate custodial sentence (step 2) and the question of suspension (step 3). In other words, both of these considerations fall squarely within the determination of the quantum of punishment. Therefore, were a sentencing judge entitled to take into account the same personal mitigating factor, at both steps (2) and (3) of the process, then the offender would potentially be benefiting twice in the domain of the quantum of punishment.

[4.64] This issue of “double-counting” has been addressed by the Court of Appeal. In *The People (DPP) v Molloy (Richard)*,<sup>172</sup> the Court stated that:

“it is important that an accused should be afforded all of the mitigation that he is due, but it is equally important that there should be no inadvertent double counting resulting in him receiving more than he is due.”<sup>173</sup>

[4.65] Similarly, in *The People (DPP) v Kelly*<sup>174</sup> it was noted that

“if the ultimate sentence is to be a proportionate one, relevant circumstances that are personal or particular to the accused must be taken into account at appropriate points in the process and given proper weighting, with care being taken to avoid double counting.”<sup>175</sup>

[4.66] It is clear, therefore, that, in the Court of Appeal’s view, taking into account the same mitigating factor twice is undesirable. Further, the Court addressed the issue in the context of suspended sentences in the recent decision of *The People (DPP) v Kavanagh*.<sup>176</sup> This case concerned an undue leniency application brought by the Director of Public Prosecutions pursuant to section 2 of the *Criminal Justice Act 1993*. The respondent was sentenced to a term of three years’ imprisonment with the final 18 months suspended. The kernel of the DPP’s argument was that the sentencing judge had erred in discounting three years from the headline sentence, as well as suspending 50% of the post-mitigation figure. This, the DPP argued, amounted to a double counting of mitigation by the sentencing judge both at the stage of fixing the length of the custodial sentence (step 2) and at the suspension inquiry (step 3). This was rejected by the Court, which held that the discount from the headline sentence reflected credit due for “true mitigation”,<sup>177</sup> while the part-suspension of the sentence was so as to incentivise the respondent’s continued

<sup>172</sup> [2016] IECA 239.

<sup>173</sup> *Ibid* at para 53.

<sup>174</sup> [2016] IECA 204.

<sup>175</sup> *Ibid* at para 33.

<sup>176</sup> [2020] IECA 13.

<sup>177</sup> The respondent had a stable family environment, a good employment record and had only one previous conviction which he had acquired 13 years previously.

desistence from criminal behaviour.<sup>178</sup> In other words, the respondent's stable family environment, good employment record and lack of previous convictions were deemed relevant to step (2), while the respondent's efforts at rehabilitation were factored into at step (3). While the Court did not find that the sentencing judge had "double-counted" in this particular case, the inference underlying the decision is that, had the sentencing court taken into account the same personal mitigation at both stages of the process, then it may have been held to amount to an error of principle.

**(e) Principles governing the imposition of conditions of suspension**

[4.67] This section will consider some of the principles that have developed in the case law in respect of conditions of suspension. Having decided that a suspended sentence is appropriate (step 3), the sentencing court may impose conditions of suspension. Section 99(2) of the *Criminal Justice Act 2006* provides that a sentencing court must make it a condition of the offender's suspension that he or she keep the peace and be of good behaviour. Furthermore section 99(3) of the 2006 Act provides that a sentencing court may, when imposing a suspended sentence of imprisonment, impose any conditions of suspension that it considers:

- (1) appropriate, having regard to the nature of the offence; and
- (2) that will reduce the likelihood of the offender committing any other offence

[4.68] It is clear that section 99(3) has given sentencing courts considerable latitude in deciding on the appropriate conditions of suspension.<sup>179</sup> However, the case law has also established that a sentencing judge should, when imposing a suspended sentence, always bear in mind that the suspended element of the sentence forms part of the overall punishment. Therefore, the longer the period for which the sentence is suspended (the operational period), the more punitive the sanction, as the length of the operational period represents the period during which the offender is constantly at risk of having to serve the custodial sentence in full.<sup>180</sup>

[4.69] The pre-2006 Act common law position was that the operational period of a suspended sentence should not generally extend beyond the length of the sentence imposed. In *The People (DPP) v Hogan*,<sup>181</sup> the Court of Criminal Appeal reiterated that, in general, the operational period should not extend beyond the length of the sentence, save in

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<sup>178</sup> *Ibid* at para 26.

<sup>179</sup> Section 99(4) of the *Criminal Justice Act 2006* provides a number of factors which the sentencing court may attach to the part-suspended sentence only. For a discussion, see chapter 5 of this Report.

<sup>180</sup> O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 22.05.

<sup>181</sup> (Court of Criminal Appeal, 4 March 2002).

exceptional circumstances. The Court maintained that it did not wish to lay down any concrete rules on the matter, but rather sought to ensure that there was a reasonable limit on the length of the operational period of a suspended sentence. However, the position is (or at least was) somewhat unclear since the enactment of section 99 of the *Criminal Justice Act 2006*. Section 99(2) refers to “a period of suspension” and does not specify a maximum length for the operational period of a suspended sentence. This was confirmed by the High Court (Peart J) in *DPP (Cogavin) v Vajekis*.<sup>182</sup> However, the Court of Appeal noted in *The People (DPP) v Stronge*<sup>183</sup> that the length of the operational period must be considered as part of the punitive element of a suspended sentence.<sup>184</sup> This was confirmed in the recent decision of *The People (DPP) v DW*<sup>185</sup> (to be discussed in detail below) where the Court held that the imposition of a condition of suspension – that the offender avoid contact with the injured part for a period of 30 years – was “disproportionate and arbitrary and ultimately excessive in the distributive sense having regard to its operative duration and the strictness and lack of flexibility in its terms.”<sup>186</sup>

- [4.70] In terms of the conditions of suspension more generally, it is well-established that the conditions of suspension also form part of the punishment.<sup>187</sup> In this regard, the conditions of suspension ought to be reasonable and proportionate. For instance, in *The People (DPP) v Broszczack*<sup>188</sup> the appellant had been sentenced to a seven-year custodial sentence, with the final three years suspended on the condition that he leave the State on his release and remain outside the country for a period of seven years. While noting that conditions of suspension must always be reasonable and proportionate, the Court held that the impugned condition was not so onerous as to undermine the exercise that the sentencing judge had been engaged in, i.e. seeking to adequately reflect the mitigating circumstances in the case by the suspension of the final three years of the headline sentence.<sup>189</sup>

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<sup>182</sup> [2014] IEHC 265.

<sup>183</sup> [2011] IECCA 79.

<sup>184</sup> *Ibid* at para 35. Riordan observes that section 50(2) of the aborted *Criminal Justice Bill 1967* provided for a three-year limit on the operational period. He speculates that the draftsman of the *Criminal Justice Act 2006* omitted to put in a similar provision in deference on the part of the legislature to what has traditionally been regarded as an exclusively judicial function. See Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 375.

<sup>185</sup> [2020] IECA 145.

<sup>186</sup> *Ibid* at para 92.

<sup>187</sup> *Ibid* at para 78.

<sup>188</sup> [2016] IECA 121.

<sup>189</sup> *Ibid* at para 45.

- [4.71] In the earlier decision of *The People (DPP) v Alexiou*,<sup>190</sup> the Court of Criminal Appeal discussed the need for sentencing courts to “avoid the risk of imposing a condition which would be tantamount to imposing a penalty not envisaged by the law”.<sup>191</sup> The Court in that case went on to give the example of a non-national working and habitually resident in the State with his family. If this person committed an offence in which the only available penalties was a fine or imprisonment, the imposition of a suspended sentence of imprisonment, with one of the conditions being that he leave the State against his wishes “could be considered so extraneous to the penalties imposed by law and beyond the discretionary powers of sentencing vested in a trial judge.”<sup>192</sup> The appellant in *Alexiou* was a South African National who was convicted of unlawful possession of a controlled drug, worth IR£10,000 (now €13,000) or more, for the purpose of sale or supply, contrary to section 15A of the *Misuse of Drugs Act 1977*, as amended. He was sentenced to four years’ imprisonment, suspended in full, on the conditions that he keep the peace and be of good behaviour and that he leave the State immediately. The DPP sought a review of the sentence on the grounds *inter alia* that it was unduly lenient.<sup>193</sup> While ultimately holding that this condition did not render the overall sentence unduly lenient, the Court also noted that, in principle, a condition to leave the State indefinitely is not good practice and that the better approach is to impose such a condition for a defined period of time that is proportionate to the overall gravity of the offence as committed by the offender. Otherwise, the Court held, there is a risk that such a condition could have a disproportionate punitive impact on the offender in circumstances where he or she may have legitimate reasons for needing to return to the State several years after the imposition of the condition of suspension.<sup>194</sup>
- [4.72] In *The People (DPP) v Lee*,<sup>195</sup> as well as the usual mandatory condition,<sup>196</sup> the appellant was also prohibited from entering the towns of Laytown and Bettystown and their environs without the written consent of the Chief Superintendent for the relevant Garda District for a period of five years from the date of sentence. The Court of Appeal held that, given the fact that the appellant’s mother lived in the area, this condition was

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<sup>190</sup> [2003] 3 IR 513.

<sup>191</sup> *Ibid* at page 526.

<sup>192</sup> *Ibid* at para 526.

<sup>193</sup> The DPP also argued that the decision of the sentencing judge offended the separation of powers in circumstances where the power to make deportation orders was reserved to the Minister for Justice, Equality and Law Reform, and that the sentence imposed would not deter non-nationals from importing drugs into the State and therefore lacked general deterrent effect.

<sup>194</sup> [2003] 3 IR 513 at page 527.

<sup>195</sup> [2017] IECA 152.

<sup>196</sup> That the offender keep the peace and be of good behaviour during the period of suspension, pursuant to section 99(2) of the *Criminal Justice Act 2006*.

disproportionate. The Court accordingly varied this condition so as to require the appellant to adhere to a curfew, during which he had to remain indoors within his notified place of residence from 19:00 each evening until 07:00 the following morning.

- [4.73] It is also well established that the conditions of suspension should afford the offender with a realistic prospect of compliance that the suspended sentence does not, in essence, amount to a sentence of immediate imprisonment with a deferred commencement date.<sup>197</sup> This involves an assessment of the personal circumstances of the offender so as to ensure that there is a reasonable prospect of compliance with the conditions of suspension. In the recent Court of Appeal decision of *The People (DPP) v Broe*,<sup>198</sup> the Court held that, before imposing a suspended sentence:

“a sentencing judge should satisfy himself or herself that there is at least a reasonable prospect that the accused will take the chance provided to him by the proposed suspended sentence ... A sentencing judge ought to, when structuring a sentence, use his/her judgment as to whether the risk associated [i.e. the risk that the suspended element may ultimately be activated] with using a suspended sentence is justifiable in the circumstances of the case.”<sup>199</sup>

- [4.74] In the earlier decision of *The People (DPP) v Johnston*,<sup>200</sup> the Court of Criminal Appeal held that the sentencing judge had been correct not to impose a suspended sentence because, in light of the offender’s previous criminal record, there was no realistic prospect of him complying with the conditions of suspension. Similarly, in *The People (DPP) v Folan*,<sup>201</sup> the Court held that the decision to partially suspend the appellant’s sentence of imprisonment (so as to reflect personal mitigation) amounted to an error of principle in circumstances where, given the fact that the offender was an alcoholic and had relapsed in the past, there was a high likelihood that he would do so again. It was therefore held that reflecting the appellant’s personal mitigation by way of part-suspension was inappropriate in the circumstances as there was not a sufficiently realistic prospect of him complying with the conditions of suspension.<sup>202</sup>
- [4.75] The recent decision of the Court of Appeal in *The People (DPP) v DW*<sup>203</sup> is important in that it established that the requirement that conditions of suspension be proportionate

<sup>197</sup> O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 22.09.

<sup>198</sup> [2020] IECA 140.

<sup>199</sup> [text added]. *Ibid* at paras 82 – 83.

<sup>200</sup> *The People (DPP) v Johnston* [2010] IECCA 97.

<sup>201</sup> [2019] IECA 361.

<sup>202</sup> *Ibid* at para 31.

<sup>203</sup> [2020] IECA 145.

does not only mean that they be proportionate in the context of the overall quantum of the punishment (i.e. in the distributive sense), but also in the sense of infringing upon the offender's rights to the least extent possible. In this case, the appellant was sentenced to a custodial sentence of four years' imprisonment with the final year suspended for three years, subject to the appellant entering into a bond in the sum of €150 to keep the peace and be of good behaviour for the suspended period. The appellant was also required to avoid contact, direct or indirect, with the injured party for a period of thirty years. It was this latter condition which formed the basis of the appeal. As noted, the Court found that the impugned condition was excessively punitive and therefore disproportionate in the distributive sense. However, the Court of Appeal also considered whether the impugned condition fell foul of the constitutional proportionality test as established in *Heaney v Ireland*<sup>204</sup> and later approved by the Supreme Court in *Re Article 26 and the Employment Equality Bill 1996*.<sup>205</sup> This test requires that the means chosen to pursue a legitimate objective must: not be arbitrary, unfair or based on irrational considerations, impair the affected person's constitutionally protected right or rights as little as possible, and be such that the effect on the person's rights is proportionate to the legitimate objective.

[4.76] The Court of Appeal in *DW* also had regard to the comments of the Supreme Court in *Lynch and Whelan v Minister for Justice, Equality and Law Reform*<sup>206</sup> where it was noted that, in the normal course, proportionality in the distributive sense, as opposed to *Heaney* proportionality "will be the dominant proportionality consideration and in the great majority of sentencing cases it will be the only such consideration."<sup>207</sup> Indeed, in the present case, the impugned condition was central to the question of whether the punishment imposed was proportionate to the overall gravity of the offence and the personal circumstances of the offender. As noted above, the condition of suspension rendered the overall punishment disproportionate in the distributive sense.

[4.77] However, the Court interpreted *Lynch and Whelan* as not going so far as to say that *Heaney* proportionality is never relevant in a sentencing context. Further, the Court held that a sentencing court, when imposing conditions of suspension, is not merely concerned with how much punishment is appropriate, but also with some other legitimate aim or need (e.g. individual or public protection or incapacitation in the public interest). In the context of the present case, as the impugned condition was imposed

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<sup>204</sup> [1994] 3 IR 593.

<sup>205</sup> [1997] IESC 6, [1997] 2 IR 321.

<sup>206</sup> [2010] IESC 34, [2012] 1 IR 1. See also Law Reform Commission, *Report on Mandatory Sentences* (LRC 108-2013) at paras 1.37 – 1.45.

<sup>207</sup> [2020] IECA 145 at para 83.

partly in furtherance of some legitimate aim,<sup>208</sup> and was also capable of impinging on the appellant's constitutional rights, the Court held that *Heaney* proportionality was engaged. In this regard, the Court held that:

"notwithstanding any legitimate aim that the sentencing judge may have been pursuing, [the impugned condition] impacted excessively on the appellant's rights, variously arising either under the Constitution, or the European Convention on Human Rights/ the Charter of Fundamental Rights, including a right of freedom of association with his children, his right as a parent to further develop his relationship with his children, and a right to enjoyment of a family life which involves his children. The condition was arguably so far-reaching in its terms as to amount to an unlawful punishment, not presently available under Irish law."<sup>209</sup>

- [4.78] The Court of Appeal accordingly quashed the sentence and re-sentenced the appellant to a custodial sentence of four years with the final year suspended for a period of three years post-release. The conditions of suspension were varied so that the appellant was required to not contact or visit the property of the injured party, directly or indirectly (save for a solicitor instructed on his behalf who may do so in writing in relation to any issue or issues pertaining to the welfare of their children), for the period of suspension. The appellant was also required to submit to the Probation Service during the period of suspension and comply with all of their requirements during this period including, but not confined to, undergoing any courses or programs advised by the Probation Service to address his anger management issues.<sup>210</sup>

## 4. The application of the *O'Keefe* principle and the *Mah-Wing* principle in Ireland

### (a) Existing research

- [4.79] The application of the *O'Keefe* principle and the *Mah-Wing* principle play a vital role in ensuring the just and proportionate imposition of the suspended sentence. It is well accepted that failing to apply the above principles can have an inflationary effect in the form of net-widening or penalty escalation.<sup>211</sup> Net-widening is a term used to describe a

<sup>208</sup> The Court (at para 92) agreed with counsel for the respondent's submission that the impugned condition was imposed in order to make "some sort of order" to address the anxieties expressed by the injured party.

<sup>209</sup> *Ibid* at para 93.

<sup>210</sup> *Ibid* at para 96.

<sup>211</sup> See Austin and Krisberg, "Wider, Stronger and Different Nets: the Dialectics of Criminal Justice Reform" (1981) 18 *Journal of Research in Crime and Delinquency* 105; McMahon, "Net-Widening:



practice on the part of sentencing judges to use the suspended sentence as a substitute for non-custodial measures such as community service and probation, thereby potentially subjecting the offender (in the event of a breach) to a custodial sentence which was never contemplated by the sentencing court. It is here where the importance of adherence to the first stage of the *O'Keefe* principle is brought into focus. Penalty-escalation refers to the tendency of sentencing judges to increase the length of the custodial sentence merely on the basis that it may never be served, which is squarely in breach of the *Mah-Wing* principle.<sup>212</sup>

- [4.80] Research in other jurisdictions has shown the prevalence of net-widening and penalty escalation in the use of the suspended sentence.<sup>213</sup> In England and Wales, prior to the enactment of section 189 of the *Criminal Justice Act 2003*, it was only possible to suspend a sentence of imprisonment on foot of "exceptional circumstances."<sup>214</sup> However, after the 2003 Act, a suspended sentence could be imposed in sentences of imprisonment of between 14 days and 12 months.<sup>215</sup> The research shows that the use of the suspended sentence rose dramatically after the 2003 Act. Suspended sentences accounted for 25% of all sanctions in 2013 compared to 1% in 2004. In indictable cases, the use of suspended sentences rose from 1% in 2004 to 13% in 2013. The use of immediate imprisonment also rose during this time period, but most significantly, there was a notable decline in the use of community sanctions.<sup>216</sup> Research conducted in Victoria found that, following the introduction of the suspended sentence, up to 50% of offender who received a suspended sentence would have previously received a more lenient sanction such as probation, a fine or community service.<sup>217</sup> In New South Wales, it was found that up to 88% of suspended sentences imposed in the local courts represented net-widening.<sup>218</sup>

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Vagaries in the Use of a Concept" (1990) 38 *British Journal of Criminology* 121; Prichard, "Net-Widening and the Diversion of Young People from Court: a Longitudinal Analysis with Implications for Restorative Justice" (2010) 43 *Australian and New Zealand Journal of Criminology* 112.

<sup>212</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at pages 266 – 267.

<sup>213</sup> See footnotes on Riordan (*ibid*) at page 262 for an in-depth discussion on this.

<sup>214</sup> Ashworth, *Sentencing and Criminal Justice* 6th ed (Cambridge University Press 2015) at page 318.

<sup>215</sup> The maximum length of a sentence that may be suspended was increased to two years by section 68 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*.

<sup>216</sup> Roberts, "The Rise of the Suspended Sentence of Imprisonment in England and Wales" (2014) *Sentencing News* Issue 1 at page 10.

<sup>217</sup> Tait, "The Invisible Sanction: Suspended Sentences in Victoria 1985-1991" (1995) 28 *Australian and New Zealand Journal of Criminology* 143 at page 149.

<sup>218</sup> Brignell and Poletti, "Suspended Sentences in New South Wales" (2003) *Sentencing Trends and Issues* No. 29 at page 11.

The figures from New Zealand, albeit lower at 8% to 22%, also suggest a net-widening effect.<sup>219</sup>

- [4.81] There is very little research in Ireland on the existence of net-widening or penalty escalation. However, Riordan's qualitative study into the perspectives of judges on the principles of suspended sentences did provide some very useful insights in this regard. This research highlighted that, although some judges expressly indicated that they impose suspended sentences in lieu of immediate custodial sentences,<sup>220</sup> others conceded that a tendency existed among the Irish judiciary to impose a suspended sentence in circumstances where a custodial sentence was not warranted.<sup>221</sup> Furthermore, a number of judges referred to a tendency to elongate the custodial element of the sentence on the basis that the sentence (or a portion of it) was going to be suspended.<sup>222</sup> This study also revealed that many judges justified this breach of the *Mah-Wing* principle on the basis of a sort of quasi-contractual relationship between the offender and the sentencing court. According to this rationale, an increase in the length of the custodial element of the suspended sentence is the price that the offender must pay to have the sentence suspended in the first place.<sup>223</sup>
- [4.82] Riordan's findings suggest that the *O'Keefe* principle and the *Mah Wing* principle are not being followed by Irish sentencing courts. On a more anecdotal level, due to the lack of guidance currently available to sentencing courts as to the factors relevant each stage of the process, the Commission notes that it would be unsurprising if *O'Keefe* test and *Mah-Wing* were not being applied in the Irish courts. However, further research is necessary in order to make any more definitive assertions in this regard. Unfortunately, existing data into practices in Irish sentencing courts is limited.<sup>224</sup> The Irish Sentencing Information System was a pioneering effort in this regard. It was set up with the function of gathering,

<sup>219</sup> Spier, *Conviction and Sentencing of Offenders in New Zealand: 1987 to 1996* (Ministry of Justice 1997).

<sup>220</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 241.

<sup>221</sup> *Ibid* at page 217.

<sup>222</sup> *Ibid* at pages 260-261. See also Ryan and Magee *The Irish Criminal Process* (Mercier Press 1983) at page 401.

<sup>223</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 262.

<sup>224</sup> However, it should be noted that the prevalence of academic research examining Irish sentencing practices has increased over the past decade or so. See, for instance: Maguire, "Consistency in Sentencing" (2010) 2 *Judicial Studies Institute Journal* 14; Hamilton, "Sentencing in the District Court: 'Here Be Dragons'" (2005) 15(3) *Irish Criminal Law Journal* 9. For an exhaustive review of the existing literature, see O'Nolan *The Irish District Court: A Social Portrait* (Cork University Press 2013) at pages 13-22.

analysing and disseminating sentencing information within the State. It was intended to be descriptive, rather than prescriptive, along the lines of a searchable database that would be available as a reference tool. A pilot project which began in 2007 created two databases, namely a case information database and a sentencing information database, particularly for sentences imposed in the Dublin Circuit Criminal Court.<sup>225</sup>

- [4.83] The data provided by this database is useful and sheds valuable insights into sentencing practices in the Irish criminal courts.<sup>226</sup> However, it must be noted that the database has not been updated since 2010<sup>227</sup> and the information available predominantly covers sentences imposed in the Dublin Circuit Court only. Furthermore, the draft sentencing information database described above is primarily qualitative and descriptive in nature. The Commission is of the view that the gathering of statistical data on sentencing for quantitative analysis and dissemination is of equal, if not greater, importance. Sentencing statistics play a fundamental role in developing sentencing guidance that is consistent and reflects current sentencing practices. In this regard, the Commission notes that the Sentencing Guidelines and Information ("SGIC"), when established, may be well placed to gather, collate and disseminate useful data on sentencing practices in this jurisdiction. However, in the interim, the Commission has conducted its own statistical analysis in an attempt to ascertain the extent to which the *O'Keefe* and *Mah-Wing* principles are observed in practice in Irish sentencing courts.

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<sup>225</sup> The pilot project was extended outside of Dublin in April 2008 to include the Cork Circuit. For a detailed discussion on the Irish Sentencing Information System, see Conroy and Gunning, "The Irish Sentencing Information System (ISIS): A Practical Guide to a Practical Tool" (2009) 1 *Judicial Studies Institute* 37. Researchers attended sentencing hearings and gathered the relevant sentencing data which was then inputted into the database. Only cases in which the researcher was aware of all of the evidence put before the judge are contained in the database. For instance, data was not collected in circumstances where the case was adjourned, or where the researcher was not present on the first date on which evidence was heard.

<sup>226</sup> The database contains sentencing information for cases heard between 2007 and 2010. In total, there are 447 cases in the database, the majority of which are from 2007 (180) and 2008 (140). The vast majority of offences are offences common to the Circuit Court such as robbery, burglary, unauthorised taking of a motor vehicle, possession of controlled drugs for sale or supply, and assault causing harm. The database also records some less common offences such as possession of child pornography, dangerous driving causing death and violent disorder. The database also records a small selection of cases such as child neglect, making a counterfeit social welfare travel pass and brothel keeping.

<sup>227</sup> For a discussion on why the database has fallen into disuse, see Edwards, "Sentencing Methodology – Towards Improved Reasoning in Sentencing" (2019) 3 *Irish Judicial Studies Journal* 40 at pages 45 – 46.

**(b) The Commission's analysis of sentencing information in the courts service annual reports***(i) Methodology*

[4.84] For the purposes of the Commission's analysis, the Courts Service Annual Reports for the years 2006 to 2017, regarding cases disposed of in the Circuit Court, were selected so as to ensure a sufficiently large sample size and to examine sentencing information since the enactment of section 99 of the *Criminal Justice Act 2006*. As there were some inconsistencies in the reporting of specific offences and the types of sanctions over the time-period,<sup>228</sup> the information was standardised in order to obtain the largest consistent sample size possible over the given time period. It should be noted that data on the unauthorised taking of a motor vehicle is only available between 2006 and 2011. Offences were standardised to include assault, sexual offences, drug offences, firearms offences, road traffic offences, and theft/robbery/fraud (these offences were generally grouped together in the sentencing information provided by the Courts Service). Sanctions imposed were standardised to include fines, community service orders, suspended sentences and imprisonment.<sup>229</sup> As raw numbers are provided by the Courts Service Annual Reports, the sanctions included in this research were expressed as a proportion of total sanctions imposed by the courts.<sup>230</sup> Furthermore, the Annual Reports provide separate sentencing information on sanctions imposed in the Dublin Circuit Court and Provincial Circuit Courts. This information was amalgamated into one, encompassing sentencing information in the Circuit Court generally. Finally, sentencing information on the total sanctions imposed, the sanctions imposed for specific offences, and, in particular, the use of suspended sentences was extracted. The results of this analysis are discussed below.

*(ii) Limitations*

[4.85] The Commission notes that there are limitations in respect of this analysis. First, while information on the number of suspended sentences imposed is provided in the Courts Service Annual Reports, there is no specific information on the imposition of part-suspended sentences. It was therefore assumed that part-suspended sentences fall into

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<sup>228</sup> Other types of penalty included dismissal, peace bond, poor box, disqualification and taken into consideration, etc. In many cases the reports record other types of penalties as "other".

<sup>229</sup> Between 2006 and 2011, information on the length of the sentence of imprisonment (up to two years, five years, ten years and over ten years) is recorded.

<sup>230</sup> Total sanctions refers to all sanctions included in this research, that is, fines, community service orders, suspended sentences and imprisonment for the Circuit Court and probation, fines, community service orders, suspended sentences and imprisonment for the District Court (see para 3.26) as well as all other sanctions as provided for by the Courts Service Annual Reports over the given time period.

the “imprisonment” categories. This assumption was made on the basis that, in 2008, sentencing information in the Circuit Court specified that the “imprisonment” category also includes part-suspended sentences. Therefore, the figures outlined below are indicative of the imposition of fully suspended sentence only. However, as this chapter is primarily concerned with the relevant principles as they apply to fully suspended sentences, the Commission notes that this limitation does not unduly affect the quality or reliability of the present analysis. In general, the categorisation of the data by the Courts Service does not describe exactly what offences are covered in the general categories. Some of these offence categories – particularly sexual offences – encompass a wide variety of offences and these categories can include offences of varying levels of severity and, thus, varying levels of severity of sentence. Finally, it should be noted that the sentencing information provided records the imposition of a sentence at first instance. As such, where a sentence is appealed and subsequently quashed or varied, this is not reflected in the statistical information provided below.

- [4.86] Although this research represents a basic statistical analysis of the available sentencing data, the Commission is of the view that this quantitative research will provide useful insights into sentencing trends in Ireland in general and, more specifically, shed some light on the extent to which the principles that nominally govern the suspended sentence are actually applied by sentencing courts. It is hoped that this research will be built on in the future by bodies such as the Sentencing Guidelines and Information Committee established under the *Judicial Council Act 2019*.

*(iii) Results: general*

- [4.87] The results of the analysis of sentencing information in the Courts Service Annual Reports between 2006 and 2017, set out in figures 1-6 below, suggests that there has been a decrease in the use of the suspended sentence in the Circuit Court for specific offences. In 2006, 40% of all sanctions<sup>231</sup> imposed for specific offences in the Circuit Court were suspended compared to 17% in 2017. Out of all the sentences imposed for assault between 2006 and 2017, 31% were suspended. Twenty-seven percent of all sentences imposed for drug offences and 23% of all sentences imposed for firearms offences were suspended during the same 11 year period, with the same percentage (23%) of all sentences imposed for theft / robbery / fraud being suspended. Sexual offences received the fewest suspended sentences, with only 19% of all sentences being suspended. Four percent of all sentences imposed for the unauthorised taking of a motor vehicle were suspended between 2006 and 2011, whereas 2% of all sentences imposed for dangerous

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<sup>231</sup> It is important to bear in mind that, when referring to “all sanctions”, what is meant is all sanctions analysed in this research, that is, fines, community service orders, suspended sentences and imprisonment.

driving and 1% of all sentences imposed for drink driving were suspended during the same time period.

*(iv) Results: sexual offences*

[4.88] *Figure 1* illustrates the sanctions imposed by the Circuit Court for sexual offences. It should be noted that “sexual offences” is a very broad category. Information is not available in relation to the particular offences or categories of sexual offence in respect of which suspended sentences were predominantly imposed. In general, fewer suspended sentences were imposed for these offences during the period examined. In 2006, 37% of all sanctions imposed for sexual offences were suspended, compared with 10% in 2017. It should be noted that the imposition of sentences of immediate imprisonment also gradually decreased from 40.9% in 2006 to 26.2% in 2017. Nevertheless, the majority of sexual offences in each year were disposed of via a sentence of immediate imprisonment (an average of 51%), whereas a suspended sentence was imposed in an average of 18% of cases. These figures support the discussion in chapter 6 of this Report regarding the presumption of an immediate custodial sentence for the offence of rape, and the findings of research into rape sentencing conducted by the Judicial Researchers Office and presented by Charleton and Scott.<sup>232</sup>

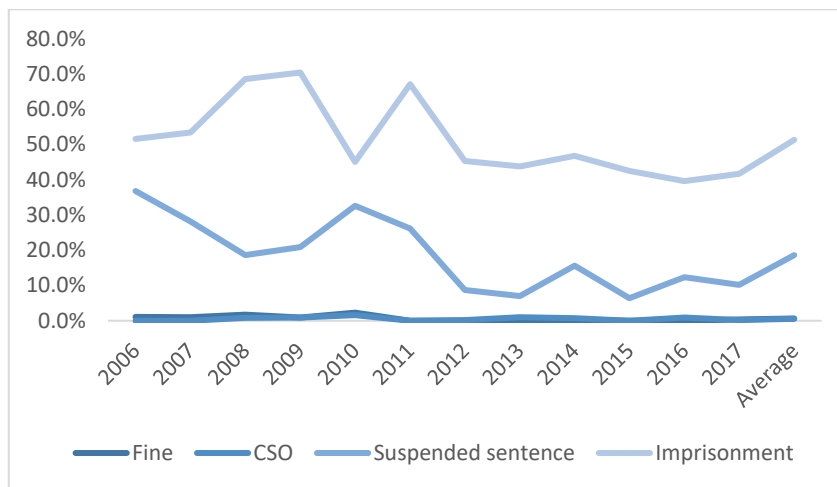


Figure 1: Sanctions imposed in the Circuit Court for sexual offences 2006-2017

*(v) Results: assault*

[4.89] In assault cases dealt with in the Circuit Court, the usage of the suspended sentence also decreased during the period examined. In 2006, 47% of all sanctions imposed were suspended sentences, compared with 22% in 2017. Once again, while the use of

<sup>232</sup> Charleton and Scott, “Throw Away the Key: Public and Judicial Approaches to Sentencing – Towards Reconciliation” (2013) 10 *Irish Probation Journal* 7.

immediate imprisonment gradually fell from 41% in 2006 to 26% in 2017, immediate imprisonment still remained the most commonly used sanction throughout this period (on average of 39%) compared with the suspended sentence (an average of 31%).

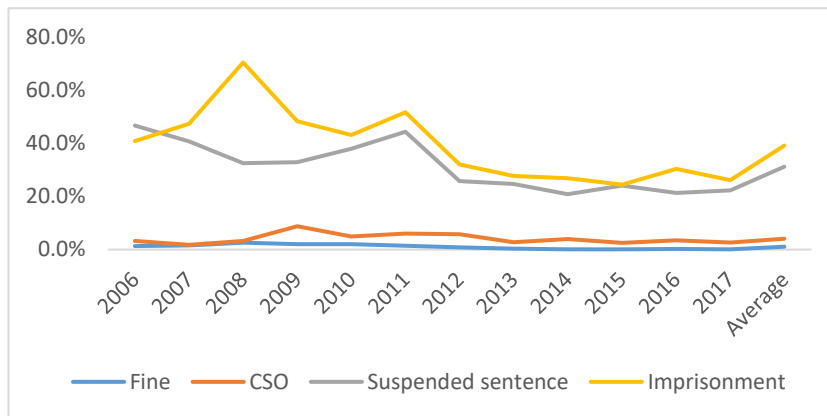


Figure 2: Sanctions imposed in the Circuit Court for assault 2006-2015

(vi) Results: drugs and firearms offences

[4.90] Figures 3 and 4 indicate the sanctions imposed by the Circuit Court for drugs and firearms offences. Similar to sexual offences and assault, the use of suspended sentences for these categories of offences has decreased over this time period. In 2006, 46% of all sanctions imposed for drug offences were suspended compared to 19% in 2017. Forty-one percent of all sanctions imposed for firearms offences in 2006 were suspended compared to 17% in 2017. These two offences carry presumptive minimum sentences under the *Misuse of Drugs Act 1977* and the *Firearms Acts*.<sup>233</sup> It is unsurprising, therefore, that, in general, the majority of sentences imposed for these offences were sentences of immediate imprisonment. However, it is interesting to note the sharp decline in the use of both imprisonment and the suspended sentence in 2012 in respect of both drug and firearms offences. In fact, from 2013 onwards, it appears that more suspended sentences than sentences of imprisonment were imposed for drug offences. The reason for this sharp decline is unclear and more research will have to be conducted to establish some likely causes.

<sup>233</sup> See further the discussion in chapter 6.

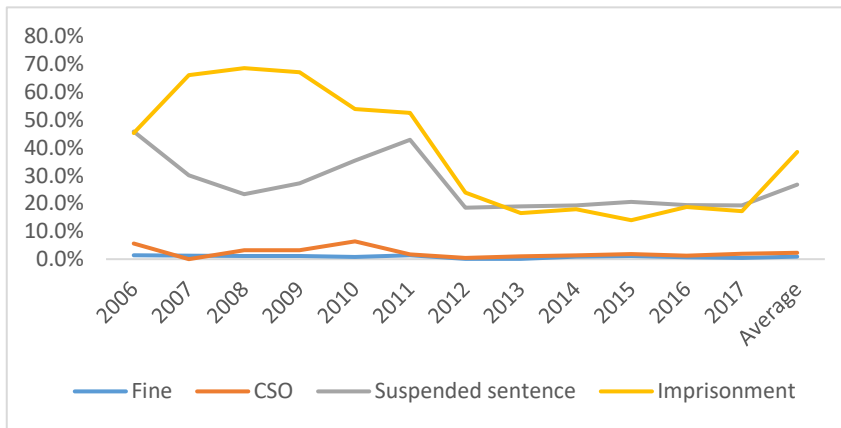


Figure 3 Sanctions imposed in the Circuit Court for drugs offences 2006-2015.

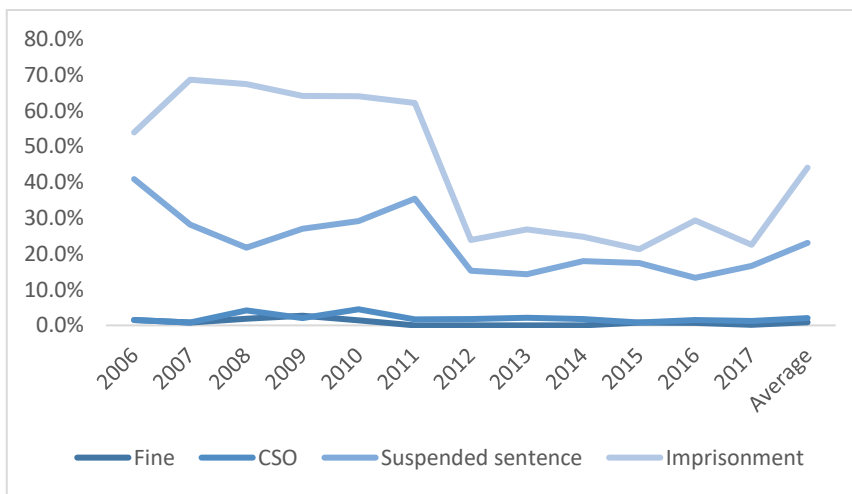


Figure 4 Sanctions imposed in the Circuit Court for firearms offences 2006-2017

(vii) *Robbery/fraud*

[4.91] *Figure 5* deals with sanctions imposed by the Circuit Court for theft/robbery/fraud. The data shows that the majority of these offences are dealt with by way of imprisonment (an average of 47%), compared with an average of 23% cases in which a suspended sentence was imposed. Similar to the offences discussed above, the use of suspended sentences for theft / robbery / fraud has decreased during this time period. In 2006, 37% of all sanctions imposed for theft/robbery / fraud were suspended compared to 17% in 2017. It should be noted that the use of immediate imprisonment also decreased during this period.



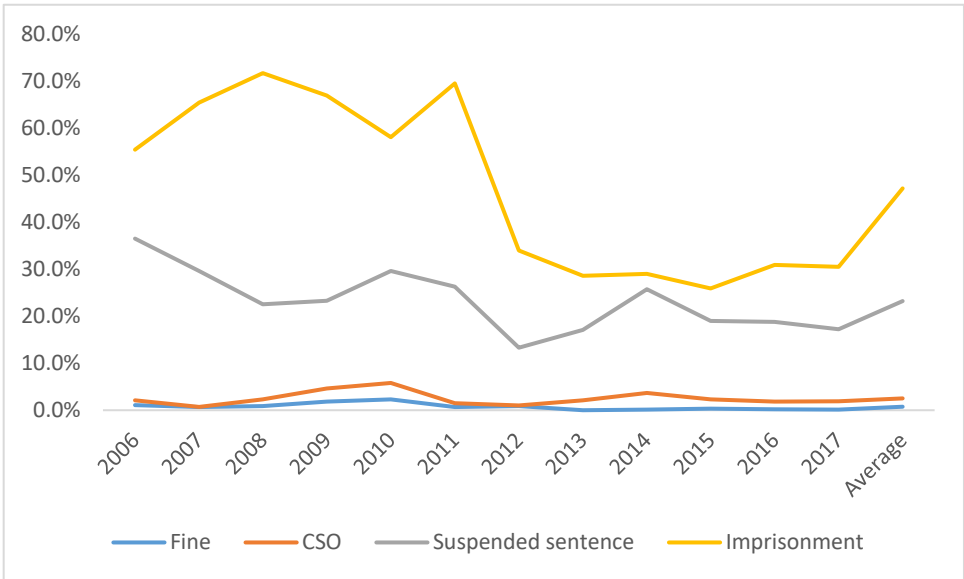


Figure 5 Sanctions imposed in the Circuit Court for theft / robbery / fraud 2006-2015

*(viii) Road traffic offences*

[4.92] Figure 6 highlights the sanctions imposed by the Circuit Court for road traffic offences. The data shows that the majority of sentences for road traffic offences dealt with in the Circuit Court were sentences of imprisonment. Between 2006 and 2011, the majority of offenders received sentences of immediate imprisonment (an average of 42%). The use of suspended sentences also decreased during this time period. Twenty-seven percent of all sanctions imposed for these offences were suspended in 2006 compared to 9% in 2017. It is also interesting to note that the higher levels of fines and community service orders imposed in respect of road traffic offences in comparison to the above discussed offences.

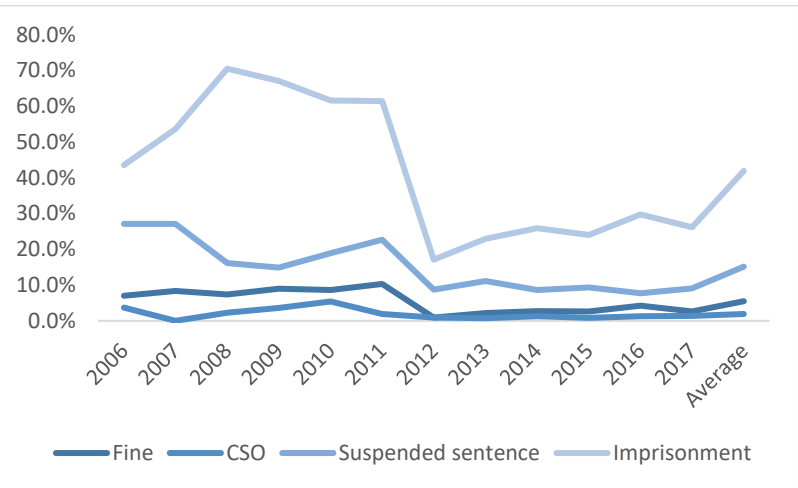


Figure 6 Sanctions imposed in the Circuit Court for road traffic offences 2006-2017

*(ix) Discussion*

- [4.93] The overarching finding emanating from the above data is a decline in the use of the fully suspended sentence in the Circuit Court during the period 2006 – 2017. Despite the somewhat limited nature of this study, the above presented data provides some useful insights into the application of the *O’Keefe* principle in the Irish courts. Firstly, the decline in the use of the fully suspended sentence is at least suggestive that courts may be opting not to impose a suspended sentence on the basis that the offence is not sufficiently serious to merit a custodial sentence. In other words, these cases are falling at the first limb of the *O’Keefe* principle. However, the Commission notes that the relatively stable percentage (between 0% – 5%) with which non-custodial sanctions were used in the Circuit Court from 2006-17 is not supportive of this assertion. Alternatively, the decline in the use of the suspended sentence during this period could be attributed to first instance sentencing courts deciding that the offence is sufficiently serious to merit a custodial sentence (first limb of *O’Keefe*) but that the circumstances of the case are such that the custodial sentence ought to be served immediately (second limb of *O’Keefe*). The fact that immediate imprisonment remained, in large part, the most commonly used sanction during the period examined gives further weight to this assertion (although the Commission does acknowledge that the use of immediate imprisonment also gradually declined during this period).
- [4.94] However, the Commission acknowledges that the decline in the use of the suspended sentence during this period may also have been caused by other factors extraneous to the application of the *O’Keefe* principle. For instance, in the period following the enactment of section 99 of the *Criminal Justice 2006*, several procedural deficiencies were highlighted by legal practitioners.<sup>234</sup> This resulted in a substantial amount of litigation being brought before the courts which ultimately culminated in the finding in *Moore v DPP*<sup>235</sup> that subsections 9 and 10 of section 99 were unconstitutional.<sup>236</sup> It could be argued, therefore, that these issues had a stultifying effect on the extent to which the suspended sentence was used by sentencing courts. Ultimately, further research is necessary in order to determine the exact extent to which Irish courts apply the *O’Keefe* principle.
- [4.95] In respect of compliance with the *Mah-Wing* principle, in the absence of more data on the lengths of suspended sentences and the proportionate length of suspended sentences compared to immediate sentences of imprisonment, it is difficult to make any sort of a definitive claim on the basis of the above data. However, as noted already, the findings of Riordan’s study do suggest that the *Mah-Wing* principle is being breached by sentencing

<sup>234</sup> See, for instance: Dwyer, “99/9: Nine Issues with Section Ninety-Nine” (2015) 20(5) *The Bar Review* 105 at page 108.

<sup>235</sup> [2016] IEHC 244.

<sup>236</sup> For a detailed discussion on this, see chapter 8 of this Report.

courts. In this regard, the Commission reiterates that the Sentencing Guidelines and Information Committee, when established pursuant to the *Judicial Council Act 2019*, may be well placed to carry out research on this issue.

## 5. Conclusion and recommendations

- [4.96] In its Issues Paper, the Commission sought views on five specific topics relating to the principles governing the use of suspended sentences:
- (1) Do the courts usually apply the *O'Keefe* principle and the *Mah-Wing* principle when deciding to impose a suspended sentence and when determining the length of this custodial sentence?
  - (2) Should the *O'Keefe* principle and the *Mah-Wing* principle be enshrined in legislation?
  - (3) Is suspension of a sentence of imprisonment appropriate to reflect factors that mitigate the seriousness of an offence as well as factors that are personal to the offender at the time of sentence?
  - (4) Are there any factors that are particularly relevant for the purpose of deciding if a sentence of imprisonment should be suspended?
  - (5) Is there any merit in having an exhaustive or non-exhaustive list of factors justifying the suspension of sentence set out in legislation or in some other formal source such as a guideline?
- [4.97] With regard to the first question, most responses pointed out that, in the absence of statistical data on the issue, it is not possible to answer with confidence whether the *O'Keefe* principle and the *Mah-Wing* principle are followed in practice. The statistical analysis conducted by the Commission in this chapter suggests that it is at least plausible that Irish courts are adhering to the *O'Keefe* principle. However, the Commission also accepts the point made in the submissions that the decrease in the use of the suspended sentence, as highlighted in the data, may be attributable to factors other than judicial adherence to the *O'Keefe* principle. As one submission pointed out, the decrease in the number of suspended sentences imposed could be due to the multitude of judicial reviews and constitutional challenges brought before the courts since the enactment of section 99 of the *Criminal Justice Act 2006*. Furthermore, and as will be discussed in detail in chapter 8 of this Report, there are several practical and procedural difficulties associated with section 99 which make the procedure somewhat cumbersome in practice. Viewed in this light, the decrease in the use of the suspended sentence may reflect judicial reticence to enforce section 99 of the 2006 Act. The Commission accepts the merits of this argument as further reinforcing the need for further research to be conducted in this area.

[4.98] As noted above, the research conducted by the Commission does not shed much light on whether the *Mah-Wing* principle is applied in practice. Riordan's study demonstrated that some of the interviewed judges breached the *Mah-Wing* principle and justified this practice on the basis that penalty escalation was the price that an offender pays in order to have his or her sentence suspended. Further, the decision of *The People (DPP) v Floyd*<sup>237</sup> is a prime example of penalty escalation (and a consequent breach of *Mah-Wing*) in action. However, the Commission reiterates that further research should be conducted by the SGIC to definitively ascertain whether the *Mah-Wing* principle is observed by the Irish courts.

**R. 4.01** If the principles set out in *O'Keefe* and *Mah-Wing* are applied, before imposing a suspended sentence, a sentencing court should first (1) satisfy itself that the offence is sufficiently serious to merit a custodial sentence and then (2) determine the length of that custodial sentence. Having completed the first two steps, a sentencing court should then (3) consider whether the circumstances of the case are such that the custodial sentence should be suspended. The Commission recommends that further research be conducted by the SGIC in order to ascertain whether the *O'Keefe* principle and the *Mah-Wing* principle are being observed by Irish sentencing courts.

[4.99] In respect of question (2), all submissions were in favour of setting out the *O'Keefe* principle and the *Mah-Wing* principle in a clear and coherent manner. However, views diverged on whether this should be done by legislation or by some other mechanism. On balance, the Commission agrees with the view that enshrining the *O'Keefe* principle and the *Mah-Wing* principle in legislation may be perceived as unduly interfering with judicial sentencing discretion. The Commission is of the view, therefore, that these principles could be comprehensively and coherently set out in the form of a sentencing guideline by the SGIC.

**R. 4.02** The Commission recommends that the *O'Keefe* principle and the *Mah-Wing* principle should be enshrined in a generic sentencing guideline drawn up by the SGIC.

[4.100] As discussed earlier in this chapter, the Irish case law, while accepting the *O'Keefe* principle and the *Mah-Wing principle* into Irish law, has not given any guidance as to how sentencing courts should apply these principles. While of the view that judicial sentencing discretion remain central to the inquiry at the first limb of the *O'Keefe* principle (step 1), the Commission has outlined the following factors that, in its view, may be useful for

<sup>237</sup> [2014] IECA 39.

sentencing courts to take into account when determining whether the offence is sufficiently serious to merit a custodial sentence:

- i. The *inherent* gravity of the offence, by reference to:
  - a) the legal ingredients involved in the commission of the offence;
  - b) the legislative maximum and occasional minimum sentences provided for by the Oireachtas, and;
  - c) whether the offence is the subject of a judicially-developed presumption of an immediate custodial sentence.
- ii. The *actual* gravity of the offence, by reference to the offender's moral culpability and the harm caused by the offending behaviour, and
- iii. In the event that the gravity of the offence merits a custodial sentence, whether the offender's personal mitigation has the effect of bringing the offence back below the custody threshold.

[4.101] The Commission also outlined how, having determined that the offence is sufficiently serious to merit a custodial sentence (step 1), the sentencing court should then apply the *Mah-Wing* principle in determining the length of the custodial sentence, by reference to the two-staged proportionality test as laid down by the Court of Appeal and outlined in the first section of this chapter (step 2). At this stage of the process, the sentencing court should bear in mind the *Mah-Wing* principle and not increase the length of the custodial sentence merely on the basis that it is going to be suspended, in part or in full.

**R. 4.03** The Commission recommends that any future guideline issued by the SGIC in respect of the *O'Keefe* principle and the *Mah-Wing* principle consider the observations made in this chapter in respect of the factors that may be relevant to each stage of the inquiry.

[4.102] However, this chapter has also noted how the inquiry at steps (1) and (2) of the process are similar in nature in that both require an assessment of the gravity of the offence, followed by the application of personal mitigating factors. In this regard, the Commission has noted how, at least at the level of principle, there is an important distinction to be drawn in terms of the purpose of both inquiries. Step (1) is concerned with determining the *type* of punishment, whereas step (2) relates to the *quantum* of punishment. Notwithstanding this theoretical distinction, however, the Commission acknowledges that, in practice, these two separate inquiries may become conflated, given the similarity in the factors relevant to both inquiries.

**R. 4.04** The Commission recommends that, in the formulation of any future guidelines issued by the SGIC in respect of the *O'Keefe* principle and the *Mah-Wing* principle, consideration be given as to whether the theoretical distinction between the type of punishment and the quantum of punishment should be observed in practice and, if so, what factors should be relevant to each stage of the process.

[4.103] Having determined that a custodial sentence is justified and fixed the length of the custodial sentence, the sentencing court should then proceed to consider the question of suspension (step 3). The majority of submissions were in agreement that, in general, personal mitigating factors are relevant to this stage of the process. However, the submissions were also in general agreement that offence-related mitigation should never be factored into the decision to suspend. This is because this category of mitigation is exclusively relevant to the first stage of the proportionality test, namely the assessment of the gravity of the offence. By extension, offence-related mitigation is crucial in determining the headline sentence. As outlined earlier in this chapter, fixing the headline sentence is the first stage in the determination of the length of the custodial sentence. As the length of the custodial sentence (step 2) must be fixed before the suspension question is considered (step 3), it follows that all factors relevant to fixing the headline sentence (including factors mitigating the gravity of the offence) must be dealt with before the question of suspension is considered

**R. 4.05** The Commission recommends that offence-related mitigation should not ordinarily be factored into the decision to suspend.

[4.104] On the other hand, personal mitigation is potentially relevant to both step 2 and step 3. Therefore, the Commission has highlighted that a potential issue around "double counting" arises if the sentencing judge is entitled to take into account the same personal mitigating factors twice. The Commission has already noted how the Court of Appeal has, at least by implication, held that double counting in this manner may amount to an error of principle.<sup>238</sup> The Commission is of the view that the question as to whether personal mitigation is factored in at the fixing of the length of the custodial sentence (step 2); or the question of suspension (step 3) is ultimately a matter for the particular sentencing court, based on the particular facts before it. However, a sentencing court should not take into account the same personal mitigation at both stages of the process.

<sup>238</sup> *The People (DPP) v Kavanagh* [2020] IECA 13 at para 24.

**R. 4.06** The Commission recommends that personal mitigation may be relevant to the question of suspension. However, given the fact that each personal mitigating factor is also potentially relevant to the setting of an appropriate custodial sentence, sentencing courts should be careful not to “double-count” the same factor at both steps (2) and (3) of the process.

**R. 4.07** The Commission recommends that the decision as to what stage a particular personal mitigating factor is taken into account is ultimately a matter for the discretion of the individual sentencing court, based on the facts before it.

[4.105] In response to question five, the Commission considers the personal mitigating factors set out earlier in this chapter to be particularly relevant to the question of suspension. However, as was stressed in the submissions, any list must be set out in a non-prescriptive manner. Each case is to be judged on its own facts and, in particular, the stage of the process at which each personal mitigating factor is accounted for a matter for the discretion of the individual sentencing judge (as long as he or she takes care to avoid any “double counting”).

**R. 4.08** The Commission recommends that the following list of personal mitigating factors are particularly relevant to whether a sentence should be suspended:

- (1) An absence of prior convictions;
- (2) Entry of a guilty plea;
- (3) Remorse;
- (4) Co-operation with authorities;
- (5) Good character;
- (6) Age;
- (7) Illness or physical/mental disability;
- (8) Currently in, or good prospects of employment or education;
- (9) Currently undergoing, or good prospects for, rehabilitation;
- (10) Specific circumstances make the individual unsuitable for prison, and
- (11) Family circumstances, in particular pregnant women or women with dependent

children.

[4.106] Views on question 5 were mostly negative, with many responses taking the view that a specific and exhaustive legislative list would be too inflexible and rigid and inimical to the discretionary and individualised nature of the Irish sentencing system. The preferred view was that sentencing guidelines would be very welcome, but that these should probably be shaped by the judiciary. The Commission is of the view that the SGIC, discussed earlier in this chapter, may be well-placed to address this issue.

**R. 4.09** The Commission recommends that the list of non-exhaustive factors outlined above could be set out in the form of a sentencing guideline by the SGIC.

[4.107] This chapter has also outlined some of the judicially-developed principles in respect of the setting of conditions of suspension. As discussed above, it is well-established that the conditions of suspension form part of the overall punishment. In this regard, the overarching principle stemming from the case law is that conditions of suspension should be proportionate and give the offender a reasonable opportunity of compliance, based on his or her personal circumstances.

**R. 4.10** The Commission recommends that sentencing courts, having decided that a suspended sentence is justified, should impose conditions of suspension that are proportionate both in terms of the duration of the operational period and the conditions of suspension, and give the offender a reasonable opportunity of compliance, based on his or her personal circumstances.



## CHAPTER 5 THE PART-SUSPENDED SENTENCE

### 1. Introduction

- [5.1] As noted in the previous chapter, the fully suspended sentence is a non-immediate custodial sentence of imprisonment. The custodial sentence has been imposed but has simultaneously been suspended on certain conditions. Therefore, the custodial element is only contingent on the offender not complying with his or her conditions of suspension and the suspended element of the sentence being revoked. In contrast, the part-suspended sentence is a two-phased sentence: the immediate custodial followed by the suspended custodial. It is clear, therefore, that both sanctions differ in terms of their punitive impact and, by extension, the sentencing rationales that they represent. It is therefore necessary to separately examine the principles and sentencing rationales underpinning the part-suspended sentence, as well as the circumstances in which the Irish courts deem the imposition of a part-suspended sentence to be appropriate.
- [5.2] This chapter begins with an analysis of the historical development of the part-suspended sentence in Ireland. The second section of the chapter analyses the principles and sentencing rationales underpinning the part-suspended sentence. The chapter then proceeds to outline and analyse some of the circumstances in which the imposition of a part-suspended sentence is deemed appropriate by the Irish courts. It is discussed how a part-suspended sentence is mainly used: (1) as a tool for incentivising rehabilitation; (2) a means of reflecting an offender's personal mitigation, and; (3) to give effect to the totality principle. The Commission also briefly outlines how the Court of Appeal has recently begun to use the part-suspended sentence in circumstances where an offender has had his or her sentence increased on foot of an undue leniency application pursuant to section 2 of the *Criminal Justice Act 1993*. The final substantive section of the chapter discusses the potential impact that the commencement of the *Parole Act 2019* may have on the operation of the part-suspended sentence in cases where the offender will also be eligible for parole during the currency of the sentence.
- [5.3] The final section of this chapter will outline the recommendations of the Commission in respect of the part-suspended sentence. Firstly, despite the fact that the part-suspended sentence and the fully suspended sentence differ in their structure and in terms of the sentencing aims which they represent, the Commission is of the view that adherence to the *O'Keefe* principle and the *Mah-Wing* principle are equally important in terms of ensuring that the overall sentence complies with the principle of proportionality. The Commission therefore recommends that these principles also be applied when a sentencing judge is considering whether to impose a part-suspended sentence.

- [5.4] In terms of the circumstances in which the part-suspended sentence is used, the Commission is of the view that the use of the part-suspended sentence as a means of incentivising an offender's rehabilitation is a commendable use of this sanction and one that is in compliance with the applicable principles. It therefore recommends its continued use in this regard. In respect of reflecting personal mitigation via part-suspension, the Commission is of the view that, ultimately, it should remain a matter for the sentencing judge as to how personal mitigation is accounted for. However, the Commission is also cognisant of the problems, from a proportionality perspective, associated with reflecting personal mitigation via part-suspension. The Commission therefore recommends that a sentencing court should always begin by asking itself whether the justice of the case requires that personal mitigation be reflected by a reduction from the headline sentence, as opposed to part-suspension. The Commission also recommends that sentencing courts adopt a similar approach when considering whether to use the part-suspended sentence as a means of giving effect to the totality principle. It is also recommended by the Commission that the use of the part-suspended sentence by the Court of Appeal – as a means of offsetting an offender's disappointment at having their original sentence increased on foot of an undue leniency application – be continued.
- [5.5] Finally, the Commission recommends that consideration be given to the likely impact of the *Parole Act 2019*, once commenced, on a sentencing court's statutory jurisdiction to impose a part-suspended sentence in cases where the offender will also be eligible for parole during the currency of the sentence.

## **2. Development of the part-suspended sentence in Ireland**

### **(a) The reviewable sentence: "Butler orders"**

- [5.6] Section 99 of the *Criminal Justice Act 2006* makes statutory provision for the part-suspended sentence in Irish law. However, part-suspended sentences had long been used by the Irish courts prior to the enactment of the 2006 Act. Osborough notes that "a species of part-suspension is encountered as early as 1944 in the case of *The People (AG) v Grey*."<sup>1</sup> The offender had been given consecutive sentences of six months' and three months' imprisonment in the Circuit Court. The judge stipulated that if the offender kept the peace and was of good behaviour for a period of 12 months, then the three-month sentence would not be put into operation.
- [5.7] During the last quarter of the twentieth century, the part-suspended sentence presented itself for the most part in the form of the reviewable sentence. Under a reviewable sentence, a determinate prison sentence was imposed with the direction that, if the

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<sup>1</sup> [1944] IR 326, as discussed in Osborough, "A 'Damocles' Sword Guaranteed Irish: The Suspended Sentence in the Republic of Ireland" (1982) 17 *Irish Jurist* 221 at pages 245 – 6.

offender were returned to the court on a specified date, the court would then review the sentence with a view to suspending the balance. If the offender had engaged positively with prison services and complied with prison discipline in the interim, then the court would invariably suspend the remainder of the sentence from the date of review. It has been observed that this type of part-suspended sentence can best be seen as a judicial counter-measure to the "revolving door syndrome" that existed in the severely overcrowded Irish Prison system in the 1980s.<sup>2</sup> O'Malley notes how the reviewable sentence was an effort on the part of the judiciary to ensure that the Prison Authorities would not release prisoners prior to the review period, during which time the prisoners would hopefully avail of some of the rehabilitative services in prison.<sup>3</sup>

- [5.8] This type of part-suspended sentence was first recognised by the Supreme Court in *The State (P v Woods) v AG*,<sup>4</sup> where a reviewable sentence imposed by Butler J in the Central Criminal Court survived a constitutional challenge. The Supreme Court rejected the argument that the "Butler Order", as it became known, usurped the role of the Executive on the basis that the court had retained seisin of the matter to determine, firstly, whether the applicant had complied with prison discipline and, secondly, whether the balance of the sentence should be suspended from the date of review. The Butler Order survived a further constitutional challenge in *The State (Morris) v Governor of Mountjoy Prison*.<sup>5</sup> Four fundamental objections to the use of the reviewable sentence were outlined by Henchy J in the Court of Criminal Appeal in *The People (DPP) v Cahill*.<sup>6</sup> The practice was held to be incompatible with the powers of the President of the High Court to allocate cases, incompatible with the offender's right of appeal, in conflict with the principles of penology, and an encroachment on the power of the Executive to commute or remit sentence pursuant to Article 13.6 of the Constitution of Ireland.
- [5.9] O'Malley notes, however, that the judgment of the Court of Criminal Appeal in *Cahill* was essentially ignored: such sentences continued to be imposed for some time after Henchy J's "demolishing of the practice of part-suspension" in *Cahill*.<sup>7</sup> Indeed, the Supreme Court in *The People (DPP) v Aylmer*<sup>8</sup> refused to quash the Butler Order imposed in that case, or indeed to comment on its desirability more generally. However, in *The People (DPP) v*

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<sup>2</sup> O'Malley, *Sentencing Law and Practice* 2nd ed (Round Hall 2006) at para 22.19.

<sup>3</sup> *Ibid.*

<sup>4</sup> [1969] IR 385.

<sup>5</sup> *The State (Morris) v Governor of Mountjoy Prison* (Supreme Court, 16 December 1970).

<sup>6</sup> [1980] IR 8.

<sup>7</sup> Osborough, "A 'Damocles' Sword Guaranteed Irish: The Suspended Sentence in the Republic of Ireland" (1982) 17 *Irish Jurist* 221 at page 250.

<sup>8</sup> [1995] 2 ILRM 624.

*Finn*<sup>9</sup> the Supreme Court held that reviewable sentences were undesirable and should be discontinued on the basis that this judicially developed practice was undesirable and should be discontinued on separation of powers grounds.<sup>10</sup> While the Supreme Court expressly stated that its remarks were *obiter* and should not be seen as invalidating any reviewable sentence in operation, the case law<sup>11</sup> in this area is now well settled that this type of part-suspended sentence is only permissible where there is an express statutory power to do so.<sup>12</sup>

**(b) The conventional part-suspended sentence**

- [5.10] The conventional part-suspended sentence can be clearly distinguished from the “Butler Order”: when a part-suspended sentence is imposed, the court announces both the custodial part of the sentence and the suspended period of the sentence on the date of sentence. From the date of imposition, the Court is *functus officio* and no longer retains seisin of the case. Despite the popularity of the reviewable sentence in the last quarter of the twentieth century, it seems that the conventional part-suspended sentence was also in use during this period. As noted by the Supreme Court in *O’Brien v Governor of Limerick Prison*,<sup>13</sup> from the 1960s onwards it became very common for “sentences to carry a proviso that the latter part of it be suspended.”<sup>14</sup> However, the sanction also ran into difficulty in *O’Brien*. In this case, the appellant had been sentenced to a period ten years’ imprisonment with the final six years suspended. Having served three out of the four years of the custodial element of his sentence, he brought an application under Article 40.4 of the Constitution of Ireland, challenging the lawfulness of his detention. His argument was that, having regard to remission under the terms of the then-applicable

<sup>9</sup> [2000] IESC 75, [2001] 2 IR 25.

<sup>10</sup> For a more detailed discussion of the Court’s reasoning in this case, see chapter 7 of this Report.

<sup>11</sup> *The People (DPP) v Dunne* [2003] 4 IR 87 at page 92.

<sup>12</sup> Section 27(3J) of the *Misuse of Drugs Act 1977*, as substituted by section 33 of the *Criminal Justice Act 2007*, allows the sentencing court to review a sentence with a view to suspending the remaining portion from the review date, provided that the court is satisfied that the offender, at the time of the offence, was addicted to one or more controlled drugs and that the addiction was a significant factor in the commission of the specific offence under section 15A. However, as clarified by the Court of Criminal Appeal in *The People (DPP) v Dunne* [2003] 4 IR 87, this statutory power to impose a reviewable sentence is confined to circumstances in which the court has, at least, imposed the presumptive minimum sentence of 10 years’ imprisonment, as the review power is only exercisable after the offender has served five years of the sentence. One exception to this rule is the practice of reviewable sentences of detention permitted for child offenders being sentenced to lengthy sentences on foot of serious indictable offences, as established in *The People (DPP) v DG* [2005] IECCA 75. Chapter 7 of this Report contains a detailed discussion as to the legal basis for this judicially developed practice.

<sup>13</sup> [1997] ILRM 349.

<sup>14</sup> *Ibid* at para 11.

legislation, section 1 of the *Prisons Ireland Act 1907* and the *Rules for the Government of Prisons 1947*, he was entitled to standard remission of one quarter of his sentence for good behaviour. The appellant maintained that his eligibility for remission was to be calculated only by reference to the custodial element of the sentence and, as he had already served three of out of this four-year custodial period, he was entitled to be released.

- [5.11] The Supreme Court found in favour of the applicant – while agreeing that it was the clear intention of the sentencing judge that the applicant would spend at least four years in custody, the Court held that that intention was inconsistent with the applicable legislation, which clearly envisaged that the period of imprisonment would be the same length as the period of the sentence, and that a prisoner’s sentence is deemed to have expired on discharge. Section 1 of the 1907 Act provides that “on his discharge [the prisoner’s] sentence shall be deemed to have expired.” Therefore, it was held that the statutory framework was incompatible with the type of order made in this case where, despite being released, the prisoner faced the possibility of further imprisonment if he breached a condition of suspension. The sentence was deemed valid insofar as the four-year custodial portion was concerned and it was against that four-year term that remission was to be calculated. Accordingly, the applicant’s immediate release was ordered.
- [5.12] Section 1 of the 1907 Act was repealed<sup>15</sup> almost immediately after the decision in *O’Brien*, which abolished the presumption inherent in the legislation that a sentence was fully discharged upon the release of a prisoner. The problematic nature of the use of the part-suspended sentence by the trial judge in *O’Brien* was also no longer an issue.<sup>16</sup>
- [5.13] The part-suspended sentence was finally given statutory force in Irish law by section 99 of the *Criminal Justice Act 2006*. Section 99(1) expressly provides that the sentencing court may make an order suspending a sentence of imprisonment “in whole or in part”. Section 99(3) of the 2006 Act provides that a sentencing court may, when imposing a suspended sentence of imprisonment (in full or in part), impose any conditions of suspension that it considers:
- a. appropriate, having regard to the nature of the offence; and
  - b. that will reduce the likelihood of the offender committing any other offence

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<sup>15</sup> By section 23 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*.

<sup>16</sup> Section 99(19) of the *Criminal Justice Act 2006* places the decision of the Supreme Court in *O’Brien v Governor of Limerick Prison* on a statutory footing. Subsection 19 provides that section 99 shall not affect the law on remission of sentence.

[5.14] Section 99(4) of the 2006 Act also outlines some of the conditions which may be attached to a part-suspended sentence. It provides that:

“when making an order under subsection 1 consisting of the suspension in part of a sentence of imprisonment...impose any or more of the following conditions:

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

(b) that the person undergo such –

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

(ii) course of education, training or therapy,

(iii) psychological counselling or other treatment.

as may be approved by the court;

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

**(c) The prevalence of the part-suspended sentence**

[5.15] As noted earlier, the reviewable sentence was a widely used variation of the part-suspended sentence up until the Supreme Court decision in *Finn*. In light of this decision, it seems that the conventional part-suspended sentence has now come to prominence. Judge Riordan, who carried out an extensive study of the attitudes of the Irish judiciary to the community service order and the suspended sentence in Ireland,<sup>17</sup> made the following observations on the manner in which the conventional-part suspended sentence replaced the reviewable sentence subsequent to the Supreme Court decision in *Finn*:

“the judges interviewed, especially the sentencing judges at first instance, appear to have abandoned the practice of reviewing sentences completely...the courts which formerly used the ‘Butler Order’ are now deploying the part suspended sentence in its stead.”<sup>18</sup>

[5.16] The quantitative element of Riordan’s study gives further weight to the above observation. He examined all of the sentences handed down in The Central Criminal

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

<sup>18</sup> *Ibid* at page 277.

Court, Dublin Circuit Criminal Court and Cork Circuit Criminal Court throughout 2006. He found that:

- 47.45% of the total custodial sentences handed down in the Central Criminal Court were partially suspended
- 40.1% of the total custodial sentences handed down in the Dublin Circuit Criminal consisted of a partially suspended element, and:
- 37.93% of the total custodial sentences handed down in the Cork Circuit Criminal Court consisted of a partially suspended sentence.<sup>19</sup>

[5.17] This quantitative study took place five years after *Finn* and therefore these figures are particularly useful in the context of highlighting how the conventional part-suspended sentence replaced the reviewable sentence after the Supreme Court's ruling in that case. Riordan's study also serves to highlight the more general point that the part-suspended sentence remained a popular sentencing option before it was given statutory force from 2 October 2006.<sup>20</sup>

[5.18] Furthermore, studies conducted since the enactment of section 99 of the 2006 Act suggest that its usage is at least as prevalent as it was pre-the 2006 Act. In May 2016, *The Irish Times* published an analysis of sentences handed down for rape convictions in the Central Criminal Court between 2013 and 2015.<sup>21</sup> This analysis showed that, in 70% of these cases, the offender received a part-suspended sentence. A more recent study carried out by Women's Aid<sup>22</sup> yielded broadly similar results. In this study, 65 cases of domestic abuse reported in the media were analysed over a 12-month period from 1 May 2018 until 30 April 2019. Out of the 65 cases, sentences of imprisonment were reported in 45 cases, with 25 (55%) of these being partly suspended.<sup>23</sup> These studies provide valuable insights into the part-suspended sentence. However, the Commission notes that further analysis is desirable in order to obtain a more comprehensive picture of the use of this sentencing measure in the Irish courts. As the authors of the Women's Aid study noted,

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<sup>19</sup> *Ibid* at page 282.

<sup>20</sup> Section 99 of the 2006 Act was not commenced until 2 October 2006, see *Criminal Justice Act 2006 (Commencement) Order 2006* (SI No 390 of 2006).

<sup>21</sup> Conor Gallagher, "Rape Sentences Averaging 10 Years after Rise over Last Decade" *The Irish Times* (23 May 2016) <<https://www.irishtimes.com/news/crime-and-law/rape-sentences-averaging-10-years-after-rise-over-last-decade-1.2656754>> accessed on 23 April 2020.

<sup>22</sup> Women's Aid and Monica Mazzone, *Unheard and Uncounted – Women, Domestic Abuse and the Irish Criminal Justice System* <[https://www.womensaid.ie/assets/files/pdf/unheard\\_and\\_uncounted\\_-\\_women\\_domestic\\_abuse\\_and\\_the\\_irish\\_criminal\\_justice\\_system\\_full\\_report.pdf](https://www.womensaid.ie/assets/files/pdf/unheard_and_uncounted_-_women_domestic_abuse_and_the_irish_criminal_justice_system_full_report.pdf)> accessed on 20 April 2020.

<sup>23</sup> *Ibid* at page 28.

the fact that they had to rely exclusively on media reports had the effect “of skewing the results towards more media worthy incidents.”<sup>24</sup> The recently commenced<sup>25</sup> *Judicial Council Act 2019* established the Judicial Council,<sup>26</sup> which, in turn, established the Sentencing Guidelines and Information Committee (SGIC)<sup>27</sup> on 30 June 2020.<sup>28</sup> As well as empowering the SGIC to take the unprecedented step of preparing and monitoring the operation of sentencing guidelines in this jurisdiction,<sup>29</sup> the 2019 Act also enables the SGIC to collate and disseminate information on sentences imposed by the courts to judges and other interested persons.<sup>30</sup> The Commission notes in passing that the SGIC might be well placed to carry out research into the prevalence of the part-suspended sentence in the Irish courts.

### 3. An overview of the part-suspended sentence

#### (a) Guiding principles

[5.19] In chapter 4 of this Report, the Commission outlined in detail the fundamental principles governing the fully suspended sentence in this jurisdiction. To briefly recap: before a sentencing court imposes a fully suspended sentence of imprisonment, a sentencing court must apply the principle established by the Court of Appeal of England and Wales in *R v O’Keefe*<sup>31</sup> and subsequently approved of in this jurisdiction.<sup>32</sup> The *O’Keefe* principle requires that a sentencing court may only consider whether a suspended sentence is justified once it has already determined that the seriousness of the offending behaviour is sufficiently serious to merit a custodial sentence. The *O’Keefe* principle is complemented by another fundamental principle governing the suspended sentence, namely that

<sup>24</sup> *Ibid* at page 25.

<sup>25</sup> *Judicial Council Act 2019 (Commencement) Order 2019* (SI No 457 of 2019); *Judicial Council Act 2019 (Commencement) (No 2) Order 2019* (S.I. No. 640 of 2019).

<sup>26</sup> The Judicial Council was established on 7 February 2020 pursuant to section 6 of the *Judicial Council Act 2019*.

<sup>27</sup> Section 23(1) of the *Judicial Council Act 2019*.

<sup>28</sup> On 22 July 2020, the newly appointed lay members of the SGIC were announced. See <[https://merrionstreet.ie/en/News-Room/Releases/Minister for Justice Helen McEntee announces appointments of Lay Members to Judicial Council Committees.html](https://merrionstreet.ie/en/News-Room/Releases/Minister%20for%20Justice%20Helen%20McEntee%20announces%20appointments%20of%20Lay%20Members%20to%20Judicial%20Council%20Committees.html)> accessed on 4 August 2020.

<sup>29</sup> Sections 23(2)(a), 23(2)(b) and 23(2)(c) of the *Judicial Council Act 2019*.

<sup>30</sup> Sections 23(2)(d) and 23(2)(e) of the *Judicial Council Act 2019*.

<sup>31</sup> [1969] QB 29.

<sup>32</sup> *The People (DPP) v Slattery* [2017] IECA 90 at para 34; *Moore v Brady* [2006] IEHC 434 at para 36; *The People (DPP) v Kavanagh* [2020] IECA 13 at para 24; *The People (DPP) v DW* [2020] IECA 145 at paras 36 – 39.



established by the Court of Appeal of England and Wales in *R v Mah-Wing* and also subsequently approved in this jurisdiction.<sup>33</sup> The *Mah-Wing* principle dictates that a sentencing court should not pass a longer sentence than it otherwise would merely on the basis that it has decided to suspend the sentence. Taken together, *O'Keefe* and *Mah-Wing* establish that, in considering whether to impose a suspended sentence, a sentencing court should consider the following sequence of steps:

- (1) it must first satisfy itself that the offence is sufficiently serious to merit a custodial sentence,
- (2) Having done so, the court should then determine the length of that custodial sentence, and;
- (3) Having fixed the length of the custodial sentence, the court should consider whether the circumstances of the case are such that the custodial sentence need not be served immediately.

[5.20] The question arises as to whether these principles are also applicable to the part-suspended sentence. As discussed in chapter 4, the application of these principles in the context of the fully suspended sentence is crucial in counteracting the problems of net-widening and penalty escalation. Net-widening refers to a practice on the part of sentencing judges to use the suspended sentence as a substitute for non-custodial measures such as community service and probation, in circumstances where the sentencing judge is not satisfied that the offence merits a custodial sentence. This is clearly in contravention with step (1) above. Penalty-escalation, on the other hand, refers to the tendency of sentencing judges to increase the length of the sentence (either the custodial element or the suspended element) on the basis that the sentence is going to be suspended.<sup>34</sup> This practice is clearly in breach of the *Mah-Wing* principle and step (2) above. However, as a part-suspended sentence involves immediate custody, the potential for net-widening is not as pronounced as it is in the case of the fully suspended sentence. In contrast, however, the potential for penalty escalation is certainly an issue in terms of the part-suspended sentence. For instance, in *The People (DPP) v Floyd*,<sup>35</sup> the Court of Appeal held that the sentencing judge had erred as, having decided that the appropriate custodial sentence was one of five years' imprisonment, then proceeded to impose a six year custodial sentence year with the final year suspended.

<sup>33</sup> *The People (DPP) v Loving* [2006] IECCA 28, [2006] 3 IR 355; *The People (DPP) v Floyd* [2014] IECA 39; *The People (DPP) v DW* [2020] IECA 145 at paras 36 – 39.

<sup>34</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at pages 266 – 267.

<sup>35</sup> [2014] IECA 39.

- [5.21] Clearly, therefore, the above three-staged process should be adhered to by sentencing judges when considering whether to impose a part-suspended sentence. In other words, before considering the issue of part-suspension, a sentencing court should first determine that the offending behaviour is sufficiently serious so as to merit the imposition of a custodial sentence (step 1) and; then set the appropriate custodial sentence (step 2). Having done this, a sentencing court may then impose a part-suspended sentence (as *per* step 3) if satisfied that, while the circumstances of the case are such that the initial portion of the custodial sentence ought to be served immediately, there are also extenuating circumstances such that the latter portion of the custodial sentence may be suspended.
- [5.22] It is clear from the above that, while the applicable principles are the same for both sanctions, they differ in structural terms. The part-suspended sentence presents as a two-phased sentence – the immediate custodial sentence followed by the suspended custodial sentence. In contrast, a fully suspended sentence does not involve any immediate element of custody. Therefore, the two sanctions differ in terms of their punitive effect and, by extension, the sentencing aims which they cater for.

**(b) Sentencing aims underpinning the part-suspended sentence**

- [5.23] In chapter 3, the Commission discussed how the suspended sentence may concurrently serve a number of different sentencing aims: it can advance the penal objectives of retribution, deterrence (general and specific), and rehabilitation and can also, on occasion, promote the avoidance of prison which, it is suggested, is another legitimate consideration at sentencing. The setting of an appropriate custodial sentence, by reference to the proportionality principle and the principle established in *Mah-Wing*, ensures that these penal purposes are catered for. On the other hand, the ultimate decision to suspend the custodial sentence (whether in full or in part) represents a view on the part of the sentencing judge that a measure aimed at encouraging desistance is also desirable in the particular case.
- [5.24] However, the part-suspended sentence is particularly well adapted to serving the different, though sometimes competing, purposes of punishment. The stigma of a criminal conviction, the obligation to adhere to the conditions of suspension and the accompanying threat of imprisonment during the operational period of a fully suspended sentence do undoubtedly carry a certain punitive value.<sup>36</sup> However, in cases of full suspension, punishment in the sense of imprisonment is contingent solely on the offender breaching his or her conditions of suspension and the suspended element of the sentence being activated. Consequently, the penal aims of retribution and general deterrence, while present, are somewhat subservient to specific deterrence, rehabilitation and the avoidance of prison, which may be seen as the decisive sentencing aims of a fully

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<sup>36</sup> O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2006) at paras 22.03 – 22.05.

suspended sentence. By contrast, in the case of a part-suspended sentence, both punitiveness and desistance are catered for in (almost) equal measure. Riordan puts it well, stating that:

“Perhaps the most salient feature of the part-suspended sentence as exercised in the Irish criminal courts is the consecutive advancement of two sentencing rationales. Firstly, the extraction of retribution by obliging the offender to serve an initial period in custody is combined with the second feature of control of the released prisoner in society under the Damocles’ sword of further punishment if the convicted person should further transgress or not abide by conditions addressed to mould his/her behaviour for the period of suspension.”<sup>37</sup>

[5.25] This characterisation of the part-suspended sentence was expressed in similar terms in the recent decision of Court of Appeal in *The People (DPP) v Kavanagh*,<sup>38</sup> where the Court (Edwards J) stated that:

“In addition to offering [the offender] a positive incentive [to reform and desist from future offending behaviour], such a [part-suspended] sentence also has the effect of holding a Sword of Damocles over the offender for the duration of the period of suspension. It therefore seeks to achieve future behaviour modification primarily through incentive, but also to some extent through deterrence, whilst at the same time still requiring the offender to spend some time in custody both as censure and as punishment.”<sup>39</sup>

[5.26] The above statements capture the essence of the part-suspended sentence in an Irish context. The imposition of an immediate custodial sentence ensures that the offender is punished by the most severe sanction available under Irish law – imprisonment – while the suspended element of the sentence is imposed with the aim of guiding the offender away from future criminal behaviour. The desistance rationale underpinning this second-phase of the sentence may be achieved through specific deterrence measures. The penal aim of specific deterrence is recognised in section 99 of the *Criminal Justice Act 2006*. The mandatory conditions to keep the peace and be of good behaviour,<sup>40</sup> the provision which allows the court to impose any other conditions as it considers necessary to reduce the likelihood of the offender committing any further offences,<sup>41</sup> and the specific conditions

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<sup>37</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 284.

<sup>38</sup> [2020] IECA 13.

<sup>39</sup> *Ibid* at para 16.

<sup>40</sup> Section 99(2) of the *Criminal Justice Act 2006*.

<sup>41</sup> Section 99(3)(b) of the *Criminal Justice Act 2006*.

which may be attached to a part-suspended sentence only,<sup>42</sup> all represent statutory expressions of specific deterrence in an Irish context. These legislative provisions, in particular section 99(3) and section 99(4) of the 2006 Act, also highlight that the part-suspended sentence may also serve a rehabilitative purpose. The rehabilitative purpose underpinning the part-suspended sentence will be discussed in detail in the next section of this chapter, along with the other situations in which the Irish courts deem the imposition of a part-suspended sentence to be appropriate in the circumstances of the case.

#### **4. Application of the part-suspended sentence in the Irish courts**

[5.27] The part-suspended sentence is a commonly used sanction in the Irish courts. This section will analyse and discuss the three main situations in which a part-suspended is deemed appropriate in the Irish courts, namely as means of: (1) incentivising the offender's rehabilitation, (2) reflecting his or her personal mitigation, or (3) giving effect to the totality principle. This section will then conclude with a brief discussion of how the Court of Appeal has recently begun to use the part-suspended sentence in the context of undue leniency applications pursuant to section 2 of the *Criminal Justice Act 1993*.

##### **(a) A tool for incentivising rehabilitation**

[5.28] It is well established in Irish case law that a sentencing judge is required, where appropriate, to incentivise the offender's rehabilitation.<sup>43</sup> In an Irish context, the part-suspended sentence is commonly used for this purpose.<sup>44</sup> A failure to incentivise the offender's rehabilitation, where appropriate to do so, will amount to an error of principle.<sup>45</sup>

[5.29] However, the Court of Appeal has also stressed on numerous occasions that this rule is not absolute. A court is not required in every case to part-suspend a sentence of imprisonment in furtherance of some abstract notion of rehabilitating the offender. Rather, it is by now well-established that, in order to justify the imposition of a part-suspended sentence as a means of encouraging rehabilitation, there must be satisfactory

<sup>42</sup> Section 99(4) of the *Criminal Justice Act 2006*.

<sup>43</sup> This is sometimes referred to as the "last chance" principle and was established in this jurisdiction in *The People (DPP) v Jennings* (Court of Criminal Appeal, 15 February 1999). See also *The People (DPP) v McGinty* [2006] IECCA 37.

<sup>44</sup> See, for instance: *The People (DPP) v Flynn* [2015] IECA 290; *The People (DPP) v Lawlor* [2016] IECA 23; *The People (DPP) v Crilly* [2019] IECA 143; *The People (DPP) v DM* [2019] IECA 147; *The People (DPP) v Sloyan* [2019] IECA 242; *The People (DPP) v DF* [2020] IECA 40; *The People (DPP) v McGrath* [2020] IECA 41.

<sup>45</sup> See, for instance: *The People (DPP) v Flynn* [2015] IECA 290; *The People (DPP) v Heirouche* [2018] IECA 99.

evidence to show that part-suspension would be a worthwhile exercise on the part of the sentencing court. In *The People (DPP) v Coughlan*<sup>46</sup> the Court of Appeal stated that:

“before an intervention, involving going the extra mile would be justified on the grounds of rewarding progress towards rehabilitation to date and/or to incentivise future rehabilitation there has to be a sound evidential basis for so intervening. There has to be evidence of a real prospect of rehabilitation.”<sup>47</sup>

[5.30] It is clear therefore that there must be some evidence, based on past conduct, from which the court can infer a genuine desire on the part of the offender to rehabilitate. Such a “sound evidential basis” for so intervening was found to be present by the Court of Appeal in *The People (DPP) v Polanski*.<sup>48</sup> In this case, the Court held that the sentencing court had erred in failing to have regard to the evidence before it that the offender had made some genuine efforts at rehabilitation. This “objective extrinsic evidence” came in the form of a letter from an addiction counsellor in prison. This letter stated that the appellant had attended 21 counselling sessions prior to sentencing and that the appellant had presented as someone who was genuinely committed to tackling his addiction. In the circumstances, the Court of Appeal held that the sentencing judge had erred in failing to incentivise the continued rehabilitation of the appellant by way of a partial suspension of the sentence.

[5.31] In contrast, in *The People (DPP) v O’Brien*,<sup>49</sup> the Court of Appeal rejected a submission that the sentencing judge had erred in not suspending part of the sentence on the basis that:

“the appellant had previously received such an incentive but had spurned it. Indeed, the present offence was committed during the suspended portion of the sentence in which that incentive had been provided. While there was evidence that the appellant had received some addiction counselling while in prison, no concrete proposals concerning how he proposed to continue rehabilitation upon his release had been put before the Court. In those circumstances it was not an appropriate case in which to part suspend any portion of the sentence, and in our view the sentencing judge was correct to decline to do so.”<sup>50</sup>

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<sup>46</sup> [2019] IECA 173.

<sup>47</sup> *Ibid* at para 25.

<sup>48</sup> [2018] IECA 225.

<sup>49</sup> [2016] IECA 164. Similarly, in *The People (DPP) v Joyce* [2019] IECA 225 the Court rejected the submission that the sentencing judge was required to part-suspend the sentence in circumstances where the offender had recently had a suspended sentence imposed and had not availed of the opportunity afforded to her by the court on that occasion.

<sup>50</sup> [2016] IECA 164 at para 31.

- [5.32] The Court of Appeal has also held that the imposition of a part-suspended sentence in circumstances where there is no evidential basis for so doing will amount to an error of principle on the part of the sentencing judge. For example, in *The People (DPP) v Cummins*,<sup>51</sup> the suspension of the final five months of a twelve-month sentence for attempted robbery was held to be unduly lenient by the Court of Appeal. One of the reasons for so holding was that there “was no evidential basis upon which to suspend the final five months of that sentence.”<sup>52</sup>
- [5.33] Finally, a sentencing judge will not be required to part-suspend a sentence in circumstances where the offender’s rehabilitation has already occurred and he or she does not need any incentive to rehabilitate. For instance, in *The People (DPP) v O’Brien*,<sup>53</sup> the Court of Appeal rejected an argument that the sentencing judge had erred in not part-suspending some of the appellant’s custodial sentence. The evidence before the sentencing court was that the appellant had not offended in the six years between the offence and sentence, had no prior convictions, and was highly unlikely to re-offend again in the future. On this basis the Court of Appeal held that:

“the sentencing judge was entitled to take the view that the appellant’s rehabilitation had already occurred and that there was, therefore, no need to include an element in the sentence designed to encourage future good behaviour or to encourage any form of rehabilitation.”<sup>54</sup>

- [5.34] While it must be acknowledged that rehabilitation is ultimately dependent on factors beyond the courts’ control, such as the availability of, and the degree of individual engagement with, treatment programmes in prison,<sup>55</sup> it is clear that the part-suspended sentence is perceived by the Court of Appeal to be a very useful tool for incentivising rehabilitation. The Commission is of the view that this practice is an appropriate use of the part-suspended sentence and also one which is entirely consistent with the *O’Keefe* principle, outlined above, as it relates to the part-suspended sentence. In other words, the sentencing court may well have determined that (1) the offending behaviour is sufficiently serious so as to merit a custodial sentence, and (2) the circumstances of the case are such that the initial portion of the custodial sentence should be served immediately. However, if the offender has shown a sustained effort at rehabilitation, from which a genuine intention may be inferred, the sentencing court may deem this to be a compelling extenuating circumstance to determine that the latter portion of the custodial sentence

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<sup>51</sup> [2020] IECA 42.

<sup>52</sup> *Ibid* at para 23.

<sup>53</sup> [2015] IECA 304.

<sup>54</sup> *Ibid* at para 39.

<sup>55</sup> O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2006) at para 5.58.

be suspended. The Commission considers this to be a legitimate and worthy use of the part-suspended sentence.

**(b) Part-suspension as mitigation**

- [5.35] As outlined in the previous chapter of this Report, an important distinction must be drawn between factors mitigating the gravity of the offence (offence-related mitigation) and factors mitigating the severity of the sentence (personal mitigation). The Commission has recommended that offence related mitigation should not ordinarily be factored into the decision to suspend. This is because this category of mitigation is exclusively relevant to the first stage of the proportionality test, namely the assessment of the gravity of the offence. By extension, offence related mitigation is crucial in determining the headline sentence. As outlined in detail in chapter 4, fixing the headline sentence is the crucial first component in the determination of the length of the custodial sentence (step 2), which must be fixed before the suspension question is considered (step 3). It therefore follows that factors exclusively relevant to step (2) should not be considered at step (3) of the process.
- [5.36] On the other hand, personal mitigation may, depending on the circumstances of the case (and within the discretion of the individual sentencing judge) be relevant to either step (2) or step (3). So long as the sentencing court has not already factored in personal mitigation in fixing the length of the custodial sentence, the offender's personal mitigation may be taken into account in the decision to suspend. Indeed, Irish sentencing courts will often partially suspend a period of imprisonment in order to reflect the offender's personal mitigation. However, the Commission notes that this practice is potentially problematic. If an offender who has been given a part-suspended sentence to reflect his or her personal mitigating factors is ultimately required to serve the suspended period in prison – either as a result of committing a subsequent offence or breaching a condition of suspension – he or she has effectively received no reduction for personal mitigating factors. In such circumstances, it could be argued that the sentence imposed has breached the principle of proportionality.<sup>56</sup> From this perspective, there is a strong argument that offenders should be granted a reduction from the headline sentence, as opposed to part-suspension, in light of their personal mitigating factors.
- [5.37] This issue was briefly considered by the Supreme Court in *The People (DPP) v Walsh*.<sup>57</sup> It is important to emphasise at the outset that *Walsh* was only an application for leave to appeal to the Supreme Court under Article 34.5.3° of the Constitution. As such, the Court was solely concerned with whether the applicant had raised an issue of general public importance, or whether it was otherwise necessary in the interests of justice that the

<sup>56</sup> O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2006) at para 22.19.

<sup>57</sup> [2015] IESCDT 26.

appeal be heard by the Supreme Court.<sup>58</sup> The applicant claimed that his case raised an issue of general public importance, namely the question of whether it should be “the norm for sentencing judges to reduce a custodial sentence unconditionally for mitigating factors before going on to consider whether there should be a suspension or part suspension of that reduced sentence in the interests of rehabilitation.”<sup>59</sup> In finding that the constitutional threshold had not been met, the Court laid significant emphasis on the fact that, in the Court of Appeal, this particular question had not been raised as a discrete issue in argument by the applicant. Rather, it formed part of the general ground of appeal that the sentencing judge had failed to attach adequate weight to the compelling mitigating factors in the case. It was on the above basis that leave to appeal was refused, with the Court stating that:

“It might well be thought that if it were intended to raise before the Court of Appeal a point which, it might be asserted, was a point of general public importance then the point would at least have merited a clear and specific reference in the grounds of appeal themselves.....Given the limited way in which the point now sought to be relied on was addressed in Mr. Walsh's appeal, the Court is not persuaded that the issue arises in such a clear cut manner in the circumstances of this case as would warrant treating the point, in the way in which it would require to be dealt with in Mr. Walsh's circumstances, as being one of general public importance”<sup>60</sup>

[5.38] Given the narrow issue with which the Court was concerned in *Walsh* and its conclusions in that regard, the broader question as to the appropriate manner in which personal mitigation should be reflected was left unanswered. Nevertheless, the Court did make some comments in *Walsh* which may be seen as suggestive of their views in respect of this broader issue. In this regard, the Court stated that:

“The precise way in which it would be appropriate either for a sentencing judge or the Court of Appeal to impose or confirm a sentence to reflect mitigating factors is very much a function of the particular circumstances of each individual case involving not only a consideration of the offence, but also all of the circumstances of the offender. While there may be factors which...might lead to the suggestion that either reduction or suspension was more appropriate in a particular case, it would only be in a clear case (if at all) that the choice made by a

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<sup>58</sup> As per Article 34.5.3° of the Constitution of Ireland.

<sup>59</sup> *Ibid* at para 7.

<sup>60</sup> *Ibid* at paras 10 – 11.



sentencing judge in that regard could be said to be circumscribed as a matter of law.”<sup>61</sup>

- [5.39] In light of the manner in which this issue was brought before the Supreme Court, the precedential value of the Court’s comments should be seen as largely confined to its own facts. Nevertheless, these comments do suggest that, in the Supreme Court’s view, the decision as to how personal mitigating factors should be reflected in the penalty to be imposed is predominantly a matter for the discretion of the individual sentencing judge. The Court of Appeal, it seems, was of the same view in *The People (DPP) v Lee*.<sup>62</sup> In this case, the appellant was appealing against the severity of his sentence of five years’ imprisonment with the final two years’ suspended for three counts of burglary. The core of the appellant’s appeal was that the sentencing judge had erred in reflecting the mitigating factors present solely by suspending the final two years of the five-year headline sentence. The appellant argued that this was an error of principle, particularly in circumstances where the suspended element of the sentence was the subject of particularly onerous conditions of suspension.<sup>63</sup> The appellant argued that the principle of proportionality required a discount from the headline sentence so as to reflect his personal mitigating factors, as well as the suspension of a further period to incentivise rehabilitation. The Court of Appeal disagreed, holding that:

“it is entirely a matter within the sentencing judge’s discretion as to how he or she structures their sentence, providing it is consistent with established sentencing principles. It does not represent an error of principle to use the mechanism of the partial suspension of a sentence for the dual purpose of reflecting mitigation and incentivising mitigation”<sup>64</sup>

- [5.40] While *Walsh* was not referred to by the Court of Appeal in *Lee*, it is clear that the Court at least shared the same view of the Supreme Court in *Walsh* that the decision as to how to reflect personal mitigation is a matter for the individual sentencing judge. Further, the Court of Appeal was also of the view that, despite the rather contingent nature of reflecting an offender’s mitigation by way of part-suspension, the offender, depending on his or her behaviour during the period of suspension, was still being given the benefit of having the period of immediate custody significantly shortened. In this regard, the Court stated:

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<sup>61</sup> *Ibid* at para 9.

<sup>62</sup> [2017] IECA 152.

<sup>63</sup> As well as the usual mandatory conditions, the appellant was also barred from entering the towns of Laytown and Bettystown and their environs without the written consent of the Chief Superintendent for the relevant Garda District for a period of 5 years from the date of sentence.

<sup>64</sup> [2017] IECA 152 at para 37.

“It has to be borne in mind, however, that the effect of suspending two years of the five year headline sentence, meant that if the appellant stayed on the straight and narrow he could expect to have to serve no more than the equivalent of a 3 year custodial sentence. This amounted to a 40% discount on the headline sentence. We are not persuaded that an effective discount of that order represented an insufficient allowance for the mitigating factors that were available in this case.”<sup>65</sup>

[5.41] The Court’s reasoning is logical in some respects and is similar to the observations of some of the judges interviewed in Riordan’s research. Some of the judges interviewed for this study made the point, when asked about the problem of penalty escalation, that a potentially longer sentence than would otherwise be the case is considered to be the price that an offender pays to have a period of the sentence suspended.<sup>66</sup> However, the Commission reiterates that, should the offender breach a condition of suspension and end up serving the suspended period in custody, he or she would retrospectively have received no effective discount for personal mitigation. This would mean that the offender ultimately serves a longer sentence of imprisonment than was actually intended, which potentially breaches the principle of proportionality.

[5.42] Indeed, in *The People (DPP) v RK*,<sup>67</sup> the Court of Appeal for the first time acknowledged, at least by implication, the issue identified above. It stated that:

“The court would have preferred to see the judge identify his starting point and then imposing a sentence somewhat less than that to take account of the plea and such other mitigating factors as were present at the time of sentence. When that net sentence was identified the question of whether there was an opportunity to incentivise rehabilitation in the future by suspending any element of the sentence would arise for consideration.”<sup>68</sup>

[5.43] Accordingly, the Court held that the sentencing judge’s decision to reflect the offender’s strong personal mitigation, most notably his guilty plea, by way of partial suspension, constituted an error of principle. While not expressly stated in *RK*, it is implicit in the Court’s reasoning that it was cognisant of the problems associated with reflecting personal mitigation by way of part-suspension. This underlying concern is also evident

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<sup>65</sup> *Ibid* at para 39.

<sup>66</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 405.

<sup>67</sup> [2016] IECA 208.

<sup>68</sup> *Ibid* at para 23.

from another decision of the Court of Appeal in *The People (DPP) v O'Sullivan*.<sup>69</sup> In this case, the sentencing court had imposed a sentence of seven-and-a-half-years' imprisonment as the headline sentence and suspended the final two-and-a-half-years to reflect the offender's personal mitigation. In finding that this sentence was unduly severe, the Court of Appeal held that the significant personal mitigation present in this case<sup>70</sup> led the Court to "expect to see some reduction from the pre-mitigation headline sentence."<sup>71</sup> The failure to do so, it was held, amounted to an error of principle.

- [5.44] In *The People (DPP) v Folan*,<sup>72</sup> the Court of Appeal expressly acknowledged why the practice of reflecting personal mitigation via part-suspension may be problematic from a proportionality perspective. In this case, the Court held that the sentencing judge's decision to reflect all of the appellant's personal mitigation by way of part-suspension of the final three years of a ten year headline sentence amounted to an insufficient discount for mitigation. The Court held that:

"The difficulty with reflecting all of the appellant's mitigation in a decision to suspend the last three years of the headline sentence is that if he relapses and gets involved even in minor offending he will lose, or may potentially lose, all of his discount for mitigation. It would have been better in our view to have given a straight discount for mitigation, or a straight discount for the great majority of the mitigation and perhaps a short-suspended period in addition to incentivise continued rehabilitation. In circumstances where we are not satisfied that the discount for mitigation was adequate and in circumstances where we also have concerns about the way in which the sentence was structured, we are satisfied to find an error of principle."<sup>73</sup>

- [5.45] While the Court's concern with an offender potentially not receiving his or her due discount for mitigation was only implicit in *RK* and *O'Sullivan*, it was clearly central to the decision in *Folan*. However, it is important that these decisions are not construed as establishing a general rule that personal mitigation may *never* be accounted for via part-suspension. Indeed, in *O'Sullivan*, the Court stated that:

"While there undoubtedly are cases where the factors present by way of mitigation can be properly and fully addressed by way of part-suspension, see

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<sup>69</sup> [2019] IECA 250.

<sup>70</sup> The appellant's reaction to the assault (he called assistance straight away, and waited at the scene), his lack of previous convictions, the fact that he was in a stable long term relationship, had a very good work record and a record of service to the community.

<sup>71</sup> *Ibid* at para 15.

<sup>72</sup> [2019] IECA 361.

<sup>73</sup> *Ibid* at paras 32 – 33.

*DPP v Walsh* [2015] IESCDT and *DPP v Lee* [2017] IECA 152 we are of the view that the factors that were present here would lead one to expect an actual reduction from the headline sentence.”<sup>74</sup>

- [5.46] The recent decision of *The People (DPP) v Broe*,<sup>75</sup> clarifies the position and confirms that reflecting personal mitigation by way of part-suspension is still permissible under Irish sentencing law. In this case the appellant’s sole ground of appeal was that the sentencing court erred in principle in reflecting the appellant’s personal mitigation by suspending the final 18 months of the ten-year headline custodial sentence. The Court of Appeal noted that, before a sentencing court makes the decision to reflect personal mitigation by way of part-suspension, it should be satisfied that there is:

“at least a reasonable prospect that the accused will take the chance provided to him by the proposed suspended sentence, because of the risk that, if a condition of the suspension is breached, the accused could lose all of the earned mitigation to which (s)he is entitled”... a sentencing judge ought to, when structuring a sentence, use his/her judgment as to whether the risk associated with using a suspended sentence is justifiable in the circumstances of the case.”<sup>76</sup>

- [5.47] Having cited the comments of the Supreme Court in *Walsh* that “it would only be in a clear case (if at all) that the choice made by a sentencing judge in that regard could be said to be circumscribed as a matter of law”,<sup>77</sup> the Court of Appeal in *Broe* stated that “it follows therefore that it will only be in rare cases that an appellate court would be disposed to intervene [on the basis that the decision to reflect mitigation by way of part-suspension amounted to an error of principle].”<sup>78</sup> In dismissing the appeal on the basis that the present case was not one of those “rare cases” that merited intervention, the Court of Appeal laid emphasis on the fact that the appellant was deemed as being a moderate risk of re-offending<sup>79</sup> and also had only relatively modest personal mitigating factors available to him. It is here where the key distinguishing features – between the appellant in *Broe*, on the one hand, and the respective appellants in *RK*, *O’Sullivan* and *Folan*, on the other – become apparent. In those earlier decisions, each appellant had the benefit of very strong personal mitigation and were liable therefore to serve a substantially longer sentence in the event of a re-activation of the suspended element of

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<sup>74</sup> *Ibid* at para 15.

<sup>75</sup> [2020] IECA 140.

<sup>76</sup> *Ibid* at para 77.

<sup>77</sup> *The People (DPP) v Walsh* [2015] IESCDT 26 at para 9 (as cited at para 78 of *The People (DPP) v Broe* [2020] IECA 140).

<sup>78</sup> [2020] IECA 140 at para 78.

<sup>79</sup> *Ibid* at para 79.

the sentence. Furthermore, in *Folan*, the appellant had serious addiction issues with alcohol and in the lead up to the present offence had relapsed. This, in the Court's view, rendered him highly likely to breach his conditions of suspension and ultimately lose all of his personal mitigation. Therefore, it was the presence of strong personal mitigation and / or the high likelihood of the suspended element of the sentence being activated in each of these decisions which rendered the decision to part-suspend, as a means of reflecting personal mitigation, impermissible.

[5.48] In light of the decision of the Court of Appeal in *Broe*, the Commission considers that *RK*, *O'Sullivan* and *Folan* are more properly viewed as decisions on the part of that court, in its appellate role, that the justice of the particular case at hand required a reduction from the headline sentence, as opposed to a part-suspension. However, on the other hand, the Commission is also of the view that the above case law demonstrates that something approaching a "best-practice" standard is emerging in respect of this issue. It appears that the Court of Appeal deems that the optimum approach for a sentencing court to adopt is to begin by asking itself whether reflecting an offender's personal mitigation by way of part-suspension is appropriate in the circumstances of the case, or whether, alternatively, this is one of those "rare cases" (as *per* the Court of Appeal in *Broe*) in which the justice of the case requires that the offender's personal mitigation be reflected by way of a reduction from the headline sentence. The Court's comments in *Broe* that this decision is "a judgment call in every case and it is not something to be managed with a micrometre,"<sup>80</sup> ensures that the decision is ultimately one for the discretion of the individual sentencing court. However, it is also clear from the above case law that the strength of the offender's personal mitigation and the likelihood that he or she will adhere to the conditions of suspension are key factors in this determination.

[5.49] The Commission endorses the above approach of the Court of Appeal on the basis that it preserves the imperative of judicial sentencing discretion, while at the same time ensuring that sentencing courts adhere to the constitutional requirement that an offender's personal mitigating factors be given due weight.

### **(c) The totality principle**

[5.50] The totality principle requires a sentencing court, when imposing consecutive sentences for individual offences "to ensure that the overall sentence is a just sentence for the criminal conduct concerned."<sup>81</sup> If the court is satisfied that the overall sentence is excessive in all of the circumstances, then it should make a reduction so as "to achieve an appropriate relativity between the totality of the criminality and the totality of the

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<sup>80</sup> *Ibid* at para 78.

<sup>81</sup> *The People (DPP) v McC* [2003] 3 IR 609 at page 618.

sentences.”<sup>82</sup> The Irish courts commonly impose a part-suspended sentence in order to give effect to the principle. For instance, in the decision of *The People (DPP) v McGrath*,<sup>83</sup> the Court of Appeal suspended the final two years of the respondent’s nine-and-a-half-years’ global sentence for manslaughter and assault causing harm, both as a means of incentivising rehabilitation and having “regard to the aggregate sentence now imposed on the respondent as regards the totality principle.”<sup>84</sup> Similarly, in *The People (DPP) v Floyd*,<sup>85</sup> the Court held that:

“Insofar as he was being required to impose a consecutive sentence on somebody who was already serving a substantial sentence, and who was serving that sentence as a first time offender and was in prison for the first time, it appears to the Court that it would have been appropriate that the question of suspending a portion of the sentence to give effect to the totality principle should have been given active consideration.”<sup>86</sup>

- [5.51] The Commission notes that this practice is open to the same objection discussed above in respect of reflecting an offender’s personal mitigation by way of part-suspension. If the offender breaches a term of this part-suspended sentence, then he or she will be liable to serve the suspended element of the sentence and, in retrospect, the principles of totality and proportionality have not been observed. Therefore, the Commission deems it as best practice that a sentencing court begin by asking itself whether the justice of the case requires a reduction from the headline sentence, as opposed to part-suspension, in order to give effect to the totality principle.

**(d) Undue leniency applications: the disappointment factor**

- [5.52] Under section 2 of the *Criminal Justice Act 1993*, The Director of Public Prosecutions may make an application to the Court of Appeal for a review of a sentence imposed by a sentencing court on the ground that it was unduly lenient. In the event that the Court of Appeal finds in favour of the DPP, it may quash the original sentence and re-sentence the respondent offender. Mindful of the fact that the offender will be faced with the harsh reality of having their original sentence increased sometime after the initial sentencing judgment, the Court of Appeal has, on occasion, partly suspended the new sentence imposed in order to account for the respondent offender’s disappointment at having his

<sup>82</sup> *The People (DPP) v FE* [2019] IESC 85 at para 35.

<sup>83</sup> [2020] IECA 41; see also *The People (DPP) v McDermott and McLoughlin* [2014] IECA 14.

<sup>84</sup> *Ibid* at para 59.

<sup>85</sup> [2014] IECA 39.

<sup>86</sup> *Ibid* at para 22.

or her sentence increased on appeal. In *The People (DPP) v Freeman*,<sup>87</sup> the rationale for this practice was stated as follows:

“It is also our practice when increasing a sentence following an undue leniency review to take account of the 'disappointment factor' from the perspective of the respondent, who is faced with having to serve a longer sentence than he had been given to expect. To take account of this we will suspend a further six months of the sentence. Accordingly, the ultimate sentence is one of ten years' imprisonment with the final four years thereof suspended.”<sup>88</sup>

- [5.53] While not strictly in compliance with the *O'Keefe* principle, the Commission deems this practice to be a pragmatic and appropriate use of the part-suspended sentence, particularly in circumstances where the finding of the court would require an offender to return to prison, having already served the entirety of the initial sentence. A potential for injustice does not arise here as there is no question of the offender retrospectively not receiving due credit for his or her personal mitigation, or indeed having a global sentence imposed that is in breach of the totality principle. Rather, the offender has had their sentence increased on foot of an error of principle on the part of the sentencing judge. In other words, the sentence imposed upon them was unduly lenient and is required to be rectified. Therefore, this practice can be seen as the appropriate exercise of mercy by the Court.<sup>89</sup>

## 5. The future of the part-suspended sentence

- [5.54] The final section of this chapter considers the potential impact of the parole system on the operation of the part-suspended sentence in this jurisdiction when the relevant provisions of the *Parole Act 2019* are commenced.

### (a) The *Parole Act 2019*

- [5.55] Enacted in July 2019, the *Parole Act 2019* has not yet been commenced. There had been long-standing calls<sup>90</sup> to put Ireland's system of parole (which has operated on a non-

<sup>87</sup> [2018] IECA 312; see also *The People (DPP) v Samuilis* [2018] IECA 316; *The People (DPP) v Lordan* [2019] IECA 136.

<sup>88</sup> *Ibid* at para 56.

<sup>89</sup> For a discussion on the place of mercy in the area of sentencing, see O'Malley, *Sentencing Law and Practice* 2nd ed (Round Hall 2006) at paras 6.05 – 6.07.

<sup>90</sup> For a detailed outline of these calls for reform, see Griffin, “Life Imprisonment and The Parole Act 2019: Assessing the Potential Impact on Parole Decision-Making” (2020) (4)(1) *Irish Judicial Studies Journal* 25 at pages 28 – 30; Griffin, “The release and recall of life sentence prisoners: policy, practice and politics (2015) *Irish Jurist* 1. In its 2013 *Report on Mandatory Sentences* (LRC 108-2013) at paras 3.85 – 3.86, the Commission recommended the establishment of an independent statutory parole

statutory basis since 2001)<sup>91</sup> on a statutory basis. As matters stand, the Parole Board reviews cases involving:

- Prisoners sentenced to determinate sentences of at least eight years but less than fourteen years, in circumstances where that prisoner has served at least half of his or her sentence, and:
- Prisoners serving sentences of between 14 years and life imprisonment. In such circumstances, prisoners may have their sentence reviewed after seven years.<sup>92</sup>

[5.56] In either case, the prisoner must have at least 12 months left to serve before the Board will conduct a review.<sup>93</sup> The sole function of the Board is to advise the Minister for Justice (“the Minister”) as to whether or not to release the particular prisoner. In other words, the ultimate decision on release is solely a matter for the Minister. The Irish Penal Reform Trust and Griffin have both heavily criticised this aspect of the non-statutory parole system, arguing for the establishment of a statutory Parole Board which would have exclusive autonomy over the release decision, free from all Ministerial control.<sup>94</sup> This has been provided for by section 27 of the 2019 Act, which vests the decision making process in the exclusive remit of the Parole Board.<sup>95</sup> However, the Minister is still responsible for the majority of appointments to the Parole Board,<sup>96</sup> as long as he or she is satisfied that the nominated person has a knowledge and understanding of the criminal justice system and the ability to make a reasonable and balanced assessment regarding release, based on certain key criteria.<sup>97</sup> Griffin has noted that this aspect of the 2019 Act does raise a concern as to the “continuation of political involvement via the appointment of Parole Board Members.”<sup>98</sup>

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board. The Commission noted that a statutory Parole board would address the questions as to the system’s compliance with the provisions of the European Convention on Human Rights.

<sup>91</sup> Griffin, “Life Imprisonment and The Parole Act 2019: Assessing the Potential Impact on Parole Decision-Making” (2020) 4(1) *Irish Judicial Studies Journal* 25 at page 30.

<sup>92</sup> O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2006) at para 21.48.

<sup>93</sup> Walsh, *Criminal Procedure* 2nd ed (Round Hall 2016) at para 25.181.

<sup>94</sup> Irish Penal Reform Trust Position Paper, *Reform of Remission, Temporary Release and Parole* (9 October 2012); Griffin, *Killing Time: Life Imprisonment and Parole in Ireland* (Palgrave MacMillan 2018) at pages 147 – 186.

<sup>95</sup> Griffin, “Life Imprisonment and The Parole Act 2019: Assessing the Potential Impact on Parole Decision-Making” (2020) 4(1) *Irish Judicial Studies Journal* 25 at pages 42 – 43.

<sup>96</sup> Section 10(2) of the *Parole Act 2019*.

<sup>97</sup> Section 10(5)(a) and 10(5)(b) of the *Parole Act 2019*.

<sup>98</sup> Griffin, “Life Imprisonment and The Parole Act 2019: Assessing the Potential Impact on Parole Decision-Making” (2020) 4(1) *Irish Judicial Studies Journal* 25 at page 35.



- [5.57] More generally, Part 2 of the Act provides for the establishment of a Parole Board, consisting of a range of experts, including judges, lawyers, psychiatrists, psychologists, representatives of the prison and probation services and various others.<sup>99</sup> Section 14 of the 2019 Act also provides that the Board shall make provision for several procedural safeguards,<sup>100</sup> including; the granting of legal aid where necessary,<sup>101</sup> enabling the parole applicant or parolee to attend a meeting with the Board with his legal representative,<sup>102</sup> enabling the parole applicant or parolee to present his or her case to the Board through his or her legal representative,<sup>103</sup> and requiring the parole applicant to be given a draft copy of the decision on their parole application and enabling the applicant to make written submissions on the draft prior to its finalisation.<sup>104</sup>
- [5.58] Section 24 of the 2019 Act is the provision of most relevance in the context of the part-suspended sentence. Section 24(1) provides that the following prisoners shall be eligible for parole:
- (a) A person serving a sentence of life imprisonment for life who has served at least 12 years of that sentence, or
  - (b) a person serving a sentence of imprisonment of a term equivalent to or longer than such term as is prescribed in regulations made by the Minister under subsection (3), who has served at least such portion of the sentence as may be prescribed by the Minister in accordance with that subsection.”
- [5.59] Section 24(3) provides that:
- “The Minister may, for the purposes of subsection (1)(b), following consultation with the [Parole] Board by regulations prescribe:
- a) a term of imprisonment of not less than eight years, and

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<sup>99</sup> Section 10 of the *Parole Act 2019*.

<sup>100</sup> As noted by Griffin, the fact that the process “will now derive from a distinct statutory framework...should mean that the decision-making process will require higher standards of procedural fairness and be subject to greater judicial oversight.” Griffin, “Life Imprisonment and The Parole Act 2019: Assessing the Potential Impact on Parole Decision-Making” (2020) (4)(1) *Irish Judicial Studies Journal* 25 at page 34.

<sup>101</sup> Section 14(1)(a) of the *Parole Act 2019*.

<sup>102</sup> Section 14(1)(c) of the *Parole Act 2019*.

<sup>103</sup> Section 14(1)(d) of the *Parole Act 2019*.

<sup>104</sup> Section 14(1)(g) of the *Parole Act 2019*.

- b) the portion of such a term to be served by a person prior to becoming eligible for parole.”

[5.60] It is clear from the above provisions that only prisoners serving a sentence of imprisonment of eight years or more will be eligible for parole under the new system. However, the precise minimum qualifying sentence, or the portion of the sentence which will have to be served before a prisoner is eligible for parole, are both left to Ministerial regulation and are, as of yet, unknown.

**(b) The interaction of the Parole Act with the part-suspended sentence**

[5.61] In terms of how this new system of early release will impact upon the operation of the part-suspended sentence, section 6 of the *Parole Act 2019* expressly states that this system will not affect other existing forms of early release, namely: temporary release pursuant to section 2 of the *Criminal Justice Act 1960*, the power to commute or remit a punishment under section 23 of the *Criminal Justice Act 1951*, general or enhanced remission under the *Prisons Act 1970* and the various prison rules, or qualifying prisoners pursuant to The *Criminal Justice (Release of Prisoners) Act 1998*.

[5.62] However, the Commission notes that the part-suspended sentence, pursuant to section 99 of the *Criminal Justice Act 2006*, is not referred to as being unaffected by the commencement of the *Parole Act 2019*. It is also noteworthy that section 24(4) sets out a number of matters to which the Minister should have regard when making the regulations under section 24(3). One of these matters is the “the objective of ensuring that there is an incentive for persons serving sentences of imprisonment to be rehabilitated”.<sup>105</sup> As noted earlier in this chapter, the part-suspended sentence is commonly used as a means of incentivising an offender’s rehabilitation. The Commission notes, therefore, that when the relevant provisions of the *Parole Act 2019* are commenced, a question may arise as to whether it will ever be appropriate for a sentencing court to hand down a part-suspended sentence in a case in which that offender will be eligible for parole. After all, both the part-suspended sentence and parole are aimed (in large part) at incentivising the offender’s rehabilitation. Further, parole is, in many respects, the more preferable form of early release as it involves an assessment which is much more individualised and will take place much more contemporaneous to the prisoner’s potential release. In this regard, section 27 of the *Parole Act 2019* provides that the Parole Board may order the release of a parole applicant if satisfied that:

- “(a) the parole applicant-

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<sup>105</sup> Section 24(4)(a) of the *Parole Act 2019*.

- i. Would not, upon being released, present an undue risk to the safety and security of members of the public (including the relevant victim), and:
- ii. *Has been rehabilitated and would, upon being released, be capable of re-integrating into society.*

and

(b) it is appropriate in all the circumstances that the parole applicant be released on parole." [emphasis added]

- [5.63] In deciding on the above, section 27(2) of the 2019 Act lists out a total of 13 matters to which the Parole Board shall have regard, including any treatment, education or training that the parole applicant has undergone. It is clear therefore that the Parole Board's decision, as well as being made much more contemporaneous to the potential release of the prisoner, is also based off a much more holistic picture of the prisoner's efforts at rehabilitation. As discussed earlier in this chapter, a sentencing judge often imposes a part-suspended sentence so as to reward the offender for to-date efforts at rehabilitation and to incentivise his or her continued rehabilitation. While the Court of Appeal has repeatedly stressed that a part-suspended sentence should not be imposed unless there is evidence of an intention to rehabilitate, this decision on the part of the court takes place at a point in time far removed from the actual release date and is made by reference to much less information as to the prisoner's suitability for early release.
- [5.64] Admittedly, there is a distinction to be drawn between the aim of the part-suspended sentence, on the one hand; and the ultimate decision to release a prisoner on parole, on the other. The former is concerned with encouraging an offender to rehabilitate himself or herself so that one day he or she will be capable of being released into society; whereas the latter is a potential end result of the prisoner having already availed of the opportunity to rehabilitate himself and ultimately being deemed as suitable to be returned back into the community. Nevertheless, the overarching aim of rehabilitating the offender is at the heart of both the parole system and the part-suspended sentence. This is reinforced by the fact that, as mentioned earlier, section 24(4)(a) requires the Minister to have regard to the objective of incentivising rehabilitation when regulating for the eligibility requirements under section 24(3). Viewed from this perspective, there is certainly an argument that the parole board is a more appropriate mechanism for furthering the same penal purpose.
- [5.65] There are also practical issues which may give rise to difficulties when *The Parole Act 2019* is commenced. As outlined above, it is as yet unknown as to what the precise minimum qualifying sentence and minimum qualifying periods will be. However, say, for the sake of argument, that the minimum qualifying sentence was left at eight years and the minimum

qualifying period set at half the period of sentence. Were a sentencing judge to hand down a nine year sentence with the final two years suspended, would that sentence be treated as a nine year sentence for the purposes of calculating eligibility for parole (for which the offender would be eligible for parole), or a seven year sentence (and hence rendering him or her ineligible for parole)? On the basis of the Supreme Court's decision in *O'Brien v Governor of Limerick Prison*,<sup>106</sup> it seems likely that the eligibility for parole would be calculated by reference to the custodial period of the sentence (as opposed to the whole sentence). However, this interpretation could lead to unfairness in circumstances where an offender who has been given a straightforward sentence of nine years is eligible for parole and the offender subjected to a nine year sentence with the final two years suspended (which, in theory at least, is the less severe sanction) is not eligible for parole.

- [5.66] Another potential issue would arise if a prisoner was granted parole and was also the subject of a part-suspended sentence. Say, for instance, a prisoner the subject of a 12-year sentence with the final two years suspended is released on parole after nine years. Does the two-year suspended period of the sentence cease upon release, or does it remain operative after he or she is released on parole? If the suspended element remains operative, what is the interaction between the period of suspension and the period during which the prisoner is on parole? Would the released offender be expected to adhere to both the conditions of suspension and his conditions of parole?
- [5.67] Furthermore, if the suspended portion of the sentence were to remain operative post-release, then there is an argument to say that a person the subject of a part-suspended sentence and who is subsequently granted parole is being treated more harshly than a prisoner who is subjected to a straightforward custodial sentence of nine years and subsequently granted parole. Say, for instance, prisoner A is sentenced to 12 years with two years suspended and prisoner B is sentenced to a straightforward sentence of 12 years. If both are released on parole after 10 years, prisoner A will be required to adhere to the conditions of suspension for two years post-release (and the conditions of parole for at least 18 months post-release); whereas prisoner B will only have to adhere to the conditions of parole for a maximum period of 18 months post-release.<sup>107</sup> This potential for injustice becomes even more pronounced when one considers that a sentence of 12 years with the final two suspended is, in principle at least, supposed to be a less severe sanction than a straightforward 12 year custodial sentence.
- [5.68] In light of the above, the Commission notes that there are certainly some practical arguments in favour of requiring a sentencing judge, in cases where the offender will be

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<sup>106</sup> [1997] ILRM 349.

<sup>107</sup> Under section 28(1)(c) of the *Parole Act 2019*, the maximum parole period is 18 months.

eligible for parole (depending on what qualifying periods will be laid down by Ministerial regulations), to pass a straightforward sentence as opposed to a part-suspended sentence. Indeed, *The Report of the Review Committee on the Parole System in England and Wales*<sup>108</sup> expressed similar concerns<sup>109</sup> and ultimately recommended that the part-suspended sentence be abolished on the basis that it would be incompatible with the proposed statutory system of parole.<sup>110</sup> This recommendation was put into effect by section 5(2)(b) of the *Criminal Justice (UK) Act 1991*, which repealed the statutory power of the courts to partly suspend a sentence of imprisonment in section 47 of the *Criminal Law (UK) Act 1977*. It should be noted that the context which gave rise to the ultimate abolishment of the part-suspended in England and Wales was somewhat different to what the situation will be in Ireland when the *Parole Act 2019* is commenced. In England and Wales, a part-suspended sentence, at the time, could only be imposed for sentences of imprisonment up to two years<sup>111</sup> and the minimum qualifying period for parole was six months.<sup>112</sup> In Ireland, there is no limit on the sentence of imprisonment which may be partly suspended and the minimum qualifying period for eligibility under the *Parole Act 2019* will be at least (subject to Ministerial regulations) eight years. Nevertheless, in light of the above discussion, the overarching concern expressed in the *Report of the Review Committee*, namely “the particularly awkward interface between parole and the partly suspended sentence”<sup>113</sup> is certainly something that will have to be considered in an Irish context once the *Parole Act 2019* is commenced.

## 6. Conclusion and recommendations

[5.69] In light of the discussion and analysis in the body of the chapter, the Commission makes the following recommendations in respect of the part-suspended sentence:

**R. 5.01** The Commission recommends that the same principles be applied irrespective of whether the sentence of imprisonment is fully suspended or part-suspended.

<sup>108</sup> The Carlisle Report, *The Parole System in England and Wales: Report of the Review Committee* (London HMSO1988) at paras 496 – 497.

<sup>109</sup> *Ibid* at paras 496 – 497.

<sup>110</sup> *Ibid* at para 500. See also O’Malley, “‘That Measure of Wise Clemency’ – Defending the Suspended Sentence” (2018) 28(2) *Irish Criminal Law Journal* 39 at page 44.

<sup>111</sup> Section 47(1) of the *Criminal Law (UK) Act 1977*.

<sup>112</sup> The Carlisle Report, *The Parole System in England and Wales: Report of the Review Committee* (London HMSO, 1988) at para 34.

<sup>113</sup> *Ibid* at para 496.

- R. 5.02** The Commission recommends that further empirical research be carried out by the newly established Sentencing Guidelines and Information Committee (SGIC) to examine the extent to, and the circumstances in, which the part-suspended sentence is used in Irish courts.
- R. 5.03** The Commission recommends that the part-suspended sentence continue to be used as a means of incentivising rehabilitation, while also acknowledging that this practice plays a limited role in the overall penal objective of rehabilitation.
- R. 5.04** The Commission recommends that it should remain a matter for the discretion of the sentencing judge as to whether or not personal mitigation be reflected via a reduction from the headline sentence, as opposed to part-suspension of the sentence. However, the Commission recommends that a sentencing court should always begin by asking itself whether reflecting an offender's personal mitigation by way of part-suspension is appropriate in the circumstances of the case, or whether the justice of the case requires that the offender's personal mitigation be reflected by way of a reduction from the headline sentence.
- R. 5.05** The Commission recommends that a sentencing court should always begin by asking itself whether the justice of the case requires that the totality principle be given effect to by way of reduction from the headline sentence, as opposed to part-suspension.
- R. 5.06** The Commission recommends the continued use of the part-suspended sentence by the Court of Appeal so as to mitigate against the offender's disappointment at having his or her sentence increased on foot of a finding of undue leniency pursuant to section 2 of the *Criminal Justice Act 1993*.
- R. 5.07** The Commission recommends that consideration be given to how the commencement of the *Parole Act 2019* will impact upon a sentencing judge's statutory jurisdiction to impose a part-suspended sentence in cases where the offender will also be eligible for parole during the currency of the sentence.

## CHAPTER 6 THE PRESUMPTION OF AN IMMEDIATE CUSTODIAL SENTENCE FOR SPECIFIC OFFENCES

### 1. Introduction

- [6.1] In its 2013 *Report on Mandatory Sentences*,<sup>1</sup> the Commission considered it appropriate that certain serious offences attract an immediate and substantial custodial sentence, save in exceptional circumstances. These offences may be said to carry the presumption of an immediate custodial sentence. In respect of offences which attract this presumption, the imposition of a fully suspended sentence will generally only be appropriate in wholly exceptional circumstances. This chapter considers the various offences under Irish law which have been expressed to attract the presumption of an immediate custodial sentence, and the circumstances in which this presumption may be rebutted.
- [6.2] The first section of this chapter considers the presumptions of an immediate custodial sentence established by statute, namely the presumptive minimum sentences provided for under the *Firearms Acts* and the *Misuse of Drugs Act 1977*, as amended. This section also discusses the extent to which these statutory arrangements, and the accompanying case law, provide for the presumption of an immediate custodial sentence for certain offences specified in the relevant Acts, and the circumstances in which this presumption may be rebutted. The second section outlines the categories of offences which are the subject of a judicially developed presumption of an immediate custodial sentence, namely: manslaughter, rape, assault causing serious harm and serious fraud offences. The third section of this chapter discusses the factors that may constitute “wholly exceptional circumstances” sufficient to rebut the presumption.
- [6.3] Finally, the chapter concludes with a discussion of the Commission’s recommendations. First, the Commission recommends that the categories of offences that currently attract the presumption under Irish law should continue to operate. However, the Commission also recommends that research should be conducted by the newly established Sentencing Guidelines and Information Committee (SGIC)<sup>2</sup> to ascertain the extent to which the presumption, and the accompanying threshold tests developed by the Irish appellate courts, are being adhered to in practice. The Commission, while acknowledging that certain offences may, by virtue of their inherent gravity, effectively (but not formally) carry the presumption of an immediate custodial sentence, also recommends that the appellate courts and the SGIC should consider whether some of the offences put forward in the submissions should be made the subject of a presumption of an immediate custodial

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<sup>1</sup> (LRC 108-2013) at para 1.67.

<sup>2</sup> Pursuant to section 23(1) of the *Judicial Council Act 2019*.

sentence. Finally, in terms of the factors that may constitute “wholly exceptional circumstances” sufficient to rebut the presumption, the Commission recommends that this should be a matter for the discretion of the individual sentencing judge, based on a consideration of the totality of the facts, including the harm caused and the moral culpability of the offender.

## 2. Presumptions of an immediate custodial sentence under statute

- [6.4] At the outset, it is important to note that there are two types of minimum sentences provided for by statute in the Irish sentencing system: a mandatory minimum sentence and a presumptive minimum sentence. A mandatory minimum sentence requires a court to impose in every case to which it applies the specified minimum, typically expressed in years’ imprisonment, though a more severe sentence, up to and including the statutory maximum, may be imposed if the circumstances of the case so demand. This, in turn, must be distinguished from a mandatory sentence *simpliciter* which leaves a court with no option but to impose that sentence on every person convicted of the offence to which it applies. In Ireland, at present, murder carries a mandatory sentence of life imprisonment.<sup>3</sup>
- [6.5] If the victim of the offence, whether it is murder or attempted murder, is a specified person under section 3 of the *Criminal Justice Act 1990* (for example a member of An Garda Síochána) then the offender must be ordered to serve a minimum of 40 years’ imprisonment if convicted of murder, and be sentenced to at least 20 years’ imprisonment if convicted of attempted murder.<sup>4</sup> Under section 99(1) of the *Criminal Justice Act 2006*, a mandatory term of imprisonment may not be suspended.
- [6.6] A presumptive minimum sentence, on the other hand, requires the imposition of a minimum term of imprisonment following conviction or a guilty plea, but permits sentencing courts to depart downwards where there are exceptional and specific circumstances that justify such a departure. A suspended sentence may be imposed in cases where the offence in question is the subject of a presumptive minimum sentence. This section will therefore focus on the presumptive minimum sentences prescribed under Irish sentencing law (i.e. the *Misuse of Drugs Act 1977* and the *Firearms Acts*). This section also discusses the extent to which the respective statutory frameworks, and the accompanying case law, provide for the presumption of an immediate custodial sentence for certain offences and the circumstances in which this presumption may be rebutted.

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<sup>3</sup> Section 2 of the *Criminal Justice Act 1990*. Section 2 also prescribes a mandatory life sentence for treason.

<sup>4</sup> Prisoners convicted of capital murder are, however, entitled to remission, see *Callan v Ireland* [2013] IESC 35, [2013] 2 IR 267 and section 5(2) of the *Criminal Justice Act 1990*.



**(a) Presumptive minimum sentences**

[6.7] The Commission, in its 2013 *Report on Mandatory Sentences*, recommended that all presumptive minimum sentencing provisions be repealed and replaced with a more structured guidance-based sentencing system.<sup>5</sup> While the Commission's general view was noted in the 2014 *Report of the Penal Policy Review Group*,<sup>6</sup> the presumptive minimum provisions under the *Misuse of Drugs Act 1977*, and those provided for in the *Firearms Acts* have not, to date, been repealed. However, the Commission notes that section 29 of the *Judicial Council Act 2019* requires that the Minister for Justice undertake a review of all minimum sentences (whether presumptive or mandatory) within two years of the commencement of the provision<sup>7</sup> (i.e. before 16 December 2021), with a view to considering whether or not these minimum sentences should be repealed. Furthermore, provisions setting out mandatory minimum sentences for certain classes of offenders must now be viewed with caution following the declaration of the Supreme Court in *Ellis v Minister for Justice and Equality*<sup>8</sup> that section 27A(8) of the *Firearms Act 1964* was unconstitutional. However, as will be discussed in more detail below, the effect of *Ellis* was to declare that mandatory minimum sentences are constitutionally impermissible where they provide for a minimum sentence that only applies to certain categories of offenders convicted of the offence (i.e. repeat offenders). It did not strike down presumptive or mandatory minimum sentences generally. The next section of this chapter discusses the presumptive minimum sentences currently available under Irish law.

*(i) The Misuse of Drugs Act 1977*

[6.8] There are 2 offences under the *Misuse of Drugs Act 1977* that carry a presumptive minimum sentence. These are the offences of possessing<sup>9</sup> ("section 15A drug offences") or importing<sup>10</sup> ("section 15B drug offences") controlled drugs having a value of €13,000 or more with intent to sell or supply. Both offences carry a presumptive minimum sentence of 10 years' imprisonment,<sup>11</sup> unless exceptional and specific circumstances exist that would make it unjust in all of the circumstances to impose the presumptive minimum

<sup>5</sup> Law Reform Commission, *Report on Mandatory Sentences* (LRC 108-2013) at paras 4.238 – 4.239.

<sup>6</sup> Department of Justice, *Strategic Review of Penal Policy: Final Report* (July 2014) at page 12.

<sup>7</sup> Section 29 of the 2019 Act was commenced on 16 December 2019, see *Judicial Council Act 2019 (Commencement) (No. 2) Order 2019* (SI No 640 of 2019).

<sup>8</sup> [2019] IESC 30.

<sup>9</sup> Section 15A of the *Misuse of Drugs Act 1977*, as inserted by section 4 of the *Criminal Justice Act 1999*.

<sup>10</sup> Section 15B of the *Misuse of Drugs Act*, as inserted by section 82 of the *Criminal Justice Act 2006*.

<sup>11</sup> Section 27(3C) of the *Misuse of Drugs Act 1977*, as substituted and inserted by section 33 of the *Criminal Justice Act 2007*.

sentence.<sup>12</sup> In considering whether or not the imposition of the presumptive minimum sentence would be unjust in all of the circumstances, the court may take into account any matters it considers appropriate, including (a) whether the person pleaded guilty to the offence and, if so – (i) the stage at which the intention to plead guilty was indicated, and (ii) the circumstances in which the indication was given, and (b) whether the person materially assisted in the investigation of the offence.<sup>13</sup> The Court may also have regard to whether the offender has any previous convictions for drug trafficking offences and whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence.<sup>14</sup>

- [6.9] These legislative provisions make it clear that, in order to depart from the presumptive minimum sentence, there must be exceptional and specific circumstances. In its 2013 *Consultation Paper on Mandatory Sentences*,<sup>15</sup> the Commission conducted an in-depth analysis of the case law determining what factors may constitute “exceptional and specific circumstances” so as to justify a departure from the presumptive minimum.<sup>16</sup> However, these exceptional circumstances only justify a departure from the 10 year presumptive minimum in favour of the imposition of a lesser term of immediate imprisonment. In other words, even if a sentencing court has determined that a departure from the presumptive minimum is justified in the circumstances of the case, the Court of Criminal Appeal repeatedly emphasised that the presumptive mandatory minimum is an indication of the inherent gravity of the offence and should be borne in mind when determining the appropriate punishment.<sup>17</sup>
- [6.10] In *The People (DPP) v Renald*,<sup>18</sup> the appellant was sentenced to five years’ imprisonment for a section 15A drug offence. The appellant argued that, once the sentencing judge concluded that the presumptive minimum should be departed from, he or she should ignore the 10-year presumptive minimum when determining the quantum of punishment. The Court of Criminal Appeal disagreed, stating that:

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<sup>12</sup> Section 27(3D)(a) of the *Misuse of Drugs Act 1977*, as substituted by section 33 of the *Criminal Justice Act 2007*.

<sup>13</sup> Section 27(3D)(b) of the *Misuse of Drugs Act 1977*, as substituted by section 33 of the *Criminal Justice Act 2007*.

<sup>14</sup> Section 27(3D)(c) of the *Misuse of Drugs Act 1977*, as substituted and inserted by section 33 of the *Criminal Justice Act 2007*.

<sup>15</sup> (LRC CP 66 – 2011).

<sup>16</sup> *Ibid* at paras 3.56 – 3.108.

<sup>17</sup> See, for instance: *The People (DPP) v Rossi and Hellewell* (Court of Criminal Appeal, 18 November 2002); *The People (DPP) v Henry* (Court of Criminal Appeal, 15 May 2002).

<sup>18</sup> (Court of Criminal Appeal, 23 November 2001).

“Even where exceptional circumstances exist which would render the statutory minimum term of imprisonment unjust, there is no question of the minimum sentence being ignored . . . Even though that sentence may not be applicable in a particular case the very existence of a lengthy mandatory minimum sentence is an important guide to the Courts in determining the gravity of the offence and the appropriate sentence to impose for its commission. That is not to say that the minimum sentence is necessarily the starting point for determining the appropriate sentence. To do so would be to ignore the other material provision, that is to say, the maximum sentence.”<sup>19</sup>

[6.11] Similarly, in *The People (DPP) v Botha*,<sup>20</sup> the Court of Criminal Appeal, having cited *Renald* with approval, stated that:

“it is clear that the effect of the statutory provision is significantly to encroach on the otherwise untrammelled discretion of the sentencing Court. If there are no specific and exceptional circumstances rendering it unjust to impose the minimum sentence then that sentence must be imposed, if indeed a greater one is not considered appropriate. Even if there are such circumstances, both the maximum and the minimum sentence continue to exist as clear and definite guidance to the Court. The Oireachtas, as it is entitled to do, has indicated that this offence is to be considered a very grave one capable of attracting a sentence which might be regarded as harsh in certain circumstances and on certain individuals.”<sup>21</sup>

[6.12] It is clear that the Court of Criminal Appeal in the above decisions was keen to emphasise that, even in circumstances where exceptional circumstances exist so as to justify a departure from the presumptive minimum, the legislative policy underpinning the presumptive minimum sentences provided for by the 1977 Act, as amended – namely to reflect the harm caused to society by drug trafficking – was respected by sentencing courts.<sup>22</sup> However, the issue with the Court’s declaration that the presumptive minimum sentence should act as “an important guide” in assessing offence gravity is that there is no basis for this in the Act itself. On the contrary, section 27(3D)(b) of the 1977 Act provides that the presumptive minimum “*shall not apply* where there the court is satisfied

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<sup>19</sup> *Ibid* at para 18.

<sup>20</sup> [2004] IECCA 1.

<sup>21</sup> *Ibid* at para 35.

<sup>22</sup> Section 27(3D)(a) of the *Misuse of Drugs Act 1977*, as substituted and inserted by section 33 of the *Criminal Justice Act 2007*.

that there are exceptional and specific circumstances...”<sup>23</sup> The Court of Appeal has slightly refined the *Renald* principle in two more recent decisions. In *The People (DPP) v Flanagan*<sup>24</sup> the Court, while acknowledging that the sentencing framework provided for by the Oireachtas in section 27 of the *Misuse of Drugs Act 1977* is “of the utmost importance in recognising the gravity of the offence and determining the appropriate punishment”, also pointed out that “the statute does not expressly authorise the use of the minimum sentence as a ‘benchmark’ in the sense of providing a [starting] figure”.<sup>25</sup> This statement echoes the concern of the Commission in respect of the *Renald* principle, namely that there is no statutory basis for the assertion that the presumptive mandatory minimum is relevant to the assessment of the gravity of the offence.

[6.13] In *The People (DPP) v Arthur Samuilis*,<sup>26</sup> the Court of Appeal carried out an extensive review of the existing authorities dealing with section 15A drug offences in the context of the cultivation of cannabis grow houses. Having done this, the Court then set out some useful guidance in terms of assessing the offender’s culpability when determining the gravity of the offence. During the course of this judgment, the Court had the following to say in terms of the relationship between the presumptive mandatory minimum and the assessment of gravity:

“Where a s.15A charge is preferred, and assuming proof exists of value in excess of the threshold figure of €13,000, the presumptive mandatory minimum sentence also arises for consideration. However, while regard must be had to it, it does not affect the assessment of gravity *per se*. On the contrary, gravity must be assessed in the first instance without reference to the presumptive minimum. Mitigation is then applied to the pre-mitigation or headline figure arrived at. If the ultimate figure arrived at is in excess of the presumptive minimum, then no further consideration of the presumptive minimum is required and the sentence as so determined is simply imposed. If, however, the ultimate sentence as so determined would fall below the presumptive minimum if imposed, the sentencing court must then consider whether there are exceptional and specific circumstances which would render it unjust to impose the presumptive minimum. If such circumstances are found to exist, the ultimate sentence as determined can be imposed notwithstanding that it falls below the presumptive minimum.

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<sup>23</sup> Emphasis added.

<sup>24</sup> [2015] IECA 94.

<sup>25</sup> *Ibid* at para 27.

<sup>26</sup> [2018] IECA 316.

Conversely, if such circumstances are found not to exist then the presumptive minimum sentence of ten years must be imposed.”<sup>27</sup>

- [6.14] Therefore, in light of *Samuilis*, the position appears to be that, in the first instance, a sentencing court should determine the appropriate quantum of punishment by reference to ordinary sentencing principles, namely the two-staged proportionality test.<sup>28</sup> Having done this, and in the event that the post-mitigation figure is less than that of 10 years, the sentencing court is required to consider whether or not the imposition of the presumptive minimum sentence of 10 years’ imprisonment would be unjust in the circumstances of the case.
- [6.15] It is clear, therefore, that the Court of Appeal in *Samuilis* slightly refined the position of its predecessor as set out in *Renald*. Nevertheless, the Commission is of the view that the general premise underpinning *Renald* – that section 15A and 15B drug offences are inherently very serious offences, as evidenced by the presumptive minimum sentence prescribed by the Oireachtas – is still a relevant factor for sentencing courts when deciding on the appropriate punishment.<sup>29</sup> Indeed, it is well established, both in the case law of the Court of Criminal Appeal and the Court of Appeal, that, even in circumstances where a sentencing court has departed from the presumptive minimum, the imposition of a non-custodial measure, or indeed a suspended custodial sentence, is only justified when there exist special reasons of a substantial nature and wholly exceptional circumstances. In *The People (DPP) v Sarsfield*,<sup>30</sup> the Court of Appeal was provided with a survey of 104 sentences dealt with by the Court of Appeal and its predecessor, the Court of Criminal Appeal. Of the 104 cases included in the survey, a fully suspended sentence was either imposed or upheld on appeal in 11 cases.<sup>31</sup> In other words, in 9.45% of these cases, the appeal court was of the view that there existed special reasons of a substantial nature and wholly exceptional circumstances.
- [6.16] The “wholly exceptional circumstances” test, which effectively imposes a presumption of an immediate custodial sentence for section 15A and 15B drug offences, was first set down by the Court of Criminal Appeal in *The People (DPP) v McGinty*.<sup>32</sup> In this case, the respondent was sentenced to a fully suspended term of five years’ imprisonment, on the

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<sup>27</sup> *Ibid* at para 43. See also *The People (DPP) v Sarsfield* [2019] IECA 260 at para 18.

<sup>28</sup> For a detailed discussion of the proportionality test in an Irish sentencing context, see chapter 4 of this Report.

<sup>29</sup> See, for instance *The People (DPP) v Byrne* [2015] IECA 5; *The People (DPP) v Fanning* [2015] IECA 11.

<sup>30</sup> [2019] IECA 260.

<sup>31</sup> *Ibid* at para 15.

<sup>32</sup> [2006] IECCA 37, [2007] 1 IR 633.

usual conditions to keep the peace and be of good behaviour, along with the additional condition that he continue to attend and complete a drug rehabilitation course. The DPP brought an undue leniency application pursuant to section 2 of the *Criminal Justice Act 1993*. During the course of the judgment, the Court emphasised that the possession of illegal drugs for the purpose of sale or supply, particularly in a significant quantity, is a very serious offence, which would normally warrant an immediate and substantial custodial sentence, even where the mitigating factors of the case justify a departure from the presumptive minimum in the 1977 Act. However, the Court went on to say that where there are “special reasons of a substantial nature and wholly exceptional circumstances, the imposition of a fully suspended sentence might be appropriate in the interests of justice.”<sup>33</sup>

- [6.17] In terms of the present case, the Court concluded that the sentencing judge was entitled to form the view that the respondent’s impressive record at rehabilitation so far, coupled with the high likelihood that, if he completed his current treatment programme (which was at an advanced stage), his rehabilitation would be complete and successful. This, along with other personal mitigating factors<sup>34</sup> in the Court’s view, amounted to wholly exceptional circumstances which justified the imposition of a fully suspended sentence. The Court was careful to state that the presumption will not be rebutted merely because an offender voluntarily enters a drug treatment programme. Rather, it was the exceptional circumstances surrounding the respondent’s rehabilitation, including the fact that he had abstained from drugs for a substantial period of time (for a period of 14 months at the date of the initial sentencing hearing) and had become a leader and role model in the programme and someone who encouraged and guided other persons who were hoping to rehabilitate themselves.<sup>35</sup>
- [6.18] Similarly, in *The People (DPP) v Flanagan*,<sup>36</sup> the respondent had been sentenced to a four-year sentence of imprisonment, suspended in its entirety, having pleaded guilty to a section 15A drug offence. The sentencing court had deemed it appropriate to impose a fully suspended sentence on the basis of the combination of personal mitigating factors present, namely: the plea of guilty; her “ostensibly genuine” remorse; her very difficult background and life history, her co-operation with the investigation; her very positive probation report which highlighted her successful completion of a drug rehabilitation programme, her continued abstention from drugs and the fact that she had not come to

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<sup>33</sup> [2006] IECCA 37 at para 25, [2007] 1 IR 633 at para 16.

<sup>34</sup> This was the respondent’s first conviction for a drug related offence and he had co-operated fully with the Gardaí, advising them of the location and the extent of the drugs in his possession.

<sup>35</sup> [2006] IECCA 37 at para 41, [2007] 1 IR 633 at para 30.

<sup>36</sup> [2015] IECA 94.

the adverse attention of the authorities since her arrest.<sup>37</sup> The Court of Appeal, having examined a number of comparator cases in this area<sup>38</sup> made the following observation:

“[I]n the overwhelming majority of cases, a S.15A offence will attract and require the imposition of an immediate, and frequently significant, custodial sentence. In acknowledging that, however, it is important not to lose sight of the requirement that a sentencing judge is not sentencing for the offence *per se*, but for the offence as committed by the particular offender in the particular circumstances of the individual case. While it is clear that a custodial sentence will be the norm in s. 15A cases, having regard to the position taken by the legislature in especially deprecating the harm caused to society by drug trafficking, and in setting a presumptive mandatory minimum sentence of ten years for such offences that is only to be departed from where exceptional circumstances exist, it cannot be the case that the legislature intended to so emasculate the discretion of a sentencing judge as to preclude him from ever imposing a non-custodial sentence in a wholly exceptional but nonetheless appropriate case. It is accepted, however, that such cases are likely to be rare and infrequent.”<sup>39</sup>

- [6.19] On the basis of the several mitigating factors present, as outlined above, the Court of Appeal held that the sentencing judge was entitled to form the view that there were special reasons of a substantial nature and wholly exceptional circumstances which justified the imposition of a wholly suspended sentence in this case.<sup>40</sup>
- [6.20] *Flanagan* and *McGinty* both indicate that strong personal mitigation can bring a case beyond the “wholly exceptional circumstances” threshold required to rebut the presumption of an immediate custodial sentence. However, the Commission notes that, in the earlier decision of *The People (DPP) v Jervis and Doyle*<sup>41</sup> the Court of Criminal Appeal, while approving of the *McGinty* test, emphasised that the combination of an offender’s personal mitigating factors is not sufficient to reach the “wholly exceptional circumstances” threshold.<sup>42</sup>
- [6.21] This was confirmed in the later decision of the Court of Appeal in *The People (DPP) v Byrne and Phayer*.<sup>43</sup> In this case, both respondents had been sentenced to a five year term

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<sup>37</sup> *Ibid* at paras 40 – 45.

<sup>38</sup> *Ibid* at para 29.

<sup>39</sup> *Ibid* at para 30.

<sup>40</sup> *Ibid* at para 46.

<sup>41</sup> [2014] IECCA 14.

<sup>42</sup> *Ibid* at para 64.

<sup>43</sup> [2015] IECA 5.

of imprisonment, having been convicted of a section 15A drug offence. The sentencing judge had decided to impose a fully suspended sentence on the basis that both respondents had the benefit of the following personal mitigating factors: an early plea of guilty, full co-operation with the authorities, no previous convictions, positive testimonials in terms of their character and work record, and both had displayed genuine remorse. In finding that the sentences imposed were unduly lenient, the Court of Appeal held that, while it was within the sentencing judge's discretion to conclude that there were exceptional and specific circumstances justifying a departure from the presumptive minimum, the circumstances in the present case fell significantly short of what could be considered wholly exceptional so as to justify the imposition of a fully suspended sentence. In this regard, the Court noted that the threshold necessary to rebut the presumption "cannot be met by accumulating or totalling a number of the oft presented mitigating factors".<sup>44</sup>

- [6.22] Similarly, in *The People (DPP) v Fanning*<sup>45</sup> the respondent was sentenced to a fully suspended sentence of imprisonment of 10 years, having pleaded guilty to a section 15A drug offence. The DPP sought a review of the sentence on grounds of asserted undue leniency, pursuant to section 2 of the *Criminal Justice Act 1993*. The Court of Appeal held that, notwithstanding the several personal mitigating factors present<sup>46</sup> the sentencing judge had given excessive weight to the mitigating factors in imposing a fully suspended sentence. In this regard, it was held that the sentencing court had failed to give effect to the legislative policy underpinning section 15A offences, as expressed in *Renald*. Accordingly, the court held that the sentence imposed was unduly lenient and amounted to an error of principle.<sup>47</sup>
- [6.23] It is therefore unclear as to whether or not personal mitigating factors, when taken cumulatively, are sufficient to rebut the presumption of an immediate custodial sentence in respect of section 15A and section 15B drug offences. In *Flanagan*, the offender's personal mitigating factors were deemed to be sufficient to rebut the presumption of an immediate custodial sentence. In contrast, in *Byrne and Fanning*, the presence of several personal mitigating factors (which were similar – but not identical – to those present in *Flanagan*) were deemed not to be sufficient to rebut the presumption. On the one hand, therefore, it could be argued that there is an inconsistency in the case law as to the

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<sup>44</sup> *Ibid* at para 47.

<sup>45</sup> [2015] IECA 11.

<sup>46</sup> *Ibid* at para 10. The respondent had the benefit of the following personal mitigation: an early plea of guilty; co-operation with the Gardaí; no previous convictions; a high level of remorse; positive engagement with the Probation Service, and; impressive testimonials in terms of work record and character.

<sup>47</sup> See also *The People (DPP) v Ryan and Rooney* [2015] IECA 2.



manner in which the *McGinty* test is applied. However, it is important to bear in mind that the above three cases appeared before the Court of Appeal in the context of a section 2 undue leniency application. Under the well-established case law in this area,<sup>48</sup> an appellate court cannot intervene merely on the basis that it would have imposed a different sentence from that imposed by the trial judge. Rather, it must be satisfied that “the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances.”<sup>49</sup> Viewed from this perspective, attempts to draw comparisons between the sentencing *outcomes* in undue leniency applications should be approached with caution, given the high threshold for appellate intervention.<sup>50</sup>

[6.24] Furthermore, while the personal mitigating factors present in all of the above three cases may have been largely similar (although not identical), it seems that it was the relatively high degree of culpability and involvement in the overall operation (and, by extension, the gravity of the offence) in both *Byrne* and *Fanning* which led the appellate court to determine that the presumption of an immediate custodial sentence had not been rebutted. Indeed, in *Fanning*, the Court placed much emphasis on the fact that the respondent played a mid-level role in the operation and had engaged in the criminal behaviour for financial reward and not due to any addiction or form of duress.<sup>51</sup> These aggravating factors were equally central to the Court’s rationale in *Byrne*.<sup>52</sup> In contrast, in *Flanagan*, it was clear that the respondent’s offending behaviour had stemmed (at least partly) from her drug addiction.<sup>53</sup> Similarly, in *McGinty* it was accepted that, at the time of the offence, the respondent was in the midst of his addiction and had accumulated a substantial amount of debt in attempting to facilitate this. As discussed in detail in chapter 4 of this Report, these factors tend to mitigate the offender’s actual moral culpability and, by extension, the gravity of the offence. Indeed, in *The People (DPP) v Sarsfield*<sup>54</sup> the Court of Appeal highlighted the importance of properly assessing the offender’s moral culpability in the context of section 15A drug offences. In this regard, the Court noted that:

“The culpability of those coming before the courts varies considerably. Sometimes, though perhaps not as often as one would wish to see, the Courts are dealing with

<sup>48</sup> For instance, see *The People (DPP) v Byrne* [1995] 1 ILRM 279; *The People (DPP) v McCormack* [2000] 4 IR 356 at page 359.

<sup>49</sup> *The People (DPP) v Stronge* [2011] IECCA 79 at para 17.

<sup>50</sup> See *The People (DPP) v Smith* [2019] IECA 1 at para 19, discussed later in this chapter.

<sup>51</sup> [2015] IECA 11 at para 27.

<sup>52</sup> [2015] IECA 11 at para 31.

<sup>53</sup> [2015] IECA 94 at para 36.

<sup>54</sup> [2019] IECA 260.

those in a supervisory role: those managing or directing the operations in question. Probably more frequently, however, those brought before the Courts play a lesser role and could be described as lower-ranking operatives in a wider criminal enterprise. These lesser roles, whether they involve storing or transporting drugs, may still be very important and without which major drug dealing and trafficking could hardly occur.

... [However] there may well be cases where the person found in possession of the drugs is left unaware, or could not have known, of the quantity or value of the drugs in question. This can arise in the case of a drugs mule who is handed a suitcase at a foreign airport and asked to import it into Ireland for a reward. As this Court often finds itself emphasising, each case will necessarily turn upon its own particular facts and the individual circumstances of an offender may serve to move the dial considerably in either direction. Even in the case of a very large haul indeed, it is possible to imagine cases where the evidence will indicate that the individual was playing a totally subservient role. Those living in abject poverty and deprivation analogous to the situation of the “gardeners” in cultivation cases is one such situation that comes to mind. On the other hand, there may be cases where the quantity of drugs is less, though perhaps still substantial, but the manner in which the individual dealt with the drugs left no room for doubt that he was the actual owner, was in effective control, and/or was the individual, or one of the individuals, who stood to make major profit from the exercise. In general, the greater the authority exercised, the greater the culpability. Where the decision to become involved in drug trafficking was one taken in order to make a financial gain, that too will increase the level of culpability.”<sup>55</sup>

[6.25] Therefore, while *Jervis and Doyle* established that the combination of personal mitigating factors are not sufficient to rebut the presumption of an immediate custodial sentence, the above decisions, when read in their entirety, suggest that this general principle is not absolute. Rather, the ultimate decision as to whether the offender’s mitigating factors are sufficient to reach the “wholly exceptional circumstances” threshold is a matter for the discretion of the sentencing judge and dependent on the circumstances of the case. As *McGinty* and *Flanagan* demonstrate, if the offender’s culpability for the offending behaviour is relatively low, then his or her personal mitigating factors may serve to rebut the presumption.

[6.26] The Courts have also acknowledged that the adverse impact that imprisonment may have on an offender may, whether alone or in conjunction with other personal mitigating factors, amount to “wholly exceptional circumstances” justifying the imposition of a fully

<sup>55</sup> *Ibid* at paras 11 – 12. See also *The People (DPP) v Monye* [2020] IECA 156 at paras 14 – 15.

suspended sentence. For instance, in *The People (DPP) v Alexiou*,<sup>56</sup> the Court of Criminal Appeal upheld a sentence of four years' imprisonment, suspended in its entirety, on the condition that the offender, a South African man, leave the State immediately. The decision to fully suspend the sentence was on the basis that the offender was of low intellectual ability, suggestible and naïve. The evidence was that, despite the fact that he was in his late twenties, the respondent was still heavily dependent on his mother who cared for him in South Africa. He had been approached by a man in Johannesburg who asked him to take a parcel to Dublin for a modest amount of money. He was in serious financial debt at the time. The Court of Criminal Appeal was satisfied that the subjective hardship that imprisonment in Ireland would cause the offender justified the imposition of a four year fully suspended sentence. Similarly, in *The People (DPP) v Wallace*,<sup>57</sup> the Court of Appeal upheld a five year suspended sentence imposed on the respondent, primarily on the basis that his serious medical condition, which necessitated the use of a wheelchair, would have placed an additional burden on him in a prison environment.

- [6.27] Similarly, the Courts have held that the adverse impact that imprisonment may have on dependents of the offender may justify the imposition of a fully suspended sentence for drug offences. For instance, in *The People (DPP) v Jervis and Doyle*,<sup>58</sup> both respondents had pleaded guilty to section 15A drug offences. The sentencing judge, having found that circumstances existed which justified a departure from the presumptive minimum, then went on to impose a fully suspended sentence of seven years on both of the respondents. In so doing, the sentencing judge had regard to the fact that the respondents were in a long-term relationship and had two children together. The Court held that the impact which imprisonment would have on the offender's family life and the welfare of his or her children, both in principle and in the circumstances of this case, justified the imposition of a wholly suspended sentence.<sup>59</sup> Finally, in *McGinty*, the Court of Criminal Appeal, in imposing a fully suspended sentence, had regard to the fact that the respondent's thus far successful efforts at rehabilitation had led to a reconciliation with him and his son which had in turn substantially improved his son's progress, both socially and academically.<sup>60</sup>

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<sup>56</sup> [2003] 3 IR 513.

<sup>57</sup> [2016] IECA 57.

<sup>58</sup> [2014] IECCA 14.

<sup>59</sup> However, it should be noted that the Court held that the failure to impose any conditions of suspension, other than the mandatory condition to keep the peace and be of good behaviour during the operational period, amounted to an error of principle and rendered the sentences imposed unduly lenient.

<sup>60</sup> [2006] IECCA 37, [2007] 1 IR 633.

*(ii) The Firearms Acts 1925 – 2009*

[6.28] The *Firearms Acts* make provision for presumptive minimum sentences for certain firearms offences. The table below outlines the offences which are the subject of a presumptive minimum sentence of either five or ten years.

<b>Legislation</b>	<b>Section</b>	<b>Offence</b>	<b>Presumptive minimum</b>	<b>Maximum Sentence</b>
<i>Firearms Act 1925</i>	Section 15 <sup>61</sup>	The possession or control of any firearm or ammunition (a) with intent to endanger life or cause serious injury to property, or (b) with intent to enable any other person, by means of the firearm or ammunition, to endanger life or cause serious injury to property, regardless of whether any injury to person or property has actually occurred is an offence.	10 years	Life Imprisonment
<i>Firearms Act 1964</i>	Section 26 <sup>62</sup>	A person who contravenes section 112(1) of the <i>Road Traffic Act 1961</i> (that is, taking possession of a mechanically propelled vehicle without the consent of the owner) and who, at the time of the contravention, has a firearm or imitation firearm with him or her, is guilty of an offence.	5 years	14 years
<i>Firearms Act 1964</i>	Section 27 <sup>63</sup>	A person commits an offence where he or she produces a firearm or imitation firearm for the purpose of resisting arrest or aiding the escape or rescue of the person or	10 years	Life Imprisonment

<sup>61</sup> As amended by section 42 of the *Criminal Justice Act 2006*.

<sup>62</sup> As substituted by section 57 of the *Criminal Justice Act 2006*.

<sup>63</sup> As substituted by section 58 of the *Criminal Justice Act 2006*.

		another person from lawful custody.		
<i>Firearms Act 1964</i>	Section 27A <sup>64</sup>	It is an offence to have possession or control of a firearm in circumstances that give rise to a reasonable inference that the person does not possess or control it for a lawful purpose, unless the person does possess or control it for such a purpose.	5 years	14 years
<i>Firearms Act 1964</i>	Section 27B <sup>65</sup>	A person commits an offence where he or she has with him or her a firearm or imitation firearm with intent to commit an indictable offence or to resist or prevent the arrest of the person or another person.	5 years	14 years
<i>Firearms and Offensive Weapons Act 1990</i>	Section 12A <sup>66</sup>	It is an offence to shorten the barrel of a shotgun to a length of less than 61 centimetres or a rifle to a length of less than 50 centimetres.	5 years	10 years

[6.29] As with the circumstances justifying a departure from the presumptive minimum sentence for section 15A and 15B offences under the *Misuse of Drugs Act 1977*, the presumptive minimum sentences prescribed in the legislative provisions set out above may be departed from where there are exceptional and specific circumstances which would make

<sup>64</sup> As substituted by section 59 of the *Criminal Justice Act 2006*. This provision was declared unconstitutional by the Supreme Court in *Ellis v Minister for Justice and Equality* [2019] IESC 30.

<sup>65</sup> As amended by section 60 of the *Criminal Justice Act 2006* and section 39 of the *Criminal Justice Act 2007*.

<sup>66</sup> As inserted by section 65 of the *Criminal Justice Act 2006*.

the imposition of the minimum term unjust in all the circumstances.<sup>67</sup> The various legislative provisions provides that the court may take into account any matters it considers appropriate, including (a) whether the person pleaded guilty to the offence and, if so – (i) the stage at which the intention to plead guilty was indicated, and (ii) the circumstances in which the indication was given, and (b) whether the person materially assisted in the investigation of the offence.<sup>68</sup> The Court may also have regard to whether the offender has any previous convictions for drug trafficking offences and whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence.<sup>69</sup>

[6.30] Sections 35 – 40 inclusive of the *Criminal Justice Act 2007* inserted a new subsection to provide for presumptive mandatory minimum sentences into section 15 of the *Firearms Act 1925*, sections 26, 27, 27A and 27B of the *Firearms Act 1964* and section 12A of the *Firearms and Offensive Weapons Act 1990*. As noted by the Court of Criminal Appeal in *The People (DPP) v Barry*,<sup>70</sup> the insertions are unusual in an Irish sentencing context in that they explicitly set out the legislative policy underlining the provisions.<sup>71</sup> Each amending provision provides that the purpose of these presumptive minimums is “in view of the harm caused to society by the unlawful use of firearms.”

[6.31] In *The People (DPP) v Ryan*,<sup>72</sup> the Court of Criminal Appeal delivered a guideline judgment in respect of the sentencing of offenders convicted of possession of a firearm in suspicious circumstances, contrary to section 27A of the *Firearms Act 1964*, as amended. Having reviewed several comparator cases in this area,<sup>73</sup> the Court of Criminal Appeal gave the following guidance:

“From that exhaustive review, it seems clear that the principal factors which will normally require to be taken into account in assessing the seriousness of an offence of possession of a firearm in suspicious circumstances are the nature and

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<sup>67</sup> As set out in subsection (5) of each of the presumptive minimum sentences provided for under the *Firearms Act 1925*, as amended, and the *Firearms Act 1964*, as amended, and subsection (10) of section 12A of the *Firearms and Offensive Weapons Act 1990*, as amended.

<sup>68</sup> As set out in subsection (5) of each of the presumptive minimum sentences provided for under the *Firearms Act 1925*, as amended, and the *Firearms Act 1964*, as amended, and subsection (10) of section 12A of the *Firearms and Offensive Weapons Act 1990*, as amended.

<sup>69</sup> As set out in subsection (6) of each of the presumptive minimum sentences provided for under the *Firearms Act 1925*, as amended, and the *Firearms Act 1964*, as amended, and subsection (11) of section 12A of the *Firearms and Offensive Weapons Act 1990*, as amended.

<sup>70</sup> [2008] IECCA 93.

<sup>71</sup> *Ibid* at para 5.

<sup>72</sup> [2014] IECCA 11.

<sup>73</sup> *Ibid* at paras 7.1 – 7.14.

quantity of the firearm or firearms concerned, the extent to which any firearm was either actually used or brandished in a way which would have caused people to be concerned that it might be used, the extent that the offence arose or might be inferred to have arisen out of criminality generally (and if so the seriousness of same) or out of specific and personal circumstances, and any circumstances concerning the culpability of the accused, such as the extent of the involvement of the accused or the extent to which it might be said that the accused was operating under a threat. Doubtless other factors could loom large on the facts of any individual case.

In the absence of exceptional and specific circumstances, there is, of course, a minimum presumptive, although non-mandatory, sentence of 5 years. Before considering any appropriate adjustment to reflect mitigating factors, it seems to this court that, in general terms, an offence at the lower end of the range ought attract a sentence of 5 to 7 years, an offence in the middle of the range ought attract a sentence of 7 to 10 years and an offence at the top of the range a sentence of 10 to 14 years.<sup>74</sup>

[6.32] Therefore, a sentencing court, in assessing the gravity of the offence and the headline sentence, should have regard to the three ranges outlined by the Court of Criminal Appeal in *Ryan*. Having done this, it should then proceed to consider whether or not there exists specific and exceptional circumstances justifying a departure from the presumptive minimum of five years. The case law in this area has established that the following factors may amount (usually in combination with other mitigating factors) to specific and exceptional circumstances justifying a departure from the presumptive minimum of five years' imprisonment:

- The offender was coerced into committing the firearms offence.<sup>75</sup>
- Genuine and successful efforts at rehabilitation since the offence.<sup>76</sup>
- The adverse impact that imprisonment would have on a dependent of the offender.<sup>77</sup>

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<sup>74</sup> *Ibid* at paras 7.15 – 7.16.

<sup>75</sup> *The People (DPP) v Barry* (Court of Criminal Appeal, 23 June 2008); *The People (DPP) v Curtin* [2010] IECCA 54.

<sup>76</sup> *The People (DPP) v O'Callaghan* [2010] IECCA 52.

<sup>77</sup> *The People (DPP) v O'Callaghan* [2010] IECCA 52.

- A combination of mitigating factors, namely an early plea, co-operation with Gardai and lack of previous convictions.<sup>78</sup> However, it should be noted that the presence of one mitigating factor – even a guilty plea – will not automatically constitute “specific and exceptional circumstances” justifying a departure from the presumptive minimum.<sup>79</sup>
- A low level of involvement in the commission of the offence.<sup>80</sup>

[6.33] The decision of the Court of Appeal in *The People (DPP) v Prenderville*<sup>81</sup> is important for present purposes in that it established that suspending a period of a sentence, so as to bring the period to be served below the presumptive minimum, will amount to an error of principle in circumstances where there are not specific and exceptional circumstances justifying such a departure. In this case, the respondent received a sentence of six years with the final 18 months suspended, having pleaded guilty to the possession of a firearm in suspicious circumstances contrary to section 27A of the *Firearms Act 1964*, as amended. The Court of Appeal found that the sentencing judge had erred in suspending the final 18 months of the six-year sentence, which meant that the period to be served in custody was less than the presumptive minimum of five years. This amounted to, it was held, an error of principle in circumstances where the sentencing court had found that specific and exceptional circumstances did not exist so as to justify a departure from the presumptive minimum.<sup>82</sup> As the Court noted, the fact that the legislative provision<sup>83</sup> refers to “specifying a term of imprisonment of not less than five years as the minimum term of imprisonment to be served puts the matter beyond doubt.”<sup>84</sup>

[6.34] In a similar vein to the presumptive minimum sentences prescribed under the *Misuse of Drugs Act 1977*, as amended, the presumptive minimums provided for under *The Firearms Acts*, and the accompanying case law to be discussed below, effectively establish the presumption of an immediate custodial sentence in respect of these offences. While

<sup>78</sup> *The People (DPP) v Curtin* [2010] IECCA 54; *The People (DPP) v Furlong and Farrell* (Court of Criminal Appeal, 23 June 2010).

<sup>79</sup> *The People (DPP) v Creighton* [2010] IECCA 56; *The People (DPP) v Dwyer* [2009] IECCA 12.

<sup>80</sup> *The People (DPP) v Curtin* [2010] IECCA 54.

<sup>81</sup> [2015] IECA 33.

<sup>82</sup> However, it should be noted that, in the earlier decision of *The People (DPP) v Creighton* [2010] IECCA 56, the Court of Criminal Appeal did not overturn a sentence of five years’ imprisonment with the final three years suspended imposed for possession of a firearm in suspicious circumstances contrary to section 27A of the *Firearms Act 1964*, as amended. The Court of Criminal Appeal did not deal at all with why the sentencing judge had not made any reference to the existence of special and exceptional circumstances justifying the imposition of a period *to be served* of less than the presumptive minimum of five years.

<sup>83</sup> Section 27A of the *Firearms Act 1964*, as amended.

<sup>84</sup> [2015] IECA 33 at para 16.



certain circumstances may exist which make a departure from the presumptive minimum justified in the circumstances of the case, it is clear that the imposition of a wholly suspended sentence for a firearms offence (the subject of a presumptive minimum) would require the presence of something similar to the *McGinty* “wholly exceptional circumstances” test, discussed above. Indeed, an analysis of the case law demonstrates that a wholly suspended sentence in such circumstances is very rare.

[6.35] *The People (DPP) v Mullarney*<sup>85</sup> concerned an undue leniency application brought by the DPP under section 2 of the *Criminal Justice Act 1993*. The respondent had been sentenced to a period of five years’ imprisonment, suspended in its entirety, having pleaded guilty to a number of firearms offences. The Court noted that, in order for the imposition of a fully suspended sentence to be justified in this case “quite exceptional circumstances would need to be present.”<sup>86</sup> The respondent had the benefit of very substantial personal mitigating factors. He had an extremely difficult upbringing and was the victim of prolonged sexual abuse throughout his childhood and teenage years. He had joined the army and served for 12 years, leaving with a clean record and commendations. At the time of sentencing, he had one previous conviction for assault. At some stage, the respondent had started to engage in drug activity and had subsequently fallen into debt with drug dealers. In response to threats to himself and his sons – from drug dealers to whom the respondent owed money – the respondent was persuaded to take possession of firearms and ammunition. Subsequent to being apprehended for the offence, the respondent had been fully co-operative with the Gardaí, had pleaded guilty and had self-rehabilitated in terms of dealing with his drug and alcohol problem. In light of “the quite exceptional history” of the respondent, along with the other mitigating factors outlined above, the Court of Criminal Appeal held that it was within the range of discretion of the sentencing judge to impose a fully suspended sentence.<sup>87</sup>

[6.36] *The People (DPP) v Farrell and Furlong*<sup>88</sup> also concerned an undue leniency application brought by the DPP under section 2 of the *Criminal Justice Act 1993*. The two respondents pleaded guilty to the offence of agreeing to participate in an enterprise intended to intimidate people into handing over money. The first named respondent (“Mr Farrell”) had received a fully suspended sentence of three years along with a fine, while the second named respondent (“Mr Furlong”) received a five-year suspended sentence with a fine. Mr Furlong had been in possession of an imitation firearm at the time of the offence and was therefore subject to the presumptive minimum provided for in section 27B of the *Firearms Act 1964*. The Court found that Mr Farrell’s sentence did not amount to an error of

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<sup>85</sup> (Court of Criminal Appeal, 11 February 2008).

<sup>86</sup> *Ibid* at para 5.

<sup>87</sup> *Ibid* at para 12.

<sup>88</sup> (Court of Criminal Appeal, 23 June 2010).

principle on the basis that his involvement in the offence was minimal, he co-operated fully and pleaded guilty. However, primarily on the basis that Mr Furlong had been in possession of an imitation firearm at the time of the offence, the Court took the view that the fully suspended sentence imposed on him was unduly lenient and amounted to an error of principle. While noting that exceptional and specific circumstances existed in favour of Mr Furlong<sup>89</sup> justifying a departure from the presumptive minimum sentence, the Court held that the mitigating factors did not justify the imposition of a fully suspended sentence. However, in light of new information that was put before the Court of Criminal Appeal on behalf of Mr Furlong – which indicated that he had not re-offended since the present offence, and was now in continuous and active employment – the Court “though with some hesitation” decided not to quash the wholly suspended sentence of five years.<sup>90</sup>

[6.37] Finally, in *The People (DPP) v O’Callaghan*<sup>91</sup> the respondent was sentenced to a period of five years’ imprisonment, suspended in its entirety, having pleaded guilty to possession of a firearm with intent to commit an indictable offence contrary to section 27B of the *Firearms Act 1964*. The respondent had the benefit of a plea of guilty. The respondent’s culpability was also lowered on account of the fact that the offences were committed when the respondent was still heavily addicted to drugs. Furthermore, the fact that the respondent was, at the time of sentence, drug free for a substantial period of time, which had, in turn, led to the revival of the respondent’s relationship with his young son also heavily influenced the sentencing court’s decision. The evidence was that the respondent now played a central role in his son’s life and that the latter would have to be placed in foster care if his father was imprisoned. It was these two factors, along with the more conventional mitigating factors, which led the Court of Criminal Appeal to the conclusion that the sentencing judge was entitled to impose a fully suspended sentence upon the respondent.

[6.38] As noted at the outset of this discussion, in the recent decision of *The People (DPP) v Ellis*<sup>92</sup> the Supreme Court declared section 27A(8) of the *Firearms Act 1964* unconstitutional. It is important at the outset, however, to note the narrowness of the issue before the Court in this decision. The Court specifically had to consider “whether it is consistent with the Constitution for the Oireachtas to legislate for a fixed or minimum mandatory sentence or penalty which does not apply to all persons convicted of the

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<sup>89</sup> Early plea of guilty, material assistance, acceptance of responsibility and co-operation with the Gardai in identifying others involved.

<sup>90</sup> (Court of Criminal Appeal, 23 June 2010) at para 10.

<sup>91</sup> [2010] IECCA 52.

<sup>92</sup> [2019] IESC 30.

offence.<sup>93</sup> The constitutionality of presumptive or mandatory minimum penalties generally were not under consideration.

- [6.39] Section 27A provides for a presumptive minimum sentence of five years' imprisonment for the offence of possession of a firearm in suspicious circumstances. The issue with subsection 8 of section 27A of the 1964 Act was that it imposed a mandatory minimum sentence of five years, but only in circumstances where the offender has already been convicted of a firearm offence which is the subject of a presumptive minimum sentence. The Supreme Court (per Finlay Geoghegan J) said that this produced a situation where the Oireachtas had:

"impermissibly crossed the divide in the constitutional separation of powers and sought to determine the minimum penalty which must be imposed by a court, not on all persons convicted of an offence contrary to s. 27A(1), but **only** on a limited group of such offenders identified by one particular characteristic, namely that such person has previously committed one or more of the listed offences."<sup>94</sup>

- [6.40] It was on this basis that the Court found that section 27A(8) of the 1964 Act was unconstitutional. While the Oireachtas was entitled to specify mandatory minimum penalties that apply to all persons convicted of a particular offence,<sup>95</sup> it could not lay down a minimum penalty to be imposed only on a certain category of offender convicted of the offence. This is because selecting the appropriate sentence for the particular offence as committed by the individual offender is exclusively a judicial task as per Article 34.1 of the Constitution.<sup>96</sup> It is important that the impact of this decision on presumptive mandatory sentences more generally is not over-stated. Indeed, the judgment of Finlay Geoghegan J emphasised that it was not considering the constitutionality of presumptive minimum sentences generally.<sup>97</sup> Therefore, the presumptive mandatory minimum sentences recognised in Irish sentencing law, and discussed above, are still in force, notwithstanding the pending general review of minimum sentences, as outlined earlier in this chapter.<sup>98</sup> However, it should also be noted that all of the mandatory minimum sentences provided for under the *Firearms Acts*, as discussed above, contain an identical provision to the one struck down in *Ellis*. Similarly, section 27(3F) of the *Misuse of Drugs Act 1977*, as amended, contains an identical provision in respect of section 15A and

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<sup>93</sup> [2019] IESC 30 at para 52 (Finlay Geoghegan J).

<sup>94</sup> *Ibid* at para 62.

<sup>95</sup> Provided that the relationship between the punishment and offence satisfies a general proportionality test.

<sup>96</sup> [2019] IESC 30 at para 60.

<sup>97</sup> *Ibid* at para 64.

<sup>98</sup> Pursuant to section 29 of the *Judicial Council Act 2019*

section 15B drug offences. In light of *Ellis*, these subsections are undoubtedly constitutionally vulnerable.

### 3. Presumptions of immediate custodial sentence at common law

#### (a) Manslaughter

[6.41] In *The People (DPP) v Princs*,<sup>99</sup> the Court of Criminal Appeal held that manslaughter resulting from an unlawful or dangerous act should normally be punished with a substantial custodial sentence. The Court held that only “where there are special circumstances and context will a moderate sentence or, *in wholly exceptional circumstances*, a non-custodial sentence, be warranted.”<sup>100</sup> It is clear, therefore, that there is a common law presumption of an immediate custodial sentence in respect of offenders convicted of manslaughter.

[6.42] An analysis of the case law points to the following circumstances as qualifying as “wholly exceptional” and therefore justifying the imposition of a suspended sentence for manslaughter:

- Strong provocation, especially where it was preceded by a history of violent or abusive behaviour;<sup>101</sup>
- Substantial diminished responsibility by reason of a mental illness;<sup>102</sup>

<sup>99</sup> [2007] IECCA 142.

<sup>100</sup> Emphasis added. [2007] IECCA 142 at para 22.

<sup>101</sup> *The People (DPP) v Princs* [2007] IECCA 142. In terms of criminal liability, the defence of provocation reduces the offence of murder to manslaughter. Therefore, in cases in which the defence of provocation has been established, a suspended sentence may be justified if the provocation was particularly strong or was brought about by prolonged subjection to violent and / or abusive behaviour. See, for example: *The People (DPP) v Hendrick* (Central Criminal Court, 20 June 1997). In this case, the offender was given a five-year suspended sentence for the manslaughter of his father. The deceased had sexually abused the offender and his siblings. Similarly, in *The People (DPP) v Bell* (Central Criminal Court, 13 November 2000), the offender was acquitted of murder but was found guilty of the manslaughter of her abusive partner. A five-year sentence, fully suspended, was imposed. In *The People (DPP) v O'Brien* (Central Criminal Court, 21 December 1999), the offender shot his 28-year-old son. The deceased was an alcoholic and had been very abusive towards members of his family. The offender was sentenced to a seven-year suspended sentence. In *The People (DPP) v Connell* (Central Criminal Court, 16 October 2001), the offender was acquitted of murder but found guilty of the manslaughter of his 25-year-old son, who suffered from acute manic psychosis. He received a four-year sentence of imprisonment with the final three years suspended.

<sup>102</sup> Section 6 of the *Criminal Law (Insanity) Act 2006* introduced the defence of diminished responsibility to reduce murder to manslaughter in circumstances where the offender, at the time of the offence, was suffering from a mental illness, mental disability, dementia or any disease of the

- Excessive self-defence or excessive defence of another;<sup>103</sup>
- Severe stress;<sup>104</sup>
- Youth or old age, and level of maturity,<sup>105</sup> and;
- Where the offender has suffered in some way as a result of the offence or the circumstances leading to up to the offence.<sup>106</sup>

[6.43] Manslaughter arising from the killing of a family member after an unexpected row has occasionally been punished with a suspended sentence. In such cases there is generally no premeditation, the offender often shows genuine remorse and he or she has suffered immensely as a result of the offence, as he or she is now bereft of a relative or a family member. In *The People (DPP) v McElvaney*,<sup>107</sup> the offender shot his younger brother during a sudden and intense row. He and his brother had been close friends. The offender was given a nine-year suspended sentence. Of course, many intra-familial homicides involve charges of murder, for which there is no possibility of any penalty on conviction

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mind (not including intoxication), that, although not justifying a finding of not guilty by reason of insanity, serves for substantially diminish the offender's responsibility for the offence – see *The People (DPP) v Crowe* [2009] IECCA 57, [2010] 1 IR 129. Similar to the defence of provocation, that for a suspended sentence to be justified in such cases, there must be present circumstances serving to substantially diminish the offender's responsibility for the offence. In *The People (DPP) v Burke* (Central Criminal Court, 23 March 2010) the offender was acquitted of murder but found guilty of the manslaughter of her husband on the ground of diminished responsibility. She was given a five-year sentence, fully suspended on the basis that her responsibility for the offence was deemed to have been substantially reduced due to her mental state at the time of the offence, along with evidence that the deceased had been very abusive towards her.

<sup>103</sup> In *The People (DPP) v Dunne* (Central Criminal Court, 27 November 1998) the offender was acquitted of murder but found guilty of the manslaughter of a neighbour. It was accepted that he was trying to protect his mother who he believed was being assaulted. He received a five-year suspended sentence.

<sup>104</sup> This is commonly considered an exceptional circumstance in cases where a young child is killed by a parent or close relative. For instance, in *The People (DPP) v Ryan* (Central Criminal Court, 29 April 1999) the offender pleaded guilty to the manslaughter of her 15-month old daughter. She was given a seven-year suspended sentence subject to strict conditions.

<sup>105</sup> In *The People (DPP) v Craig* [2010] IECCA 27, the offender, in light of her age and level of maturity, had been sentenced to three-and-a-half-years' imprisonment, suspended in full, for a manslaughter offence in which she was a secondary participant. Although the Court of Criminal Appeal held that the sentencing court had attached insufficient weight to the fact that a gun had been involved, it sentenced the defendant to three-and-a-half years' imprisonment with the final two-and-a-half years suspended, presumably on the same grounds as were highlighted by the sentencing judge.

<sup>106</sup> In *The People (DPP) v Roche* (*The Irish Times*, 8 November 2002) two offenders pleaded guilty to the manslaughter of a man at a new-age settlement in County Leitrim. Both offenders received a suspended sentence.

<sup>107</sup> (Central Criminal Court, 8 May 1990).

other than life imprisonment;<sup>108</sup> where such cases result in charges of manslaughter they may be aggravated by, for instance, a history of abuse. In such circumstances, the imposition of a suspended sentence will be less likely.

- [6.44] In *The People (DPP) v Mahon*,<sup>109</sup> the Supreme Court gave detailed guidance on sentencing in manslaughter cases. It is notable that the Court here drew upon statistics published by the Irish Prison Service regarding the length of the terms of imprisonment served by persons who had been sentenced to life imprisonment (in most cases for murder).<sup>110</sup> By engaging in this exercise, the Court was able to observe that the average time spent in custody before release following a life sentence had increased over the last 15 years or so. This serves to underscore the importance of data-gathering and analysis of sentencing information, which is stressed elsewhere in this Report.<sup>111</sup>
- [6.45] Regarding sentencing bands for manslaughter, the Court divided the sentencing ranges into four categories:
1. The worst cases
  2. High culpability cases
  3. Medium culpability cases, and
  4. Low culpability cases.
- [6.46] The Court held that the worst cases should attract a headline sentence of between 15 and 20 years, though a life sentence may also be appropriate if the circumstances of the case are particularly egregious. Sentences in the high culpability range should attract a headline sentence of between 10 and 15-years' imprisonment. Medium culpability offending should attract a headline sentence of between four- and 10-years' imprisonment. Finally, low culpability offending may justify a headline sentence of up to four years' imprisonment. The Court gave several examples of each type of case drawn from prior jurisprudence. While *Mahon* did not give any guidance as to the circumstances in which a suspended sentence is justified in manslaughter cases, it may be inferred that only offences falling within the "low" culpability band will ordinarily be capable of being disposed of by way of a suspended sentence on account of mitigating factors.

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<sup>108</sup> For example, in *The People (DPP) v Chada* (Central Criminal Court, 7 October 2014) the offender was convicted of the murder of his two sons. Two sentences of life imprisonment were imposed, to run concurrently.

<sup>109</sup> [2019] IESC 24.

<sup>110</sup> *Ibid* at paras 39 – 44.

<sup>111</sup> See, in particular, chapter 8 of this Report.

**(b) Rape**

- [6.47] In *The People (DPP) v Tiernan*,<sup>112</sup> the Supreme Court held that rape involves such a serious attack on the human dignity and bodily integrity of the victim that it should, save in exceptional circumstances, be punished with a substantial and immediate custodial sentence, even in the absence of aggravating factors. It is also clear, therefore, that there is a presumption of an immediate custodial sentence in respect of the offence of rape. However, this presumption does not preclude a sentencing court from exercising its discretion to impose a fully suspended sentence in wholly exceptional cases. In *The People (DPP) v Keane*,<sup>113</sup> the Court of Criminal Appeal stated that, while the possibility of a non-custodial sentence (or indeed a suspended custodial sentence) is not, in principle, excluded in rape cases in which there are wholly exceptional circumstances, the starting point for any court when imposing a sentence for the offence of rape is that of an immediate and substantial custodial sentence.<sup>114</sup>
- [6.48] The Court in *Keane* affirmed that it is only where there are particularly strong or unusual circumstances that the possibility of a suspended sentence will arise in a rape case. In *The People (DPP) v Drought*,<sup>115</sup> the Central Criminal Court (Charleton J) examined cases of rape over a three-year period in which "lenient", "ordinary" and "severe" sentences had been imposed. With regard to the lenient category, the Court examined cases in which a suspended sentence had been imposed. The Court noted that a wholly suspended sentence could only be contemplated where the circumstances of the case were "so completely exceptional as to allow the court to approach sentencing for the offence of rape in a way that deviates so completely from the norm established by law."<sup>116</sup>
- [6.49] In the decision of *The People (DPP) v FE*,<sup>117</sup> the Supreme Court conducted an extensive review of sentencing case law in rape cases and gave useful guidance as to the applicable ranges of appropriate headline sentences for sentencing for this category of offence. Having reviewed a number of Court of Appeal decisions, the Court (Charleton J) outlined the following sentencing ranges:

- (1) Ordinarily, the headline sentence should be approximately seven years' imprisonment. Such a headline sentence will be merited in circumstances "where

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<sup>112</sup> [1988] 1 IR 250, [1989] ILRM 149. See also *R v Roberts* [1982] 1 All ER 609; *R v McDonald* [1989] NI 37.

<sup>113</sup> [2007] IECCA 119, [2008] 3 IR 177.

<sup>114</sup> See also the comments of the Court of Criminal Appeal in *The People (DPP) v NY* [2002] 4 IR 309 at page 315.

<sup>115</sup> [2007] IEHC 310, [2008] 1 IR 308.

<sup>116</sup> [2007] IEHC 310 at para 24, [2008] 1 IR 308 at page 319.

<sup>117</sup> [2019] IESC 85.

coercion or force or other aggravating circumstances were not at a level that would require a more serious sentence.”<sup>118</sup>

- (2) In respect of more serious offences, a headline sentence of between 10 to 15 years’ imprisonment would be appropriate. The Court noted that “what characterises these cases is a more than usual level of degradation of the victim or the use of violence or intimidation beyond that associated with the offence, or the abuse of trust.”<sup>119</sup>
- (3) Finally, there was a range of between 15 years to life imprisonment for the most serious and extreme cases.

[6.50] In respect of suspended sentences, the Court essentially reiterated the principle laid down in the earlier decisions of *Tiernan* and *Keane*, noting that:

“while a suspended sentence for rape is possible, since the Oireachtas has enabled it, any such approach should be considered in the context of the gravity of the offence and the effect on the victim as both being very rare and requiring an especial justification.”<sup>120</sup>

[6.51] In its review, the Court found four decisions in which a fully suspended sentence was imposed for the offence of rape. Two of these sentences were not interfered with<sup>121</sup> and two were ultimately overturned on appeal.<sup>122</sup> One of the cases falling into the former category was the decision of *The People (DPP) v WC*.<sup>123</sup> In this case, the offender pleaded guilty to raping his then girlfriend after a night of New Year’s Eve celebrations. The offender and the complainant initially engaged in what was described as a consensual and intimate encounter. However, when the offender sought to have sexual intercourse with the complainant, she did not consent to this and was raped by the offender. The

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<sup>118</sup> *Ibid* at para 52.

<sup>119</sup> *Ibid* at para 57.

<sup>120</sup> *Ibid* at para 47.

<sup>121</sup> *The People (DPP) v WC* [1994] 1 ILRM 321; *The People (DPP) v JJK* (Central Criminal Court, 22 October 2018). However, it is worth noting, as the Court in *FE* (at para 46) did, that *WC* was not approved on appeal as, at the time, the undue leniency procedure, pursuant to section 2 of the *Criminal Justice Act 1993*, was not available.

<sup>122</sup> *The People (DPP) v Hustveit* [2016] IECA 271; *The People (DPP) v Counihan* [2015] IECA 76. It should be noted that there was one another decision – *The People (DPP) v NY* [2002] 4 IR 309 – in which the Court of Criminal Appeal, having overturned the sentence imposed in the Central Criminal Court (three years’ imprisonment, with the last nine months suspended), imposed a fully suspended sentence but this was in circumstances where the offender had already served a period in custody by the time the appeal was heard.

<sup>123</sup> [1994] 1 ILRM 321.



sentencing judge had imposed a sentence of nine years' imprisonment, wholly suspended. The Central Criminal Court (Flood J) was influenced in his decision by the fact that:

"From the earliest stages of this incident the accused has admitted his guilt and accepted the serious harm that was caused by his conduct. when the accused was interviewed... he admitted his involvement in the offence and indicated a clear desire to plead guilty to any offence with which he might be charged. Subsequent to that interview he made a full written statement to the same effect. He also wrote to the complainant a letter admitting his guilt, acknowledging the wrong he had done to her, and expressing, what I am satisfied is, real remorse."<sup>124</sup>

- [6.52] The sentencing court was also of the view that the offender could be more effectively treated and rehabilitated within the community, as there was, at the time, no prison-based treatment for sex offenders. The other decision reviewed by the Supreme Court in *FE* in which a fully suspended sentence was handed down was *The People (DPP) v JJK*.<sup>125</sup> In this case, the offender was aged 86 at the time of sentencing and was suffering from a number of health difficulties. He had also already served a term of imprisonment in respect of sexual offences committed against another person.
- [6.53] The Court also discussed two decisions in which fully suspended sentences had been overturned by the Court of Appeal. Firstly, in *The People (DPP) v Hustveit*,<sup>126</sup> the respondent was sentenced to a seven-year term of imprisonment, fully suspended, having pleaded guilty to repeatedly raping his then girlfriend while she slept over an approximately seven-month period. The sentencing court had decided to impose a fully suspended sentence on the ground that the offending behaviour would not have come to light but for the offender's own admissions. The DPP applied for a review of the sentence on grounds of undue leniency pursuant to section 2 of the *Criminal Justice Act 1993*. The Court of Appeal held that, in light of the manner in which the offending behaviour came to light, as well as other significant personal mitigation in favour of the respondent,<sup>127</sup> "there was scope for suspending a significant portion of that sentence".<sup>128</sup> Nevertheless, the Court went on to state that "the case was not so wholly exceptional as to permit an entirely non-custodial disposal. This case involved repeated offending over a significant

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<sup>124</sup> *Ibid* at para 37.

<sup>125</sup> (Central Criminal Court, 22 October 2018).

<sup>126</sup> [2016] IECA 271.

<sup>127</sup> *Ibid* at para 18.

<sup>128</sup> *Ibid* at para 29.

period of time.”<sup>129</sup> The Court of Appeal quashed the original sentence and replaced it with a sentence of two-and-a-half-years’ imprisonment with the final 15 months suspended.

[6.54] Similarly, in *The People (DPP) v Coughlan*,<sup>130</sup> the offender had been sentenced to a term of seven years’ imprisonment, suspended in its entirety. The offender had raped his wife’s 13-year-old sister while she was babysitting. In light of the exceptional personal circumstances of the offender,<sup>131</sup> and notwithstanding the gravity of the offending behaviour, the sentencing judge formed the view that there were wholly exceptional circumstances present which justified the imposition of a fully suspended sentence. The Court of Appeal rejected the proposition that the offender’s personal circumstances, either taken alone or cumulatively, were sufficient to reach the “wholly exceptional circumstances” threshold and accordingly found that the sentence imposed was unduly lenient. However, the Court, in acknowledging the “particular and extreme circumstances of this case”, suspended the final seven years of the 10-year headline sentence.<sup>132</sup>

[6.55] The preceding discussion demonstrates that the imposition of a fully suspended sentence for the offence of rape is extremely rare. Indeed, the available data adds further weight to this assertion. In May 2016, *The Irish Times* published an analysis of rape sentences imposed in the Central Criminal Court between 2013 and 2015.<sup>133</sup> This analysis showed that 70% of sentences for rape were partly suspended. In general, only those who went to trial and refused to admit their guilt after conviction received entirely unsuspended sentences. However, in the case of some particularly heinous crimes, entirely unsuspended sentences were imposed despite a guilty plea. An example of this was the conviction of a 77-year-old man for abusing both his daughter and granddaughter. He was sentenced to seven years’ imprisonment despite his guilty plea and advanced age.<sup>134</sup> In terms of the presumption of an immediate custodial sentence, the research found that only three of the cases examined were disposed of by way of a fully suspended sentence.

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<sup>129</sup> *Ibid* at para 29.

<sup>130</sup> [2015] IECA 76.

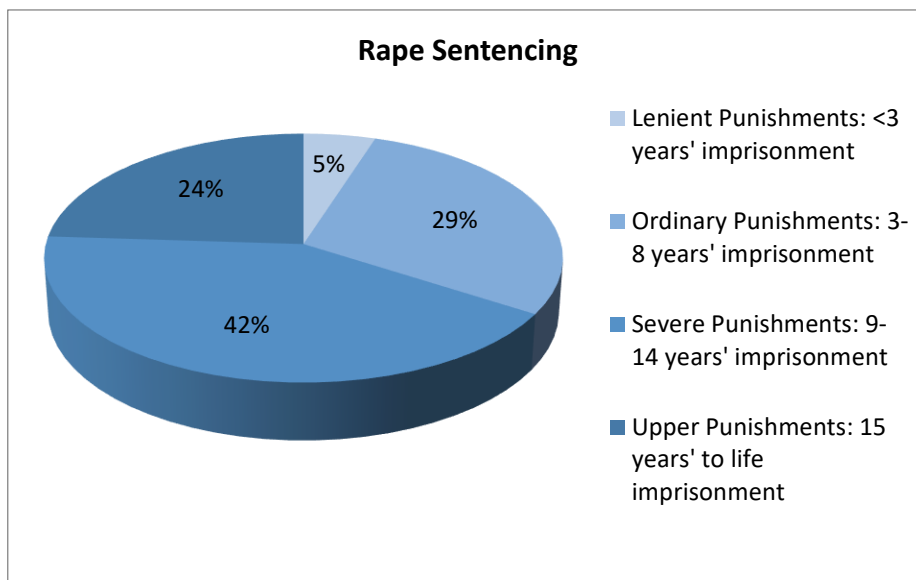
<sup>131</sup> The offender had no previous convictions and had not come to the adverse attention of the authorities in the almost 30 years since the offence; he was, at the date of sentencing, in a settled relationship with his partner; they had three young boys who had autism and required a high level of care; the evidence was that the offender took a central role in the care of the children. Also, the sentencing judge placed a lot of emphasis on the fact that the offender had, since the offending behaviour, effected a kind of self-rehabilitation which made a significant impression on the judge.

<sup>132</sup> [2015] IECA 76 at para 17.

<sup>133</sup> Conor Gallagher, “Rape Sentences Averaging 10 Years after Rise over Last Decade” *The Irish Times* (23 May 2016) <<https://www.irishtimes.com/news/crime-and-law/rape-sentences-averaging-10-years-after-rise-over-last-decade-1.2656754>> accessed on 22 July 2020.

<sup>134</sup> *Ibid*.

[6.56] A study carried out by Women’s Aid<sup>135</sup> yielded broadly similar results. This research analysed 65 domestic abuse cases over a 12-month period between 2018 and 2019. In eight of the 65 cases examined, the principal charge was rape. Out of those eight cases, all were given custodial sentences ranging between five years to life imprisonment. In none of these cases was a wholly suspended sentence imposed. A partially suspended sentence was imposed in four out of the eight cases, with the average length of sentence being 21 months. However, it should be noted, as the authors of the study did, that the fact that they had to rely exclusively on the media reports had the effect of “skewing the results towards more media worthy incidents.”<sup>136</sup> Finally, *Figure 1* below illustrates a statistical analysis of sentencing for rape completed in November 2012, as carried out by Charleton J (writing extra-judicially) and Scott.<sup>137</sup>



*Figure 1. Rape Sentencing*

[6.57] In conclusion, while a fully suspended sentence should not be excluded from the range of sentencing options available to the court, this sanction should only be imposed in wholly exceptional circumstances. Further, even when such exceptional circumstances are present, they should be weighed up carefully against the gravity of the offence and, in particular, the impact on the victim. During the consultation for this Report, several submissions pointed out that the imposition of a fully suspended sentence for serious

<sup>135</sup> Women’s Aid and Monica Mazzone, *Unheard and Uncounted – Women, Domestic Abuse and the Irish Criminal Justice System* <[https://www.womensaid.ie/assets/files/pdf/unheard\\_and\\_uncounted\\_-\\_women\\_domestic\\_abuse\\_and\\_the\\_irish\\_criminal\\_justice\\_system\\_full\\_report.pdf](https://www.womensaid.ie/assets/files/pdf/unheard_and_uncounted_-_women_domestic_abuse_and_the_irish_criminal_justice_system_full_report.pdf)> accessed on 20 April 2020.

<sup>136</sup> *Ibid* at page 25.

<sup>137</sup> Charleton and Scott, “Throw Away the Key: Public and Judicial Approaches to Sentencing – Towards Reconciliation” (2013) 10 *Irish Probation Journal* 7. The sentencing information was analysed and compiled by the Judicial Researcher’s Office within the Courts Service.

offences is extremely frustrating for the victim with a potential for re-traumatisation,<sup>138</sup> particularly in circumstances where a breach of a condition of suspension may not ultimately lead to a revocation of the suspended element of the sentence.<sup>139</sup> This impact on the victim is undoubtedly more pronounced for the offence of rape, where the victim's right to bodily integrity has been egregiously infringed. Therefore, the Commission is of the view that, even when there are present wholly exceptional circumstances, sentencing courts should consider whether the gravity of the offence and the impact on the victim renders the imposition of a fully suspended sentence unjust in all of the circumstances of the case.

### (c) Causing serious harm

[6.58] Sentencing guidance for the offence of causing serious harm contrary to section 4 of the *Non-Fatal Offences against the Person Act 1997* ("causing serious harm") was issued by the Court of Criminal Appeal in *The People (DPP) v Fitzgibbon*.<sup>140</sup> The appellant in this case was under the care of two healthcare professionals who had picked him up from a city centre location. He seemed quite agitated and appeared to be under the influence of alcohol and drugs. He asked the driver of the car to pull into a service station, after which he jumped out and launched into a serious and unprovoked attack on a 16-year-old youth. The victim was punched 26 times in the head, followed by 65 stamps to the head and two stamps to the chest. The attack lasted approximately four minutes and had a devastating physical and psychological impact on the victim. The sentencing judge imposed a sentence of 15 years' imprisonment on the offender, with the final three years suspended. The Court of Criminal Appeal, having found an error of principle, invited further submissions on the appropriate sentence. In the end, the Court of Criminal Appeal imposed a sentence of nine-and-a-half years' imprisonment.<sup>141</sup>

<sup>138</sup> In this regard, the Commission notes that Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] *OJ L* 315/57 provides at Article 18: "... Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm..." The Directive does not define the term "secondary victimisation," but it is defined in the *Criminal Justice (Victims of Crime) Act 2017*, the Act by which the Directive is transposed, as meaning "victimisation that occurs indirectly through the response of institutions and individuals to the victim." The Act does not expressly refer to secondary victimisation in the sentencing context, but the Directive has direct effect.

<sup>139</sup> See chapter 8 for a discussion on the issues associated with the monitoring and enforcement of conditions of suspension.

<sup>140</sup> [2014] IECCA 12, [2014] 2 ILRM 116.

<sup>141</sup> *The People (DPP) v Fitzgibbon* [2014] IECCA 12, [2014] 2 ILRM 116.

- [6.59] At a more general level, the Court of Criminal Appeal in *Fitzgibbon* offered guidance on sentencing in cases of causing serious harm. The Court listed a number of factors that may be taken into consideration when assessing harm and culpability in such cases, namely:
- The severity and viciousness of the assault;
  - The injuries suffered;
  - The degree of culpability;
  - The general circumstances surrounding the assault, such as whether it was committed in the context of any further criminality;
  - Whether a weapon was used, and
  - Any other relevant factors which should be taken into account in each individual case.
- [6.60] With regard to the range of sentences, the Court held that offences at the lower end of the scale of gravity may attract a headline sentence of between two to four years' imprisonment, in the absence of unusual factors. In the mid-range, a sentence of four years to seven-and-a-half years may be appropriate, with the upper range deemed to be a sentence of seven-and-a-half-years to twelve-and-a-half years' imprisonment. Finally, the Court noted that cases of an exceptional nature may warrant, before taking mitigating circumstances into account, a headline sentence of twelve-and-a-half years to life imprisonment.<sup>142</sup>
- [6.61] The Court of Appeal has applied the *Fitzgibbon* guidance in a number of decisions.<sup>143</sup> However, in *The People (DPP) v O'Sullivan*,<sup>144</sup> the Court concluded that the sentencing bands established in *Fitzgibbon* were in need of refinement. In this regard, the Court in *O'Sullivan* commented that:

"In the almost five years since the decision in *DPP v Fitzgibbon*, quite a number of cases of s. 4 assaults have come before the Courts, whether by way of appeals against severity or applications to review on grounds of undue leniency. The experience of the Court is that the upper end of the suggested range for mid-range and upper-range offences impose excessive constraints on Sentencing Judges. The experience of the courts operating under *Fitzgibbon* is that an upper

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<sup>142</sup> See *The People (DPP) v Z* [2014] IECCA 13, [2014] ILRM 132 for the circumstances in which the maximum penalty may be imposed.

<sup>143</sup> See *The People (DPP) Cullen* [2015] IECA 4; *The People (DPP) v McCarthy* [2014] IECA 8; *The People (DPP) v Whelan* [2018] IECA 142.

<sup>144</sup> [2019] IECA 250.

limit of seven and a half years for a mid-range is too low and a figure of ten years would be more appropriate. Likewise, we are inclined to the view that a figure of twelve and a half years as a pre-mitigation for high-end offences is too low and should be increased to fifteen years with exceptional cases higher again.”<sup>145</sup>

- [6.62] It has been argued that it would have been preferable if the Court of Appeal had provided an empirical basis for its decision to adjust the guidelines for causing serious harm, as opposed to merely relying on their anecdotal impression gained from previous cases that had come before it.<sup>146</sup> Nevertheless, in light of *O’Sullivan*, the sentencing bands set out in *Fitzgibbon* have been altered slightly so that the mid-range of gravity is now between four years and 10 years’ imprisonment, while the upper-range has been recalibrated to a period of imprisonment of between 10 to 15 years. However, the Court did not make any changes to the starting point of two years’ imprisonment for offences on the low range of gravity identified in *Fitzgibbon*.
- [6.63] On one view, it could be argued that the sentencing bands established in the above decisions created the presumption of an immediate custodial sentence in respect of the offence of causing serious harm. After all, both *Fitzgibbon* and *O’Sullivan* established two years’ imprisonment as the starting point on the lower range. However, it is important to emphasise that the bands identified above are in respect of headline sentences. In other words, while the gravity of the offending behaviour inherent in an offence of causing serious harm should, on the basis of the above guidance, always merit a headline custodial sentence of at least two years’ imprisonment, an offender’s personal circumstances may well lead a sentencing court to the conclusion that the custodial sentence should be fully suspended. Therefore, it does not necessarily follow that the above decisions established a presumption of an immediate custodial sentence in respect of the offence of causing serious harm. Indeed, this issue was raised by the Court of Appeal in *O’Sullivan*, where it noted that:

“we stress, and it is our impression that this is not always fully appreciated, that the guidance [in *Fitzgibbon*] was offered in respect of pre-mitigation sentences. In many cases, there will of course be factors present by way of mitigation so that the ultimate sentence imposed will be less than the sentence identified as a headline or starting pre-mitigation sentence. In some cases, there may be very powerful mitigation present in which case the ultimate sentence imposed will, in

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<sup>145</sup> *Ibid* at para 8.

<sup>146</sup> O’Malley, “Sentencing: Guidance and Guidelines” *Annual National Prosecutors’ Conference* (7 December 2019) at page 4.

all likelihood, diverge very considerably indeed from the starting pre-mitigation headline sentence."<sup>147</sup>

[6.64] Nevertheless, in two subsequent decisions, the Court of Appeal has set out in more explicit terms that the offence of causing serious harm ought to attract the presumption of an immediate custodial sentence. These decisions have also given guidance as to the factors to which a sentencing court should have regard when deciding whether this presumption has been rebutted. *The People (DPP) v (Ann-Marie) Byrne*<sup>148</sup> concerned an undue leniency application brought by the DPP pursuant to section 2 of the *Criminal Justice Act 1993*. The respondent had been given a fully suspended sentence, having pleaded guilty to one count of causing serious harm. The respondent had, during a violent altercation with the victim, bitten her bottom lip and removed nine square centimetres of tissue from the victim's face. The sentencing judge, in determining that the gravity of the offence fell into the upper end of the mid-range of gravity (as laid out in *Fitzgibbon* i.e. four to seven years' imprisonment), set the headline sentence at seven years' imprisonment. However, given the various personal mitigating factors present, namely:

- an early plea of guilty;
- no previous convictions or history of violence;
- genuine remorse;
- the various adversities in her life;
- strong evidence of the steps taken by the respondent to address these personal difficulties, and;
- the fact that, at the time of sentencing, the respondent had recently had a baby and was pregnant again;

the sentencing judge decided that this was an appropriate case to suspend the entirety of the sentence.

[6.65] The Court of Appeal held that:

"The offence in this case was subject to discretionary punishment. However, we recognise that some offences will be so serious that they effectively carry a presumption against the suspension of a custodial sentence in its entirety.....However, even in such cases existing jurisprudence indicates that a

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<sup>147</sup> [2019] IECA 250 at para 8.

<sup>148</sup> [2017] IECA 97.

wholly suspended sentence can be imposed in cases where there are special reasons of a substantial nature and particularly exceptional circumstances....The present case was very serious and it cannot be gainsaid but that a sentence involving an immediate custodial element would represent the norm **absent special reasons of a substantial nature and particularly exceptional circumstances**".<sup>149</sup>

[6.66] The Court also cited with approval a decision of the Court of Appeal of New South Wales – *R v Zamagias*<sup>150</sup> – and endorsed the principles established in that decision in respect of the factors to which a sentencing judge should have regard when deciding if the presumption has been rebutted, namely:

- The nature of the offence committed;
- The objective seriousness of the criminality involved;
- The need for general or specific deterrence;
- The subjective circumstances of the offender.

[6.67] While acknowledging that the sentence imposed was very lenient, the Court ultimately concluded in *(Ann-Marie) Byrne* that:

"the particular circumstances of this case, which cumulatively influenced him to take the step that he did, comprised special reasons of a substantial nature and were sufficiently exceptional to have allowed him to legitimately exercise his discretion to suspend the entirety of the sentence."<sup>151</sup>

[6.68] A fully suspended sentence handed down for one count of causing serious harm was also upheld by the Court of Appeal in *The People (DPP) v Smith*.<sup>152</sup> In this case, the respondent and the victim spent all day drinking together. An argument broke out between the two men, subsequent to which the respondent stabbed the victim twice in the back with a kitchen knife. The sentencing judge fixed the headline sentence at five years. Having taken into account the "significant mitigating factors" present – which were remarkably similar to those present in *(Ann-Marie) Byrne*<sup>153</sup> – the sentencing judge deducted two

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<sup>149</sup> *Ibid* at paras 33 – 34 [emphasis added].

<sup>150</sup> [2002] NEWCCA 17 at para 32.

<sup>151</sup> [2017] IECA 97 at para 46.

<sup>152</sup> [2019] IECA 1.

<sup>153</sup> In *Smith*, the respondent had entered an early plea, had no previous convictions, the probation report had indicated that, since the offence, the respondent had changed the course of his life – he was now in stable employment, in a stable relationship and was a father to a young child. He



years from the headline sentence of five years so as to reach a post-mitigation figure of three years' imprisonment. Finally, having regard to the "exceptionally positive probation report", the sentencing judge concluded that this "was one of those exceptional cases where society is best served by suspending the sentence of three years in whole ... for a period of five years".<sup>154</sup>

- [6.69] The Court of Appeal, dismissing the DPP's undue leniency application, applied the principles established in *(Ann-Marie) Byrne*. In respect of the need for specific and / or general deterrence,<sup>155</sup> the Court said the following:

"General deterrence is pursued in all cases through the setting of an appropriate headline sentence. There was no quarrel in this appeal with the headline sentence of five years nominated by the sentencing judge. Although he does not reference deterrence as an objective in his sentencing remarks, it is clear from the judge's acknowledgment of public concern about the use of knives that he was fully alive to the need to encourage desistance in the case of the specific offender in question, and in the case of others to deter generally. His acknowledgement that the offender in this case '*has a very low risk assessment*' and that '*he has changed the course of his life*' makes it clear that he sees little need for specific deterrence in the circumstances of the case"<sup>156</sup>

- [6.70] Furthermore, having regard to the significant mitigation present in the case,<sup>157</sup> the Court held that the decision to fully suspend represented "the legitimate exercise of judicial discretion that was open to the judge in the light of the evidence that he had heard, and in pursuit of the penal objective of incentivising continued rehabilitation".<sup>158</sup> In conclusion, the Court stated that while there was "no single circumstance in this case that could be characterised [as of a special nature or wholly exceptional], we nevertheless consider that

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expressed remorse and offered to pay the victim €1,000 in compensation. Finally, three years had passed between the offence and sentencing, during which time he had not re-offended.

<sup>154</sup> [2019] IECA at para 12.

<sup>155</sup> The third of the principles in *(Ann-Marie) Byrne*, derived from the New South Wales decision of *Zamagias*.

<sup>156</sup> [2019] IECA 1 at para 18.

<sup>157</sup> The early plea of guilty, lack of previous convictions, the fact that, since the offence, the respondent had changed the course of his life – he was now in stable employment, in a stable relationship and was a father to a young child. He expressed remorse and offered to pay the victim €1,000 in compensation. Finally, three years had passed between the offence and sentencing, during which time he had not re-offended.

<sup>158</sup> [2019] IECA 1 at para 21.

cumulatively all of the circumstances of the respondent's case, taken together, were sufficient to meet the required threshold."<sup>159</sup>

[6.71] The above decisions are a welcome development of the guidance outlined by the Court of Criminal Appeal in *Fitzgibbon*, as refined by the Court of Appeal in *O'Sullivan*. While these earlier decisions implied that the offence of causing serious harm should attract the presumption of an immediate custodial sentence, this implication has been put in much more express terms in the decisions of *(Ann-Marie) Byrne* and *Smith*. The position is now clear. In sentencing offenders for this offence, sentencing courts should start from the proposition that this offence should ordinarily be met with an immediate custodial sentence. The full suspension of a custodial sentence is only justified when there are present "special reasons of a substantial nature and particularly exceptional circumstances."<sup>160</sup> Further, these decisions have given some guidance as to what factors may be sufficient to rebut this presumption.

[6.72] However, it is important that the precedential value arising from these decisions for future sentencing courts is not over-stated. As the Court was keen to point out in *Smith*:

"We consider that sight must not be lost in this case of the fact that this is an undue leniency review. The fact that a more severe sentence might have been imposed, and upheld if appealed, is not a relevant consideration. The question is whether the sentence actually imposed was unduly lenient, i.e. outside of the norm to a significant degree."<sup>161</sup>

[6.73] As discussed earlier in this chapter, the threshold for appellate intervention in an undue leniency application is quite high. Therefore, a sentencing judge faced with similar facts to the above cases may conclude that an immediate custodial sentence is merited. Crucially, such a decision would not necessarily be overturned on review on foot of the outcome of the decisions in *(Ann-Marie) Byrne* and *Smith*. Nevertheless, the general principles outlined in these cases, and discussed above, should prove very useful for Irish sentencing courts.

#### **(d) Fraud**

[6.74] In *The People (DPP) v Murray*,<sup>162</sup> a case involving elaborate and sophisticated social welfare fraud, lasting several years and amounting to the fraudulent misappropriation of

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<sup>159</sup> *Ibid* at para 22.

<sup>160</sup> As per the Court of Appeal in *The People (DPP) v Ann-Marie Byrne* [2017] IECA 97 at para 33.

<sup>161</sup> [2019] IECA 1 at para 19.

<sup>162</sup> [2012] IECCA 60.

€250,000, the Court of Criminal Appeal held that a presumption of an immediate custodial sentence should apply. The Court stated that:

“[O]ffences of this kind strike at the heart of principles of equity, equality of treatment and social solidarity on which the entire edifice of the taxation and social security systems lean.

We therefore suggest for the future guidance of sentencing courts that significant and systematic frauds directed upon the public revenue – whether illegal tax evasion on the one hand or social security fraud on the other – should generally meet with an immediate and appreciable custodial sentence, although naturally the sentence to be imposed in any given case must have appropriate regard to the individual circumstances of each accused.”<sup>163</sup>

[6.75] However, in *The People (DPP) v Begley*,<sup>164</sup> a case involving the fraudulent evasion of customs duties to the sum of €1.6 million over several years, the Court of Criminal Appeal stressed that no parallel set of sentencing rules exists in respect of tax fraud or social welfare cases. In other words, ordinary sentencing principles should apply to serious frauds.<sup>165</sup> *Begley* may be seen as a retreat from the above cited statement of principle in *Murray*. However, in a subsequent decision, *The People (DPP) v Zaffer*,<sup>166</sup> the Court of Appeal re-affirmed the position initially set down in *Murray*. In *Zaffer*, the respondent, a senior insurance claims official, pleaded guilty to the theft of €221,600 over a six-year period. The sentencing judge sentenced him to two-and-a-half-years’ imprisonment, suspended in its entirety. The DPP sought a review of the sentence on grounds of undue leniency. The Court of Appeal held that, even allowing to the greatest possible extent for the respondent’s strong personal mitigation, a fully suspended sentence was unduly lenient and unjustified. Therefore, allowing the appeal, the Court commented that:

“serious pre-meditated fraud will almost always merit a custodial sentence... only the existence of exceptional circumstances should result in an entirely suspended sentence where there are hundreds of thousands of euro involved.”<sup>167</sup>

[6.76] Therefore, *Zaffer* established that the presumption of an immediate custodial sentence applies in cases of serious fraud. Furthermore, an analysis of the facts in *Zaffer* suggests

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<sup>163</sup> *Ibid* at paras 21 – 22.

<sup>164</sup> [2013] IECCA 32, [2013] 2 IR 188.

<sup>165</sup> See further chapter 9 of this Report, where sentencing for fraud is considered in a corporate context.

<sup>166</sup> [2016] IECA 321.

<sup>167</sup> *Ibid* at para 15.

that “conventional” personal mitigating factors, even when taken cumulatively, will not suffice to reach the “exceptional circumstances” threshold, particularly where the gravity of the offence is at a particularly high level. In *Zaffer*, the offender had the benefit of a guilty plea, a lack of previous convictions, good educational qualifications, as well as her own difficult personal circumstances, including drug addiction. Nevertheless, these personal mitigating factors, particularly when viewed against the fact that the offending behaviour was pre-meditated and took place over a prolonged period and involved a sum in excess of €200,000, were not sufficient to justify the imposition of a fully suspended sentence.

[6.77] The decision of *The People (DPP) v Boyle*<sup>168</sup> reinforces the point made above. In this case, the respondent had pleaded guilty to 25 representative counts of theft and forgery, amounting to an estimated €204,000. A two-year sentence, suspended in its entirety, was imposed by the sentencing court. In delivering judgment on the DPP’s undue leniency application, the Court of Appeal acknowledged that there were “significant mitigating factors” present in this case – the respondent had entered an early plea of guilty, had no previous convictions and had made significant positive contributions to charity. There were also three reports before the Court, detailing “traumatic incidents and events during the respondent’s childhood.”<sup>169</sup> Notwithstanding this, the Court felt that this “was a case in which the offending was of such seriousness that a custodial sentence was required.”<sup>170</sup> In re-sentencing the respondent, the Court was of the view that a sentence of two years’ imprisonment would have been appropriate to reflect the gravity of the offending behaviour. However, taking into account the fact that it was sending someone to prison three-and-a-half years after the original sentencing, and the fact that a sum of €25,000 had been raised by way of partial restitution, the Court sentenced the respondent to a term of 15 months’ imprisonment.

[6.78] Both *Zaffer* and *Boyle* suggest that “conventional” mitigating factors, even when coupled with what may be described as exceptional circumstances i.e. the respondent’s traumatic childhood in *Boyle*, may not be sufficient to reach the “exceptional circumstances” threshold. This is particularly the case when the offending behaviour is of a particularly egregious nature i.e. large scale pre-meditated fraud involving six figure sums. Indeed, the analysis of the Court of Appeal in *The People (DPP) v Maguire*<sup>171</sup> confirms that fully suspended sentences for serious fraud offences are extremely rare. In *Maguire*, the Court reviewed 19 decisions of the Court of Criminal Appeal and the Court of Appeal in relation to sentencing for fraud offences. The Court observed that in the majority of the decisions

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<sup>168</sup> [2019] IECA 160.

<sup>169</sup> *Ibid* at para 11.

<sup>170</sup> *Ibid* at para 12.

<sup>171</sup> [2018] IECA 310.

analysed, the headline sentence typically ranged between two to four years' imprisonment. The Court also observed that the common aggravating factors in the cases in which the headline sentence was between two and four years were:

- The six figure sums involved;
- There was some level of planning or pre-meditation, and
- Significant breaches of trust.

[6.79] In terms of the final post-mitigation figure, the Court's review indicated that wholly suspended sentences are rare, stating that:

"in almost every case there required to be a significant discount for mitigation such that we see eventual outcomes in the hump of the bell ranging between eighteen months and three years' imprisonment to be actually served. However, a reasonably significant number of cases, typified by *Perry*, *Maguire*, *Zaffer*, and *Durcan*, resulted in final sentences of less than eighteen months to be actually served. Moreover, exceptional circumstances in *Lawlor* and *Hehir*, resulted in wholly suspended sentences."<sup>172</sup>

[6.80] As can be seen from the above extract, in only two of the 19 decisions examined in *Maguire* was the sentence imposed suspended in its entirety. In the first of these decisions, *The People (DPP) v Lawlor*,<sup>173</sup> the Court of Appeal upheld the sentencing court's decision to wholly suspend a sentence of three years' imprisonment. The offender in this case had pleaded guilty to 11 counts of theft for fraudulently obtaining up to €170,000 in jobseekers' allowance over an 11-year period. Similar to most cases for serious fraud offences,<sup>174</sup> the respondent had pleaded guilty at an early stage and had no previous convictions. However, the factor which brought this case across the "wholly exceptional circumstances" threshold was the adverse impact that the imprisonment of the respondent would have on his sisters – both of whom were disabled and dependent on him for care. The evidence presented to the sentencing judge was that, were the respondent to be imprisoned, both of his sisters would no longer be able to remain living at home. On foot of this, the Court of Appeal held that the imposition of a wholly suspended sentence was justified in the circumstances of the case.

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<sup>172</sup> *Ibid* at para 110.

<sup>173</sup> [2018] IECA 243.

<sup>174</sup> *The People (DPP) v Maguire* [2018] IECA 310 at para 110; *The People (DPP) v Zaffer (No 2)* [2017] IECA 12 at para 7, where the Court of Appeal noted that "a feature of these types of fraud cases is often the fact that the perpetrator was previously a person of exemplary character." See chapter 9 for a further discussion.

- [6.81] In *The People (DPP) v Hehir*,<sup>175</sup> delivered on the same day as *Lawlor*, the respondent pleaded guilty to several counts of fraud, amounting to €221,000. The sentencing judge imposed a two-year sentence of imprisonment, wholly suspended for a period of five years. The Court of Appeal upheld this decision, primarily on the basis of the mitigating factors present, namely the very early admission of guilt, his lack of previous convictions, the fact that he had paid back almost €30,000 and, finally, the fact that the offending behaviour stemmed from a severe gambling addiction (which he had since made genuine and sustained efforts to deal with). Owing to the accumulation of these personal mitigating factors, the Court of Appeal held that the imposition of a wholly suspended sentence was within the sentencing judge's legitimate margin of discretion.
- [6.82] At face value, it could be argued that there are inconsistencies between the outcomes of the decisions in *Zaffer* and *Boyle*, on the one hand, and *Lawlor* and *Hehir*, on the other, particularly given the fact that, broadly speaking, all four decisions contained similar sets of mitigating factors and, importantly, broadly comparable levels of seriousness. However, again, as was discussed earlier in this chapter, the Court of Appeal has repeatedly cautioned against affording too much precedential value to appellate *outcomes* (as opposed to the principles established in these cases) in section 2 undue leniency applications. This is due to the fact that the threshold for appellate intervention is so high. This point was reiterated by the Court in *Lawlor*, where it stated:

"As with *Hehir*, also delivered today, had the judge decided that custody could not be avoided completely and so decided to structure the sentence by requiring part to be served but providing for suspension in part, it may well be that there could not have been a successful appeal against severity of sentence. However, as the authorities make clear, that is not determinative of the issue. The question for this Court is whether the sentence for the particular offence involved here was unduly lenient in that it was a substantial departure from what would be regarded as the appropriate sentence."<sup>176</sup>

#### **4. Wholly exceptional circumstances and rebutting the presumption**

- [6.83] In England and Wales, section 5 of the *Criminal Justice Act 1991* significantly curtailed the use of the suspended sentence by limiting its application to situations where "the exercise of that power can be justified by the exceptional circumstances of the case".<sup>177</sup> Although

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<sup>175</sup> [2018] IECA 244.

<sup>176</sup> [2018] IECA 243 at para 34.

<sup>177</sup> This provision was consolidated in the *Criminal Courts (Sentencing) Act 2000*.

this provision has since been repealed,<sup>178</sup> the English experience may provide some helpful guidance on what may constitute “exceptional circumstances” capable of rebutting the presumption of an immediate custodial sentence. Stone analysed the imposition of suspended sentences in a shire county from October 1992 to September 1993.<sup>179</sup> Although this research was conducted almost 30 years ago, the circumstances that were considered to be exceptional still hold relevance today. First, it must be noted that within the first year of the 1991 Act coming into force, early Court of Appeal decisions in England and Wales made it clear that “exceptional circumstances” did not include relatively commonplace features, such as a guilty plea, previous good character, youth and adverse consequences of conviction.<sup>180</sup> The “exceptional circumstances” identified by Stone fall into two categories, namely offence-based exceptionality and non-offence-based exceptionality (the latter of these generally focusing on the personal circumstances of the offender, or third parties). With regard to offence-based exceptional circumstances, Stone identified one clear-cut example from the shire county analysis, namely where the offender is pressured into committing the offence, in particular the offence of fraud. However, Stone also highlighted a number of English and Welsh Court of Appeal decisions in which offence-based exceptionalities were deemed “exceptional circumstances”, namely:

- Exceptional provocation;<sup>181</sup>
- The importation of drugs but a refusal to hand them over to the intended recipients, and
- The handling of burgled goods left in good faith to the individual in a will.

[6.84] Within the sample of cases analysed by Stone, the circumstances justifying suspension were predominantly non-offence-based. From his analysis, Stone identified the following exceptional circumstances:

- Seeking treatment, that is:
  - Taking active steps to receive help for his or her problems;

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<sup>178</sup> Section 189 of the *Criminal Justice Act 2003*.

<sup>179</sup> Stone, “The Suspended Sentence Since the Criminal Justice Act 1991” [1994] *Criminal Law Review* 399.

<sup>180</sup> *R v Okinikan* [1992] 14 Cr App R (S) 453; *R v Lowery* [1992] 14 Cr App R (S) 485; *R v Sanderson* [1992] 14 Cr App R (S) 561.

<sup>181</sup> *R v Huntley* [1993] 14 Cr App R (S) 795; [1993] Crim LR 721.

- Evidence that real progress has been made and that immediate custody would jeopardise this, and
- A high degree of motivation and effort.
- Tragic circumstances, such as:
  - Where an offender's life has featured as unusual amount of sadness, sickness, childhood abuse or disadvantage.
- Improved circumstances and efforts where immediate custody would undermine this progress, such as where:
  - The offender has experienced a significant improvement in life circumstances or has obtained a moral standing in the community since the commission of the offence;
  - The offender has secured employment or a training course following a prolonged period of unemployment;
  - The offender has severed ties with bad influences, moved away and/or made a fresh start;
  - The offender has re-engaged positively with his or her relationships, particularly with his or her spouse or parents,<sup>182</sup> and
  - Any other demonstration of a reaffirmation of identity and citizenship.
- Stale offences, such as where:
  - There has been a considerable lapse in time since the commission of the offence;
  - The offender has made an effort to distance him- or herself from that period of his or her life.
  - Adverse effect of custody on others, that is, a need to avoid collateral damage to third parties, in particular young children, elderly parents or ill or disabled spouses.
  - Preserving the status quo, that is, where the individual has a settled lifestyle and immediate imprisonment would, at best, severely disrupt and, at worse, completely destroy this situation.

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<sup>182</sup> This was affirmed as an exceptional circumstance by the Court of Appeal of England and Wales in *R v Cameron* [1993] 14 Cr App R (S) 801, [1993] Crim LR 721.



- [6.85] The Commission notes that the Irish case law discussed throughout this chapter mirrors much of the findings of Stone’s analysis. In terms of offence-based exceptional circumstances, the Irish courts have established that an offender’s reduced moral culpability, either by way of duress,<sup>183</sup> provocation<sup>184</sup> or in circumstances where the offender was acting under the compulsion of an addiction<sup>185</sup> may be sufficient (along with other mitigating factors) to rebut the presumption of an immediate custodial sentence. Similarly, in terms of offender-based exceptional circumstances, many of the factors identified by Stone as constituting exceptional circumstances have also been accepted in the Irish case law as being sufficient to rebut the presumption, namely: positive and genuine efforts at rehabilitation;<sup>186</sup> a particularly difficult childhood and upbringing;<sup>187</sup> the disproportionately adverse impact that prison would have on the offender (by reason of old age or ill-health)<sup>188</sup> or dependent third parties.<sup>189</sup>
- [6.86] As noted above, the Court of Appeal of England and Wales<sup>190</sup> established that the presence of conventional mitigating factors will not be sufficient to reach the “exceptional circumstances” threshold to justify the imposition of a fully suspended sentence. As the discussion throughout this chapter makes clear, the position in this regard under Irish sentencing law is less clear-cut. To recap, in terms of offences contrary to section 15 of the *Misuse of Drugs Act 1977*, while the Court of Criminal Appeal made it clear<sup>191</sup> that the wholly exceptional circumstances threshold will not be met simply by adding up the offender’s personal mitigating factors, there is authority for the proposition that mitigating factors may, when taken together, be sufficient to rebut the presumption in the case of the section 15 drug offences. In respect of the offence of causing serious harm,

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<sup>183</sup> *The People (DPP) v Fanning* [2015] IECA 94; *The People (DPP) v Mullarney* (Court of Criminal Appeal, 11 February 2008); *The People (DPP) v Barry* (Court of Criminal Appeal, 23 June 2008); *The People (DPP) v Curtin* [2010] IECCA 54.

<sup>184</sup> *The People (DPP) v Princs* [2007] IECCA 142; *The People (DPP) v Hendrick* (Central Criminal Court, 20 June 1997).

<sup>185</sup> *The People (DPP) v O’Callaghan* [2010] IECCA 52; *The People (DPP) v McGinty* [2006] IECCA 37, [2007] 1 IR 633; *The People (DPP) v Hehir* [2018] IECA 244.

<sup>186</sup> *The People (DPP) v O’Callaghan* [2010] IECCA 52; *The People (DPP) v Smith* [2019] IECA 1; *The People (DPP) v (Ann-Marie) Byrne* [2017] IECA 19.

<sup>187</sup> *The People (DPP) v Mullarney* (Court of Criminal Appeal, 11 February 2008).

<sup>188</sup> *The People (DPP) v Wallace* [2016] IECA 57; *The People (DPP) v JJK* (Central Criminal Court, 22 October 2018).

<sup>189</sup> *The People (DPP) v Jervis and Doyle* [2014] IECCA 14; *The People (DPP) v Lawlor* [2018] IECA 243.

<sup>190</sup> *R v Okinikan* [1992] 14 Cr App R (S) 453; *R v Lowery* [1992] 14 Cr App R (S) 485; *R v Sanderson* [1992] 14 Cr App R (S) 561.

<sup>191</sup> *The People (DPP) v Jervis and Doyle* [2014] IECCA 14; *The People (DPP) v Byrne and Phayer* [2015] IECA 5.

two decisions of the Court of Appeal<sup>192</sup> suggest that the presence of significant mitigation may serve to rebut the presumption. Finally, while some decisions of the Court of Appeal in the area of serious fraud offences suggest that mitigation will not be sufficient to rebut the presumption,<sup>193</sup> other authorities indicate that an offender's personal circumstances may serve to bring the case across the "wholly exceptional circumstances" threshold.<sup>194</sup>

- [6.87] It is difficult, therefore, to map what the precise position is under Irish sentencing law. However, as noted throughout this chapter, much of the jurisprudence in this area stems from undue leniency applications brought by the DPP pursuant to section 2 of the *Criminal Justice Act 1993*. As the threshold for appellate intervention is so high in undue leniency applications, there is a difficulty in attempting to compare sentencing *outcomes* between two apparently similar cases. This difficulty is exacerbated in a sentencing system in which individualised justice is a constitutional imperative.<sup>195</sup> Furthermore, the Commission is of the view that the question of whether or not an offender's "conventional" personal mitigation is sufficient to rebut the presumption should not be approached by considering personal mitigation in isolation. As discussed in chapter 4 of this Report, it is a constitutional requirement that the gravity of the offence is also taken into account. While two offenders may have a similar set of mitigating circumstances, the differing gravity of the respective offending conduct may result in the presumption being rebutted in one case and not the other.
- [6.88] The Commission is therefore of the view that the question of whether the combination of "conventional" personal mitigating circumstances is sufficient to rebut the presumption should not be approached by considering the offender's individual personal circumstances in isolation. Rather, this question should be considered on a case-by-case basis, taking into account all of the circumstances of the case including the gravity of the offence, by reference to the harm caused and the moral culpability of the offender. In cases of low or mid-level seriousness, the presence of conventional mitigating factors may be sufficient to rebut the presumption. On the other hand, in cases of a particularly egregious nature, something much more out of the ordinary may be required so as to qualify as being a "wholly exceptional" case, meriting a fully suspended sentence.

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<sup>192</sup> *The People (DPP) v (Ann-Marie) Byrne* [2017] IECA 97; *The People (DPP) v Smith* [2019] IECA 1.

<sup>193</sup> *The People (DPP) v Zaffer* [2016] IECA 321; *The People (DPP) v Boyle* [2016] IECA 160.

<sup>194</sup> *The People (DPP) v Hehir* [2018] IECA 244; *The People (DPP) v Lawlor* [2018] IECA 243.

<sup>195</sup> For a further discussion on this, see chapter 4 of this Report.

## 5. Conclusion and recommendations

- [6.89] In its Issues Paper, the Commission sought views on three issues regarding the presumption of an immediate custodial sentence:
- (1) whether the presumption of an immediate custodial sentence was appropriate in the categories of offences outlined above, and whether other offences should attract the presumption;
  - (2) what should count as a “wholly exceptional” circumstance when rebutting the presumption, and whether other circumstances should be taken into account in rebutting the presumption, and
  - (3) whether there should be a defined list or range of exceptional circumstances that may be taken into account.
- [6.90] In general, the majority of the submissions were in agreement that the presumption of an immediate custodial sentence is appropriate for the offences discussed throughout this chapter. However, some submissions expressed anecdotal concerns that the common-law presumption of an immediate custodial sentence in respect of the offence of causing serious harm might not be adhered to in practice. Therefore, it was suggested that research should be carried out to determine the extent to which this presumption, as set out in *Byrne*, is being observed by sentencing courts of first instance. The Commission endorses this suggestion. The analysis conducted in this chapter has, owing to a lack of access to first instance sentencing decisions in this jurisdiction, largely focused on the appeal court jurisprudence dealing with the presumption of an immediate custodial sentence. While this case law has developed useful threshold tests to be applied by sentencing courts, it is difficult for the Commission to make any observations in respect of the extent to which these tests are being applied in sentencing courts. The Commission is therefore of the view that research of the type advocated for in the submissions would be an extremely valuable and worthwhile exercise. In this regard, the Commission notes that the recently commenced *Judicial Council Act 2019*<sup>196</sup> makes provision for establishment of a Judicial Council<sup>197</sup> which, in turn, established the Sentencing Guidelines and Information Committee (SGIC)<sup>198</sup> on 30 June 2020.<sup>199</sup> The SGIC is responsible for the collation and

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<sup>196</sup> *Judicial Council Act 2019 (Commencement) Order 2019* (SI No 457 of 2019) and *Judicial Council Act 2019 (Commencement) (No. 2) Order 2019* (SI No 640 of 2019).

<sup>197</sup> The Judicial Council was established on 7 February 2020 pursuant to section 6 of the *Judicial Council Act 2019*.

<sup>198</sup> Section 23(1) of the *Judicial Council Act 2019*.

<sup>199</sup> On 22 July 2020 the newly appointed lay members of the SGIC were announced. See <<https://merriestreet.ie/en/News->

dissemination of information on sentences imposed by the courts to the judiciary and other interested persons.<sup>200</sup> The Commission is of the view that the SGIC may be well placed to carry out such research.

- R. 6.01** The Commission recommends that the presumptions of an immediate custodial sentence discussed in this chapter should continue to be developed and applied in Irish sentencing courts.
- R. 6.02** The Commission recommends that research be conducted by the Sentencing Guidelines and Information Committee (SGIC) into the extent to which these presumptions of an immediate custodial are observed by first-instance sentencing courts.

[6.91] In terms of presumptive minimums, some submissions advocated for the abolishing of the presumptive minimum sentences outlined earlier in this chapter. This is in line with the Commission's recommendation in its *2013 Report on Mandatory Sentences*.<sup>201</sup> The Commission reiterates this recommendation here. In this regard, the Commission welcomes the fact that, pursuant to section 29 of the *Judicial Council Act 2019*, a review of minimum sentences in this jurisdiction (both mandatory and presumptive) is due to take place over the course of the next two years.

[6.92] In terms of whether other categories of offences should attract the presumption of an immediate custodial sentence, various suggestions were included in the submissions, namely: attempted murder, child abduction, defilement<sup>202</sup> and various sexual offences such as sexual assault, aggravated sexual assault, defilement offences, grooming offences and other child exploitation offences. While none of these offences have been expressly (either judicially or statutorily) subjected to the presumption of an immediate custodial sentence, research conducted in 2014<sup>203</sup> suggests that Irish sentencing courts treat certain serious offending behaviour, by virtue of its inherent gravity, as effectively attracting the presumption of an immediate custodial sentence, irrespective of whether the offence in

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[Room/Releases/Minister for Justice Helen McEntee announces appointments of Lay Members to Judicial Council Committees.html](#)> accessed on 4 August 2020.

<sup>200</sup> Sections 23(2)(d) and 23(2)(e) of the *Judicial Council Act 2019*.

<sup>201</sup> Law Reform Commission, *Report on Mandatory Sentences* (LRC 108-2013) at paras 4.238 and 4.239.

<sup>202</sup> The offence of defilement is now defined as a sexual act with a child: sections 2 and 3 of the *Criminal Law (Sexual Offences) Act 2006*, as substituted by sections 16 and 17 of the *Criminal Law (Sexual Offences) Act 2017*.

<sup>203</sup> Maguire, "When is Prison a Last Resort? Definitional Problems and Judicial Interpretations" (2014) 24(3) *Irish Criminal Law Journal* 62. This article is based on PhD research conducted by Maguire. See Maguire *Sentencing in Ireland: An Exploration of the Views, Rationales and Sentencing Practices of the District and Circuit Court Judges* (PhD Thesis, Trinity College Dublin 2008).

question has explicitly been the subject of such a presumption. This research primarily explored judicial perspectives on the principle of last resort. However, the study also highlighted that, when asked about the circumstances in which they would impose sentences of imprisonment, the majority of the District Court and Circuit Court judges interviewed identified three circumstances in which the principle of prison as a last resort<sup>204</sup> was effectively set aside in favour of the presumption of an immediate custodial sentence, namely:

- Serious offences;
- Repeat offenders, and
- When no other sanction is appropriate.

[6.93] In terms of particular offences, a number of District Court judges considered “mugging” and burglary to be serious offences for which an effective presumption of an immediate custodial sentence exists. Serious assaults and offences involving the possession of knives were also considered to start off with a presumption in favour of an immediate custodial sentence. In the Circuit Court, one judge commented that: “if the offence is particularly hideous, that the public at large wouldn’t accept anything else and a marker has to be put down that that sort of offence cannot be tolerated – then they have to go to prison.”<sup>205</sup> This research also highlighted that a sort of presumption of an immediate custodial sentence existed in respect of recidivist offenders, particularly when there is a high likelihood of re-offending. However, in the survey, District Court judges also stated that this effective presumption may be rebutted if he or she is satisfied that the offender is willing to change his or her behaviour.<sup>206</sup>

[6.94] This research shows that, regardless of whether an offence has been formally made the subject of a presumption of an immediate custodial sentence, an effective presumption exists, by virtue of the inherent gravity of the offence. It follows that, in such circumstances, a suspended sentence may only be imposed in extremely rare cases. However, in aid of consistency and fairness, the Commission notes the value in the appellate courts, or indeed the SGIC, considering whether other serious offences suggested in the submissions should be made the subject of a presumption of an immediate custodial sentence.

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<sup>204</sup> See chapter 4 for a discussion of this principle.

<sup>205</sup> Maguire, “When is Prison a Last Resort? Definitional Problems and Judicial Interpretations” (2014) 24(3) *Irish Criminal Law Journal* 62 at page 75.

<sup>206</sup> *Ibid* at page 75. See also Maguire, “Consistency in Sentencing” (2010) 2 *Judicial Studies Institute Journal* 14 at page 45; Healy and O’Donnell, “Crime, Consequences and Court Reports” (2010) 20(1) *Irish Criminal Law Journal* 2.

**R. 6.03** The Commission recommends that the appellate courts or the SGIC examine and develop the categories of offences which, by virtue of their inherent gravity, should attract the presumption of an immediate custodial sentence.

[6.95] In terms of questions no. (2) and no. (3), the Commission notes that there was a broad consensus across the submissions that, at a general level, what constitutes an “exceptional circumstance” should remain within the discretion of the individual sentencing court, based on the particular facts before it. In terms of individual factors, many of the circumstances identified in the Irish case law, as discussed throughout this chapter, and identified in Stone’s analysis, were highlighted by individual submissions as potentially being sufficient to rebut the presumption of an immediate custodial sentence. However, several of the submissions also highlighted that certain factors such as the impact on the victim should always be afforded significant weight in cases of serious offending behaviour – particularly with regard to sexual offences – when deciding whether or not the presumption has been rebutted. The Commission endorses this suggestion. As noted by the Commission in this chapter, the question of whether or not personal mitigating factors, when taken cumulatively, are sufficient to rebut the presumption should not be considered in isolation from the totality of the facts. Rather, this should be considered in tandem with the gravity of the offence, by reference to the harm caused and the moral culpability of the offender. Having done so, a sentencing court should then exercise its discretion in deciding whether the presumption has been rebutted.

**R. 6.04** The Commission recommends that there should be no defined list or range of exceptional circumstances that might be taken into account when considering whether or not the presumption of an immediate custodial sentence has been rebutted.

**R. 6.05** The Commission recommends that the question as to whether personal mitigating factors, either alone or taken cumulatively, constitute “wholly exceptional circumstances” should remain a matter for the discretion of the individual sentencing court, based on a consideration of the totality of the facts before it, particularly the harm caused and the moral culpability of the offender.

## CHAPTER 7 THE SUSPENDED SENTENCE AND CHILD OFFENDERS

### 1. Introduction

- [7.1] Initially, in the *Issues Paper on Suspended Sentences*,<sup>1</sup> the Commission decided that it would deal solely with the issue of suspended sentences of imprisonment imposed on adults. It did not propose to deal with the suspension of sentences of detention imposed on children. However, in light of the submissions received on the Issues Paper and the judgment of the Court of Appeal in *The People (DPP) v AS*,<sup>2</sup> it was decided that this issue merited some discussion in this Report. Subsequently, the Commission held a special consultation attended by members of the judiciary, lawyers, Garda representatives, non-governmental organisations and academics and it found the contributions made at that consultation to be most valuable in its deliberations on this topic.
- [7.2] Furthermore, throughout the consultation process and during the writing of this Report, the Commission observed several issues associated with some of the sentencing options available under Part 9 of the *Children Act 2001*, in respect of how these legislative provisions deal with child offenders who turn 18 during the currency of a sentence. These issues, insofar as they relate to suspended sentences of detention (or analogous sentencing sanctions) are also given consideration in this chapter.
- [7.3] This chapter begins with a general overview of the applicable law for sentencing child offenders in Ireland. The next section discusses the decision of the Court of Appeal in *The People (DPP) v AS*<sup>3</sup> that the suspension of a sentence of detention is not permissible under the current statutory framework. The chapter then proceeds to discuss certain provisions of the *Children Act 2001*, which provide the court with sentencing options that are analogous with, but not identical to, a suspended sentence of detention. The Commission also discusses the practice of reviewable sentences of detention, both in terms of their merits as a sentencing option for child offenders, and their uncertain legal basis in light of the Supreme Court decision in *The People (DPP) v Finn*.<sup>4</sup>
- [7.4] The final section of this chapter sets out the Commission's recommendations as to whether it would be desirable to make statutory provision for the suspension of a sentence of detention. The Commission is of the view that the policy arguments against

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<sup>1</sup> Law Reform Commission, *Issues Paper on Suspended Sentences* (LRC IP 12-2017) at para 1.

<sup>2</sup> [2017] IECA 310.

<sup>3</sup> [2017] IECA 310.

<sup>4</sup> [2000] IESC 75, [2001] 2 IR 25.

suspended sentences of detention are well founded, particularly in the context of the fully suspended sentence. In light of the need for a strong temporal nexus between the offence and the punishment, and the particular and unique aims of the juvenile justice system, the Commission recommends that statutory provision should not be made for the suspension of a sentence of detention, either in section 99 of the *Criminal Justice Act 2006* or Part 9 of the *Children Act 2001*.

- [7.5] However, the Commission acknowledges the merit in sentencing judges having at their disposal a sentencing option similar to a partially suspended sentence of detention, particularly for serious offences. The Commission acknowledges that the detention and supervision order, pursuant to section 151 of the *Children Act 2001*, could serve as an appropriate approximation of the part-suspended sentence. However, it also recommends that consideration be given to the fact that, currently, a detention and supervision order cannot, it seems, be used in circumstances where the child offender will turn 18 during the currency of the sentence. Assuming this is the proper interpretation of the relevant provision of the *Children Act 2001*, it has the effect of rendering this sentencing option effectively inapplicable for sentencing courts tasked with sentencing children to lengthy sentences on foot of serious offending behaviour. Finally, the Commission recommends that the practice of reviewable sentences of detention be continued, but that it be put on a statutory footing so as to bring clarity and certainty as to the legal basis of this sentencing option.

## **2. Sentencing child offenders**

### **(a) General principles**

- [7.6] The *Children Act 2001*, and in particular Part 9, sets out the powers of the courts in relation to child offenders. Section 156 provides that no child may be made subject to a term of imprisonment. Section 142 provides that child offenders may be made subject to a period of detention in a children detention school or children detention centre.
- [7.7] Section 96(2)<sup>5</sup> of the 2001 Act sets out the fundamental principle governing the sentencing of children in this jurisdiction. It provides that:

“any penalty imposed on a child for an offence should cause as little interference as possible with the child’s legitimate activities and pursuits, should take the form most likely to maintain and promote the development of the child and should take the least restrictive form that is appropriate in the circumstances, in

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<sup>5</sup> As amended by section 136 of the *Criminal Justice Act 2006*.



particular, a period of detention should be imposed only as a measure of last resort.”<sup>6</sup>

- [7.8] Section 96 of the *Criminal Justice Act 2006* provides that “when dealing with a child charged with an offence, a court shall have regard to the child’s best interests, the interests of the victim and the protection of society”.<sup>7</sup> In *The People (DPP) v JH*,<sup>8</sup> the Court of Appeal (Mahon J) outlined the rationale for these principles in the context of juvenile justice:

“detention is likely to disrupt the child’s normal development and education and thereby hamper the opportunity for the child to achieve adulthood in what might be described as normal circumstances.”<sup>9</sup>

- [7.9] In *The People (DPP) v TC*,<sup>10</sup> Judge O’Connor set out the sentencing principles as they apply to child offenders and engaged in a lengthy review of both international and domestic law in this regard. Under Article 3 of the *United Nations Convention on the Rights of the Child*<sup>11</sup> and under section 96 of the *Children Act 2001*, the best interests of the child must be the primary consideration in all actions relating to a child. This necessitates a “separate juvenile system”,<sup>12</sup> which requires a different approach to the sentencing of children and young offenders. In *TC*, Judge O’Connor correctly pointed out that “[j]ustice and welfare concerns are issues in any juvenile sentencing in criminal law matters,”<sup>13</sup> and that while pre-trial procedures ought to be governed primarily by justice considerations, welfare considerations should predominate once a child has been found guilty of an offence i.e. at the sentencing stage.<sup>14</sup> More recently, in *B (A Minor suing*

<sup>6</sup> The “last resort” principle is also reiterated in section 96 of the *Children Act 2001*.

<sup>7</sup> The welfare and educational ethos underpinning the *Children Act 2001* is also evident in section 158, as amended, which outlines the purpose of children detention schools. It provides that “it shall be the principal object of children detention schools to provide appropriate educational, training and other programmes and facilities for children and ... to promote their re-integration into society and prepare them to take their place in the community of persons who observe the law and are capable of making a positive and productive contribution to society.”

<sup>8</sup> [2017] IECA 206.

<sup>9</sup> *Ibid* at para 13.

<sup>10</sup> [2017] IEDC 7.

<sup>11</sup> UN Committee on the Rights of the Child, *General Comment No 10 (2007): Children’s Rights in Juvenile Justice* (25 April 2007).

<sup>12</sup> [2017] IEDC 7 at para 10.

<sup>13</sup> *Ibid* at para 18.

<sup>14</sup> O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 9.06.

*through his Mother and Next Friend, C) v The Director of Oberstown*,<sup>15</sup> the High Court (Reynolds J) noted that:

“the detention of children is primarily focused on rehabilitation rather than punishment, with a multiagency approach that is customised to meet the individual needs of the child and its best welfare interests. The Act of 2001 imposes duties on the respondent in respect of a tailored approach to the individual needs of a child in detention with a view to securing sustained rehabilitation.”<sup>16</sup>

[7.10] More generally, it is a well-established principle that criminal proceedings involving children should be dealt with as expeditiously as possible. As the Supreme Court (Geoghegan J) put it in *BF v DPP*,<sup>17</sup> once there is a decision on the part of the authorities to proceed with a prosecution against a child, there should be no delay so as to ensure that a trial takes place while the child is reasonably close to the age at which he or she is alleged to have committed the offences.<sup>18</sup> This principle has been most recently approved of in an Irish context by the Supreme Court in *Cullen v DPP*,<sup>19</sup> where it was held that, in cases involving child offenders:

“there is a ‘special duty’ on the part of the State authorities, over and above the normal duty of expedition, to ensure the speedy trial of [the child].”<sup>20</sup>

[7.11] It is clear that the observance of this principle is equally important at the sentencing stage of the criminal process. Once a child offender has been convicted of an offence, he or she must be sentenced as quickly as possible. In this regard, the Commission notes that it is crucial that there be a strong temporal nexus between the offence and the punishment so as to ensure that the child cognitively associates the punishment imposed with the offence. As the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, commonly known as the Beijing Rules,<sup>21</sup> put it:

“The speedy conduct of formal procedures in juvenile cases is a paramount concern. Otherwise whatever good may be achieved by the procedure and the

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<sup>15</sup> [2018] IEHC 601.

<sup>16</sup> *Ibid* at para 37.

<sup>17</sup> [2001] IESC 18, [2001] 1 IR 656.

<sup>18</sup> [2001] IESC 18 at para 19, [2001] 1 IR 656 at pages 663 – 664.

<sup>19</sup> [2014] IESC 59.

<sup>20</sup> *Ibid* at para 69.

<sup>21</sup> The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) adopted by the General Assembly in 1985 (A/RES/40/44), as cited in O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 9.20.

disposition is at risk. As time passes, the juvenile will find it increasingly difficult, if not impossible, to relate the procedure and the disposition to the offence, both intellectually and psychologically.”<sup>22</sup>

**(b) Relevant age of the child offender for sentencing purposes**

- [7.12] The relevant age of the child for the purposes of sentencing is potentially problematic: is it the date of the offending behaviour, or the date of conviction/sentence? In England and Wales, the rule is that a person will be sentenced according to their age at the date of conviction (which will often also be the day of sentence).<sup>23</sup> However, this rule was identified by reference to statutory provisions<sup>24</sup> that have no analogue in Irish law. O’Malley has thus observed that, in an Irish context, the matter must be approached by reference to first principles when construing the *Children Act 2001*.<sup>25</sup> On this basis, he posits that, since various penalty provisions of Part 9 of the 2001 Act refer to “the child” and “parents or guardians” throughout, that would not be necessary in the case of an adult offender, the Act necessarily implies that those under the age of 18 at the date of conviction must be sentenced as children.<sup>26</sup>
- [7.13] A further potential difficulty arises when the child offender reaches the age of majority by the time of conviction and sentence, despite having committed the offence as a child. While some procedural safeguards available to a child offender will remain even after he or she has “aged-out” during the currency of the criminal trial<sup>27</sup> the position is different in respect of sentencing. For the purposes of sentencing, an offender cannot be sentenced to a term of detention as he or she is now an adult. However, it is a reasonably well established principle of sentencing that when an adult is being sentenced for an offence committed during childhood, the penalty that the offender would have received, if

<sup>22</sup> *Ibid*, as cited in O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 9.22.

<sup>23</sup> *R v Danga* [1992] 2 QB 476.

<sup>24</sup> These statutory provisions are to be found in *The (UK) Criminal Justice Act 1982*. Section 1(3A) provides, in relevant part, that: “the only custodial orders that a court may make where a person under 21 years of age is convicted or found guilty of an offence are...”. The Court, at page 4 of the judgment, placed emphasis on the words “is convicted or found guilty of an offence” in section 1(3A). The Court also placed emphasis on section 1(5) of the 1982 Act, which provides that “no court shall commit a person under 21 years of age to be detained ... unless it is of the opinion that no other method of dealing with him is appropriate.” The Court held (at page 4) that this particular provision “as a matter of practicality, strongly suggests that the committal is to take place contemporaneously with, or at any rate very close to, the default or the contempt.” Finally, the Court laid emphasis on the fact that the use of the term “the offender” in section 1(A) of the 1982 Act indicates that a person becomes an offender once they are convicted.

<sup>25</sup> O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 9.16.

<sup>26</sup> *Ibid*.

<sup>27</sup> *McD v DPP* [2016] IEHC 210.

sentenced immediately after the offence was committed, is a matter which can be taken into account for this purpose. In *R v Ghafoor*, the English Court of Appeal set out the rationale for this approach as follows:

“The starting point is the sentence that the defendant would have been likely to receive if he had been sentenced at the date of the commission of the offence. It has been described as “a powerful factor”. That is for the obvious reason that ... the philosophy of restricting sentencing powers in relation to young persons reflects both (a) society’s acceptance that young offenders are less responsible for their actions and therefore less culpable than adults, and (b) the recognition that, in consequence, sentencing them should place greater emphasis on rehabilitation, and less on retribution and deterrence than in the case of adults.”<sup>28</sup>

[7.14] This approach has been approved by the English Court of Appeal in subsequent cases,<sup>29</sup> by the Irish High Court in *MS v DPP*,<sup>30</sup> and, most recently, by the Court of Appeal in *The People (DPP) v JH*.<sup>31</sup> In *JH*, the appellant was convicted of two counts of rape and two of sexual assault. At the time of the offences, the appellant was 15 and the complainant was 11. By the time of conviction and sentence, he was 23. The sentencing court imposed a two-year sentence in respect of the sexual assault counts and a four-year sentence in respect of the rape counts, to run concurrently. The appellant appealed against the severity of this sentence on the basis that the sentencing judge had not given sufficient weight to his young age and lack of maturity at the time of the offence. The Court of Appeal agreed with this argument and accordingly quashed the sentence imposed. In re-sentencing the appellant, the Court set a headline sentence of two-and-a-half years. In light of the mitigating factors present, it reduced the headline sentence to 18 months imprisonment, with the final 6 months suspended for a period of one year.

[7.15] While this issue is not directly relevant for the purposes of the present Report, the Commission acknowledges that an offender’s age and level of maturity are highly relevant factors in the context of the principle of proportionality. As outlined in chapter 4 of this Report, this overarching distributive principle of Irish sentencing law requires that a sentence be proportionate to the gravity of the offence and the personal circumstances of the offender. The components of offence gravity are the harm caused and the moral

<sup>28</sup> *R v Ghafoor* [2002] EWCA Crim 1857 at para 31.

<sup>29</sup> *R v Keffa* [2015] EWCA Crim 436 at para 23; *R v Broley* [2015] EWCA Crim 343 at para 18; *R v Maidment* [2014] EWCA Crim 1125 at para 12.

<sup>30</sup> [2018] IEHC 285 at para 39.

<sup>31</sup> [2017] IECA 206.

culpability of the offender at the time of the offence. An offender's young age and level of maturity at the time of the offence are clearly central to the offender's moral culpability and by extension, the court's assessment of offence gravity. As noted in *JH*, the rebuttable presumption contained in section 52 of the *Children Act 2001* – that a child aged between 12 and 14 does not have the capacity to know that the act or omission concerned was wrong – helps to place the culpability of a 15 year old in context.

### **(c) Sentencing child offenders convicted of murder**

- [7.16] Statutory mandatory sentences present a further challenge in circumstances where the offender is being sentenced as an adult for an offence committed as a child. For instance, section 2 of the *Criminal Justice Act 1990* provides for a mandatory life sentence of imprisonment for adults convicted of murder. Clearly, the rule in *JH* could not apply in such circumstances on the basis that the principle of proportionality only applies to discretionary punishment.<sup>32</sup> Again, while this issue is not strictly within the scope of this Report, the Commission notes that such a scenario, were it ever to come before the courts, would carry a risk of injustice to the offender being sentenced.
- [7.17] More generally, the Commission notes that the 2001 Act does not provide much guidance in terms of the approach to be taken when sentencing child offenders convicted of murder who remain under 18 at the date of conviction / sentence. By virtue of the fact that a child may never be sentenced to a sentence of imprisonment,<sup>33</sup> it seems clear that the mandatory sentence of life imprisonment provided for in section 2 of the 1990 Act cannot apply to child offenders. Further, section 142 of the *Children Act 2001* provides the court with a general power to "impose on a child a period of detention in a children detention school or a children detention centre." This general power to impose a period of detention, it seems, enables a sentencing court to sentence a child convicted of murder to life if the court deems it appropriate in the circumstances. Older decisions of the Irish courts decided prior to the enactment of the *Children Act 2001* support this assertion.<sup>34</sup> This position was affirmed recently in the high-profile sentencing of *Boy A* and *Boy B* for the murder of Ana Kriégel. *Boy A* had been convicted of murder and aggravated sexual assault, while *Boy B* was convicted of murder. McDermott J in the Central Criminal Court sentenced *Boy A* to life with an in-built review after 12 years, and sentenced *Boy B* to fifteen years with a review after eight years. During the course of his sentencing remarks,

<sup>32</sup> As per the Supreme Court decision in *Lynch and Whelan v Minister for Justice* [2010] IESC 34 at para 92, [2012] 1 IR 1 at para 55.

<sup>33</sup> Section 156 of the *Children Act 2001*.

<sup>34</sup> *State (O) v O'Brien* [1973] IR 50 and *The People (DPP) v VW (a minor)* (Court of Criminal Appeal, 23 March 1998). For a discussion, see O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 9.57.

the sentencing judge noted that it was open to him to impose a life sentence, but that it was not mandatory in the case of child offenders.<sup>35</sup>

- [7.18] It seems clear from the above that a sentencing court may impose any sentence of detention, including life, on a child offender convicted of murder. However, the Commission notes that section 9 of the *Children (Amendment) Act 2015*, when commenced, will put the above on a more solid statutory footing. Section 9 provides that the period of detention that a sentencing court may impose upon the child offender “shall not exceed the term of detention or imprisonment that the court could have imposed on a person of full age and capacity who is convicted of such an offence.”

### 3. Inapplicability of the suspended sentence to child offenders

- [7.19] Section 99(1) of the *Criminal Justice Act 2006 Act* refers to a sentence of imprisonment. Section 98 of the 2006 Act, as amended, defines “imprisonment” as including detention in a place provided for under section 2 of the *Prisons Act 1970*. Section 2 of the 1970 Act empowers the Minister to provide places other than prisons for the detention of offenders for the purpose of promoting their rehabilitation. Section 3 of the 1970 Act provides that the Minister may, by regulations, specify, by reference to age and gender, the classes of persons that may be detained in a place provided under section 2 of the 1970 Act. The relevant regulations made under section 3 of the 1970 Act are:

1. *Detention of Offenders (Wheatfield Place of Detention) Regulations 2013*;<sup>36</sup>
2. *Detention of Offenders (Castlerea) Regulations 1998*;<sup>37</sup>
3. *Detention of Offenders (Shelton Abbey) Regulations 1976*;<sup>38</sup>
4. *Detention of Offenders (Training Unit) Regulations 1975*,<sup>39</sup> and
5. *Detention of Offenders (Loughan House) Regulations 1973*.<sup>40</sup>

- [7.20] According to these regulations, it would be possible to send persons under the age of 18 to some of these places of detention. Under these regulations males not less than 17

<sup>35</sup> Conor Gallagher, “Ana Kriégel Murder: Boy A sentenced to life, Boy B sentenced to 15 years” *The Irish Times* (5 November 2019) <<https://www.irishtimes.com/news/crime-and-law/courts/criminal-court/ana-kriegel-murder-boy-a-sentenced-to-life-boy-b-sentenced-to-15-years-1.4072944>> accessed on 6 April 2020.

<sup>36</sup> *Detention of Offenders (Wheatfield Place of Detention) Regulations 2013* (SI No 511 of 2013).

<sup>37</sup> *Detention of Offenders (Castlerea) Regulations, 1998* (SI No 158 of 1998).

<sup>38</sup> *Detention of Offenders (Wheatfield Place of Detention) Regulations 2013* (SI No. 511 of 2013).

<sup>39</sup> *Detention of Offenders (Training Unit) Regulations 1975* (SI No 251 of 1975).

<sup>40</sup> *Detention of Offenders (Loughan House) Regulations 1973* (SI No 60 of 1973).

years of age may be sent to Wheatfield, males of not less than 16 years of age may be sent to the Training Unit and Loughan House, and males of not less than 15 years of age may be sent to Castlereagh.

- [7.21] However, under section 160 of the *Children Act 2001*, Oberstown Boys' School, Trinity House School, and Oberstown Girls' School have been designated as Children Detention Schools for the purposes of the 2001 Act.<sup>41</sup> Further, pursuant to section 163A of the *Children Act 2001*, these three children detention schools have been amalgamated into Oberstown Children Detention School. Upon the closure of St. Patrick's Institution on April 7 2017,<sup>42</sup> child offenders between the ages of 10 to 18 that had been sentenced to a period of detention are to be sent to Oberstown Children Detention School pursuant to section 32 of the *Children (Amendment) Act 2015*.<sup>43</sup> Therefore, it seems that the relevant provisions of the *Children Act 2001* supersede the minimum ages specified in the relevant regulations. Moreover, as Oberstown is not a place of detention provided for under sections 2 and 3 of the *Prisons Act 1970*, it can be concluded, *per* the definition of "imprisonment" under section 98 of the *Criminal Justice Act 2006*, that section 99 of the 2006 Act does not apply to child offenders.
- [7.22] In *The People (DPP) v AS*,<sup>44</sup> a case stated from the Circuit Court, the Court of Appeal was asked to decide whether section 99 of the 2006 Act applies to sentences of detention for child offenders. In July 2014, the Circuit Court had sentenced the child offender, who was 15 years old at the date of sentencing and therefore a "child" as defined by the *Children Act 2001*,<sup>45</sup> to four years' detention for robbery. The final two years of this sentence of detention was suspended for a period of four years. In February 2017, the matter was re-entered pursuant to section 99(13) of the 2006 Act, following a contended breach of the conditions of suspension. During the hearing on activation, the Circuit Court heard uncontested evidence that, in 2016 (i.e. during the operational period) the child offender was convicted of robbery and criminal damage and sentenced to two years' and one-year detention respectively. In 2017, the child offender escaped from detention and, while unlawfully at large, committed another robbery. He was identified by Gardaí and subsequently arrested, charged and convicted. In light of the evidence before it at the

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<sup>41</sup> *Children Act 2001 (Section 160 Designation) Order 2015* (SI No 94 of 2015).

<sup>42</sup> *Saint Patrick's Institution Closing Order 2017* (SI No 135 of 2017).

<sup>43</sup> This section provides that any child who was to be detained in St. Patrick's Institution shall now be detained in a children detention school, which the Minister specified, by order, to be Oberstown Detention School. See *Children (Amendment) Act 2015 (Section 32(5)) Order 2017* (SI No 108 of 2017).

<sup>44</sup> [2017] IECA 310.

<sup>45</sup> Under section 3 of the *Children Act 2001*, a child is defined as "a person under the age of 18 years".

activation hearing, the Circuit Court was satisfied that the child offender had breached the conditions of suspension initially imposed in the Circuit Court. At the time of the activation hearing, the child offender had turned 18.

- [7.23] During the activation hearing, counsel for the DPP raised a concern as to whether the Circuit Court had the power to activate the suspended portion of the sentence of detention. As such, the Circuit Court stated a case to the Court of Appeal, asking:
- (1) Whether a judge has, pursuant to section 99 of the 2006 Act or otherwise, the jurisdiction to suspend – in whole or in part – a sentence of detention imposed on a child offender, and:
  - (2) Whether the judge in the specific case has the power to activate some or all of the suspended sentence imposed on the child offender.

[7.24] In answering the first question, the Court held it to be clear from the terms of section 99 that the section only applies to sentences of imprisonment. As the Court pointed out, “imprisonment”, for the purposes of section 99, is defined in section 98 of the 2006 Act as including “detention in a place provided for under section 2 of the *Prisons Act 1970* and ‘sentence of imprisonment’ shall be construed accordingly”. The Court rejected the arguments of prosecuting counsel that the word “includes” extends the power of suspension to sentences of detention. Furthermore, the Court held that the central policy objective underlying Part 9 of the 2001 Act is to be found in section 156 of that Act, which provides that “[n]o court shall pass a sentence of imprisonment on a child”. The Court also pointed to the fact that, more generally, Part 9 of the 2001 Act provides a sufficient range of alternative options to imprisonment, ranging from a reprimand to a period of detention. Therefore, the Court rejected the argument that the Oireachtas could have intended to row back on the public policy objectives given effect to in Part 9 of the 2001 Act, in the absence of express words indicating such an intention. On the basis of the above two findings, the Court found that the Circuit Court did not have the power, under section 99 of the 2006 Act, to suspend any portion of the sentence of detention imposed on the child offender.

[7.25] The Court then went on to consider whether a jurisdiction to suspend a sentence of detention may still exist at common law. In *DPP (Purtill) v Murray*,<sup>46</sup> the High Court held that the common law power to suspend a sentence of imprisonment did not survive the enactment of section 99. However, in *AS*, it was argued that the finding in *DPP (Purtill)*, namely that section 99 provided a “complete code” for the purposes of regulating the suspended sentence, only applied to suspended sentences of imprisonment as that is all that section 99 purports to apply to. The Court of Appeal, citing Supreme Court

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<sup>46</sup> [2015] IEHC 782.



authorities supporting such an argument,<sup>47</sup> was prepared to accept that if a parallel jurisdiction existed at common law to suspend a sentence of detention, then such a power could potentially have survived the enactment of section 99. However, whether such a power could have survived the enactment of Part 9 of the 2001 Act is quite another issue. The Court held that the 2001 Act contains a wide range of non-custodial options and the failure to provide for suspended sentences – other than in section 144(9)<sup>48</sup> – must be regarded as a conscious and deliberate policy choice. The Court therefore concluded that the former common law jurisdiction to suspend a sentence of detention imposed on a child offender did not survive the enactment of the 2001 Act. In answering the first question posed in the case stated in the negative, it was not necessary for the Court to address the second question asked, namely whether the Circuit Court had the power to activate the suspended element of the sentence of detention in the case at hand.

#### **4. Sentencing options analogous to a suspended sentence of detention**

[7.26] As the Court of Appeal in *AS* made clear, the suspension of a sentence of detention is not permissible under Irish sentencing law. However, Part 9 of the *Children Act 2001* provides for a range of sentencing options for the sentencing of child offenders. This section outlines two of these options which may be seen as analogous with, but not wholly identical to, the suspended sentence. It also discusses the judicially developed practice of reviewable sentences of detention.

##### **(a) The deferred detention order**

[7.27] Section 144 of the 2001 Act empowers the sentencing court to impose a deferred detention order. In such a case, a detention order is specified, but the imposition of this order is deferred to a later date. Section 144(1) provides:

“Without prejudice to section 145, where a court—

(a) has considered a probation officer’s report or any other report made pursuant to this Part,

<sup>47</sup> *Mavior v Zerko* [2013] IESC 15, 3 IR 268; *In Re FD* [2015] IESC 83, 1 IR 741.

<sup>48</sup> Section 144(9) of the *Children Act 2001* provides a limited and restricted power of suspension where the making of a detention order has been deferred in the circumstances provided for in section 144(1). This provision is set out in full in the next section of this chapter.

(b) has heard the evidence of any person whose attendance it may have requested, including any person who made such a report,

(c) has given the parent or guardian of the child concerned (or, if the child is married, his or her spouse), if present in court for the proceedings, or, if not so present, an adult relative of the child or other adult accompanying the child, an opportunity to give evidence, and

(d) is of opinion that the appropriate way of dealing with the child would be to make a children detention order,

it may defer making the order, in accordance with the provisions of this section, if a place is not available for the child in a children detention school or for any other sufficient reason.”

- [7.28] It is clear that section 144(1) was enacted with the primary objective of relieving overcrowding in children detention schools. However, section 144(2) also provides that the court shall make a deferred detention order where it is of the opinion that it would be in the interests of justice to do so, having regard to the nature of the offence and the age, level of understanding, character and circumstances of the child concerned. It is clear therefore that section 144(2) provides for a more general power to impose a deferred detention order when the sentencing court is of the opinion that it would be in the interests of justice to do so.
- [7.29] In cases where the deferred detention order has been made pursuant to section 144(1), the Director of that school must apply to the court when a place becomes available.<sup>49</sup> In all other circumstances, a resumed hearing shall take place not more than one year after the adjourned hearing and may take place notwithstanding that the child has attained the age of 18 years in the interim.<sup>50</sup> At the resumed hearing of the deferred detention order, having heard evidence from the probation and welfare officer, the court shall either (a) impose the period of detention which it had deferred or any shorter period (b) suspend the whole or any portion of a period of detention so imposed, or (c) impose a community sanction appropriate to the age of the child.<sup>51</sup>
- [7.30] The deferred sentence of detention (in respect of the general power of deferment under section 144(2)) and the fully suspended sentence are similar in terms of their effect in that

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<sup>49</sup> Section 144(4) of the *Children Act 2001*.

<sup>50</sup> Section 144(8) of the *Children Act 2001*.

<sup>51</sup> Section 144(9) of the *Children Act 2001*.

both measures do not involve any immediate custodial element. In the case of both measures, depending on the offender's behaviour during the operational / deferred period, he or she may not serve any period in custody. Under section 114(6)(b) of the 2001 Act, the court may impose a number of conditions for the child to comply with during the deferred period, in much the same vein as the conditions of suspension which may be imposed on an adult offender under sections 99(3) and 99(4) of the *Criminal Justice Act 2006*. Both the fully suspended sentence and the deferred sentence of detention also have as their *primary* purposes the furtherance of the sentencing aim of the avoidance of custody, as well as the desistance-based aims of specific deterrence and / or rehabilitation. The similarities between the two measures are further reinforced by the fact that section 144(9)(b) of the 2001 Act provides the only set of circumstances under which a sentence of detention may be suspended under the *Children Act 2001*, as outlined in the preceding paragraph.

- [7.31] However, despite their similarities, both sentencing options are distinct forms of punishment. Under a deferred detention order, the length of the term of sentence is not imposed at the outset. Instead, the sentence is deferred for a specified period of time and it will only be imposed if, at the resumed hearing, the court deems it necessary to do so. On the other hand, where a sentence of imprisonment is fully suspended, the sentence of imprisonment is imposed at the outset, but the sentence is only activated if the offender breaches a condition of suspension during the operational period. In this respect, a deferral order is comparatively more generous in that it can result in no custodial element being imposed at all.

**(b) A detention and supervision order**

- [7.32] Section 151(1) of the 2001 Act provides that:

“where a sentencing court is satisfied that detention is the only suitable way of dealing with a child who is between 16 and 18 year of age it may, instead of making a children detention order, make a detention and supervision order.”

- [7.33] This order is defined in the Act as providing for a period of detention in a children detention centre followed by supervision in the community<sup>52</sup> provided by the Probation and Welfare Service.<sup>53</sup> Half of the total sentence must be spent in a detention centre with the other half being served under supervision.<sup>54</sup> The Court may impose certain of the conditions provided for under section 117 of the 2001 Act that it considers necessary to

<sup>52</sup> Section 151(2) of the *Children Act 2001*.

<sup>53</sup> Section 151(5) of the *Children Act 2001*.

<sup>54</sup> Section 151(3) of the *Children Act 2001*.

ensure the child is of good behaviour and also so as to reduce the likelihood of the child committing any further offences.<sup>55</sup>

- [7.34] The detention and supervision order largely mirrors the part-suspension of a sentence of imprisonment provided for under section 99 of the *Criminal Justice Act 2006*. Both measures involve an immediate custodial element, followed by a period whereby the remainder of the sentence is served in the community under the supervision of the Probation and Welfare Service. At this juncture, the Commission notes that there are sound policy reasons for having such an option available to sentencing courts when sentencing child offenders, particularly in the case of serious offending behaviour. Child offenders sentenced for serious indictable offences will invariably have served a significant period in custody, first in a detention school and (very likely) later in a prison, having turned 18 and been transferred to a prison pursuant to section 155 of the 2001 Act. It is therefore crucial that offenders in this position be subject to some form of supervision upon release, so as to assist in their successful re-integration into the community. The detention and supervision order can therefore be seen as a very important approximation of the part-suspended sentence in the context of child offenders.
- [7.35] However, there is an issue with the detention and supervision order as to whether or not it can apply to a child offender who will “age out” during the currency of the sentence. The provision is somewhat contradictory in this regard. On the one hand, section 151(6) provides that “a detention and supervision order, insofar as it relates to detention, shall be treated for all purposes to be a children detention order”. Section 155 of the 2001 Act, as amended,<sup>56</sup> provides that where any person “is detained in a children detention school on foot of a children detention order” and reaches the age of 18 during the currency of the sentence, the child may be transferred by ministerial order, either to a place of detention under section 2 of the *Prisons Act 1970* or to a prison, to serve out the remainder of the sentence. Therefore, if the detention element of a detention and supervision order is to be treated, as *per* section 151(6), for all purposes as a children detention order, then it is arguable that section 151 may be applied in circumstances where the child will “age out” during the custodial element of the sentence.
- [7.36] However, when read in its entirety, it appears that section 151 was intended to be used only in circumstances where the child will remain under 18 for the duration of the sentence, including the supervision element of the sentence. Both the provisions dealing with the conditions which may be attached to a detention and supervision order<sup>57</sup> and the

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<sup>55</sup> Section 151(7) of the *Children Act 2001*.

<sup>56</sup> Section 11 of the *Children (Amendment) Act 2015*.

<sup>57</sup> Section 151(7) of the *Children Act 2001* empowers the sentencing court to impose any of the conditions set out in section 117 of the Act.

provisions for dealing with non-compliance with the order<sup>58</sup> seem to only be applicable to a person under the age of 18. The provisions dealing with non-compliance are particularly problematic. Non-compliance with a detention and supervision order is dealt with under section 130 of the 2001 Act, under which a court may:

- (1) direct the child to comply with the order insofar as it has not been complied with
- (2) revoke the order and substitute it with a different community sanction, or
- (3) revoke the order and deal with the case in any other way in which it could have been dealt with before the order was made.<sup>59</sup>

- [7.37] All three options available to a court under section 130 raise issues in respect of offenders who have turned 18 during the currency of the order. The first course of action – directing the child to comply with the order – does not work as, by definition, the offender is no longer a “child” within the meaning of the 2001 Act. The second course of action – the imposition of an order under section 129 or another community sanction – suffers from a similar definitional problem as “community sanction” for the purposes of the 2001 Act is defined entirely by reference to orders within that Act that apply only to persons under the age of 18.
- [7.38] The third course of action puts a sentencing court in a somewhat contradictory position. It allows the court to revoke the original order and deal with the case in any other way in which it could have been dealt with before the order was made. However, the problem with allowing the court to treat the case in the same way as it could have before the original order was made (i.e. when the offender was still under 18) is that none of the remedies available to it can apply to the offender, who is now over the age of 18. This leads to a situation where, when the order was made, the offender could not have received a sentence of imprisonment (as they were under 18) but because they have now turned 18 they cannot be sentenced to a period of detention, either.
- [7.39] The preceding discussion suggests that, in order to avail of a detention and supervision order, the sentencing court must be satisfied that the child offender will be under 18 for the duration of the sentence, including the supervision element of the sentence. This issue arose for consideration in the recent sentencing of *Boy A* and *Boy B*, the facts of which

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<sup>58</sup> Section 151(8) of the *Children Act 2001* enables the court to apply the enforcement powers outlined in section 130 of the Act.

<sup>59</sup> This formula of words is replicated in other non-compliance provisions of the 2001 Act: see, for example, sections 122 (non-compliance with day centre order), 132 (non-compliance with mentor (family support) order) and 136 (non-compliance with restriction on movement order). Some modifications exist where the application can be heard by a court other than the court that made the initial order, but the basic formula remains the same in each provision.

have been outlined earlier in this chapter. At the sentencing hearing, counsel for the DPP submitted to the court that the wording of section 151 necessarily implies that a detention and supervision order may only be imposed by the court if the child offender will still be under 18 throughout the entirety of the supervision element of the sentence.<sup>60</sup> This was on the basis of the issues with the provisions dealing with non-compliance, as outlined above. It seems that McDermott J was in agreement with this submission as he did not avail of an order under section 151. Instead, he sentenced *Boy A* to life with an in-built review after 12 years, while sentencing *Boy B* to fifteen years with a review after 8 years.<sup>61</sup>

- [7.40] The same issue arose again in the recent case of *The People (DPP) v MS*, in which a teenage boy was sentenced in the Central Criminal Court for the attempted murder of a woman in Dún Laoghaire when he was aged fifteen. The sentencing court set a headline sentence of life, before reducing that to 11 years on account of the mitigating factors present, including his early plea of guilty, his age and the fact that he was suffering from a mental illness at the time of the offence.<sup>62</sup> In the course of his sentencing remarks, White J stated that, had the option been available to him, he would have imposed a partly suspended sentence of detention, combined with intensive monitoring in the community. However, as it was not open to the court under the current statutory framework to suspend part of a period of detention, White J instead opted to order a review of the 11 year sentence of detention after five years.<sup>63</sup> Given the similarities between the part-suspended sentence and a detention and supervision order, it seems clear that White J was also of the view that he could not avail of the detention and supervision order on the basis that the child offender would have reached his majority during the currency of this sentence.<sup>64</sup>

<sup>60</sup> Conor Gallagher, "Sentencing over Ana Kriégel murder surrounded by complicated law" *The Irish Times* (29 October 2019) <<https://www.irishtimes.com/news/crime-and-law/sentencing-over-ana-kri%C3%A9gel-murder-surrounded-by-complicated-law-1.4066287>> accessed on 8 April 2020.

<sup>61</sup> Conor Gallagher, "Ana Kriégel Murder: Boy A sentenced to life, Boy B sentenced to 15 years" *The Irish Times* (5 November 2019) <<https://www.irishtimes.com/news/crime-and-law/courts/criminal-court/ana-kriegel-murder-boy-a-sentenced-to-life-boy-b-sentenced-to-15-years-1.4072944>> accessed on 6 April 2020.

<sup>62</sup> Orla O'Donnell, "Boy sentenced over Dún Laoghaire attempted murder" *RTÉ* (4 November 2019) <<https://www.rte.ie/news/courts/2019/1104/1088531-dun-laoghaire-court/>> accessed on 27 April 2020.

<sup>63</sup> Conor Gallagher, "Teenager sentenced to 11 years for attempted murder at Dún Laoghaire" *The Irish Times*, (November 4 2019) <<https://www.irishtimes.com/news/crime-and-law/courts/criminal-court/teenager-sentenced-to-11-years-for-attempted-murder-at-d%C3%BAAn-laoghaire-1.4071610>> accessed on 29 April 2020.

<sup>64</sup> This was confirmed by the Court of Appeal in *The People (DPP) v MS* [2020] IECA 178. The Court noted (at para 7) that "[i]n the course of the plea in mitigation, there had been reference to s. 151 of

- [7.41] Finally, the decision of the Court of Appeal in *The People (DPP) v D McD*<sup>65</sup> highlights some of the practical difficulties associated with the detention and supervision order when dealing with child offenders who have nearly reached adulthood at the time of sentence. The appellant in this case pleaded guilty to three counts of false imprisonment, three counts of robbery and two counts of assault causing harm. At the date of sentence – 12 April 2019 – the appellant was two weeks short of his 18th birthday. During sentencing, the sentencing court expressed a desire to include some post-release supervisory element in the sentence, while also emphasising that the gravity of the offence was one that called for immediate detention. However, having invited submissions from counsel, the sentencing court formed the view that this was not possible under the current statutory framework as the appellant would have reached adulthood by the time the supervisory element of the sentence came into effect. He therefore imposed a period of four years’ detention with the accompanying order that the Probation Service supervise the appellant while in custody.
- [7.42] The appellant appealed to the Court of Appeal on the basis that the sentence imposed did not adequately reflect the various mitigating factors present, namely the guilty plea, the expressions of remorse and the positive indications in the Probation Report that the appellant was beginning to take positive steps towards his rehabilitation. While noting that section 151 of the 2001 Act constrained the options available to the sentencing court, the appellant argued that the sentencing court had erred in not deferring the finalisation of sentence for a couple of weeks until the appellant had turned 18, at which point the option of part-suspension under section 99 of the 2006 Act would have become available to the sentencing court. The Court of Appeal, somewhat hesitantly, agreed with this submission, holding that:

“In light of the fact that the judge was so obviously and clearly anxious to be in a position to provide for the continuing involvement of the Probation Service following the appellant’s release into the community, we have, not without considerable hesitation, concluded that the judge erred, at least to the extent of

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the *Children Act 2001* but counsel for the DPP contended that the section was not applicable and the judge took the view that the Director’s approach was the correct one.” This decision of the Court of Appeal arose out of an application brought the DPP seeking to have the sentence handed down by White J in the Central Criminal Court quashed on the grounds that it was unduly lenient. It is to be noted that the Court allowed the appeal but invited further submissions from the parties on the issue of re-sentencing. The Court gave further judgment in the case on 29 July 2020, holding that seven years (rather than the original five) of the 11-year detention period should be served before the sentence is reviewed.

<sup>65</sup> [2020] IECA 149.

not specifically considering the option of deferring finalisation so as to open up the possibility of part-suspension.”<sup>66</sup>

- [7.43] Having found that the sentencing court erred in principle, the Court of Appeal proceeded to re-sentence the appellant who had, by the date of the judgment, turned 18. The Court therefore had the benefit of the part-suspended sentence as a sentencing option. Accordingly, the Court imposed a sentence of four years’ imprisonment with the final 18 months suspended on conditions.
- [7.44] These decisions highlight the practical difficulties with the operation of section 151 of the 2001 Act. In theory, a detention and supervision order can be seen as a useful approximation of the part-suspended sentence in the context of child offenders. However, in practice, the fact that the offender must be a child for the duration of the sentence, including the period of supervision, is problematic. This peculiarity of the legislation effectively serves to debar its application in the case of children being sentenced for serious offences as the child offender will almost invariably have turned 18 during the currency of the sentence.

### **(c) Reviewable sentences of detention**

- [7.45] The reviewable sentence of detention allows a sentencing court to impose a sentence of detention, while also ordering that the matter be brought back to the court for review after a defined portion of the sentence has been served. This sentencing option is very similar to the imposition of a part-suspended sentence. After the initial custodial element has been served and the review hearing takes place, the sentencing court may, if satisfied with the offender’s conduct and engagement with the relevant services in custody, suspend the balance of the sentence.
- [7.46] Since the Supreme Court decision in *The People (DPP) v Finn*,<sup>67</sup> it is generally accepted that the practice of reviewing sentences in respect of adult offenders is inappropriate from a constitutional perspective. The central issue *Finn* was the time limits within which The Director of Public Prosecutions is obliged to lodge a Notice of Appeal against sentence. However, during the course of this judgment, Keane CJ expressed the view that the practice of reviewable sentences was undesirable and should be discontinued. It should be noted that the Supreme Court’s comments on this issue were strictly *obiter* and Keane CJ was keen to emphasise that they were not to be taken as impugning the validity of reviewable sentences already imposed by sentencing courts. Nevertheless it has been observed that the practice of reviewable sentences of imprisonment has largely ceased

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<sup>66</sup> *Ibid* at para 14.

<sup>67</sup> [2000] IESC 75, [2001] 2 IR 25.



since *Finn* was decided.<sup>68</sup> Riordan, in his qualitative study of the Irish judiciary, notes that “a clear departure is demonstrated from the use of the reviewable sentence” since the *Finn* decision, with most judges identifying the “intensified use of the part suspended sentence as a replacement for the reviewable sentence.”<sup>69</sup>

[7.47] Indeed, subsequent to *Finn*, it is generally accepted that the practice of reviewable sentences is impermissible in the absence of statutory authority to do so.<sup>70</sup> As discussed already in chapter 5 of this Report, such a statutory power exists when sentencing offenders convicted under section 15A or section 15B of the *Misuse of Drugs Act 1977*.<sup>71</sup> In contrast, the difficulty identified in *Finn* was that the practice of reviewable sentences was not exercised pursuant to any statutory power, but rather was based upon an assumed common law power.<sup>72</sup> Further, the exercise of this judicially developed practice was held to be an undue interference with an express statutory power of the Executive. Under Article 13.6 of the Constitution of Ireland, the commutation or remission of sentence lies within the remit of the President, unless this power is “conferred by law on other authorities”. Section 23 of the *Criminal Justice Act 1951* delegates to the Executive this power of commutation or remission in respect “of all punishment imposed by a court exercising criminal jurisdiction.”<sup>73</sup> Therefore, it was held that the practice of reviewable sentences was “in all but name, the exercise by the court of the power of commutation or remission which, during the currency of the sentence imposed by the court, is vested exclusively in the Executive.”<sup>74</sup> In other words, the Courts were essentially exercising a

<sup>68</sup> O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 22.43.

<sup>69</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at pages 275 – 277.

<sup>70</sup> *The People (DPP) v Dunne* [2003] 4 IR 87 at page 92.

<sup>71</sup> Section 27(3) of the *Misuse of Drugs Act 1977*, as substituted by section 33 of the *Criminal Justice Act 2007*, allows the sentencing court to review a sentence with a view to suspending the remaining portion from the review date, provided that the court is satisfied that the offender, at the time of the offence, was addicted to one or more controlled drugs and that the addiction was a significant factor in the commission of the specific offence under section 15(a). However, as clarified by the Court of Criminal Appeal in *The People (DPP) v Dunne* [2003] 4 IR 87, this statutory power to impose a reviewable sentence is confined to circumstances in which the court has, at least, imposed the presumptive minimum sentence of 10 years’ imprisonment, as the review power is only exercisable after the offender has served five years of the sentence.

<sup>72</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 28.

<sup>73</sup> Section 23(3) permits the government to delegate this power to the Minister for Justice. This power was delegated to the Minister by *The Criminal Justice Act 1951 (Section 23) (Delegation of Powers) Order 1998* (SI No 416 of 1998).

<sup>74</sup> [2000] IESC 75 at para 84, [2001] 2 IR 25 at page 46.

statutory power which had been exclusively vested in the Executive, which was “undesirable” from a separation of powers perspective.

- [7.48] However, in *The People (DPP) v DG*,<sup>75</sup> the Court of Criminal Appeal held that this practice is permissible when dealing with child offenders. In *DG*, the appellant, who was convicted of murder, was 15 at the date of the offence, and 17 at the date of conviction and sentencing. He was sentenced to detention for life, subject to review after ten years. The appellant appealed the severity of the sentence, arguing that the trial judge, in imposing sentence, should have sentenced him to a determinate sentence for a specified number of years even if, having regard to the gravity of the offence, this would have amounted to a very lengthy sentence. Such a course of action, the appellant argued, would have left him with “some light at the end of the tunnel” in that he would have been able to identify the point at which he would be released, thereby incentivising his rehabilitation. Counsel for the Director of Public Prosecutions submitted that the imposition of a reviewable sentence is not good sentencing policy and is not one which in principle should be applied by the Courts. The appeal was refused, with the court holding that:

“Children or very young offenders convicted of serious offences which would normally involve lengthy custodial sentences must be considered as falling into a special category insofar as there is a special onus on the Court to have regard to their rehabilitation and welfare for the future because of their young age at the time and the reasons outlined above. In one sense counsel for the appellant is correct that there should be ‘*a light at the end of the tunnel*’ for the appellant. However, in the Court’s view the learned trial judge provided for this in determining that the sentence imposed should be reviewed by the Court in the year 2014, ten years after he had been taken into custody in connection with the offence. For young persons like the appellant who fall into the special category referred to above the provision for a later review of the sentence imposed may be appropriate when it is inappropriate for other categories of cases. Moreover, the imposition of a sentence, in this instance a life sentence, subject to a review by the Court, does not in any way impinge on the autonomous power of the Executive to exercise clemency or to provide for special or early release pursuant to statutory powers as and when the relevant authorities deem appropriate.”<sup>76</sup>

- [7.49] It is clear from the above that the reviewable sentence in respect of child offenders convicted of serious offences operates as an exception to the general rule established in *Finn*. Indeed, the reviewable sentence of detention is an important and useful sentencing option in the sentencing of child offenders. It has similar advantages to the part-

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<sup>75</sup> [2005] IECCA 75.

<sup>76</sup> *Ibid* at para 24.

suspended sentence, with the added benefit that, in the case of a reviewable sentence, the conditions of suspension (if the reviewing court – on the review date – deems it appropriate to suspend the remainder of the sentence) are contemporaneous to the offender re-entering the community. Therefore, it could be argued that this measure enables a more individualised assessment to take place. Furthermore, the reviewable sentence of detention provides valuable flexibility in dealing with children convicted of serious offences: it reflects the welfare and rehabilitative ideals underpinning the juvenile justice system, while at the same time ensuring that serious offending behaviour by child offenders be met with a punitive sanction. As the Court of Criminal Appeal put it in *The People (DPP) v Sheedy*,<sup>77</sup> the review structure is particularly useful in the case of child offenders as:

“a judge is enabled to individualise a sentence for the particular convicted person. It is a tool by which the judge may include in the sentence the appropriate element of punishment (retribution and deterrence) and yet also include an element of rehabilitation.”<sup>78</sup>

[7.50] Further, as the recent sentencing decisions by the Central Criminal Court in cases of children convicted of serious offences demonstrate, the reviewable sentence usefully fills the vacuum left by the issues associated with the detention and supervision order created by section 151 of the *Children Act 2001*. As discussed earlier, this sentencing option is effectively rendered inapplicable when the child offender is being sentenced for some of the more serious indictable criminal offences. This is because such an order cannot apparently be imposed by a sentencing court unless the child offender remains under the age of 18 for the entirety of the sentence, including the period of supervision. Therefore, sentencing courts handing down sentences for murder (or indeed other serious indictable offences) will be faced with the problem that the child will almost inevitably have turned 18 at some point throughout the sentence. In light of these considerations, the reviewable sentence may be seen as a pragmatic judicial response to the issues associated with some provisions in Part 9 of the *Children Act 2001*.

[7.51] However, notwithstanding the utility of the reviewable sentence when sentencing child offenders, the legal basis for the practice does appear to be at odds with the Supreme Court decision in *Finn*. Firstly, there is no statutory basis for the practice. Secondly, the power of commutation and remission, vested in the Executive by virtue of section 23 of the *Criminal Justice Act 1951*, is not confined to sentences of imprisonment. The wording of the section is clear. It empowers the Executive to commute or remit a sentence in respect of “of all punishment imposed by a court exercising criminal jurisdiction”

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<sup>77</sup> [2000] 2 IR 184.

<sup>78</sup> *Ibid* at page 194.

(emphasis added). Indeed, the recent Supreme Court decision of *B (A Minor suing through his Mother and Next Friend, JG) v The Director of Oberstown*<sup>79</sup> confirmed that section 23 of the 1951 Act applies also to sentences of detention. In *B*, the main issue before the Court was whether or not child offenders undergoing a sentence of detention pursuant to the provisions of the *Children Act 2001* are entitled to seek enhanced remission in the same way as adult prisoners serving sentences of imprisonment.<sup>80</sup> However, during the course of the judgment, the Supreme Court expressly stated that, while certain provisions of the *Children (Amendment) Act 2015* are awaiting commencement,<sup>81</sup> child offenders are entitled to general remission of one quarter of the sentence by virtue of the general power of remission and commutation of sentence conferred on the Executive by section 23 of the *Criminal Justice Act 1951*.<sup>82</sup> Viewed in this light, it is at least arguable that the reviewable sentence of detention is subject to the same constitutional issues as were identified by the Supreme Court in *Finn*, namely that this practice interferes with the statutory executive function of commutation and remission of sentence.

- [7.52] The foregoing discussion highlights the need to place the reviewable sentence of detention on a statutory footing. This need for more certainty as to the precise parameters of this practice will become even more pressing when the relevant provisions of the *Parole Act 2019* are commenced. As discussed in detail in chapter 5 of this Report, the 2019 Act will put Ireland's parole system on a statutory footing. Section 2 of the 2019

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<sup>79</sup> [2020] IESC 18.

<sup>80</sup> The High Court refused the applicant's claim in this regard, holding that allowing child offenders to avail of the scheme of enhanced remission could potentially interfere with the early release mechanisms provided for in the 2001 Act. See *B (A Minor suing through his Mother and Next Friend, C) v The Director of Oberstown* [2018] IEHC 601. In refusing the appeal, the Supreme Court – *B (A Minor suing through his Mother and Next Friend, JG) v The Director of Oberstown* [2020] IESC 18 – noted that the core of the appellant's claim was that he was not treated equally to adults who were objectively in the same situation as him in that they were undergoing custodial sentences. In this regard, the Court held (at para 67) that "this claim is not well founded. It could be successfully maintained only if the rationale of the *Children Act 2001*, which distinguishes clearly between children and adults, were to be challenged and undermined." The Court also pointed out that, in essence, the appellant was seeking an order from the court to be included in a statutory scheme which by its terms excluded him. This raised an issue from a separation of powers perspective which, although not fatal to his claim, had "simply not been addressed in these proceedings" (para 78).

<sup>81</sup> Section 151(4) of the *Children Act 2001* makes provision for a child being released from detention upon earning remission of sentence by industry or good conduct. Section 10 of the *Children (Amendment) Act 2015* amends section 151(4) of the 2001 Act and instead makes provision for the Minister to make regulations under section 221 of the 2001 Act, as amended by section 18 of the 2015 Act: which adds "remission of portion of a child's period of detention" to the list of matters that the Minister may make regulation for. However, the time of writing, section 10 of the 2015 Act has not yet been commenced.

<sup>82</sup> *B (A Minor suing through his Mother and Next Friend, JG) v The Director of Oberstown* [2020] IESC 18 at para 31.

Act provides that any reference in the Act to a person serving a sentence of imprisonment shall be construed as including:

“a person upon whom a sentence of detention was imposed by a court when he or she was a child where he or she has been transferred to a prison to serve the remainder of the sentence in accordance with section 144 of the Act of 2001.”

[7.53] As noted, a child offender who was initially sentenced to a reviewable sentence of detention will often “age-out” during the currency of the sentence and be subsequently transferred to an adult prison pursuant to section 155 of the 2001 Act. The question arises, therefore, as to how the offender’s statutory parole rights under the 2019 Act will interact with, or be affected by, the sentencing court’s decision to order that the case be judicially reviewed on a certain date. The Commission notes that, in any review of the practice of reviewable sentences of detention, consideration should be given to how this practice interacts with an “aged out” offender’s statutory rights under the *Parole Act 2019*.

## 5. Conclusion and recommendations

[7.54] As noted at the beginning of this chapter, the Commission held a special consultation attended by members of the judiciary, lawyers, Garda representatives, non-governmental organisations and academics to address the key issues. During this consultation, the Commission sought views on the following questions:

- (1) Do the principles of suspended sentences reconcile with the justice and welfare considerations of the juvenile justice system?
- (2) Should the suspended sentence be available as a sentencing option for young offenders? If so:
  - (a) Should section 99 of the *Criminal Justice Act 2006* be amended to provide for suspended sentences of detention for young offenders?
  - (b) Should Part 9 of the *Children Act 2001* be amended to provide for suspended sentences of detention for young offenders?
- (3) Are there particular considerations that might arise where a young offender has reached the age of majority when he or she is brought back before the court for a hearing on activation of a suspended sentence of detention?

[7.55] The general view on the first of these questions was that the objectives of a period of detention for child offenders and the objectives of a period of imprisonment for adult offenders are fundamentally different. Detention is informed predominantly by welfare

considerations, whereas imprisonment is primarily punitive.<sup>83</sup> From this point of view, the reconciliation of these two systems seems counterintuitive and inappropriate: if detention is in the child's best interests, it seems unjust and inappropriate to suspend or withhold that detention. A related concern was that some of the procedural deficiencies (to be discussed in detail in chapter 8 of the Report) associated with section 99 of the *Criminal Justice Act 2006* make the process of re-entry and revocation of the suspended sentence slow and inefficient. Many of the consultees therefore commented that the somewhat cumbersome nature of the suspended sentence procedure would be inappropriate when dealing with child offenders.

- [7.56] The Commission agrees with both of these observations. In respect of the latter point, in particular, expeditiousness and efficiency are desirable in the criminal process generally, but they are of critical importance when dealing with child offenders. Further, as outlined earlier in this chapter, when sentencing child offenders, there must be a close temporal nexus between the wrongdoing and the punishment. Otherwise, a child may not cognitively associate the link between the two events. Were provision to be made in section 99 of the *Criminal Justice Act 2006* for the suspension of a term of detention, then in circumstances where a condition of suspension was breached, a consequent activation hearing could lead to the punishment (i.e. detention) being imposed a considerable time after the sentence had been imposed (and, in many instances, much longer after the offence was committed). In such circumstances, it is likely that a child would fail to associate the penalty with the offence. The above issue would be particularly pronounced in the case of a fully suspended sentence of detention. As noted earlier in this Report, a fully suspended sentence, in contrast to the partially suspended sentence, does not involve any element of immediate custody. Therefore, in circumstances where a condition of a fully suspended sentence was breached, a consequent activation hearing could lead to the punishment, in the form of detention, being imposed a considerable time after the sentence had been imposed (and, again, even longer after the offence was committed).
- [7.57] The Commission acknowledges the view expressed by two consultees that, given the issues associated with certain provisions of the *Children Act 2001*, perhaps the best course of action would be simply to amend section 99 so as to allow for the suspension of sentences of detention as well. However, on the basis of the above concerns, particularly the deficiencies associated with section 99 of the *Criminal Justice Act 2006*, the Commission is of the view that that such a course of action would not be conducive to the particular and unique needs of the juvenile justice system in this jurisdiction.

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<sup>83</sup> This point was recently made in the High Court (Reynolds J) in *B. (A Minor suing through his Mother and Next Friend, C.) v The Director of Oberstown* [2018] IEHC 601 at para 37.

**R. 7.01** The Commission recommends against an amendment to section 99 of the *Criminal Justice Act 2006* to provide for the suspension of sentences of detention, in whole or in part.

[7.58] As a number of consultees pointed out, the failure to provide for the suspension of sentences of detention in the *Children Act 2001* was a deliberate and conscious policy decision. In light of the distinct and unique aims of the juvenile justice system, as outlined in the first section of this chapter, the Commission is of the view that this policy is based upon sound and compelling considerations. Further, the Commission agrees with the view expressed at the consultation that the existing provisions of the *Children Act 2001*, while imperfect, provide a suitable approximation of the part-suspended sentence of detention.

**R. 7.02** The Commission therefore recommends against any amendment to Part 9 of the *Children Act 2001* to provide for the suspension of sentences of detention in whole or in part.

[7.59] Notwithstanding the above recommendations, the Commission wishes to reiterate that there are sound policy reasons in favour of a sentencing option which is analogous to a partially suspended sentence of detention in the juvenile justice context. This is particularly so in the case of serious offending behaviour to ensure that child offenders (who will almost invariably have reached adulthood by their release date) have some element of supervision and guidance on their release. At the consultation, it was suggested that, as the deferred detention order provided for by section 144 of the *Children Act 2001*<sup>84</sup> was originally intended, in part, to deal with the issue of overcrowding in children detention facilities (an objective no longer as pressing since the construction of Oberstown Children Detention Campus), section 144(1) could be repealed and the general power of deferment in section 144(2) be retained. Further, it was suggested that, in order to provide for a more open-ended power of deferment, that the requirements in sections 144(8)<sup>85</sup> and 144(11)<sup>86</sup> should be amended to enable the original order to be deferred on more than one occasion and for a period of longer than one year. It was suggested that such an amendment would cater for circumstances where the deferment order has worked very well and the proper course of action is the continued deferment of the detention order.

<sup>84</sup> Section 144(1) provides that a deferred order may be made by the court in accordance with this section "if a place is not available for the child in a children detention school or for any other sufficient reason (emphasis added).

<sup>85</sup> This section provides that that the resumed hearing shall take place not later than one year after the original hearing.

<sup>86</sup> This section provides that a deferred sentence may only be so deferred on one occasion.

[7.60] The Commission notes that, on one view, this suggestion is unobjectionable. As discussed earlier in this chapter, the deferred detention order shares many similar characteristics with the suspended sentence. This is reinforced by the fact that section 144(9)(b) provides for the only limited circumstances in which a detention order under the 2001 Act may ultimately be suspended. Furthermore, the fact that, in the case of a deferred sentence of detention, the sentence is not imposed but merely specified, renders the order more aligned with the overarching principle of the 2001 Act, namely detention as a last resort. Therefore, the deferred detention order is, on one view, an entirely apt alternative to the suspended sentence of detention.

[7.61] However, on balance, the Commission is not in favour of the above suggested changes to section 144 of the 2001 Act. The deferred sentence of detention is, in terms of its effect, similar to the wholly suspended sentence, in that both measures do not involve any immediate custodial element. In the case of both measures, depending on the offender's behaviour, he or she may not serve any period in custody. However, in circumstances where the sentencing court, at the resumed hearing of a deferred detention order, deems it necessary to impose the period of detention that it had specified at the original hearing,<sup>87</sup> then at least one year will have elapsed between the original sentencing and the imposition of punishment,<sup>88</sup> and an even longer period between the wrongdoing and the punishment. Further, in a situation where the sentencing court, at the resumed hearing, imposes a suspended sentence<sup>89</sup> or some other community sanction<sup>90</sup> and the child offender subsequently breaches the conditions attached to either of these orders, he or she would potentially be subjected to a period of detention. It is arguable therefore that section 144 in its current form does not cater for a sufficient temporal nexus between the offence and the punishment. Further, were the requirements in sections 144(8)<sup>91</sup> and 144(11)<sup>92</sup> to be relaxed (which were, it seems, clearly included in the Act so as to militate against the above issue arising), as suggested at the consultation, then there would potentially be an unjustifiable and improper time lag between the initial offence and the ultimate punishment. The Commission considers that the provision of such a general, open-ended power of deferment of a detention order would, in effect, be the equivalent of a fully suspended sentence of detention. In light of the need for a strong temporal nexus between the punishment and the offence, the Commission is of the view that such

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<sup>87</sup> Pursuant to section 144(9)(a) of the 2001 Act.

<sup>88</sup> As per section 144(8) of the 2001 Act.

<sup>89</sup> Pursuant to section 144(9)(b) of the 2001 Act.

<sup>90</sup> Pursuant to section 144(9)(c) of the 2001 Act.

<sup>91</sup> This section provides that that the resumed hearing shall take place not later than one year after the original hearing.

<sup>92</sup> This section provides that a deferred sentence may only be so deferred once.



a course of action would not be conducive to the policy and ethos underpinning the juvenile justice system.

[7.62] The Commission also notes that there are unresolved practical difficulties in respect of child offenders "ageing out" during the deferred period. Section 144(8) provides that the resumed hearing may take place notwithstanding that the child has turned 18. However, the orders available to the court at the resumed hearing under section 144(9) allow it to:

(a) impose the period of detention which it had deferred or any shorter period;

(b) suspend the whole or any portion of a period of detention so imposed; or

(c) impose a community sanction appropriate to the age of the child.<sup>93</sup>

[7.63] Therefore, while section 144(8) explicitly allows for the resumed hearing to take place even if the offender has "aged out", the remedies available to the court are only enforceable as against a child. The Department of Justice Draft Youth Justice Strategy 2020-2026<sup>94</sup> has as one of its strategic objectives to amend and update the *Children Act 2001* where necessary.<sup>95</sup> One area which is referred to as in need of review is the "transition to adulthood" provisions in Parts 7-9 of the 2001 Act.<sup>96</sup> The Commission is hopeful that consideration will be given to the transitional issues outlined above in respect of section 144 of the 2001 Act.

**R. 7.03** The Commission recommends against any legislative amendment to section 144 of the *Children Act 2001* to provide for a general, open ended power to defer a sentence of detention, as this would, in effect, amount to a sanction analogous to a fully suspended sentence of detention.

**R. 7.04** The Commission also recommends that, in any general review of the *Children Act 2001*, consideration be given to the "ageing out" issues in respect of section 144 of the Act.

[7.64] The general consensus at the consultation was that the section 151 detention and supervision order represented an appropriate variant of the part-suspended sentence for child offenders. However, as discussed earlier in this chapter, a significant issue with this legislative provision has come to light on foot of a couple of recent high-profile

<sup>93</sup> Section 144(9) of the 2001 Act.

<sup>94</sup> Department of Justice, *Draft Youth Justice Strategy 2020-2026* (1 May 2020) <[http://www.justice.ie/en/JELR/Draft Youth Justice Strategy 2020 \(Public Consultation\).pdf/Files/Draft Youth Justice Strategy 2020 \(Public Consultation\).pdf](http://www.justice.ie/en/JELR/Draft%20Youth%20Justice%20Strategy%202020-2026%20(Public%20Consultation).pdf/Files/Draft%20Youth%20Justice%20Strategy%202020-2026%20(Public%20Consultation).pdf)> accessed 4 May 2020.

<sup>95</sup> *Ibid* at page 14.

<sup>96</sup> *Ibid* at page 32.

sentencing decisions handed down in the Central Criminal Court. It seems that, in order for a sentencing court to avail of this sentencing option, the child offender must remain under 18 for the duration of the sentence, including the supervision period. Otherwise, a sentencing court faced with the issue of non-compliance with the conditions of community supervision by an “aged-out” offender would be left in a situation in which it could not enforce any of the remedies nominally available to it under section 130 of the 2001 Act.

- [7.65] A similar issue was recently confronted by the Court of Appeal in *The People (DPP) v McC*.<sup>97</sup> This case arose from an undue leniency application brought by the DPP under section 2 of the *Criminal Justice Act 1993*, on the grounds that the Director asserted that the sentence imposed was unduly lenient. Section 2 of the 1993 Act provides that, in the event that the appeal court finds the sentence to be unduly lenient, it may quash the sentence and re-sentence the offender to a “sentence which could have been imposed on him by the sentencing court concerned.” The applicant had been sentenced to a period of detention. However, by the time the DPP’s undue leniency appeal came on for hearing, the defendant had reached the age of 18. Having found that the sentence was unduly lenient, the Court of Appeal then found itself in the difficult position of not being able to impose any of the orders that “could have been imposed by the sentencing court concerned”, according to section 2 of the 1993 Act, as the applicant was no longer under 18 years of age. Similarly, it could not impose any punishment applicable to adult offenders as, at the time of the original sentence, such punishment could not have been imposed by the sentencing court. The Court, concluding that it was an “inconvenient interpretation” it was “not absurd”,<sup>98</sup> consequently held that it could not engage in anything but a literal interpretation of section 2(3) of the 1993 Act. This tied the Court’s hands in such a way that it could not impose an alternative sentence, so it had to simultaneously find that the sentence was unduly lenient and let it stand. The Court suggested that this oversight be examined by the Oireachtas and remedied through appropriate statutory amendment.<sup>99</sup>
- [7.66] In light of the finding of the Court in *McC*, it is very likely that a sentencing court would have significant difficulty in revoking an order under section 130 of the *Children Act 2001* and re-sentencing a child offender who has “aged out” in the meantime. The Commission reiterates its hope that the Department of Justice’s review of the “transition to adulthood” provisions in the 2001 Act will include an examination of the issues identified by the Commission in respect of section 151 of the 2001 Act.

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<sup>97</sup> [2018] IECA 309.

<sup>98</sup> [2018] IECA 309 at para 92.

<sup>99</sup> [2018] IECA 309 at para 98.

**R. 7.05** The Commission views the detention and supervision order as an appropriate proxy for the part-suspended sentence in the context of child offenders. However, it recommends that, in any general review of the *Children Act 2001*, consideration be given to the “ageing out” difficulties inherent in section 151, as identified in this chapter.

[7.67] In this chapter, the Commission has highlighted some of the concerns regarding the legal basis for the practice of imposing reviewable sentences of detention. However, this sanction serves an important function in the current juvenile justice system in this jurisdiction, particularly in light of the current transitional difficulties outlined in respect of section 151 of the 2001 Act. Furthermore, the flexibility inherent in the reviewable sentence allows sentencing courts to adhere to the values and principles underpinning the juvenile justice system, while at the same time ensuring that serious offending behaviour is marked out by the appropriate level of punishment. In its 1996 *Report on Sentencing*, the Commission briefly considered the practice of reviewable sentences (in the context of adult sentences of imprisonment). A majority (3:2) of the Commission recommended that this practice be ceased by the Courts on the basis that this was the function of the Executive and not the judiciary. Of course, this recommendation was given prior to the Supreme Court decision in *Finn*. As noted, the established position now seems to be that such a practice is only permissible, in an adult context, when there is express statutory authority to do so. In light of the benefits of this practice in the context of child offenders, the Commission is of the view that the practice of reviewable sentences of detention should be put on a statutory footing.

**R. 7.06** The Commission recommends that the practice of reviewable sentences of detention be continued, particularly in the case of lengthy sentences of detention handed down for serious offences.

**R. 7.07** However, the Commission also recommends that this practice be put on a statutory basis to ensure that it does not unduly interfere with the functions of the Executive.

[7.68] Finally, the Commission makes the following recommendations in light of some of the observations made in the first section of this chapter. While not strictly within the scope of this Report, the Commission notes that these issues are important in the context of juvenile justice and in need of review.

**R. 7.08** The Commission recommends that, when sentencing an adult offender for an offence that he or she has committed as a child, the sentencing court should take account of the offender’s young age and level of maturity at the time of committing the offence.

**R. 7.09** The Commission also recommends that, in any general review of the *Children Act 2001*, consideration be given to clarifying the law on the sentencing of children convicted of murder, including the sentencing of adults convicted of murder committed while they were under 18.

## CHAPTER 8 PROCEDURAL AND PRACTICAL ASPECTS OF SUSPENDED SENTENCES

### 1. Introduction

- [8.1] The suspension of a sentence of imprisonment was legislated for by section 99 of the *Criminal Justice Act 2006*, which placed the previously common-law sanction on a statutory footing for the first time.<sup>1</sup> The rationale behind the enactment of section 99 was to provide an effective mechanism for dealing with those who reoffended or breached a condition of suspension during the operational period of the suspended sentence. This, as O'Malley notes, was undoubtedly a legitimate and commendable ambition.<sup>2</sup> However, despite a number of amendments,<sup>3</sup> section 99 has proven to be problematic. In 2016, in *Moore v DPP*<sup>4</sup>, the High Court declared that subsections (9) and (10) of section 99 of the 2006 Act were unconstitutional. These subsections concerned the activation of a suspended sentence in the event of the commission of a triggering offence and set out the procedures to be followed in such circumstances. In response to the decision in *Moore*, the Oireachtas enacted the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, which not only amended subsections (9) and (10) of section 99 but clarified a number of other procedural issues identified in that section.
- [8.2] This chapter outlines and discusses the procedural and practical issues associated with section 99 of the *Criminal Justice Act 2006*, as amended. The first section of this chapter includes a discussion on the offences for which a suspended sentence may be imposed and the term of imprisonment that may be suspended. The second section discusses the period of time for which a suspended sentence may be in operation ("the operational period"). This section also discusses both the mandatory condition of suspension that the offender must keep the peace and be of good behaviour during the operational period under section 99(2) of the 2006 Act, and the various discretionary conditions which may

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<sup>1</sup> Section 99 of the *Criminal Justice Act 2006* was not, however, the first legislative attempt to place the suspended sentence on a statutory basis. Section 50 of the *Criminal Justice Bill 1967* first proposed to put the Irish courts' jurisdiction to suspend a sentence of imprisonment (and the suspension of a fine) on a statutory footing. However, upon the dissolution of the Dáil in June 1969, at which stage the Bill was at the committee stage (as of May 7 1969), the 1967 Bill never became law. See chapter 1 for further discussion.

<sup>2</sup> O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at paragraph 22.01.

<sup>3</sup> Section 99 has been amended by section 60 of the *Criminal Justice Act 2007*; section 51 of the *Criminal Justice (Miscellaneous Provisions) Act 2009*, and most recently, by *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, section 2.

<sup>4</sup> [2016] IEHC 244.

be imposed pursuant to sections 99(3) and 99(4). The case law of the Irish appellate courts, which serves to constrain the broad statutory discretion afforded to sentencing judges in choosing conditions of suspension, is also discussed.

- [8.3] The third section discusses the rules governing the activation of the suspended sentence, either on foot of a conviction for a subsequent offence (“the triggering offence”) during the operational period, or a breach of one of the other discretionary conditions of suspension imposed on the offender. Most of this section of the chapter is devoted to the substantial amount of case law that arose in the lead up to the finding of unconstitutionality of sections 99(9) and 99(10) in *Moore*, and the case law which dealt with the fallout from that decision. The post-*Moore* case law centred on whether or not an offender who, pre-*Moore*, had the custodial element of his or her suspended sentence activated under sections 99(9) and 99(10), could retrospectively rely on the finding of unconstitutionality in *Moore*.
- [8.4] The fourth section of this chapter discusses some of the practical issues associated with the suspended sentence, in particular the monitoring and enforcement of conditions of suspension. This discussion takes place within the context of broader structural deficiencies within the Irish criminal justice system, namely: delays in the criminal process, the lack of an inter-agency collaborative approach and the current data-deficit across all stages of the criminal process. While acknowledging some of the improvements made in respect of the above issues in recent years, the Commission discusses the urgent need for the concretisation and ultimate implementation of these, at present, largely aspirational proposals. In the context of the suspended sentence, this section discusses how the lack of data on the operation of the suspended sentence renders it very difficult to definitively ascertain whether the largely anecdotal view – that the monitoring and enforcement of the suspended sentence is sub-optimal – stands up to empirical scrutiny. However, the Commission expresses the view that inefficiencies in the criminal process more generally may be hindering the efficacy of the suspended sentence and, in particular, the extent to which the sanction may be effectively monitored and enforced.
- [8.5] The final section of this chapter outlines and discusses the Commission’s 13 recommendations. Firstly, it is recommended that there be no prescribed limit on the length of the custodial sentence that may be suspended, or on the length of the operational period. However, the Commission recommends that, as it forms part of the overall punishment, the length of the operational period should always be proportionate – both in the distributive sense and in terms of infringing on the offender’s rights as little as possible. In this regard, it is also recommended that, in general, the operational period should not exceed the length of the imposed custodial sentence, unless the justice of the case demands it.

- [8.6] In respect of the conditions of suspension, the Commission recommends that the mandatory condition to keep the peace and be of good behaviour during the operational period be retained. It also recommends against enlarging the list of discretionary conditions of suspension that a sentencing court may impose pursuant to sections 99(3) and 99(4) of the 2006 Act. Rather, the Commission recommends that these conditions of suspension should continue to be tailored to the specific circumstances of the case, bearing in mind the policy objectives of rehabilitation and desistance underpinning these legislative provisions. Finally, the Commission recommends that the broad statutory discretion afforded to sentencing judges in this regard should be constrained by the principle that the condition of suspension imposed be proportionate and afford the offender with a reasonable prospect of compliance, based on his or her personal circumstances. This inquiry may involve, where practicable, an assessment as to whether or not the offender consents to the conditions of suspension.
- [8.7] In respect of the activation of the custodial element of a suspended sentence, the Commission recommends that the current position be retained, namely that any offence should continue to be capable of constituting a triggering offence for the purpose of activating a suspended sentence. The Commission also endorses the decision of the Court of Appeal in *Clarke v Governor of Mountjoy Prison*<sup>5</sup> that the custodial element of the suspended sentence may be activated on foot of a triggering offence, both by way of section 99(10) as amended, and the standalone power in section 99(17) to revoke a suspended sentence for a breach of a condition of suspension (the breach of condition in the case of a triggering offence being the breach of the mandatory condition to keep the peace and be of good behaviour).
- [8.8] The Commission then makes two recommendations in respect of some of the amendments to section 99 of the 2006 Act. First, it is recommended that the word “may” be substituted for the word “shall” in section 99(8A)(a) of the *Criminal Justice Act 2006*.<sup>6</sup> This recommendation is made so as to avoid the current situation whereby offenders who, subsequent to committing a triggering offence and having been remanded back to the original court for the activation hearing, may be remanded in custody for a considerable time (in the event that they are refused bail) while awaiting the outcome of an appeal in respect of the triggering offence. The Commission also recommends that, in

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<sup>5</sup> [2016] IECA 244.

<sup>6</sup> Section 99(8A) was inserted by section 2(c) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*.

the interests of all involved, section 99 of the *Criminal Justice Act 2006* and all of the subsequent amendments, be consolidated into a single piece of legislation.<sup>7</sup>

- [8.9] Finally, the Commission makes two recommendations so as to ensure the effective and efficient operation of the suspended sentence in this jurisdiction and, in particular, the monitoring and enforcement of conditions of suspension. While again acknowledging the progress made in recent years, the Commission recommends that consideration be given to providing each relevant agency within the criminal justice system the necessary resources for the establishment of dedicated data management and analysis units, so as to facilitate the collection, collation and dissemination of data in relation to the criminal justice system generally, and the operation of the suspended sentence in particular. The Commission is of the view that access to empirical data could transform policymaking to ensure that policies are evidence-based. In the context of the suspended sentence, improving the collection, analysis and sharing of data could, for instance, inform the various agencies involved in the criminal process as to how best to manage the monitoring and enforcement of conditions of suspension. The Commission also recommends that the ICT architecture underpinning court processes should be examined, and that consideration be given to streamlining and modernising the ICT systems in each agency of the criminal justice system, and ensuring their interoperability, so as to facilitate a collaborative and efficient approach to the operation of the criminal justice system.

## **2. Imposition of a suspended sentence**

### **(a) Offences for which a suspended sentence of imprisonment may be imposed**

- [8.10] Section 99(1) of the *Criminal Justice Act 2006* makes it clear that a suspended sentence may be imposed for any offence that is punished by a term of imprisonment, except where that term of imprisonment is mandatory. It should be noted that the section makes no reference to detention, which applies to children convicted of criminal offences. The point was clarified definitively by the Court of Appeal in *The People (DPP) v AS*,<sup>8</sup> where it was held that sentences of detention cannot be suspended.

### **(b) Repeal of the common law power to suspend**

- [8.11] With the enactment of section 99 of the *Criminal Justice Act 2006*, it was initially unclear as to whether the common law power to suspend a sentence of imprisonment had been repealed, as section 99 did not explicitly repeal it. The issue came before the Court of

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<sup>7</sup> It should be noted that an administrative consolidation of section 99 of the *Criminal Justice Act 2006* has been prepared by the Law Reform Commission and is available at <<http://revisedacts.lawreform.ie/eli/2006/act/26/section/99/revised/en/html>>, accessed 17 August 2020.

<sup>8</sup> [2017] IECA 310.



Criminal Appeal in *The People (DPP) v Ryan*,<sup>9</sup> in which the question before the Court was whether a suspended sentence could be activated in part where it had been imposed prior to the commencement of section 99 of the 2006 Act. Under the common law, a suspended sentence could only be activated in full, not in part. The prosecution argued that, as the suspended sentence at issue was imposed before the commencement of section 99, it was governed by common law rules and must be activated in full. The Court of Criminal Appeal disagreed, stating that there was nothing in section 99 that imposed a temporal restriction so that only suspended sentences imposed after the commencement of the section could benefit from activation in part.

- [8.12] Subsequently, in *DPP (Madden and Hynes) v Carter*,<sup>10</sup> the High Court held that the powers to impose and activate suspended sentences are now entirely governed by section 99. The Court reiterated this point in *DPP (Purtill) v Murray*.<sup>11</sup> The Court in this case noted that the presumption against implied repeal effecting changes in the common law does not apply to criminal statutes. While the statutory scheme introduced changes to the manner in which suspended sentences are imposed and activated – especially with respect to the power to activate a suspended sentence in part – it could not be said, it was held, that the 2006 Act altered the legal position of the defendant in any real way. The wording of section 99 made it clear that the legislature intended to regulate the suspended sentence by placing it on a statutory footing and by providing a complete code with regard to the procedure (but not the principles) governing suspended sentences, the supervision of those subject to suspended sentences and enforcement in the event of a breach. As such, the High Court concluded that there was no scope for a parallel common law jurisdiction.<sup>12</sup>

### **(c) Term of imprisonment that may be suspended**

- [8.13] Under section 99 of the *Criminal Justice Act 2006*, there is no limit on the term of imprisonment that may be suspended.<sup>13</sup> A suspended sentence may be imposed for any

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<sup>9</sup> [2009] IECCA 21.

<sup>10</sup> [2014] IEHC 179.

<sup>11</sup> [2015] IEHC 782.

<sup>12</sup> This analysis was recently endorsed by the Court of Appeal in *The People (DPP) v AS* [2017] IECA 310. See also the judgment of that same Court in *Heaphy v Governor of Cork Prison* [2018] IECA 125 at para 51, where it held that while “the [2006] Act did not expressly repeal the pre-existing common law power to suspend sentences, the practical consequence of s. 99, when viewed in the context of Part 10 and of the entire statute, is that the sentencing regime in regard to part and wholly suspended sentences is now exclusively governed by the statute.”

<sup>13</sup> In this respect, Ireland is distinct from most other countries that allow for the imposition of suspended sentences. Tasmania also allowed for the suspension of a prison sentence of any length, but the sanction was abolished in that jurisdiction (subject to certain transitional provisions) by the

term of imprisonment except mandatory penalties, such as the mandatory sentence of life imprisonment for murder. This reinforces the point made in chapter 3 of this Report in respect of the flexibility of the suspended sentence: the sanction may be imposed for minor offences that merit a sentence of imprisonment as well as very serious crimes, including manslaughter. This approach contrasts with many other common law jurisdictions, in which the maximum term of imprisonment that may be suspended ranges from 14 days to five years.<sup>14</sup>

### 3. Conditions of suspension

#### (a) The operational period

- [8.14] Section 99 of the *Criminal Justice Act 2006* does not specify a maximum length for the operational period of a suspended sentence. There was a view that, at common law, the operational period of a suspended sentence should not extend beyond the length of the sentence imposed. However, in practice this was rarely followed. In *The People (Attorney General) v McClure*,<sup>15</sup> the Court of Criminal Appeal quashed a sentence of 15 months' imprisonment and re-sentenced the appellant to a sentence of nine months' imprisonment, wholly suspended for two years. Similarly, in *The People (Attorney General) v Murphy*,<sup>16</sup> the Court of Criminal Appeal varied the sentence from five years' imprisonment to one of four years suspended for five years. In *The People (DPP) v Hogan*,<sup>17</sup> the Court of Criminal Appeal reiterated that, in general, the operational period should not extend beyond the length of the sentence, save in exceptional circumstances. The Court maintained that it did not wish to lay down any concrete rules on the matter, but rather sought to ensure that there was a reasonable limit on the length of the operational period of a suspended sentence.

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*Sentencing Amendment (Phasing Out of Suspended Sentences) Act 2017*. The Australian Capital Territory currently still allows for sentences of any length to be suspended, see section 12 of the *Crimes (Sentencing) Act 2005*.

<sup>14</sup> In England and Wales, section 68 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* specifies that the maximum term of imprisonment that may be suspended is between 14 days and 2 years. Northern Ireland (*Treatment of Offenders Act (Northern Ireland) 1968*), South Australia (*Criminal Law (Sentencing) Act 1988*) and New South Wales (*Crimes (Sentencing Procedure) Act 1999*) all provide that the maximum term of imprisonment that may be suspended is two years. Western Australia (*Sentencing Act 1995*), the Northern Territory (*Sentencing Act 1995*) and Queensland (*Penalties and Sentences Act 1992*) provide that the maximum term of imprisonment that may be suspended is five years.

<sup>15</sup> [1945] IR 275.

<sup>16</sup> (Court of Criminal Appeal, 12 December 1974).

<sup>17</sup> (Court of Criminal Appeal, 4 March 2002).

- [8.15] The above decisions were decided before section 99 of the *Criminal Justice Act 2006* came into force. Subsequently, in *DPP (Cogavin) v Vajeukis*,<sup>18</sup> the High Court held that nothing in section 99 prevented the courts from imposing an operational period that exceeded the length of the sentence. The High Court also held that, while the District Court may not impose an immediate custodial sentence exceeding two years, it is not precluded from imposing a suspended sentence with an operational period of more than two years. Although these comments are *obiter*, they corroborate section 99(2), which refers to a “period of suspension” without any time limits. This is the general practice in legislation governing suspended sentences that impose a limit on the length of the operational period.<sup>19</sup>
- [8.16] However, the length of the operational period must be considered as forming part of the overall punishment of the suspended sentence.<sup>20</sup> As such, particularly long operational periods may fall foul of the principle of proportionality. In the recent decision of the Court of Appeal in *The People (DPP) v DW*,<sup>21</sup> the appellant was sentenced to a custodial sentence of four years’ imprisonment with the final year suspended for three years, subject to the appellant entering into a bond in the sum of €150 to keep the peace and be of good behaviour for the suspended period. The appellant was also required to avoid contact, direct or indirect, with the injured party for a period of 30 years. The Court held that this 30 year operational period was “disproportionate and arbitrary and ultimately excessive in the distributive sense having regard to its operative duration.”<sup>22</sup> Importantly, the Court was also of the view that the operational period was disproportionate in the sense that it impacted excessively on the appellant’s rights, variously arising either under the Constitution of Ireland, or the European Convention on Human Rights / the Charter of Fundamental Rights, including the right to freedom of association with his children, his right as a parent to further develop his relationship with his children, and the right to enjoyment of a family life which involves his children.<sup>23</sup> Thus, the operational period was deemed, as well as being disproportionate in the distributive sense, also disproportionate in the sense that it excessively impinged on the appellant’s rights, in breach of the

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<sup>18</sup> [2014] IEHC 265.

<sup>19</sup> See, for instance: section 189(3) of the *Criminal Justice Act 2003* (England and Wales); sections 18(1) and (1A) of the *Treatment of Offenders (Northern Ireland) Act 1968* (NI); sections 76(1) and 81(1) of the *Sentencing Act 1995* (WA); section 40(6) of the *Sentencing Act 1995* (NT); section 40 of the *Criminal Law (Sentencing) Act 1988* (SA); sections 144(5) and (6) of the *Penalties and Sentences Act 1992* (Qld), and; section 12(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

<sup>20</sup> *The People (DPP) v Stronge* [2011] IECCA 79.

<sup>21</sup> [2020] IECA 145.

<sup>22</sup> *Ibid* at para 92.

<sup>23</sup> *Ibid* at para 93.

proportionality principle laid down in *Heaney v Ireland*,<sup>24</sup> and later approved by the Supreme Court in *Re Article 26 and the Employment Equality Bill 1996*.<sup>25</sup>

**(b) Conditions of suspension**

[8.17] Under section 99 of the *Criminal Justice Act 2006*, an individual who receives a suspended sentence is subject to the mandatory condition to keep the peace and be of good behaviour for the duration of the operational period. Generally, this refers to not committing another offence. Subsections (3)<sup>26</sup> and (4)<sup>27</sup> of section 99 provide for the imposition of additional conditions. Section 99(3) of the 2006 Act provides that a sentencing court may, having decided that a suspended sentence (in full or in part) is appropriate in the circumstances of the case, impose any conditions of suspension that it considers:

- a. appropriate, having regard to the nature of the offence; and
- b. will reduce the likelihood of the offender committing any other offence

[8.18] Section 99(4) also outlines some of the conditions which may be imposed by the sentencing court when imposing a part-suspended sentence. It provides that the court may:

“when making an order under subsection (1) consisting of the suspension in part of a sentence of imprisonment... impose any or more of the following conditions:

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

(b) that the person undergo such –

- (i) treatment for drug, alcohol or other substance addiction,
- (ii) course of education, training or therapy,
- (iii) psychological counselling or other treatment.

as may be approved by the court;

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<sup>24</sup> [1994] 3 IR 593.

<sup>25</sup> [1997] IESC 6, [1997] 2 IR 321. See chapter 4 for a detailed discussion of the Court’s reasoning in *DW*.

<sup>26</sup> These conditions may be imposed in respect of any suspended sentence (in full or in part).

<sup>27</sup> These conditions may only be imposed in respect of part-suspended sentences.

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

[8.19] These additional conditions available under sections 99(3) and 99(4) of the 2006 Act, which may be imposed at the discretion of the court, generally serve to promote rehabilitation and desistance.<sup>28</sup> However, while subsections (3) and (4) provide the court with a wide discretion as to the conditions that it may impose, the case law has established that the conditions of suspension form part of the overall punishment and must therefore be proportionate to the overall gravity of the offence as committed by the offender.<sup>29</sup> Further, the conditions of suspension imposed should afford the offender with a realistic prospect of compliance so that that the suspended sentence does not, in essence, amount to a sentence of immediate imprisonment with a deferred commencement date.<sup>30</sup> This involves an assessment of the personal circumstances of the offender so as to ensure that there is a reasonable prospect of compliance with the conditions of suspension proposed. In the recent Court of Appeal decision of *The People (DPP) v Broe*,<sup>31</sup> the Court held that, before imposing a suspended sentence:

“a sentencing judge should satisfy himself or herself that there is at least a reasonable prospect that the accused will take the chance provided to him by the proposed suspended sentence ... A sentencing judge ought to, when structuring a sentence, use his/her judgment as to whether the risk associated [i.e. the risk that the suspended element may ultimately be activated] with using a suspended sentence is justifiable in the circumstances of the case.”<sup>32</sup>

[8.20] In the earlier decision of *The People (DPP) v Johnston*,<sup>33</sup> the Court of Criminal Appeal held that the sentencing judge had been correct not to impose a suspended sentence because, in light of the offender’s previous criminal record, there was no realistic prospect of him complying with the conditions of suspension. Similarly, in *The People (DPP) v Folan*,<sup>34</sup> the Court held that the decision to partially suspend the appellant’s sentence of imprisonment (so as to reflect his personal mitigation) amounted to an error of principle, in circumstances where, given the fact that the offender was an alcoholic and had

<sup>28</sup> For further discussion, see chapters 3 and 5 of this Report.

<sup>29</sup> As outlined in *DW*, this means that conditions must be proportionate in the distributive sense and in terms of ensuring that the offender’s rights are not excessively infringed.

<sup>30</sup> O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 22.09.

<sup>31</sup> [2020] IECA 140. This decision is discussed in more detail in chapter 5 of this Report.

<sup>32</sup> [text added]. *Ibid* at paras 82 – 83.

<sup>33</sup> [2010] IECCA 97.

<sup>34</sup> [2019] IECA 361. See also *The People (DPP) v Lee* [2017] IECA 152. *Lee* is discussed in chapter 4 of this Report.

relapsed in the past, there was a high likelihood that he would do so again. It was therefore held that reflecting the appellant's personal mitigation by way of part-suspension was inappropriate in the circumstances as there was not a sufficiently realistic prospect of him complying with the conditions of suspension.<sup>35</sup>

- [8.21] Although section 99(6) of the 2006 Act permits the imposition of additional conditions at the request of the Probation Service at any time before the expiration of the sentence, it does not permit the extension of the original operational period imposed by the sentencing court. It is notable that other common law jurisdictions allow courts to extend the length of the operational period at a later stage.<sup>36</sup> However, the Irish position must be considered in the context of there being no statutory limit to the length of the operational period originally imposed (as long as it is proportionate). It is arguable, therefore, that there is less of a necessity for a mechanism for extending the length of the operational period at a later date.

## 4. Activation of a suspended sentence

### (a) The subsequent offence

- [8.22] Under section 99(9) of the *Criminal Justice Act 2006*, as amended, an offender who is subject to a suspended sentence is liable to have the suspended sentence activated if he or she is convicted of an offence, however minor ("the triggering offence"), during the operational period of the suspended sentence. On one view, the fact that the triggering offence can be any offence may seem unfair, in circumstances where an offender who is subject to a suspended sentence is convicted of a triggering offence that is either not punishable by imprisonment or carries a maximum sentence of only a few months in prison. For instance, in *The People (DPP) v Kiely*,<sup>37</sup> the offender committed a number of serious driving offences and was sentenced to six years' imprisonment, wholly suspended. During the operational period he was convicted of public order offences and the court that imposed the suspended sentence reactivated the custodial sentence in part. This decision was upheld on appeal. O'Malley has observed that, while the initial suspension may have been a relatively lenient sentence, the actual punishment endured by the offender here was ultimately relatively severe.<sup>38</sup> Similarly, in the Northern Irish case of *R v*

<sup>35</sup> *Ibid* at para 31.

<sup>36</sup> Sections 20AA(1) and (3) of the *Crimes Act 1914* (Cth); section 43 of the *Sentencing Act 1995* (NT); section 58(3) of the *Criminal Law (Sentencing) Act 1988* (SA); Section 147(1) of the *Penalties and Sentences Act 1992* (Qld); Sections 27(4C)(c) and 4E(c) of the *Sentencing Act 1997* (Tas); section 189, schedule 12, paragraphs 8 and 16 of the *Criminal Justice Act 2003*; section 19(1) of the *Treatment of Offenders Act (Northern Ireland) 1968*.

<sup>37</sup> (Court of Criminal Appeal, 19 February 2008).

<sup>38</sup> O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 22.28.

*Wightman*,<sup>39</sup> the offender received a suspended sentence for the larceny of a cheque and forgery, and later had the suspended sentence activated upon conviction for the theft of a fountain pen.

- [8.23] The *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017* does not address the issue of the nature of the triggering offence. Section 2(c) of the 2016 Act, which inserts subsection (8A) into section 99 of the 2006 Act, still refers simply to conviction for “an offence,” rather than, for example, an offence that is punishable by imprisonment or an “arrestable offence.”<sup>40</sup>

### **(b) Remand procedures**

- [8.24] Section 99(9) of the 2006 Act, as originally enacted, provided that where an offender who is subject to a suspended sentence, and is convicted of a triggering offence during the operational period, the court that convicted the individual for the subsequent offence was required to, before imposing sentence, remand him or her in custody or on bail to the next sitting of the court that imposed the suspended sentence. This was a mandatory provision.<sup>41</sup>
- [8.25] Section 2(c) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, which inserts subsection (8A) into section 99 of the 2006 Act, amends these remand procedures by providing that the offender who is subject to a suspended sentence and who has been convicted of a subsequent offence shall be remanded to the court that imposed the suspended sentence *after* sentence is imposed for the subsequent offence. As in section 99(9), this remand provision is mandatory. This legislative amendment was introduced on foot of the finding in *Moore and others v DPP*<sup>42</sup> that sections 99(9) and (10) of the 2006 Act were unconstitutional. This decision, and the subsequent fallout, will be discussed in detail later in this chapter.

### **(c) Presumption of activation**

- [8.26] Section 99 of the *Criminal Justice Act 2006* provides for an implicit presumption of full activation in the event of a subsequent conviction or a breach of a condition of suspension. This presumption is, however, tempered by broad powers of judicial discretion, as it can be rebutted where the court is of the opinion that it would be unjust

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<sup>39</sup> [1950] NI 124.

<sup>40</sup> As *per* section 2 of the *Criminal Justice Act 1997*, an arrestable offence “means an offence for which a person of full capacity and not previously convicted may, under or by virtue of any enactment, be punished by imprisonment for a term of five years or by a more severe penalty and includes an attempt to commit any such offence”.

<sup>41</sup> *DPP (Moloney) v O’Callaghan* [2015] IEHC 165.

<sup>42</sup> *Moore and others v DPP* [2016] IEHC 244, [2018] 2 IR 170.

in all of the circumstances to activate the suspended sentence, either in part or at all. As Judge Riordan, writing extra-judicially, notes, both sections 99(10)<sup>43</sup> and 99(17)<sup>44</sup> of the 2006 Act provide the sentencing court with a “double discretion to disregard the breach having regard to all the circumstances of the case and, even if moved to activate the sentence, the court may impose a lesser sentence than that originally specified.”<sup>45</sup> In *The People (DPP) v Ryan*,<sup>46</sup> the Court of Criminal Appeal commented that:

“[t]he object of the section as a whole is to deal with a perceived injustice where reactivation of a suspended sentence or a suspended portion of a sentence could be perceived as disproportionate in the absence of a power in the court to reactivate the sentence in part.”<sup>47</sup>

- [8.27] Subsection (8C), inserted by section 2(c) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, does not change this discretionary procedure. The discretion to activate a suspended sentence in part is a welcome change from the common law procedure, whereby the court could either decide to ignore a *de minimis* breach (that is, a breach of the conditions of suspension that is immaterial or negligible), or activate the sentence in its entirety.<sup>48</sup>

**(d) The “next sitting”**

- [8.28] Under section 99(9) of the 2006 Act, as originally enacted, where an offender who was subject to a suspended sentence was convicted of a triggering offence, he or she had to be remanded to the “next sitting” of the court that handed down the original suspended sentence. The precise meaning of “next sitting” was discussed in *DPP (Madden and Hynes) v Carter*,<sup>49</sup> in which the High Court held that suspended sentences are now governed entirely by section 99, which should be strictly adhered to. The term “the next sitting”, the High Court held, should therefore be interpreted literally. The Court went on to hold that the District Court in this case had no jurisdiction to deal with the applicant, as

<sup>43</sup> Section 99(10) may only be invoked to revoke a suspended sentence on foot of a conviction for a triggering offence.

<sup>44</sup> Section 99(17) may be invoked to revoke a suspended sentence on foot of *any* condition of suspension, including a breach of the condition to keep the peace and be of good behaviour on foot of a conviction for a triggering offence. See *Clarke v Governor of Mountjoy Prison* [2016] IECA 244, discussed below.

<sup>45</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 372.

<sup>46</sup> [2009] IECCA 21.

<sup>47</sup> *Ibid* at para 63.

<sup>48</sup> *The People (DPP) v Stewart* (Court of Criminal Appeal, 12 January 2004).

<sup>49</sup> [2014] IEHC 179.



he had not been brought before it in the proper manner. The High Court pointed out that, had the applicant been remanded in custody and required to remain there for longer than was necessary, he would have had a genuine reason to challenge the legality of his detention. The Supreme Court unanimously upheld this decision, stating that “next sitting” meant the next sitting “which is reasonably possible in the circumstances of the case,” which would ordinarily be the next full day of court hearings.<sup>50</sup>

[8.29] In *Cobzaru v O’Donoghoe*,<sup>51</sup> the High Court clarified that section 99 of the 2006 Act refers to the next sitting of the *court* and not the courthouse. In this case the applicant was remanded to the next sitting of the Circuit Court which was to be the following day in Court 16. However, the Circuit Court was not sitting in Court 16 and was, instead, sitting in Court 5. The High Court, in refusing judicial review, commented that the inability of the prosecution to inform the applicant of the change of venue would not assist her, as the matter was adjourned so that she could be notified and cautioned to attend.

[8.30] Section 2(c) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, which inserts subsection (8A) into section 99 of the 2006 Act, provides that an offender who is subject to a suspended sentence, who has been convicted of a triggering offence, shall be remanded to the court that imposed the suspended sentence *after* sentence is imposed for the subsequent offence. This sitting of the court must be no later than 15 days after being remanded, or if there is no sitting of that court within 15 days, to the next sitting of the court thereafter.

#### **(e) Revisiting and varying the original sentence**

[8.31] An issue arose under section 99(10) of the 2006 Act regarding revisiting and varying the original sentence during the revocation procedure. In *The People (DPP) v Kiely*,<sup>52</sup> at an activation hearing, the Circuit Court had activated four years of a six year suspended sentence, and suspended the final two years. The appellant appealed the activation of the four years. The Court of Criminal Appeal, in dismissing the appeal, commented *obiter* that during the activation hearing, the original court had the right to vary the original sentence.

[8.32] However, in *DPP (Cogavin) v Vajeuskis*,<sup>53</sup> the High Court held that the original sentence could not be revisited during the activation proceedings. Any challenge to the original sentence must be brought by way of an appeal or judicial review. *Kiely* was not discussed by the High Court in *Vajeuskis*. The Commission is of the view that the

<sup>50</sup> *The People (DPP) v Carter and Kenny* [2015] IESC 20, [2015] 3 IR 58.

<sup>51</sup> [2016] IEHC 359.

<sup>52</sup> (Court of Criminal Appeal, 19 February 2008).

<sup>53</sup> [2014] IEHC 265.

comments of the Supreme Court in *The People (DPP) v Finn*, discussed in detail in chapter 7 of this Report, may also be of some assistance in resolving this conflict in the authorities.<sup>54</sup> In that case, the Court was critical of the practice of “reviewable sentences”; that is, a determinate prison sentence subject to review by the court once a portion of the sentence was served. The Court observed that commutation of sentence is an executive function. As such, it was not a function properly exercised by the judiciary.<sup>55</sup> The fully suspended sentence is a non-immediate custodial sentence and, therefore, consists of both the suspended period and, if activated, the custodial element. Similarly, the part-suspended sentence concurrently consists of an immediate custodial element and a suspended custodial element. It seems, therefore, that variation of either of these elements (the custodial element or the suspended element) at the activation hearing would effectively amount to commutation of sentence.<sup>56</sup> This lends further support to the view of the High Court in *Vajeuskis* that the original sentence may be challenged only through an appeal or judicial review.

**(f) Activation following a breach of conditions**

[8.33] As discussed above, a suspended sentence may be activated upon conviction for a subsequent triggering offence. Furthermore, a suspended sentence may be activated where there has been a breach of a condition of suspension. Section 99(13) provides that, where a member of An Garda Síochána, or the governor of the prison to which an offender subject to a part-suspended sentence has been committed, has reasonable grounds for believing that the offender has breached the mandatory conditions of

<sup>54</sup> *The People (DPP) v Finn* [2000] IESC 75, [2000] 2 IR 25.

<sup>55</sup> The Court’s criticisms of this point were *obiter* and it did not make any order or finding that this practice was unconstitutional. Nevertheless, as O’Malley observes, the practice of reviewable sentences seems to have stopped since *Finn* was decided (at least in the absence of express statutory authority for such sentences). O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 22.43. Section 27(3J) of the *Misuse of Drugs Act 1977*, as substituted by section 33 of the *Criminal Justice Act 2007*, allows the sentencing court to review a sentence with a view to suspending the remaining portion from the review date, provided that the court is satisfied that the offender, at the time of the offence, was addicted to one or more controlled drugs and that the addiction was a significant factor in the commission of the specific offence under section 15(a). However, as clarified by the Court of Criminal Appeal in *The People (DPP) v Dunne* [2003] 4 IR 87, this statutory power to impose a reviewable sentence is confined to circumstances in which the court has, at least, imposed the presumptive minimum sentence of 10 years’ imprisonment, as the review power is only exercisable after the offender has served five years of the sentence. One exception to this rule is the practice of reviewable sentences of detention permitted for child offenders being sentenced to lengthy sentences on foot of serious indictable offences, as established in *The People (DPP) v DG* [2005] IECCA 75. Chapter 7 of this Report contains a detailed discussion as to the legal basis for this judicially developed practice.

<sup>56</sup> However, it should be noted that this practice is now effectively provided for through part-activation of a suspended sentence, with a fresh suspension on the un-activated remainder of the sentence, see section 99(18A) of the *Criminal Justice Act 2006*, discussed below.

suspension under section 99(2), namely to keep the peace and be of good behaviour, he or she may apply to the court to have the suspended sentence activated. Section 2(f) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017* amended section 99(13) of the 2006 Act and enhanced the powers of the Gardaí and prison governors, allowing them to apply for activation of a suspended sentence, not only in circumstances where there are reasonable grounds for believing that the offender subject to the suspended sentence has breached a mandatory condition of suspension under section 99(2), but also where they have reasonable grounds for believing that the offender has breached one of the discretionary conditions imposed pursuant to section 99(3). This modification appears to enhance the role of the Gardaí as being concerned with the detection of crime as well as its prevention. However, anecdotally, it has been suggested that re-entries for breaches of conditions imposed under subsections (3) or (4) are more frequently initiated by probation officers than Gardaí, with the latter only generally becoming involved in the reactivation process upon the commission and conviction of a triggering offence.

[8.34] Section 2(g) of the 2017 Act inserted subsection (13A), which provides that the Director of Public Prosecutions may, if she has reasonable grounds for believing that an individual who is subject to a suspended sentence has contravened a condition imposed under section 99(3), apply to the court to initiate activation proceedings. This arguably confers monitoring and investigatory powers on the Director of Public Prosecutions. Section 99(3) enables the courts to impose additional conditions, other than the mandatory conditions to keep the peace and be of good behaviour under section 99(2). While it would make sense that the Director of Public Prosecutions could apply to the court to initiate activation proceedings where an offender has been convicted of a triggering offence, the additional conditions under section 99(3) can vary significantly, ranging from, for instance, drug addiction counselling to a curfew requirement. Supervising compliance with such provisions may fall outside of the remit of what the Director of Public Prosecutions can monitor and enforce. However, as section 99(3) is effectively a catch-all provision, in that it encompasses all possible conditions that can be imposed, including to keep the peace and be of good behaviour, by empowering the Director of Public Prosecutions under this subsection, it appears that the Act was intended, as far as possible, to ensure that suspended sentences are being effectively monitored and breaches detected and enforced.<sup>57</sup>

[8.35] Under section 99(14) as originally enacted a probation officer could apply for activation of a suspended sentence where he or she had reasonable grounds for believing that an offender subject to a suspended sentence had breached one or more of the conditions of

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<sup>57</sup> This was the intention of the Minister for Justice, who emphasised this point when discussing provisions of the *Criminal Justice (Suspended Sentences of Imprisonment) Bill 2016* at Second Stage: Dáil Debates (24 January 2017) at page 72.

suspension imposed under subsections (3) or (4). Section 2(h) of the 2017 Act amended section 99(14) of the 2006 Act by removing the power of the relevant probation officer to apply to the court where they have reasonable grounds for believing that an offender has breached a condition of suspension under section 99(3). However, probation officers may still make applications to the court in respect of breaches of conditions under subsection (4), namely the conditions that may be imposed in respect of part-suspended sentences only. As outlined above, these conditions fall directly within the remit of the Probation Service. Considering that the powers of the Gardaí, the governors of prisons, and the Director of Public Prosecutions have been enhanced by the 2017 Act to cover breaches of conditions imposed under section 99(3), the intention behind these legislative changes may be to ensure that the responsibilities and resources of the Probation Service do not become overly stretched.

**(g) Temporary release**

[8.36] Section 99(19) provides that section 99 of the 2006 Act does not affect the powers of the Minister for Justice to make rules for the temporary release of prisoners under section 2 of the *Criminal Justice Act 1960*, nor the rules governing remission under Rule 59 of the Prison Rules 2007, which replaced Rule 38 of the Rules for the Government of Prisons 1947. Section 99(19) places the decision of the Supreme Court in *O'Brien v Governor of Limerick Prison*<sup>58</sup> on a statutory footing. The applicant in this case had been sentenced to a period ten years' imprisonment with the final six years suspended. Having served three out of the four years of the custodial element of his sentence, he brought an application under Article 40.4 of the Constitution of Ireland on the basis that his continuing detention was unlawful. His argument was that, having regard to remission under the terms of the then-applicable legislation, section 1 of the *Prisons Ireland Act 1907* and the *Rules for the Government of Prisons 1947*, he was entitled to standard remission of one quarter of his sentence for good behaviour. The applicant maintained that his eligibility for remission was to be calculated only by reference to the custodial element of the sentence and, as he had already served three out of this four-year custodial period, he was entitled to be released.

[8.37] The Supreme Court found in favour of the applicant – while agreeing that it was the clear intention of the sentencing judge that the applicant would spend at least four years in custody, the Court held that that intention was inconsistent with the applicable legislation, which clearly envisaged that the period of imprisonment would be the same length as the period of the sentence, and that a prisoner's sentence is deemed to have expired on discharge. Section 1 of the 1907 Act provides that "on his discharge [the prisoner's] sentence shall be deemed to have expired." Therefore, it was held that the statutory framework was incompatible with the type of order made in this case where, despite

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<sup>58</sup> [1997] 2 ILRM 349.

being released, the prisoner faced the possibility of further imprisonment if he breached a condition of suspension. The sentence was deemed valid insofar as the four-year custodial portion was concerned and it was against that four-year term that remission was to be calculated. Accordingly, the applicant's immediate release was ordered.

**(h) Right to appeal**

*(i) Constitutional requirement that the activation process must await the completion of the subsequent criminal charge, including appeal*

[8.38] In *Moore and others v DPP*<sup>59</sup> the High Court (Moriarty J) held that there was a constitutional infirmity in the revocation procedures of section 99 of the *Criminal Justice Act 2006*, in particular where an offender was convicted of a triggering offence during the operational period of a suspended sentence. As discussed above, subsections (9) and (10) of section 99, as originally enacted, provided that where an offender was convicted of a subsequent offence, he or she was to be remanded to the original court to have the suspended sentence for the original offence activated *before* he or she would be sentenced for the triggering offence.<sup>60</sup> The High Court held that this activation procedure breached the offender's right to appeal the subsequent conviction. The result was that the offender's original suspended sentence could be converted into a sentence of immediate imprisonment before he or she had an opportunity to challenge, on appeal, the conviction for the subsequent offence. If the offender successfully challenged the subsequent conviction, then the activation of the original suspended sentence should not have occurred, as no triggering offence was committed.

[8.39] As discussed above, the amendments to section 99 by the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017* have sought to rectify this issue by inserting subsections (8A) to (8H) into section 99.<sup>61</sup> These sections provide that where the offender is convicted of a triggering offence, the activation hearing of a suspended sentence will not occur until *after* the offender has been sentenced for the subsequent offence and, should he or she wish to appeal either the conviction or sentence, after the appeals process for the subsequent offence has been fully exhausted.

[8.40] In order to appreciate the process that led to the decision in *Moore*, the Commission describes here the prior case law on activation under section 99. Until the decision in

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<sup>59</sup> *Moore and others v DPP* [2016] IEHC 244, [2018] 2 IR 170.

<sup>60</sup> This language was, itself, inserted by section 60 of the *Criminal Justice Act 2007*. The 2006 Act had originally provided that the court that was passing sentence for the triggering offence would remand the offender to the original court *after* passing sentence for that triggering offence. This position has been reinstated by the 2017 Act's amendments.

<sup>61</sup> Commenced with effect from 11 January 2019 by the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017 (Commencement) Order 2019* (SI No 1 of 2019).

*Moore*, an offender convicted in the District Court could appeal to the Circuit Court against conviction, sentence, or both. The appeal operated as a rehearing and a stay on the District Court order for the duration of the appeal. Yet an appeal could not be taken until sentence was imposed, as conviction and sentence cannot be severed.<sup>62</sup> Under section 99(9) and (10), where an offender subject to a suspended sentence was convicted of a triggering offence during the operational period, he or she was remanded back to the original court that imposed the suspended sentence for a decision on whether to activate the suspended sentence (and, if so, to what extent) *before* sentence for the triggering offence could be imposed by the court that convicted the individual of the subsequent offence. Only after a decision regarding the activation of the suspended sentence was made would the offender be remanded back to the court that convicted him or her of the subsequent offence for sentencing. As such, where an offender who was subject to a suspended sentence was convicted of a triggering offence and wished to appeal this conviction, he or she was precluded from doing so until after he or she had been sentenced for the subsequent offence, which only occurred after a decision regarding the activation of the suspended sentence was made by the original court. If the sentence were activated, in whole or in part, and the offender were committed to custody but later had the decision of the District Court in relation to the subsequent offence quashed on appeal, he or she might legitimately complain of unlawful detention.

- [8.41] In *Muintean v Hamill*,<sup>63</sup> the applicant was convicted of an offence in the District Court while subject to a suspended sentence. He was remanded to the original court for a hearing on activation, during which time he attempted to file an appeal against the triggering conviction. The High Court (McCarthy J) dismissed the appeal because the activation procedure had not been completed, as the District Court had not yet imposed a sentence for the subsequent offence and, as such, an appeal could not yet be brought. Similarly, in *Sharlott v Collins*,<sup>64</sup> the applicant was convicted of an offence in the District Court and subsequently remanded to the Circuit Court for a decision on activation of a

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<sup>62</sup> Section 99(9) and (10) of the 2006 Act was thought to conflict with the principle that conviction and sentence may not be severed. The High Court addressed this issue in *Harvey v Leonard* [2008] IEHC 209, in which the applicant argued that the District Court had no jurisdiction to remand him to the original court, as conviction and sentence may not be severed. The High Court held that, while conviction and sentence were not severable in the sense that if one fell, the other did too, in this case neither had fallen. The Court (at para 16) did not agree that “conviction and sentence are so inextricably linked that nothing of substance can occur between them.” The High Court pointed out that the District Court frequently convict and then remand for sentencing to allow time for the preparation of a probation report. The Court concluded that the procedure required under section 99 occurred within the same interval between conviction and sentencing. In *Murphy v Watkin* (High Court, 11 July 2014), the High Court reiterated its position on the severability of conviction and sentence for the purposes of section 99(9) of the 2006 Act.

<sup>63</sup> [2010] IEHC 391.

<sup>64</sup> [2010] IEHC 482.

suspended sentence imposed in that court. The applicant filed an appeal against the conviction and sought a prohibition order to stop the activation hearing pending his appeal against the triggering offence. The High Court (Hanna J) dismissed the appeal, stating that under section 99(9), the District Court was obliged to remand the offender to the Circuit Court and that an appeal could not be filed until sentence had been imposed by the District Court. The High Court did, however, acknowledge the difficulties that these procedures caused, stating: “[w]ere [the applicant] ultimately to succeed and to stand innocent of the District Court charge, he would undoubtedly suffer a grave injustice were the Circuit Court sentence in the meantime activated.”<sup>65</sup>

[8.42] In *The People (DPP) v Devine*,<sup>66</sup> the respondent had pleaded guilty in the District Court to an offence committed during the operational period of a suspended sentence imposed by the Court of Criminal Appeal. The District Court, after sentencing the respondent, remanded him to the next sitting of the Court of Criminal Appeal for a decision on activation of the suspended sentence. However, this was in contravention with the terms of section 99(9) which, as noted, required that an offender be remanded to the next sitting of the court that imposed the suspended sentence for a decision on activation (i.e. the Court of Criminal Appeal) before sentence was imposed for the subsequent offence in the District Court. Consequently, the District Court had no jurisdiction to remand the respondent to the Court of Criminal Appeal, and the Court of Criminal Appeal had no jurisdiction to decide on the activation of the suspended sentence, as the proper procedures under sections 99(9) and (10) of the 2006 Act had not been adhered to.<sup>67</sup>

[8.43] In *DPP (Moloney) v O’Callaghan*,<sup>68</sup> it was argued that the court that had originally imposed the suspended sentence should defer a decision on activation and remand the matter back to the court that had convicted the offender of the subsequent offence so that a sentence could be imposed and an appeal taken. The High Court (Faherty J) rejected this argument as incompatible with the procedure set out in sections 99(9) and (10) of the 2006 Act. The High Court held that:

“The provisions of ss. 99(9)-99(10) constitute a legislative barrier to the possibility of a person convicted while under a period of

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<sup>65</sup> [2010] IEHC 482 at para 19.

<sup>66</sup> [2011] IECCA 67.

<sup>67</sup> It is interesting to note that the procedure followed by the District Court in this case would now be considered to be the correct approach, as provided for by the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*.

<sup>68</sup> [2015] IEHC 165.

suspension being able to stave off a possible revocation of the suspension pending appeal of the triggering conviction.”<sup>69</sup>

- [8.44] A further complication arises from the District Court’s jurisdiction, under section 1 of the *Probation of Offenders Act 1907*, to dismiss a charge or to grant a conditional discharge, notwithstanding that the court may be satisfied that the charge is proved. A literal interpretation of section 99(9) of the 2006 Act requires a remand only where there has been a subsequent conviction (as opposed to merely a breach of one of the conditions of suspension under sections 99(3) and (4)). This could be interpreted as meaning that, where the District Court applies the *Probation of Offenders Act 1907*, it is not under an obligation to remand the offender to the next sitting of the court that imposed the suspended sentence. However, the decision as to whether or not to apply the 1907 Act generally occurs at what may be considered the sentencing stage of a District Court hearing. Thus, if the offender is remanded to the original court and has his or her suspended sentence activated, but upon remand back to the District Court the 1907 Act is applied and no conviction is ever recorded, then the offender has avoided conviction for the subsequent offence, but will nonetheless serve a term of imprisonment for the original offence.<sup>70</sup>
- [8.45] This anomaly has now been addressed by the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*. Section 99(8A) of that Act refers to an individual who has “commit[ed] an offence” being remanded to the court that imposed the suspended sentence after sentence has been passed for the triggering offence. Since an order under the 1907 Act does not constitute a sentence, it is now clear that the District Court will not be under an obligation to remand an offender back to the court that imposed a suspended sentence where the 1907 Act is applied. In such situations, the offender will no longer suffer the consequence of having their suspended sentence activated for an offence that does not ultimately result in a recorded conviction or sentence.
- [8.46] As discussed above, subsections (9) and (10) of section 99 were ultimately declared unconstitutional in *Moore v DPP*.<sup>71</sup> The High Court referred to the “chequered history” of section 99, pointing to a number of previous cases that highlighted significant issues with the application of the section in practice.<sup>72</sup> One of the main shortcomings of

<sup>69</sup> *Ibid* at para 31.

<sup>70</sup> O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 22.35.

<sup>71</sup> [2016] IEHC 244, [2018] 2 IR 170.

<sup>72</sup> *The People (DPP) v Carter and Kenny* [2015] IESC 20; *Sharlott v Collins* [2010] IEHC 482; *McCabe v Ireland* [2014] IEHC 435. The High Court also referred to (at paras 15 – 16 [neutral citation], page 187 – 189 [Irish Reports]) a detailed paper presented by District Judge Malone on the general topic of suspended sentences which commented that, while the concept of section 99 was to be



section 99 identified by the Court was that it paradoxically tried to do too much, effectively seeking to regulate every remote possibility that could arise. In striking down the impugned provisions, the High Court held that, although the Constitution may not be invoked for reasons of expedience or popularity, it could not be ignored that judges from all jurisdictions had expressed a wariness towards section 99 and that “protagonists, lay and professional, in the arena of criminal law simply do not know at present where they stand.”<sup>73</sup> The High Court, thus, held that subsections (9) and (10) of section 99 were unconstitutional.

(ii) *The case law post-Moore*

- [8.47] A substantial body of case law has emerged subsequent to the decision in *Moore*.<sup>74</sup> This litigation has largely focused on whether or not an offender who, pre-*Moore*, had the custodial element of his or her suspended sentence activated under sections 99(9) and (10), could retrospectively rely on the finding of unconstitutionality in *Moore*. This section of the chapter deals with some of the more significant decisions in this regard. In *Clarke v Governor of Mountjoy Prison*,<sup>75</sup> the applicant applied to the High Court under Article 40.4.2° of the Constitution for an inquiry into the lawfulness of his detention following the decision in *Moore*. The High Court, agreed that, in principle, the applicant was entitled to rely on *Moore* on foot of the fact that, at the time of his application, an appeal against the severity of his sentence for the triggering offence, pursuant to section 99(12) of the 2006 Act, was still pending. Therefore, he had not fallen foul of the “finality principle”.<sup>76</sup> However, McDermott J rejected the proposition that “the finality argument

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welcomed as an effort to enshrine in statute the power to suspend sentences, “practical difficulties have caused frustration amongst all court-users and are in danger of lessening the impact of the more positive aspects of this legislation.”

<sup>73</sup> [2016] IEHC 244 at para 24, [2018] 2 IR 170 at page 190.

<sup>74</sup> See *Ryan v DPP* [2016] IEHC 380; *O’Sullivan (application for Habeas Corpus)* [2016] IEHC 311; *Foley v Governor of Portlaoise Prison* [2016] IECA 411; *Larkin v Governor of Mountjoy Prison* [2016] IEHC 680, *Kennedy v Governor of Portlaoise Prison* [2017] IEHC 402.

<sup>75</sup> [2016] IEHC 278.

<sup>76</sup> This principle was formulated in an Irish context by the Supreme Court in *A v Governor of Arbour Hill Prison* [2006] IESC 45. In that case Mr A had been convicted in the Circuit Criminal Court on a plea of guilty of unlawful carnal knowledge contrary to section 1(1) of the *Criminal Law (Amendment) Act 1935* and was sentenced to three years’ imprisonment. He sought release from custody pursuant to the provisions of Article 40.4.1° of the Constitution. He contended that his detention was unlawful on the basis that the Supreme Court in *CC v Ireland* [2006] 4 IR 1 found that section 1(1) of the *Criminal Law (Amendment) Act 1935* was inconsistent with the Constitution. This argument was rejected by the Court on the basis that Mr A had exhausted all of his rights of appeal and therefore he was precluded from relying on a subsequent finding of unconstitutionality. In this regard, Murray CJ (at para 115) held that “[o]nce finality has been reached and the parties have in the context of each case exhausted their actual or potential remedies the judicial decision must be deemed valid and lawful.”

must always prevail against all others in determining the retroactivity of such a declaration....the behaviour of the applicant and other circumstances of the case must also be considered.”<sup>77</sup>

- [8.48] In holding that the applicant’s detention was lawful, the Court distinguished the case from *Moore* on the basis that the applicant in this case had pleaded guilty to the triggering offence. Therefore, in contrast to the situation in *Moore*, the applicant here was not a person convicted in the District Court who wished to appeal that conviction but was debarred from doing so in light of the issues with sections 99(9) and (10). On this basis, the court held that the applicant “did not experience the prejudicial or suggested discriminatory effects of the impugned subsections found to apply to the *Moore* defendants. He was guilty and accepted his guilt.”<sup>78</sup> The Court also found that there was no evidence that the applicant had suffered any fundamental injustice, unfairness or unfair prejudice. In this regard, the Court concluded that:

“[The applicant] seeks the technical benefit of the declaration which has no relevance to the merits of the case. To permit the applicant release on that basis would... not [be] justified or mandated by the decisions of the Supreme Court and Court of Appeal... nor is it justified on the facts of this case... I am satisfied that the applicant is detained in accordance with law. The application is refused.”<sup>79</sup>

- [8.49] The decision of the High Court was appealed to the Court of Appeal.<sup>80</sup> The Court (Birmingham P), in dismissing the appeal, approached the issue in a slightly different manner than the High Court. The Court considered the broad powers afforded to the courts under section 99(17), which provides for the power to activate a suspended sentence in the event of a breach of a condition of suspension. The Court considered section 99(17) to be similar to section 99(10), except that it was more extensive and conferred sentencing courts with a more general jurisdiction to activate a suspended sentence. Section 99(17) empowers a court to revoke the suspended sentence where the offender has “contravened a condition” of the suspended sentence, whereas section 99(10) allows for the revocation of the suspended sentence where the offender has been convicted of a subsequent offence. In the Court’s view, by committing the triggering

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<sup>77</sup> [2016] IEHC 278 at para 41.

<sup>78</sup> *Ibid* at para 55.

<sup>79</sup> *Ibid* at para 63.

<sup>80</sup> *Clarke v Governor of Mountjoy Prison* [2016] IECA 244.

offence, the applicant<sup>81</sup> was in breach of the mandatory condition to keep the peace and be of good behaviour (i.e. not to commit any further crimes during the operational period). Thus, the Circuit Court had the jurisdiction to revoke the suspended sentence under section 99(17), as well as section 99(10). Although the Circuit Court had not specified under what subsection it was activating the suspended sentence, the Court of Appeal concluded from the transcripts that the Circuit Court had moved beyond the remit of section 99(10) and towards the broader powers conferred on the court in section 99(17). As pointed out by Birmingham P, the significance of this finding is that "it is not a precondition to the exercise of a subs. (17) jurisdiction that the person be brought before the court pursuant to subs. (9)."<sup>82</sup> Subsection 17 simply states that "[a] court shall, where it is satisfied that a person to whom an order under *subsection (1)* applies has contravened a condition of the order." On this basis, the Court held that the suspended element of the applicant's sentence had not been revoked pursuant to the subsections struck down in *Moore* (i.e. sections 99(9) and (10)) but rather pursuant to subsection 17. Therefore, it was held that the applicant had not been unlawfully detained, and the appeal was dismissed.

[8.50] Further, the Court went on to state that, in the event that it was wrong in respect of the subsection under which the suspended element of the sentence was revoked, it was also in agreement with the reasoning of McDermott J in the High Court. The Court acknowledged that the applicant's proceedings had not yet been finalised in that he had an appeal against sentence pending and was therefore, in principle, entitled to rely on the finality principle. However, the Court held that the applicant was nevertheless debarred from relying on *Moore* by virtue of his conduct. In this regard, the Court concluded that it did not:

"believe that the fact that because an appeal was lodged and accordingly that matters had not been finalised before judgment in *Moore* that it follows automatically that Mr. Clarke is entitled to be released. The position is that Mr. Clarke committed offences of the utmost gravity. He persuaded the Circuit Court to deal with him in a very lenient fashion indeed and then very shortly after his release, having served the custodial element of his sentence, he breached the conditions of his suspended sentences in a number of respects. There was a full and fair hearing in the Circuit Court over two days which addressed the issue of whether the sentence should be activated. The judge in the Circuit Court decided to activate the sentence. Mr. Clarke has a right of appeal from that decision and has invoked that right by lodging a notice of appeal. On the hearing of that

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<sup>81</sup> For the purpose of the appeal in the Court of Appeal, Mr Clarke was the appellant, appealing the decision of the High Court. However, in aid of consistency, in this Report he is referred to as the applicant, both when discussing the decision of the High Court and the Court of Appeal.

<sup>82</sup> [2016] IECA 244 at para 31.

appeal Mr. Clarke can argue that the activation of the sentences in full was an excessive and disproportionate response

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In those circumstances I cannot see how it can be said that there was a default of fundamental requirements such that the detention could be said to be wanting in due process of law or that his detention arises from a departure from fundamental rules of natural justice.”<sup>83</sup>

[8.51] A similar conclusion was reached by the High Court (O’Flaherty J) in *Wansboro v DPP*.<sup>84</sup> In this case, the High Court was again asked to consider whether the applicant in this case was precluded from obtaining the benefit of the declaration of unconstitutionality in *Moore*. The pertinent facts in this case were broadly similar to those present in *Clarke*, namely that the applicant had pleaded guilty to the “triggering” offence and therefore had no intention to appeal against this conviction. Further, the applicant here, similar to the applicant in *Clarke*, had appealed the severity of his sentence for the triggering offence, as well as the decision to revoke his suspended sentence. It was on this latter basis that the High Court held that the proceedings had not been finalised and, accordingly, the applicant was, in principle, permitted to raise the *Moore* issue.

[8.52] However, similar to the court in *Clarke*, the High Court in *Wansboro* held that the case law is clear that an applicant whose proceedings have not been finalised does not have an absolute right to retrospectively rely on a finding of unconstitutionality. The extent of this right of retroactivity is dependent on the facts of the case and, in particular, the conduct of the offender in question. In this respect, the Court held that the applicant’s conduct had effectively debarred him from relying on *Moore*. The fact that the applicant pleaded guilty and had never sought to challenge the constitutionality of sections 99(9) and 99(10), it was held, meant that he fell well short of the threshold identified by Birmingham P in the Court of Appeal in *Clarke*, namely that there must be “a default of fundamental requirements such that detention could be said to be wanting in due process of law or that his detention arises on a departure from fundamental rules of natural justice.”<sup>85</sup>

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<sup>83</sup> *Ibid* at para 32.

<sup>84</sup> [2017] IEHC 391.

<sup>85</sup> *Ibid* at para 33.

[8.53] The applicant<sup>86</sup> was granted a “leapfrog” appeal to the Supreme Court,<sup>87</sup> which overturned the decision of the High Court. In delivering the majority judgment, Dunne J<sup>88</sup> agreed with the reasoning in *Clarke*, insofar as it was held that the right to rely on a previous finding of unconstitutionality is not absolute and may be lost on foot of an offender’s circumstances and conduct. However, crucially, the Court rejected the approach in *Clarke* (and subsequently applied by the High Court in *Wansboro*) that issues such as a guilty plea or a failure to challenge the constitutionality of the legislative provision that was subsequently struck down could preclude an individual from retrospectively relying on this finding of unconstitutionality. In coming to this conclusion, the Court carried out a review of a number of authorities dealing with the scope of the finality principle, namely *A v Governor of Arbour Hill Prison*,<sup>89</sup> *State (Byrne) v Frawley*,<sup>90</sup> *The People (DPP) v O’Connor*,<sup>91</sup> *The People (DPP) v Bolger*<sup>92</sup> and *The People (DPP) v Cunningham*.<sup>93</sup>

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<sup>86</sup> For the purpose of the appeal in the Supreme Court, Mr Wansboro was the appellant, appealing the decision of the High Court. However, in aid of consistency, in this Report he is referred to as the applicant, both when discussing the decision of the High Court and the Supreme Court.

<sup>87</sup> *Wansboro v DPP* [2018] IESC 63.

<sup>88</sup> Finlay Geoghegan J handed down a dissenting judgment.

<sup>89</sup> [2006] IESC 45. In that case Mr A had been convicted in the Circuit Criminal Court on a plea of guilty of unlawful carnal knowledge contrary to section 1(1) of the *Criminal Law (Amendment) Act 1935* and was sentenced to three years imprisonment. He sought release from custody pursuant to the provisions of Article 40.4.1° of the Constitution. He contended that his detention was unlawful on the basis that the Supreme Court in *CC v Ireland* [2006] 4 IR 1 found that section 1(1) of the *Criminal Law (Amendment) Act 1935* was inconsistent with the Constitution. This argument was rejected by the Court on the basis that Mr A had exhausted all of his rights of appeal and therefore he was precluded from relying on a subsequent finding on unconstitutionality. In this regard, Murray CJ (at para 115) held that “Once finality has been reached and the parties have in the context of each case exhausted their actual or potential remedies the judicial decision must be deemed valid and lawful.”

<sup>90</sup> [1978] IR 326. In this case, the appellant sought to rely on the finding in *de Búrca v Attorney General* [1976] IR 38, that certain provisions of the *Juries Act 1927* were unconstitutional. The *de Búrca* decision had been handed down during the course of the appellant’s trial in *Byrne*, but his legal team opted not to raise the issue, either at trial or on appeal, notwithstanding the fact that his counsel had also represented the appellant in *de Búrca*. In holding that he could not rely on the finding, the Court held that the appellant had, by his conduct, lost the “competence to lay claim to [the right] in the circumstances of the case”.

<sup>91</sup> [2014] IECCA 4. In this case, the appellant sought to rely on the finding in *Damache v DPP* [2012] 2 IR 266 that section 29(1) of the *Offences against the State Act 1939* was unconstitutional. The appellant had been arrested on foot of a warrant issued pursuant to section 29 of the 1939 Act and thus sought to rely on the finding of unconstitutionality in *Damache*. The Court of Criminal Appeal refused his application, primarily on the basis that, during the course of the trial, counsel for the

[8.54] Having reviewed these authorities, Dunne J concluded that the appropriate inquiry for a Court to embark upon is:

“not so much a question of examining the merits of the particular facts and circumstances of the applicant and the offence concerned... rather, it is a question of looking at the conduct of the proceedings and the decisions taken in the course of those proceedings to see if, by reason of any steps taken, the individual is debarred from relying on the finding of invalidity.”<sup>94</sup>

[8.55] In this regard, the Court held that the High Court in *Wansboro* had erred in placing too much emphasis on the conduct of the appellant by reference to the merits of the case. In other words, the inquiry should not focus on whether or not the applicant pleaded guilty or challenged the constitutionality of the legislative provision which was subsequently struck down.<sup>95</sup> Rather, the correct approach is to consider whether or not the applicant took a view which expressly acquiesced to the constitutionality of the section,<sup>96</sup> or had exhausted all of his or her avenues of appeal.<sup>97</sup> Applying this criteria to the present case, Dunne J concluded that:

“None of the factors identified in cases such as *A, Byrne, Cunningham, Bolger or O’Connor* are present on the facts of this case. The appellant did not adopt any strategy or engage in any conduct in the course of the proceedings which could

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appellant expressly conceded that the search warrant – issued pursuant to section 29(1) of the 1939 Act – was issued in accordance with law.

<sup>92</sup> [2013] IECCA 6. The appellant in this case was precluded from relying on *Damache* on the basis that the constitutionality of section 29(1) had not been raised at trial. In this regard, Denham C.J. noted (at para 54) that “[o]nce a strategy has been taken by an accused in a trial, then another approach may not be taken on appeal.”

<sup>93</sup> [2012] IECCA 64. In this case, the appellant was permitted to rely on *Damache* in circumstances where he had not taken a position at trial which was fundamentally inconsistent with the position adopted on appeal. The State argued that, as the appellant had not challenged, either before or after his conviction, the constitutionality of the section 29(1), that he should be debarred from relying on *Damache*. However, this was rejected by the Supreme Court. It was held that a failure to challenge the constitutionality of a provision which was subsequently determined to be unconstitutional will not, in and of itself, debar the appellant from relying on such a finding. Rather, as Hardiman J put it (at para 81), in order to be debarred, the applicant must engage in conduct “which either directly or indirectly acknowledged the validity of the particular course of conduct or law which was subsequently put at issue.” As the applicant in *Cunningham* had not engaged in such conduct, he was not debarred from relying on *Damache*.

<sup>94</sup> [2018] IESC 63 at para 50.

<sup>95</sup> *The People (DPP) v Cunningham* [2012] IECCA 64.

<sup>96</sup> As was the case in *The People (DPP) v O’Connor* [2014] IECCA 4.

<sup>97</sup> As occurred in *A v Governor of Arbour Hill Prison* [2006] IESC 45.

debar him from relief. Further, he did not acquiesce in a process which he knew or understood to be unconstitutional.....For those reasons, I am satisfied that there has been a want of due process of law in that the learned Circuit Court judge lacked jurisdiction to revoke the suspended sentence at issue by reason of the method by which the appellant was brought before the Court and that he is entitled to the relief sought."<sup>98</sup>

*(iii) Activation by the Circuit Court on appeal from the District Court*

[8.56] The application of section 99 of the *Criminal Justice Act 2006* to suspended sentences that are imposed by the Circuit Court on appeal from the District Court created another problem, as there was no right of appeal against the decision of the Circuit Court in these circumstances. According to *The People (DPP) v Foley*<sup>99</sup> when a suspended sentence is imposed by an appellate court, it is the appellate court, and not the original court, that must deal with an activation hearing. This caused problems where the Circuit Court, on a full *de novo* appeal from the District Court, imposed a suspended sentence and then subsequently activated that sentence. In effect, there was no right to appeal the decision of the Circuit Court to activate the suspended sentence in this instance on the basis that, in summary prosecutions, the decision of the Circuit Court on appeal is final and cannot be appealed.

[8.57] This arose in *McCabe v Governor of Mountjoy Prison*.<sup>100</sup> The High Court (Hogan J) did not declare section 99 to be unconstitutional, but rather declared that the activation of a suspended sentence by the Circuit Court, which had imposed that suspended sentence on appeal from the District Court, would be unconstitutional in the absence of a legally conferred right to appeal the activation decision of the Circuit Court. The Court of Appeal disagreed, holding that section 99(12) of the 2006 Act should be interpreted as conferring a right of appeal to the Court of Appeal in such circumstances.<sup>101</sup> The Court pointed out that the activation procedure is distinct from the appeal itself, and, as such, there is a right to appeal the revocation decision of the Circuit Court. Section 2(l) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, which inserts section 99(22) into the 2006 Act, clarifies the procedures where a suspended sentence is imposed on appeal. Section 99(22) of the 2006 Act, as amended, provides that where a suspended sentence is imposed on appeal, the court that should deal with an activation hearing is the court from which the appeal was taken, that is, the court that imposed the original suspended

<sup>98</sup> [2018] IESC 63 at para 50.

<sup>99</sup> [2014] IESC 2, [2014] 1 IR 360.

<sup>100</sup> [2014] IEHC 435.

<sup>101</sup> *McCabe v Governor of Mountjoy Prison* [2015] IECA 156, [2015] 3 IR 95.

sentence. This avoids the constitutional issue in *McCabe* and effectively reverts to the pre-*Foley* procedure established in *The People (Attorney General) v Grimes*.<sup>102</sup>

## 5. Practical issues with the monitoring and enforcement of the suspended sentence

[8.58] It is clear that the enactment of section 99 of the *Criminal Justice Act 2006* has not proven to be an unmitigated success. As the preceding discussion highlights, a substantial body of litigation – in the form of judicial reviews, *habeas corpus* applications and constitutional challenges – has followed the section’s enactment, leading some commentators to draw comparisons between this body of litigation and that arising from the consistently contested drink-driving legislation.<sup>103</sup> Further, while, as a consequence of the amendments made by the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*, the flood of litigation appears to have subsided, difficulties remain in relation to the monitoring and enforcement of conditions of suspension. This section deals with some of these issues and discusses how some structural deficiencies within the criminal justice system more generally may be contributing to these problems.

### (a) Delays and lack of cohesion within the Irish criminal justice system

[8.59] Section 99 does not operate in isolation, but rather it must be assessed in its context: a relatively complicated piece of legislation functioning within an unwieldy and protracted criminal process. First, there are intractable delays in the Irish criminal process, particularly in indictable matters. Undue delay in concluding criminal matters inevitably compounds the stress caused in the course of criminal proceedings to both victims and defendants. The state is obliged by the Victims’ Directive to protect victims from secondary victimisation and emotional or psychological harm;<sup>104</sup> by the same token, defendants are entitled to conclusion and finality in criminal proceedings within a reasonable timeframe.

<sup>102</sup> [1955] IR 315.

<sup>103</sup> Dwyer, “Nine Issues with Section Ninety-Nine” (2015) 20(5) *The Bar Review* at pages 105 – 109.

<sup>104</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57 provides at Article 18: “... Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm...” The Directive does not define the term “secondary victimisation,” but it is defined in the *Criminal Justice (Victims of Crime) Act 2017*, the Act by which the Directive is transposed, as meaning “victimisation that occurs indirectly through the response of institutions and individuals to the victim.” The Act does not expressly refer to secondary victimisation in the sentencing context, but the Directive has direct effect.



*McFarlane v Ireland*<sup>105</sup> concerned a criminal prosecution in Ireland which lasted for ten years and six months from the time the applicant was charged to the completion of the criminal proceedings, prompting the European Court of Human Rights to hold that the overall length of the criminal proceedings against the applicant was excessive and failed to meet the “reasonable time” requirement of Article 6 § 1 of the Convention. There is, of course, also a constitutional requirement that criminal cases are dealt with expeditiously. In *Nash v DPP*,<sup>106</sup> the Supreme Court held that, quite apart from the right to a fair trial,<sup>107</sup> defendants:

“have a general constitutional entitlement (similar to the rights established under the European Convention on Human Rights) to have those rights, obligations or liabilities (including criminal liabilities) determined in a timely fashion...”<sup>108</sup>

- [8.60] While the picture varies throughout different areas of the country, the Courts Service Annual Report 2018<sup>109</sup> indicates that in 15 of the 26 Circuit Court offices listed, criminal trial waiting times exceeded six months. In Limerick, the waiting time for Circuit Criminal Court trials for that year was 24 months. In Dublin, the timeline was 18 months; in Dundalk it was 12 – 18 months; in Wicklow and Wexford it was 12 months.<sup>110</sup>
- [8.61] In the context of the suspended sentence, offending is not neatly confined within county bounds, and so the practical challenges of differing waiting times for returns for trial are acutely felt when probation officers and Gardaí seek to re-enter cases for sentence activation, when cases are travelling at different speeds through the criminal process. A legislative scheme that functions well in wielding the sword of Damocles over a one-time offender, and in dealing with a repeat offender with a single transgressing triggering offence, inevitably struggles to meet the challenge presented by reactivations in cases involving recidivist offenders with multiple pending cases in different court districts and circuits, and at various jurisdictional levels in the criminal process. Submissions received for this Report referred to the practical challenge of ensuring that the relevant judges,

<sup>105</sup> (ECtHR 10 September 2010) at paras 140 – 156.

<sup>106</sup> [2015] IESC 32.

<sup>107</sup> It should be noted, however, that in *II v JJ* [2012] IEHC 327 – a case to which the Supreme Court referred to in *Nash* – the High Court held (at para 6) that “The duty to ensure the efficient dispatch of litigation within a reasonable time forms an important part of the judicial constitutional mandate to administer justice under Article 34.1 of the Constitution.” In any event, it is clear that the expeditious administration of justice is a constitutional requirement in an Irish context.

<sup>108</sup> [2015] IESC 32 at para 2.7.

<sup>109</sup> Court Service, *Annual Report 2018* <[http://www.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/C2B4BFC1AFEC7B098025842D00473F25/\\$FILE/Courts%20Service%20Annual%20Report%202018.pdf](http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/C2B4BFC1AFEC7B098025842D00473F25/$FILE/Courts%20Service%20Annual%20Report%202018.pdf)> accessed on 28 June 2020.

<sup>110</sup> *Ibid* at page 106.

prosecutors, Gardaí and defendant are brought together at the same time, at an appropriate court sitting, for an activation hearing. Further, delays and adjournments can also adversely affect the Probation Service in managing offender supervision and ensuring compliance. Indeed, it may be assumed, in the absence of data, that the current cumbersome nature of the criminal process more generally, coupled with the insufficient levels of inter-agency collaboration, hinder the relevant criminal justice agents' task of effectively monitoring and supervising the suspended sentence.

- [8.62] A lack of cohesion in the criminal process has long been lamented. A 2004 audit of the Probation and Welfare Service conducted by the Comptroller and Auditor General<sup>111</sup> found that there was limited evidence of coordination and integration of services within the criminal justice system generally, and that information sharing was uncoordinated and limited. The report recommended that "[t]here should be greater co-ordination and integration of the various agencies in order to achieve a rational, cost effective and efficient criminal justice system."<sup>112</sup> In 2009 the Garda Síochána Inspectorate recommended an examination of court waiting times and "inefficient office technology systems" as factors impacting on Garda availability for core policing duties.<sup>113</sup> Each of the key state actors in the process – the Garda Síochána, the Director of Public Prosecutions, the Probation Service and the Courts Service – do not have integrated IT systems. This is a longstanding barrier to evidenced-based analysis and is undoubtedly inefficient.
- [8.63] A review of Scotland's criminal justice system in 2003<sup>114</sup> ("the Normand report") made a criticism that could well be levelled here, namely that there was a "persisting degree of fragmentation within the system."<sup>115</sup> The report noted that any references to co-operation and inter-agency collaboration were vague and unspecific; that individual bodies were largely unaware of the actions of other bodies; and that the way in which individual bodies worked hindered the work of others. The report concluded that a set of overarching aims and objectives for all criminal justice bodies was required to improve co-operation and coordination across the system. The report recommended that no single agency could tackle the complexities involved in reducing re-offending and suggested that what was required was an effective framework of cross-system

<sup>111</sup> Comptroller and Auditor General, *Special Report 46: The Probation and Welfare Service*, 2004 <<https://www.audit.gov.ie/en/Find-Report/Publications/2004/Special-Report-46-The-Probation-and-Welfare-Service.pdf>> accessed 29 June 2020.

<sup>112</sup> *Ibid* at page 60.

<sup>113</sup> Garda Inspectorate, *Report on Resource Allocation (January 2020)* <<https://www.gsinsp.ie/wp-content/uploads/2019/09/Resource-Allocation.pdf>> accessed on 4 July 2020.

<sup>114</sup> Andrew Normand, *Proposals for the Integration of Aims, Objectives and Targets in the Scottish Criminal Justice System* (March 2003) <<https://www2.gov.scot/Publications/2003/03/16775/20150>> accessed on 8 July 2020.

<sup>115</sup> *Ibid* at para 9.2.

mechanisms and better joined up working.<sup>116</sup> In response, the then Scottish Executive established the National Criminal Justice Board, which includes senior representatives from most criminal justice bodies. Since then there has been a marked expansion of the architecture of the Scottish criminal justice system, including a national and local criminal justice boards, drug and alcohol action teams, community justice authorities, the Police Services Authority, the Scottish Crime and Drug Enforcement Agency, specialist adjudication in the form of domestic violence, drugs and youth courts, and the multi-agency public protection arrangements (MAPPA).<sup>117</sup>

- [8.64] While in Ireland there are strong working relationships between certain individuals and agencies within the criminal justice system, the process is not coordinated as effectively as it could be. The Commission considers that opportunities for a coordinated approach to the practical organisation of processes within the criminal justice system should be explored. Digital tools should be maximised for data management, inter-agency communication and efficient case management to enable seamless inter-agency collaboration from the point of arrest to the conclusion of the case, including where appropriate, sentence imposition and, in the context of the suspended sentence, activation.
- [8.65] The Commission notes a number of initiatives aimed at greater co-operation and collaboration in the Irish criminal justice system. One such example is the Criminal Justice Strategic Committee, chaired by the Secretary General of the Department of Justice, and comprising of the heads of An Garda Síochána, The Courts Service, The Irish Prison Service, The Policing Authority, The Probation Service, The Legal Aid Board, Forensic Science Ireland and the Director of Public Prosecutions. The 2014 Strategic Penal Policy Review noted impressive efforts at collaboration and coordination between the Irish Prison Service and Probation Service, and between the Gardaí and Courts Service, under the auspices of the Criminal Justice Interoperability Project.<sup>118</sup> The Review Group also recommended “that there “be greater emphasis, if necessary through legislation, on

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<sup>116</sup> *Ibid* at para 10.29.

<sup>117</sup> The Scottish Centre for Crime and Justice Research, *A Report for AUDIT Scotland, Changes to Scotland's Criminal Justice Post-Devolution: Main Legislative Developments, major reviews of policy and procedure, and the introduction of 'new' bodies* <<http://www.sccjr.ac.uk/wp-content/uploads/2012/12/Changes-to-Criminal-Justice-in-Scotland-post-Devolution.pdf>> accessed on 7 July 2020 at page 28.

<sup>118</sup> Strategic Penal Policy Review, *Final Report* (July 2014) <<http://www.justice.ie/en/JELR/Strategic%20Review%20of%20Penal%20Policy.pdf/Files/Strategic%20Review%20of%20Penal%20Policy.pdf>> accessed on 7 July 2020 at page 108.

promoting inter-agency co-operation in the management and rehabilitation of offenders.”<sup>119</sup>

- [8.66] Since the 2014 Report, there have been some encouraging initiatives demonstrating an appreciation of the need for, and the benefits of, greater inter-agency collaboration in the criminal justice system. Most notably, on 21 November 2014, the Joint Agency Response to Crime (JARC) was established. JARC is a strategic offender management initiative led by An Garda Síochána, the Probation Service and the Irish Prison Service, with the active support and engagement of the Department of Justice and Equality. One of the key objectives of JARC is to develop and strengthen a multi-agency approach to the management of recidivist offenders.<sup>120</sup> In 2018, an independent evaluation was carried out by the JARC Evaluation Framework Working Group, which examined the three pilot programmes launched under JARC, namely: “ACER3”, “STRIVE” and “Change Works”.<sup>121</sup> While noting that it was difficult to draw any definitive conclusions – on account of the small sample sizes and inconsistencies in terms of data collection – the review noted a consistent reduction in the rate of recidivism amongst participants.<sup>122</sup> In this regard, it was found that 37% of Bridge (Change Works) participants did not reoffend; almost 30% of STRIVE participants did not reoffend, and 15% of ACER3 participants did not reoffend, with a reduction in offending noted among a further 45% of participants.<sup>123</sup> Following the success of these pilots, the ACER3 programme has been rolled out to additional locations in Dundalk, Waterford and Limerick, while a Youth-JARC programme (for offenders aged 16-21) is being piloted in Dublin and Cork in partnership with Tusla and the National Educational Welfare Board.<sup>124</sup> This commendable initiative serves as a clear illustration as to how a collaborative inter-agency approach can improve the workings of the Irish criminal justice system for all concerned. However, a more coordinated approach is also required on a macro level.<sup>125</sup>

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<sup>119</sup> *Ibid* at page 31.

<sup>120</sup> JARC Evaluation Framework Working Group, *Critical Review of Initial Evaluations on the Three JARC Pilot Projects* (2018) <[http://www.justice.ie/en/JELR/Final%20Desktop%20Evaluation%20of%20JARC%20Pilot%20Projects\\_18.9.18.pdf/Files/Final%20Desktop%20Evaluation%20of%20JARC%20Pilot%20Projects\\_18.9.18.pdf](http://www.justice.ie/en/JELR/Final%20Desktop%20Evaluation%20of%20JARC%20Pilot%20Projects_18.9.18.pdf/Files/Final%20Desktop%20Evaluation%20of%20JARC%20Pilot%20Projects_18.9.18.pdf)> accessed on 8 July 2020 at page 8.

<sup>121</sup> *Ibid* at page 7.

<sup>122</sup> *Ibid* at page 10.

<sup>123</sup> *Ibid* at page 27.

<sup>124</sup> *Ibid* at page 38.

<sup>125</sup> The Commission also cites the Sex Offender Risk Assessment and Management (SORAM) as another good example of enhanced levels of co-ordination and co-operation between statutory organisations involved in managing the risks posed to the community by convicted sex offenders.

- [8.67] In 2020 the Criminal Justice Strategic Committee announced its intention to develop the first Irish Criminal Justice Sectoral Strategy.<sup>126</sup> Some of the core aims of the sectoral strategy include to:
- i. provide a basis for the Department and the agencies in the sector to commit to working collaboratively in the interests of a cohesive joined up system to make safer communities throughout Ireland, and
  - ii. identify shared strategic priorities to support a more efficient system.<sup>127</sup>
- [8.68] Finally, the Department of Justice, in collaboration with An Garda Síochána, the Courts Service, the Irish Prison Service, the Probation Service, the Legal Aid Board, the Office of the Director of Public Prosecutions, Forensic Science Ireland, the Policing Authority and Irish Youth Justice Service, has recently announced its intention to deliver a “Criminal Justice Operational Hub” (CJOH). It is anticipated that the CJOH will provide for data to be exchanged between the existing criminal justice agencies. The data will be accessed in an anonymised format for research purposes and facilitate the development of evidence-based policy.<sup>128</sup>
- [8.69] The above initiatives all provide encouraging examples of a growing recognition of the need for greater collaboration in the Irish criminal justice system. However, the Commission considers that these commendable initiatives should be more than aspirational: they should be concretised with practical proposals to reduce avoidable inefficiencies in the criminal justice process throughout a case’s life cycle.
- [8.70] There has also been inadequate investment in the Information and Communications Technology (ICT) infrastructure needed to underpin modern and efficient case, time and document management processes within the Irish criminal justice system. While the quest

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See <https://www.garda.ie/en/about-us/organised-serious-crime/garda-national-protective-services-bureau-gnpsb-/sex-offender-risk-assessment-and-management-soram-/>

<sup>126</sup> *Criminal Justice Strategic Committee, Background Document on a Criminal Justice Sectoral Strategy* (July 2020)  
<[http://www.justice.ie/en/JELR/About the Criminal Justice Sectoral Strategy.pdf/Files/About the Criminal Justice Sectoral Strategy.pdf](http://www.justice.ie/en/JELR/About%20the%20Criminal%20Justice%20Sectoral%20Strategy.pdf/Files/About%20the%20Criminal%20Justice%20Sectoral%20Strategy.pdf)> accessed on 8 July 2020.

<sup>127</sup> *Ibid* at page 2.

<sup>128</sup> Correspondence between Mr. Aidan O’Driscoll, Secretary General at the Department of Justice, and the Committee of Public Accounts, *Criminal Justice Operational Hub* (27 February 2019)  
<[https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/committee\\_of\\_public\\_accounts/submissions/2019/2019-03-07\\_correspondence-aidan-o-driscoll-secretary-general-department-of-justice-and-equality-32r002019-pac\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/committee_of_public_accounts/submissions/2019/2019-03-07_correspondence-aidan-o-driscoll-secretary-general-department-of-justice-and-equality-32r002019-pac_en.pdf)> accessed on 25 June 2020.

for efficiencies has often focused on pre-trial hearings and procedures,<sup>129</sup> in the Commission's view, it is crucial that the approach to ICT is coordinated and maximised for efficiency in case management throughout the criminal process, including at the sentencing stage. Extensive digitisation of the courts system has taken place in England and Wales.<sup>130</sup> In that jurisdiction, the 2015 Leveson *Review of Efficiency in Criminal Proceedings* noted that:

"[t]he work of the criminal justice system currently relies on a combination of long-standing manual processes and aging computer systems that have evolved in a piecemeal fashion over many decades. There is no doubt that to increase the efficiency of the system, we need better, quicker and less costly ways of creating, filing and distributing documents; easier and more flexible ways of enabling all those involved in the process to communicate effectively with one another. We need to reduce the number of hearings at which the participants have to attend in person. It is critical that we avoid duplication of work (such as "re-keying" the same information) and that we reduce administrative errors. Well-constructed IT has the potential to overcome most of these challenges."<sup>131</sup>

[8.71] The Report describes the proposed new online case-management process – from the beginning to the end of the criminal process – in the following terms:

"At the very outset of criminal proceedings, following charge, the police will make all the relevant documentation available via a digital case file, to which the Crown Prosecution Service will be provided access. Any prosecution material in the proceedings will only need to be entered onto the system once (thereby avoiding any re-typing/re-keying). The case will be managed entirely online, with the various participants having access to the case-

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<sup>129</sup> See, for instance Department of Justice and Equality, *Report of the Working Group on Efficiency Measures in the Criminal Justice System – Circuit and District Courts*, 2012. See also the Revised General Scheme of a *Criminal Procedure Bill (April 2015)*, which focuses, in the main, on reforming aspects of pre-trial hearings.

<sup>130</sup> The Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals, *Transforming our Justice System* (September 2016) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/553261/joint-vision-statement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf)> accessed on 14 July 2020.

<sup>131</sup> The Leveson *Review of Efficiency in Criminal Proceedings* (January 2015), at p. 5. <<https://www.judiciary.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf>> accessed 14 July 2020.

management system at the different stages in the process when they become engaged. The CPS will create the case file online. This will involve preparing the 'papers' in a digital format that will reflect the bundles with which the courts are currently used to working, and additional material will 'slot in' at the appropriate place in the file. The parties and the judiciary will be able to work on the electronic 'papers', privately highlighting, editing, and making comments."<sup>132</sup>

- [8.72] The Report suggests that "[w]hilst the development of the processes that are necessary for this radical change is a complicated undertaking, the financial savings that will be brought about by eliminating paper and the increase in efficiency should be very considerable."<sup>133</sup> The Commission considers that the potential for similar reforms should be explored in this jurisdiction.
- [8.73] A final and related issue is the current data deficit in relation to all aspects of the functioning of the criminal process. The Criminal Justice Operational Hub (CJOH), mentioned above, provides an opportunity for data collection and empirical research to be conducted in respect of all stages of the criminal process. In a sentencing context, pursuant to the recently commenced *Judicial Council Act 2019*<sup>134</sup> the Judicial Council<sup>135</sup> established the Sentencing Guidelines and Information Committee (SGIC)<sup>136</sup> on 30 June 2020.<sup>137</sup> One of the functions conferred on the SGIC by the 2019 Act is the collation and dissemination of information on sentences imposed by the courts to judges and other interested persons.<sup>138</sup> The Commission is of the view that both the SGIC and the CJOH have the potential, if afforded the necessary resources, to shed further light on the workings of the sentencing process. As will be discussed below, however, the current data deficit in this respect significantly hampers our ability to definitively identify and, by extension, effectively address, some of the practical issues that have been anecdotally

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<sup>132</sup> *Ibid* at page 6.

<sup>133</sup> *Ibid* at page 6.

<sup>134</sup> *Judicial Council Act 2019 (Commencement) Order 2019* (SI No 457 of 2019); *Judicial Council Act 2019 (Commencement) (No 2) Order 2019* (S.I. No. 640 of 2019).

<sup>135</sup> The Judicial Council was established on 7 February 2020 pursuant to section 6 of the *Judicial Council Act 2019*.

<sup>136</sup> Section 23(1) of the *Judicial Council Act 2019*.

<sup>137</sup> On 22 July 2020, the newly appointed lay members of the SGIC were announced. See <[https://merrionstreet.ie/en/News-Room/Releases/Minister\\_for\\_Justice\\_Helen\\_McEntee\\_announces\\_appointments\\_of\\_Lay\\_Members\\_to\\_Judicial\\_Council\\_Committees.html](https://merrionstreet.ie/en/News-Room/Releases/Minister_for_Justice_Helen_McEntee_announces_appointments_of_Lay_Members_to_Judicial_Council_Committees.html)> accessed on 4 August 2020.

<sup>138</sup> Sections 23(2)(d) and 23(2)(e) of the *Judicial Council Act 2019*.

flagged as being associated with the operation of the suspended sentence in this jurisdiction.

**(b) Speculating without data: monitoring and enforcing conditions of suspension in Ireland**

[8.74] In Chapter 2 of this Report, it was noted how, in contrast to where the suspended sentence ranks on the scale of gravity – just below an immediate custodial sentence – the sanction suffers from a poor public image on the basis that it is perceived to be an unduly lenient sanction. As Riordan notes:

“while the perceptions of offenders and the public on this issue have not been surveyed in Ireland .... Studies elsewhere of offender and public perceptions of the suspended sentence have tended to locate the sanction at very low levels in the scale of penalty and severity ... [b]ecause the suspended sentence is attenuated and contingent, it appears to recede rapidly down the scale of severity in the view of the public. There is no reason to believe that offenders in Ireland do not ascribe the same placement for the suspended sentence as do the general public in these studies.”<sup>139</sup>

[8.75] It is clear that if the suspended sentence is effectively to serve its purpose as both a punitive sanction and / or as a means for dissuading the offender from future offending behaviour,<sup>140</sup> then the monitoring and enforcement of the sanction must be closely scrutinised. As discussed earlier, there is currently a dearth of data available as to the workings of the Irish criminal justice system. Unfortunately, this observation applies with equal force to the operation of the suspended sentence. As such, any observations as to the extent to which the suspended sentence is monitored and enforced are anecdotal. However, Riordan’s study provides some very valuable insights in respect of the operation of the suspended sentence in this jurisdiction. In terms of the extent to which conditions of suspension are monitored and enforced in this jurisdiction, he notes that:

“where a breach of the suspended sentence is committed, the likelihood that the offender will ever have to answer for such breach is quite slim due to structural failures within the criminal justice system to detect such breaches or to seek activation of sentences which are suspended”<sup>141</sup>

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<sup>139</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 257. For a discussion of the international studies on this issue, see pages 257 – 260 of Riordan.

<sup>140</sup> For a discussion, see chapter 3 of this Report.

<sup>141</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 263.



[8.76] Various judges interviewed by Riordan were of the view that rates of enforcement and monitoring were low. As one of the judges interviewed put it:

“If [the suspended sentence] is going to be used, it should be taken seriously and re-activated when called upon. For many years when I was practising, it was a complete joke because nobody ever reactivated it”<sup>142</sup>

[8.77] Another judge noted that his or her:

“experience has been that few if any of the cases where I have imposed suspended sentences has ever been brought back before me and I do not believe it to be because all of them have achieved their purpose.”<sup>143</sup>

[8.78] Various other interviewees from different courts expressed similar scepticism as to the extent to which conditions of suspension are monitored and enforced.<sup>144</sup> These findings suggest that, at least from the perspective of members of the judiciary, rates of monitoring and enforcement of conditions of suspension in Ireland are particularly low. However, again, the lack of available data renders it difficult to draw any definitive conclusions in this regard. What is certain, however, is that if re-entry rates for breaches of conditions are in fact low, the efficacy and penal value of the sanction is diminished significantly. As Roberts and Gabor put it:

“If violation of the [condition of suspension] results in expeditious committal to custody, the sanction carries the penal value of a term of custody. On the other hand, if the conditions imposed on the offender are fairly minimal and courts react to breaches of those conditions with indulgence, the [suspended] sentence may be no more severe than a term of probation. In short a [suspended] sentence can only be fixed on a scale of penal severity by considering the nature of the conditions imposed on the offender, and the threatened punishment that will be imposed in the event that these conditions are breached.”<sup>145</sup>

[8.79] As pointed out in some of the submissions, an ineffective system of monitoring and enforcement of conditions of suspension exacerbates the frustrations of the victims of the crime(s) for which the offender received a suspended sentence. As noted, the suspended sentence, at least internationally, suffers from a poor public image on the basis that it is perceived as an unduly lenient sanction. If the offender does not face re-activation

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<sup>142</sup> *Ibid* at page 250.

<sup>143</sup> *Ibid* at pages 306 – 307.

<sup>144</sup> *Ibid* at pages 306 – 307, page 250.

<sup>145</sup> Roberts and Gabor “Living in the shadow of the prison: Lessons from the Canadian Experience in Decarceration” (2004) 44 *British Journal of Criminology* 92 at pages 93 – 94.

proceedings for a breach of one of his or her conditions, then the victim, and indeed the public at large, might legitimately call into question the whole basis of the suspended sentence as a sanction. Thus, effective monitoring and enforcement is crucial in maintaining the legitimacy of the suspended sentence in the eyes of the public.

[8.80] The above discussion strongly underscores the importance of an effective system of data gathering in the context of the suspended sentence, as well as the need for efficient and modern case management processes. The views expressed by judges in Riordan's study, as well as some of the submissions received for this Report – which asserted that revocation applications were rarely made unless and until there was a conviction for a triggering offence – are concerning. However, it is difficult to definitively conclude that the suspended sentence is widely under-supervised. The lack of data also makes it difficult to ascertain, in the event that rates of enforcement are in fact low, the reasons as to why this is the case. As discussed earlier in this chapter, section 99 of the *Criminal Justice Act 2006* affords the various criminal justice agents involved – the Probation Service, the relevant prison governor, the Gardáí and the Director of Public Prosecutions – a wide statutory discretion in deciding whether or not to make a revocation application to the court. The question arises as to whether monitoring and enforcement are approached consistently. Consistency of approach to revocations of suspended sentences is a matter of basic fairness, which should be approached in a uniform manner by all of the relevant actors, informed by relevant legal factors such as the gravity of the breach, the risk that the offender poses to the public and the personal needs of the offender. The current lack of oversight hinders the robust analysis of monitoring and enforcement of conditions of suspension in this jurisdiction.

[8.81] The points made in the above discussion also firmly reinforce the need for a whole-of-government, evidence-based, inter-agency approach to court processes and a substantial investment in Information and Communications Technology (ICT). The potential for digitisation of the justice system generally should be explored. The Commission is also of the view that the concretisation and implementation of the inter-agency initiatives discussed above, with a coordinated approach to ICT as well as the proper resourcing of the Criminal Justice Operations Hub and the Sentencing Guidelines Information Committee, are critical in ensuring that the suspended sentence is more effectively and efficiently monitored and enforced in this jurisdiction.

## **6. Conclusion and recommendations**

[8.82] In its Issues Paper, the Commission sought views on several questions relating to the procedural and practical aspects of suspended sentences and, in particular, the operation of section 99 of the *Criminal Justice Act 2006*. These questions were:

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

[8.83] In respect of the first question, regarding whether the common law power to suspend a sentence of imprisonment should be repealed, submissions that advanced an opinion on the subject settled on the view that repealing the common law power to suspend a sentence would be desirable. This issue was addressed by the High Court in the *Purtill* case. As discussed earlier in this chapter, the Court in that case held that the common law power to suspend a sentence of imprisonment had effectively not survived the enactment of the *Criminal Justice Act 2006*. The Commission endorses the view expressed in *Purtill* that the enactment of section 99 effectively abolished the common law power to suspend a sentence of imprisonment. As such, it is of the view that an express repeal abolishing the common-law power is unnecessary.

[8.84] There was a strong consensus in response to the question as to whether there should be a limit on the length of the custodial sentence that may be suspended. All submissions that addressed this point took the view that there should be no such limits in principle, so as to allow the individual sentencing court tailor the sentence according to both the gravity of the offence and the personal circumstances of the offender. The Commission is in agreement with the submissions in this regard. As noted throughout this Report,<sup>146</sup> the suspended sentence is an inherently flexible sanction, capable of simultaneously catering for the punitive aims of retribution and general deterrence, on the one hand, and the

<sup>146</sup> See, in particular, chapter 3 of this Report.

crime desistance based aims of specific deterrence, rehabilitation and, where appropriate, the avoidance of prison, on the other. The Commission is of the view, therefore, that were a limit placed on the length of the custodial sentence that may be suspended, this inherent flexibility would be unduly hindered.

**R. 8.01** The Commission recommends that there be no prescribed limit on the length of the custodial sentence that may be suspended.

[8.85] In a similar vein, almost all submissions that addressed the issue of the length of the operational period of the suspended sentence argued that there should be no prescriptive limits on operational periods. Any legislative restriction in this regard, it was argued, would deprive the individual sentencing court from tailoring the individual sentence to both the gravity of the offence and the personal circumstances of the offender.

[8.86] The Commission is largely in agreement with the submissions received on this issue, again on the basis of the need to preserve the flexibility inherent in the sanction and the imperative of judicial sentencing discretion. However, it should be noted that, as discussed earlier, the operational period forms part of the overall punishment<sup>147</sup> and should therefore be proportionate, both in the distributive sense and in terms of infringing on the offender's rights as little as possible.<sup>148</sup>

**R. 8.02** The Commission recommends that there be no statutory limit on the operational period of a suspended sentence.

**R. 8.03** The Commission also recommends, however, that, as it forms part of the overall punishment, the length of the operational period should always be proportionate both in the distributive sense and in terms of infringing on the offender's rights as little as possible.

[8.87] In respect of whether the length of the operational period of a suspended sentence should be permitted to exceed the length of the imposed sentence of imprisonment, the majority of submissions expressed the view that such limitations should not be prescribed by legislation, on the basis that this might unduly hinder the exercise of judicial sentencing discretion and potentially facilitate injustice in individual cases.

<sup>147</sup> *The People (DPP) v Stronge* [2011] IECCA 79.

<sup>148</sup> As per the Court of Appeal decision in *The People (DPP) v DW* [2020] IECA 145, discussed earlier in this chapter.

[8.88] Again, the Commission concurs, in the main, with the view expressed in the submissions on this issue. However, this general principle should be tempered with the requirement outlined above, namely that the operational period should be proportionate. Therefore, a sentencing court that imposes an operational period in excess of the length of the custodial sentence should be satisfied that the justice of the case requires it.

**R. 8.04** The Commission recommends that, in general, the operational period of a suspended sentence should not exceed the length of the imposed sentence of imprisonment. However, this may exceptionally occur where the justice of the case demands it.

[8.89] Most submissions took the view that there should not be a specified list of conditions of suspension set out in legislation. As with the issues considered above, there was a fear that this would reduce the flexibility of the sanction. The Commission endorses this view. Sections 99(3) and 99(4) of the *Criminal Justice Act 2006* provide sentencing courts with a broad discretion as to the conditions of suspension that it may impose in an individual case. As discussed throughout this Report,<sup>149</sup> these legislative provisions are underpinned by the crime desistance penal aims of specific deterrence, rehabilitation and, in certain circumstances, avoidance of prison, thereby allowing sentencing courts to tailor sentences according to the particular needs of the individual offender. Furthermore, the sentencing judge's discretion in choosing conditions of suspension is tempered by the principle that, as well as being proportionate – again, both in the distributive sense and in terms of infringing upon the offender's rights to the least extent possible<sup>150</sup> – these conditions should afford the offender with a reasonable prospect of compliance, based on his or her personal circumstances.<sup>151</sup>

[8.90] The Commission also endorses the point made in the submission that, insofar as is practicable, conditions should be consented to by the offender prior to being imposed, as is the case with Community Service Orders.<sup>152</sup> Consent and agreement improve the prospects of compliance. Robinson and McNeill<sup>153</sup> distinguish between formal compliance – behaviour that technically meets minimal behavioural requirements – and substantive compliance which is based on the offender's active engagement and co-operation with the requirements of the order. Substantive compliance implies attitudinal acceptance of

<sup>149</sup> See, in particular, chapters 3 and 5 of this Report.

<sup>150</sup> *The People (DPP) v DW* [2020] IECA 145.

<sup>151</sup> *The People (DPP) v Broe* [2020] IECA 140.

<sup>152</sup> Section 4(1)(b) of the *Criminal Justice (Community Service) Act 1983*, as substituted by section 4(a) of the *Criminal Justice Act (Community Service) Amendment Act 2011*.

<sup>153</sup> Robinson and McNeill, "Exploring the Dynamics of Compliance with Community Penalties" (2008) 12(4) *Theoretical Criminology* 431-449.

the sanction and a willingness to engage with it. Successful supervision, measured in terms of changed behaviour and desistance from offending, while requiring both forms of compliance,<sup>154</sup> needs substantive compliance that is built with quality engagement, appropriate and purposeful conditions and consistency and clarity in supervision. The Commission is therefore of the view that carefully considered conditions, formulated, where practicable, with the agreement of the offender, are of considerable importance to the success of the suspended sentence in attempting to change the future behaviour of the offender.

- R. 8.05** The Commission recommends that the condition identified in section 99(2) of the *Criminal Justice Act 2006*, that an offender must keep the peace and be of good behaviour during the operational period, be retained as a mandatory condition of a suspended sentence.
- R. 8.06** The Commission recommends that there be no further specific conditions of suspension outlined in legislation. Further, the discretionary conditions of suspension, as provided for in sections 99(3) and 99(4) of the *Criminal Justice Act 2006*, should continue to be tailored to the specific circumstances of the case, bearing in mind the rehabilitative and individual desistance penal aims underpinning these legislative provisions.
- R. 8.07** The Commission also recommends that the conditions of suspension imposed should be proportionate (both in the distributive sense and in terms of infringing upon the offender's rights to the least extent possible) and afford the offender with a reasonable prospect of compliance, based on his or her personal circumstances. This inquiry may involve, where practicable, an assessment as to whether or not the offender agrees to the conditions of suspension.

[8.91] The idea that a triggering offence would, itself, have to be punishable with imprisonment in order to activate a suspended sentence met with some diverging views. Those submissions in favour of the retention of the current system (where any offence may cause the activation of a suspended sentence) suggested that procedural difficulty and confusion may arise if only certain classes of offence qualified as triggering offences. Submissions in favour of the view that the triggering offence should itself be serious enough to merit imprisonment argued that there may be a sense of heavy-handedness in circumstances where an offender has a sentence of imprisonment activated for a comparatively minor offence.

<sup>154</sup> Bottoms, "Compliance with Community Penalties" in Bottoms, Gelsthorpe and Rex (eds), *Community Penalties: Change and Challenges* (Willan 2002).

- [8.92] On balance, the Commission is of the view that the current situation be retained. Firstly, the perception of unfairness or heavy-handedness outlined above, it seems, stem from the slightly inaccurate view that the offender is being imprisoned “because” of the triggering offence. While it is true that it is necessary for the offender to be convicted of a triggering offence (or a breach of any of the discretionary conditions imposed) in order to render him or her liable to have the originally imposed custodial sentence activated, the reasons for the imposition of the original custodial sentence all stem from the gravity of the original offending. As discussed in chapter 4, before considering whether a custodial sentence should be suspended, a sentencing court should first determine the length of that custodial sentence, by reference to the gravity of the offence and the personal circumstances of the offender. Therefore, while a triggering offence (or a breach of any other condition of suspension) is causally necessary for the sentence of imprisonment to be activated, it does not figure at all in the substantive moral or legal justification for the imposition of the initial custodial sentence. Those justifications come from the wrongdoing involved in the original offending.
- [8.93] It is also worth re-iterating that the courts, both by virtue of section 99(10) of the 2006 Act, as amended, and section 99(17) of the 2006 Act, are vested with what Riordan has described as a “double discretion to disregard the breach having regard to all the circumstances of the case and even if moved to activate the sentence the court may impose a lesser sentence than that originally specified.”<sup>155</sup> Therefore, the Commission is of the view that any perceived heavy-handedness is offset by the fact that a sentencing court may, even if the offender has been convicted of a triggering offence (and particularly if the offence is a minor one), decide that the activation of the custodial element of the sentence, either at all or in full, is unjust in all the circumstances of the case.

**R. 8.08** The Commission recommends that any offence should count as a triggering offence for the purpose of activation of a suspended sentence.

- [8.94] The question as to the scope of the activation power in section 99(17) of the 2006 Act was not given much attention in the submissions. However, the Commission notes that the view that section 99(17) is a standalone power to revoke a suspended sentence was approved by the Court of Appeal in *Clarke*<sup>156</sup> and that this has been applied in several subsequent cases.<sup>157</sup> The Commission also endorses this construction of section 99(17). As

<sup>155</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 372.

<sup>156</sup> *Clarke v Governor of Mountjoy Prison* [2016] IECA 244 at paras 30 – 31.

<sup>157</sup> See, for instance: *Wansboro v DPP* [2017] IEHC 391 at para 22 and *Larkin v Governor of Mountjoy Prison* [2016] IEHC 680 at para 23.

noted earlier in this chapter, subsection 17 simply states that “[a] court shall, where it is satisfied that a person to whom an order under *subsection (1)* applies has contravened a condition of the order”. As the conviction for a triggering offence also constitutes a breach of a condition of suspension (i.e. the mandatory condition to keep the peace and be of good behaviour under section 99(2) of the 2006 Act), it is clear that section 99(17) permits the court to revoke a suspended sentence on the basis that the triggering offence is also deemed to be a breach of a condition of suspension.

**R. 8.09** The Commission recommends that section 99(17) of the *Criminal Justice Act 2006* be read as a standalone power to revoke a suspended sentence.

- [8.95] Section 99 of the 2006 Act has been the subject of three subsequent amendments,<sup>158</sup> most recently by the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*. Some of the submissions pointed out that, since the 2017 Act, the procedure seems to be working without much difficulty. This is further evidenced by the fact that very few challenges to section 99 have arisen since the post-*Moore* case law, culminating in the decision of the Supreme Court in *Wansboro*. Nevertheless, it was also pointed out in the submissions that certain issues remain. For instance, section 99(8A)(a) of the *Criminal Justice Act 2006*, as inserted by section 2(c) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017* provides that, where an offender has been convicted of a triggering offence during the operational period, the court which tried the triggering offence shall, after imposing sentence, remand that person in custody or on bail to the next available sitting of the court that imposed the suspended sentence for the hearing on activation. As discussed earlier, the 2017 Act was introduced, in the main, to deal with the *Moore* decision.
- [8.96] However, a potential issue arising out of this legislative amendment lies in the fact that if the offender seeks an appeal against conviction or against sentence of the triggering offence, the activation hearing will be adjourned pending the outcome of the appeal. During this time, the offender will be on remand and thus in custody, in the event that he or she does not qualify for bail. Given the substantial delays in the criminal process, as discussed earlier, the offender could potentially be remanded in custody for some time. This potential for injustice is even more pronounced given the possibility that the offender may ultimately be acquitted of the triggering offence.
- [8.97] Further, there is a lack of clarity and scope for confusion in cases where an offender who is the subject of multiple suspended sentences commits a triggering offence. For instance,

<sup>158</sup> Section 60 of the *Criminal Justice Act 2007*, section 51 of the *Criminal Justice (Miscellaneous Provisions) Act 2009*, section 2 of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*.



if an offender has a suspended sentence from the District Court, and a suspended sentence from the Circuit Court, and they are convicted of a triggering offence in the Central Criminal Court, does the offender need to be remanded to both courts which imposed the suspended sentences? This would seem to be the position as *per* the (albeit *obiter*) comments of the Supreme Court in *Carter*, in which it was held that section 99 makes no reference to venue; it seems to contemplate that the offender will be remanded to the relevant circuit, in the case of the Circuit Court, and the relevant district, in the case of the District Court.<sup>159</sup> Again, given the delays in the criminal process more generally, this situation could lead to an offender being remanded in custody for some time while awaiting the outcome of the multiple activation hearings and any appeals arising therefrom.

- [8.98] The Commission is of the view that these difficulties could be avoided by rewording the provision requiring the court in which the triggering offence is tried to remand the matter of activation to the original sentencing court. This provision is currently mandatory, however, if the word “may” were substituted for the word “shall”, it could avoid these procedural difficulties and it may be the more just and fair thing to do, in circumstances where an offender could face a long time in custody by operation of the remand provisions of the 2006 Act, as amended.

**R. 8.10** The Commission recommends that the word “may” be substituted for the word “shall” in section 99(8A)(a) of the *Criminal Justice Act 2006*, as inserted by section 2(c) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*.

- [8.99] Another issue with the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017* was raised in the submissions. As noted earlier in this chapter, Section 2(l) of the 2017 Act, which inserts section 99(22) into the 2006 Act, clarifies the procedures where a suspended sentence is imposed on appeal. Section 99(22) provides that, where a suspended sentence is imposed on appeal, the court that should deal with an activation hearing is the court from which the appeal was taken, that is, the court that imposed the original suspended sentence. Previously, the position had been that as set out in *The People (DPP) v Foley*.<sup>160</sup> In this case, the Court held that, where a suspended sentence is imposed by an appellate court, it is the appellate court, and not the original court, that must deal with an activation hearing. This created problems where the Circuit Court, on appeal from the District Court, imposed a suspended sentence and then subsequently activated that sentence. In effect, there was no right to appeal the decision of the Circuit Court to activate the suspended sentence in this instance on the basis that, in summary

<sup>159</sup> *Director of Public Prosecutions v Carter* [2015] IESC 20 at para 52.

<sup>160</sup> [2014] IESC 2, [2014] 1 IR 360.

prosecutions, the decision of the Circuit Court on appeal is final and cannot be appealed. Accordingly, section 2(l) of the 2017 Act was enacted in order to rectify this issue.

- [8.100] However, as pointed out to the Commission during consultations, this legislative amendment creates another potential anomaly. Say, for instance, an offender was sentenced to a period of nine months' imprisonment in the District Court. On appeal to the Circuit Court the sentence is replaced with a 12-month custodial sentence, suspended in full. If the offender is subsequently convicted of a triggering offence, under the current law, he or she will be sent back to the District Court, which will be put in the rather unusual position of presiding over an application for revocation of a suspended sentence that it had not in fact imposed at the outset.
- [8.101] It is clear, therefore that certain issues remain with section 99 of the *Criminal Justice Act 2006*, as amended. In addition, the fact that section 99 and all of the accompanying amendments have not as yet been consolidated is undesirable from an access to legislation perspective. Notwithstanding that a consolidated version of section 99 of the *Criminal Justice Act 2006* is available in the form of a Revised Act prepared by the Law Reform Commission, the Commission is of the view that section 99 might usefully be consolidated in a single piece of legislation which could place section 99 within the wider context of the other available sanctions. Head 48 of The General Scheme of the *Criminal Justice (Community Sanctions) Bill 2014*<sup>161</sup> includes a proposal to substitute section 99, with amendments aimed at clarifying and improving the operation of the section in cases where the court wishes to impose Probation Service supervision as a condition of suspension. The Commission notes that this General Scheme, which has not yet moved beyond the Heads of Bill, provides the legislature with an opportunity to consolidate section 99, and to also perhaps consider rectifying some of the issues associated with the 2017 Act, as discussed above. However, the Commission also notes that, since the *Community Sanctions Bill 2014* is intended to deal with non-custodial sanctions, further consideration may have to be given to the question of whether that is the appropriate place in which to consolidate legislation governing the suspended sentence, which is, after all, a non-immediate custodial sentence.

**R. 8.11** The Commission recommends that section 99 of the *Criminal Justice Act 2006*, including all existing amendments, and any further amendments that may be required, be consolidated in a single piece of legislation.

- [8.102] As discussed above, the current data deficit in relation to the criminal process, including at the sentencing stage, renders it difficult to draw any conclusions regarding the efficacy

<sup>161</sup> The Heads of the Bill can be found here: <<http://www.justice.ie/en/JELR/Pages/PB14000031>> accessed 30 June 2020.

of the suspended sentence more generally and, in particular, the extent to which conditions of suspension are monitored and enforced in this jurisdiction. While Riordan's study, and indeed some of the submissions received for this Report, suggest that the sanction may be under-supervised, much more in the way of data collection, collation and dissemination is required in order to make definitive conclusions in this regard. The Criminal Justice Operational Hub (CJOH) and the Sentencing Guidelines and Information Committee (SGIC) may be well-placed, if afforded the necessary resources, to shed further light on the workings of the sentencing process.

[8.103] However, the Commission is also of the view that these initiatives, in isolation, are not sufficient. In this regard, consideration might usefully be given to establishing dedicated data analysis units within all criminal justice agencies, so as to ascertain a greater understanding of the workings of the sentencing process and, in the context of the observations made in this chapter, the suspended sentence. Such a collaborative approach would enable the creation of coherent data systems within each agency and, by extension, facilitate bodies such as the SGIC and the CJOH in presenting this data in a coherent and useful manner to practitioners, policy-makers, legislators, academics and other interested parties.

[8.104] As noted earlier in this chapter, there has been a growing recognition in recent years of the need for greater inter-agency collaboration within the criminal justice system, in particular, the Criminal Justice Strategic Committee, and the recent announcements regarding the proposed establishment of a Criminal Justice Sectoral Strategy. The Commission is of the view that the concretisation and ultimate implementation of these proposals into a genuinely collaborative, data-driven and efficient system would help to shed light on, and thereby address, many of the structural deficiencies discussed in this chapter.

**R. 8.12** The Commission recommends that consideration be given to providing each relevant agency within the criminal justice system with the necessary resources for the establishment of a dedicated data analysis unit, so as to facilitate the collection, collation and dissemination of data in relation to the operation of the suspended sentence and, in particular, the monitoring and enforcement of conditions of suspension.

[8.105] Finally, as discussed earlier, the cumbersome nature of the criminal process more generally exacerbates the issues identified above in respect of the suspended sentence. The substantial waiting times highlighted in the Courts Service Annual Report 2018<sup>162</sup> are

<sup>162</sup> Courts Service, *Annual Report 2018*

<[http://www.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/C2B4BFC1AFEC7B098025842D00473F25/\\$FILE/Courts%20Service%20Annual%20Report%202018.pdf](http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/C2B4BFC1AFEC7B098025842D00473F25/$FILE/Courts%20Service%20Annual%20Report%202018.pdf)> accessed on 28 June 2020.

concerning and point to large amounts of time and resources being wasted by numerous key criminal justice stakeholders. In this regard, case management processes could and should be modernised, with Information and Communications Technology (ICT) maximised for case management, inter-agency coordination and scheduling. In this regard, the Commission notes with approval the comments in the 2018 Courts Service Annual Report that work had begun on implementing a new ICT within the Courts Service. The Report noted that "ICT is the cornerstone and enabler for modernisation and reform initiatives, supporting increased interaction with other justice agencies and government departments."<sup>163</sup> However, while these single agency initiatives are to be welcomed, again, a more holistic collaborative approach to ICT infrastructure would lead to improvement of and greater efficiency in the criminal system as a whole. In this regard, the Commission is of the view that the potential for digitisation of the justice system generally should be explored.

**R. 8.13** The Commission recommends that consideration be given to the streamlining and modernising of the ICT systems underpinning the criminal justice system so as to facilitate a collaborative and efficient approach to the operation of the criminal justice system, from arrest to final appeal.

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<sup>163</sup> *Ibid* at page 39.

## CHAPTER 9 SUSPENDED SENTENCES AND WHITE-COLLAR OFFENDERS

### 1. Introduction

- [9.1] White-collar crime encompasses a wide variety of offending, often regulatory in nature – environmental crime, health and safety offences, revenue offences, agriculture and sea fisheries offences – as well as financial crime committed in the corporate context, including: fraud offences, competition offences and insider trading. Horan notes that the term “white-collar crime” is difficult to define because it relates to different concepts depending on the jurisdiction and the context, and is a term that is “both under-inclusive and over-inclusive.”<sup>1</sup> Instead, she outlines that “terms such as ‘business crime’, ‘economic crime’, ‘regulatory crime’ and ‘corporate crime’ tend to be preferred by leading academics in this field, particularly the latter term, which captures “all crimes committable by corporations and persons involved in corporate life, regardless of the type of crime involved or the class of the offender.”<sup>2</sup>
- [9.2] Penalties vary enormously across the white-collar and regulatory spectrum: sea fisheries offences are not punishable by a term of imprisonment;<sup>3</sup> health and safety offences can attract a two year term of imprisonment;<sup>4</sup> while environmental offences and many fraud offences carry penalties of ten years’ imprisonment.<sup>5</sup> As such, it is difficult to formulate one-sized guidance to fit all categories of white-collar offending, given the divergence between the various regulatory regimes and the fact that, in this context, courts are called upon to sentence individuals as well as corporate bodies. In addition, the case law is better developed in some areas than others: for instance, health and safety law and

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<sup>1</sup> Horan, “A Theoretical Introduction to Corporate, White-Collar and Regulatory Crime” *Trinity College Dublin Extra-Mural Course in White Collar Crime* (January 2015).

<sup>2</sup> Horan, *Corporate Crime* (Bloomsbury Professional 2011) at para 1.01.

<sup>3</sup> Section 28 of the *Sea Fisheries and Maritime Jurisdiction Act 2006*. Terms of imprisonment are prescribed for assault or obstruction of a sea fisheries protection officer, but not for substantive sea fisheries offences.

<sup>4</sup> Section 78 of the *Safety, Health and Welfare at Work Act 2005* attract a potential penalty of two years’ imprisonment. It is also possible to prosecute for the offence of endangerment contrary to section 13 of the *Non-Fatal Offences against the Person Act 1997* in the health and safety context, an offence which, when prosecuted on indictment, carries a seven year sentence.

<sup>5</sup> See, for example, section 10 of the *Waste Management Act 1996* and sections 4, 9, 10, 11, 25, 26, 27, 28, 29 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*. For a discussion on some of the leading decisions around sentencing for serious fraud offences, and the accompanying judicially-developed presumption of an immediate custodial sentence, see chapter 6 of this Report.

competition offences have received comparatively greater attention than other regulatory areas.<sup>6</sup>

- [9.3] The Commission has recently considered the challenges corporate offending presents to the substantive criminal law in its *Report on Regulatory Powers and Corporate Offences*.<sup>7</sup> The sentencing of corporations is comparatively straightforward, at least insofar as the question of suspended sentences is concerned. However, while it is now well-established that corporate bodies can be held criminally liable for transgressions of the criminal law, it is obvious that corporate entities cannot be the subject of a custodial sentence, but rather are punished by the imposition of fines, forfeiture and by other administrative sanctions, such as the revocation of licences.<sup>8</sup> Therefore, the question of suspension is of no application to corporate bodies. The officers of such corporations may of course also be prosecuted, either as the co-accused of a corporate entity or as individuals; these individuals are liable to custodial penalties and, accordingly, the question of a suspended sentence may arise in this context. Therefore, this chapter considers what, if any, additional considerations apply to individual white-collar offenders, and whether the applicable principles ought to be distinguished from ordinary Irish sentencing law principles. However, a full examination of the various types of offending falling with the rubric of the term “white-collar crime” is outside the scope of this Report. The Commission’s focus in this chapter is, therefore, necessarily confined to the suspended sentence in relation to competition offences and health and safety offences.
- [9.4] The first part of this chapter outlines the general sentencing principles applicable to white-collar offending. The Irish courts have confirmed that no separate sentencing regime exists for this category of offending. Therefore, white-collar offenders should be sentenced in accordance with the same general principles, and especially the principle of proportionality, as apply to all other offenders. Accordingly, both the gravity of the offence and the personal circumstances of the individual offender are the core considerations for sentencing judges when determining the appropriate level of punishment. In this regard, this section of the chapter also explores the tensions between ensuring that the gravity of white-collar offending is marked by an appropriately severe sanction, while at the same time ensuring that those guilty of such offending receive due credit for personal mitigating factors.
- [9.5] The second part of the chapter focuses on the leading Irish decisions in the area of competition law, with a view to discerning the circumstances in which the imposition of a suspended sentence may be appropriate. In a similar vein, the third section discusses

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<sup>6</sup> Horan, *Corporate Crime* (Bloomsbury 2011) at para 7.22.

<sup>7</sup> LRC 119-2018.

<sup>8</sup> Sentencing options for corporate bodies are largely confined to the imposition of financial penalties. See O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 19.24.

some of the Irish case law on health and safety offences. The jurisprudence, both in respect of competition offences and health and safety offences, reflects an increasing recognition on the part of the Irish courts of the societal harm caused by white-collar offending, while simultaneously acknowledging the constitutional requirement that the offender receive a proportionate sentence which requires that due credit be given for personal mitigating factors, and this in turn may often point to a suspended sentence as the most appropriate penalty.

- [9.6] The final section outlines the Commission's recommendations. The Commission endorses the current position of the Irish courts that no separate sentencing regime should exist in the area of white-collar offences. However, the Commission stresses that the harm caused by white-collar offending should always be borne in mind when setting the appropriate punishment. In this regard, the Commission also recommends that the various discrete offences encompassed by the broad term "white collar crime" would benefit from sentencing guidance as to the factors relevant to the assessment of the gravity of the offence, and in determining whether the offence merits a custodial (immediate or suspended) sentence in the circumstances of the case. The Commission suggests that the factors identified in this chapter may usefully be considered if and when such guidance is formulated by the newly established Sentencing Guidelines and Information Committee (SGIC).<sup>9</sup>

## 2. General sentencing principles for white-collar offending

- [9.7] The Irish case law has established that no special sentencing regime exists for white-collar offences. In *The People (DPP) v Begley*,<sup>10</sup> the appellant pleaded guilty to one count of attempted fraudulent evasion of customs duty and three counts of fraudulent evasion of customs duty, to the sum of €1.6 million, arising out of the importation of garlic into the state contrary to section 186 of the *Customs Consolidation Act 1876*, as amended. The sentencing court imposed a total sentence of six years' imprisonment. In delivering judgment in the appeal against the severity of the sentence,<sup>11</sup> the Court of Criminal Appeal discussed a previous judgment of the same Court – *The People (DPP) v Murray*<sup>12</sup> – in which it was held that cases involving serious fraud should "generally meet with an immediate and appreciable custodial sentence".<sup>13</sup> In response to the suggestion that this

<sup>9</sup> Pursuant to section 23(1) of the *Judicial Council Act 2019*.

<sup>10</sup> [2013] IECCA 32, [2013] 2 IR 188.

<sup>11</sup> The Court of Criminal Appeal ultimately found that the six-year sentence imposed was unduly severe. In re-sentencing the appellant, the Court took into account the appellant's personal mitigating factors and reduced the sentence to two years' imprisonment.

<sup>12</sup> [2012] IECCA 60.

<sup>13</sup> [2013] IECCA 32 at paras 21 – 22, [2013] 2 IR 188 at para 44.

statement of principle created a separate sentencing regime for tax fraud cases, the Court stated that:

“It therefore seems to this Court that [*Murray*] should not be read as suggesting the establishment of any parallel rules on sentencing, relative to such crimes or as contemplating any significant adjustment on how courts should value or weigh genuine factors in mitigation. In many respects this is unsurprising, as within the existing structure of sentencing, there is sufficient flexibility to deal with any changing circumstances or context, whatever the range may be. Therefore, whilst noting the importance of [*Murray*] for its underlying analysis, it does not appear to this Court that the same either intended to, or in fact created, any substantial departure from the existing principles and how such are applied.”<sup>14</sup>

- [9.8] *Begley* has been cited with approval in the context of white-collar offending more generally.<sup>15</sup> The decision of *The People (DPP) v Clarkin*<sup>16</sup> is also instructive in this regard. The respondent, having pleaded guilty to a charge of criminal fraudulent trading, was sentenced to a custodial sentence of one-year imprisonment, suspended for a period of two years. The respondent was the managing director of a company which, due to increasing financial difficulties, began to submit fictitious invoices to the bank as part of an arrangement akin to a factoring agreement, whereby the bank would advance money to the company on receipt of these invoices. The bank lost €1.27 million as a result of the fraudulent trading and was still owed almost €900,000 at the time of sentence. In dismissing the undue leniency application brought by the Director of Public Prosecutions, the Court of Appeal held that the sentencing court correctly gave appropriate weight to the respondent’s strong personal mitigating factors, including the fact that the respondent himself had approached the bank and informed it of the fraudulent conduct, he sold his family home in an effort to pay back some of the money owed, had made no personal benefit and was motivated in his actions to save the company which employed over 50 people, was 61 years of age at the time of the offence and was deemed as highly unlikely to re-offend. While agreeing with the point made by the Director that, normally, an immediate custodial sentence would be appropriate in these circumstances

<sup>14</sup> [2013] IECCA 32, [2013] 2 IR 188 at para 44.

<sup>15</sup> *The People (DPP) v O’Brien* [2015] IECA 304; *The People (DPP) v Maguire* [2015] IECA 350; *The People (DPP) v Siobhan Maguire* [2018] IECA 310; *The People (DPP) v Walsh* [2016] IECA 74; *The People (DPP) v Durcan* [2017] IECA 3; *The People (DPP) v Zaffer* [2016] IECA 321; *The People (DPP) v Zaffer (No 2)* [2017] IECA 12. For a discussion of some of the decisions, in the context of the judicially developed presumption of an immediate custodial sentence in respect of serious fraud offences, see chapter 6 of this Report.

<sup>16</sup> (Court of Criminal Appeal, 10 February 2003).



for deterrence purposes, stressed that the personal circumstances of the offender must always be given due consideration.

- [9.9] It is clear from these judgments that white-collar offending is not the subject of a parallel sentencing regime under Irish sentencing law. In other words, Irish sentencing courts, when sentencing white-collar offenders, should do so according to the ordinary principles of sentencing. By extension, this means that sentencing courts in this jurisdiction are constitutionally required to sentence white-collar offenders in a manner that is proportionate to both the gravity of the offence and the personal circumstances of the offender. However, it has been argued that the application of the principle of proportionality in this context operates to privilege white-collar offenders. McGrath, having discussed the two-staged proportionality test, opines that:

“[T]he system of proportionate punishment, as defined in the above case law, tended to privilege corporate offenders. White-collar crimes were considered to be less harmful and culpable than conventional crimes. Moreover, corporate offenders, by virtue of their personal circumstances and the nature of their crimes, were more likely to avail of the mitigating factors and avoid any aggravating factors. As a result, they were likely to receive less severe punishments. In particular, it was shown that white-collar criminals were generally of good character and did not have previous convictions. They were unlikely to use weapons, invade homes, or be part of criminal gangs. They had more to lose than ordinary criminals and could integrate back into society with ease. For these reasons, the rules on sentencing, though applying equally to ‘crimes in the suites’ and ‘crimes in the streets’, were actually systemically biased and resulted in lighter penalties for corporate offenders.”<sup>17</sup>

- [9.10] The Commission acknowledges the merit in the above argument, particularly when viewed through the prism of the constitutional requirement of equality before the law.<sup>18</sup> There is a marked distinction between white-collar offenders who “are typically well-educated members of the middle class with positive prospects and may be regarded as typically having more to lose than conventional criminals.... [and] conventional criminals who, more often than not, have previous convictions, have not had access to higher education and have underprivileged backgrounds”.<sup>19</sup> Indeed, in *The People (DPP) v Maguire*<sup>20</sup> the Court carried out a comprehensive review of many fraud sentencing cases

<sup>17</sup> McGrath, “Sentencing White-Collar Criminals: Making the Punishment Fit the White-Collar Crime” (2012) 22(3) *Irish Criminal Law Journal* 73 at page 79.

<sup>18</sup> As per Article 40.3 of the Constitution of Ireland.

<sup>19</sup> McGrath, “Sentencing White-Collar Criminals: Making the Punishment Fit the White-Collar Crime” (2012) 22(3) *Irish Criminal Law Journal* 73 at page 81.

<sup>20</sup> [2018] IECA 310.

and handed down sentencing guidance in respect of this type of offending behaviour. The Court observed that:

“What is also striking from the comparators is that in many cases the court has been significantly influenced in imposing an ultimate sentence which is low, compared to those routinely imposed for other non-fraudulent crimes of dishonesty, by the offender’s absence of previous convictions and previous good character.”<sup>21</sup>

[9.11] This difference in personal circumstances and personal mitigation undoubtedly carries a risk of a disparity in treatment in respect of how these two categories of offenders are sanctioned. This potential for injustice becomes more pronounced if mitigating factors such as lack of previous convictions are considered out of context. As O’Malley notes, “the offence may well be an isolated lapse by a person who has genuinely been of good and commendable character ... however, the absence of previous convictions should count for less, and often considerably less, where there has been a pattern of hitherto undetected offending over a lengthy period.”<sup>22</sup>

[9.12] However, on the other hand, the primary aim of the requirement of equality before the law in a sentencing context is to eliminate unwarranted disparity, namely differences in the penalties imposed on two offenders (or two categories of offenders) which cannot be attributed to legitimate sentencing factors.<sup>23</sup> An offender’s personal circumstances are undoubtedly legitimate sentencing factors in an Irish sentencing context. Indeed, as noted, Irish sentencing courts are constitutionally mandated to give due weight to an offender’s personal circumstances. The Commission is of the view that this constitutional requirement should apply with equal force in sentencing white-collar offenders, notwithstanding that the presence of strong personal mitigation is an almost ever-present feature amongst this category of offender. To do otherwise would run counter to the principle of proportionality and, by extension, potentially result in unwarranted disparity. Further, as discussed in chapter 4 of this Report, the principle of prison as a last resort should always be borne in mind by sentencing courts, particularly in the context of first-time, non-violent offenders. This principle, it seems, is particularly relevant in the context

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<sup>21</sup> *Ibid* at para 110. See also *The People (DPP) v Zaffer (No 2)* [2017] IECA 12 at para 7, where the Court noted that “a feature of these types of fraud cases is often the fact that the perpetrator was previously a person of exemplary character.”

<sup>22</sup> O’Malley, “Sentencing White-Collar and Corporate Crime” in McGrath (ed), *White-Collar Crime in Ireland: Law and Policy* (Clarus 2019) at page 169.

<sup>23</sup> For a discussion on this, see chapter 4 of this Report.

of sentencing white-collar offenders, in that this category of offender are rarely, if ever, physically dangerous and, by and large, have no previous criminal record.<sup>24</sup>

- [9.13] However, the Commission also stresses the need to ensure that white-collar offenders are not treated unduly leniently. One justification proffered for treating white-collar offenders more leniently than conventional offenders is that, given the low likelihood of re-offending, a conviction may, in and of itself, have a sufficient punitive and deterrent effect on a white-collar offender. In this regard, Gopalan<sup>25</sup> states that:

“If the law stops at conviction, deterrent objectives can be achieved without the need for the State to bear the cost of imprisonment. The possibility of imposing consequential sanctions satisfies the retributive dimension. Lastly, the incapacitation objective is achieved by legal impediments.”<sup>26</sup>

- [9.14] While there is certain merit to Gopalan’s argument, this, again, raises the issue of equality before the law. In response, O’Malley posits the following rhetorical question:

“is it compatible with any meaningful notion of equality before the law to treat a conviction as adequate punishment in the cases of a privileged offender convicted of a certain type of crime, but inadequate (in the sense that the conviction must be accompanied by a formal penalty such as imprisonment) for other offenders whose conduct may have caused less harm to the economy and to society at large?”<sup>27</sup>

- [9.15] The Commission agrees with O’Malley’s response to the “punishment without imprisonment” argument put forward by Gopalan. Further, while a conviction will arguably deter the particular offender from future offending behaviour (specific deterrence); it may not adequately dissuade other businesses and individuals from transgressing the criminal law (general deterrence). Notwithstanding the lack of empirical evidence as to the deterrent effect of severe penalties imposed for white-collar offenders,<sup>28</sup> there is an undeniable logic to the argument that other businesses and individuals may take note when severe penalties are imposed on others for conduct which

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<sup>24</sup> O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 19.05.

<sup>25</sup> Gopalan, “Skilling’s Martyrdom: The Case for Criminalisation without Incarceration” (2010) 44 *University of San Francisco Law Review* 459.

<sup>26</sup> *Ibid* at page 504.

<sup>27</sup> O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 19.05.

<sup>28</sup> Henning, “Is Deterrence Relevant in Sentencing White-Collar Defendants?” (2015) 61 *Wayne Law Review* 27.

they themselves are engaged in, or have the opportunity to engage in.<sup>29</sup> In *The People (DPP) v Duffy*<sup>30</sup> (discussed in detail below), the Central Criminal Court (McKechnie J) suggested that imprisonment may be appropriate for certain white-collar behaviour on the basis that:

“prison, in particular for those with unblemished pasts, for those who are respected within the community, and for those who are unlikely to re-offend can be a very powerful deterrent .... and can carry a uniquely strong moral message.”<sup>31</sup>

- [9.16] In addition, it is important to note that the societal harm caused by white-collar crime, both in terms of its financial cost (to the Exchequer or private bodies), and the wide-ranging impact that it can have on social institutions and society as a whole, is often much greater than the harm caused by “conventional” crime.<sup>32</sup> Viewed from this perspective, the gravity of certain corporate and regulatory offences, both in terms of the harm caused and the moral culpability of the offender, may be sufficient to merit a custodial sentence.
- [9.17] It is clear, therefore, that a balance must be struck to ensure that white-collar offenders receive due credit for personal mitigating factors, while the gravity of this category of offending is simultaneously marked with an appropriately severe sanction.<sup>33</sup> Indeed, recent Irish case law suggests a growing recognition on the part of the Irish courts of the harm caused by white-collar offending.<sup>34</sup> The Commission outlines two case studies below in the areas of competition law and health and safety law, which are demonstrative of this shift. Although, to date, only one sentence of immediate imprisonment has been imposed for a health and safety offence (and none for a competition offence), both case studies clearly illustrate a judicial willingness to treat such offences seriously, while simultaneously affording the offender due credit for his or her personal mitigation. As is discussed below,

<sup>29</sup> Wheeler, Mann and Serat, *Sitting in Judgment: The Sentencing of White-Collar Criminals* (Yale University Press 1988) at page 133.

<sup>30</sup> [2009] IEHC 208.

<sup>31</sup> *Ibid* at para 48.

<sup>32</sup> Sutherland, ‘White-collar Criminality’ (1940) 5(1) *American Sociological Review* 1 at pages 10 – 11; Kilcommins et al, *Crime, Punishment and the Search for Order in Ireland* (IPA 2004) at page 131, as cited in Kilcommins, “Defining Corporate, White – Collar and Regulatory Crime: Offences, Defences and Procedure” (May 11, 2019) <<https://ssrn.com/abstract=3597949>> accessed on 23 May 2020 at page 6.

<sup>33</sup> Malley, “Sentencing White-Collar and Corporate Crime” in McGrath (ed), *White-Collar Crime in Ireland: Law and Policy* (Clarus 2019) at page 169.

<sup>34</sup> As discussed in detail in chapter 6 of this Report, the Irish courts have established that serious fraud offences should be subject to the presumption of an immediate custodial sentence.

this is achieved through the inherently flexible sentencing option of the suspended sentence.

### 3. Suspended sentences for competition offences

- [9.18] Ireland has been described as having been to the fore of the criminalisation of competition offences.<sup>35</sup> Under the *Competition Act 1991*, anti-competitive practices and the abuse of a dominant position were prohibited. However, the remedies under the 1991 Act were exclusively civil in nature. The *Competition (Amendment) Act 1996* made it a criminal offence for an undertaking, such as a corporate body, to enter into an anti-competitive agreement or engage in a concerted practice designed to prevent, restrict or distort competition. The *Competition Act 2002* repealed the 1991 and 1996 Acts. Section 6 criminalises agreements between undertakings, decisions by associations of undertakings, and concerted practices which have as their object or effect the prevention, restriction or distortion of competition.<sup>36</sup> The offence of the abuse of a dominant position is also provided for under section 7 of the 2002 Act. Section 2 of the *Competition (Amendment) Act 2012* increased the maximum penalties for these offences. The 2012 Act also amended the 2002 Act by inserting section 8(11A), which provides that section 1 of the *Probation of Offenders Act 1907* shall not be applied to an offence under sections 6 or 7 of the 2002 Act.
- [9.19] There have been relatively few prosecutions for competition offences. Perhaps most significantly, a sentence of immediate imprisonment has yet to be imposed for a competition offence. However, as will be outlined below, several individual offenders have received suspended sentences of imprisonment, ranging from three months to two years. Indeed, competition offences are an area in which the appropriateness of a suspended sentence is particularly evident, in that the court is able to mark the gravity of the offence by declaring it worthy of imprisonment, while simultaneously giving due credit for factors that mitigate the severity of the sentence to be imposed.<sup>37</sup> In light of this, it is worth analysing the facts of some of the leading "cartel" competition law cases in which suspended sentences have been imposed in order to extrapolate some of the general principles relating to the appropriateness of a suspended sentence for competition offences.

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<sup>35</sup> O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 19.35.

<sup>36</sup> Section 6 of the *Competition Act 2002*.

<sup>37</sup> O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 19.47.

[9.20] The starting point in this regard is the decision of the Central Criminal Court in *The People (DPP) v Manning*.<sup>38</sup> The offender pleaded guilty to aiding and abetting the Irish Ford Dealers Association and its members in implementing a cartel relating to the distribution of guide prices for vehicles to its 53 members. The offender had been appointed as a part-time secretary to the Irish Ford Dealers Association (IFDA), which was set up to, among other things, assist car dealers in obtaining a reasonable profit on the sale of their cars. The scheme, labelled a "Programme for Profitability", involved the distribution of guide prices to IFDA members. All members of the IFDA were obliged to lodge a bond with the association as security in the event that a fine was imposed for any breaches of the scheme. In the event of a breach, a fine was levied on a per car basis. The IFDA engaged secret shoppers to ensure that the scheme was being complied with. While issuing pricing guidelines was legal, their enforcement was not. The effect of the enforcement mechanisms was to prevent a dealer from breaching the agreement and undercutting other dealers. It was argued that, in reality, a glass floor was put down to prevent more generous discounting, while simultaneously providing the illusion of competition.<sup>39</sup> When the *Competition Act 2002* was enacted, the IFDA recognised the potential concerns that the scheme might raise. As a result, a consultant was hired to report on the conformity of the scheme with the 2002 Act. The Director of Public Prosecutions argued that the reasoning behind hiring the consultant was to give an illusion of legality to the scheme,<sup>40</sup> as "a form of window dressing feigning compliance."<sup>41</sup> In 2006, proceedings were brought against the offender on charges of aiding and abetting the IFDA and its members in implementing the agreement, the aim of which was to prevent, restrict or distort competition in the motor vehicle trade so as to directly or indirectly fix the selling price of cars, contrary to sections 2, 4(1) and 6 of the *Competition Act 2002*.

[9.21] The Central Criminal Court (McKechnie J), in rejecting the offender's assertion that he was merely a "conduit" following orders, highlighted the sheer sophistication and complexity of the scheme. The Court considered the offender's role to have been crucial to the longevity and success of the scheme. Perhaps most significantly, the Court was of the view that there were a variety of compelling reasons to impose a custodial sentence in cases of serious breaches of competition law. In this respect, the Court held that:

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<sup>38</sup> (Central Criminal Court, 9 February 2007). The discussion that follows is based on the analysis in Wade, "The Irish Competition authority: Looking Back at Some Landmark Cases as a New Era for Irish Competition Law Dawns – Part 1" (2015) 22(6) *Commercial Law Practitioner* 153.

<sup>39</sup> Curtis and McNally, "The Classic Cartel-Hatchback Sentence?" (2007) 4(1) *Competition Law Review* 41 at page 42.

<sup>40</sup> *Ibid* at pages 42 – 43.

<sup>41</sup> Wade, "The Irish Competition authority: Looking Back at Some Landmark Cases as a New Era for Irish Competition Law Dawns – Part 1" (2015) 22(6) *Commercial Law Practitioner* 153 at page 154.

"[A] sentence can operate as an effective deterrent in particular where if fines were to have the same effect they would have to be pitched at an impossibly high figure. Secondly, fines on companies might not always guarantee an adequate incentive for individuals within those firms to act responsibly. This particular point may not, in some circumstances, have the same force where individuals are concerned. Thirdly, knowledge within undertakings that courts will regularly make use of a custodial sentence may act as an incentive to people to offer greater cooperation in cartel investigations against, and quite frequently against their employers. Fourthly, prison, in particular for those with unblemished pasts, for those who are respected within the community, and for those who are unlikely to re-offend can be a very powerful deterrent and finally, the imposition of the sentence for the type or category of persons above described can carry a uniquely strong moral message."<sup>42</sup>

- [9.22] The Court also had regard to the severe and wide-ranging harm caused by this type of offending behaviour, noting that:

"This type of crime is a crime against all consumers and is not simply against one or more individuals. To that extent it is different from other types of crime, and while society has an interest in preventing, detecting and prosecuting all crimes, those which involve a breach of the Competition Act are particularly pernicious. In effect, every individual who wished to purchase, for cash, a vehicle from these dealers over the period which I have mentioned was liable to be defrauded, and many surely were by this scheme and by the practices which this cartel operated unashamedly. These activities in my view have done a shocking disservice to the public at large."<sup>43</sup>

- [9.23] Having regard to the gravity of the offence, the Court imposed a 12-month sentence of imprisonment along with a fine of €30,000. However, having regard to the plea of guilty, the sentencing court decided to suspend the sentence of imprisonment for a period of five years. *Manning* illustrates an explicit judicial recognition of the economic and social harm caused by anti-competitive practices such as price fixing. The Central Criminal Court was prepared to impose an immediate custodial sentence, but decided, in light of the offender's personal mitigating factors, and in particular the guilty plea, that the suspension of the custodial sentence along with the imposition of a significant fine was appropriate in all of the circumstances.

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<sup>42</sup> *Ibid* at page 156.

<sup>43</sup> *Ibid* at page 157.

- [9.24] In *The People (DPP) v Duffy*,<sup>44</sup> McKechnie J reiterated the view expressed in *Manning* in respect of the appropriateness of a sentence of immediate imprisonment in cases of serious anti-competitive conduct. The offender in this case was the treasurer of the Citroën Dealers Association (CDA), which was established to implement and maintain a scheme to achieve set prices for the maximum permissible discounts offered by retail dealers, to set recommended price lists for new vehicles, and to set prices for delivery charges, accessories, trade-ins and parts. The CDA employed secret shoppers to ensure compliance with the scheme. The offender was charged with, and pleaded guilty to price-fixing and anti-competitive behaviour, contrary to section 4(1) of the *Competition Act 1991* and section 2 of the *Competition (Amendment) Act 1996*.
- [9.25] The Court considered cartels to “operate one of the most serious forms of anti-competitive behaviour which exists, inflicting the most harm on customers, consumers and the public alike”,<sup>45</sup> meaning that such offences are capable of attracting an immediate custodial sentence. On the issue of when a custodial sentence would be appropriate, the Central Criminal Court quoted with approval<sup>46</sup> the English case of *R v Whittle*<sup>47</sup> in which the Court of Appeal of England and Wales identified a non-exhaustive list of relevant considerations to be taken into account when sentencing competition offences, namely:
- The gravity and nature of the offence;
  - The duration of the offence;
  - The degree of culpability of the defendant implementing the cartel agreement;
  - The degree of culpability of the defendant enforcing the cartel agreement;
  - Whether the defendant’s conduct was contrary to guidelines laid down in a company compliance manual;
  - Whether the defendant co-operated with any investigation;
  - Whether or not the defendant was compelled to participate under duress;
  - Whether the offence was a first offence, and

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<sup>44</sup> [2009] IEHC 208, [2009] 3 IR 613.

<sup>45</sup> [2009] IEHC 208 at para 22, [2009] 3 IR 613 at page 625.

<sup>46</sup> [2009] IEHC 208 at para 33, [2009] 3 IR 613 at pages 628 – 629.

<sup>47</sup> [2008] EWCA Crim 2560, [2009] Lloyds Rep FC 77.



- Any other personal circumstances.<sup>48</sup>

- [9.26] The Court went on to reiterate its comments from the *Manning* case, setting out the good reasons for imposing a custodial sentence in cartel cases, namely the need to ensure effective deterrence (specific and general), the inadequacy of fines to ensure compliance in certain circumstances and the need to encourage co-operation with the investigation of cartel offences.<sup>49</sup>
- [9.27] Applying these principles in *Duffy*, the Court concluded that the gravity of the offence merited an immediate custodial sentence, handing down a sentence of imprisonment of 15 months' imprisonment along with fines totalling €50,000. However, the Court felt bound to take account of sentencing judgments previously delivered in respect of two other CDA dealers. Since the circumstances of the other two offenders were "virtually indistinguishable"<sup>50</sup> from those present in *Duffy* and in light of the need to respect consistency in sentencing, the Court, somewhat reluctantly, suspended the sentence of imprisonment for a period of five years.
- [9.28] As discussed in detail in chapter 3 of this Report, the suspended sentence is an inherently flexible sentencing option which allows sentencing courts simultaneously to serve a number of different sentencing aims. This flexibility is evidenced by the facts and eventual sentencing outcomes in both *Manning* and *Duffy*. In both cases, the Central Criminal Court emphasised the societal harm caused by anti-competitive criminal conduct. Further, the Court in both decisions was of the view that the gravity of the particular offending behaviour merited an immediate custodial sentence. However, on the basis of the mitigating factors present (and the need to respect consistency in sentencing in *Duffy*), the Court deemed it appropriate to fully suspend the respective sentences of imprisonment.
- [9.29] On one view, it could be argued that the sentences finally imposed in those cases did not adequately reflect the gravity of the offending, particularly in light of the strong words used by the court to describe the conduct in question. However, it is important to note that the suspended sentences of imprisonment were not the only penalties imposed on the offenders in *Manning* and *Duffy*. First, under section 839 of the *Companies Act 2014*,<sup>51</sup> any person convicted of any offence in relation to a company shall be automatically disqualified from holding the position of a company director for a period of five years from the date of conviction. It is arguable, therefore, that this ancillary (and mandatory) order, in the view of the court, served the punitive aims of retribution and incapacitation,

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<sup>48</sup> *Ibid* at para 34.

<sup>49</sup> [2009] IEHC 208 at para 42, [2009] 3 IR 613 at page 632.

<sup>50</sup> [2009] IEHC 208 at para 66, [2009] 3 IR 613 at page 640.

<sup>51</sup> Previously section 160(3) of the *Companies Act 1990*.

thereby reducing the need for these punitive aims to be reflected by way of an immediate custodial sentence.<sup>52</sup> Furthermore, the Commission is also of the view that the imposition of substantial fines, in tandem with a custodial sentence, may also have persuaded the Court that a suspended custodial sentence, as opposed to an immediate custodial sentence, was justified in all of the circumstances of the case.<sup>53</sup>

[9.30] In *The People (DPP) v Aston Carpets and Smith*,<sup>54</sup> the Court of Appeal cited with approval the decisions of *Manning* and *Duffy*. In this case, the DPP sought a review of the sentence imposed on grounds that it was unduly lenient, pursuant to section 2 of the *Criminal Justice Act 1993*. In this case, Brendan Smith (“the manager”) acting as director and manager of a carpet and flooring company (“the company”) entered into an anti-competitive agreement with the operator of another flooring company. The financial gain resulting from this activity was said to be around €31,000.<sup>55</sup> Both the manager and the company pleaded guilty to engaging in and implementing an anti-competitive agreement, contrary to sections 4(1), 6(1), 8(1) and 8(6) of the *Competition Act 2002*. The manager also pleaded guilty to the offence of committing an act with intent to impede a prosecution, contrary to sections 7(2) and 7(4) of the *Criminal Law Act 1997*. The sentencing judge imposed a fine of €10,000 on the company and a fine of €7,500 (in respect of the first count) and three-months’ imprisonment, suspended for two years (in respect of the second count), on the manager, who was also disqualified from acting as a company director for a period of five years pursuant to section 839 of the *Companies Act 2014*.

[9.31] As noted, the DPP sought a review of the sentences on the basis that they were unduly lenient. The Court did not disturb the fine imposed on the company, or the suspended sentence of imprisonment on the manager. In respect of the fine imposed on the manager and having cited with approval *Duffy* and *Manning*, the Court distinguished this case from *Duffy* on the basis that the profit made from this conduct was relatively modest and, further, the number of customers affected, in contrast to *Duffy*, was relatively low.<sup>56</sup>

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<sup>52</sup> See O’Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 19.53, where he notes that “courts should be willing to treat consequential disqualification as potentially punitive; it may mitigate the primary punishment if it imposes a real hardship or detriment on the offender. But it may have little or no relevance to the main sentence if it is unlikely to impinge on the offender in any material way.” In *Duffy* (at paras 60 – 63) McKechnie J briefly dealt with whether or not a disqualification order should form part of the overall punishment, but did not form a definitive view on the issue as he deemed it unnecessary to do so on the facts of the case.

<sup>53</sup> Combining suspended sentences with other orders is considered in further detail in chapter 10 of this Report.

<sup>54</sup> [2018] IECA 194.

<sup>55</sup> *Ibid* at para 23.

<sup>56</sup> *Ibid* at para 17.

Nevertheless, the Court held that the fine imposed on him was unduly lenient on the basis that "he was in reality the person who orchestrated, authorised and conducted the criminal behaviour in question."<sup>57</sup>

- [9.32] The suspended sentence imposed on the manager in this case,<sup>58</sup> and the finding that the fine imposed was unduly lenient, is indicative of the gradual recognition of the Irish courts of the need for a sufficiently punitive response to this form of criminal behaviour. In this regard, the Court noted that "save in exceptional circumstances, a fine should be for a sum greater than the financial gain so that it satisfies the requirement that it is punitive and acts as a deterrent."<sup>59</sup>

#### 4. Suspended sentences for health and safety offences

- [9.33] Section 78 of the *Safety, Health and Welfare at Work Act 2005* (as amended) provides that a person found guilty of an offence under the Act is liable on summary conviction to a class A fine (maximum €5,000), a prison term not exceeding 12 months, or both, or on indictment to a maximum fine of €3 million, a prison term not exceeding two years, or both. Between 2005 and 2018, there were 339 prosecutions for health and safety offences. Two-hundred-and-sixty-nine corporate offenders and 70 individuals were prosecuted during this time period. In 89% of prosecutions taken, offenders pleaded guilty. The imposition of a fine was the predominant sentencing outcome for health and safety offences during this period. Fines ranged from between €200 and €2 million. Individuals were fined between €200 and €50,000 and corporate offenders were fined between €400 and €2 million. Other sanctions imposed during this time period include: five applications of the *Probation of Offenders Act 1907*, three Community Service Orders and 14 suspended sentences. There were also two charitable donations and a compensation order to be held on trust for the daughter of the deceased.<sup>60</sup>
- [9.34] While corporate bodies can be convicted of breaches of the criminal law, they cannot (for obvious reasons) be sentenced to a period of imprisonment. Therefore, cases concerning offences committed by corporate bodies are of limited relevance for the purposes of this

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<sup>57</sup> *Ibid* at para 23.

<sup>58</sup> While the suspended sentence imposed on the manager was, strictly speaking, for the separate offence of committing an act with intent to impede a prosecution contrary to sections 7(2) and 7(4) of the *Criminal Law Act 1997*, it was inextricably linked with the offence committed under the *Competition Act 2002*. After all, had there been no anti-competitive conduct there would have been no need to carry out an act so as to impede prosecution for said conduct.

<sup>59</sup> *Ibid* at para 23.

<sup>60</sup> This information was obtained through an analysis of the Annual Reports of the Health and Safety Authority between 2005 and 2018.

chapter.<sup>61</sup> Accordingly, this section will focus on the applicable principles insofar as they relate to the sentencing of individual white-collar offenders on foot of breaches of the *Safety, Health and Welfare at Work Act 2005*. Below, the Commission outlines four sentencing decisions in which individual offenders received fully suspended sentences of imprisonment, before discussing the first Irish decision in which an immediate custodial sentence was imposed for a breach of the 2005 Act.

- [9.35] First, in *The People (DPP) v Clare County Council and Scully*,<sup>62</sup> a retired local authority senior executive engineer pleaded guilty to offences under the 2005 Act. The case arose as a result of the death of a dumper truck driver when the truck he had been operating overturned and he was thrown from it. At the time of the accident, the worker was not wearing a seatbelt. The Circuit Criminal Court held that the death of the worker was foreseeable and preventable and would not have happened if the County Council and the engineer had enforced the wearing of seatbelts. The Court considered that the event marked a dishonourable end to the engineer's otherwise exemplary career. The Court imposed concurrent sentences of 12 months' imprisonment on the engineer, fully suspended for a period of two years. The Court took into account in mitigation the fact that the engineer was hard-working and diligent, had been a friend of the deceased, and had expressed genuine regret and remorse.
- [9.36] In *The People (DPP) v Cormac Building Contractors, Kildownet Utilities, Byrne and Molloy*,<sup>63</sup> a worker was fatally electrocuted when a truck-mounted concrete pump came into contact with 10,000 volt overhead power lines. The site manager and the director of the company pleaded guilty to failing to have a safe system of work, contrary to section 6 of the *Safety, Health and Welfare at Work Act 1989*.<sup>64</sup> Both offenders were also convicted of endangerment, contrary to section 13 of the *Non-Fatal Offences against the Person Act 1997*.
- [9.37] The Circuit Criminal Court heard that both offenders had been warned on numerous occasions about the dangers of the overhead power lines. An ESB engineer gave evidence

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<sup>61</sup> It is worth mentioning, however, that some corporate offenders have received some very heavy fines for health and safety offences. See, for example, *The People (DPP) v Roadteam Logistics Solutions (AKA Nolan Transport)* [2016] IECA 38, where a €1 million fine was upheld by the Court of Appeal. For a discussion on the applicable sentencing principles when sentencing corporate offenders in breach of the *Safety, Health and Welfare at Work Act 2005*, see O'Malley, *Sentencing Law and Practice*, 3rd ed (Round Hall 2016) at paras 20.04 – 20.09. In *The People (DPP) v Roseberry Construction* [2003] 4 IR 338 at page 341, the Court of Criminal Appeal set out the factors relevant to setting the appropriate fine in the context of corporate offenders.

<sup>62</sup> (Circuit Criminal Court, 16 and 17 February 2010).

<sup>63</sup> (Circuit Criminal Court, 24 November 2006).

<sup>64</sup> Section 6 of the *Safety, Health and Welfare at Work Act 1989* has since been replaced by section 12 of the *Safety, Health and Welfare at Work Act 2005*.

that he was passing the site when a crane caught his attention. He stopped his journey and went to the site office to warn the site manager of this danger. He told the Court that he saw nothing on site that would have alerted workers to the danger. On another occasion, a former HSA inspector issued directions in relation to the overhead wires at the site. On yet another occasion, a safety consultant hired by the main contractor outlined the dangers posed by the overhead lines and noted that better signage was needed. However, subsequent to signs being erected on the site, the same safety consultant became extremely alarmed when he saw a mobile crane working under the high voltage wires with no goalpost warning system in place.

- [9.38] The Court heard that both the company and the individual offenders had made apologies to the deceased's family and that a trust fund had been set up for the deceased's daughter. An offer of €10,000 in compensation had also been made to the deceased's family. The Court held that the offenders had made a mistake by not making sure that the work was stopped entirely until the correct measures had been put in place. The Court imposed a three-year suspended sentence on the site manager and a two-year suspended sentence on the director and commented that both men would have to live with the fact of the worker's death.
- [9.39] In *The People (DPP) v Technical Engineering and Tooling Services Ltd, Hunt, Kelly and Sheil*,<sup>65</sup> the company and its three directors pleaded guilty to placing at risk the safety, health and welfare of persons working at a tool milling machine, contrary to section 14 of the 2005 Act. The case arose in light of a fatal incident resulting from the bypassing of the interlocks on a milling machine, which meant that the machine could be operated without the guards in place. The Circuit Criminal Court heard that the homemade extension bar and drill were operating at about 10,000 rpm. There were warning labels on the machine that made it clear that extended pieces should not be operated at a speed greater than 8,000 rpm. At the time of the incident, no supervisor was present and no risk assessment for the milling machines was in place.
- [9.40] During the plea in mitigation, it was argued that: the company had an excellent safety record, a safety management system was in place, the managing director attended monthly safety meetings, safety notices were posted in the canteen and employees' duties were explained to them in a safety statement which each employee had signed. However, the Court also heard evidence that the managing director himself had no formal safety training. In imposing sentence, the Court noted that this fatal accident came some months after a "near miss" incident in 2005 which, the Court held, should have acted as a warning. The Court also described the company's paperwork as a "sham" and an attempt "to show everything was correct when it was not". Finally, the Court noted that the company had bypassed interlocks, used a homemade extension bar, had used grub

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<sup>65</sup> (Circuit Criminal Court, 6 March 2006).

screws, ignored warnings on the machines, provided no inspection or supervision and disabled the safety system. The Court concluded that, in respect of the three directors, there was no need for a deterrent element in the form of a fine. The Court imposed sentences of three years' imprisonment on each of the directors and suspended each of these sentences on conditions.

- [9.41] The fourth case study is *The People (DPP) v McKeown*,<sup>66</sup> in which the offender, a school bus owner, pleaded guilty to failing to manage and conduct his undertaking, and in particular failing to maintain a bus, so that non-employees were exposed to risks to their health and safety, contrary to section 12 of the 2005 Act. The case arose as a result of a bus crash in which a 15-year-old schoolboy was killed and other schoolchildren were injured.
- [9.42] Although the offender initially pleaded not guilty, he changed his plea to guilty three days into the trial. Accordingly, the Circuit Criminal Court did not attach as much weight to the guilty plea as would usually be merited. The Court did, however, note that the offender had co-operated fully with the HSA investigation and had shown genuine remorse. The Court also accepted evidence of his good character and low risk of reoffending. Finally, in light of the offender's difficult financial position, the Court considered there to be little point in imposing a fine and, as a result, imposed a 12-month suspended sentence.
- [9.43] The decision of *Health and Safety Authority v Walker*<sup>67</sup> represented a new departure for the Irish courts in that it was the first occasion in which an immediate custodial sentence was imposed for a breach of the 2005 Act. The offender, the skipper of a fishing vessel, pleaded guilty to a charge under section 11(1)(c)(ii) of the 2005 Act. One of his crew members, who was not wearing a life jacket, drowned after falling overboard. The offender was in breach of his legal obligations to put appropriate safety procedures in place and to ensure that a man overboard procedure was in place. The evidence was also that, although these jackets were available, the crew were not wearing them at the time as they found them awkward to work with. While taking into account the offender's plea in mitigation – the fact that he: was unaware that he was in breach of his legal obligations, attempted an unsuccessful rescue himself, and continued to suffer post-traumatic stress disorder following the accident – the Court noted that the loss of life, and the responsibility of the offender in this regard, merited an immediate custodial sentence. The Court imposed a six-month custodial sentence with the final two months suspended. It

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<sup>66</sup> (Circuit Criminal Court, July 2013).

<sup>67</sup> (Gorey District Court, April 2019).

should be noted, however, that the offender was released on bail pending the outcome of an appeal on sentence in the Circuit Court.<sup>68</sup>

## 5. Conclusion and recommendations

- [9.44] In its Issues Paper, the Commission sought views on the following two questions on the topic of suspended sentences and corporate-related offences:
- (1) Is a specific sentencing regime required for those who commit corporate-related offences?
  - (2) What factors should be relevant to the question of whether a custodial sentence (immediate or suspended) is appropriate in the case of competition offences and health and safety offences?
- [9.45] Some submissions expressed concerns that the social position of white-collar offenders may give rise to unfairness in that this category of offender, in contrast to the conventional criminal, invariably has the benefit of substantial personal mitigation. Nevertheless, even those submissions which raised this issue concluded that a separate sentencing regime would not be appropriate in the white-collar context. Rather, the overarching consensus emerging from the submissions was that the appropriate sentence should always be tailored to the gravity of the offence and the personal circumstances of the offender.
- [9.46] The Commission endorses the position put forward in the submissions. The Commission acknowledges and accepts that the concern raised in the submissions (and outlined earlier in this chapter) does raise potential problems in terms of the constitutional requirement of equality before the law.<sup>69</sup> However, a separate sentencing regime in which these personal mitigating factors are given less weight in a white-collar context would raise similar issues from an equality perspective. Such a situation would also be difficult to reconcile with the other constitutional requirement that an offender's personal circumstances always be given due weight in setting the appropriate punishment. Finally, such an approach would run counter to the principle that prison should be used as a sanction of last resort for non-violent first-time offenders. However, on the other hand, it is imperative that the societal harm caused by white-collar offending should always be reflected in the sentence imposed. Further, a sentencing court should always consider whether, based on the individual facts before it, the sentencing aim of general deterrence should be afforded priority.

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<sup>68</sup> At the time of writing, the Commission is not aware of the outcome of the Circuit Court appeal against sentence.

<sup>69</sup> As per Article 40.1 of the Constitution of Ireland.

[9.47] It is clear, therefore, that a balance must be struck between white-collar offenders receiving due credit for mitigation, while at the same time ensuring that the gravity of the offence is marked by an appropriate sanction. The Commission is of the view that the best mechanism to achieve this balance lies within the current parameters of Irish sentencing law. In other words, sentencing courts, when sentencing white-collar offenders, should, as well as giving due weight to personal mitigation, always properly assess the gravity of the offence, particularly the societal (and individual) harm caused by white-collar offending. As the case law discussed above highlights, the suspended sentence is a particularly appropriate sanction to simultaneously balancing these conflicting elements. However, the Commission also stresses that, in some cases of a sufficiently serious nature, it may be appropriate to impose an immediate sentence of imprisonment on offenders convicted of corporate related offences.

**R. 9.01** The Commission recommends that no separate sentencing regime should operate in the area of white-collar offending. Rather, a sentencing court should continue to determine the appropriate sentence by reference to the gravity of the offence and the personal circumstances of the offender.

[9.48] A limited number of factors were identified as being relevant for the purpose of determining whether a custodial sentence (immediate or suspended) is appropriate in cases of competition offences. It was posited that the amount of money involved, or the societal harm caused by the offending behaviour might be particularly important factors. The Commission is in agreement with these suggestions. In addition, the Commission is of the view that the following factors are relevant to the question of whether a custodial sentence, whether it be immediate or suspended, is appropriate in the circumstances of the case:

- The duration of the offending behaviour;
- The level of involvement and degree of culpability of the offender in implementing the cartel agreement;
- The level of involvement and degree of culpability of the offender in enforcing the cartel agreement;
- Whether the defendant's conduct was contrary to guidelines laid down in a company compliance manual;
- Whether the offender was compelled to participate under duress;
- whether, in the circumstances of the case, the imposition of a non-custodial sanction (e.g. a fine) would be inadequate to meet the sentencing aims of general and specific deterrence;



- The offender's personal circumstances such as a plea of guilty, lack of previous convictions and level of co-operation with the investigation;

[9.49] The following factors were suggested as relevant in considering whether or not a custodial sentence (suspended or immediate) is appropriate for breaches of the *Safety, Health and Welfare at Work Act 2005*;

- Death or serious injury has resulted from the incident;
- Risks have repeatedly been run;
- Warnings / near misses have been ignored;
- Flagrant and deliberate breaches of Health and Safety law are evident;
- Safety features have been deliberately disabled or bypassed;
- A high level risk or a significant degree of danger created by the offence;
- Evidence of a high degree of negligence or recklessness, and
- advertence to or knowingly taking risks with safety.
- Evidence that the offender's attitude to health and safety had been cavalier, careless or irresponsible;
- A serious systematic failure which put people at risk, even if no injury, or serious injury, actually occurred;
- Prompt admission of responsibility;
- A timely guilty plea;
- Steps taken to remedy deficiencies in the workplace after they were drawn to the employer's attention;
- A good safety record.

[9.50] The Commission endorses these suggestions as factors relevant to sentencing in the area of health and safety offences. Further, the Commission is also in agreement with another view put forward in the submissions that sentencing in the white-collar context would benefit from the development of sentencing guidance. The Commission is of the view that the relevant factors identified in this chapter may usefully be considered in the development of any sentencing guidelines in the area of competition offences and health and safety offences. Further, as noted at the outset of this chapter, white-collar crime encompasses a wide variety of offending. As such, the Commission considers that the

SGIC might usefully consider whether the various categories of white-collar offending not considered in this chapter would benefit from the development of tailored sentencing guidance.

**R. 9.02** The Commission recommends that the SGIC should have regard to the factors identified in this chapter in formulating any future sentencing guidance in respect of competition offences and health and safety offences.

**R. 9.03** The Commission also recommends that the various discrete types of offending behaviour which fall within the scope of the term “white collar crime” be examined by the SGIC with a view to the formulation of tailored sentencing guidance.

## CHAPTER 10 COMBINING SUSPENDED SENTENCES WITH OTHER ORDERS

### 1. Introduction

- [10.1] This chapter considers the use of suspended sentences of imprisonment in combination with other types of order that may be imposed on an offender following a conviction or a plea of guilty. In particular, the chapter considers the pairing of suspended sentences of imprisonment with: (1) the Community Service Order (CSO) and (2) monetary orders such as fines and compensation orders. The first section of the chapter outlines the law governing the CSO in this jurisdiction. It compares the CSO to the suspended sentence and discusses the current legislative prohibition on combining both of these sanctions. The second section analyses the circumstances in which it is appropriate to combine a suspended sentence with both a fine and a compensation order.
- [10.2] The final section outlines the Commission's recommendations. Despite the similarities between the CSO and the suspended sentence, the Commission recommends that the current legislative prohibition on combining these orders be maintained. This recommendation is made on two bases. First, the Commission considers it important, from a policy perspective, that the line between non-custodial sanctions (i.e. the CSO) and custodial sanctions (i.e. the suspended sentence) should not be blurred. Second, the broad discretion afforded to sentencing judges<sup>1</sup> in choosing the appropriate conditions of suspension allows for the imposition of community-based conditions of suspension. There is, therefore, little need from a practical perspective to make provision for the combination of these sanctions.
- [10.3] The Commission also recommends that the suspended sentence should rank just above the CSO on the scale of severity. While both sanctions are capable of catering for broadly similar sentencing aims, the CSO is statutorily classified as an alternative to custody (i.e. a non-custodial sanction), whereas the suspended sentence is more properly defined as a non-immediate custodial sentence. Furthermore, given the wide disparity in terms of the maximum punishment available for each sanction, the suspended sentence is generally more appropriate to reflect more serious offending behaviour and should therefore rank above the CSO on the scale of gravity.
- [10.4] In respect of combining the suspended sentence with a fine, the Commission recommends that, when imposing a fine upon an offender in combination with a suspended sentence, the sentencing court should always be careful to ensure that the fine is proportionate and gives the offender a reasonable prospect of

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<sup>1</sup> As per sections 99(3) and 99(4) of the *Criminal Justice Act 2006*.

payment. Finally, the Commission recommends that the payment of compensation may be taken into account as a mitigating factor indicative of remorse when assessing the severity of the sentence. However, the Commission also recommends that the payment of compensation should not, in the absence of other strong personal mitigation, justify the imposition of a fully suspended sentence. Otherwise, as stressed in the submissions, there may be the legitimate perception that more affluent offenders are effectively able to buy their way out of an immediate custodial sentence. This general rule should not, however, preclude a sentencing court from imposing a fully suspended sentence in circumstances where compensation has been paid and the offender has the benefit of other strong personal mitigation.

## 2. Suspended sentences and community service orders

### (a) The Criminal Justice (Community Service) Act 1983, as amended

[10.5] The *Criminal Justice (Community Service) Act 1983* introduced the community service order (CSO). The 1983 Act, as amended, provides that a sentencing court shall not make a CSO unless it is satisfied, having regard to the offender's circumstances, the assessment report of the Probation Service and, if necessary, having heard evidence from the probation officer, that the offender is a suitable person to comply with the terms of the order.<sup>2</sup> The offender must also have given his or her consent to the court prior to the imposition of the CSO.<sup>3</sup> The court must explain the effect of the CSO to the offender, as well as the consequences of failure to comply with its terms. The applicable punishment is a requirement to perform unpaid work for a specified number of hours – the minimum being 40 hours and the maximum being 240.<sup>4</sup>

[10.6] It is clear from the *Criminal Justice (Community Service) Act 1983* that the underlying rationale of the CSO is to provide an alternative to custody. Section 2 of the 1983 Act provides that a CSO may be made by any court (other than the Special Criminal Court) in respect of an offender who has been convicted of an offence for which, in the court's opinion, the appropriate sentence would otherwise have been one of imprisonment.<sup>5</sup> Sections 115 and 116 of the *Children Act 2001* provide that a court may impose a CSO under section 3 of the 1983 Act in respect of any child offender over the age of 16, if it considers that the imposition of such a sanction would be the most suitable way of

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<sup>2</sup> Section 4(1)(a) of the *Criminal Justice (Community Service) Act 1983*, as substituted by section 4(a) of the *Criminal Justice Act (Community Service) Amendment Act 2011*.

<sup>3</sup> Section 4(1)(b) of the *Criminal Justice (Community Service) Act 1983*, as substituted by section 4(a) of the *Criminal Justice Act (Community Service) Amendment Act 2011*.

<sup>4</sup> Section 3(2) of the *Criminal Justice (Community Service) Act 1983*.

<sup>5</sup> Section 2 of the *Criminal Justice (Community Service) Act 1983*.

dealing with the case.<sup>6</sup> Section 3(1)(a) of the 1983 Act, as amended, provides that, if the sentencing court is of the opinion that the offence merits a sentence of imprisonment of 12 months or less, it **shall** consider whether the imposition of a CSO in lieu of a sentence of imprisonment is appropriate in the circumstances of the case.<sup>7</sup> If the sentencing court is of the opinion that the offence merits a sentence of imprisonment of more than 12 months, it **may** consider whether the imposition of a CSO in lieu of a sentence of imprisonment is appropriate in the circumstances of the case.<sup>8</sup> In *Foley v Judge Murphy and DPP*,<sup>9</sup> the High Court (Dunne J) declared that, in order for a sentencing court to comply with section 2 of the 1983 Act, it must specify the term of imprisonment in substitution for which a CSO was made. Otherwise, it was held, the court does not have the jurisdiction to impose a CSO. However, the Court in *Foley* accepted that the term of imprisonment does not operate as a default punishment if the offender fails to comply with the terms of the CSO. Further, the courts do not need to explicitly state that a CSO was considered or to give reasons why a short prison sentence was preferred.<sup>10</sup>

- [10.7] In England and Wales, an unpaid work requirement may be made a condition of suspension under section 182 of the *Criminal Justice Act 2003*. The case law of the Court of Appeal of England and Wales has established that, where an offender who is subject to a suspended sentence has completed all or a substantial portion of the unpaid work condition of suspension, but has also breached another condition of suspension during the operational period, it is generally appropriate to activate the suspended sentence in

<sup>6</sup> As noted by Riordan, sections 115 and 116 of the *Children Act 2001* marked a departure from the requirement in section 2 of the 1983 Act that a CSO may only be imposed in lieu of a sentence of imprisonment. See Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at pages 191 – 195.

<sup>7</sup> Section 3(1)(a) of the *Criminal Justice (Community Service) Act 1983* as substituted by section 3(a) of the *Criminal Justice (Community Service) Amendment Act 2011*.

<sup>8</sup> Section 3(1)(b) of the *Criminal Justice (Community Service) Act 1983* as substituted by section 3(a) of the *Criminal Justice (Community Service) Amendment Act 2011*.

<sup>9</sup> [2005] IEHC 332, [2005] 3 IR 574.

<sup>10</sup> See *O'Brien v Coughlan* [2014] IEHC 425 and [2015] IECA 245. The Court of Appeal, although allowing the appeal on another ground, essentially agreed with the High Court on the community service point. The Court held that it may be desirable in general circumstances for a judge to expressly state that a community service order was considered, but it is not an obligatory requirement in that a failure to do so will not result in the invalidation of the CSO imposed. The Court of Appeal also rejected the argument that the trial judge was obliged to order the preparation of a report to assess the defendant's suitability for a community service order, stating that this need only be done once the judge had decided that the case could possibly be dealt with by way of a CSO. This analysis has also been endorsed in *Maguire v Governor of the Dóchas Centre* [2016] IEHC 378 and *Silaghi v Judge O'Hagan* [2017] IEHC 29.

part only.<sup>11</sup> However, as was held by the Court of Appeal of England and Wales in *R v Swallow*,<sup>12</sup> the completion of the unpaid work condition does not automatically guarantee only part-activation of a suspended sentence. In this regard, the Court held that:

“[t]he only principle is that each case in which an offender is liable to have activated a suspended sentence of imprisonment will depend upon its individual facts. The Court will need to make an assessment to what degree an unpaid work requirement represented a punishment for the offender and to what extent the work requirement had been completed by the time the liability for activation of the suspended sentence arose.”<sup>13</sup>

- [10.8] There is no specific provision under section 99 of the *Criminal Justice Act 2006* for a condition of unpaid work. However, given the broad discretion afforded to sentencing courts in respect of the conditions of suspension that it may impose,<sup>14</sup> it is possible for sentencing courts to impose community-based conditions of suspension, including that the offender perform unpaid work in the community. Indeed, in Judge Riordan’s study, one of the judges interviewed outlined a practice that he had developed whereby he would impose a suspended sentence with one of the conditions of suspension being that the offender carry out a certain amount of hours of unpaid work in the community.<sup>15</sup>
- [10.9] The pre-requisite in the 1983 Act that a custodial sentence would otherwise have been appropriate has been criticised on the basis that it unduly restricts the imposition of a CSO.<sup>16</sup> Many of the judges interviewed in Riordan’s study expressed a desire that the requirement in section 2 of the 1983 Act be removed.<sup>17</sup> Walsh and Sexton asserted that this pre-requisite was a major contributing factor to the relatively low rate at which they found that the CSO is used in Irish courts.<sup>18</sup> Finally, O’Malley asserts that “there is no

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

<sup>12</sup> [2013] EWCA Crim 719.

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

<sup>14</sup> As per sections 99(3) and 99(4) of the *Criminal Justice Act 2006*.

<sup>15</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 167.

<sup>16</sup> *Final Report of the Expert Group on the Probation and Welfare Service* (Government of Ireland 1999) at para 2.4.

<sup>17</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at pages 162 – 163.

<sup>18</sup> Walsh and Sexton, *An Empirical Study of Community Service Orders in Ireland* (Department of Justice, Equality and Law Reform 1999) at page 68. Riordan has also examined other reasons why the CSO may be underused in Irish courts. See Riordan, *The Role of the Community Service Order*

logical reason why the community service order should not operate as a 'stand-alone' provision."<sup>19</sup> While there is evidence that some judges circumvent the requirement in section 2 of the 1983 Act by imposing a CSO in circumstances where a custodial sentence might not otherwise have been imposed had the CSO option not been available,<sup>20</sup> the Commission notes in passing that the underuse of community sanctions in the Irish penal system is unfortunate,<sup>21</sup> particularly in light of recent findings that community sanctions may be far more effective in reducing recidivism rates than imprisonment. A 2020 policy review by the Department of Justice examined a significant amount of international empirical studies on the impact of imprisonment on recidivism rates, all of which pointed to a "growing body of evidence that short terms of imprisonment are less effective in terms of reducing recidivism than suspended sentences or community service."<sup>22</sup>

**(b) The combination of suspended sentences and community service orders**

- [10.10] A CSO may be combined with other orders,<sup>23</sup> but the legislative framework prohibits the imposition of a sentence of imprisonment, whether suspended or not, in combination with a CSO.<sup>24</sup> As noted by Walsh and Sexton, the terms of the *Criminal Justice (Community Service) Act 1983* clearly precluded a sentencing court from combining a sentence of imprisonment with a CSO. In this regard, they note that:

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*and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at pages 182 – 190.

<sup>19</sup> O'Malley, *Sentencing Law and Practice* 2nd ed (Round Hall 2006) at para 24.05.

<sup>20</sup> Walsh and Sexton, *An Empirical Study of Community Service Orders in Ireland* (Department of Justice, Equality and Law Reform 1999) at page 42.

<sup>21</sup> Research by the Irish Penal Reform Trust on sentencing in the District Court found that community service orders were under-used sanctions. The Trust noted that: "The fullest possible use should be made of existing measures such as community service orders (CSOs) and probation orders. This should be facilitated by increased resourcing of the Probation and Welfare Service." See Irish Penal Reform Trust, *Research Brief: Sentencing in the District Courts* (2003) <[https://www.iprt.ie/site/assets/files/6122/patterns\\_of\\_sentencing\\_research\\_brief\\_2003.pdf](https://www.iprt.ie/site/assets/files/6122/patterns_of_sentencing_research_brief_2003.pdf)> accessed on 15 April 2020. However, the Commission notes that the Prison Service Annual Service Report 2019 highlighted that 76% of all committals to prison under sentence were for a period of twelve months or less. This figure is suggestive of a significant underuse of the CSO as a substitute for short prison See Irish Prison Service, *Annual Report 2019* (Stationery Office 2019) at page 29.

<sup>22</sup> Department of Justice and Equality and Professor Ian O'Donnell, "An Evidence Review of Recidivism and Policy Responses" (May 2020) at page 11. The international studies and the findings arising from same are discussed in detail at pages 38 – 80.

<sup>23</sup> Other orders include licence revocation, disqualification or endorsement, confiscation, forfeiture or restitution of property, or payment of compensation, costs, or expenses. See section 3(3) of the *Criminal Justice (Community Service) Act 1983*.

<sup>24</sup> Section 3(1) of the *Criminal Justice (Community Service) Act 1983*.

“[section 3(1) of the 1983 Act] specifically states that the court before whom the offender is convicted may make a CSO in respect of the offence of which he is convicted *instead of dealing with him in any other way*. The clear implication is that a CSO cannot be combined with a term of imprisonment or a sentence of imprisonment which is suspended in whole or in part.”<sup>25</sup>

[10.11] Section 3(1) of the 1983 Act has since been substituted by section 3 of the *Criminal Justice (Community Service) Amendment Act 2011*. However, the wording of the amending provision also makes clear that the court may only impose a CSO “as an alternative” to a term of imprisonment. On one viewing, this legislative prohibition may seem slightly counterintuitive, given that the suspended sentence and the CSO share a number of similarities. Firstly, while the pre-requisite in section 2 of the 1983 Act that a custodial sentence would otherwise have been appropriate has been criticised, as noted above, the present law provides that neither penalty may be imposed unless the seriousness of the offending behaviour crosses the custody threshold.<sup>26</sup> Both sanctions can also be said to cater for broadly similar sentencing aims. As noted in chapter 3 of this Report, the suspended sentence can simultaneously serve the penal objectives of retribution, deterrence (general and specific) and rehabilitation. In a similar vein, the Commission notes that Head 23 of the *General Scheme for the Community Sanctions Bill 2014* provides for a number of matters that a sentencing court shall take into account in determining whether or not a community-based sanction is appropriate, including the seriousness of the offence, the facilitation of the rehabilitation of the person, and the extent to which the imposition of a supervised community sanction may reduce the likelihood of the person committing further offences. These three considerations largely mirror the primary sentencing aims underpinning the suspended sentence (retribution, deterrence – specific and general – and rehabilitation). Similarly, in the White Paper which preceded the

<sup>25</sup> Walsh and Sexton, *An Empirical Study of Community Service Orders in Ireland* (Department of Justice, Equality and Law Reform 1999) at page 68. The authors were making this point in the context of criticising a decision of the Central Criminal Court (unnamed) in which the offender was convicted of rape. The Court had adjourned the case for the preparation of a probation report on the offender. When the case came back before the Court for sentencing the Court imposed a sentence of seven years imprisonment. However, it also stipulated that it would review the sentence after the expiry of one year. With this in mind, the Court asked the probation service to submit a further report on the offender for the review hearing. This report should include an assessment of the offender's suitability for a CSO. When the case came up for review the Court suspended the remaining six years on a number of conditions, including a CSO of 240 hours. The authors properly criticise this decision as contravening the express terms of the statute, which prohibits the combination of suspended sentences and the CSO.

<sup>26</sup> For CSOs, this is set out in Section 3(1)(a) of the *Criminal Justice (Community Service) Act 1983* as substituted by section 3(a) of the *Criminal Justice (Community Service) Amendment Act 2011*. In the case of suspended sentences, the custody threshold has been developed through the case law. Most recently, see *The People (DPP) v DW* [2020] IECA 145 at paras 36 – 39. For a detailed discussion, see chapter 4 of this Report.



Oireachtas debates on the *Criminal Justice (Community Service) Bill 1983*,<sup>27</sup> the potential flexibility inherent in the CSO was described in the following terms:

“Community service orders can be seen from several viewpoints: either as a more positive and less expensive alternative to custodial sentences; as introducing into the penal system an additional dimension which stresses atonement to the community for the offence committed; or as having psychological value in bringing offenders into close contact with those members of the community who are most in need of help and support. To some, it might appear to have a symbolically retributive value. Thus although the Court order, which would deprive the offender of his leisure time and require him to do work for the community, would necessarily involve a punitive element, it would also provide an opportunity to the offender to engage in personal service to the community and this might in turn lead to a changed attitude and outlook on his part.”<sup>28</sup>

[10.12] Furthermore, the penalties applicable for a breach of the conditions of both sanctions, while at face value differ in their severity, on closer inspection, are also quite similar. In the case of a suspended sentence, pursuant to section 99(17) of the *Criminal Justice Act 2006*, the sentencing court at the activation hearing has a “double discretion to disregard the breach having regard to all the circumstances of the case and, even if moved to activate the sentence, the court may impose a lesser sentence than that originally specified.”<sup>29</sup> In terms of the CSO, under section 7(4) of the 1983 Act, an offender who fails without reasonable excuse to comply with one of the conditions listed in section 3 of the 1983 Act<sup>30</sup> will be guilty of a discrete offence under section 7(4) of the 1983 Act, as amended, which is punishable with a class D fine.<sup>31</sup> However, Section 8 of the 1983 Act, as amended<sup>32</sup> allows the court hearing the charge under Section 7(4) the alternative option of simply revoking the CSO, or revoking the CSO and dealing with the offender in any manner as if the CSO had not been made. Similarly, section 11(1) of the 1983 Act, as

<sup>27</sup> Community Service Orders (Stationery Office 1981).

<sup>28</sup> *Ibid* at para 5.

<sup>29</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 372.

<sup>30</sup> There are only three mandatory conditions attaching to a CSO, namely that the offender: report to the relevant officer for community service, perform satisfactorily the work required, and notify the officer of any change of address. See section 7(1) of the *Criminal Justice (Community Service) Act 1983* as amended by section 6 of the *Criminal Justice (Community Service) Amendment Act 2011*. These conditions are discussed in more detail below.

<sup>31</sup> Section 7(4) of the *Criminal Justice (Community Service) Act 1983*, as amended and read in light of section 7 of the *Fines Act 2010*.

<sup>32</sup> As amended by section 7 of the *Criminal Justice (Community Service) Amendment Act 2011*.

amended,<sup>33</sup> permits the sentencing court, upon hearing an application for revocation, to revoke the CSO and deal with the offender in any manner as if the CSO had not been made. Riordan notes that under “[s]ections 7, 8 and 11 of the *Criminal Justice (Community Service) Act 1983*, the court is unfettered in its discretion to deal with the offender in any manner the court might determine.”<sup>34</sup> This wide-ranging discretion is similar to the “double discretion” afforded to sentencing courts in determining how it should deal with a breach of a suspended sentence. Granted, there is a distinction to be drawn in that sections 8 and 11 of the 1983 Act do not necessarily presuppose the imposition of a custodial sentence upon revocation of the CSO,<sup>35</sup> whereas the only option open to the sentencing judge subsequent to the decision to revoke a suspended sentence is to activate the custodial sentence (in full or in part) which had been imposed, but suspended, at the original sentencing hearing. Nevertheless, the imposition of a custodial sentence is open to a sentencing judge subsequent to the decision to revoke a CSO. Indeed, in Riordan’s study, several of the judges interviewed stated that, notwithstanding the discretion vested in the court by the 1983 Act, they would invariably impose a sentence of imprisonment in the event of a breach of the conditions of a CSO.<sup>36</sup> Therefore, the potential consequences for breach of a CSO and the suspended sentence respectively is another feature common to both sanctions.

- [10.13] On closer inspection, however, it is clear that both sanctions were intended to, and indeed do, operate as separate and distinct punishments. First, there is no doubt, both from the debates in both Houses of the Oireachtas in the lead up to the enactment of the 1983 Act<sup>37</sup> and from an analysis of public opinion as to the efficacy of prisons in 1980s Ireland,<sup>38</sup> that the primary rationale behind the introduction of the CSO was to provide an

<sup>33</sup> Section 11(1) of the *Criminal Justice (Community Service) Act 1983*, was substituted by section 10 of the *Criminal Justice (Community Service) Amendment Act 2011*.

<sup>34</sup> See Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 146.

<sup>35</sup> As noted by the High Court in *The People (DPP) v Foley* [2005] IEHC 332, [2005] 3 IR 574, the term of imprisonment that is specified to be in lieu of the CSO does not operate as a default punishment if the offender fails to comply with the terms of the CSO.

<sup>36</sup> *Ibid* at pages 173 – 174.

<sup>37</sup> See Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at pages 136 – 141.

<sup>38</sup> Riordan also traces the political and public desire for the provision of an alternative to prison, in light of a number of converging factors: namely: prison over-crowding, a growing belief that rehabilitation within a prison setting was inadequate in light of a lack of rehabilitation services in Irish prisons, the ever-increasing cost of imprisonment, its inefficacy as a deterrent measure, and a growing recognition that community service may be a more useful form of punishment than imprisonment. See Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at pages 123 – 140.

alternative to custody.<sup>39</sup> In contrast, the suspended sentence is better defined as a non-immediate custodial sanction. As discussed in chapter 4 of this Report, the first limb of the *O'Keefe* principle requires that, before a sentencing court imposes a suspended sentence, it must first be satisfied that the offence is sufficiently serious to merit a custodial sentence. It should then, as per the *Mah-Wing* principle, set the length of that custodial sentence. Only having imposed and set the length of the custodial sentence, should the sentencing court then proceed to consider whether it is appropriate to suspend it. In contrast, while a sentence of imprisonment is specified in the case of the CSO, this sentence of imprisonment is then expressly substituted for a CSO. As noted, a custodial sentence (but not necessarily *the same* custodial sentence which was specified and replaced by the CSO) may be imposed upon a breach of a CSO. However, this is quite different to the situation in the case of a revocation of a suspended sentence, where the custodial sentence that was imposed at the outset is then activated (in full or in part). In short, the crucial distinction between the two sanctions is that the CSO is an express alternative to a custodial sentence, whereas the suspended sentence is a non-immediate custodial sentence.

- [10.14] The conditions of suspension available for the two sanctions are also a point of distinction. In the case of the CSO, the offender is required to adhere to three conditions, namely that he or she report to the relevant officer for community service, perform satisfactorily the work required, and notify the officer of any change of address.<sup>40</sup> On the other hand, as discussed in chapter 4 of this Report, a sentencing court retains a very broad discretion as to the conditions of suspension which may be imposed. As well as the mandatory condition to keep the peace and be of good behaviour,<sup>41</sup> these conditions may be quite onerous, subject to the principle that they are proportionate and afford the offender with a reasonable opportunity of compliance, based on his or her personal circumstances.<sup>42</sup>
- [10.15] Finally, while both sanctions do serve broadly similar sentencing aims, the respective applicable punishments for each demonstrate that the suspended sentence is generally<sup>43</sup>

<sup>39</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 144.

<sup>40</sup> Section 7(1) of the *Criminal Justice (Community Service) Act 1983* as amended by section 6 of the *Criminal Justice (Community Service) Amendment Act 2011*.

<sup>41</sup> As per section 99(2) of the *Criminal Justice Act 2006*.

<sup>42</sup> As per sections 99(3) and 99(4) of the *Criminal Justice Act 2006*. See chapter 3 of this Report for a detailed discussion of the case law on this issue.

<sup>43</sup> Although, the decision of *The People (DPP) v O'Reilly* [2007] IECCA 118, [2008] 3 IR 632 may be seen as an exception to this general perception. In this case, the offender pleaded guilty to, among other things, dangerous driving causing death, which carries a maximum sentence of 10 years'

the more appropriate sanction in cases of more serious offending behaviour. After all, apart from mandatory terms of imprisonment, there is no limit to the length of a sentence of imprisonment that may be suspended under section 99(1) of the *Criminal Justice Act 2006*. Indeed, the suspended sentence is often utilised in cases of serious offending behaviour, and is available, and often availed of, in the sentencing of offences which carry a presumption of an immediate custodial sentence.<sup>44</sup> In contrast, the maximum punishment under a CSO is 240 hours unpaid work.<sup>45</sup> Walsh and Sexton in their comprehensive study on the CSO in Ireland, found that, out of 297 CSOs examined in one particular year, only 13 were made in the Circuit Court, one in the Central Criminal Court, while the remaining 283 were imposed in the District Court.<sup>46</sup> As noted by Riordan, by virtue of the maximum punishment of 240 hours unpaid work, “[c]ommunity service as operated in Ireland is almost exclusively a penalty reserved for cases disposed of in the District Court where the maximum penalty on conviction is twelve months imprisonment.”<sup>47</sup>

### 3. Suspended sentences and monetary orders

#### (a) Fines

[10.16] Section 50 of the *Criminal Justice Bill 1967* proposed the suspension of both sentences of imprisonment and fines. However, the 1967 Bill never became law and when suspended sentences were put on a statutory footing under section 99 of the *Criminal Justice Act 2006*, the section provided for the power to suspend sentences of imprisonment only. Of course, there is nothing in section 99 of the 2006 Act to preclude a sentencing court from imposing a fine together with a suspended sentence. Section 10(3) of the *Criminal Law Act 1997* provides that a person convicted on indictment may be fined in lieu of, or in

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imprisonment. He received a five-year suspended sentence. The Court of Criminal Appeal held that this sentence was unduly lenient and resented the defendant to 240 hours of community service. The Court held that, in cases such as these a court must meet the requirements of both specific and general deterrence and that, on the facts of the case before it, a CSO would “constitute a plainly visible form of deterrence for other road users in the locality where this offence occurred and where all the affected parties reside. However, it should be noted that Riordan properly criticises this decision as being “difficult to reconcile with the requirements of Section 2 of the 1983 Act which requires the prior contemplation of an actual custodial sentence”. See Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 152 (fn 40).

<sup>44</sup> See chapter 6 of this Report.

<sup>45</sup> Section 3(2) of the *Criminal Justice (Community Service) Act 1983*.

<sup>46</sup> Walsh and Sexton, *An Empirical Study of Community Service Orders in Ireland* (Department of Justice, Equality and Law Reform 1999) at page 65.

<sup>47</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 188.

addition to, another sanction, unless the offence carries a mandatory penalty. While section 10(3) of the 1997 Act does not apply to summary offences, O'Malley asserts that a District Court judge is likely vested with the jurisdiction to combine a suspended sentence with a fine when imposing sentence for any offence in which he or she is statutorily empowered to impose a fine, a term of imprisonment, or both.<sup>48</sup>

[10.17] It is clear, therefore, that Irish sentencing courts may combine a suspended sentence with a fine. However, the Commission notes that there are some potential problems with this practice. For instance, if the two sanctions were to be simultaneously imposed upon an offender, he or she could, in principle, be liable to serve two prison sentences – one for the non-payment of the fine<sup>49</sup> and the other in the event that the suspended sentence was activated. This issue was discussed by the Court of Appeal of England and Wales in *R v King*.<sup>50</sup> In this case, a fine and a suspended sentence were imposed for burglary. The single judge granted leave to appeal due to a concern that the offender may end up serving two prison sentences for the same offence. While dismissing the appeal, the Court did make the following point:

"There is nothing in principle to prevent such a course being taken... The only warning that this court would like to give is that in imposing a fine, special care should be taken in such cases to see that it is well within the man's means to pay, otherwise if a fine is given which results in imprisonment, then the danger foreseen by the single judge might well arise."<sup>51</sup>

[10.18] Therefore, according to the judgment in *King*, the amount of the fine should always be assessed by reference to the offender's means so as to ensure that the order to pay a fine does not, in essence, amount to a sentence of imprisonment. This is a well-accepted general principle in Irish sentencing law<sup>52</sup> and has been given statutory force in section 5 of the *Fines (Payment and Recovery) Act 2014*. Otherwise, coupling a fine with a suspended sentence may ultimately result in a much more lenient sanction for affluent

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<sup>48</sup> O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 22.17.

<sup>49</sup> However, it should be noted that imprisonment for non-payment of a fine is the enforcement measure of last resort, see section 2(1) of the *Courts (No. 2) Act 1986*, as substituted by section 20(b) of the *Fines (Payment and Recovery) Act 2014*.

<sup>50</sup> [1970] 54 Cr App R 362.

<sup>51</sup> [1970] 1 WLR 1016 at 1017; [1970] 54 Cr App R 362. The same principle was applied by the Court of Appeal of England and Wales in *R v Leigh* [1970] 54 Cr app R 169.

<sup>52</sup> See O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at para 22.17.

offenders than offenders of less means.<sup>53</sup> Indeed, albeit in a slightly different context, some Irish academics have expressed concerns that the informal “poor-box” system that currently operates in Ireland caters for socioeconomic disparities in the Irish criminal justice system, whereby “certain defendants may be able to avoid punishment via the poor box system, while defendants who cannot afford the donation may have no option but to face the full rigour of the law.”<sup>54</sup> In its 2005 *Report on the Court Poor Box: Probation of Offenders*,<sup>55</sup> the Commission acknowledged that there was at least the perception that affluent offenders could buy their way of a conviction<sup>56</sup> and recommended that the poor box system be replaced with a more transparent statutory reparation fund.<sup>57</sup> Head 30 of the *General Scheme of the Criminal Justice (Community Sanctions) Bill 2014* proposes the establishment of such a statutory system. However, the Commission notes that there has been no further progress in moving this scheme onto the next stage of the legislative process.

- [10.19] In chapter 4 of this Report, the Commission recommended that, when imposing conditions of suspension, the Court should always ensure that these conditions are proportionate and give the offender a reasonable prospect of compliance. The Commission is of the view that the same principle should be applied by sentencing courts when imposing a fine upon an offender, particularly when this fine is in combination with a suspended sentence. In other words, the sentencing court should always be careful to ensure that the fine is proportionate and gives the offender a reasonable prospect of payment, based on his or her financial means.

### **(b) Compensation orders**

- [10.20] Reparation as a sentencing aim has recently achieved greater recognition in many jurisdictions such as England and Wales,<sup>58</sup> New Zealand<sup>59</sup> and Canada.<sup>60</sup> In Ireland, the

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<sup>53</sup> Wasik, “Sentencing Guidelines: The Problem of Conditional Sentences” (1994) 13 *Criminal Justice Ethics* 50.

<sup>54</sup> O’Donnell, “Crime, Punishment and Poverty: Who gets punished?” in Bacik (ed), *Crime and Poverty in Ireland* (Round Hall 1998) at page 43; see also Fitzpatrick, “A Social Policy Essay on Ireland’s Prison Population” (2015) *Academia Online* <[https://www.academia.edu/7660226/Social\\_Policy\\_Essay\\_on\\_Irelands\\_Prison\\_Population](https://www.academia.edu/7660226/Social_Policy_Essay_on_Irelands_Prison_Population)> accessed on 18 June 2020 at page 4.

<sup>55</sup> (LRC 75 – 2005).

<sup>56</sup> *Ibid* at para 1.42.

<sup>57</sup> *Ibid* at para 1.43.

<sup>58</sup> Section 142 of the *Criminal Justice Act 2003* (England and Wales).

<sup>59</sup> Section 7 of the *Sentencing Act 2007* (New Zealand).

<sup>60</sup> Section 718 of the *Canadian Criminal Code*.

Supreme Court has considered reparation to be a legitimate sentencing aim.<sup>61</sup> However, with regard to the purpose or rationale underpinning compensation orders, there is no obvious consensus. Some maintain that compensation orders advance both restorative and reparative objectives and impress a sense of responsibility on offenders.<sup>62</sup> On the other hand, the Court of Appeal of England and Wales has stated that empowering the courts to make compensation orders spares victims from having to take separate civil proceedings.<sup>63</sup> Nevertheless, there are significant differences between civil and criminal proceedings with respect to the payment of compensation. Most notably, a court imposing a compensation order in a criminal case must have regard to the offender's means.<sup>64</sup> This is an irrelevant consideration when making an award against a defendant in civil proceedings.<sup>65</sup> Furthermore, as noted by the Court of Criminal Appeal in *The People (DPP) v Lyons*,<sup>66</sup> the fact that an offender who has been convicted in a criminal court and faces sentencing, has also previously been held liable to pay compensation on foot of a civil action, cannot have any bearing on the severity of the sentence imposed by the criminal court.<sup>67</sup>

[10.21] Court-ordered compensation in the criminal sphere is governed by section 6 of the *Criminal Justice Act 1993*. Section 6(1) provides that a court may, instead of or in addition to any other penalty, unless it considers there to be any reason to the contrary, make a compensation order in respect of any personal injury or loss resulting from the offence of which the offender has been convicted. Section 6(2) provides that the order shall be of such an amount as the court considers appropriate, having regard to any evidence and / or representations made by or on behalf of the offender, the injured party or the prosecutor. The order for compensation shall not exceed the amount of damages that, in the opinion of the court, the injured party would be entitled to in a civil action against the offender.<sup>68</sup> Section 6(5) of the 1993 Act provides that, in setting the amount of the compensation order, the Court shall have regard to the offender's means.

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<sup>61</sup> *The People (DPP) v MS* [2000] 2 ILRM 311 at page 318; *The People (DPP) v Daniels* [2014] IESC 64. See also the treatment of *Daniels* in *Balmer v Minister for Justice and Equality* [2016] IESC 25, though the specifically reparative elements of *Daniels* were not stressed in that case, some important aspects of the decision were affirmed.

<sup>62</sup> Shapland, Willore and Duff, *Victims in the Criminal Justice System* (Gower 1985).

<sup>63</sup> *R v Inwood* [1974] 60 Cr App R 70 at page 73.

<sup>64</sup> Section 6(5) of the *Criminal Justice Act 1993*.

<sup>65</sup> *R v Oddy* [1974] 59 Cr App 66.

<sup>66</sup> [2014] IECCA 27.

<sup>67</sup> *Ibid* at para 63.

<sup>68</sup> Section 6(2) of the *Criminal Justice Act 1993*.

[10.22] It is clear from the wording of section 6(1) of the 1993 Act, which provides that sentencing courts may make compensation orders in addition to or instead of any other penalty, that a sentencing court is permitted to impose a suspended sentence in combination with a fine. As the Court of Criminal Appeal in *The People (DPP) v C*,<sup>69</sup> noted:

“in enacting s.6(1) of the 1993 Act, the Oireachtas clearly intended that a sentencing court should have discretion when it makes an order requiring compensation to be paid by a convicted person to a victim that it be in addition to or instead of a custodial sentence and the Oireachtas conferred such a discretion on the court.”<sup>70</sup>

[10.23] Accordingly, in the above decision the Court of Criminal Appeal rejected the argument that a sentencing court is prohibited from imposing a custodial sentence in combination with a compensation order. In this regard, the Court noted that:

“the payment of compensation is just one of those factors to be taken into account. It has never been, as far as this court is aware, a principle that a custodial sentence is to be excluded where compensation has been paid.”<sup>71</sup>

[10.24] However, while payment of compensation cannot preclude a sentencing court from imposing a custodial sentence in tandem with the compensation order, it is clear from the case law that the payment of compensation may legitimately serve as a mitigating factor tending to reduce the severity of the sentence. As the Court of Criminal Appeal noted in *The People (DPP) v McCabe*,<sup>72</sup> the payment of compensation is a matter “which the court can, and must, take into account in deciding what the appropriate sentence should be.”<sup>73</sup> In *The People (DPP) v Boyle*,<sup>74</sup> the respondent had pleaded guilty to 25 representative counts of theft and forgery, amounting to an estimated €204,000. A two-year sentence, suspended in its entirety, was imposed by the sentencing court. In delivering judgment on the DPP’s undue leniency application, the Court of Appeal, while acknowledging that there were “significant mitigating factors” present,<sup>75</sup> held that this “was a case in which the

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<sup>69</sup> (Court of Criminal Appeal, 18 February 2002).

<sup>70</sup> *Ibid* at page 6.

<sup>71</sup> *Ibid* at page 6.

<sup>72</sup> [2005] IECCA 90.

<sup>73</sup> *Ibid* at para 39.

<sup>74</sup> [2019] IECA 160.

<sup>75</sup> The respondent had entered an early plea of guilty, had no previous convictions and had made significant positive contributions to charity. There were also three reports before the Court, detailing traumatic incidents and events during the respondent’s childhood.



offending was of such seriousness that a custodial sentence was required.”<sup>76</sup> In re-sentencing the respondent, the Court was of the view that a sentence of two years’ imprisonment would have been appropriate to reflect the gravity of the offending behaviour. However, the Court further reduced the figure of two years’ imprisonment to 15 months’ imprisonment on account of the fact that the respondent had, since the offence, paid €25,000 in compensation to the injured party.

[10.25] The Courts have also made it clear that the payment of compensation should have a limited influence in mitigating the otherwise deserved punishment. For instance, in *The People (DPP) v Lyons*,<sup>77</sup> the offender was found guilty of sexual assault that fell into the upper range on the scale of gravity. He was sentenced to six years’ imprisonment with the last five-and-a-half years suspended. The sentencing court also ordered that the offender pay €75,000 in compensation to the victim, pursuant to section 6 of the *Criminal Justice Act 1993*. Having found that the sentencing court gave undue weight to the mitigating factors in the case, the Court of Criminal Appeal substituted a sentence of six years’ imprisonment with the final four years suspended. During the course of the judgment, the Court noted that the fact that an offender has agreed to pay compensation to the victim should only be “a marginal factor in mitigation, where the payment creates a special burden or hardship on the accused.”<sup>78</sup>

[10.26] Similarly, the fact that compensation has been paid cannot, in and of itself, justify the imposition of a fully suspended sentence, particularly in cases of serious offending behaviour. As discussed in detail in chapter 6 of this Report, the offence of rape is subject to a presumption of an immediate custodial sentence. This presumption may only be rebutted on foot of “wholly exceptional circumstances”. In *The People (DPP) v McLaughlin*,<sup>79</sup> the Court of Criminal Appeal held that the payment or offer of compensation, however substantial, does not qualify as an exceptional circumstance sufficient to rebut the presumption of an immediate custodial sentence so as to justify the imposition of a suspended sentence. In this case, the sentencing court had imposed a three year fully suspended sentence for rape, in circumstances where the victim accepted an offer of €10,000 in compensation. In finding that the sentence imposed was unduly lenient, the Court of Criminal Appeal quashed the original sentence and re-sentenced the offender to four years’ imprisonment with the final three years suspended in light of mitigating factors, including the payment of compensation.

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<sup>76</sup> *Ibid* at para 12.

<sup>77</sup> [2014] IECCA 27.

<sup>78</sup> *Ibid* at para 67.

<sup>79</sup> [2005] IECCA 91, [2005] 3 IR 198.

- [10.27] However, while the payment of compensation should not, in and of itself, justify the imposition of a suspended sentence on foot of serious offending behaviour, the case law demonstrates that this factor, in combination with other compelling personal mitigating factors, may justify the imposition of a fully suspended sentence in exceptional circumstances. In *The People (DPP) v McCabe*,<sup>80</sup> the offender received a wholly suspended sentence for aggravated sexual assault, having paid the victim €15,000 in damages. The Court of Criminal Appeal held that the sentencing judge had erred in principle by treating the payment of compensation as a factor that, without taking into account the other mitigating factors, justified suspension. However, in light of the other strong personal mitigating factors present – most notably his early admission of guilt, lack of previous convictions and impressive and sustained efforts at rehabilitation since the offending behaviour – the Court decided to allow the suspended sentence imposed to stand.
- [10.28] Similarly, in *The People (DPP) v Hehir*,<sup>81</sup> the respondent pleaded guilty to several counts of fraud, amounting to €221,000. The sentencing judge imposed a two-year sentence of imprisonment, wholly suspended for a period of five years. The Court of Appeal upheld this decision, primarily on the basis of the mitigating factors present, namely the very early admission of guilt, his lack of previous convictions, the fact that the offending arose out of a serious gambling addiction and, finally, the fact that the respondent had paid back almost €30,000. In *The People (DPP) v Smith*,<sup>82</sup> the Court of Appeal upheld a fully suspended sentence imposed on the respondent for one count of causing serious harm, contrary to section 4 of the *Non-Fatal Offences against the Person Act 1997*. The Court held that the various mitigating factors present,<sup>83</sup> including the fact that the respondent offered to pay the victim €1,000 in compensation, meant that the imposition of a fully suspended sentence was justified in the circumstances of the case.

#### **4. Conclusion and recommendations**

- [10.29] In its Issues Paper, the Commission sought views on four questions on the topic of combining suspended sentences with other orders:

- (1) Do you think a suspended sentence should be capable of being combined with a community service order (CSO)?

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<sup>80</sup> [2005] IECCA 90.

<sup>81</sup> [2018] IECA 244.

<sup>82</sup> [2019] IECA 1.

<sup>83</sup> The respondent had entered an early plea, had no previous convictions, the probation report had indicated that, since the offence, the respondent had changed the course of his life – he was now in stable employment, in a stable relationship and was a father to a young child.

- (2) Do you think a suspended sentence would be appropriate where the offence is too serious for a CSO, but the offence is not serious enough to warrant an immediate and /or lengthy sentence of imprisonment?
- (3) Do you think compensation orders should be regarded as a mitigating factor justifying suspension?

[10.30] The proposal in the first question was met with general approval from consultees. The decline in the use of community sanctions by the Irish courts was seen as a regrettable development, and it was argued that the attachment of such orders to suspended sentences might promote their use. Additionally, given that suspended sentences are often imposed in cases of serious offending behaviour (and the conditions of suspension can, it was suggested, be relatively undemanding), it was argued that it would be desirable to impose additional conditions of suspension on offenders through the use of community sanctions.

[10.31] The Commission notes the merit in the overarching argument put forward in the submissions. Indeed, as noted earlier in this chapter, the CSO and the suspended sentence do have a number of common features. However, at present, there are two obstacles to the proposal to make provision for the combination of the suspended sentence and the CSO:

(1) The terms of the *Criminal Justice (Community Service) Act 1983* preclude the combination of a community order with a sentence of imprisonment, including a suspended sentence of imprisonment, and

(2) As discussed in chapter 4 of this Report, the *O'Keefe* principle, which has been accepted in Irish law, requires that a sentencing court first be satisfied that the offence is sufficiently serious to merit a custodial sentence. In this regard, a sentencing court must, before considering whether a suspended sentence is appropriate, first decide that all non-custodial sanctions, including a CSO, would not be appropriate in the circumstances of the case.

[10.32] Therefore, both the statutory framework regulating the CSO, and the general principles governing the suspended sentence in this jurisdiction, present both sanctions as mutually exclusive, as opposed to mutually complementary, penal sanctions. As discussed above, the rationale for this distinction is that the legislative framework for CSOs expressly frames the sanction as an alternative to custody (i.e. a non-custodial sanction), whereas section 99 of the *Criminal Justice Act 2006*, and the attendant case law defines the suspended sentence as a non-immediate custodial sanction. Crucially, while a sentence of imprisonment is specified in the case of the CSO, this sentence of imprisonment is then expressly substituted for a CSO. As noted, a custodial sentence (but not necessarily the custodial sentence which was specified and replaced by a CSO) may be imposed upon a

breach of a CSO. However, this is quite different to the situation in the case of a revocation of a suspended sentence, where the custodial sentence that was imposed at the outset is then activated (in full or in part).

[10.33] The Commission is of the view that the legislative prohibition on combining the two penal sanctions is, on balance, justified. The distinction between the suspended sentence as a non-immediate custodial sentence and the CSO as a non-custodial alternative to imprisonment, has been discussed in detail in this chapter. The Commission considers it important, from a practical perspective, not to blur this dividing line between custodial and non-custodial sanctions by permitting the combination of the two sanctions. Further, the Commission is of the view that the benefit of making provision for the combining of both orders would, in practice, be minimal. One of the main arguments put forward in the submissions was that the suspended sentence would benefit from being able to impose community-based conditions of suspension. However, the Commission notes that sections 99(3) and 99(4) of the *Criminal Justice Act 2006* provides sentencing courts with a wide discretion as to the conditions of suspension that it may impose. It is therefore open to a sentencing judge to require, as part of the conditions of suspension, that the offender participate in some kind of community service. Indeed, as noted above, in Riordan's study one of the judges interviewed outlined a practice that he had developed, whereby he would impose a suspended sentence but would then impose a condition of suspension that the offender carry out a certain amount of hours of unpaid work in the community.<sup>84</sup> Given the broad discretion afforded to sentencing courts in respect of the conditions of suspension that it may impose, it is clearly open to it to implement a strong community-based element into the sentence, if deemed to be appropriate in the circumstances of the case.

[10.34] In summary, the Commission is of the view that it would be undesirable (from a policy perspective) and unnecessary (from a practical perspective) to permit the combination of both sanctions. The Commission is of the view, therefore, that both sanctions should remain as important, but discrete, sentencing options available to Irish sentencing courts.

**R. 10.01** The Commission recommends that suspended sentences should not be made capable of being imposed in combination with community service orders.

[10.35] However, the Commission does acknowledge and agree with the submission that the underuse of community sanctions in the Irish penal justice system is a regrettable development. This is particularly unfortunate in light of the recent review by the Department of Justice which found that there was a "growing body of evidence that short

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<sup>84</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 167.

terms of imprisonment are less effective in terms of reducing recidivism than suspended sentences or community service.”<sup>85</sup> As noted earlier, Walsh and Sexton asserted that the prior custodial requirement was a major contributing factor to the relatively low rate with which the CSO was utilised in Irish courts.<sup>86</sup> In its 2005 *Report on the Court Poor Box: Probation of Offenders*, the Commission noted with approval the recommendation of the 1999 *Final Report of the Expert Group on the Probation and Welfare* that the CSO be made a non-custodial sanction in its own right.<sup>87</sup> In this regard, the Commission welcomes the proposal for an enhanced scheme of community sanctions that is being proposed in the General Scheme of the *Community Sanctions Bill 2014*.<sup>88</sup> The scheme provides for a wide array of community sanctions and, importantly, these proposed sanctions, including the Probation Supervision Order<sup>89</sup> do not require that the court first satisfy itself that a custodial sentence would otherwise have been appropriate. This has the potential to broaden the application and use of community sanctions in the Irish penal system.

- [10.36] The Commission also welcomes the proposal to place the Probation Service on a statutory footing,<sup>90</sup> and the enhanced role of the Service proposed in the scheme, both with respect to the suspended sentence,<sup>91</sup> and the other proposed community sanctions.<sup>92</sup> Some of the submissions received expressed regret that that the General Scheme of the *Criminal Justice (Community Sanctions) Bill 2014* has not been moved onto the next stage of the legislative process. The Commission agrees with this view and notes that some progress in this regard is essential in ensuring that community sanctions become a more widely used sanction in the Irish criminal justice system. To enhance their use, and indeed utility, there is much merit in the idea that Community Service should be

<sup>85</sup> Department of Justice and Equality and O’Donnell, “An Evidence Review of Recidivism and Policy Responses” (May 2020) at page 11. The international studies and the findings arising from same are discussed in detail at pages 38 – 80.

<sup>86</sup> Walsh and Sexton, *An Empirical Study of Community Service Orders in Ireland* (Department of Justice, Equality and Law Reform 1999) at page 68.

<sup>87</sup> (LRC 75-2005) at para 3.50.

<sup>88</sup> See Part 4 of the General Scheme of the *Criminal Justice (Community Sanctions) Bill 2014*.

<sup>89</sup> Under Head 25 of the General Scheme of the *Criminal Justice (Community Sanctions) Bill 2014*.

<sup>90</sup> In its 2005 *Report on the Court Poor Box: Probation of Offenders* (LRC 75-2005), the Commission endorsed the recommendations of the 1999 *Final Report of the Expert Group on the Probation and Welfare Service* to place the Probation Service on a statutory basis. Indeed, the Commission notes with approval that many of the recommendations put forward in the 1999 Report, and ultimately endorsed in the Commission’s 2005 Report are reflected in the General Scheme of the *Criminal Justice (Community Sanctions) Bill 2014*. This underscores the importance in ensuring that the General Scheme of the *Criminal Justice (Community Sanctions) Bill 2014* is moved onto the next stage of the legislative process.

<sup>91</sup> See head 48 of the General Scheme of the *Criminal Justice (Community Sanctions) Bill 2014*.

<sup>92</sup> See Part 4 of the General Scheme of the *Criminal Justice (Community Sanctions) Bill 2014*.

reframed as a standalone penalty, without a pre-requisite that the case merits a particular sentence of imprisonment before a CSO can be imposed.

- [10.37] Responses to the second question were unanimously in support of the view that suspended sentences should form a sort of “middle ground” between the lower end of the punitive scale, i.e. between the CSO and the immediate sentence of imprisonment. As discussed earlier in this chapter, while both sanctions do share some common characteristics, the suspended sentence is generally the more appropriate sanction in cases of serious offending behaviour. This is evidenced by the fact that, apart from mandatory terms of imprisonment, there is no limit to the length of a sentence of imprisonment that may be suspended under section 99(1) of the *Criminal Justice Act 2006*. As noted earlier, the suspended sentence is often utilised in cases of serious offending behaviour, and is available, and indeed is often availed of, in the sentencing of offences which carry a presumption of an immediate custodial sentence.<sup>93</sup> In contrast, the maximum punishment under a CSO is 240 hours unpaid work<sup>94</sup> and the Irish literature suggests that the CSO is almost exclusively a sanction of the District Court.<sup>95</sup>
- [10.38] Therefore, while the CSO and the suspended sentence share some common features, particularly in terms of the penological aims that they operate in furtherance of, the Commission is of the view that the suspended sentence should rank above the CSO on the scale of severity.

**R. 10.02** The Commission recommends that suspended sentences should rank just below a term of immediate imprisonment, and above the CSO on the scale of severity.

- [10.39] Submissions on question no (3) were largely in agreement with the principles established in the case law on this issue, as discussed above. Most submissions agreed that, in principle, the payment of compensation may be taken into account as a mitigating factor, serving to reduce the severity of the sentence. However, this point was almost unanimously qualified with the assertion that the payment of compensation should not, in and of itself, justify a fully suspended sentence where an immediate custodial sentence would otherwise be appropriate, particularly in cases of serious offending. The majority of the submissions expressed concerns that such a situation would give rise to the perception that affluent offenders were effectively able to buy their way out of an immediate custodial sentence.

<sup>93</sup> See chapter 6 of this Report.

<sup>94</sup> Section 3(2) of the *Criminal Justice (Community Service) Act 1983*.

<sup>95</sup> Riordan, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective* (PhD Thesis, University College Cork 2009) at page 188.

[10.40] The Commission is largely in agreement with the submissions received on this question. The payment of compensation as a mitigating factor is consistent with the constitutional requirement that the offender's personal circumstances always be taken into account. However, this mitigating factor should not, in and of itself, justify the imposition of a fully suspended sentence, particularly in cases of serious offending behaviour. Such a situation would, as strongly expressed in the submissions, give rise to the perception that offenders are effectively able to buy their way out of prison. As outlined earlier in this chapter, this concern was expressed by the Commission in its 2005 *Report on the Court Poor Box: Probation of Offenders*<sup>96</sup> in respect of the "poor-box" system. The Commission reiterates this concern here in this context. However, the Commission also notes that section 6(5) of the *Criminal Justice Act 1993* militates somewhat against this by requiring sentencing courts to have regard to the offender's means when setting the amount of the fine.

[10.41] Finally, the Commission makes the point that, while the payment of compensation should never, in and of itself, justify the imposition of a fully suspended sentence in cases of serious offending behaviour, this general rule should not preclude the possibility of a sentencing court, in circumstances where the payment of compensation is accompanied by other strong personal mitigation, imposing a fully suspended sentence.

- R. 10.03** The Commission recommends that the payment of compensation may be taken into account as a mitigating factor when assessing the severity of the sentence.
- R. 10.04** However, the Commission also recommends that this mitigating factor should not, in the absence of other personal mitigation, justify the imposition of a fully suspended sentence. This general rule should not, however, preclude a sentencing court from imposing a fully suspended sentence in circumstances where compensation has been paid and the offender has the benefit of other strong personal mitigation.
- R. 10.05** The Commission also recommends that, when imposing a fine upon an offender in combination with a suspended sentence, the sentencing court should always be careful to ensure that the fine is proportionate and gives the offender a reasonable prospect of payment.

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<sup>96</sup> (LRC 75 – 2005) at para 1.42.





## APPENDIX A SUMMARY OF RECOMMENDATIONS

### Chapter 2 Locating the Suspended Sentence on the Hierarchy of Criminal Penalties

- R 2.01** The Commission recommends that the part-suspended sentence should rank just below an immediate custodial sentence and just above the fully suspended sentence.
- R 2.02** The Commission also recommends that the fully suspended sentence be located just below the part-suspended sentence and just above the deferred sentence.

### Chapter 3 The Compatibility of the Suspended Sentence with the Purposes of Punishment

- R 3.01** The Commission recommends that the suspended sentence should continue to be treated as compatible with the sentencing aims of retribution, deterrence (general and specific) and rehabilitation. The precise manner by, and the extent to, which these aims are given effect should be a matter for the discretion of the individual sentencing judge.
- R 3.02** The Commission recommends that the general penal aim of avoidance of prison (in the sense of treating immediate imprisonment as a measure of last resort) should be taken into account when considering whether to impose a suspended sentence. However, this sentencing aim should not be considered in isolation and it must always be weighed against competing factors that tend to justify immediate imprisonment.

### Chapter 4 Principles Governing the Suspended Sentence

- R 4.01** If the principles set out in *O'Keefe* and *Mah-Wing* are applied, before imposing a suspended sentence, a sentencing court should first (1) satisfy itself that the offence is sufficiently serious to merit a custodial sentence and then (2) determine the length of that custodial sentence. Having completed the first two steps, a sentencing court should then (3) consider whether the circumstances of the case are such that the custodial sentence should be suspended. The Commission recommends that further research be conducted by the SGIC in order to ascertain whether the *O'Keefe* principle and the *Mah-Wing* principle are being observed by Irish sentencing courts.

- R 4.02** The Commission recommends that the *O’Keefe* principle and the *Mah-Wing* principle should be enshrined in a generic sentencing guideline drawn up by the SGIC.
- R 4.03** The Commission recommends that any future guideline issued in respect of the *O’Keefe* principle and the *Mah-Wing* principle consider the observations made in this chapter in respect of the factors that may be relevant to each stage of the inquiry.
- R 4.04** The Commission recommends that, in the formulation of any future guidelines issued in respect of the *O’Keefe* principle and the *Mah-Wing* principle, consideration be given as to whether the theoretical distinction between the type of punishment and the quantum of punishment should be observed in practice and, if so, what factors should be relevant to each stage of the process.
- R 4.05** The Commission recommends that offence-related mitigation should not ordinarily be factored into the decision to suspend.
- R 4.06** The Commission recommends that personal mitigation may be relevant to the question of suspension. However, given the fact that each personal mitigating factor is also potentially relevant to the setting of an appropriate custodial sentence, sentencing courts should be careful not to “double-count” the same factor at both steps (2) and (3) of the process.
- R 4.07** The Commission recommends that the decision as to what stage a particular personal mitigating factor is taken into account is ultimately a matter for the discretion of the individual sentencing court, based on the facts before it.
- R 4.08** The Commission recommends that the following list of personal mitigating factors are particularly relevant to whether a sentence should be suspended:
- (1) An absence of prior convictions;
  - (2) Entry of a guilty plea;
  - (3) Remorse;
  - (4) Co-operation with authorities;
  - (5) Good character;
  - (6) Age;

- (7) Illness or physical/mental disability;
- (8) Currently in, or good prospects of employment or education;
- (9) Currently undergoing, or good prospects for, rehabilitation;
- (10) Specific circumstances make the individual unsuitable for prison, and
- (11) Family circumstances, in particular pregnant women or women with dependent children.

**R 4.09** The Commission recommends that the list of non-exhaustive factors outlined above could be set out in the form of a sentencing guideline by the SGIC.

**R 4.10** The Commission recommends that sentencing courts, having decided that a suspended sentence is justified, should impose conditions of suspension that are proportionate both in terms of the duration of the operational period and the conditions of suspension, and give the offender a reasonable opportunity of compliance, based on his or her personal circumstances.

## Chapter 5 The Part-Suspended Sentence

**R 5.01** The Commission recommends that the same principles be applied irrespective of whether the sentence of imprisonment is fully suspended or part-suspended.

**R 5.02** The Commission recommends that further empirical research be carried out by the SGIC to examine the extent to, and the circumstances in, which the part-suspended sentence is used in Irish courts.

**R 5.03** The Commission recommends that the part-suspended sentence continue to be used as a means of incentivising rehabilitation, while also acknowledging that this practice plays a limited role in the overall penal objective of rehabilitation.

**R 5.04** The Commission recommends that it should remain a matter for the discretion of the sentencing judge as to whether or not personal mitigation be reflected via a reduction from the headline sentence, as opposed to part-suspension of the sentence. However, the Commission recommends that a sentencing court should always begin by asking itself whether reflecting an offender's personal mitigation by way of part-suspension is appropriate in the circumstances of the case, or whether the justice of the case requires that the offender's personal mitigation be reflected by way of a reduction from the headline sentence.

- R 5.05** The Commission recommends that a sentencing court should always begin by asking itself whether the justice of the case requires that the totality principle be given effect to by way of reduction from the headline sentence, as opposed to part-suspension.
- R 5.06** The Commission recommends the continued use of the part-suspended sentence by the Court of Appeal so as to mitigate against the offender's disappointment at having his or her sentence increased on foot of a finding of undue leniency pursuant to section 2 of the *Criminal Justice Act 1993*.
- R 5.07** The Commission recommends that consideration be given to how the commencement of the *Parole Act 2019* will impact upon a sentencing judge's statutory jurisdiction to impose a part-suspended sentence in cases where the offender will also be eligible for parole during the currency of the sentence.

## Chapter 6 The Presumption of an Immediate Custodial Sentence

- R 6.01** The Commission recommends that the presumptions of an immediate custodial sentence discussed in this chapter should continue to be developed and applied in Irish sentencing courts.
- R 6.02** The Commission recommends that research be conducted by the SGIC into the extent to which these presumptions of an immediate custodial are observed by first-instance sentencing courts.
- R 6.03** The Commission recommends that the appellate courts or the SGIC examine and develop the categories of offences which, by virtue of their inherent gravity, should attract the presumption of an immediate custodial sentence.
- R 6.04** The Commission recommends that there should be no defined list or range of exceptional circumstances that might be taken into account when considering whether or not the presumption of an immediate custodial sentence has been rebutted.
- R 6.05** The Commission recommends that the question as to whether personal mitigating factors, either alone or taken cumulatively, constitute "wholly exceptional circumstances" should remain a matter for the discretion of the individual sentencing court, based on a consideration of the totality of the facts before it, particularly the harm caused and the moral culpability of the offender.

## Chapter 7 The Suspended Sentence and Child Offenders

- R 7.01** The Commission recommends against an amendment to section 99 of the *Criminal Justice Act 2006* to provide for the suspension of sentences of detention, in whole or in part.
- R 7.02** The Commission recommends against any amendment to Part 9 of the *Children Act 2001* to provide for the suspension of sentences of detention in whole or in part.
- R 7.03** The Commission recommends against any legislative amendment to section 144 of the *Children Act 2001* to provide for a general, open ended power to defer a sentence of detention, as this would, in effect, amount to a sanction analogous to a fully suspended sentence of detention.
- R 7.04** The Commission also recommends that, in any general review of the *Children Act 2001*, consideration be given to the "ageing out" issues in respect of section 144 of the Act.
- R 7.05** The Commission views the detention and supervision order as an appropriate proxy for the part-suspended sentence in the context of child offenders. However, it recommends that, in any general review of the *Children Act 2001*, consideration be given to the "ageing out" difficulties inherent in section 151, as identified in this chapter.
- R 7.06** The Commission recommends that the practice of reviewable sentences of detention be continued, particularly in the case of lengthy sentences of detention handed down for serious offences.
- R 7.07** However, the Commission also recommends that this practice be put on a statutory basis to ensure that it does not unduly interfere with the functions of the Executive.
- R 7.08** The Commission recommends that, when sentencing an adult offender for an offence that he or she has committed as a child, the sentencing court should take account of the offender's young age and level of maturity at the time of committing the offence.
- R 7.09** The Commission also recommends that, in any general review of the *Children Act 2001*, consideration be given to clarifying the law on the sentencing of children convicted of murder, including the sentencing of adults convicted of murder committed while they were under 18.

## Chapter 8 Practical and Procedural Issues Associated with the Suspended Sentence

- R 8.01** The Commission recommends that there be no prescribed limit on the length of the custodial sentence that may be suspended.
- R 8.02** The Commission recommends that there be no statutory limit on the operational period of a suspended sentence.
- R 8.03** The Commission also recommends, however, that, as it forms part of the overall punishment, the length of the operational period should always be proportionate both in the distributive sense and in terms of infringing on the offender's rights as little as possible.
- R 8.04** The Commission recommends that, in general, the operational period of a suspended sentence should not exceed the length of the imposed sentence of imprisonment. However, this may exceptionally occur where the justice of the case demands it.
- R 8.05** The Commission recommends that the condition identified in section 99(2) of the *Criminal Justice Act 2006*, that an offender must keep the peace and be of good behaviour during the operational period, be retained as a mandatory condition of a suspended sentence.
- R 8.06** The Commission recommends that there be no further specific conditions of suspension outlined in legislation. Further, the discretionary conditions of suspension, as provided for in sections 99(3) and 99(4) of the *Criminal Justice Act 2006*, should continue to be tailored to the specific circumstances of the case, bearing in mind the rehabilitative and individual desistance penal aims underpinning these legislative provisions.
- R 8.07** The Commission also recommends that the conditions of suspension imposed should be proportionate (both in the distributive sense and in terms of infringing upon the offender's rights to the least extent possible) and afford the offender with a reasonable prospect of compliance, based on his or her personal circumstances. This inquiry may involve, where practicable, an assessment as to whether or not the offender agrees to the conditions of suspension.
- R 8.08** The Commission recommends that any offence should count as a triggering offence for the purpose of activation of a suspended sentence.

- R 8.09** The Commission recommends that section 99(17) of the *Criminal Justice Act 2006* be read as a standalone power to revoke a suspended sentence.
- R 8.10** The Commission recommends that the word “may” be substituted for the word “shall” in section 99(8A)(a) of the *Criminal Justice Act 2006*, as inserted by section 2(c) of the *Criminal Justice (Suspended Sentences of Imprisonment) Act 2017*.
- R 8.11** The Commission recommends that section 99 of the *Criminal Justice Act 2006*, including all existing amendments, and any further amendments that may be required, be consolidated in a single piece of legislation.
- R 8.12** The Commission recommends that consideration be given to providing each relevant agency within the criminal justice system with the necessary resources for the establishment of a dedicated data analysis unit, so as to facilitate the collection, collation and dissemination of data in relation to the operation of the suspended sentence and, in particular, the monitoring and enforcement of conditions of suspension.
- R 8.13** The Commission recommends that consideration be given to the streamlining and modernising of the ICT systems underpinning the criminal justice system so as to facilitate a collaborative and efficient approach to the operation of the criminal justice system, from arrest to final appeal.

## Chapter 9 Suspended Sentences and White-Collar Offenders

- R 9.01** The Commission recommends that no separate sentencing regime should operate in the area of white-collar offending. Rather, a sentencing court should continue to determine the appropriate sentence by reference to the gravity of the offence and the personal circumstances of the offender.
- R 9.02** The Commission recommends that the SGIC should have regard to the factors identified in this chapter in formulating any future sentencing guidance in respect of competition offences and health and safety offences.
- R 9.03** The Commission also recommends that the various discrete types of offending behaviour which fall within the scope of the term “white collar crime” be examined by the SGIC with a view to the formulation of tailored sentencing guidance.

## Chapter 10 Combining the Suspended Sentence with Other Orders

- R 10.01** The Commission recommends that suspended sentences should not be made capable of being imposed in combination with community service orders.
- R 10.02** The Commission recommends that suspended sentences should rank just below a term of immediate imprisonment, and above the CSO on the scale of severity.
- R 10.03** The Commission recommends that the payment of compensation may be taken into account as a mitigating factor when assessing the severity of the sentence
- R 10.04** However, the Commission also recommends that this mitigating factor should not, in the absence of other personal mitigation, justify the imposition of a fully suspended sentence. This general rule should not, however, preclude a sentencing court from imposing a fully suspended sentence in circumstances where compensation has been paid and the offender has the benefit of other strong personal mitigation.
- R 10.05** The Commission also recommends that, when imposing a fine upon an offender in combination with a suspended sentence, the sentencing court should always be careful to ensure that the fine is proportionate and gives the offender a reasonable prospect of payment.



## APPENDIX B DRAFT SENTENCING PRINCIPLES

Based on the recommendations made throughout this Report, the following are suggested as a set of guiding principles governing the use of the suspended sentence.

### Guiding Principle No. 1

1. Before considering whether or not the imposition of a suspended sentence is justified in the circumstances of the case, a sentencing court should first satisfy itself that the offence is sufficiently serious as to merit a custodial sentence. In other words, the court must be satisfied that the seriousness of the offence passes the custody threshold. In making this determination, the sentencing court should take into account the following factors:
  - i. In the first instance, a sentencing court should have regard to the *inherent* gravity of the offence, by reference to:
    - the legal ingredients involved in the commission of the offence;
    - the statutory maximum and occasional minimum sentence set by the Oireachtas for the offence, and;
    - whether the offence is one which the Irish courts have determined that, by virtue of its inherent gravity, ought to attract the presumption of an immediate custodial sentence.
  - ii. Having ascertained the inherent seriousness of the offence, a sentencing court should then proceed to look at the *actual* gravity of the offence. In this regard, the moral culpability of the offender and the harm caused by the offence are the key determinants. The key question in this regard is whether the nature of the harm which the offender knowingly inflicted, intended to cause or risked causing is sufficiently serious to merit a custodial sentence.
  - iii. Finally, a sentencing court should always be cognisant of the principle of prison as a last resort and the fact that the constitutional principle of proportionality requires that the personal circumstances of the offender be taken into account. Therefore, in the event that a sentencing court has decided that the gravity of the offending behaviour is sufficiently serious to merit a custodial sentence, it should then consider whether or not the

offender's personal mitigation brings the case back below the custody threshold.

**Note:**

This guiding principle derives from the discussion at paras 4.33 – 4.46 of this Report. This principle, established by the Court of Appeal of England and Wales in *R v O'Keefe* [1969] QB 29, was implicitly approved by the Irish courts in *The People (DPP) v Slattery* [2017] IECA 90 at para 34; *Moore v Brady* [2006] IEHC 434 at para 36; *The People (DPP) v Kavanagh* [2020] IECA 13 at para 24, before being expressly endorsed by the Court of Appeal in *The People (DPP) v DW* [2020] IECA 145 at paras 36 – 39.

## Guiding Principle No. 2

2. Having determined that the offence is sufficiently serious to merit a custodial sentence, a sentencing court should, before deciding whether or not to suspend the sentence of imprisonment, firstly determine the length of the custodial sentence, by reference to the two-staged proportionality principle. In this regard the sentencing court should:
  - i. Identify the range of applicable penalties as provided for by the Oireachtas and / or any applicable guideline judgments handed down by the appellate courts.
  - ii. Having done this, the sentencing court should determine the headline sentence, by reference to the gravity of the offence. The two key determinants of offence gravity are the moral culpability of the offender and the harm caused, or risked, by the offending behaviour. In this regard, the sentencing court may have regard to any of the following mitigating or aggravating factors that it deems relevant to either of these two components of offence gravity:

*Factors tending to aggravate the gravity of the offence*

- Whether the offence was planned or premeditated;
- Whether the offender committed the offence as a member of a group organised for crime;
- Whether the offence formed part of a campaign of offences;
- 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;

- Whether the offender exploited a position of confidence or trust, including offences committed by law enforcement officers;
- Whether the offender threatened to use or actually used violence, or used, threatened to use, or carried, a weapon;
- 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;
- Whether the offender caused or risked substantial economic loss to the victim of the offence;
- Whether the offence was committed for pleasure or excitement;
- Any other factors that:
  - Increase the harm caused or risked by the offender, or
  - Increase the moral culpability of the offender.

Factors tending to mitigate the gravity of the offence

- Whether the offence was committed under circumstances of duress not amounting to a defence to criminal liability;
- Whether the offender was provoked;
- Whether the offence was committed on impulse, or the offender showed no sustained motivation to break the law;
- Whether the offender, through age or ill-health or otherwise, was of a reduced mental capacity when committing the offence;
- Whether the offence was occasioned as a result of strong temptation;
- Whether the offender was motivated by strong compassion or human sympathy;
- Whether the offender played only a minor role in the commission of the offence;
- Whether no serious injury resulted nor was intended;
- Whether the offender made voluntary attempts to prevent the effects of the offence;

- 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;
  - Any other factors that:
    - Mitigate the harm caused or risked by the offender, or
    - mitigate the moral culpability of the offender.
- iii. Having set the headline sentence, the sentencing court should then take into account any personal mitigating factors which serve to reduce the severity of the sentence. In this regard, the court may have regard to any of the following personal mitigating factors that it deems relevant to the case at hand:
- An absence of prior convictions;
  - Entry of a guilty plea;
  - Remorse;
  - Co-operation with authorities;
  - Subsequent good character;
  - If imprisonment would, by reason of old age, illness, or physical/mental disability result in manifest subjective hardship to the offender;
  - To reward efforts at rehabilitation to date and/or to incentivise further rehabilitation;
  - Specific circumstances which make the offender unsuitable for prison;
  - Family circumstances, in particular pregnant women or women with dependent children;
  - Any other personal circumstances of the offender which may serve to mitigate the severity of the sentence.

**Note:**

This principle that the length of the custodial sentence should be decided before the question of suspension arises derives from the decision of the Court of Appeal of England and Wales in *R v Mah-Wing* [1983] 5 Cr App R (s) 347. This principle is discussed in detail at paras 4.48 – 4.54 of this Report and was implicitly endorsed as forming part of Irish sentencing law in *The People (DPP) v Loving* [2006] IECCA 28, [2006] 3 IR 355 and *The People (DPP) v Floyd* [2014] IECA 39, prior to being expressly approved by the Court of Appeal in the decision of *The People (DPP) v DW* [2020] IECA 145 at paras 36 – 39. The two-staged proportionality test is discussed in detail at paras 4.10 – 4.22 of this Report.

It should also be noted that, at paras 4.55 – 4.58 of this Report, the Commission outlined some potential overlap between the factors relevant to guiding principle 1 and guiding principle 2. The Commission recommends that this potential difficulty be given further consideration by the Sentencing Guidelines and Information Committee (SGIC) tasked with formulating sentencing guidance in this area.

**Guiding Principle No. 3****3. Having:**

- (1) Determined that the offence merits a custodial sentence (the type of punishment), and
- (2) Set the length of this custodial sentence,

the sentencing court should then consider whether immediate imprisonment is necessary or, alternatively, whether the custodial sentence may be suspended.

In deciding this, the sentencing court may have regard to any of the personal mitigating factors, as outlined in guiding principle no. 2, that were not taken into account in setting the length of the custodial sentence. This is to ensure that personal mitigating factors are not “double-counted” both in determining the length of the custodial sentence (guiding principle no. 2) and in deciding whether or not that custodial sentence should be suspended (guiding principle no. 3).

**Note:**

This guiding principle stems from the discussion at paras at 4.59 – 4.65 of this Report.

## Guiding Principle No. 4

4. Having decided that a suspended sentence is appropriate in the circumstances of the case, a sentencing court may then impose conditions of suspension. Sections 99(3)<sup>1</sup> and 99(4)<sup>2</sup> of the *Criminal Justice Act 2006* provide the court with a wide discretion as to the conditions of suspension that it may impose upon a particular offender. Furthermore, section 99 does not place any limitation on the length of the period for which the sentence may be suspended (“the operational period”). Nevertheless, when deciding upon the conditions of suspension and the length of the operational period, the sentencing court should bear in mind that this element of the suspended sentence forms part of the overall punishment. In this regard, sentencing courts should ensure that both the operational period and the conditions of suspension:
- i. Afford the offender with a reasonable prospect of compliance, based on his or her personal circumstances; and
  - ii. Are proportionate, both in the distributive sense of being proportionate to the overall gravity of the offending and proportionate in terms of impinging on the offender’s individual rights to the least extent possible.

**Note:**

This guiding principle stems from the discussion at paras 4.67 – 4.76 of this Report and, in particular, the decisions of the Irish appellate courts in *The People (DPP) v Stronge* [2011] IECCA 79; *The People (DPP) v Broszczack* [2016] IECA 121; *The People (DPP) v DW* [2020] IECA 145; *The People (DPP) v Broe* [2020] IECA 140.

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<sup>1</sup> For any suspended sentence (in full or in part).

<sup>2</sup> In the case of part-suspended sentences only.

## Guiding Principle No. 5

5. There is a distinction between the fully suspended sentence and the part-suspended sentence. The fully suspended sentence is a non-immediate custodial sentence of imprisonment. In the case of the fully suspended sentence, the offender may not have to serve any of the custodial sentence if he or she complies with the conditions of suspension. In contrast, the part-suspended sentence is a two-phased sentence: the immediate custodial sentence followed by the suspended custodial sentence. Having served the initial custodial element of the sentence, the offender is then released from prison but will then be required to adhere to any of the conditions of suspension imposed by the original sentencing court. Nevertheless, Guiding Principles 1 – 4, as outlined above, are, broadly speaking, of equal application to the part-suspended sentence. In other words, before considering whether to impose a part-suspended sentence, the sentencing court should first:
- i. determine that the offending behaviour is sufficiently serious so as to merit the imposition of a custodial sentence and then;
  - ii. set the appropriate custodial sentence.

Having done this, a sentencing court may impose a part-suspended sentence if satisfied that, while the circumstances of the case are such that the initial portion of the custodial sentence ought to be served immediately, there are also personal mitigating factors relevant to the offender such that the latter portion of the custodial sentence should be suspended.

**Note:**

This guiding principle stems from the discussion at paras 5.18 – 5.21 of this Report.

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The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law.

The Commission's law reform role is carried out primarily under a Programme of Law Reform. Its *Fifth Programme of Law Reform* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act it was approved by the Government in March 2019 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act.

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