



The Law Reform Commission
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLI

REPORT

ON

PENALTIES FOR MINOR OFFENCES

(LRC 69 - 2003)

IRELAND

The Law Reform Commission

IPC House, 35-39 Shelbourne Road, Ballsbridge, Dublin 4

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First Published

The Law Reform Commission 2003
February 2003

ISSN 1393- 3132

BY POST

An Taoiseach Bertie Ahern, TD.
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1 March 2003

Dear Taoiseach

I enclose a copy of the Commission's **Report on Penalties for Minor Offences** (LRC 69 – 2003) which will be published in the near future.

Yours sincerely,

Declan Budd
President

THE LAW REFORM COMMISSION

Background

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

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

To date the Commission has published sixty seven Reports containing proposals for reform of the law; eleven Working Papers; twenty Consultation Papers; a number of specialised Papers for limited circulation; *An Examination of the Law of Bail*; and twenty three Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in Appendix 9 to this Report.

Membership

The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners. The Commissioners at present are:

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INTRODUCTION

1. Under Article 38 of the Constitution¹ no one can be tried on a criminal offence without a jury, save in certain circumstances, one of which is where the case involves a “minor offence”.² A minor offence is currently interpreted to mean an offence for which the punishment does not exceed 12 months imprisonment and/or €3,000. These maxima therefore act as a cut-off point in determining what offences attract the right to jury trial in this jurisdiction.³ The aim of this Report is to consider the appropriateness of such upper limits, particularly in the light of the central role accorded to jury trial in our criminal justice system. In England, the birth-place of trial by jury, the most frequently quoted encomium for the jury is Lord Devlin’s description of it as “the lamp that shows that freedom lives”.⁴ In this jurisdiction too, trial by jury occupies a position at the apex of our legal system by virtue of Article 38.

2. It is important, however, to emphasise the limited ambit of this Report. It does not purport to examine the whole range of District Court sentencing options, but rather focuses primarily on the terms of imprisonment and the fines which may be imposed by that Court for minor offences. Further, the Commission is not suggesting any limit on a District Court judge’s⁵ sentencing jurisdiction where an accused

¹ Article 38.2 states: “Minor offences may be tried by courts of summary jurisdiction.” Article 38.5 states: “Save in the case of the trial of offences under s.2, s.3, or s.4 of this Article no person shall be tried on any criminal charge without a jury.”

² There are two other exceptions to the constitutional imperative of trial by jury. These are Article 38.3 and 38.4 which create exceptions for special courts and military courts respectively.

³ See paragraphs 1.19 and 1.23 below.

⁴ Devlin *Trial by Jury* (London Stevens 1966) at 164.

⁵ Section 2(1)(b) of the *Courts Act 1991* substituted the title “judge of the District Court” for the old title “justice of the District Court”. Judges of the District Court are therefore referred to herein as “District Court judges”.

consents to summary trial or where there is a guilty plea.⁶ As a result, the Commission's recommendation on sentencing pertains only to summary offences and offences which are triable summarily at the direction of the Director of Public Prosecutions ("DPP") (so-called "hybrid" offences).

3. The law governing penalties for minor offences is one of the areas to be examined as part of the Commission's Second Programme for Law Reform. In accordance with usual procedure, the Commission produced as an initial step a *Consultation Paper on Penalties for Minor Offences*⁷ which was published in March 2002. This initial examination of the topic led the Commission to make four provisional recommendations relating to prison sentences and fines which may be imposed for a minor offence. These were as follows:

- (1) There should be a clear statutory headline to the effect that the District Court may impose a prison sentence of up to a maximum of six months only for minor offences.
- (2) There should be an obligation on a District Court judge to give written reasons for a decision to impose a custodial sentence.
- (3) The law should be adjusted to state explicitly that higher fines may be imposed where an offender is well-off.
- (4) In the case of a corporation, the maximum fine possible should be increased to a level three times higher than that for natural persons.

4. Since then the Commission has sought and received written and oral submissions on the topic which have proved extremely helpful in its deliberations. In addition, in July the Commission held what proved to be an exceptionally lively seminar which was attended by many distinguished lawyers and several judges from all four main courts. The names of those who attended the seminar are listed in Appendix 1. To those who attended the seminar or who made written or oral submissions on the subject, the Commission is most grateful.

5. This Report considers each of these four recommendations in the light of this wisdom and experience. The Report is divided in two

⁶ See s.2(2) of the *Criminal Justice Act 1951* as amended and s.13 of the *Criminal Procedure Act 1967*.

⁷ CP18-2002.

parts. Part I comprises Chapters 1 to 3 which examine the recommendations relating to the imposition of terms of imprisonment in respect of minor offences. Part II consists of Chapters 4 to 6 and concerns the level of fine imposed for a minor offence. Chapter 1 briefly summarises the law as it currently stands in relation to minor offences dealing first with the statutory framework and then the case law interpreting the central constitutional provision, Article 38.2. Chapter 2 revisits the proposal to limit the maximum term of imprisonment to six months for a minor offence. In Chapter 3 the Commission develops its argument in relation to its second provisional recommendation. Chapter 4 discusses the recommendation that fines may or should be adjusted according to the financial circumstances of an offender in line with the principle of equality of impact. Chapter 5 elaborates on one of the main difficulties with the recommendation in Chapter 4 namely, how an offender's means may be ascertained expeditiously by the District Court. Chapter 6 deals with the proposal to increase the maximum fine for companies and includes some comparative analysis with other jurisdictions. A final chapter provides a summary of the Commission's recommendations.

6. As noted above, this paper is concerned with only two types of penalty which may be imposed in respect of a minor offence namely, terms of imprisonment and fines. However, by way of indicating future plans it is apposite to mention at this juncture that the Commission is interested in developing alternatives to custody for minor offences. Indeed those District Court judges who attended the seminar were fully in favour of providing the District Court with real alternatives to imprisonment. Among those mooted were weekend or night-time orders, supervision orders, suspension orders, confiscation orders, and safety orders. In this regard, it is salutary to note recent developments in Britain. The authors of the most recent English White Paper, published last year and entitled *Justice for All*,⁸ have sought to provide sentencers with a better framework within which to tailor sentences to the offender and the offence. In pursuit of this aim the new sentences proposed in the White Paper include customised community sentences, "custody plus" (a short prison sentence followed by a community programme), "custody minus" (a short suspended prison sentence followed by community service) and "intermittent custody" (where a prison sentence and community

⁸ *CJS: Justice for All* (London HMSO 2002) (Cmnd 5563) at paragraph 4.19.

sentence are served intermittently). The development of non-custodial alternatives is an important topic and one which has a direct bearing on the subject matter of this Report. A greater range of alternatives to custodial sentences should be developed in order to offer alternatives to the use of prison as a default sanction because so few non-custodial options are available.⁹

7. Likewise, the law in relation to fines should be viewed against a wider background. This Report surveys the process of determining the amount of the fine to be imposed by the court. However, there are considerable difficulties in the area of fines at a later stage in the process namely, collection. In this regard it is of note that, in the period between the publication of the *Consultation Paper on Penalties for Minor Offences*¹⁰ and this Report, the *Report of the High Level Group on the Collection of Fines*¹¹ and the Nexus Research Co-operative *Final Report on Imprisonment for Fine Default and Civil Debt*¹² have been published. These reports have highlighted the current problems in relation to the enforcement of court-imposed fines and the need for reform in this area. Such reforms may well be included in the proposed *Enforcement of Fines Bill*. The Commission has made its own contribution in this area with the publication in July 2002 of an updated *Report on the Indexation of Fines*.¹³ While the

⁹ In this regard see the comments of the Sub-Committee on Crime and Punishment of the Joint Committee on Justice, Equality, Defence and Women's Rights in its *Report on Alternatives to Fines and the Uses of Prison* (2000) at paragraph 36: "It is possible that prison is widely used because there is an insufficient range of alternative penalties which are attractive to the courts and perceived as tough and effective by the public. Under these circumstances it is difficult to establish the right emphasis to place on prison. The true demand for prison will only emerge when a proper range of alternatives is in place." The *Final Report of the Expert Group on the Probation and Welfare Service* (1999) also found at paragraph 1.10 that, "[the] courts, in many instances, have not been in a position to impose non-custodial sanctions in suitable cases, due to the absence of the necessary range of options." Accordingly, it strongly recommended a shift in policy to facilitate the increased use of a much greater range of non-custodial sanctions.

¹⁰ CP18-2002.

¹¹ Dublin Stationery Office 2001.

¹² Nexus Research Co-operative *Final Report to Department of Justice, Equality and Law Reform on Imprisonment for Fine Default and Civil Debt* (Dublin Stationery Office 2002).

¹³ Law Reform Commission *Report on the Indexation of Fines: A Review of*

present Report has slightly different objectives from that Report, it would nevertheless be appropriate and convenient if the recommendations made here in relation to fines were implemented in tandem with any legislation on the indexation of fines. To the extent that the analysis made here intersects with that on indexation published in the recent Report, it is referred to at the appropriate points.

8. It should be noted that since most of the statutes cited in this paper refer to punts, both the punt value and its euro equivalent are stated.

PART I: MINOR OFFENCES AND PRISON SENTENCES

CHAPTER 1: DISTRICT COURT JURISDICTION AND THE CONSTITUTION

1.01 This chapter consists of a brief summary of the jurisdiction of the District Court. A more comprehensive treatment of this topic can be found in the Chapters 1 to 3 of the Consultation Paper. It is important to reiterate that the first recommendation which examines the sentencing powers of the District Court and which forms the subject matter of Chapter 2, relates only to summary offences and “hybrid” offences, discussed at (a) and (d) below respectively. However in order to present a complete picture it is proposed to set out herein all of the different types of offences in relation to which the District Court can exercise its summary jurisdiction.

A. Summary Jurisdiction and Indictable Offences Triable Summarily

1.02 At common law, trial by jury was the only form of proceedings known to the law in criminal matters for many centuries.¹⁴ The middle decades of the nineteenth century, however, saw the enactment of a number of statutes extending the use of summary trial in respect of certain offences.¹⁵ Thus prior to the enactment of the 1922 Constitution, the *Petty Sessions (Ireland) Act 1851*, the *Summary Jurisdiction (Ireland) (Amendment) Act 1871* and the *Fines (Ireland) Acts 1851-74* (known collectively as the *Summary Jurisdiction Acts*) regulated and prescribed the procedure for the

¹⁴ Trial by jury had gradually become the main form of trial at common law since the prohibition of trial by ordeal by Pope Innocent III in November 1215.

¹⁵ These statutes created both offences which could only be tried summarily and offences which were triable either way. An example of the former is *19 George 2 c.21* (which was an Act to prevent profane cursing and swearing). In respect of the latter category a number of either way offences were created by the *Dublin Police Act 1842* and the *Criminal Justice Act 1855*.

exercise of summary jurisdiction by Justices of the Peace sitting at Petty Sessions. Indeed it should be noted that some of these Acts remain in force and continue to govern certain procedural aspects of the District Court's jurisdiction.¹⁶

1.03 On the establishment of the Irish Free State (Saorstát Éireann), the District Court became the court of summary jurisdiction in relation to criminal matters, dealing with approximately 90% of all criminal cases. The District Court can exercise its summary jurisdiction in the following three situations: in relation to summary offences; indictable offences which may be triable summarily; and guilty pleas. This Chapter will now elaborate on each of these heads of jurisdiction.

(a) Summary Offences

1.04 Section 77 of the *Courts of Justice Act 1924* states:

“The District Court shall have and exercise all powers, jurisdictions, and authorities which immediately before the 6th day of December 1922 were vested by statute or otherwise in Justices or a Justice of the Peace sitting at Petty Sessions.”

1.05 This provision refers back to the pre-independence legislation referred to above, of which the most significant Acts are the *Petty Sessions (Ireland) Act 1851* and the *Fines (Ireland) Act 1851-74*. Post-independence statutes have gone on to add to the miscellaneous collection of summary offences over which the Court has jurisdiction.

(b) Indictable Offences Triable Summarily

1.06 Subject to a number of conditions, including the seriousness of the facts of the particular case, s.2(2) of the *Criminal Justice Act 1951*

¹⁶ For example ss.10 and 11 of the *Petty Sessions (Ireland) Act 1851* which deal with the jurisdiction of a District Court judge to take a complaint and issue a summons, and to issue a warrant in lieu of a summons in the case of an indictable offence. The *Summary Jurisdiction Act 1857* sets out the procedure for a case stated from the District Court to the High Court.

(as amended)¹⁷ empowers the District Court to try summarily a number of indictable offences. The provision states:

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

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

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

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

1.07 It should be noted first that this provision only applies to those offences listed in the first schedule to the 1951 Act.¹⁸ Most significantly these included many of the main offences under the *Larceny Acts 1861*¹⁹ and *1916*.²⁰ Other offences included: perjury; offences in the nature of public mischief;²¹ riot or unlawful assembly;²² some minor offences under the *Malicious Damage Act 1861*;²³ offences under the *Forgery Act 1913*,²⁴ obtaining by false

¹⁷ Section 2 of the *Criminal Justice Act 1951* was amended slightly by s.19 of the *Criminal Procedure Act 1967*, sections 21(6) and 22 of the *Criminal Law (Jurisdiction) Act 1976* and s.8 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*.

¹⁸ In addition, s.2(1)(b) of the 1951 Act provides for a mechanism whereby the Minister for Justice may make an order declaring an indictable offence to be a scheduled offence for the purposes of the Act. It should be noted, however, that no order of this kind has yet been made by the Minister.

¹⁹ This Act has been repealed by the *Criminal Justice (Theft and Fraud) Offences Act 2001* save for ss.12-16, 24 and 25.

²⁰ This Act has been repealed by the *Criminal Justice (Theft and Fraud) Offences Act 2001*.

²¹ The offence of effecting a public mischief is known to the common law of Ireland. See *DPP (Vizzard) v Carew* [1981] ILRM 91.

²² See fn 29 below.

²³ See fn 28 below.

²⁴ This Act has been repealed by the *Criminal Justice (Theft and Fraud)*

pretences; assault occasioning actual bodily harm;²⁵ indecent assault;²⁶ and attempted carnal knowledge. The number of offences in this category has been whittled down in recent years as replacement legislation for common law offences such as assault,²⁷ criminal damage²⁸ and riot²⁹ has come on stream. These new statutes have abandoned the 1951 model leaving it instead to the DPP to elect the mode of trial (the “hybrid” model explained at paragraph 1.11 below). Despite this trend, a trial regime very similar to that under the 1951 Act (whereby an accused retains a right to elect for trial by jury) has been adopted for the trial of the new offence of sexual assault under the *Criminal Law (Rape) (Amendment) Act 1990*³⁰ and more recently in the trial of offences under the *Theft and Fraud Offences Act 2001*.³¹ The latter creates a new offence of theft to replace the existing common law offences of larceny, embezzlement, and fraudulent conversion as well as bringing together in one consolidated statute the law on existing offences such as robbery and burglary. New offences of forgery, counterfeiting and obtaining by deception also have been created. Thus the 1951 model, or more accurately an amalgam thereof, continues to govern the trial procedure for a number of significant property offences.

Offences Act 2001.

²⁵ See fn 27 below.

²⁶ See fn 30 below.

²⁷ The common law offence of assault occasioning actual bodily harm was abolished by s.28(1) of the *Non-Fatal Offences Against the Person Act 1997*. A new offence of assault causing harm was created by virtue of s.3 of the 1997 Act and can be tried summarily or on indictment.

²⁸ The *Malicious Damage Act 1861* was repealed by s.15 of the *Criminal Damage Act 1991*, save for sections 35-38, 40, 41, 47, 48, 58 and 72. The new offence of criminal damage created under the 1991 Act can be tried summarily or on indictment.

²⁹ The offence of riot was abolished by s.14 of the *Criminal Justice (Public Order) Act 1994* which substituted a statutory offence of riot in place of the common law offence. The statutory offence is triable only on indictment.

³⁰ Section 16 of the *Criminal Law (Rape) (Amendment) Act 1990* amending s.2(1) of the *Criminal Law (Rape) Act 1981*. The offence of “indecent assault” became known as “sexual assault” by virtue of s.2 of the *Criminal Law (Rape) (Amendment) Act 1990*.

³¹ Section 53 of the *Criminal Justice (Theft and Fraud) Offences Act 2001* closely mirrors the provisions of s.2 of the *Criminal Justice Act 1951* as amended but imposes a heavier fine of £1,500 (€1,905).

1.08 If the offence falls within this category three other conditions must be satisfied in order for the offence to be tried summarily. First, even if an individual is accused of a scheduled offence within the meaning of the 1951 Act, the court must be of the opinion that the facts proved or alleged constitute a minor offence fit to be so tried. In *State (O'Hagan) v Delap*³² it was held that where a District Court judge has elected to try a case summarily and has embarked on the trial, circumstances may arise which indicate that the offence is not in fact minor in nature and in that event the judge would be obliged to send the case forward for trial on indictment.³³ Secondly, and most significantly, the accused on being informed by the court of his or her right to be tried by jury must not object to being tried summarily. Finally, since the enactment of s.8 of the *Criminal Justice (Miscellaneous Provisions) Act 1997* the Director of Public Prosecutions must also consent to the accused being tried summarily.³⁴

1.09 Section 4(1) of the *Criminal Justice Act 1951* (as amended by s.17 of the *Criminal Justice Act 1984*) sets out the maximum sentences for crimes of this kind as being a term of imprisonment not exceeding 12 months, a fine not exceeding IR£1,000 (€1,270) or both fine and imprisonment. It is clear that the legislature had to limit the sentence which could be handed down by the courts in these specific types of cases as it would be unfair if accused persons, having waived their right to jury trial, could still be given sentences as severe as the maximum sentence they could have received if they had gone before a jury.

³² *State (O'Hagan) v Delap* [1983] ILRM 241, 244.

³³ However, it does not appear to be open to a District Court judge to exercise this option at the sentencing stage. In the subsequent case of *Feeney v. District Justice Clifford* [1989] IR 668 the Supreme Court held that once the District Court had accepted jurisdiction and convicted the applicant it could no longer decline jurisdiction even if facts emerged at the sentencing stage which indicated that the sentencing options were inadequate.

³⁴ Section 8 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*. The requirement of the DPP's consent for all cases was suggested by the Supreme Court in *Feeney v District Justice Clifford* [1989] IR 668, 679.

(c) Guilty Pleas

1.10 If there is a plea of guilty then, in respect of most indictable offences, the case may be referred to the District Court for sentencing with the consent of the DPP.³⁵ In such a case the District Court's maximum power of sentencing is a fine not exceeding IR£1,000 (€1,270) and/or imprisonment for a term not exceeding 12 months.³⁶

(d) "Hybrid" Offences

1.11 There is an increasing practice by which, when a statute creates an offence, it goes on to stipulate that the offence may be triable either summarily or on indictment, at the discretion of the DPP. It follows that if an offence is prosecuted on indictment, the case will not be heard by the District Court unless a guilty plea is entered and the case is referred to the lower court for sentencing. Such a provision provides for either a lesser or greater maximum punishment, depending on which way the offence is being tried. A typical example is s.4 of the *Criminal Damage Act 1991*, which states:

“[A] person...who has anything in his custody...intending without lawful excuse to use it....

(a) to damage any property belonging to some other person...shall be guilty of an offence and shall be liable –

(i) on summary conviction, to a fine not exceeding £1,000 [€1,270] or imprisonment for a term not exceeding 12 months or both, and

³⁵ This is authorised by s.13 of the *Criminal Procedure Act 1967*, as amended by s.17 of the *Criminal Justice Act 1984*.

³⁶ Section 13(3)(a) of the *Criminal Procedure Act 1967* originally set out the maximum penalty which may be imposed by a District Court judge in such cases, but this was amended by s.17 of the *Criminal Justice Act 1967* which confines the District Court judge's sentencing power to 12 months' imprisonment and a fine of IR£1,000 (€1,270).

(ii) on conviction on indictment, to a fine not exceeding £10,000 [€12,700] or imprisonment for a term not exceeding 10 years or both.”

1.12 The difference between this provision and s.2 of the *Criminal Justice Act 1951* is the fact that it is a cardinal feature of the 1951 Act that the accused, in addition to the DPP, has a right of election. In other words, the accused may insist on being tried on indictment. This is in contrast to “hybrid” provisions like the *Criminal Damage Act 1991* where the choice is exclusively that of the DPP.

B. Article 38.2 of the Constitution: Fines

1.13 Under Article 38 of the Constitution³⁷ no one can be tried on a criminal offence without a jury save in three exceptional circumstances, one of which is the subject of this paper; namely, in the case of “minor offences”.³⁸ The distinction between the constitutional concepts of minor and non-minor offences equates more or less with the statutory distinction drawn between summary and indictable offences. As a general rule summary offences are also minor offences so that the Constitution is satisfied. However in this Part the Commission is concerned with the exceptional and problematic instances of non-minor offences which are nevertheless triable without a jury. If a statute stipulates a penalty for an offence which is non-minor but which is triable in the District Court without a jury then, as a result of Article 38, the statute is susceptible to a claim of unconstitutionality.

1.14 The term “minor offence” is not defined in the Constitution. Therefore it has fallen to the judiciary in its role as interpreter of the Constitution to construe the term. For the initial two decades or so

³⁷ Article 38.2 states: “Minor offences may be tried by courts of summary jurisdiction”. Article 38.5 states: “Save in the case of the trial of offences under s.2, s.3 or s.4 of this Article no person shall be tried on any criminal charge without a jury”.

³⁸ The other two exceptions are Article 38.3, which states that special courts may be established by law for the trial of offences in cases where the ordinary courts may be inadequate to secure the effective administration of justice and the preservation of public peace and order, and Article 38.4, which states that military courts may be established for the trial of offences against military law in certain circumstances.

after the coming into existence of the Constitution the issue attracted little attention from the courts. Since the beginning of the 1960s, however, the test for whether an offence is minor or non-minor has been developed through a series of cases challenging various statutes which provide for the summary prosecution of alleged non-minor offences. The courts have been obliged to consider the nature of minor offences and they have pointed to various factors which should be examined in order to decide whether an offence is minor or non-minor.

1.15 The leading case is *Melling v Ó Mathghamhna*³⁹ in which the Supreme Court laid down a set of four criteria to be considered when deciding whether or not a particular offence is minor or non-minor.⁴⁰ The most significant of these were considered to be first, the severity of the punishment provided for by law, whether imprisonment or a fine and secondly, the moral quality of the acts required to constitute the offence in question thereby indicating that certain offences such as murder or rape could never be regarded as minor offences. Other criteria listed in *Melling* relate to the state of the law at the time of the Constitution's enactment and the state of public opinion at that time, although as Kelly⁴¹ notes these two factors may well be only different aspects of the same criterion. It is with the first of these criteria - in practice the most important factor⁴² - that this section is concerned.

Maximum Fine

1.16 There has been no definitive judgment on the significant question of the maximum fine above which an offence ceases to be minor. This is because in many of the cases which have come to court the monetary limits have been very much above any figure which in the light of contemporary financial values might be regarded as an acceptable limit.

³⁹ [1962] IR 1.

⁴⁰ Kelly, Hogan and Whyte *The Irish Constitution* (3rd ed. Butterworths 1994) at 628-638.

⁴¹ *Ibid* at 637.

⁴² In *Melling* the Supreme Court agreed that this was the most important factor for consideration in determining whether an offence was minor.

1.17 In *State (Rollinson) v Kelly*⁴³ Griffin J outlined what he took to be the accepted penalty for a summarily triable offence in the early 1980s:

“[I]n respect of the three years 1980 – 82, being the latest years in respect of which the bound volumes of the Acts of the Oireachtas as promulgated are available, a high proportion of the Acts in each year made provision for offences and for the penalties for such offences. With the exception of the *Family Law (Protection of Spouses and Children) Act 1981*, in the case of every such Act in those three years there is provision for a fine not exceeding £500 [€635] on summary conviction, and under the *Litter Act 1982*, a person guilty of an offence is by s.15 liable on summary conviction to a fine not exceeding £800 [€1015.79]”⁴⁴

1.18 The majority of the Supreme Court in *Rollinson* held that a fine of €635 (IR£500) is minor and Griffin J went so far as to say that in his opinion “at the present time a fine of £500 (or indeed a sum fairly considerably in excess of that sum) would not be sufficient to take an offence out of the category of those which are minor offences and which are therefore triable in the District Court”.⁴⁵

1.19 In 1994 Kelly, Hogan and Whyte stated: “[T]o judge from a miscellaneous variety of recently enacted legislation the Oireachtas appears to be of the view that a fine of £1,000 [€1,270] is the maximum which may be imposed following summary conviction.”⁴⁶ This authority goes on to mention as examples, s.15(5)(a) of the *Merchant Shipping Act 1992*, the Table to the *Environmental Protection Agency Act 1992* and s.9(2) of the *Control Of Dogs (Amendment) Act 1992*. More recently, the *Planning And Development Act 2000* allows for a maximum fine of €1,905 (IR£1,500) on summary conviction for certain offences⁴⁷ and in the *Prevention Of Corruption (Amendment) Act 2001* the figure has crept

⁴³ [1984] IR 248.

⁴⁴ *Ibid* at 263 – 264.

⁴⁵ *State (Rollinson) v Kelly* [1984] IR 248, 263.

⁴⁶ Kelly, Hogan and Whyte *The Irish Constitution* (3rd ed. Butterworths 1994) at 632.

⁴⁷ See ss.97(18) and 156(1)(a) of the *Planning and Development Act 2000*.

up to €3,000 (£2,362). The same figure is provided for in the *Competition Act 2002* for summary offences under the *Competition Acts*. Further, as discussed in Chapter 6, the Health and Safety Authority has recommended an increased level of fine not exceeding IR£2,500 (€3,174) for summary health and safety offences. These increments, though modest in their amounts reflect a steady upward trend in the amount of the maximum fine over and above the level of inflation.

C. Article 38.2 of the Constitution: Prison Sentences

1.20 For many years there had been no judicial statement giving a precise length of imprisonment which would remove an offence from the category of minor offences. Even today, despite the fact that some more recent case law comes closer to specifying the acceptable maximum sentence for minor offences, the question still remains open to some extent. Statements in this regard tend to be either very general, giving vague outlines, or refer only to the particular circumstances of the case in question. A survey of the relevant case law was conducted in the Consultation Paper.⁴⁸ All that can really be said with certainty is that an offence is minor where the punishment is less than six months imprisonment,⁴⁹ whereas an offence is non-minor where the punishment is two years or more.⁵⁰

1.21 The most recent case on the subject is *Mallon v Minister for Agriculture, Food and Forestry*⁵¹ in which there is a dictum specifically stating that 12 months is an acceptable penalty for a minor offence. In that case the applicant applied for orders of prohibition in respect of prosecutions for alleged contraventions of the *European Communities (Control of Oestrogenic, Androgenic, Gestagenic and Thyrostatic Substances) Regulations 1988* and the *European Communities (Control of Veterinary Medical Products and their Residues) Regulations 1990*. One of the applicant's arguments was based on the contention that imprisonment for a term "not

⁴⁸ Law Reform Commission *Consultation Paper on Penalties for Minor Offences* (LRC CP 18-2002) at paragraphs 3.02-3.09.

⁴⁹ *Conroy v Attorney General* [1965] IR 411.

⁵⁰ *Mallon v Minister for Agriculture, Food and Forestry* [1996] 1 IR 517.

⁵¹ *Ibid.*

exceeding two years” for a summary offence, as provided for by the 1990 Regulations, was repugnant to the Constitution. In the High Court Costello J accepted this submission of repugnancy. On appeal this point was conceded by the respondents so it was not argued before the Court that the sentence set out in the 1988 Regulations namely, one year, was unconstitutional. Although the Supreme Court did not expressly rule on this point, as it was not relevant to the appeal, it seems to have been implicitly accepted by the Court and the parties to the action that a penalty of two years imprisonment for a minor offence was unconstitutional and that one year was not. The only judicial comment expressly on this issue however was an *obiter dictum* by Barron J where he said that “a penalty of one year’s imprisonment would not have infringed the provisions of Article 38 of the Constitution”.⁵² In the circumstances one can say that the Supreme Court in *Mallon* seems to have been of the opinion that one year’s imprisonment is a valid sentence for minor offences.⁵³

1.22 This view was supported, though again the point was not argued, by Moriarty J in *Meagher v O’Leary*⁵⁴ (where the charges were brought under the same regulations as in *Mallon*) where he stated:

“It is uncontested in argument, and indeed was set forth in the Supreme Court judgments in the *Mallon* case *supra*, that a maximum penalty of two years’ imprisonment for a single offence takes that offence beyond the category of a minor one, whereas a maximum penalty of one year’s imprisonment does not...”⁵⁵

1.23 As to legislative practice one should note that two of the most recent pieces of legislation to come from the Oireachtas containing provisions for summary conviction, the *Illegal Immigrants (Trafficking) Act 2000* and the *Prevention Of Corruption (Amendment) Act 2001*, provide that the maximum sentence which may be given on a summary conviction for an offence under the Acts

⁵² *Mallon v Minister for Agriculture, Food and Forestry* [1996] 1 IR 517, 542.

⁵³ See Casey *Constitutional Law in Ireland* (3rd ed. Sweet & Maxwell 2000) at 320.

⁵⁴ [1998] 1 ILRM 211.

⁵⁵ *Ibid* at 218.

is 12 months. These penalties are then in line with the Supreme Court interpretation which seems to be implicit in *Mallon*. For the purposes of this Report therefore the Commission adopts the view that a minor offence is an offence which attracts a penalty of not more than one year's imprisonment.

CHAPTER 2: THE MAXIMUM SENTENCE REAPPRAISED

2.01 In this chapter the current permissible maximum prison sentence for a minor offence is discussed in more detail. As noted in Chapter 1, current constitutional wisdom would suggest that a sentence of 12 months imprisonment would not take an offence out of the minor category. However it is open to serious question whether this is an appropriate sanction for an offence classified as “minor”. In the Consultation Paper the Commission advanced two arguments in relation to this point. First of all it is wildly out of line with modern-day perceptions of justice to regard a fine of €3,000 (IR£2,363) as calling for a jury trial while not according this protection where a prison sentence of 12 months is involved. This seems a clear anomaly. Even disregarding for a moment the loss of liberty and other adverse consequences such as loss of employability and reputation which flow from a prison term, the financial implications alone of imprisonment for 12 months far exceed those of a €3,000 (IR£2,363) fine.⁵⁶ All in all there is little equivalence between the two penalties. Secondly to classify a 12 month prison term as a suitable penalty for a minor offence is to disregard the comprehensive restriction on an individual’s liberty necessitated by a prison term. These arguments are further bolstered by the central position occupied by jury trial in our constitutional and legal system, which will be considered now followed by a more detailed examination of the arguments in relation to an individual’s right to liberty.

⁵⁶ See Law Reform Commission *Consultation Paper on Penalties for Minor Offences* (CP18-2002) at 42-43.

A. The Importance of Jury Trial

2.02 Trial by jury has been described by various eminent legal commentators as a “palladium of liberty”⁵⁷ and “the lamp that shows that freedom lives”.⁵⁸ In this jurisdiction, moreover, the ambiguity which surrounds its status as a constitutional right in England⁵⁹ is put beyond any doubt by the express guarantee in Article 38.5 of the 1937 Constitution that “no person shall be tried on any criminal charge without a jury.” As it has been expressed in mandatory terms, this provision has been described as a “constitutional imperative” rather than a personal “right”.⁶⁰ This may imply perhaps that an individual accused has no power to waive the right to jury trial.

2.03 There is also a clear judicial preference for jury trial. For instance in the *locus classicus* on jury trial, *de Burca v Attorney General*,⁶¹ Henchy J said:

“There is no doubt that the primary aim of s.5 of Article 38 in mandating trial by jury for criminal offences other than minor ones... is to ensure that every person charged with such an offence will be assured of a trial in due course of law by a group of laymen who, chosen at random from a reasonably diverse panel of jurors drawn from the community, will produce a verdict of guilty or not guilty *free from the risks inherent in a trial conducted by a judge or judges only*, and which will therefore carry with it the assurance of both correctness and public acceptability that may be expected from the group verdict of such a representative cross section of the community.”⁶²

⁵⁷ Blackstone *Commentaries* Vol IV (1776) at 349.

⁵⁸ Devlin *Trial by Jury* (London Stevens 1966) at 164.

⁵⁹ Darbyshire “The Lamp That Shows That Freedom Lives - Is it Worth the Candle?” [1991] Crim LR 740, 742-744.

⁶⁰ See the comments of Henchy J in *Holohan v Donohue* [1986] ILRM 250, 256: “[Trial by jury] is not only preferred but made mandatory for the trial of non-minor offences...”

⁶¹ [1976] IR 38.

⁶² *Ibid* at 74. Emphasis added.

2.04 More recently in *D v DPP*,⁶³ a case admittedly concerning pre-trial prejudicial newspaper coverage, Denham J stated that “on the hierarchy of constitutional rights there is no doubt that the applicant’s right to fair procedures is superior to the community’s right to prosecute”, commenting further that “fair procedures incorporates the requirement of trial by a jury.”⁶⁴ Finlay CJ in *D* also expressed confidence in the “robust common sense of juries” while Hamilton P in *Z*,⁶⁵ another pre-trial publicity case, remarked: “I too share the confidence our judicial system has in juries.”⁶⁶

2.05 The considerable research which has already been carried out in Britain into the scope of the right to jury trial was also instructive in considering the benefits of trial by jury. Much of this research was carried out in the course of the British debate on either-way offences, a summary of which was included in some detail in the Consultation Paper.⁶⁷ The Commission notes the differences between the District Court in Ireland and the magistrates’ courts in England, in particular the fact that the former is presided over by trained lawyers while the latter is mostly comprised of lay persons who are advised as to the law by a court clerk. However the focus of these studies is the jury itself rather than the quality of the alternative. Thus, despite these differences between the lower courts in the two jurisdictions, the research findings shine some light on the reasons that motivate some accused to prefer trial by jury.

2.06 The British studies show that the reasons why an accused may wish to opt for trial by jury vary considerably. It is possible that some defendants elect trial by jury purely as a delaying tactic in order to maximise the time spent on remand or to increase the likelihood that key prosecution witnesses do not attend. (At the moment, the Circuit Court lists are short and so no particular delay would be encountered by electing for a jury trial. If this situation were to change, obviously delaying tactics would be an issue.) Others, however, genuinely perceive it to offer a fairer and fuller trial. For example a 1992

⁶³ [1994] 2 IR 465.

⁶⁴ *Ibid* at 442.

⁶⁵ [1994] 2 ILRM 481.

⁶⁶ *Ibid* at 493.

⁶⁷ See Chapter 5 of the Law Reform Commission *Consultation Paper on Penalties for Minor Offences* (CP 18-2002).

British study conducted by Hedderman and Moxon⁶⁸ found that a substantial number of defendants chose to be dealt with at the Crown Court because they did not trust magistrates to give due weight to their case. An earlier study by Riley and Vennard⁶⁹ also found that those defendants who chose jury trial did so because they intended to contest the case and viewed the Crown Court as offering a better chance of acquittal and this belief would appear to be borne out by the statistics in England.⁷⁰ Two points should be made here. First, it cannot be assumed that Irish defendants would share similar perceptions about jury trial. Secondly, it is important to note that these are mere perceptions with little or no means of verifying whether they are well founded. Indeed Ashworth has commented of these studies:

“[The research findings] are strongly favourable to Crown Court trial in terms of the fairness of its procedure. The impression given is that the Crown Court looks into cases more thoroughly and allows more time for putting the case and examining the evidence, whereas Magistrates’ Courts operate at too great a speed and tend to give undue weight to the word of police witnesses. These are mere opinions, though they have been reaffirmed by all research projects on the point.”⁷¹

2.07 In any event it is fair to say that in an objective sense trial by jury is slower and more thorough. There is usually: representation by a solicitor and counsel; advance disclosure of the prosecution case including witness statements in the Book of Evidence;⁷² a more

⁶⁸ Hedderman and Moxon *Magistrates’ Court or Crown Court? Mode of Trial Decision and Sentencing* (British Research Study No. 125 1992) at vi-vii.

⁶⁹ Riley and Vennard *Triable Either-Way Cases: Crown Court or Magistrates’ Court?* (British Research Study No. 98 1988) at iii.

⁷⁰ British Consultation Paper *Determining Mode of Trial in Either Way Cases* (July 1998) at paragraph 9.

⁷¹ Ashworth *The Criminal Process* (1st ed. London 1994) at 246-7. Emphasis added.

⁷² Save for certain types of summary offence (such as drunken driving), it is only where the accused is to be tried on indictment that the prosecution is bound by statute (s.6(2) of the *Criminal Procedure Act 1967*) to furnish in advance details of the evidence to be adduced against him. See further Dwyer “The Duty of Disclosure in Criminal Proceedings” (1993) 3(1) ICLJ 66.

thorough explanation of the legal principles applied by the judge; (both on matters relating to the admissibility of evidence and in the summing up); and importantly a full *verbatim* record of the proceedings which means errors of law are much more easily detectable.

2.08 One of the most important benefits is derived from the division of labour between the judge and jury as arbiters of fact and law respectively. In a trial conducted by a judge alone the vital distinction between the admissibility of evidence and the weight which should be attributed to it may become blurred. Whereas in a jury trial the question of the admissibility of evidence is decided in their absence by means of a “trial within a trial”, in trials without a jury a judge cannot determine questions of admissibility without first hearing the evidence upon which they have to rule. Thus if previous convictions or alleged admissions are found to be inadmissible judges are expected to put these out of their minds as they assume the role of trier of fact. Greer and White⁷³ have argued in this regard that “[i]t would be very difficult for a judge genuinely not to be influenced by the fact that an accused has confessed even though the circumstances of the confession rendered it inadmissible.” Moreover, in a jury trial, even if the item of evidence is ruled admissible, the separate functions performed by the judge and jury mean that it is still open to defence counsel to cast doubt in the jury’s minds over the weight to be attributed to it. It may be more difficult to convince judges sitting alone as to the poor probative value of the evidence when they have already determined that the circumstances were such as to render it admissible. However careful the judge sitting alone may be to be mindful of this distinction, the reiteration of the respective roles of the judge and jury in respect of law and facts helps to emphasise the perception of their diverse roles.

2.09 The separation of powers between judge and jury is also valuable in testing the credibility of witnesses. As Greer and White observe, “whereas a judge’s legal training will lead him to concentrate on inconsistencies or the lack of them, a jury will take an overall view of a witness bearing in mind his/her demeanour, attitude and so on.”⁷⁴ Judges may also be required to warn themselves as to

⁷³ Greer and White *Abolishing the Diplock Courts* (The Cobden Trust 1986) at 11-12, quoted in Charleton and McDermott “Constitutional Aspects of Non-Jury Courts” (2000) Bar Rev 106, 107.

⁷⁴ *Ibid.*

the dangers of convicting upon the uncorroborated evidence of an accomplice. This may cast a perception of doubt over the efficacy of the warning despite the scrupulous conscientiousness of the judge. Another consideration with a judge-only trial is that there may be an element of case-hardening to which judges sitting alone may be prone. Trial by jury provides a mechanism by which each case is heard on its individual merits by a fresh tribunal of fact.⁷⁵

2.10 It is important also to consider the role played by the jury in the criminal justice system. As noted in the Consultation Paper, “the jury system embraces values reaching beyond the perceptions of accused persons such as the participation of the public in the criminal justice system and confidence of the general public in that system.”⁷⁶ The jury system promotes the ideal of community involvement in the criminal justice system and brings people of both sexes, all ages and from various walks of life and social backgrounds to the administration of criminal justice. The jury as a “little parliament”⁷⁷ can be seen as the ultimate manifestation of participatory democracy. Personal involvement by the public in determining someone’s guilt or innocence also gives people confidence in the fairness of the system. As Cornish⁷⁸ has noted:

“...the system has the intrinsic advantage that in drawing upon a steady stream of ordinary citizens it is not only educating them in the work of the courts, but also, since they are generally satisfied with their own performance, sending them back to their ordinary lives with a sense of the fairness and propriety of the judicial process in their country.”⁷⁹

⁷⁵ For a list of advantages of a jury trial, albeit in the context of discussion on non-jury courts, see in Charleton and McDermott “Constitutional Aspects of Non-Jury Courts” (2000) Bar Rev 106, 107.

⁷⁶ Law Reform Commission *Consultation Paper on Penalties for Minor Offences* (CP 18-2002) at paragraph 5.31.

⁷⁷ See Devlin *Trial by Jury* (London Stevens 1966) at 164: “Each jury is a little parliament. The jury sense is the parliamentary sense. I cannot see one dying and the other surviving. The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject’s freedom in the hands of twelve of his countrymen.”

⁷⁸ Cornish *The Jury* (Harmondsworth Penguin 1968).

⁷⁹ *Ibid* at 255.

2.11 This line of argument is even stronger here than in Britain where there are considerable numbers of lay justices.⁸⁰ The ideological role of the jury should not be dismissed lightly. To the New Zealand Law Commission for example, the “strong function which juries play in legitimising verdicts and maintaining public confidence in the criminal justice system” constituted an “important argument” which militated against altering the three-month threshold for entitlement to jury trial.⁸¹

2.12 Despite the foregoing the jury has not been without its critics.⁸² Indeed among their number in Ireland can be found former High Court Judge Rory O’Hanlon who compares the system unfavourably with trial by judge alone.⁸³ One of his main criticisms relates to the fact that the jury is not required to justify how they arrived at their decision; while a judgment delivered by a judge may be scrutinised by an appellate court there is much less scope for overturning a jury verdict unless no reasonable jury could have arrived at the same conclusion. This of course is a substantial consideration. O’Hanlon also makes the point that, unlike the members of a jury, a judge has been trained throughout his legal career to leave personal considerations aside and to look at cases objectively and impartially. As juries are not trained in this manner they may on occasion return perverse verdicts. While this is undoubtedly a valid point there is very little in the way of evidence to support this claim as, save in the case of a miscarriage of justice, it is extremely difficult to know whether the “right” verdict has been reached. Further, despite these criticisms, it is clear from the above that trial by jury has much to commend it and does offer defendants significant advantages over trial by judge alone. The presence of a jury not only involves citizens in the system of justice but imposes a discipline on the judge and advocates to present cases in an orderly and understandable fashion.

⁸⁰ See the comments of Darbyshire in this regard “The Lamp That Shows That Freedom Lives - Is it Worth the Candle?” [1991] Crim LR 740, 746.

⁸¹ New Zealand Law Commission *Juries in Criminal Trials* (NZLC 69-2001) at paragraph 78.

⁸² See for example Darbyshire *op cit.* For a discussion of the arguments on both sides of the debate see Findlay and Duff (eds.) *The Jury Under Attack* (Butterworths 1988).

⁸³ O’Hanlon “The Sacred Cow of Trial by Jury” (1990-1992) 25-27 Ir Jur (NS) 57.

B. The Right to Liberty

2.13 Article 40.4.1 of the Constitution grants the citizen a general guarantee of personal liberty in its provision that “[n]o citizen shall be deprived of his personal liberty save in accordance with law.” As evidenced by the firm language used by the Supreme Court in cases such as *O’Callaghan*⁸⁴ and *Ryan*⁸⁵ there can be little doubt that a citizen’s right to liberty is a fundamental right and as such one which should be accorded the most stringent protection. Obversely it can be said that the deprivation of this fundamental right brought about by the imposition of a prison term is, as the *Whittaker Report*⁸⁶ noted, the gravest penalty known to our society today.

2.14 Indeed the right to personal liberty is not the only right which is withdrawn or restricted by virtue of a term of imprisonment. As the Whittaker Committee put it in their Report:⁸⁷

“The ordinary citizen, with his own home, free to come and go as he pleases, able to choose his company and pastimes, finds it difficult to visualise the lot of a prisoner, confined within a forbidding perimeter and bleak environment, shut up alone in a cell for sixteen hours of every day, his movement restricted at every turn by locks and bars, his daily regime one of utter predictability and barely tolerable monotony, deprived of access to a toilet at night, under constant supervision and thus enjoying no privacy, his correspondence censored, his visits regulated and supervised, no time in private with loved ones...”

2.15 These aspects of imprisonment were highlighted more recently by the Government *Report on the Management of Offenders: A Five Year Plan* which noted that “the bottom line is that imprisonment removes totally the right to free movement which is

⁸⁴ *People v O’Callaghan* [1966] IR 501.

⁸⁵ *Ryan v DPP* [1989] IR 399.

⁸⁶ *Report of the Committee of Inquiry into the Penal System* (Dublin Stationery Office 1985).

⁸⁷ *Ibid* at paragraph 4.2.

one of the most valued of human rights and also considerably limits various other rights such as the right to unrestricted communication with others.”⁸⁸ The severity of imprisonment as a form of punishment is also implicitly recognised by the widespread international assent to the principle of restraint on the use of imprisonment. For example Resolution VIII of the *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders* states that “imprisonment should be used as a sanction of last resort”.⁸⁹ Similarly the Council of Europe has declared a policy of encouraging the use of non-custodial sentences and reserving custodial sentences for the most serious types of offence.⁹⁰ In this jurisdiction the principle has been given statutory expression in the *Children Act 2001* with regard to young offenders.⁹¹

2.16 In the light of the above, an argument might be made along the lines that an accused should have a right to jury trial before *any* term of imprisonment is imposed by a court. However, as noted in the Consultation Paper, the Commission does not feel able (at the present moment) to make this recommendation in view of the possible implications that such a proposal would have for the criminal justice system as it currently operates. Instead it was felt that the restriction on a citizen’s liberty which a sentence of more than six months represents should only be visited on a person following a jury trial since trial by jury is the highest form of protection recognised by the Constitution.

C. Comparisons with Other Jurisdictions

2.17 Comparisons with other common law jurisdictions with analogous constitutional arrangements for non-jury trial for minor offences lend support to the Commission’s argument concerning the severity of a sentence of 6 to 12 months for a minor offence. In the US, where the equivalent of a minor offence is known as a “petty

⁸⁸ Department of Justice *The Management of Offenders: A Five Year Plan* (Dublin Stationery Office 1994) at 17.

⁸⁹ Paragraph 5(e).

⁹⁰ *European Rules on Community Sanctions and Measures 1992*.

⁹¹ Section 96(2) lays down the principle that “a period of detention should be imposed only as a measure of last resort”. Section 143(1) gives specific statutory effect to this principle.

offence”, the 1975 Supreme Court case of *Muniz v Hoffman*⁹² held that for minor crimes a sentence of imprisonment for longer than six months was constitutionally impermissible unless the defendant had been given the opportunity of a jury trial. Section 24(e) of the *New Zealand Bill Of Rights Act 1990* allows for a right of trial by jury for an offence punishable by imprisonment for a term in excess of three months (although as it happens the general status of the New Zealand Bill of Rights is such that this provision does not necessarily invalidate statutes which provide for summary trial of a crime with a higher penalty than three months). In Australia those judges who have considered the point have varied in their opinions as to the appropriate boundaries for exclusion from the right to jury trial. Their views range from the position that any sentence of imprisonment at all should attract trial by jury to the position that summary trials are permissible up to a maximum term of 12 months.

2.18 Reference to the British debate on either-way offences has already been made. However there is another category of less serious offences which are only triable summarily in magistrates’ courts. These offences are subject to a current maximum term of imprisonment of six months as provided for by s.27(1) of the *Criminal Law Act 1977*. It should be noted here that the latest Government White Paper *Justice for All* published in July 2002 has recommended that magistrates’ sentencing powers be increased possibly up to 18 months.⁹³ An analogy can also be drawn with the sheriff courts in Scotland. In summary proceedings, a sheriff’s sentencing powers are restricted to six months imprisonment (or 12 months in the case of a second or subsequent offence of violence or dishonesty).

D. Delay and Costs Implications

2.19 Reaction to the Consultation Paper at the seminar and in written submissions received by the Commission focused on the

⁹² 422 US 454.

⁹³ “We will legislate to increase magistrates’ sentencing powers to 12 months, and to allow us to increase them up to a maximum of 18 months, depending on the results of evaluations, and taking account of any necessary additional training requirements”: *CJS: Justice for All* London HMSO. 2002 (Cmnd 5563) at paragraph 4.19.

practical effects of the provisional proposal to reduce to six months the maximum sentence which can be imposed for a minor offence in the District Courts. It was submitted that the effect of any such change in the law would be a substantial increase in the number of cases being sent forward for jury trial in the Circuit Court which would in turn have important costs and delay implications. Delays for criminal cases in the Circuit Court in Dublin are currently between four and six weeks. It was suggested that these may be exacerbated should the proposals come into effect. Delay is always an enemy of justice and it is important to bear in mind the requirements under the Constitution and the fair trial provisions of Article 6 of the European Convention. However, as discussed below, the Commission does not believe its proposals will inexorably lead to a deluge of cases in the Circuit Court.

(a) *Number of Additional Circuit Court Cases*

2.20 An obvious starting point in attempting to ascertain the consequences for the Circuit Court caseload of any reduction in District Court sentencing powers is the available empirical evidence on current sentencing in the District Court. At the moment the Court deals with approximately 90% or more of all criminal cases.⁹⁴ As outlined in Chapter 1, it is possible to further divide those indictable cases which are tried summarily into three sub-categories, namely: “hybrid” offences, which are triable summarily or on indictment at the discretion of the DPP; offences scheduled under s.2(2) of the *Criminal Justice Act 1951* as amended;⁹⁵ and guilty pleas which are referred with the consent of the DPP to the District Court for sentencing.⁹⁶ It will also be recalled from Chapter 1 that the Commission is not suggesting any limit on a District Court judge’s sentencing powers where an accused consents to summary trial or where there is a guilty plea; thus the latter two categories will not be affected by the provision. These two categories represent offences in which accused persons have either waived their rights to trial by jury

⁹⁴ Statistics for 2001 indicate that the District Court heard 386,075 summary cases and 50,431 indictable cases. The District Court returned 8,834 cases for trial on indictment.

⁹⁵ As amended by s.8 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*.

⁹⁶ Section 13 of the *Criminal Procedure Act 1967*.

in the Circuit Court or pleaded guilty before the Circuit Court and therefore do not fall within the ambit of the recommendation. As a result, in seeking an approximation of the additional burden on the caseload of the Circuit Court which might result from the change proposed, it is necessary to combine the numbers of summary offences and “hybrid” offences which currently attract sentences within the 6 to 12 month range. These figures will obviously be subject to different prevailing circumstances, such as changing demographic trends and the crime rate but nevertheless may provide an indication of the potential impact of a reduction of the maximum penalty.

2.21 Unfortunately national statistics on District Court sentencing patterns are not available in the requisite level of detail. However, some data on sentencing in Dublin and Limerick in 2001 is available from the Courts Service by virtue of the Criminal Case Tracking System.⁹⁷ While these statistics may provide an indication of how frequently sentences of over six months are imposed in the District Court, it is important to note that these figures may not accurately represent sentencing practices in other areas. In any event, the statistics provided by the Courts Service indicate that the number of offences in respect of which the offender received an immediate sentence of imprisonment in District Courts within the Dublin Metropolitan Area in 2001 was 3,665. Of these, the figures which relate to sentences of imprisonment of over six months can be categorised as follows:

⁹⁷ The Criminal Case Tracking System (CCTS) is part of the Courts Service Information Technology Strategic Plan to implement modern technologies in all areas on courts business and operates in the Dublin Metropolitan and Limerick District Courts. CCTS is an Oracle Relational Database and is designed to utilise modern database capabilities to allow the organisation to achieve a centralised and uniformed collection of data on criminal cases. CCTS was completed and implemented in 2001. The system enables court staff and management to record and monitor the progress of criminal court cases, showing the complete lifecycle of these cases.

Table 2.1: Sentencing Information: Dublin Metropolitan District⁹⁸ 2001. Offences by Category: Immediate Sentence of Imprisonment of Over Six Months⁹⁹

Offence	Summons	Charge Sheet	Total
Summary	17	171	188
Indictable triable summarily	4	342	346
Triable summarily at DPP's direction	3	111	114
Total	24	624	648

2.22 As the Commission's proposal would affect only summary offences and offences which are triable summarily at the DPP's direction, it would appear that 302 (188 + 114) out of the 648 cases in which a sentence of 6 to 12 months was imposed would fall to be dealt with by the Circuit Court. Assuming that sentencing practice has not changed significantly since 2001, this would amount to 302 extra Circuit Court cases per year in the Dublin Area.

2.23 Sentencing information for Limerick for 2001 indicates that a lesser number of offences may be affected. The number of offences which received an immediate sentence of imprisonment was 323. The relevant figures for present purposes namely, those pertaining to sentences of imprisonment of over six months, can be further broken down as follows:

⁹⁸ The following District Court areas are not included: Children's Court; Kilmainhain; Tallaght.

⁹⁹ Source: Courts Service.

Table 2.2: Sentencing Information: Limerick¹⁰⁰ 2001. Offences by Category: Immediate Sentence of Imprisonment of Over Six Months¹⁰¹

Offence	Summons	Charge Sheet	Total
Summary	1	6	7
Indictable triable summarily	0	24	24
Triable summarily at DPP's direction	2	27	29
Total	3	57	60

2.24 As can be seen from Table 2.2., the number of cases in the relevant categories corresponds approximately to 36 (7+29) extra Circuit Court cases in Limerick per year.

2.25 Should the District Court sentencing powers be limited to six months, a number of comments can be made in interpreting these figures to deduce an impression of the additional burden on the caseload of the Circuit Court. In the first place, the figures given include sentences of the appropriate length whether given following a trial or a guilty plea. In a strong majority of cases the accused pleads guilty (76% of cases disposed of by the Circuit Court in 2001 comprised cases in which a plea of guilty was entered).¹⁰² However, even in those cases, sentencing would place demands upon Circuit Court time, the amount depending upon the stage at which the guilty plea was entered. Another factor to bear in mind is that the issue is not simply one of counting up how many offenders are sentenced to 6 to 12 months, as in the figures just cited. These figures show only those cases in which the offender had pleaded guilty or was convicted. However if the District Court's power of sentencing were reduced to six months then there would be a number of other cases in which the DPP would take the view that the offence was so serious that it would have to be tried in the Circuit Court. In a good proportion of such cases the accused would be acquitted. The

¹⁰⁰ District Court Area of Limerick.

¹⁰¹ Source: Courts Service.

¹⁰² *Ibid.*

relevance of this for present purposes is that under the present regime there is no equivalent figure for these cases which can be considered alongside the figures cited above. Lastly, and perhaps most importantly, this figure represents *current* sentencing practice. It is to be hoped that this Report may prompt a re-examination of this area by sentencing judges in the District Court who may begin to reconceptualise the tariffs for a minor offence. If this were to occur then the concerns expressed as to the additional burden which would be placed on the Circuit Court would, to some extent, be met by the aforementioned change in sentencing practice.

(b) *Costs Implications*

2.26 In any event the additional time and cost of conducting a trial in the Circuit Court requires careful consideration. From the information garnered at the Commission's seminar it is reasonable to assume that a relatively uncomplicated case involving only a couple of witnesses could be heard in a couple of hours in the District Court. In the Circuit Court on the other hand, the trial of an equivalent case is likely to run into a second day's hearing. The fallout may therefore be significant in terms of the additional days for which the Circuit Court would be required to sit and, consequently, in terms of the additional Circuit Court Judges which may need to be appointed. Extra costs would also be incurred by the Courts Service in terms of an increased demand placed on human and physical resources.

2.27 It is also of paramount importance to consider the additional expenditure required to defend an action in the Circuit Court where the majority of defendants are in receipt of legal aid. Fees between the two courts differ considerably. If one assumes that a defendant will usually be represented in the District Court by a solicitor only but in the Circuit Court by both a solicitor and counsel, then it is possible to estimate the additional cost to the Exchequer of running a case in the higher court. A solicitor is paid a €208.73 (IR£164.39) fee for appearing in the District Court. In contrast, in the Circuit Court a solicitor is given an initial brief fee of €1,184 (IR£932) and the same amount is also given in brief fees to counsel. A second day in the Circuit Court (assuming as stated above an average trial would continue into a second day) would require a refresher fee of €432.16 (£340.35) for the solicitor and €592 (£466.24) for counsel. Thus if the trial continues into the second day the total bill for a defendant's

legal aid in the Circuit Court is €3,392.16 (IR£2,671.54). This is an additional €3,183.43 (IR£2,507.15) as compared with District Court costs. While the costs incurred by the State in bringing additional prosecutions in the Circuit Court as opposed to the District Court are less amenable to calculation given that salaried State solicitors are retained by the Office of the DPP, the fees cited above for defence counsel in the Circuit Court would be mirrored on the prosecution side. It is important to consider as well the extra demands which would be placed on the resources of the DPP's Office. Allowing for such hidden costs, the additional amount would have to be in the order of €10,000. Moreover this figure does not take into account the cost of the judge, the court and its staff.

2.28 This figure invites an enquiry into the number of additional jury trials in respect of which these extra costs would be incurred. However, when factors such as those discussed in paragraph 2.22 are taken into account, most notably the number of guilty pleas and the prospect that the sentencing maxima are reconceptualised by District Court judges, it appears impossible to estimate with any accuracy the additional costs which would be incurred. In any event, in considering the costs implications which may flow from the recommendation, it is worth reemphasising that a citizen's right to liberty is a fundamental right and as such one which should be accorded the most stringent protection.

2.29 There is one further objection to a proposal to reduce the District Court's sentencing power which has been suggested to the Commission. This criticism is directed at the workability of any such provision bearing in mind that the District Court would retain a discretion to impose consecutive sentences of up to 24 months.¹⁰³ The significance of this power could arise from the fact that in many criminal cases there are a number of different charges or counts brought against the accused, arising out of separate incidents. Often a multiple offender will receive what is effect a "discount" for bulk offending when he or she asks the court to take a number of counts

¹⁰³ Section 5 of the *Criminal Justice Act 1951* (as amended by s.12(1) of the *Criminal Justice Act 1984*) provides: "[W]hen a sentence of imprisonment is passed on any person by the District Court, the court may order that the sentence shall commence at the expiration of any other term of imprisonment to which that person has been previously sentenced, so that where two or more sentences passed by the District Court are ordered to run consecutively the aggregate term of imprisonment shall not exceed two years."

into consideration. The significant point is that the District Court judge retains a discretion to impose consecutive sentences provided that each of these charges arise from separate incidents. It has been suggested that if a six month maximum were introduced District Court judges might exercise their discretion to sentence consecutively in such a manner that a person convicted of a number of separate offences would receive consecutive six month sentences in circumstances where otherwise they would have served their sentences concurrently.¹⁰⁴

2.30 It is, however, noteworthy that as a general principle of law sentences may not be extended by means of consecutive sentencing so as to render them disproportionate to the offence. Therefore, where consecutive offences are imposed, the totality of the resulting punishment should be readjusted to reflect the overall gravity of the offending behaviour, the so-called “totality principle”.¹⁰⁵ Moreover the Supreme Court in *Meagher v O’Leary*¹⁰⁶ has already expressed strong disapproval of a practice whereby prosecution authorities artificially multiply charges in the hope of securing consecutive sentences. O’Flaherty J further noted that “for a judge to approbate such a course of conduct would... be a misuse of a discretion by him or her.”

¹⁰⁴ Another possibility is that sentences may be increased through the adoption of consecutive sentences of six months for offences arising from the same criminal “transaction” whereas previously concurrent sentences would have been imposed. As a general rule concurrent sentences are ordinarily imposed when the offences arise from the same incident (the “one transaction rule”). In *Meagher v O’Leary* [1998] 4 IR 44 Moriarty J stated that “when a summary sentencing jurisdiction is being exercised in relation to what in essence amounts to a single criminal transaction, it is wrong in law that consecutive sentences should be imposed in respect of different summonses or charges clearly referable to that single transaction, in such a fashion as to render the aggregate sentence in excess of twelve months.” Moriarty J further remarked obiter that an appropriate test for determining whether the offences were separate and therefore whether consecutive sentences could be imposed in respect of different charges or summonses would be “whether or not an acquittal on a first alleged complaint would amount to a bar against the prosecution proceeding on second or subsequent complaints.” It is to be hoped that, in the event of such a practice growing up in the District Courts, the judicial principles thus developed would act as a useful touchstone.

¹⁰⁵ See O’Malley *Sentencing Law and Practice* (Round Hall Sweet and Maxwell 2000) at para 6-89.

¹⁰⁶ [1998] 2 ILRM 481.

(c) Conclusion: View of the Majority

2.31 The arguments are clearly well balanced. The Commission is unanimous in its recommendation that ideally, the restriction on a citizen's liberty represented by a term of imprisonment of 6 to 12 months should only be visited on a person following a jury trial.

2.32 However, at the present time the majority of the Commission feel unable to recommend legislation giving effect to this principle for two reasons. The first relates to the lack of nationwide statistical data on the sentencing of offenders in the District Court which would permit the Commission to ascertain (with a reasonable degree of accuracy) the effect of such legislation, or indeed the frequency with which sentences of 6 to 12 months are currently imposed in the District Court in this jurisdiction. Although the statistics available for Dublin and Limerick (admittedly District Courts with heavy caseloads) indicate that there is unlikely to be a huge influx of cases into the Circuit Court, the lack of data on sentencing in the country as a whole presents a significant handicap to any discussion on sentencing limits. The majority of the Commission think it imprudent to make a directional recommendation in the absence of such data. Secondly, the Commission is of the view that a wider range of non-custodial sanctions and measures should be made available to District Court judges prior to the implementation of any proposal to curtail their sentencing powers in respect of minor offences. Although the Commission majority have ultimately favoured a non-directional recommendation in this area of reform, they remain firmly committed to the principle that a maximum level of 6 to 12 months is an inappropriate penalty for a minor offence. They therefore exhort sentencing judges in the District Court to reconceptualise the sentencing maximum for minor offences.

2.33 Therefore, at the present time, the majority of the Commission feel unable to recommend legislation which would impose a limit of six months on the District Court's sentencing powers.

(d) Conclusion: View of the Minority

2.34 While the practical effect of a proposal to reduce the sentencing maximum for a minor offence cannot be described as

negligible, on the basis of the statistical information available the minority of the Commission does not consider the implications to be so overwhelming as to render any such proposal unworkable. Further these implications do not appear so significant as to override the important principle identified earlier at paragraph 2.15, namely, that the restriction on a citizen's liberty which a sentence of more than six months represents should only be visited on a person following a jury trial.

2.35 *The minority of the Commission therefore further recommends legislation along the following lines:*

“(1) Without prejudice to s.5 of the Criminal Justice Act 1951 as amended [consecutive terms of imprisonment], a District Court shall not have power to impose imprisonment for more than six months in respect of any one offence.”

*“(2) Unless expressly excluded, subs.(1) shall apply even if the offence in question is one for which a person would otherwise be liable on summary conviction to imprisonment for more than six months”.*¹⁰⁷

2.36 This provision would be subject to two exceptions. First, those indictable offences triable summarily which are scheduled under s.2(2) of the *Criminal Justice Act 1951* as amended¹⁰⁸ and in respect of which the accused has a right to insist upon a jury trial. Secondly, those indictable cases in which pleas of guilty have been entered and which have been referred with the consent of the DPP to the District Court for sentencing only.¹⁰⁹

2.37 It is important to emphasise though that in reaching these conclusions the Commission is not seeking (indirectly) to alter the Constitution. The proposal is rather that, despite the constitutional requirement, District Court judges (majority view) or the legislature (minority view) would on policy grounds observe a self-denying

¹⁰⁷ See s.27 of the English *Criminal Law Act 1977*.

¹⁰⁸ Section 2 of the *Criminal Justice Act 1951* was amended slightly by s.19 of the *Criminal Procedure Act 1967*, ss.21(6) and 22 of the *Criminal Law (Jurisdiction) Act 1976* and s.8 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*.

¹⁰⁹ Section 13 of the *Criminal Procedure Act 1967*.

ordinance. While cognisant of the fact that its role does not extend to recommending constitutional amendments, the Commission nevertheless seeks to suggest to the All-Party Oireachtas Committee on the Constitution that the recommendation might be copper-fastened by the only foolproof method, namely, a constitutional amendment. The Commission also notes that the allocation of the jurisdiction as between the District Court and the Circuit Court is presently being reviewed by the Working Group on the Jurisdiction of the Courts. The Commission hopes that the conclusions reached herein in relation to the appropriate maximum term which should be imposed for a minor offence could be considered in the broader context of this review. In addition, it is noteworthy that the Government, while in no way attempting to pre-empt the recommendations of the Working Group, has set out a proposal in its Programme for Government to establish a single court for the trial of indictable offences. It is possible that the Commission's views may dovetail well with any development.

CHAPTER 3: THE REQUIREMENT TO GIVE REASONS

3.01 The hardship occasioned by a custodial sentence and the respect afforded the liberty of the citizen by the Irish constitutional and legal system has further led the Commission to recommend that there be a requirement that a District Court judge should give brief written reasons as to why a prison sentence rather than a non-custodial sentence has to be imposed.¹¹⁰

A. Arguments in Favour of Giving Reasons for a Sentencing Decision

3.02 There are several arguments in favour of the introduction of a requirement to give reasons. The Commission believes that the public has an interest in knowing the reasons behind sentencing decisions and, by countering any appearance of arbitrariness, public confidence in the criminal justice system may well be enhanced as a result. A second advantage flowing from a duty to give reasons is that it may encourage more considered legal decisions. In his classic article on this subject Thomas quotes from *The Franks Report*:¹¹¹ “[A] decision is apt to be better if the reasons for it have to be set out in writing because the reasons are then more likely to have been properly thought out.”¹¹² More recently, Lord Justice Henry stated in the civil case of *Flannery v Halifax Estate Agencies Ltd*¹¹³ that “a requirement to give reasons concentrates the mind. If it is fulfilled the resulting decision is much more likely to be soundly based on the

¹¹⁰ Law Reform Commission *Consultation Paper on Penalties for Minor Offences* (CP 18-2002) at paragraphs 6.29 and 9.3.

¹¹¹ *The Franks Report* 1957 (Cmnd 218) at paragraph 98.

¹¹² Thomas “Sentencing - The Case For Reasoned Decisions” [1963] Crim L R 243, 247.

¹¹³ [2000] 1 WLR 377.

evidence than if it is not.”¹¹⁴ Views along similar lines were expressed at the seminar. A number of those who attended expressed the hope that the imposition of a requirement to give reasons would result in an improved standard of advocacy in the District Court and would encourage District Court judges to elicit more information from advocates before sentencing. In this regard it is of interest to note that in 1992, as part of its recommendations to promote consistency in sentencing, the Council of Europe advocated that concrete reasons for sentencing decisions be given in Member States, particularly when a custodial sentence is imposed.¹¹⁵

3.03 It is also salutary to note the impact which the *Cawley*¹¹⁶ decision in Britain has had on the use of imprisonment by the courts for young fine defaulters. In *Cawley* the High Court reinforced the statutory requirement laid down in s.1(5a)b of the *Criminal Justice Act 1982* for the courts to articulate clearly the reasons why each fine enforcement measure had failed or had not been used before committing a young fine defaulter to jail. Simon Brown LJ stated :

“[I]t must be possible to see from the face of the warrant (and register) why it is that... the justices have felt no alternative but to commit this young person to custody... the reasoning process must be gone through. The reasons must be clearly capable of articulation. They must indeed be articulated in open court.”¹¹⁷

3.04 The judgment, coupled with a new “best practice” guide fortuitously issued about the same time by the Lord Chancellor’s Department,¹¹⁸ has had the effect that the number of fine defaulters

¹¹⁴ *Ibid* at 396.

¹¹⁵ “E.1. Courts should in general state concrete reasons for imposing sentences. In particular specific reasons should be given when a custodial sentence is imposed”: Council of Europe *Consistency in Sentencing Recommendation No. R (92)* 17 Strasbourg 19 October 1992.

¹¹⁶ *R v Oldham Justices and another, ex parte Cawley* [1997] QB 1; [1996] 1 All ER 464.

¹¹⁷ *Ibid*.

¹¹⁸ In 1995 a Working Group was set up by the Magistrates’ Association, the Justices’ Clerks Society and the Lord Chancellor’s Department to study the enforcement of financial penalties. It sought to identify ways of improving enforcement and produced a report in 1996 which highlighted good practice as well as giving guidance on fine enforcement.

received into prison has fallen sharply from its peak at 21,000 in 1994 to around 5,000 in 1997 and 1998.¹¹⁹ Such findings lend strong support to the argument that an obligation to state the reasons for a decision can lead to greater care and fairness in judicial decision-making.

3.05 A cynical person might say that such an obligation could lead to an increased number of judicial reviews. A more constructive way of viewing this is that the provision of reasons for a decision would mean that appellate and review courts would be better able to assess the appropriateness of the sentence imposed at first instance. Indeed the utilitarian aspect of reasoned decision making was highlighted by Keane J in *Golding v The Labour Court*:¹²⁰

“[T]he determination by the Labour Court need not... take any particular form: what is essential is that the manner in which it [the determination] is expressed leaves no room for doubt as to the reasons which led to the decision, thus ensuring that neither the appellate nor the supervisory jurisdiction of this court is frustrated by an inadequate indication of reasons.”

B. Constitutional Justice and Human Rights Obligations to Give Reasons

3.06 Thus far this chapter has considered the policy arguments in favour of a duty to give reasons. In this part it is noted that the recommendation made here is in fact merely an aspect of the general constitutional and human rights obligation to give reasons for a decision. Prior to the entry into force of the *Freedom Of Information Act 1997*, a wide doctrine requiring administrative bodies to give reasons for their decisions had been deduced from the notion of constitutional justice. Decisions such as *The State (Creedon) v Criminal Injuries Compensation Tribunal*¹²¹ and *International Fishing Vessels Ltd v Minister for the Marine*¹²² had brought Irish

¹¹⁹ See Ashworth *Sentencing and Criminal Justice* (3rd ed Butterworths 2000) at 278. See also Whittaker and Moxon *Enforcing Financial Penalties* (British HORS 165 1996) at XI and 38-39.

¹²⁰ [1994] ELR 153, 159.

¹²¹ [1988] IR 51.

¹²² [1989] IR 149.

jurisprudence to a level whereby nearly all tribunals or public bodies could be asked to provide at least some kind of explanation for their decisions, at any rate where judicial review proceedings were in prospect.¹²³ Rather surprisingly, however, in the light of this strong tide running prior to the recent decision in *O'Mahony*¹²⁴ discussed below, the issue concerning the obligation on a court to give reasons for its judgment had not been the subject of detailed judicial comment.¹²⁵

3.07 The next stage of development was statutory. The *Freedom of Information Act 1997* imposed an extensive duty on “public bodies”¹²⁶ to give reasons in making certain sorts of decisions.¹²⁷ While this expression naturally does not include the courts, one might reasonably ask whether the requirement to give reasons should not apply *a fortiori* where the decisions being taken affect the liberty of the citizen.

3.08 To go back to the principles of constitutional justice charted in paragraph 3.06 and the right to reasons as deduced therefrom, the law in this area has been considerably developed by the recent decision of the Supreme Court in the case of *O'Mahony v Judge Thomas Ballagh and the DPP*.¹²⁸ In *O'Mahony* the applicant had been convicted of drunken driving. He sought judicial review of the decision of the District Court judge on the basis that his trial in the District Court was not conducted in accordance with the principles of constitutional

¹²³ See further Byrne and Binchy *Annual Review of Irish Law 1988* (Dublin Round Hall Press 1989) at 17-18.

¹²⁴ Supreme Court 13 December 2001 (Irish Examiner Law Report 28 January 2002).

¹²⁵ It should be noted that the fact that such an obligation existed was recognised by the Supreme Court in *Creedon v Criminal Injuries Compensation Tribunal* [1988] IR 51: “I am satisfied that the requirement which applies to this Tribunal, as it would to a court, that justice should appear to be done, necessitates that the unsuccessful applicant before it should be made aware in general and broad terms of the grounds on which he or she has failed.”

¹²⁶ For a list of bodies which are included under the *Freedom of Information Act 1997*, see the First Schedule to the Act.

¹²⁷ See Hogan and Morgan *Administrative Law in Ireland* (3rd ed. Sweet & Maxwell 1998) at 574-577.

¹²⁸ Supreme Court 13 December 2001 (Irish Examiner Law Report 28 January 2002).

justice in that the trial judge had failed to address a submission made by counsel on behalf of the applicant. Counsel for the applicant had applied to the court for a non-suit at the close of the prosecution case. On appeal to the Supreme Court Murphy J held that:

“I would be very far from suggesting that Judges of the District Court should compose extensive judgments to meet some academic standard of excellence. In practice, it would be undesirable - and perhaps impossible - to reserve decisions even for a brief period. On the other hand it does seem, and in my view this case illustrates, that every trial judge hearing a case at first instance must give a ruling in such a fashion as to indicate which of the arguments he is accepting and which he is rejecting and, as far as is practicable in the time available, his reasons for so doing. As I have already said, there is no suggestion that Judge Ballagh conducted the case otherwise than with dignity and propriety. It does seem to me however, that in failing to rule on the arguments made in support of the application for a non suit he fell ‘into an unconstitutionality’ to use the words of Henchy J in the *State (Holland) v Kennedy* [1977] IR 183 p.201.”¹²⁹

3.09 Although Murphy J showed a keen awareness of the demands placed on a District Court judge’s time, he also thought it essential that reasons for their decisions should be stated in open court. Moreover, he placed a special emphasis on the judge’s obligation to respond to submissions made by counsel and give reasons for this response. It is clear that submissions made by counsel concerning the appropriateness of non-custodial alternatives would fall squarely within the scope of this proposition. From this position it is only a few steps further to impose a requirement that, first, the reasons for a judge’s decision to impose a custodial sentence are recorded and secondly, that reasons are required even where there has been no such submission.

3.10 The *O’Mahony* case finds a resonance in the jurisprudence of Article 6(1) of the *European Convention on Human Rights and Fundamental Freedoms* which provides for the right to a fair trial.¹³⁰

¹²⁹ Supreme Court 13 December 2001 (Irish Examiner Law Report 28 January 2002). Emphasis added.

¹³⁰ Article 6(1) states: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public

It is a requirement of a fair trial in both civil and criminal matters that a court should give reasons for its judgment. As stated by the European Court of Human Rights in *Van De Hurk v The Netherlands*:¹³¹ “Article 6(1) obliges courts to give reasons for their decisions but cannot be understood as requiring a detailed answer for every argument. Nor is the European Court called upon to examine whether arguments are adequately met.”¹³² Therefore while Article 6(1) does not require a full response to all arguments before the court, as noted by the European Court in *Hiro Balani v Spain*¹³³ it does oblige the court to provide a “specific and express” answer where the submission, if successful, would be decisive to the outcome of the case. It is also important to note that the extent of the requirement may vary according to the nature of the decision and the circumstances of the case.¹³⁴ While this requirement does not apply to jury trials it does apply to summary trials. The primary reason given by the European Court for the obligation to give reasoned decisions is so that the “accused may usefully exercise the right of appeal available to him”,¹³⁵ although further justifications for this right lie in the fact that both the defendant and the wider public have a legitimate interest in knowing the grounds for any judgment.

3.11 In the light of this jurisprudence it is likely that the incorporation of the European Convention into our domestic law will strengthen the requirement to give reasons.¹³⁶ Certainly since the enactment of the *Human Rights Act 1998* in England and Wales, closer attention has been paid by the legal community in our neighbouring jurisdiction to the need to give reasons. In *Stefan v General Medical Council*¹³⁷ for example, the Privy Council made reference to the “possible reappraisal of the whole position [in

hearing within a reasonable time by an independent and impartial tribunal established by law.”

¹³¹ (1994) 18 EHRR 481.

¹³² *Ibid* at paragraph 61.

¹³³ (1994) 19 EHRR 566.

¹³⁴ *Ibid*; *Ruiz Torifa v Spain* (1995) 19 EHRR 553; *Georgiadis v Greece* (1997) 24 EHRR 606.

¹³⁵ *Hadjianastassiou v Greece* (1992) 16 EHRR 219.

¹³⁶ At the time of writing the *European Convention on Human Rights Bill 2001* had reached the second stage of its passage through the Oireachtas.

¹³⁷ [1999] 1 WLR 1293.

relation to the duty to give reasons] which the passing of the *Human Rights Act 1998* may bring about.” Significantly, Baker has also noted that “the [pre-1998] failure of many magistrates to give reasons for verdicts or submissions of no case to answer is questionable”.¹³⁸ Indeed in the run-up to the 1998 Act, magistrates were hastily trained to give reasons. The requirement now forms part of the latest *Magistrates’ Court Sentencing Guidelines* which state unequivocally that “magistrates should normally give reasons for their findings and decision; this is obligatory under the *Human Rights Act*.”¹³⁹ A *pro-forma* document for stating the reasons for sentence is also included in the *Sentencing Guidelines*, a copy of which is provided in Appendix 3. On this document, magistrates are invited to note details such as the offence committed, its aggravating and mitigating features and the offender’s previous record.

3.12 Most significantly of all, magistrates in England and Wales who impose a custodial sentence are required by law, by virtue of s.1 of the *Criminal Justice Act 1991* (now consolidated in s.79 of the *Powers of Criminal Courts Sentencing Act 2000*), to identify in open court the criterion on which a custodial sentence is based. There are three possible criteria. First, that the offence was so serious that only a custodial sentence can be justified; secondly, that the offence was a “violent or sexual offence” and that only such a sentence would be adequate to protect the public from serious harm; and thirdly, that the offender has failed to express his willingness to comply with a probation/ supervision/ drug treatment order. If the court bases its decision on either the first or second criterion then it must go further and state why it is of this opinion.¹⁴⁰ The decision and the reasons underpinning it must be explained to the offender in open court and in ordinary language¹⁴¹ and these reasons must then be recorded in both the warrant of commitment and in the court register.¹⁴² The overall effect of these provisions is that they act as a significant restriction on the judicial discretion to impose custodial sentences. While the

¹³⁸ Baker *Human Rights Act 1998: A Practitioner’s Guide* (London Sweet & Maxwell 1998) at paragraph 4-70.

¹³⁹ The Magistrates’ Association *Magistrates’ Court Sentencing Guidelines* (The Magistrates’ Association 2000) at 68.

¹⁴⁰ Section 79(4)(a) of the *Powers of Criminal Courts (Sentencing) Act 2000*.

¹⁴¹ Section 79(4)(b) of the *Powers of Criminal Courts (Sentencing) Act 2000*.

¹⁴² Section 79(5) of the *Powers of Criminal Courts (Sentencing) Act 2000*.

proposal under consideration here is not as exacting in its requirements, the English provisions are instructive in that they are clearly informed by a desire to ensure that decisions to impose a custodial sentence are seen to be carefully taken because reasons are given and doubly recorded.

C. How Extensive Must the Reasons Be?

3.13 The next issue concerns how extensive the reasons provided by the court should be. Perusal of the pre-1997 case-law on the extent of the duty to give reasons in an administrative context reveals that the requirement may be satisfied so long as the reasons given are meaningful. Thus the grounds upon which a decision is based should be given in “general and broad terms”¹⁴³ and the “broad gist”¹⁴⁴ of the basis for a decision should be apparent. On the other hand, Ashworth notes that “a kind of moral expostulation about the offence, ‘one of the worst of its kind’, ‘a dreadful and brutal attack’”¹⁴⁵ will not suffice in isolation. In the Council of Europe’s Recommendation on sentencing referred to above, “reason” is given the following definition: “[A] motivation which relates the particular sentence to the normal range of sentences for the type of crime and to the declared rationales for sentencing.”¹⁴⁶

3.14 In the Consultation Paper the Commission did not elaborate on the exact content of the reasons to be given, recommending that wording along the following lines be adopted: “I impose a custodial sentence of...for the following reasons:...”¹⁴⁷ It noted that the reasons do not have to be lengthy nor elaborate. At the same time such a formula may simply generate terse responses such as “seriousness”, “persistence”, “last resort” *et cetera*. The danger is that the reasons

¹⁴³ *The State (Creedon) v Criminal Injuries Compensation Tribunal* [1988] IR 51.

¹⁴⁴ *Faulker v Ministry for Industry and Commerce* [1997] ELR 107.

¹⁴⁵ Ashworth *Sentencing and Criminal Justice* (3rd ed. Butterworths 2000) at 305.

¹⁴⁶ Council of Europe *Consistency in Sentencing, Recommendation No. R (92)* 17 Strasbourg 19 October 1992, Recommendation E.2.

¹⁴⁷ Law Reform Commission *Consultation Paper on Penalties for Minor Offences* (CP 18-2002) at paragraph 6.28.

given could become reduced to the level of the formulaic providing no real insight. Bearing this in mind, the Commission recommends that brief reasons should be given outlining the aggravating and mitigating factors influencing the decision with particular emphasis, where appropriate, on why the non-custodial options available to the judge are not appropriate. In listing the factors which in their opinion render the offence one in respect of which a prison sentence is the most suitable punishment, judges may wish to have regard to the list of aggravating and mitigating factors outlined in the Law Reform Commission's *Report on Sentencing*¹⁴⁸ and which are listed in Appendix 3.¹⁴⁹

3.15 The main objection to an obligation to give reasons concerns the fact that it may cast an additional burden on the courts and cause delay. This is not a small point. Coupled with the present obligation imposed on the courts by *O'Mahony* which is to rule in open court on submissions made by counsel and, as far as is practicable, give reasons for such rulings. This will have the result that, in a case which may only take half an hour or so, several more minutes will have to be devoted to formulating and announcing reasons as to the judge's decisions on for example, submissions made by counsel on the strength of the evidence against the accused or on any defence raised. Further, there may be resource implications in terms of the additional administrative burden that the recording of these reasons may place on the Courts Service.

3.16 However the requirement that decisions are fair and reasoned, particularly where an individual's liberty is at stake, is so overwhelming that the Commission considers that this should not be sacrificed for the sake of speed or administrative convenience. Furthermore, it has been noted in submissions made to the Commission on the issue that in practice most District Court judges already give reasons for imposing a custodial sentence where those reasons are not self-evident. In some District Court areas at least,

¹⁴⁸ Law Reform Commission *Report on Sentencing* (LRC 53-1996) at 26-27.

¹⁴⁹ O'Malley states in his book on *Sentencing Law and Practice* (Dublin Round Hall Sweet & Maxwell 2000) at 10 "There would be nothing to lose and much to gain from enacting a statute setting out the main factors that are ethically relevant in the determination of sentences." He recognises the list of aggravating and mitigating factors in the Commission's *Report on Sentencing op cit* as being declaratory of the existing law, but also notes that it has no legal status.

therefore, the Commission's recommendation would only serve to set on a statutory footing what is current good practice. In short as one contributor noted at our seminar: "[T]he most primitive jurisprudential definition of law is that it must be reasoned and not arbitrary...there are practical problems, but even a note of the mitigating/aggravating factors is light years ahead of no reasons at all."¹⁵⁰

3.17 Accordingly, the Commission adheres to its earlier recommendation that a District Court judge should be required to give concise, written reasons for any decision to impose a prison sentence rather than a non-custodial sentence. The Commission further recommends, as part of this requirement, that District Court judges should record the aggravating and mitigating factors which influenced the decision, with particular emphasis on why the non-custodial options available to the judge are not appropriate.

D. Where Should the Reasons be Recorded?

3.18 Given this recommendation, a practical issue arises as to where the reasons should be recorded. Although no mention was made of this in *O'Mahony*, there would appear to be two options open to the District Court judge. One suggestion is that the reasons could be written where the sentence imposed is written, namely at the foot of the charge sheet or summons. As the charge sheet would then be appended to the warrant of commitment, this would serve to record the reasons on the warrant. This option seemed to receive considerable support at the seminar with contributors suggesting that the reasons could either be recorded on the charge sheet or a separate sheet which would then be appended with the charge sheet to the warrant. Another means of recording the reasons would be a "custodial sentence" book which would be kept by the clerk in the District Court office for future reference. As mentioned above, in England a magistrate is required to record the reasons to impose a custodial sentence in two places; on both the warrant of commitment and the court register. It appears to the Commission that the reasons should be recorded on the charge sheet and, by extension, on the warrant of commitment where most of the main orders made by the

¹⁵⁰ Remark by Judge Bryan McMahon at the Law Reform Commission Seminar on Minor Offences 1 July 2002.

District Court judge are recorded. This would also enable the District Court judge to note the reasons for imposing a custodial sentence personally.

PART II: MINOR OFFENCES AND FINES

CHAPTER 4: HIGHER FINES FOR WELL OFF OFFENDERS

4.01 The following three chapters are concerned with the level of fine which may be levied for a minor offence. As noted in Chapter 1, a survey of the constitutional case law defining “minor offence” locates the current upper limit for fines for a minor offence (in so far as it can be gauged) at around €3,000 (IR£2,363). The purpose of this chapter is to consider whether a court should adjust fines imposed for minor offences in accordance with the financial circumstances of an offender in order to ensure that the penalties are equally onerous on those who commit comparable offences even though their financial circumstances may be very different. First of all, however, a preliminary observation should be made regarding the amount of the supposed maximum fine itself.

A. Reviewing the Upper Limit

4.02 As observed by the Commission in the Consultation Paper, three factors argue in favour of the view that what is conventionally regarded as the maximum constitutionally permitted fine is too low.¹⁵¹ First, and most significantly, there has been no authoritative modern review of the effect of inflation on the limit for a fine. The current maximum figure of €3,000 (IR£2,363) may therefore not properly reflect the changes wrought by inflation.¹⁵² The Supreme Court in *Melling*¹⁵³ held unanimously that for the purposes of any such

¹⁵¹ See Law Reform Commission *Consultation Paper on Penalties for Minor Offences* (LRC CP18-2002) at paragraphs 6.09-6.17.

¹⁵² See further Law Reform Commission *Report on the Indexation of Fines* (LRC 37-1991) and also Law Reform Commission *Report on the Indexation of Fines: A Review of Developments* (LRC 65-2002).

¹⁵³ *Melling v O Mathghamhna* [1962] IR 1.

assessment the relevant date of comparison is 1922.¹⁵⁴ If one considers that the court in *Melling* also found that a fixed penalty of IR£100 (€127) was minor then, taking the inflation rate since 1922 into account, this would increase the maximum figure forty-fold to €5,079 (IR£4,000) (or even more if one were to take the relevant date as 1937 given that there was actually deflation during the period 1922-37).

4.03 Furthermore, in most of the cases on the topic the courts appear to have adopted inflation as the appropriate guide.¹⁵⁵ Yet, it is open to question whether the inflation rate is the appropriate “connecting factor” in any assessment of the current value of the upper limit. As highlighted by the Supreme Court in *Melling*, it is important to consider the penalty from the point of view of the offender. In this regard, the increase in the wage rate would provide a better indicator than inflation as to the impact which the fine makes on the individual. If the wage-rate figure is adopted then the increase is much higher. For example, from 1953 (the earliest date for which information is available) a 66-fold increase occurred in the average industrial wage rate as opposed to a increase of 19-fold in the rate of inflation.

4.04 Secondly, the criminal jurisdiction of the District Court has failed to keep pace with the increases in the Court’s jurisdictional limits in civil cases. The current District Court limit established in 1991 is €6,349 (IR£5,000). Section 14 of the *Courts and Court Officers Act 2002*, which has yet to be brought into effect, extends the civil jurisdiction of the District Court to €20,000 (IR£15,750). When one considers that the District Court civil jurisdictional limit in 1924 of IR£25 (€32) would now be worth €1,365 (IR£1,075), it is clear that these increases have gone far beyond mere inflationary levels.

4.05 The final suggested basis of comparison is a rather different one. If one compares the maximum fine with the maximum prison sentence which can be imposed for a minor offence (currently 12

¹⁵⁴ It should be noted, however, that in the more recent case of *State (Rollinson) v Kelly* [1984] IR 248 the Supreme Court adopted a different approach in comparing the fine at issue in *Melling* in 1960 to that in *Rollinson* in 1984.

¹⁵⁵ The only case in which a judge looked at other factors to any degree was in *State (Rollinson) v Kelly* [1984] IR 248. However, Griffin J only considered the effect of such increases since 1960 (the date of the *Melling* decision) and not since 1922 or 1937.

months) there would appear to be an imbalance between the two.¹⁵⁶ This would arguably remain the case even if the reduced maximum of six months were adopted as recommended by the Commission in Chapter 2 above. While there is little authority on the point in Ireland, the case-law in other common law jurisdictions appears to indicate that a custodial sentence is a much more severe punishment than a fine. As noted in the US case of *Muniz v Hoffman*,¹⁵⁷ the US Supreme Court was of the opinion that “from the standpoint of determining the seriousness of the risk and the extent of the possible deprivation faced by a contemnor, imprisonment and fines are intrinsically different.” In that case they held that a six month term of imprisonment was sufficient to bring an offence out of the minor category but that the imposition of a fine of a US\$10,000 on a trade union was not. The Commission believes that the view that there is little moral equivalence between the two maxima is one which would be shared by both lawyers and citizens alike. Indeed, in a socio-legal survey carried out in the US in 1984 relating to the development of severity scales for penalties, a 12 month prison sentence was considered to be equivalent to a US\$10,000 fine (or €19,579). *These considerations therefore lead the Commission to question the correctness of the prevailing wisdom that a maximum fine of over €3,000 (IR£2,363) would be unconstitutional.*

B. Fining and the Principle of Equality of Impact

(a) *The Status Quo*

4.06 A question of obvious importance is the extent to which the level of fines currently imposed on offenders acts as a sufficient deterrent. A recent examination conducted by the Comptroller and Auditor General into the efficiency of the fines system in relation to cases within the jurisdiction of the District Court sheds important light on some of the issues. *The Report on Value for Money Examination: Department of Justice, Equality and Law Reform -*

¹⁵⁶ For instance in a recent District Court prosecution involving accessing child pornography on the internet, the offender preferred to pay €40,000 to a charity rather than receiving a custodial sentence: see *Irish Times* 17 January 2003.

¹⁵⁷ 422 US 454.

*Collection of Fines*¹⁵⁸ notes that the ultimate objective of the fines system is to reduce the level of offences committed by deterring undesirable behaviour. Having examined the available data on legal proceedings in Dublin District Court cases in 1998 the Report found that fines were imposed in half of the 57,100 summons cases actually heard.¹⁵⁹ Overall, the average fine imposed by the Dublin District Courts was IR£100 (€127), with the average fine imposed obviously varying considerably between different types of offences. Average fines imposed in fine cases in Dublin in 1998 were as follows:

- Parking offences - IR£66 (€84)
- Disc offences - IR£119 (€151)
- Speeding offences - IR£68 (€86)
- Other motoring offences - IR£97 (€123)
- Other criminal offences - IR£167 (€212)¹⁶⁰

4.07 These figures raise questions as to the extent to which these fines adequately effect the aims of the criminal law, namely, to make an impact on offenders. While a fine of IR£100 (€127) may have quite severe financial implications for an unemployed offender, it is unlikely to impact significantly on those with much higher incomes.

4.08 This brings us to the law as regards equality of impact in fining as it stands at present. Currently there is some provision for means adjustment in the District Court. Section 43 of the *Criminal Justice Administration Act 1914* (as reflected in Order 23, rule 4 of the *District Court Rules 1997*¹⁶¹) provides:

¹⁵⁸ Comptroller and Auditor General *Report on Value for Money Examination: Department of Justice Equality and Law Reform- Collection of Fines*, Report No.37 Dublin Stationery Office 2000.

¹⁵⁹ *Ibid* at paragraph 3.44. The figure is much less when considered as a proportion of all summonses actually issued. Fines were imposed on defendants in relation to an estimated 20% (125,000) of the summonses issued in all District Court areas in 1998. The disparity in these two figures is due to the large number of cases which are not heard (due to, for example, the failure to serve summonses and the large number of cases which are struck out without being heard or are withdrawn by the prosecution or where there is an acquittal).

¹⁶⁰ Comptroller and Auditor General *Report on Value for Money Examination: Department of Justice, Equality and Law Reform - Collection of Fines* Report No.37 (Dublin Stationery Office 2000) at paragraph 3.45.

¹⁶¹ SI No 93 of 1997.

“[A] court of summary jurisdiction, in fixing the amount of any fine to be imposed on an offender, shall take into consideration, amongst other things, the means of an offender so far as they appear or are known to the court.”

4.09 However, though the wording of the legislation itself is open-ended, it is likely that this would be interpreted as only requiring a reduction in the standard fine in the case of offenders with less than average means and not allowing an increase for more affluent offenders. The reason is a long-established common law rule that fines should not be increased for the better-off. English authority for this includes *R v Messana*¹⁶² and *R v Fairburn*.¹⁶³ While there is no Irish authority explicitly adopting this position, it is prudent to assume it would be followed here given the long line of authority on the point in England. Thus at present it is likely that adjustments for means may only operate in one direction; the amount of a fine can be reduced in the light of an offender’s income but the law may be such that the amount cannot be adjusted upwards to reflect the plutocratic opulence of a rich offender.

A Costs / Compensation Order Against the Offender

4.10 It should be noted too that District Court judges retain a discretion to impose on offenders the costs of the prosecution and/ or witnesses’ expenses. Order 36 rule 1 of the *District Court Rules 1997* provides:

“Where the Court makes an order in any case of summary jurisdiction (including an order to ‘strike out’ for want of jurisdiction) it shall have power to order any party to the proceedings other than the Director of Public Prosecutions, or a member of the Garda Síochána acting in discharge of his or her duties as a police officer, to pay to the other party such costs and witnesses’ expenses as it shall think fit to award.”

¹⁶² [1981] 3 Cr App R (S) 88.

¹⁶³ [1980] Cr App R (S) 315.

4.11 A compensation order can also be made under s.6(12) of the *Criminal Justice Act 1993* directing an individual who has been dealt with under the *Probation of Offenders Act 1907* to pay compensation.

4.12 These provisions allow District Court judges, through the imposition of costs/compensation in addition to a fine, of taking a step which has the effect of increasing the punitive impact on an offender. However a query may be raised as to whether these options should be used in effect to compensate for the inadequacy of a fine. To do so would be to make use of a power for an improper purpose. Furthermore costs are imposed fairly rarely. As noted by the *Report on the Collection of Fines*, “in Dublin, only direct witness expenses are sought by the prosecution e.g. in drink driving cases, the fees for doctors who take blood or urine samples are usually sought. In other cases, costs are sought infrequently because direct expenditure rarely arises.”¹⁶⁴ Indeed this option is availed of little by the prosecution. The Report also found that costs were awarded to the prosecution in only 2% of cases where fines were imposed in Dublin District Courts in 1998. Therefore, while the provision remains a useful one in appropriate circumstances, particularly where the State has incurred considerable expenditure in its prosecution of an offender, it is unsuited to more generalised usage.

(b) *The Principle of Equality of Impact*

4.13 It is axiomatic that equality is necessary in order to do justice. In Ireland this fundamental postulate finds expression in provisions such as Article 40.1 of the Constitution which enshrines the principle of equality before the law.¹⁶⁵ While this principle has not yet been invoked in the field of sentencing law in this jurisdiction,¹⁶⁶ in

¹⁶⁴ Comptroller and Auditor General *Report on Value for Money Examination: Department of Justice, Equality and Law Reform Collection of Fines* Report No.37 (Dublin Stationery Office 2000) at paragraph 3.47.

¹⁶⁵ Article 40.1 provides: “All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to difference of capacity, physical and moral, and of social function.”

¹⁶⁶ It should be noted that, in a more general sense, the Supreme Court’s interpretation of the constitutional guarantee to equality has been quite restrictive. See, for example, *Lowth v Minister for Social Welfare* [1998] 4 IR 321.

England Professor Ashworth has identified the principle of equality before the law and the cognate principle of equal impact as having contemporary relevance for the English sentencing system.¹⁶⁷ The principle of equal impact can be broadly described as the principle that penalties “should be so calculated as to impose an equal impact on the offenders subjected to them.”¹⁶⁸ In its application to fines the principle requires that fines should be adjusted to reflect the means of offenders to ensure that fines will be “felt” by offenders whatever their wealth. This commonsensical principle requires that fines be increased for those who are better-off as well as reduced for those of more limited means. Further it is in keeping with the line of policy contained in the saver to Article 40.1, namely, that the principle of equality before the law “shall not be held to mean that [laws] shall not have due regard to differences of capacity”. As Kelly¹⁶⁹ notes “it corresponds with the idea, visible in continental equality jurisprudence, that common sense or the realities of society may justify or even positively require a certain form of legislative differentiation.”

(i) *Unit Fines*

4.14 One way of giving effect to the principle of equality of impact is by means of a system of “unit” or “day” fines. This system was introduced into magistrates’ courts in England by virtue of the *Criminal Justice Act 1991*.¹⁷⁰ It operates by assessing the seriousness of the offence and assigning a number of units on a scale from 1 to 50 to reflect this. The offender’s disposable weekly income is then calculated and the fine is determined by multiplying the two figures.

4.15 In its recent *Report on the Indexation of Fines: A Review of Developments*¹⁷¹ the Commission conducted an extensive survey of

¹⁶⁷ Ashworth *Sentencing & Criminal Justice* (3rd ed. Butterworths 2000) at 78-84.

¹⁶⁸ Ashworth *Sentencing and Criminal Justice* (3rd ed. Butterworths 2000) at 82.

¹⁶⁹ Kelly, Hogan and Whyte *The Irish Constitution* (Butterworths 1994).

¹⁷⁰ The 1991 Act came into effect on 1 October 1992.

¹⁷¹ Law Reform Commission *Report on the Indexation of Fines: A Review of Developments* (LRC 65-2002). The Report focused in particular on the conclusions drawn by the New Zealand Ministry of Justice Criminal Justice

developments in respect of the unit fines system in a number of countries such as Australia and New Zealand. It observed that unit fines had proved unworkable in other jurisdictions due to a number of factors such as the restrictions they place on the discretion of the sentencing court, the complexity of the system (involving as it does a two-step process of assessing the severity of the offence and then the offender's means) and the difficulties in obtaining accurate information on an offender's means. It concluded thus:

“[T]he desirability of unit fine schemes has been considered subsequently in a number of jurisdictions and the arguments against the adoption of such schemes would appear to have prevailed...the Commission believes it would be inappropriate to adopt such a system at the present time.”¹⁷²

(ii) *Current English Provisions*

4.16 In any event, the failure of the unit fines experiment in England did not lead the British legislature to abandon the principle of equal impact altogether. Instead, a counter-reform was introduced in the form of a statutory provision which leaves magistrates with considerably more discretion when determining the amount of a fine. Section 65 of the *Criminal Justice Act 1993* (as amended)¹⁷³ substituted a new s.18 of the *Criminal Justice Act 1991*¹⁷⁴ providing that a court is required to enquire into an offender's financial circumstances before fixing the amount of a fine. In fixing the amount of the fine, magistrates are still required to ensure that it reflects *inter alia* the offender's financial circumstances. A similar provision has also been introduced recently in New Zealand by virtue of s.40 of the *Sentencing Act 2002*. This provides that, in determining the amount of a fine, a court must take into account *inter alia* the

Policy Group *Review of Monetary Penalties in New Zealand* (June 2000) at Chapter 5 and the New South Wales Law Reform Commission *Report on Sentencing* (NSWLRC 79-1996) at Chapter 3.

¹⁷² Law Reform Commission *Report on the Indexation of Fines: A Review of Developments* (LRC 65-2002) at 55.

¹⁷³ Section 65 was amended by s.168 Schedule 9 paragraph 42 of the *Criminal Justice and Public Order Act 1994*.

¹⁷⁴ This section is now consolidated as s.128 of the *Powers of Criminal Courts (Sentencing) Act 2000*.

financial capacity of an offender, whether this has the effect of reducing or increasing the amount of a fine.

4.17 To turn once again to the English provisions, it is instructive to examine in more detail the local arrangements put in place by magistrates' courts since 1993. Ashworth¹⁷⁵ notes that the obvious danger was that magistrates would return to the pre-1991 approach with all its concomitant inconsistencies. Studies conducted subsequent to the enactment of the 1993 Act appear to have borne out the author's fears. Home Office studies undertaken by Charman *et al*¹⁷⁶ in 1996 and Flood-Page and Mackie¹⁷⁷ in 1998 revealed considerable divergence in the approach taken by magistrates. The 1998 study, for example, sought to examine the circumstances in which fines were used and how they were set in relation to income; to this end, interviews were undertaken in 12 courts. The researchers found that the magistrates' courts were divided in their approach to fixing the amount of a fine. Four of the 12 courts had broadly adopted the fines recommended in the Magistrates' Association's 1993 *Guidelines* which were similar to the pre-1991 regime. Four of the courts had altered indicators of seriousness for different offences to take account of local factors. The remaining four courts had retained some type of informal unit fines system. Flood-Page and Mackie also solicited magistrates' views on fining both low-income and wealthy offenders. These interviews revealed considerable divergences of opinion, leading the researchers to conclude that "these contrasting opinions meant that wealthy offenders could receive very different fines at different courts as the size of the fine imposed depends largely upon the views of the magistrates at that court."¹⁷⁸

4.18 While these studies were conducted on quite a small scale and therefore must be treated as suggestive rather than conclusive of court

¹⁷⁵ Ashworth *Sentencing and Criminal Justice* (3rd ed. Butterworths 2000) at 275.

¹⁷⁶ Charman, Gibson, Honess, and Morgan *Fine Impositions and Enforcement Following the Criminal Justice Act 1993* (British Research Findings No. 36 1996).

¹⁷⁷ Flood-Page and Mackie *Sentencing Practice: An examination of decisions in Magistrates' Courts and the Crown Court in the mid-1990's* (British Research study No. 180 1998).

¹⁷⁸ *Ibid* at 53.

practices, nevertheless, as Ashworth points out, the results “do little to allay fears that disparities in fining occur to a considerable degree.”¹⁷⁹ Indeed concerns about disparities in the fines imposed by magistrates in different geographical areas¹⁸⁰ have led the Magistrates’ Association in the most recent version of their *Sentencing Guidelines* (2000) to take a more structured approach with fines being set according to three broad income bands. Ashworth heralds this development as “an attempt to combine structure with flexibility”.¹⁸¹

4.19 The fining system under the guidelines can be summarised briefly thus. A magistrate, having assessed the seriousness of the offence, will categorise it at level A, B or C. These groups mean that the fine should be equated with: half a week’s net income; one week’s net income; and one and a half weeks’ net income respectively. The suggested fines have been calculated to take account of ordinary living expenses so, when determining the amount of a fine, magistrates need to look only at net income. Net income means “take-home pay” or, in the case of someone on benefits, “cash in hand.” In the absence of adequate information on means, magistrates will then proceed to make an assessment of the offender’s income drawing such inferences as to means as they think just in the circumstances. The guideline fines suggested by the Magistrates’ Association *Sentencing Guidelines* are given in Appendix 4.

4.20 To conclude, therefore, it would appear that the magistrates’ courts in England have come full circle. Having abandoned a system of unit fines and adopted a looser formulation in 1993, means-tested fines are once again being introduced as non-statutory guidelines. In the light of these developments it is tempting to conclude that the unit fines system merits re-examination. However, in the light of the difficulties experienced in England and other jurisdictions with the unit fines system, most notably with its rigid and complex formula as mentioned at paragraph 4.15, the Commission considers it imprudent to recommend a similar system here.

¹⁷⁹ Ashworth *Sentencing and Criminal Justice* (3rd ed. Butterworths 2000) at 275.

¹⁸⁰ See Editorial “Fines-consistency or controversy?” (2000) 150 *New Law Journal* 449.

¹⁸¹ Ashworth *op cit* (3rd ed. Butterworths 2000) at 276.

4.21 For reasons given at paragraphs 4.07 and 4.13, the Commission favours giving effect to the principle of equality of impact by other means. Legislation along the following lines seems to offer a workable and straightforward model:

“(1) Before fixing the amount of any fine to be imposed on an offender, a District Court shall inquire into the financial circumstances of the offender.

(2) The amount of any fine fixed by a District Court shall be such as, in the opinion of the Court, reflects the seriousness of the offence.

(3) In fixing the amount of any fine to be imposed on an offender (whether an individual or other person,) a District Court shall take into account the circumstances of the case including, among other things, the financial circumstances of the offender so far as they are known or appear to the Court.

(4) Subsection (3) above applies whether taking into account the financial circumstances of the offender has the effect of increasing or reducing the amount of the fine.”¹⁸²

4.22 As noted in subsection (3), these provisions should be without prejudice to the general discretion of the sentencing judge to impose a penalty that is appropriate and just having regard to all the circumstances of the case. The Commission also reiterates its view (also expressed in the updated *Report on the Indexation of Fines*¹⁸³) that the imposition of different fines in respect of similar offences in circumstances where the means of the offenders differs is not productive of inequality but rather a result that furthers the underlying principle of equality of impact.

¹⁸² This legislation is modelled upon s.65 of the English *Criminal Justice Act 1993* as amended by s.168 Schedule 9 paragraph 42 of the *Criminal Justice and Public Order Act 1994* now consolidated as s.128 of the *Powers of Criminal Courts (Sentencing) Act 2000*.

¹⁸³ Law Reform Commission *Report on Indexation of Fines: A Review of Developments* (LRC 65-2002) at paragraph 3.08.

CHAPTER 5: ASCERTAINING THE MEANS OF AN OFFENDER

5.01 In the light of the recommendation in the previous chapter, it is important to give consideration to the ways in which the court can obtain an accurate and timely indication of an offender's means. As noted above, this significant difficulty contributed to the demise of the unit fine system not only in England but also in other countries such as Mexico, Western Australia and the Commonwealth of Australia.¹⁸⁴ In the Consultation Paper the Commission recognised that this posed a difficulty, although one which was not insurmountable. In its provisional recommendation the Commission concluded thus:

“[U]ndoubtedly, the difficulty of obtaining an accurate assessment of the accused's means is substantial. The proposal that the Commission is making - to match the fine to the offender's means - will operate more or less imperfectly, to the extent that courts do not have a complete picture of the accused's means.”¹⁸⁵

5.02 In seeking to resolve this difficult problem, additional impetus is added by the sentiments expressed by judges at the seminar to the effect that the current methods by which means are established in the courts are inadequate. Both District Court and Circuit Court judges were keen to emphasise that ascertaining an individual's means was an exercise fraught with difficulty and one in which they had hitherto relied heavily on their own common sense and experience. Moreover, since the recommendation applies to both natural and legal persons, it is necessary to consider how means

¹⁸⁴ See Law Reform Commission *Report on Indexation of Fines* (LRC 37-1991) at 58-62.

¹⁸⁵ *Ibid* at paragraph 7.21.

assessments may be best carried out both in respect of individuals and companies.

A. ASCERTAINING THE FINANCIAL CIRCUMSTANCES OF INDIVIDUALS

(a) *English Methods of Ascertaining Means*

5.03 As the legislation proposed is modelled on that already in place in England, the methods by which magistrates' courts in our neighbouring jurisdiction ascertain the means of an offender provide an obvious starting point. Although as noted above a court is obliged to consider an individual's financial circumstances, it is the offender's duty to disclose their financial circumstances. It is clear from the debates at the time that the British government did not intend that there should be a prescribed statutory form for inquiring into an individual's financial circumstances.¹⁸⁶ Nevertheless, since 1993 means enquiry forms have been used by various magistrates' courts to assist in determining means.¹⁸⁷

5.04 While the forms vary in the amount of detail required, they all seek basic information on income and expenditure and most request documentary evidence such as pay slips to support the information provided in the form. Although operating on a non-statutory basis, the use of means forms appears to be fairly widespread in England and Wales. In this regard it is interesting to note that 11 of the 12 courts studied by Flood-Page and Mackie¹⁸⁸ followed the recommendations of the *Best Practice Guidance* issued by the Lord Chancellor's Department (1990) to obtain information about offenders' income for all fine cases. The other court studied by the researchers relied on questions in court. In this study, at least, the

¹⁸⁶ Parliament had actually considered whether the legal aid form would be sufficient but this idea was rejected on the basis that a change in the law would be required to remove the need for the offender to give his consent to the form being used for this purpose and that such a change could act as a disincentive to defendants applying for legal aid.

¹⁸⁷ Sally Dickinson, Chief Executive, Magistrates' Association kindly gave us assistance in providing us with sample forms.

¹⁸⁸ Flood-Page and Mackie *Sentencing Practice: An examination of decisions in Magistrates' Courts and the Crown Court in the mid-1990's* (British Research study No. 180 London 1998).

form was by far the preferred method of ascertaining means. Currently means enquiry forms vary from court to court in the level of detail they require, although the Magistrates' Association are in the process of developing a standard means form which should be available to magistrates in the near future.¹⁸⁹

5.05 The 1993 Act, however, does provide the court with two options where an offender has failed to furnish the court with information as to means. First, where it has not been provided with adequate information, s.126 of the 2000 Act empowers a court to make a financial circumstances order against an individual.¹⁹⁰ Section 126(3) defines the order thus:

“In this section a ‘financial circumstances order’ means, in relation to any individual, an order requiring him to give to the court, within such period as may be specified in the order, such a statement of his financial circumstances as the court may require.”

5.06 As the section makes clear, it is for the court to determine how much information it requires as to means. In practical terms this affords the court the option of compelling the offender to complete a means form in advance of sentence. It is an offence for an offender who fails to comply with the order without reasonable excuse to knowingly or recklessly make a statement which he or she knows to be false, or to knowingly fail to disclose any information.¹⁹¹ However, the Commission notes the view expressed by the Magistrates' Association in England that this provision is rarely used.¹⁹²

¹⁸⁹ At the time of writing, the standardised form had been formulated and had been sent to Lord Chancellor's office for approval.

¹⁹⁰ Schedule 3 paragraph 2 of the *Criminal Justice Act 1993*. It should be noted that the terminology changed from a “statement of means” (s. 20 of the 1991 Act) to a “statement of financial circumstances”. This change is probably not significant. See Fortson “Criminal Justice Act, 1993” in *Current Law Statutes Annotated 1993* Volume 3 (London Sweet and Maxwell 1994) at 36-119.

¹⁹¹ Subsections 126(4) -126(5).

¹⁹² Sally Dickinson, Chief Executive & Association Secretary, Magistrates' Association.

5.07 The alternative course of action is for the court to proceed by virtue of s.128(5) to make such determination in relation to the offender's financial circumstances as it thinks fit. This may be done straight away where an offender has failed to co-operate with the court in providing information as to means or subsequently where he has failed to comply with a financial circumstances order. Fortson¹⁹³ has noted that, in this event, "the court may simply try to make a realistic determination from the limited information available to it or (and there seems nothing wrong in principle with this approach) it may assume that an offender is well able to pay any fine that the court may impose unless and until the offender establishes the contrary." At the same time, the *Magistrates' Association's Sentencing Guidelines*¹⁹⁴ indicate that it is inappropriate simply to fine the offender the maximum amount. Instead, magistrates are advised to draw such inference as to means as they think just in the circumstances.

5.08 The fact that a magistrates' court in England may request individuals to produce their pay slips or social welfare receipts as a means of verifying evidence stated in the means enquiry forms is an interesting feature which merits development. Ideally, there should be compulsory disclosure of income through tax returns or social welfare documents. The objection will be raised however that these are highly confidential documents. It is possible that a similar objection may be made in respect of unofficial documents such as pay slips. Nevertheless, this system has worked effectively in England since 1991 without particular public outrage. This has been so despite the fact that, in failing to comply fully with this order, an individual commits a summary offence. In the final analysis, courts are entitled to the evidence which they need irrespective of embarrassment. Should a defendant object to details of their financial position being aired in open court, there would appear to be little difficulty with the court viewing the document in confidence.

¹⁹³ Fortson "Criminal Justice Act 1993" in *Current Law Statutes Annotated 1993* (London Sweet & Maxwell 1994) at 36-120.

¹⁹⁴ The Magistrates' Association *Magistrates' Court Sentencing Guidelines* (The Magistrates' Association 2000) at 70.

(b) Means Assessment in Ireland

5.09 There is a dearth of research in Ireland on fines imposed by the courts generally and the same problem pertains to the subject under discussion namely, the extent of the enquiry made by District Court judges into an offender's financial circumstances when determining the amount of a fine. This Report has already observed that there is currently a statutory requirement on the District Court to take into consideration the means of the offender in fixing the amount of any fine to be imposed, although this serves in practice only to reduce it.¹⁹⁵ These enquiries are usually conducted verbally in open court. The limited research that has been conducted however, has tended to focus on imprisonment for debt collection or where fines were too high or inappropriate given the offender's poverty (which would suggest that the enquiry as it stands may not elicit the true position). The Commission is concerned here with both this problem and with the situation in which the fine is too low given the offender's means.

5.10 The Joint Committee on Justice, Equality, Defence and Women's Rights in its recent (2000) Report on *Alternatives to Fines and Uses of Prison*¹⁹⁶ recommended a full means enquiry in every case where a financial penalty is being considered in order "[t]o ensure that fines are explicitly tailored to the defendant's ability to pay".¹⁹⁷ O'Donnell¹⁹⁸ in *Crime and Poverty in Ireland* also makes an argument for reform. While acknowledging that the current law states that judges must take into account the defendant's means when setting the level of the fine, he argues that, given the high level of imprisonment in default of payment of fines (35% in 1993), the system is not working effectively.

¹⁹⁵ Section 43 of the *Criminal Justice Administration Act 1914* as reflected in Order 23 of the *District Court Rules* (SI 93 of 1997).

¹⁹⁶ See Joint Committee on Justice, Equality, Defence and Women's Rights *Report of the Sub-Committee on Crime and Punishment of the Joint Committee on Justice Equality, Defence and Women's Rights on Alternatives to Fines and the Uses of Prison* (Stationery Office February 2000) at paragraph 16.

¹⁹⁷ *Ibid.*

¹⁹⁸ See O'Donnell "Crime, Punishment and Poverty" in Bacik and O'Connell (eds.) *Crime and Poverty in Ireland* (Round Hall Sweet and Maxwell 1998) at 40-41.

5.11 More recently the *Report on Imprisonment for Fine Default and Civil Debt*,¹⁹⁹ commissioned by the Department of Justice, aimed to gather qualitative information in relation to those persons who find themselves committed to prison for non-payment of fines and civil debt. In the course of their research, the authors conducted 24 interviews with persons in prison for non-payment of fines or civil debt. Although the views of fine defaulters towards the court process are obviously highly subjective, nevertheless, the issues raised by the interviews are of considerable interest. First, in relation to the court process, the report notes that “not all interviewees were in court, and even where interviewees had been, their understanding of the setting and process is often very limited.”²⁰⁰ Secondly, and even more worryingly, the Report concluded that “enquiries in the court process about offenders means and capacity to pay fines would appear to be non-existent or at best cursory.”²⁰¹ Moreover, the Report’s conclusions find a resonance in research conducted into imprisonment for civil debt.²⁰²

¹⁹⁹ Nexus Research Co-operative *Final Report to Department of Justice, Equality and Law Reform on Imprisonment for Fine Default and Civil Debt* (Dublin Stationery Office 2002).

²⁰⁰ *Ibid* at 40.

²⁰¹ *Ibid* at 48.

²⁰² Connolly examined statistics on imprisonment for civil debt for 1993 and concluded that very few debtors used the limited facilities available to them, many failed to appear in court and few applied for or were granted legal aid. See Connolly “The legal System in Ireland: Its Impact on those in Debt” in Cousins (ed.) *Debt and Money Advice: A Partnership Approach-Report of the National Money Advice Conference Department of Social Welfare* (2000). In a similar vein, a recent submission on behalf of the Money Advice and Budgeting Service (“MABS”) for the West and North West Region in 1999 analysed 33 debt cases and noted that only two debtors had submitted a statement of means and only four had appeared in court (including the two who had submitted the statement of means). The MABS argued that debtors were not participating in the court process whilst actions which may have serious consequences were escalating against them. They recommended that measures be put in place to encourage debtor participation. One of these measures comprised the production of “information leaflets and simplified means forms for completion which clearly showed income, expenditure, credit and debt commitments” to be sent with court documentation to help the debtor understand and take part in the proceedings. See Money Advice and Budgeting Service West and North West Region *Submission to the Department of Justice, Equality and Law Reform; Subject: Response to proposed Attachment of Earnings Bill and appraisal of the legal system for debt recovery* (Unpublished 1999). In the case of civil debt there is no set form for the debtor to complete although the

(i) *Legal Aid*

5.12 An analogy can also be drawn with the procedure already in place for legal aid (though this machinery is not actually used in a typical fine case). It will be recalled that, in the debate preceding the introduction of the *Criminal Justice Act 1993* in England, the British Parliament gave consideration to the use of the existing legal aid form for that purpose.²⁰³ Certainly it can be supposed that the aim of individuals in both situations may be to present their incomes in as modest a light as possible. The analogy is best drawn with the procedure for *criminal* as opposed to *civil* legal aid since the procedure attending eligibility for the civil legal aid system is essentially administrative rather than judicial; it is carried out by civil servants rather than members of the judiciary. Further the civil legal aid process is more drawn-out with a facility for the details provided to be verified by other Government Departments such as the Department of Social Welfare or the Revenue Commissioners.

(I) *criminal legal aid*

5.13 Woods notes in his book²⁰⁴ on District Court criminal procedure:

“Before a person is granted a legal aid certificate he may be required by the Court to furnish a written statement about matters relevant for determining whether his means are sufficient to enable him to obtain legal aid. [1962 Act, s.9]. For this purpose a Statement of Means Form is prescribed under r. 9(2), 1965 regs., and copies may be obtained from the Court officer. The penalty on summary conviction for knowingly making false or misleading statements (either verbally or in writing) for the purpose of obtaining legal aid is

introduction of a comprehensive means form is advocated by both Connolly and the MABS.

²⁰³ However, they ultimately dismissed this idea on the grounds that a change in the law would be required to remove the need for the offender to give his consent to the form being used for this purpose and that such a change could act as a disincentive to defendants to apply for legal aid.

²⁰⁴ Woods *District Court Practice and Procedure in Criminal Cases* (1994).

a fine not exceeding £100 or six months imprisonment, or both, and the Court may further order a person to repay any sum already paid under the scheme in respect of that certificate [1962 Act, s.11].”²⁰⁵

5.14 The statement of means form referred to is brief and inquires into matters such as number of dependants, average weekly income, rent/ mortgage payments and assets that could be used to obtain legal aid. The form prescribed in the 1965 regulations is given in Appendix 6. It is noteworthy that it is a summary offence to provide false or misleading information on the means form.

(II) *civil legal aid*

5.15 A legal aid certificate is a requirement to obtain legal aid and will be granted on the condition that an applicant meets the financial eligibility requirements.²⁰⁶ Civil legal aid in Ireland is subject to a more rigorous means test than criminal legal aid. Applicants must complete a statement of income and a statement of capital for civil legal aid. Details must be furnished with regard to an applicant’s disposable income (that is, income after certain deductions in respect of dependants, rent or mortgage payments, *et cetera* have been made) and also their disposable capital (that is, the value of an individual’s capital resources after certain deductions in respect of any charge, mortgage, loan or debt *et cetera*). Copies of these statements are provided in Appendix 7. Income as declared is expected to be

²⁰⁵ Woods *op cit* at 555-556. Section 9(1) of the *Criminal Justice (Legal Aid) Act 1962* provides:

“Before a person is granted a legal aid certificate he may be required by the court or judge, as the case may be, granting the certificate to furnish a written statement in such form as may be prescribed by the Minister by regulations under s.10 of his Act about matters relevant for determining whether his means are insufficient to enable him to obtain legal aid.”

Rule 9(2) of the *Criminal Justice (Legal Aid) Regulations 1965* provides:

“Where a person is required, pursuant to s.9 of the Act, to furnish a statement relevant for determining whether his means are insufficient to enable him to obtain legal aid, the statement shall be in the form set out in the Second Schedule to these Regulations.”

²⁰⁶ Section 28 of the *Civil Legal Aid Act 1995*.

supported by documentary evidence such as a pay slip or social welfare book. Applicants are warned that the Department of Social Welfare or another Government body such as the Revenue Commissioners may be asked to investigate their means.

(c) *Should a Means Form be Adopted?*

5.16 The available data on means assessment by the courts in England and Ireland serves to highlight a number of issues. The first question to be answered in the light of this research is therefore: should a compulsory statutory means form be adopted? As discussed above, a statutory form was not centrally adopted in England in 1993 yet courts and magistrates' associations have thought it worth developing their own form locally. It is also pertinent to note that the limited research that has been conducted in Ireland into fines, although focusing primarily on imprisonment for debt collection or in default of payment of fines, tends to suggest that the means enquiry which currently operates in fixing the amount of a fine is far from satisfactory and has led to calls for a fuller, more systematic means enquiry in every case. A means form may go some way towards meeting this objective. A further argument in favour of a form relates to the adequacy of the current oral enquiry. Judges at the seminar readily conceded that present assessments as to means in court are a very imprecise science. This would suggest that there is room for improvement in this area.

5.17 On the other hand it should be remembered that District Court judges may hear 250 to 300 traffic cases in a morning. The compulsory use of a form, the discussion of its contents and the enforcement of this requirement, may prove a time consuming process given that a fine is frequently imposed for this type of summary offence.²⁰⁷ It will be recalled that the recent Report on the Collection of Fines for example found that in Dublin District Court cases in 1998 fines were imposed in half of the 57,100 summons cases actually heard. An obligation to conduct a detailed enquiry as to assets and income may significantly add to the workload of the District Courts. In this regard, it should also be borne in mind that the

²⁰⁷ Comptroller and Auditor General *Report on Value for Money Examination: Department of Justice, Equality and Law Reform- Collection of Fines* Report No.37 (Dublin Stationery Office 2000) at paragraph 3.44.

Commission seeks to discourage the use of custodial sentences where possible. The inconvenience associated with the imposition of a fine could very well discourage the use of one of the main alternatives to a custodial sentence in Ireland.

5.18 Another issue arising from the research is the fact that a significant number of offenders do not participate in the process. For this reason it is important that, in the absence of information as to means (whether due to the non-appearance of the offender in court or otherwise), the court should be able to proceed to make such determinations in relation to an offender's financial circumstances as it thinks fit.

5.19 *On balance, therefore, the Commission considers that the mandatory use of a statutory form may unduly inhibit a District Court judge's discretion in assessing the means of an offender. A compromise solution, however, may lie in making the use of a means form discretionary. This would allow the Court to come to its own conclusions as to whether a form would be of any assistance in determining means and avoid unnecessary delay in cases where an offender's means are self-evident. As outlined by the Minister of State in England prior to the introduction of the 1993 legislation, "[this would allow the] courts to determine how, and in what depth [the] inquiry should be made in each case... [W]e don't want to fetter the discretion of the courts..."²⁰⁸ In the absence of the relevant information as to means, the court should be able to proceed to make such determination in relation to an offender's financial circumstances as it thinks fit.*

(d) *The Scope of the Inquiry*

5.20 Next this section considers the scope of the inquiry into financial circumstances. Should questions be asked on the means form as to the capital assets of an offender and should the inquiry extend to an offender's partner or spouse?

²⁰⁸ Standing Committee B Col. 244 June 17 1993.

(i) *Should Assets be Considered?*

5.21 In relation to the first question, it is noteworthy that most of the English means enquiry forms focus on an individual's weekly disposable income to the exclusion of capital assets. However, it should be noted that the use of weekly disposable income as the relevant criterion in England is a throwback to the unit fines system which sought to punish offenders by depriving them of a certain number of days' income. In contrast, the approach taken in New Zealand is that, should a court require the offender to provide a declaration of financial capacity, this must contain information on all sources of income without restriction namely, assets, liabilities, and outgoings including ownership of real estate, vehicle ownership and realisable assets. Indeed one drawback with the English approach is that, by restricting a means inquiry solely to an individual's income, it may allow someone who is income-poor but asset-rich to attract only a relatively light fine. It is difficult to see why, in these circumstances, the principle of equality of impact should not extend to the assets of such individuals when the amount of a fine is being assessed.

5.22 For this reason the Commission believes that the Court should have regard, where appropriate, to the assets of an offender when determining the fine to be imposed and that questions should be included on the relevant form as to the assets owned by an individual. Thus, not only would the salaries of offenders be taken into account, but also their incomes from rental properties, their ownership of land or real estate (excluding the family home), income from stocks and shares and other securities and debts owed to them. The Commission considers however, that it would be improper for consumer goods, such as the family car, to be taken into account in any assessment of financial circumstances. The counter-argument to this proposal - that it would open up an appalling vista of complication - may be met by saying that the form would only be used on fairly rare occasions when, for good reasons (whether as to income or capital), the court considered that it would serve a useful and just purpose.

(ii) *Whose Financial Circumstances: Offenders or Their Families?*

5.23 In relation to the second point, there is case law which addresses the issue in England. The English courts have interpreted s.65 of the *Criminal Justice Act 1993*, as amended, to permit consideration of the means of only the individual who is before the court. This issue was raised in the case of *Colfox v Dorset County Council*²⁰⁹ which arose by way of a case stated against a fine imposed on the appellant. One of the grounds upon which the appeal was taken was that the Crown Court had erred in law in relying upon common knowledge in Dorset that the applicant came from a very well-known local, land-owning family when imposing the fine. The Appeal Court quashed the decision of the Crown Court and held that “in the light of s.18 and the authorities (see *R v Charlambous* 6 Cr App R (S) 389) the ability of the family to pay a fine must be ignored. What matters is the ability of the defendant to pay the fine.”²¹⁰

5.24 The *Charlambous* case referred to in the judgement merits further consideration since it concerns a common situation in which the court is required to assess the means of a married woman whose personal income is small or non-existent but whose husband has a substantial income and who accordingly has a standard of living based upon that level of income. The case concerned a fine of Stg£300 imposed on a married woman for petty larceny. The woman’s annual income from a newspaper kiosk, combined with that of her husband who owned the kiosk, appeared to be around Stg£8,000. However the appellant’s personal earnings from the kiosk were only about Stg£15 per week. The Court reduced the fine to Stg£50, emphasising that a fine must not be so high that a person could not afford to pay the fine from his or her own money. It seemed to the Court unjust that a family should be fined. Although the case was decided in 1984 in the context of the (non-statutory) requirement that the sentencer in the Crown Court should ensure that the offender has the means to pay the fine, it would appear to indicate that the sentencer should have regard only to the personal means of the offender and disregard any resources to which an individual may have effective access, such as those of their spouse.

²⁰⁹ Queen’s Bench Division Hooper J 10 February 1996.

²¹⁰ *Ibid* at 5.

5.25 As the *Colfox* case would appear to suggest, the same reasoning would apply to the provisions of s.65. Although this may appear productive of some injustice in the case where a spouse has a much more substantial income, traditionally the relevant means to be taken into account were always those of the offender. As one commentator noted in relation to the *Charlambous* case above, “[a]lthough the result may seem artificial it would be consistent with the principle developed in other kinds of case that a court should not impose a fine on an offender without means on the assumption that some other person will pay the fine....”²¹¹ Opinion at the seminar and in written submissions to the Commission followed the view that punishment should be strictly personal to the offender and that taking into account the means of an offender’s spouse could be productive of injustice. In view of these considerations and also the constitutional right to privacy of the spouse (who has not been convicted of any offence) the Commission considers it unwise to take into account a spouse’s means or, therefore, to extend the means inquiry to the spouse or partner of the offender. *In the light of this and other conclusions reached in relation to the capital assets of an offender at paragraph 5.22 above, the Commission recommends that a precedent means form along the lines of the form in Appendix 8 be adopted.* Such a form may assist the court in endeavouring to ascertain an individual offender’s financial circumstances in cases where the court deems fit.

B. ASCERTAINING THE FINANCIAL CIRCUMSTANCES OF A COMPANY

5.26 As remarked in the Consultation Paper, the problem of determining income is less acute in the case of companies as they are required to file an “annual return” with the Registrar of Companies. The information provided on the annual return, which includes specified particulars of the annual accounts of the company such as the balance sheet and profit and loss account,²¹² is, therefore, accessible to the public.²¹³ At least in theory, there should be little

²¹¹ [1985] Crim L Rev 328.

²¹² Sections 7-12 of the *Companies (Amendment) Act 1986*.

²¹³ Section 125 of the *Companies Act 1963* requires every company having a share capital once a year to make a return (termed the “annual return”) to the

difficulty for a company to produce these documents for the court prior to sentence. This issue was examined by the English Court of Appeal in the case of *R v Howe*,²¹⁴ a health and safety case in which the Court set out guidelines as to the fines which should be imposed on companies for health and safety offences. It is worth quoting at length from the judgment for the judicial exploration of the practical difficulties surrounding the production in court of information as to the state of a company's finances. Scott Baker J stated:

“Any fine should reflect not only the gravity of the offence but also the means of the offender, and this applies just as much to corporate defendants as to any other (see s.18(3) of the *Criminal Justice Act 1991*). Difficulty is sometimes found in obtaining timely and accurate information about a corporate defendant's means. The starting point is its annual accounts. If a defendant company wishes to make any submission to the court about its ability to pay a fine it should supply copies of its accounts and any other financial information on which it intends to rely in good time before the hearing both to the court and to the prosecution. This will give the prosecution the opportunity to assist the court should the court wish it. Usually accounts need to be considered with some care to avoid reaching a superficial and perhaps erroneous conclusion. Where accounts or other financial information are deliberately not supplied the court will be entitled to assume that the company is in a position to pay any financial penalty it is minded to impose. Where the relevant information is provided late it may be desirable for sentence to be adjourned, if necessary at the defendant's expense, so as to avoid the risk of the court taking what it is told at face value and imposing an inadequate penalty.”²¹⁵

5.27 The Commission echoes the views expressed by Scott Baker J in relation to the difficulties which may obtain in relying on the

Registrar of Companies. Failure by the company to comply with these requirements renders the company liable to a fine not exceeding IR£500 (€635). Where the company fails for two consecutive years to make an annual return, the Registrar may take steps to have the company's name struck off the Register of Companies and to have the company dissolved.

²¹⁴ [1999] 2 All ER 249.

²¹⁵ [1999] 2 All ER 249, 254-5.

annual accounts of a company to provide an accurate reflection of its financial worth. Very often the accounts which are appended to the annual return may not provide information on the market value, as opposed to the book value, of the company's stock. It is therefore important that judges should be alive to this problem when attempting to determine the financial circumstances of a company prior to imposing a fine. As noted in earlier papers, the experience of a good judge may stand in good stead for reams of accounts and Nordic calculations.²¹⁶

²¹⁶ Law Reform Commission *Report on the Indexation of Fines* (LRC 37-1991) at 62.

CHAPTER 6: INCREASING THE MAXIMUM FINE FOR COMPANIES

6.01 The penalties which may be imposed specifically on corporations for minor infringements of the law formed the subject matter of the Commission's final recommendation in the Consultation Paper.²¹⁷ Penalties specifically suited to the corporate character, such as equity fines and corporate probation,²¹⁸ have recently been developed in other jurisdictions. In Ireland the fine is the only real sanction available as companies obviously cannot be incarcerated.²¹⁹ Further, since companies use cost-benefit analysis (whether formally or informally), it is obviously important to impose fines on companies which are significant enough to act as a sufficient deterrent. Two points are relevant here. First, companies would be subject to the general principle considered in paragraph 4.21 above in favour of increasing fines for individual wrongdoers based on the principle of "equality of impact". As noted by the English Court of Appeal in *Howe*,²²⁰ the obvious point of departure in assessing the means of a company is its annual accounts which companies are required to file as part of their "annual return". This decision is examined above at paragraph 5.26. Secondly, in the case of many companies, even a maximum fine of up to €3,000 would represent only a tiny fraction of their annual profit. Accordingly, this chapter examines a proposal to permit an increase in the maximum fine for a company.

²¹⁷ See above at paragraph 3.

²¹⁸ See further the Law Reform Commission's forthcoming *Consultation Paper on Corporate Homicide* and for a useful comparative discussion, Friel, "Corporate Criminal Liability: A Comparative Analysis-Part I" (1999) CLP 191 and "Part II" (1999) CLP 226.

²¹⁹ Corporations may, however, be subjected to dissolution or other forms of incapacitation, but this has undesirable overspill effects in terms of unemployment, *et cetera*.

²²⁰ *R v Howe* [1999] 2 All ER 249.

A. The Need for Higher Fines for Companies

6.02 In recent times the legislature has criminalised a wide variety of activities which apply exclusively or mainly in the corporate sector. As noted by O’Sullivan,²²¹ “the Companies Acts 1963-1990, the Pension Act 1990, the Investment Intermediaries Act 1995, the Safety, Health and Welfare at Work Act 1989, the Competition Act 1991 (as amended by the Competition (Amendment) Act 1996) all provide inter alia mechanisms whereby summary charges can be brought by a designated authority as part of a process of ensuring that the aims of the Act are achieved.”²²² It is proposed, therefore, to examine the penalties imposed in some of the principal areas where companies form the majority of offenders, namely: (a) company law; (b) health and safety law; (c) competition law, and; (d) environmental law.

(a) Company Law

6.03 Currently most summary offences under the *Companies Acts 1963-2001* are subject to a maximum level of €1,905 (IR£1,500). This represents an increase of €635 (IR£500) on the previous maxima and is provided for in the *Company Law Enforcement Act 2001*.²²³ Nevertheless, it has been observed by the Company Law Review Group in their *First Report*²²⁴ that it has been the practice of the courts to impose fines for company law offences in the order of €317 (IR£250). As the Group rather temperately pointed out, “this does not help the deterrent factor”.²²⁵ This led it to recommend that a minimum fine of €500 (IR£394) should be set (save with such limited statutory exceptions as are necessary to comply with the constitutional rights of the defendant). Friel²²⁶ has also been critical

²²¹ O’Sullivan “The Prosecution of Companies for Summary Offences” (2000) 3(6) Irish Business Law 155.

²²² *Ibid.*

²²³ Section 104(c) of the *Company Law Enforcement Act 2001*.

²²⁴ Company Law Review Group *First Report* (Dublin Stationery Office 2001).

²²⁵ *Ibid* at para 8.5.2.

²²⁶ Friel “Corporate Criminal Liability: A Comparative Analysis - Part I” (1999) CLP 191.

of the low fines imposed on companies for breaches of company law. Indeed in his observation that there is little equivalence between the two penalties provided for under the Acts (a fine of IR£1,500 and up to 12 months in jail), he chimes with the Commission's earlier remarks at paragraph 2.01 in relation to minor offences in general. As he notes with regard to the offence of fraudulent trading:²²⁷

“[T]he ratio of fiscal penalty to custodial sentence seems incongruous. It is difficult to see how £1,000 could be the equivalent of up to 12 months in jail. If we take the average industrial wage is in the order of IR£18,000, it perhaps might have been better to permit the courts the opportunity to impose a fine at that sort of level. Given the reluctance in the judiciary to send business people to jail, the fine option offers the court little more than a chance of giving a director a slap on the wrist.”²²⁸

6.04 This point has also been made recently in the context of the parliamentary debates on the *Criminal Justice (Theft and Fraud Offences) Bill 2000*. As Mr C Lenihan TD noted in relation to the penalty of IR£1,500 (€1,905) provided for in the Bill:

“Such a fine is a drop in the ocean when one considers the type of financial fraud which can be perpetrated against financial institutions or the State, such as false claims for European subsidies. If we want to take on the corporate sector or senior executives of companies, we must ensure the sanctions sting them.”²²⁹

(b) *Health and Safety Law*

6.05 Within the regulatory field, the Health and Safety Authority (“HSA”) has been particularly active in seeking to maximise the effectiveness of penalties imposed on offenders convicted of breaches of the *Health and Safety Acts*. As is to be expected, corporations

²²⁷ Section 297 of the *Companies Act 1963* as inserted by s.135 of the *Companies Act 1990*.

²²⁸ Friel “Corporate Criminal Liability: A Comparative Analysis - Part I” (1999) CLP 191, 192.

²²⁹ Vol 527 *Dail Debates* Col 279.

form the majority of the defendants in these proceedings, with the remainder being natural persons.²³⁰ Fines are imposed in nearly all summary cases. Although most of the prosecutions brought by the authority are summary in nature it should be emphasised that the behaviour for which proceedings are brought will often have had extremely serious consequences for the victims involved, with accidents resulting in serious injury or even death. Currently, the maximum fine for any offence under the Acts on summary conviction is €1,905 (IR£1,500).²³¹

6.06 The statistics from the HSA's most recent report are instructive. In 2001 the Authority brought 85 summary prosecutions and only 7 cases on indictment. Of the summary proceedings, convictions were obtained in 73 cases and fines were imposed in 72 cases. The average fine imposed per case was €1,882 (IR£1,482) and the average fine imposed per charge was €885 (IR£697) (the same defendant may have faced several charges). Notably, 36 of the 85 cases completed in the District Courts related to workplace fatalities. Convictions were obtained in 31 of these cases with the average fine amounting to €2,306 (IR£1,816).²³² A good illustration of the token nature of the fines imposed is provided by the details of a case taken by the HSA in 2001 against the Sean Quinn Group. The Group was fined €1,270 (IR£1,000) on 6 February 2001 in respect of charges relating to a fatal accident in which a worker was buried alive while working in a six foot deep trench. There can be little doubt that a €1,267 fine made little impact on a group which employs over 2,000 people nationwide and has an annual turnover of IR£275 million.

6.07 Indeed the inconsequential nature of the fines imposed on corporations for health and safety offences was the subject of recent comment from the bench in the highly publicised case of *The People (DPP) v Zoe Developments*.²³³ The defendant, Zoe Developments,

²³⁰ In 51 of the 85 summary proceedings initiated in 2001, the defendants were either public limited companies, private limited companies or public bodies such as the ESB. See further Health and Safety Authority *2001 Annual Report* (Dublin Stationery Office 2002) Appendix I, "Enforcement Statistics".

²³¹ Section 49 of the *Safety, Health and Welfare at Work Act 1989* as amended by s.41 of the *Organisation of Working Time Act 1997*.

²³² Health and Safety Authority *2001 Annual Report* (Dublin Stationery Office 2002) Appendix I, "Enforcement Statistics".

²³³ Circuit Court 23 June 2000.

was prosecuted on indictment for breaches of the *Health and Safety Acts* resulting in a fatal accident and was fined IR£15,000 (€19,046).²³⁴ In imposing the unusually high penalty on the defendant Judge Frank O'Donnell remarked that a fine "should be more than a blip on the balance sheet of the company", suggesting strongly that in imposing a fine a court should have regard to the size and profits of an offender as well as the degree of culpability.²³⁵

6.08 It must be conceded that a significant part of the problem is that prosecutions against companies are most commonly brought summarily in the District Courts and because of this attract only small fines when arguably they should have been brought before a jury in a higher court.²³⁶ However this does not detract from the argument that if there is a summary prosecution the fines imposed on companies should be capable of making an impact in order to act as a sufficient deterrent. It is noteworthy that part of the motivation behind the recent review of the *Safety, Health and Welfare at Work Act 1989* was derived from the fact that some employers were simply not being deterred by the penalties applying to the Act.²³⁷ As a result of that review, the HSA's Legislation and Guidance Sub-Committee recommended an increased level of fine not exceeding IR£2,500 (€3,174) per offence on summary conviction. This would apply to each of the three categories of offences under the new hierarchical

²³⁴ It was not the first time that the company had been before the courts for health and safety offences. Indeed, in injunctive proceedings brought against it by the HSA in 1997 seeking implementation of a health and safety plan, it was described by Kelly J in the High Court as a "recidivist criminal". See *Irish Times* 19 November 1997.

²³⁵ See also the Law Reform Commission's forthcoming *Consultation Paper on Corporate Homicide*.

²³⁶ This problem was highlighted by Kelly J in the High Court in the earlier proceedings (see fn 180 above) against Zoe Developments, where he stated that he hoped that in the future the HSA would avail of going to the higher courts instead of the lower court, where "developers demonstrate contempt for the fines imposed." *Irish Times* 19 November 1997.

²³⁷ Mr Joe Hegarty, Vice-Chairperson of the Health & Safety Authority stated at the NISO Annual Conference, "*Legislative Review - A Healthy Exercise*" October 2001 Killarney: "Initially the Minister wrote to the Authority requesting that it carry out a review of the 1989 Act... He [the Minister] noted that while many employers had made strong efforts to improve safety and health, there were still those who had not responded and who were not deterred by the penalties applying to the Act."

structure recommended by the review group.²³⁸ If implemented this would represent an increase of IR£1,000 (€1,270) on the previous maximum.²³⁹ The moderation of this proposal probably stems from the fact that there is perceived to be a constitutional limit of approximately €3,000 on the maximum fine which may be imposed for a summary offence. That such a maximum is constitutionally required, at any rate in the case of companies, is something that is contested at paragraphs 6.27-6.31 below.

(c) Competition Law

6.09 If a fine is to act as an effective deterrent, it is arguable that the amount exacted should be more than any profit which is to be gained from the illegality. This argument is particularly apposite in the context of prosecutions brought by the Competition Authority for breaches of the *Competition Acts*. The danger is that a relatively small fine of say IR£500 (€635) for an infringement of the Acts would come to be regarded as a minor cost of doing business. Often the money to be made from evading regulations is greater than anything the company is likely to be fined if caught. The *Report of the Competition Authority 2000*,²⁴⁰ for example, provides details of the sole prosecution for price fixing taken against a company since the *Competition Act 1996* came into force. Judge O'Donnell in Limerick District Court imposed a fine of IR£500 (€634.87) on Estuary Fuel Ltd in respect of each of the two charges of breaching s.4(1) of the *Competition Act 1996*. It is likely, indeed very probable, that the profits made by Estuary Fuel from the price fixing agreement it entered into with the filling station far exceeded the fine imposed. In

²³⁸ For Category 1 offences (summary only), a fine not exceeding IR£2,500 (€3,174) was recommended. For Category 2 offences, the same level of fine was recommended on summary conviction or on conviction on indictment, being a fine not exceeding IR£25,000 (€31,743). For Category 3 offences, the HSA recommended the same level of fine IR£2,500 (€3,174) per offence on summary conviction or on conviction on indictment, a fine not exceeding IR£100,000 (€126,974) per offence or, at the discretion of the court, to imprisonment for a term not exceeding two years per offence or to both such fine and such imprisonment.

²³⁹ In the light of the HSA's review, health and safety legislation is currently being drafted. However, a Bill has yet to be published.

²⁴⁰ Competition Authority *Annual Report 2000* (Dublin Stationery Office 2001) at 15-16.

this regard, it is of interest to note that the *Competition Act 2002* has increased the maximum fine for offences under the *Competition Acts* to €3,000 (IR£2,363).

6.10 An interesting point of comparison with the domestic sanctions in place for corporations in breach of competition law is provided by the administrative fines imposed by the European Commission for violations of European competition law. Article 15 of Regulation 17 confers powers on the Commission to impose fines for infringements of Article 81(1) or Article 82. These may range from €1,000 to €1,000,000 or a sum in excess of that but not exceeding 10% of the turnover of the undertakings involved. This is despite the fact that Article 15(4) explicitly states that decisions taken by the Commission on fines “shall not be of a criminal nature”. While it has been strongly argued that these administrative fines fall under the concept of a “criminal charge”, as set out in Article 6 of the *European Convention on Human Rights*, thereby attracting the Article’s procedural guarantees, this has not yet been definitively decided.²⁴¹ It is of further interest to note that the Court of Justice has ruled that it is permissible for the Commission in fixing the amount of the fine to have regard to the total turnover of the undertaking as an indicator of the size and economic power of the undertaking. While the Court stressed that this should not result in fines being fixed simply as a result of turnover, it does clearly indicate that fines should be adjusted according to the wealth of the offender.

(d) Environmental Law

6.11 The above argument - that the fine should bear some relationship to the profit made by the company from breaching the law - also finds a resonance in the area of environmental law where there can be a substantial material gain from violating the law. As noted in the recent *Report on Criminal Enforcement of Environmental Law in the European Union*²⁴² (which unfortunately did not include

²⁴¹ A case is currently pending before the European Court of Human Rights against all 15 Member States of the European Union on the grounds that these fines are criminal in nature and as a result were imposed in breach of Article 6(1) of the *European Convention on Human Rights*. See *Senator Lines GmbH v Member States of the European Union* Application No 56672/00.

²⁴² Faure and Heine (based on work done by the IMPEL Network (European

Ireland), “environmental criminality typically is corporate crime”²⁴³ and as such “it must not be forgotten that often serious financial investments have to be made to comply with environmental legislation... for instance, by... having to invest in a water cleaning installation or other abatement technology.”²⁴⁴ This has also been noted by the Environment Agency in Britain which has complained that the current scale of penalties for environmental crime is inadequate to promote good environmental performance. Again, this is because it is cheaper for companies to commit environmental crime than to comply with the law. At the launch of the Agency’s 2000 Report, the Chairman, Sir John Harman, remarked that “fines will need to substantially increase for businesses to understand the environment’s true value. The current scale of penalties levied by the courts makes pollution an acceptable risk.”²⁴⁵

6.12 In many of the regulatory areas discussed above, such as health and safety law and environmental law, much of the legislation is of European derivation. By far the bulk of community secondary legislation is received into Irish law by means of s.3 of the *European Communities Act 1972*²⁴⁶ which allows for the creation of offences by ministerial regulation but bars the creation of indictable offences.²⁴⁷ Accordingly, European Union (“EU”) directives, when they are transposed into Irish legislation, give rise to offences which are summary in nature and thus subject to the €3,000 upper threshold.

6.13 This constraint obviously inhibits the deterrent effect of European legislation and also holds implications for its effective

Union Network for the Implementation and Enforcement of Environmental Law)) *Report on the Criminal Enforcement of Environmental Law in the European Union* (Danish Ministry of Environment and Energy 2000).

²⁴³ This is also true in Ireland. See, for example, the *Report on IPC (Integrated Pollution Control) Licensing and Control 2000* (Environmental Protection Agency 2001) at 19. Eleven out of the 15 defendants in proceedings taken by the EPA were limited companies.

²⁴⁴ *Ibid* at 62.

²⁴⁵ The *ENDS Report* 321 October 2001 at 13.

²⁴⁶ See the comments of Collins and Fennelly “Irlande” in Rideau (ed) *Les Etats Membres de l’Union Europeenne: Adaptions, Mutations Resistances* (Universite de Nice-Sophia Antiplois 1997) at 263-300.

²⁴⁷ Section 3(3) of the *European Communities Act 1972* states: “Regulations under this section shall not create an indictable offence.”

enforcement, as the maximum fine which may be imposed on an offender is obviously a factor which enforcers will take into consideration in deciding whether to prosecute under this legislation.²⁴⁸ As Scannell has noted in the environmental field:²⁴⁹

“All offences created by regulations under this section implementing environmental directives are therefore triable summarily, are minor in nature and are punishable by lenient maximum penalties.... The deterrent potential of these penalties is thus minimised... this would appear to be contrary to the jurisprudence of the European Court in *Harz v. Deutsche Tradax*²⁵⁰ where it was held that sanctions provided under national law must have a ‘real deterrent effect - they must be such as to guarantee full and effective judicial protection.”

6.14 Another relevant authority is the *Greek Maize*²⁵¹ decision in which the European Court set out the objective of penalties under Community law. Such penalties should be “effective, proportionate and dissuasive.” Therefore, in the area of environmental law at least, the question could be asked as to whether a fine of €3,000 for a financially mighty corporate offender is adequate to reflect Ireland’s compliance with those objectives of the penalties.

6.15 Indeed it is possible to go further than this. Article 29.4.7 (originally Article 29.4.1) provides: “No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities...”. It is certainly arguable that a higher fine is “necessitated by the obligations of membership” in order that the penalty for community offences may be effective and dissuasive. Moreover, this argument is strengthened by the recent decision of the Supreme Court in *Meagher v Minister for Agriculture*²⁵² which

²⁴⁸ Of course if one accepts the argument made at paragraph 4.05 above, the maximum fine could be significantly increased for all offenders.

²⁴⁹ Scannell *Environmental and Planning Law in Ireland* (Round Hall Press Dublin 1995) at 14.

²⁵⁰ [1984] ECR 1921.

²⁵¹ *Commission v Greece* [1989] ECR I-2965, Case 68/88. See further Baker “Taking European Criminal Law Seriously” [1998] Crim L R 361.

²⁵² [1994] 1 IR 329.

appears to suggest that it may be sufficient to satisfy Article 29.4.7 if Community membership renders the acts in question desirable on practical grounds, as opposed to mandatory. While the suggestion must remain tentative for the time being, this authority certainly admits of the possibility that fines above the €3,000 maximum for offences derived from Community law would survive a constitutional challenge.

B. Corporate Fines: A Comparative Excursus

6.16 A brief survey of other common and civil law countries reveals that many countries have made special provision in their case-law or legislation for heavier fines for corporate offenders. The situations in some of these countries will now be examined.

(a) United Kingdom

6.17 In Britain, as in Ireland, fines are the most common sanction against companies. Magistrates' courts are limited to a maximum fine of Stg£5,000 in most cases²⁵³ under the *Criminal Justice Act 1991*, but the Crown Court has no overall limit. While it has been observed that the amount of the fine actually imposed on companies is often not high enough to have a real deterrent effect,²⁵⁴ the Court of Appeal went some way towards addressing this problem in the case of *R v Howe*.²⁵⁵ The decision marked the strongest indication yet from the English courts that, when imposing a fine on an offender, it is relevant to take into account the fact that it is a corporate offender with concomitant resources.

²⁵³ Important exceptions to this Stg£5,000 upper limit are the penalties for health and safety offences for which the lower court maximum is now Stg£20,000.

²⁵⁴ See, for example, the comments of Bergman in the context of fines imposed for breaches of health and safety legislation: "Any reform of sentencing procedures must question whether an upper limit should exist for corporate offenders": Bergman "Corporate Sanctions and Corporate Probation" (1992) NLJ 1312, 1312, fn 3.

²⁵⁵ [1999] 2 All ER 249.

6.18 The *Howe* case came about as a result of a fatal accident where an employee of the appellant, a small engineering company, was electrocuted. The fines imposed on the appellant in the Crown Court for various breaches of the health and safety legislation amounted to Stg£48,000 in total (plus costs of Stg£7,500), a sum which the appellant contended was excessive. Having outlined the appropriate aggravating and mitigating features to be taken into account in a case of that kind, the Court went on to discuss the weight to be attached to a company's financial circumstances when determining the amount of a fine to be imposed. While in general a fine should not be so large as to jeopardise the future of the company itself and that of its employees, nevertheless, "the object of prosecutions for health and safety offences in the workplace is to achieve a safe environment for those who work there and for other members of the public who may be affected. *A fine needs to be large enough to bring that message home where the defendant is a company not only to those who manage it but also to its shareholders.*"²⁵⁶ Vitality, moreover, the decision left the courts with considerable discretion in accepting that there may be cases where the offences are so serious that the defendant ought not to be in business. On the facts in *Howe* however, the Court decided that the judge had given inadequate weight to the financial position of the appellant (as a small company with an annual turnover of only Stg£355,000) and it reduced the amount of the fine from Stg£48,000 to Stg£15,000.

6.19 After the decision in *Howe*, there has been a rise in the level of fines imposed by the courts on corporate offenders,²⁵⁷ culminating in the record fine of Stg£1.5 million on Great Western Trains for health and safety offences. Despite this there are still calls from some commentators in England for judges to seek information in open court about the company's assets and recent profits before sentencing.²⁵⁸

²⁵⁶ [1999] 2 All ER 249, 255. Emphasis added.

²⁵⁷ See Hickman "Corporate Killing Reforms" (2001) 151 NLJ 912, 913.

²⁵⁸ See, for example, Trotter "Corporate Manslaughter" (2000) NLJ 455 who points out that the Stg£1.5 million fine represented only 5.6% of GWT's profit for the financial year ending 31 March 1998.

(b) USA

6.20 Prior to the enactment of the *Sentencing Reform Act* in 1984, the maximum corporate fines which could be imposed for federal offences was relatively small. For example, federal wire fraud attracted a maximum corporate fine of only US\$1,000 per offence. The unavailability of large fines led to modest penalties being imposed on firms convicted of quite serious crimes. The *Sentencing Reform Act 1984* made two key changes in corporate sentencing standards for federal crimes. First, it raised maximum fines for corporate offenders. Maximum fines for corporate felonies, misdemeanours and infractions were increased to figures broadly speaking twice as high as those for individuals. Thus, for example, maximum fines for felonies and serious misdemeanours causing death are US\$250,000 for individuals but US\$500,000 for organisations.²⁵⁹ Secondly, the Act created the United States Sentencing Commission and authorised the Commission to enact guidelines governing the sentencing of organisational offenders including corporations.

6.21 In 1991 the Sentencing Commission, after considerable research,²⁶⁰ issued guidelines for fines that can be levied against corporations convicted of federal felonies or class ‘a’ misdemeanours. The procedure for determining the level of the fine is quite complex. While a detailed explanation of the formula applied is not possible in the limited space afforded here, it is interesting to note that the emphasis is largely placed on the culpability of the company since this determines the ultimate fine imposed. First, a base fine is determined from factors measuring the seriousness of the organisation’s offence. The base fine is then transformed into a recommended fine range based on the computation of a “culpability score” for the corporate defendant which ranges between 0-10. Surprisingly, the size or income of the defendant is relevant only in so

²⁵⁹ 18 USC at 3571 (1988).

²⁶⁰ Work began on the Commission’s Sentencing Guidelines for organisational offenders in 1986. It is interesting to note that an approach to fining which was considered but ultimately rejected by the Commission, was a proposal to scale corporate fines based on percentages of a firm’s income or assets. This approach was in line with the principle of equality of impact outlined above in attempting to standardise organisational penalties by imposing fines having similar impacts on large and small organisations.

far as it affects the scope of the conduct undertaken by the company or the ability of the company to pay restitution.²⁶¹

(c) *Australia and New Zealand*

6.22 The legislative provisions in place in Australia and New Zealand were touched upon briefly in the Consultation Paper.²⁶² The Antipodean jurisdictions have forged ahead with reforms in this area and in Australia legislation has been enacted which provides for higher fines for corporations at both federal and state level. Examples of such legislation include: s.4(3) of the Commonwealth of Australia *Crimes Act 1914*;²⁶³ s.16 of the Northern Territory of Australia *Sentencing Act 1995*;²⁶⁴ s.40(5) of the Western Australia *Sentencing Act 1995*;²⁶⁵ s.431(2) of the Australian Capital Territory *Crimes Act 1900*;²⁶⁶ and s.181(B) of the Queensland *Penalties And Sentences Act 1992*.²⁶⁷ All of these Acts broadly provide for a multiplier of five to

²⁶¹ See further Gruner “Towards an Organisational Jurisprudence: Transforming Corporate Criminal Law through Federal Sentencing Reform” (1994) 36 *Ariz L Rev* 407.

²⁶² Law Reform Commission *Consultation Paper on Penalties for Minor Offences* (CP18-2002) at 61.

²⁶³ Section 4B(3) states: “Where a body corporate is convicted of an offence against the law of the Commonwealth, the court may, if the contrary intention does not appear and the court thinks fit, impose a pecuniary penalty not exceeding an amount equal to 5 times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence.”

²⁶⁴ Section 16(2) provides that the maximum fine a court may impose is, save where otherwise stated, A\$2,000 in the case of an individual or A\$10,000 in the case of a body corporate.

²⁶⁵ Section 40(5) states: “Except where a statutory penalty is expressly provided for a body corporate, a body corporate that is convicted of an offence the statutory penalty for which is or includes a fine is liable to a fine of 5 times the maximum fine that could be imposed on natural person convicted of the same offence.”

²⁶⁶ Section 431(2) provides that a fine imposed in addition to or instead of imprisonment shall not exceed, where the offence is punishable by imprisonment for a period exceeding 12 months but not exceeding 2 years, A\$5,000 where the offender is a natural person or A\$25,000 in any other case.

²⁶⁷ Section 181(B) of the *Queensland Penalties and Sentences Act 1992* states:

“(1) This section applies to a provision prescribing a maximum

be applied to fines which are levied on corporations as distinct from natural persons. In other states, statutes creating offences in areas where corporate crime is likely to be significant, such as pollution, provide for increased penalties for bodies corporate. An example is s.27(1) of the New South Wales *Marine Pollution Act 1987* which provides for a fine of 2,000 penalty units (A\$220,000) for a natural person convicted under the Act, while for a body corporate a fine of 10,000 penalty units (A\$1,100,000) applies. Other states provide for fines to be imposed on bodies corporate where the only penalty provided for individuals is a term of imprisonment.²⁶⁸ In New Zealand under various sections of the *Land Transport Act 1998* a different maximum is also introduced for companies as distinct from individuals.²⁶⁹

(d) Canada

6.23 Section 735(1) of the Canadian *Criminal Code* lays down the fines to be applied to corporate offenders. The section provides thus:

“(1) [A] corporation that is convicted of an offence is liable, in lieu of any imprisonment that is prescribed as punishment for that offence, to be fined in an amount, except where otherwise provided by law,

(a) that is in the discretion of the court, where the offence is an indictable offence; or

fine for an offence only if the provision does not expressly prescribe a maximum fine for a body corporate different from the maximum fine for an individual.

(2) The maximum fine is taken only to be the maximum fine for an individual.

(3) If a body corporate is found guilty of the offence, the court may impose a maximum fine of an amount equal to 5 times the maximum fine for an individual.”

²⁶⁸ See, for example, s.16 of the *New South Wales Crimes (Sentencing Procedure) Act 1999*.

²⁶⁹ For example s.42(2), which sets out the penalties for a failure to secure the load of a vehicle, provides for a fine of A\$2,000 for an individual and A\$10,000 for a body corporate.

(b) not exceeding twenty-five thousand dollars, [€16,638] where the offence is a summary conviction offence.”

6.24 It is generally accepted that the fine should be greater than the amount of any profit which has accrued to the defendant from the illegality. The Code also provides special enforcement procedures for fines on corporations.²⁷⁰

(e) France

6.25 In many civil law countries corporations cannot be sanctioned under the criminal law - this is the concept of *societas delinquere non potest*.²⁷¹ France, however, bowing to pressure from Europe²⁷² and the French public (after a particularly high profile instance of corporate abuse)²⁷³ has embraced a comprehensive range of sanctions that can be levied against corporations. The 1992 *Nouveau Code Penal* provides for fines and numerous other innovative penalties such as the dissolution of a corporation and its placement in judicial supervision. Corporations can be fined up to *five* times the maximum for individual offenders and for repeated offences the maximum is *ten* times that for individuals.²⁷⁴

6.26 In sum, it can be said that there are good reasons of policy for increasing the fines imposed on corporate offenders. The sphere of

²⁷⁰ See Stessens “Corporate Criminal Liability: A Comparative Perspective” (1994) 43 ICLQ 493.

²⁷¹ This is the case under the Dutch *Penal Code* of 1886 and the German and Italian Constitutions.

²⁷² In the late 1980s the Council of Europe called upon Member States to impose corporate criminal liability. This was followed by a recommendation from the Council of Ministers of the EC to impose criminal responsibility on corporations.

²⁷³ This was the scandal surrounding the Centre National de Transfusions Sanguines (CTNS) whereby HIV infected blood was supplied to haemophiliac patients. See judgment of 22 June 1994 Cass Crim 1994 Bull Crim No 93-83-900 (Fr.).

²⁷⁴ *Code Penal 1992* Articles 131-37 to 131-49 and 131-12 to 131-15. See in particular Articles 131-38: “*Le taux maximum de l’amende applicable aux personnes morales est egal au quintuple de celui prévu pour les personnes physiques par la loi qui reprime l’infraction.*”

corporate offending is probably an area in which the hypothesis of the rational, calculating criminal has a realistic basis. However, if fines imposed by courts are to have some deterrent effect, it is important they should signify something more than a mere “slap on the wrist” or, to quote Judge O’Donnell’s phrase, “a blip on the balance sheet” of a company. As seen above, the problem is especially acute in the case of minor offences since, in practice, most prosecutions against companies for regulatory offences are brought in the District Courts. Moreover, comparisons with Britain, the US and other common law jurisdictions, and indeed with civil law jurisdictions such as France, serve to strengthen the argument in favour of increased penalties for corporate as opposed to individual offenders.

C. Constitutional Implications of a Higher Maximum for Companies

6.27 All this leads on to the view that there should be a higher maximum for companies. However, there is a need to consider first whether there would be any constitutional difficulties in such a change. The main difficulty, as discussed in the Consultation Paper, concerns whether it would remove offences from the category of “minor offences” in Article 38.2 so as to entitle a company facing such a fine to a jury trial under Article 38.5 of the Constitution.

6.28 There is no case law directly on the point. However two arguments are relevant here. First, the decision of Barron J in *State (Calcul International Ltd) v Appeal Commissioners*²⁷⁵ concerning Article 37.1 is of interest. Article 37.1 is an analogous provision to Article 38.2 in that it provides an exemption to Article 34.1, stating that justice may be administered only in a court of law. According to Article 37.1 this is not required in “the case of limited functions and powers of a judicial nature in matters other than criminal matters...” The powers at issue in the case were those exercisable by the Appeal Commissioners under Part XXVI of the *Income Tax Act 1967*. Barron J held in the High Court that the powers before the court were “limited” and hence fell within the ambit of Article 37.1. In reaching this conclusion he had regard not to the absolute amount of tax paid but to the relativity between the tax paid and the means of the taxpayer. The correct test was the effect or impact of the power on

²⁷⁵ High Court Barron J 18 December 1986.

the individual's income when exercised. This Article 37.1 case, therefore, may provide guidance as to how the courts would interpret the "minor offence" exception under Article 38.2. The judgment is at least suggestive of the possibility that the courts may adopt a practical approach to the constitutional issues from the point of view of helping to achieve fairness and equality of impact.

6.29 The second argument is premised on the fact that a corporation, unlike a human being, cannot be imprisoned and that the maximum fine should be augmented to reflect this fact. The existing constitutional case-law on minor offences, such as *Conroy*²⁷⁶ and *Mallon*,²⁷⁷ suggests that, if a punishment were imposed on a convicted person which consisted of both the maximum fine *and* the maximum period of imprisonment, such a penalty would be constitutional. Given that such a punishment could obviously only be imposed in the case of an individual, the Commission believes that there is no constitutional difficulty in increasing the maximum fine which may be imposed on a corporation to reflect the fact that the corporation cannot be imprisoned. *The Commission therefore recommends the introduction of a split level maximum fine with a higher level of fine to be imposed on corporations rather than human beings, in the belief that this would not violate Article 38.5.* It is important to note that the Commission's recommendation will only serve to increase the maximum penalties for corporate offenders. The District Court will naturally retain a discretion to take into account factors such as remorse, the undertaking of preventative measures by the offender, as well as the actual financial strengths or weakness of a company when assessing the appropriate fine in all the circumstances.

6.30 A further issue concerns what the ratio between the maximum figures for an individual and a corporation should be. The existing case law offers little in the way of guidance since it has never been necessary for the courts to consider which is the more significant element of a punishment that includes both imprisonment and a fine. However, the case law in other jurisdictions where the issue has received judicial attention, such as the *Muniz v Hoffman*²⁷⁸ decision in the US, is strongly supportive of the view that the imprisonment is the more serious element in the determination of whether or not an

²⁷⁶ *Conroy v Attorney General* [1965] IR 411.

²⁷⁷ *Mallon v Minister for Agriculture* [1996] 1 IR 517.

²⁷⁸ 422 US 454.

offence is minor in nature. This view also derives support from the value placed on the right to liberty in other contexts in Irish law.

6.31 Despite these favourable indications, however, the Commission thinks that it may be constitutionally doubtful to recommend a multiplier of five for fines imposed on corporations as is done in Queensland or France. The Commission is not cognisant of any constitutional difficulties with the multiplier of two applied to federal corporate offences in the US. *It therefore recommends that, in the case of a corporation, the maximum fine possible should be increased by a factor of three times that applicable to a human person.*

6.32 Thus, the following draft (modelled on the *Queensland Penalties and Sentences Act 1992*) is recommended:

“(1) This section applies to a provision prescribing a maximum fine (whether with or without imprisonment) for an offence only if the provision does not expressly prescribe a maximum fine for a body corporate different from the maximum fine for an individual.

(2) The maximum fine is taken to be the maximum fine only for an individual.

(3) If a body corporate is found guilty of the offence, the court may impose a maximum fine of an amount equal to three times the maximum fine for an individual.”

6.33 This general provision would apply both to legislation enacted before or after the proposed reform. This should not be retrospective since, in line with Article 15.5 of the Constitution, the increased penalty would not apply to offences committed before the reform was enacted.

CHAPTER 7: SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

7.01 The Commission is unanimous in its view that ideally, the restriction on a citizen's liberty represented by a term of imprisonment of 6 to 12 months should only be visited on a person following a jury trial [paragraph 2.31]. They therefore exhort District Court judges to reconceptualise the sentencing maximum for minor offences [paragraph 2.32]. However, at the present time, the majority of the Commission feel unable to recommend legislation giving effect to this principle [paragraph 2.33]. The minority of the Commission recommends legislation along the following lines:

“(1) Without prejudice to s.5 of the *Criminal Justice Act 1951* as amended [consecutive terms of imprisonment], a District Court shall not have power to impose imprisonment for more than six months in respect of any one offence.”

“(2) Unless expressly excluded, subs.(1) shall apply even if the offence in question is one for which a person would otherwise be liable on summary conviction to imprisonment for more than six months.”²⁷⁹

7.02 This provision would be subject to two exceptions. First, those indictable offences triable summarily which are scheduled under s.2(2) of the *Criminal Justice Act 1951* as amended²⁸⁰ and in respect of which the accused has a right to insist upon a jury trial. Secondly, those indictable cases in which pleas of guilty have been

²⁷⁹ See s.27 of the English *Criminal Law Act 1977*.

²⁸⁰ Section 2 of the *Criminal Justice Act 1951* was amended slightly by s.19 of the *Criminal Procedure Act 1967*, ss.21(6) and 22 of the *Criminal Law (Jurisdiction) Act 1976* and s.8 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*.

entered and which have been referred with the consent of the DPP to the District Court for sentencing only.²⁸¹ [Paragraph 2.35-2.36].

7.03 In relation to the requirement to give reasons the Commission adheres to its earlier recommendation that a District Court judge should be required to give concise written reasons for any decision to impose a prison sentence rather than a non-custodial sentence. The Commission further suggests that, as part of this requirement, District Court judges should record the aggravating and mitigating factors which influenced the decision with particular emphasis on why non-custodial options available to the judge were not appropriate [paragraph 3.17].

7.04 As regards fines, the Commission questions the correctness of the prevailing wisdom that a maximum fine of over €3,000 (IR£2,363) would be unconstitutional, taking into account the maximum figures accepted for the 1920s and the changes in the value of money and wages during the intervening decades [paragraph 4.05].

7.05 In relation to fines, the Commission further recommends that effect be given in this jurisdiction to the principle of equality of impact so that the amount of a fine may be increased for more affluent offenders as well as decreased for those offenders of more limited means. Legislation along the following lines is recommended:

“(1) Before fixing the amount of any fine to be imposed on an offender,²⁸² a court shall inquire into his financial circumstances.

(2) The amount of any fine fixed by a District Court shall be such as, in the opinion of the court, reflects the seriousness of the offence.

²⁸¹ Section 13 of the *Criminal Procedure Act 1967*.

²⁸² The original English legislation reads, “on an offender who is an individual”, making a curious distinction between companies and individuals. In the case of an individual offender, the English courts are placed under a duty to investigate the offender’s financial circumstances. This does not apply in the case of an offender which is a corporation, yet the court is required by subsection (3) to take into account the financial circumstances of the offender in each case.

(3) In fixing the amount of any fine to be imposed on an offender (whether an individual or other person), a court shall take into account the circumstances of the case including, among other things, the financial circumstances of the offender so far as they are known, or appear, to the court.

(4) Subsection (3) above applies whether taking into account the financial circumstances of the offender has the effect of increasing or reducing the amount of the fine.” [Paragraph 4.21].

7.06 In relation to the implementation of the above recommendation, the Commission considers that the mandatory use of a statutory form may unduly inhibit a District Court judge’s discretion in assessing the means of an individual offender. Therefore the Commission recommends that the decision to use a means form when assessing an offender’s means should remain within the discretion of the individual District Court judge [paragraph 5.19]. A precedent means form along the lines of the form in Appendix 8 is recommended for individual offenders. In respect of corporate offenders, the Commission does not recommend a means form given the availability of a company’s annual accounts as part of its annual return [paragraph 5.26]. In the absence of the relevant information as to means, the court should be able to proceed to make such determinations in relation to an offender’s financial circumstances as it thinks fit.

7.07 Additionally, in relation to the fines which may be imposed for a minor offence, the Commission believes that there are solid grounds, most notably the fact that a corporation cannot be incarcerated, for saying that it would be constitutional to increase the maximum fine in the case of a corporation to a figure above that fixed for human beings. There are also strong arguments of policy supporting the introduction of a split level maximum fine. The Commission therefore recommends that in the case of a corporation the maximum fine possible should be increased by a factor of three times that applicable to a human person. The following draft (modelled on the *Queensland Penalties and Sentences Act 1992*) is recommended:

“(1) This section applies to a provision prescribing a maximum fine (whether with or without imprisonment) for an

offence only if the provision does not expressly prescribe a maximum fine for a body corporate different from the maximum fine for an individual.

(2) The maximum fine is taken to be the maximum fine only for an individual.

(3) If a body corporate is found guilty of the offence, the court may impose a maximum fine of an amount equal to three times the maximum fine for an individual.” [Paragraph 6.32].

APPENDIX 1: ACKNOWLEDGEMENTS

The Commission would like to thank the following people who offered advice and assistance in relation to this Report. Full responsibility for this Report, however, lies with the Commission.

Brian Battelle, Information Technology Sector, The Courts Service
Olive Caulfield, Secretary to the Working Group on the Jurisdiction of the Courts

Sally Dickinson, Head of the Magistrates Association of England and Wales

Liam Edwards, National Co-ordinator, Money Advice and Budgeting Service

Valerie Fallon, Department of Justice, Equality and Law Reform

Jim Finn, Circuit and District Courts Directorate, The Courts Service

Yvonne Keogh, Legal Advisor, Employment Rights Division, Department of Enterprise, Trade and Employment

Beverley Moore, Sentencing and Offences Unit, British Home Office

Kevin O'Connell, Legal Advisor, Office of the Director of Corporate Enforcement

Dr Ian O'Donnell, Institute of Criminology, University College Dublin

His Honour Judge Sean O'Leary, Circuit Court

Michael O'Neill, Legal Advisor, Health and Safety Authority

Noel Rubotham, Director of Reform and Development, Courts Service

Sheila Werry, Sentencing and Offences Unit, British Home Office

James Woods, Former District Court Clerk, Limerick

The Commission is also grateful for the advice of several other members of the judiciary and legal profession.

**APPENDIX 2: LIST OF ATTENDEES AT SEMINAR ON
PENALTIES FOR MINOR OFFENCES,
MONDAY, 1 JULY 2002.**

Judge David Anderson, District Court;
Ivana Bacik, Reid Professor of Criminal Law, Criminology and
Penology, Trinity College Dublin;
Con Body, Secretary, Health and Safety Authority;
Conal Boyce, Law Society of Ireland Criminal Law Reform
Committee;
Rory Brady SC, Attorney General;
Mary Burke, Director, National Crime Council;
Thomas J Cahill, Barrister-at-Law;
Rachael Casey, Judges' Library, The Courts Service;
Olive Caulfield, Secretary to the Working Group on the Jurisdiction
of the Courts;
Douglas Clarke, Barrister-at-Law;
Judge Michael Connellan, District Court;
Judge Mary Devins, District Court;
Judge William Early, District Court;
Valerie Fallon, Department of Justice, Equality and Law Reform;
The Hon Mr Justice Niall Fennelly, Supreme Court, Working Group
on the Jurisdiction of the Courts;
Flo Haines, Working Group on the Jurisdiction of the Courts;
James Hamilton, Director of Public Prosecutions;
Judge William Hartnett, District Court;
Judge Gerard Haughton, District Court;
The Hon Mr Justice Herbert, High Court;
Liam Herrick, Irish Council for Civil Liberties;
His Hon Judge Desmond Hogan, Circuit Court;
The Hon Mr Justice Ronan Keane, Chief Justice;
His Hon Judge Anthony Kennedy, Circuit Court;
Ronan Kennedy, Office of the Chief Justice, The Courts Service;
Superintendent Martin Lally, President of the Association of Garda
Superintendents;
Her Hon Judge Jacqueline Linnane, Circuit Court;
Claire Loftus, Chief Prosecution Solicitor, Office of the DPP;
Charles Lysaght, Former Research Counsellor, Law Reform
Commission;
Judge Mary Martin, District Court;
Judge Sean McBride, District Court;

Judge James Paul McDonnell, District Court;
Felix McEnroy, Barrister-at-Law;
His Hon Judge Bryan McMahon, Circuit Court;
The Hon Mr Justice Moriarty, High Court;
The Hon Mr Justice Roderick Murphy, High Court;
Paul Murray, Department of Justice, Equality and Law Reform;
Caitlin Ni Fhlaitheartaigh, Office of the Attorney General;
Dr Ian O'Donnell, Institute of Criminology, UCD;
His Hon Judge Sean O'Leary, Circuit Court;
Dr Paul O'Mahony, Trinity College Dublin;
Rita O'Meara, Barrister-at-Law;
Michael O'Neill, Legal Advisor, Health and Safety Authority;
Majella Redmond, Working Group on the Jurisdiction of the Courts;
Mary Ellen Ring, Barrister-at-Law;
Judge David Riordan, District Court;
Noel Rubotham, Working Group on the Jurisdiction of the Courts;
Garret Sheehan, Solicitor;
The Hon Mr Justice Esmond Smyth, President of the Circuit Court;
Superintendent Joe Staunton, Secretary of the Association of Garda Superintendents.

**APPENDIX 3: MAGISTRATES ASSOCIATION FORM
FOR STATING THE REASONS FOR
SENTENCE**

Stating the reasons for sentence

1. We are dealing with an offence of:
.....

2. We have considered the impact on the victim which was

3. We have taken into account the following aggravating features of the offence:
.....
.....

4. And the following mitigating features of the offence:
.....
.....

5. (*where relevant*) We have taken into account that the offence was:
 racially aggravated
 committed on bail

6. We have taken into account your previous record, specifically the offences of.....
and your failure to respond to the sentences imposed.

7. We have taken into account the following matters in mitigation:
.....
.....

8. We have taken into account the fact that you pleaded guilty [at an early stage] [but not
until] and we have reduced the sentence accordingly.

9. And, as a result, we have decided that the most appropriate sentence for you is:
.....

10. (*where relevant*) We have decided not to award compensation in this case because:
.....

APPENDIX 4: AGGRAVATING AND MITIGATING FACTORS

Aggravating factors

- (1) Whether the offence was planned or premeditated;
- (2) Whether the offender committed the offence as a member of a group organised for crime;
- (3) Whether the offence formed part of a campaign of offences;
- (4) Whether the offender exploited the position of a weak or defenceless victim or exploited the knowledge that the victim's access to justice might have been impeded;
- (5) Whether the offender exploited a position of confidence or trust, including offences committed by law enforcement officers;
- (6) Whether the offender threatened to use or actually used violence, or used, threatened to use, or carried, a weapon;
- (7) Whether the offender caused, threatened to cause, or risked the death or serious injury of another person, or used or threatened to use excessive cruelty;
- (8) Whether the offender caused or risked substantial economic loss to the victim of the offence;
- (9) Whether the offence was committed for pleasure or excitement;
- (10) Whether the offender played a leading role in the commission of the offence or induced others to participate in the commission of the offence;
- (11) Whether the offence was committed on a law enforcement officer;
- (12) Any other circumstances which:

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

Mitigating factors

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

APPENDIX 5: MAGISTRATES' ASSOCIATION GUIDELINE FINES

EXAMPLE GUIDELINE FINES

Based on weekly income net of Tax and National Insurance

Decrease/ increase according to income	NET WEEKLY INCOME - £s									
	100	130	160	190	220	250	300	350	400	
FINE A	50	65	80	95	110	125	150	175	200	
FINE B	100	130	160	190	220	250	300	350	400	
FINE C	150	195	240	285	330	375	450	525	600	

*If the offence is aggravated, but not serious enough for a community penalty, INCREASE the fine.
If there are mitigating elements, REDUCE the fine*

REDUCE IF GIVING SOME DISCOUNT FOR A TIMELY GUILTY PLEA – SEE PAGE 66

**IF THERE IS INSUFFICIENT INCOME TO PAY A FINE AND COMPENSATION,
CONSIDER ORDERING ONLY THE COMPENSATION – SEE PAGE 75**

APPENDIX 6: CRIMINAL LEGAL AID FORM

SECOND SCHEDULE

STATEMENT OF MEANS OF AN APPLICANT FOR FREE LEGAL AID IN A CRIMINAL CASE

As an applicant for free legal aid, you are hereby required in pursuance of section 9 of the Criminal Justice (Legal Aid) Act, 1962, to furnish on this form particulars relevant for determining whether your means are insufficient to enable you to obtain legal aid.

You must enter true and correct particulars against each numbered heading. If the answer is "None" or "No," this must be written in.

The declaration at the end must be signed and the form must be returned to:

.....

1. Name of applicant (in block letters)
.....
2. Full postal address
.....
3. State whether single man/woman, married man/woman, widow or widower
.....
4. Occupation
.....
5. Average weekly income from all sources, including overtime £
6. If you pay rent, please state the weekly amount £
7. If you own your own house, please state amount of
 - (a) ground rent (annual)
 - (b) rates, and
 - (c) monthly mortgage repayments (if any)
8. What persons do you support? If any are children at school state their ages
.....
.....
9. What money have you, or is likely to be available to you that could be used for obtaining legal aid at your own expense?
.....
.....
10. What other assets have you that could be used for obtaining legal aid at your own expense?
.....
.....
11. If you are under twenty-one, are your parents or guardian able and willing to provide legal aid for you or to assist you in providing yourself with legal aid?
.....

Irish Statute Book 1922 - 1998 © Irish Government 1999

DECLARATION*

I declare that to the best of my knowledge and belief the above particulars are true.

Date.....

Signature
.....

*WARNING.—If any person in furnishing this statement of means knowingly makes any false statement or false representation he is liable, on summary conviction, to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding six months or to both the fine and the imprisonment.

INCOME

Please complete columns A or B, whichever you find most convenient. If your spouse/partner is the opposing party it is not necessary to provide information on his/her resources. Income as declared should be supported by documentary evidence, e.g. social welfare book, recent pay slip, bank statements, up to date accounts etc.

TYPE OF INCOME		(A) € PER WEEK		(B) € PER MONTH	
		SELF	SPOUSE/ PARTNER	SELF	SPOUSE/ PARTNER
1	EMPLOYMENT				
2	SOCIAL WELFARE/HEALTH ACTS <i>State type</i>				
3	MAINTENANCE RECEIVED				
4	BUSINESS/ OTHER OCCUPATION				
5	OTHER SOURCE (e.g. a FAS Course Pensions, etc)				
6	BENEFIT IN KIND, e.g. a car, accommodation, insurance premiums, etc.				

DEDUCTIONS

Please complete columns A or B, whichever you find most convenient. The figures quoted must be actual amounts paid and should be supported by relevant receipts, etc.

TYPE OF DEDUCTION		(A) € PER WEEK		(B) € PER MONTH	
		SELF	SPOUSE/ PARTNER	SELF	SPOUSE/ PARTNER
1	ACCOMMODATION				
2	INCOME TAX				
3	P.R.S.I.				
4	CHILD CARE working parent				
5	MAINTENANCE PAYMENTS				
6	AGES OF DEPENDANT CHILDREN:		7	OTHER DEPENDANTS (specify):	

PART I

STATEMENT OF CAPITAL

1 MONEY - € AMOUNT

	Self	Spouse/ Partner		Self	Spouse/ Partner
ON HANDS			BUILDING SOCIETY		
BANK ACCOUNT(S)			CREDIT UNION		
AN POST ACCOUNT			OTHER INSTITUTION		

2 FAMILY HOME (IF OWNED BY YOU OR YOUR SPOUSE/PARTNER)

Value of	Self	Spouse/ Partner	Outstanding Mortgage	€
(a) Home	€		Monthly repayments	€
(b) Contents	€		Mortgagee	

3 LAND

Acreage	Self	Spouse/ Partner	Do you farm the land?	YES/NO
Market Value Land	€		Outstanding Charge/ Mortgage	€

If you farm land, own stock or machinery you must complete Form 2a

4 PROPERTY OTHER THAN LAND OR FAMILY HOME (including farm buildings)

Type of Property & Value	Self	Spouse/ Partner	Mortgagee	
			Outstanding Mortgage	€
			Monthly Repayments	€

5 STOCKS, SHARES, OTHER SECURITIES - € VALUE

TYPE OF STOCK, SHARE OF SECURITY	Self	Spouse/ Partner	TYPE OF STOCK, SHARE OF SECURITY	Self	Spouse/ Partner

6 INTEREST IN A COMPANY, BUSINESS OR PROPERTY OWNING BODY - € VALUE

NAME OF COMPANY, BUSINESS OR BODY	Self	Spouse/ Partner	NAME OF COMPANY, BUSINESS OR BODY	Self	Spouse/ Partner

Furnish details of capital assets, type of interest and shareholding on Form 2b

7 LIFE INSURANCE OR ENDOWMENT POLICIES - € VALUE

TYPE OF POLICY	Self	Spouse/ Partner	TYPE OF POLICY	Self	Spouse/ Partner

8 DEBTS OWED TO THE APPLICANT - € VALUE

OWED BY WHOM	Self	Spouse/ Partner	OWED BY WHOM	Self	Spouse/ Partner

9 VALUABLES (other than personal items of jewellery) - € VALUE

NATURE OF VALUABLE	Self	Spouse/ Partner	NATURE OF VALUABLE	Self	Spouse/ Partner

10 OTHER CAPITAL RESOURCES (eg car) - € VALUE

NATURE OF RESOURCE	Self	Spouse/ Partner	NATURE OF RESOURCE	Self	Spouse/ Partner

11 CAPITAL PAYMENTS ON FOOT OF A LOAN (not shown at 2,3 & 4 above)

LOAN ADVANCED BY					
LOAN ADVANCED TO					
LOAN OBTAINED FOR					
OUTSTANDING BALANCE	€		MONTHLY CAPITAL PAYMENT	€	
LOAN ADVANCED BY					
LOAN ADVANCED TO					
LOAN OBTAINED FOR					
OUTSTANDING BALANCE	€		MONTHLY CAPITAL PAYMENT	€	

12 LEGALLY ENFORCEABLE DEBTS

CREDITOR		AMOUNT PAYABLE	€	
NATURE OF DEBT				
CREDITOR		AMOUNT PAYABLE	€	
NATURE OF DEBT				

PART II

IMPORTANT

You should read the DECLARATION hereunder carefully before you sign this Form. If you do not understand any part of the form or the declaration please contact the Law Centre.

- ▶ I hereby declare that to the best of my knowledge the information which I have given is correct.
- ▶ I understand that the furnishing of incorrect information or the failure to disclose any material fact may lead to the withdrawal of legal advice and/or aid in which event I may be liable for costs incurred.
- ▶ I understand that if my means change I must inform the Board.
- ▶ I consent to the transmission to the Legal Aid Board of all information about my case which the Board may require.
- ▶ I understand that the contribution which I shall be required to pay will not be determined finally by the Board until my means have been verified.
- ▶ I consent to the Board seeking any report they consider necessary from the Department of Social Welfare, the Revenue Commissioners, the Commissioners of Valuation or any person or body who, in the opinion of the Board, is likely to be in a position to provide assistance.

SIGNED:

Date:

APPENDIX 8: PRECEDENT MEANS FORM

**[] DISTRICT COURT
MEANS ENQUIRY FORM**

The District Court has a power to impose a financial penalty if you are convicted. In order to enable the Court to fix this penalty at the appropriate amount, please complete the following form.

Date of Hearing:
Case Number:

PERSONAL DETAILS

1. Name:
2. Date of Birth:
3. Address:
4. Number of Dependant Children:
5. Other Dependents:

INCOME

6. Please indicate as appropriate: employed / self-employed / unemployed.
 - (a) If employed / self-employed, please state take-home / net weekly income (including overtime):
 - (b) If unemployed, please state weekly amount of Social Welfare / Health Acts benefit:
7. Other sources of income: please indicate weekly amount as appropriate:
 - (a) Maintenance:

- (b) FAS Course:
- (c) Commission:
- (d) Pension:
- (e) Benefit in Kind (*eg* car, accommodation):
- (f) Other:(*eg* rental income)

OUTGOINGS

8. Please state the weekly amount of outgoings under the following headings:
- (a) Rent / Mortgage:
 - (b) Child Care:
 - (c) Maintenance Payments:

CAPITAL

9. Please indicate the amount of any monies belonging to you in the following:
- (a) Bank/Building Society Account:
 - (b) An Post Account:
 - (c) Credit Union:
 - (d) Other institution:
10. If you own land or property *other than the family home*, please provide the following information:
- (a) (i) Market Value Land:
 - (ii) Outstanding Charge / Mortgage on Land:

- (b) (i) Market Value of Property:
- (ii) Outstanding Charge / Mortgage on Property:

11. If you own stocks or shares, please indicate the following:

- (a) Type of Stock / Share of Security:
- (b) Value of Stock / Share:

12. If you are owed debts, please indicate the following:

- (a) Owed by Whom:
- (b) Value of Debt:

Signature:

.....

Date:

.....



The Law Reform Commission

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

APPENDIX 9: LIST OF LAW REFORM COMMISSION PUBLICATIONS

First Programme for Examination of Certain Branches of the Law with a View to their Reform (December 1976) (Prl. 5984)	€0.13
Working Paper No. 1-1977, The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977)	€1.40
Working Paper No. 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (November 1977)	€1.27
Working Paper No. 3-1977, Civil Liability for Animals (November 1977)	€3.17
First (Annual) Report (1977) (Prl. 6961)	€0.51
Working Paper No. 4-1978, The Law Relating to Breach of Promise of Marriage (November 1978)	€1.27
Working Paper No. 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harboursing of a Spouse (December 1978)	€1.27

Working Paper No. 6-1979, The Law Relating to Seduction and the Enticement and Harbours of a Child (February 1979)	€1.90
Working Paper No. 7-1979, The Law Relating to Loss of Consortium and Loss of Services of a Child (March 1979)	€1.27
Working Paper No. 8-1979, Judicial Review of Administrative Action: the Problem of Remedies (December 1979)	€1.90
Second (Annual) Report (1978/79) (Prl. 8855)	€0.95
Working Paper No. 9-1980, The Rule Against Hearsay (April 1980)	€2.54
Third (Annual) Report (1980) (Prl. 9733)	€0.95
First Report on Family Law - Criminal Conversation, Enticement and Harbours of a Spouse or Child, Loss of Consortium, Personal Injury to a Child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC 1-1981) (March 1981)	€2.54
Working Paper No. 10-1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (September 1981)	€2.22
Fourth (Annual) Report (1981) (Pl. 742)	€0.95
Report on Civil Liability for Animals	

(LRC 2-1982) (May 1982)	€1.27
Report on Defective Premises (LRC 3-1982) (May 1982)	€1.27
Report on Illegitimacy (LRC 4-1982) (September 1982)	€4.44
Fifth (Annual) Report (1982) (Pl. 1795)	€0.95
Report on the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5-1983) (April 1983)	€1.90
Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6-1983) (November 1983)	€1.27
Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983) (December 1983)	€1.90
Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983) (December 1983)	€3.81
Sixth (Annual) Report (1983) (Pl. 2622)	€1.27
Report on Nullity of Marriage (LRC 9-1984) (October 1984)	€4.44
Working Paper No. 11-1984, Recognition of Foreign Divorces and Legal Separations (October 1984)	€2.54
Seventh (Annual) Report (1984) (Pl. 3313)	€1.27

Report on Recognition of Foreign Divorces and Legal Separations (LRC 10-1985) (April 1985)	€1.27
Report on Vagrancy and Related Offences (LRC 11-1985) (June 1985)	€3.81
Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters (LRC 12-1985) (June 1985)	€2.54
Report on Competence and Compellability of Spouses as Witnesses (LRC 13-1985) (July 1985)	€3.17
Report on Offences Under the Dublin Police Acts and Related Offences (LRC 14-1985) (July 1985)	€3.17
Report on Minors' Contracts (LRC 15-1985) (August 1985)	€4.44
Report on the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (LRC 16-1985) (August 1985)	€2.54
Report on the Liability in Tort of Minors and the Liability of Parents for Damage Caused by Minors (LRC 17-1985) (September 1985)	€3.81
Report on the Liability in Tort of Mentally Disabled Persons (LRC 18-1985) (September 1985)	€2.54

Report on Private International Law Aspects of Capacity to Marry and Choice of Law in Proceedings for Nullity of Marriage (LRC 19-1985) (October 1985)	€4.44
Report on Jurisdiction in Proceedings for Nullity of Marriage, Recognition of Foreign Nullity Decrees, and the Hague Convention on the Celebration and Recognition of the Validity of Marriages (LRC 20-1985) (October 1985)	€2.54
Eighth (Annual) Report (1985) (Pl. 4281)	€1.27
Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries (LRC 21-1987) (September 1987)	€5.71
Consultation Paper on Rape (December 1987)	€7.62
Report on the Service of Documents Abroad re Civil Proceedings -the Hague Convention (LRC 22-1987) (December 1987)	€2.54
Report on Receiving Stolen Property (LRC 23-1987) (December 1987)	€8.89
Ninth (Annual) Report (1986-1987) (Pl. 5625)	€1.90
Report on Rape and Allied Offences (LRC 24-1988) (May 1988)	€3.81

Report on the Rule Against Hearsay in Civil Cases (LRC 25-1988) (September 1988)	€3.81
Report on Malicious Damage (LRC 26-1988) (September 1988)	€5.08
Report on Debt Collection: (1) The Law Relating to Sheriffs (LRC 27-1988) (October 1988)	€6.35
Tenth (Annual) Report (1988) (Pl. 6542)	€1.90
Report on Debt Collection: (2) Retention of Title (LRC 28-1988) (April 1989)	€5.08
Report on the Recognition of Foreign Adoption Decrees (LRC 29-1989) (June 1989)	€6.35
Report on Land Law and Conveyancing Law: (1) General Proposals (LRC 30-1989) (June 1989)	€6.35
Consultation Paper on Child Sexual Abuse (August 1989)	€12.70
Report on Land Law and Conveyancing Law: (2) Enduring Powers of Attorney (LRC 31-1989) (October 1989)	€5.08
Eleventh (Annual) Report (1989) (Pl. 7448)	€1.90
Report on Child Sexual Abuse (LRC 32-1990) (September 1990)	€8.89

Report on Sexual Offences against the Mentally Handicapped (LRC 33-1990) (September 1990)	€5.08
Report on Oaths and Affirmations (LRC 34-1990) (December 1990)	€6.35
Report on Confiscation of the Proceeds of Crime (LRC 35-1991) (January 1991)	€7.62
Consultation Paper on the Civil Law of Defamation (March 1991)	€25.39
Report on the Hague Convention on Succession to the Estates of Deceased Persons (LRC 36-1991) (May 1991)	€8.89
Twelfth (Annual) Report (1990) (Pl. 8292)	€1.90
Consultation Paper on Contempt of Court (July 1991)	€25.39
Consultation Paper on the Crime of Libel (August 1991)	€13.97
Report on the Indexation of Fines (LRC 37-1991) (October 1991)	€8.25
Report on the Civil Law of Defamation (LRC 38-1991) (December 1991)	€8.89
Report on Land Law and Conveyancing Law: (3) The Passing of Risk from Vendor to Purchaser (LRC 39-1991) (December 1991); (4) Service of Completion Notices (LRC 40-1991) (December 1991)	€7.62

Thirteenth (Annual) Report (1991) (PI. 9214)	€2.54
Report on the Crime of Libel (LRC 41-1991) (December 1991)	€5.08
Report on United Nations (Vienna) Convention on Contracts for the International Sale of Goods 1980 (LRC 42-1992) (May 1992)	€10.16
Report on the Law Relating to Dishonesty (LRC 43-1992) (September 1992)	€25.39
Land Law and Conveyancing Law: (5) Further General Proposals (LRC 44-1992) (October 1992)	€7.62
Consultation Paper on Sentencing (March 1993)	€25.39
Consultation Paper on Occupiers' Liability (June 1993)	€12.70
Fourteenth (Annual) Report (1992) (PN. 0051)	€2.54
Report on Non-Fatal Offences Against The Person (LRC 45-1994) (February 1994)	€25.39
Consultation Paper on Family Courts (March 1994)	€12.70
Report on Occupiers' Liability (LRC 46-1994) (April 1994)	€7.62
Report on Contempt of Court (LRC 47-1994) (September 1994)	€12.70
Fifteenth (Annual) Report (1993) (PN. 1122)	€2.54

Report on the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (LRC 48-1995) (February 1995)	€12.70
Consultation Paper on Intoxication as a Defence to a Criminal Offence (February 1995)	€12.70
Report on Interests of Vendor and Purchaser in Land during the period between Contract and Completion (LRC 49-1995) (April 1995)	€10.16
An Examination of the Law of Bail (LRC 50-1995) (August 1995)	€12.70
Sixteenth (Annual) Report (1994) (PN. 1919)	€2.54
Report on Intoxication (LRC 51-1995) (November 1995)	€2.54
Report on Family Courts (LRC 52-1996) (March 1996)	€12.70
Seventeenth (Annual) Report (1995) (PN. 2960)	€3.17
Report on Sentencing (LRC 53-1996) (August 1996)	€10.16
Consultation Paper on Privacy: Surveillance and the Interception of Communications (September 1996)	€25.39
Report on Personal Injuries (LRC 54-1996) (December 1996)	€12.70
Eighteenth (Annual) Report (1996)	

(PN. 3760)	€7.62
Consultation Paper on the Implementation of The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993 (September 1997)	€12.70
Report on The Unidroit Convention on Stolen or Illegally Exported Cultural Objects (LRC 55-1997) (October 1997)	€19.05
Report on Land Law and Conveyancing Law (6): Further General Proposals including the execution of deeds (LRC 56-1998) (May 1998)	€10.16
Consultation Paper on Aggravated, Exemplary and Restitutory Damages (May 1998)	€19.05
Nineteenth (Annual) Report (1997) (PN. 6218)	€3.81
Report on Privacy: Surveillance and the Interception of Communications (LRC 57-1998) (June 1998)	€25.39
Report on the Implementation of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993 (LRC 58-1998) (June 1998)	€12.70
Consultation Paper on the Statutes of Limitation: Claims in Contract and Tort in Respect of Latent Damage (Other Than Personal Injury) (November 1998)	€6.35

Twentieth (Annual) Report (1998) (PN. 7471)	€3.81
Consultation Paper on Statutory Drafting and Interpretation: <i>Plain Language and the Law</i> (LRC CP14- 1999) (July 1999)	€7.62
Consultation Paper on Section 2 of the Civil Liability (<i>Amendment</i>) Act, 1964: <i>The Deductibility of Collateral Benefits from Awards of Damages</i> (LRC CP15-1999) (August 1999)	€9.52
Report on Gazumping (LRC 59-1999) (October 1999)	€6.35
Twenty First (Annual) Report (1999) (PN. 8643)	€3.81
Report on Aggravated, Exemplary and Restitutionary Damages (LRC 60-2000) (August 2000)	€7.62
Second Programme for examination of certain branches of the law with a view to their reform: 2000-2007 (PN 9459) (December 2000)	€6.35
Consultation Paper on the Law of Limitation of Actions arising from Non-Sexual Abuse Of Children (LRC CP16-2000) (September 2000)	€7.62
Report on Statutory Drafting and Interpretation: <i>Plain Language and the Law</i> (LRC 61-2000) (December 2000)	€7.62
Report on the Rule against Perpetuities and Cognate Rules (LRC	

62-2000) (December 2000)	€10.16
Report on the Variation of Trusts (LRC 63-2000) (December 2000)	€7.62
Report on The Statutes of Limitations: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury) (LRC 64-2001) (March 2001)	€7.62
Consultation Paper on Homicide: The Mental Element in Murder (LRC CP17-2001) (March 2001)	€6.35
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