



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

REPORT

MANDATORY SENTENCES

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Law Reform Commission

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LAW REFORM COMMISSION'S ROLE

The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 180 documents (Working Papers, Consultation Papers and Reports) containing proposals for law reform and these are all available at www.lawreform.ie. Most of these proposals have led to reforming legislation.

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

TABLE OF CONTENTS

TABLE OF LEGISLATION	xiii	
TABLE OF CASES	xix	
INTRODUCTION	1	
A Background: Request by the Attorney General on Mandatory Sentences	1	
B Scope of the Attorney General’s Request: “Sentences,” “Offences” and General Principles of Sentencing	1	
C Scope of the Attorney General’s Request: “Mandatory Sentences”	2	
D Outline of the Report	3	
CHAPTER 1	CONCEPTUAL FRAMEWORK FOR CRIMINAL SANCTIONS AND SENTENCING	5
A Introduction	5	
B Overview of the Aims of the Criminal Justice System and Principles of Sentencing	5	
C Aims of the Criminal Justice System and Sanctions	11	
(1) Deterrence	11	
(2) Punishment	12	
(3) Reformation and Rehabilitation	12	
(4) Reparation	13	
(5) Incapacitation	13	
(6) Discussion	14	
D Principles of Sentencing and Justice	14	
(1) Consistency	14	
(2) Proportionality	16	
(3) Discussion	32	
E Towards a Principles-Based Structured Sentencing System	32	
(1) The Problem of a Lack of Structure and Inconsistent Approaches	33	
(2) Improved Structure and Greater Consistency in Sentencing	35	
(3) Conclusions and the Commission’s General Approach	40	
(4) Structured Sentencing in the Context of Mandatory and Presumptive Regimes	41	
CHAPTER 2	HISTORICAL EVOLUTION OF MANDATORY SENTENCES	43
A Introduction	43	
B Historical Evolution of Entirely Mandatory Sentences	43	
(1) United Kingdom	43	
(2) Ireland	59	
C Historical Evolution of Presumptive Minimum Sentences	70	

	(1) Mandatory Sentences for Drugs Offences	70
	(2) Mandatory Sentences for Firearm Offences	82
D	Historical Evolution of Mandatory Sentences for Second or Subsequent Offences	90
	(1) United States	90
	(2) England and Wales	91
	(3) Ireland	96
CHAPTER 3	ENTIRELY MANDATORY SENTENCES	103
A	Introduction	103
B	The Mandatory Life Sentence for Murder	103
	(1) The Mandatory Life Sentence	103
	(2) The Mandatory Life Sentence and Temporary Release	103
C	Comparative Analysis	107
	(1) Northern Ireland	107
	(2) England and Wales	109
	(3) Scotland	112
	(4) Canada	112
	(5) Australia	113
	(6) New Zealand	115
	(7) United States of America	115
	(8) Summary	116
D	The Mandatory Life Sentence and the Conceptual Framework	116
	(1) The Mandatory Life Sentence and the Aims of Sentencing	116
	(2) The Mandatory Life Sentence and the Principles of Justice	117
	(3) Discussion	119
CHAPTER 4	PRESUMPTIVE MINIMUM SENTENCES	127
A	Introduction	127
B	Presumptive Minimum Sentences under the Misuse of Drugs Act 1977	127
	(1) Elements of the Offences	127
	(2) Penalties	133
	(3) Early Release	139
	(4) Drug Mules	141
C	Presumptive Minimum Sentences under the Firearms Acts	141
	(1) Elements of the Offences	141
	(2) Penalties	145
	(3) Early Release	148
D	Comparative Analysis	148
E	Presumptive Minimum Sentences and the Conceptual Framework	174

	(1) Presumptive Minimum Sentences and the Aims of Sentencing	174
	(2) Presumptive Minimum Sentences and the Principles of Justice	178
	(3) Discussion	180
CHAPTER 5	MANDATORY SENTENCES FOR SECOND OR SUBSEQUENT OFFENCES	185
A	Introduction	185
B	Presumptive Sentence for a Second or Subsequent Offence under the Criminal Justice Act 2007	185
	(1) Elements which Trigger the Presumptive Minimum Sentence	185
	(2) Penalty for Subsequent Scheduled Offence	187
	(3) Early Release	187
C	Mandatory Sentence for a Second or Subsequent Offence under the Misuse of Drugs Act 1977	188
	(1) Operation of the Mandatory Sentencing Regime under section 27(3F) of the Misuse of Drugs Act 1977	188
D	Mandatory Sentence for a Second or Subsequent Offence under the Firearms Acts	188
	(1) Operation of the Mandatory Sentencing Regime under the Firearms Acts	188
E	Comparative Analysis	189
F	Mandatory and Presumptive Sentences for Second or Subsequent Offences and the Conceptual Framework	207
	(1) Mandatory and Presumptive Sentences for Second or Subsequent Offences and the Aims of Sentencing	207
	(2) Mandatory Sentences for Second or Subsequent Offences and the Principles of Justice	209
	(3) Discussion	211
CHAPTER 6	SUMMARY OF RECOMMENDATIONS	215

TABLE OF LEGISLATION

			Pg
Anti-Drug Abuse Act 1986	Pub. L. No. 99-570	US	72
Bail Act 1997	No 16 of 1997	Irl	183
Baume's Law 1926		US	89
Boggs Act 1951	Ch 66, 65 Stat 767	US	70
Children and Young Persons Act 1908	c 67	UK	42
Children and Young Persons Act 1933	c 12	Eng	42
Competition Act 2002	No. 14 of 2002	Irl	8
Comprehensive Drug Abuse Prevention and Control Act 1970	Pub. L. No. 91-513	US	71
Controlled Drugs and Substances Act	SC 1996, c 19	Can	158
Controlled Substances Act	21 USC 841	US	195
Controlled Substances Import and Export Act	21 USC 960	US	195
Convention Rights (Compliance) Scotland Act 2001	2001 asp 7	Scot	57
Corrective Services Act 2006 (Qld)	No. 29 of 2006	Aus	114
Courts of Justice Act 1924	No 10 of 1924	Irl	18
Courts of Justice Act 1929	No 37 of 1929	Irl	129
Crime (Sentences) Act 1997	c 43	Eng	49
Crime and Punishment (Scotland) Act 1997	c 48	Scot	57
Crimes (Sentence Administration) Act 2005 (ACT)	No. 59 of 2005	Aus	113
Crimes (Sentencing Procedure) Act 1999 (NSW)	No 92 of 1999	Aus	37
Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002 (NSW)	No 90 of 2002	Aus	165
Crimes (Sentencing) Act 2005 (ACT)	No 58 of 2005	Aus	113
Crimes Act 1900 (ACT)		Aus	112
Crimes Act 1900 (NSW)	No 40 of 1900	Aus	112
Crimes Act 1914 (CW)	No 12 of 1914	Aus	37
Crimes Act 1958	No. 6231 of 1958	Vic	112
Crimes Amendment (Murder of Police Officers) Act 2011 (NSW)	No 20 of 2011	Aus	112
Criminal Appeal Act 1968	c 19	E,W,S	48
Criminal Assets Bureau Act 1996	No 31 of 1996	Irl	85

Criminal Code Act 1899 (Qld)		Aus	113
Criminal Code Act 1924 (Tas)	No 69 of 1924	Aus	112
Criminal Code Act 1995 (CW)	No 12 of 1995	Aus	112
Criminal Justice (Drug Trafficking) Act 1996	No 29 of 1996	Irl	77
Criminal Justice (Northern Ireland) Order 2008	No 1216 of 2008 (NI 1)	NI	56
Criminal Justice (Public Order) Act 1994	No 2 of 1994	Irl	88
Criminal Justice (Scotland) Act 2003	2003 asp 7	Scot	57
Criminal Justice (Temporary Release of Prisoners) Act 2003	No 34 of 2003	Irl	103
Criminal Justice (Theft and Fraud Offences) Act 2001	No 50 of 2001	Irl	9
Criminal Justice Act (Northern Ireland) 1966	c 20	NI	55
Criminal Justice Act 1948	c 58	Eng	91
Criminal Justice Act 1951	No 2 of 1951	Irl	103
Criminal Justice Act 1960	No 27 of 1960	Irl	103
Criminal Justice Act 1964	No 5 of 1964	Irl	59
Criminal Justice Act 1967	c 80	Eng	91
Criminal Justice Act 1988	c 33	Eng	150
Criminal Justice Act 1990	No 16 of 1990	Irl	10
Criminal Justice Act 1991	c 53	Eng	73
Criminal Justice Act 1999	No 10 of 1999	Irl	30
Criminal Justice Act 2003	c 44	Eng	51
Criminal Justice Act 2006	No 26 of 2006	Irl	79
Criminal Justice Act 2007	No 29 of 2007	Irl	80
Criminal Justice and Licensing (Scotland) Act 2010	asp 13 of 2010	Scot	152
Criminal Law (Rape) (Amendment) Act 1990	No 32 of 1990	Irl	9
Criminal Law (Sentencing) Act 1988 (SA)		Aus	201
Criminal Law Act 1997	c 14	Irl	96
Criminal Law Amendment (Homicide) Act 2008 (WA)	No 29 of 2008	Aus	112
Criminal Law Consolidation Act 1935 (SA)	No 2252 of 1935	Aus	113
Criminal Procedure (Scotland) Act 1995	c 46	Scot	57
Criminal Reform Amendment Act (No 2) 2006 (NT)	No 34 of 2006	Aus	113
Defence Act 1954	No 18 of 1954	Irl	59

Domestic and Family Violence Act 2007 (NT)	No 34 of 2007	Aus	199
Drug Trafficking Act 1994	c 37	Eng	75
Euro Changeover (Amounts) Act 2001	No 16 of 2001	Irl	78
European Convention on Human Rights Act 2003	No 20 of 2003	Irl	64
Fair Sentencing Act 2010	Pub. L. No. 111- 220	US	73
Felony Firearm Law 1975 (Florida)		US	82
Felony Firearm Statute 1977 (Mich)		US	82
Firearms (Amendment) (Northern Ireland) Order 2005	No 1966 of 2005 (NI 16)	NI	146
Firearms (Northern Ireland) Order 1981	No 3267 of 1992	NI	147
Firearms (Northern Ireland) Order 2004	No 702 of 2004 (NI 3)	NI	146
Firearms Act 1925	No. 17 of 1925	Irl	3
Firearms Act 1964	No 1 of 1964	Irl	86
Firearms Act 1968	c 27	UK	84
Firearms and Offensive Weapons Act 1990	No 12 of 1990	Irl	86
Gun Control Act 1968	Pub. L. No. 90- 618	US	81
Habitual Criminals Act 1869	c 69	UK	90
Habitual Felony Offender Act (Alabama)		US	153
Harrison Act 1914	Ch 1, 38 Stat 785	US	70
Health and Safety etc at Work Act 1974	c 37	UK	27
Homicide Act 1957	c 11	UK	44
Human Rights Act 1998	c 42	UK	55
Human Rights Commission Act 2000	No 9 of 2000	Irl	98
Infanticide Act 1922	c 18	UK	42
Infanticide Act 1938	c 36	Eng	42
International Criminal Court Act 2006	No. 30 of 2006	Irl	42
Legal Aid, Sentencing and Punishment of Offenders Act 2012	c 10	UK	94
Life Sentences (Northern Ireland) Order 2001	No 2564 of 2001 (NI 2)	NI	55
Migration Act 1958 (CW)	No. 62 of 1958	Aus	165
Misuse of Drugs Act (NT)		Aus	168

Misuse of Drugs Act 1971	c 38	UK	75
Misuse of Drugs Act 1977	No 12 of 1977	Irl	10
Misuse of Drugs Act 1984	No 18 of 1984	Irl	76
Murder (Abolition of Death Penalty) Act 1965	c 71	UK	45
Narcotics Control Act 1956	Ch 629, s 103, 70 Stat 567	US	70
Non-Fatal Offences Against the Person Act 1997	No 26 of 1997	Irl	9
Northern Ireland (Emergency Provisions) Act 1973	c 53	NI	55
Northern Ireland Act 1998	c 48	UK	56
Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010	No 976 of 2010	NI	56
Offences Against the Person Act 1861	c 100	Irl	9
Offences Against the State Act 1939	No 13 of 1939	Irl	16
Omnibus Anti-Drug Abuse Act 1988		US	72
Parole Act 2002	No 10 of 2002	NZ	114
Penal Servitude Act 1857	c 3	UK	90
Penal Servitude Act 1864	c 47	UK	90
Penalties and Sentences Act 1992 (Qld)	No 48 of 1992	Aus	37
Persistent Offender Accountability Act 1994	c 1	US	89
Powers of Criminal Courts (Sentencing) Act 2000	c 6	Eng	75
Powers of Criminal Courts Act 1973	c 62	Eng	92
Prevention of Crime Act 1908	c 59	UK	91
Prevention of Crime Act 1953	c 14	E,W,S	150
Prevention of Crimes Act 1871	c 112	UK	91
Prevention of Crimes Act 1879	c 55 (42 & 43 Vict)	UK	90
Prisoners and Criminal Proceedings (Scotland) Act 1993	c 9	Scot	57
Probation of Offenders Act 1907	7 Edw. 7. Ch.17	UK	2
Proceeds of Crime Act 1996	No 30 of 1996	Irl	77
Road Traffic Act 1961	No 24 of 1961	Irl	140
Safe Streets and Communities Act	SC 2012, c 1	Can	158
Safety, Health and Welfare at Work Act 1989	No 7 of 1989	Irl	26
Safety, Health and Welfare at Work Act 2005	No 10 of 2005	Irl	26
Scotland Act 1998	c 46	Scot	58

			Pg
Sentencing (Amendment) Act 2007	No 27 of 2007	NZ	37
Sentencing Act 1991 (Vic)	No 49 of 1991	Aus	201
Sentencing Act 1995 (NT)		Aus	37
Sentencing Act 1995 (WA)	No 76 of 1995	Aus	37
Sentencing Act 1997 (Tas)	No 59 of 2007	Aus	113
Sentencing Act 2002	No 9 of 2002	NZ	37
Standing up for Victims of White Collar Crime Act	SC 2011, c 6	Can	164
Transfer of Sentenced Persons Act 1995	No 16 of 1995	Irl	1
Treason Act 1939	No 10 of 1939	Irl	59
Uniform Determinate Sentencing Act 1976		US	82
Violent Crime Reduction Act 2006	c 38	UK	146

TABLE OF CASES

			Pg
Attorney General for Northern Ireland v Gallagher	[1962] NI 122	NI	55
Caffrey v Governor of Portlaoise Prison	[2012] IESC 4	Irl	63
Cox v Ireland	[1992] 2 IR 503	Irl	16
Deaton v Attorney General	[1963] IR 170	Irl	62
DPP v Smith	[1961] AC 290	NI	55
Dunne v Judge Coughlan	High Court 25 April 2005	Irl	21
Heaney v Ireland	[1994] 3 IR 593	Irl	16
HM Advocate v Al Megrahi	High Court of Justiciary 24 November 2003	UK	111
HM Advocate v Boyle and Others	[2009] HCJAC 89	UK	57
Hussain v United Kingdom	(1996) 22 EHRR 1	ECHR	48
In re the Employment Equality Bill 1996	[1997] 2 IR 321	Irl	16
Kafkaris v Cyprus	(2009) 49 EHRR 35	ECHR	65
Locke v HM Advocate	2008 SLT 159	UK	111
Lockyer v Andrade	583 US 63 (2003)	US	192
Minister for Justice and Equality v Nolan	[2012] IEHC 249	Irl	13
Minister for Posts and Telegraphs v Campbell	[1966] IR 69	Irl	126
Nascimento v Minister for Justice, Equality and Law Reform	[2011] 1 IR 1	Irl	64
Practice Statement (Crime: Life Sentences)	[2002] 3 All ER 412	UK	56
Pudlizsewski v Judge Coughlan	[2006] IEHC 304	Irl	18
R (on the application of Westlake) v Criminal Cases Review Commission	[2004] EWHC 2779 (Admin)	UK	43
R (Smith) v Secretary of State for the Home Department	[2006] 1 AC 159	UK	49

R v Bieber	[2009] 1 WLR 223	UK	52
R v Candless	[2004] NI 269	NI	56
R v Dalton	[1995] 2 Cr App R 340	UK	48
R v Dobson and Norris	Central Criminal Court 4 January 2012	UK	110
R v Ellis	[2003] EWCA Crim 3556	UK	44
R v F Howe & Sons (Engineers) Ltd	[1999] 2 All ER 249	Eng	27
R v Howell	[2010] NICC 48	NI	108
R v Howells	[1999] 1 WLR 307	UK	19
R v Jones and Others	[2006] 2 Cr App R (S) 19	UK	53
R v Kelly	[2011] 4 All ER 687	UK	109
R v King	(1986) 82 Cr App R 120	Eng	31
R v Latimer	[2001] 1 SCR 3	Can	12
R v M(CA)	[1996] 1 SCR 500	Can	12
R v Oliver	(2003) 1 Cr App R 28	Eng	28
R v Secretary of State for the Home Department ex parte Bentley	[1993] EWHC QB 2	UK	44
R v Stewart	[2011] NICC 10	NI	108
R v Veregrin	[1933] 2 DLR 362	Can	103
R v Walsh	[2004] NI 269	NI	108
Re Royal Prerogative of Mercy upon Deportation Proceedings	[1933] SCR 269	Can	103
Stafford v United Kingdom	(2002) 35 EHRR 32	ECHR	50
State (C) v Frawley	[1976] IR 365	Irl	7
State (Healy) v Donoghue	[1976] IR 325	Irl	61
State (P Woods) v Attorney General	[1969] IR 385	Irl	178
The People (AG) v O'Callaghan	[1966] IR 501	Irl	13
The People (Attorney General) v O'Driscoll	(1972) 1 Frewen 351	Irl	17
The People (Attorney General) v Poyning	[1972] IR 402	Irl	7
The People (DPP) v Alexiou	[2003] 3 IR 513	Irl	133
The People (DPP) v Anderson	[2010] IECCA 46	Irl	133

			Pg
The People (DPP) v Barry	Court of Criminal Appeal 23 June 2008	Irl	142
The People (DPP) v Benjamin	Court of Criminal Appeal 14 January 2002	Irl	133
The People (DPP) v Black	[2010] IECCA 91	Irl	25
The People (DPP) v Botha	[2004] 2 IR 375	Irl	131
The People (DPP) v Brodigan	Court of Criminal Appeal 13 October 2008	Irl	133
The People (DPP) v Byrne	[2012] IECCA 72	Irl	133
The People (DPP) v Carmody	[1988] ILRM 370	Irl	13
The People (DPP) v Charles	Portlaoise Circuit Court 13 July 2004	Irl	79
The People (DPP) v Clail	[2009] IECCA 13	Irl	141
The People (DPP) v Cleary and Brown	[2012] IECCA 32	Irl	134
The People (DPP) v Colclough	[2010] IECCA 15	Irl	20
The People (DPP) v Coles	[2009] IECCA 144	Irl	133
The People (DPP) v Connolly	[2011] IESC 6	Irl	128
The People (DPP) v Costelloe	Court of Criminal Appeal 2 April 2009	Irl	132
The People (DPP) v Crowe	[2010] 1 IR 129	Irl	19
The People (DPP) v Curtin	[2010] IECCA 54	Irl	141
The People (DPP) v Davis	[2008] IECCA 58	Irl	134
The People (DPP) v Deans	[2012] IECCA 11	Irl	136
The People (DPP) v Delaney	[2010] IECCA 57	Irl	133
The People (DPP) v Delaney	Court of Criminal Appeal 28 February 2000	Irl	137
The People (DPP) v Dermody	[2007] 2 IR 622	Irl	133
The People (DPP) v Dillon	Court of Criminal Appeal 17 December 2008	Irl	21
The People (DPP) v Ducque	[2005] IECCA 92	Irl	131
The People (DPP) v Duffy	[2009] 3 IR 613	Irl	8
The People (DPP) v Duffy	Court of Criminal Appeal 21 December 2001	Irl	131
The People (DPP) v Dunne	[2003] 4 IR 87	Irl	138
The People (DPP) v Dwyer	Court of Criminal Appeal 9 February 2009	Irl	142
The People (DPP) v Farrell	[2010] IECCA 116	Irl	132

The People (DPP) v Finn	[2001] 2 IR 25	Irl	138
The People (DPP) v Finnamore	[2008] IECCA 99	Irl	130
The People (DPP) v Fitzgerald	[2010] IECCA 53	Irl	142
The People (DPP) v Foley	[1995] 1 IR 267	Irl	126
The People (DPP) v Gallagher	[2006] IECCA 110	Irl	126
The People (DPP) v Galligan	Court of Criminal Appeal 23 July 2003	Irl	132
The People (DPP) v Gilligan (No 2)	[2004] 3 IR 87	Irl	135
The People (DPP) v Gilloughly	Court of Criminal Appeal 7 March 2005	Irl	131
The People (DPP) v GK	[2008] IECCA 110	Irl	13
The People (DPP) v Godspeed	Court of Criminal Appeal 13 July 2009	Irl	133
The People (DPP) v Goulding	[2010] IECCA 85	Irl	126
The People (DPP) v H	[2007] IEHC 335	Irl	18
The People (DPP) v Halligan	Court of Criminal Appeal 15 February 2010	Irl	19
The People (DPP) v Hanley	[2010] IECCA 99	Irl	127
The People (DPP) v Harding	[2011] IECCA 20	Irl	136
The People (DPP) v Harty	Court of Criminal Appeal 19 February 2008	Irl	18
The People (DPP) v Heelan	[2008] IECCA 73	Irl	142
The People (DPP) v Heffernan	Court of Criminal Appeal 10 October 2002	Irl	178
The People (DPP) v Henry	Court of Criminal Appeal 15 May 2002	Irl	132
The People (DPP) v Hogarty	Court of Criminal Appeal 21 December 2001	Irl	131
The People (DPP) v Howard and McGrath	Court of Criminal Appeal 29 July 2005	Irl	133
The People (DPP) v Jackson	Court of Criminal Appeal 26 April 1993	Irl	13
The People (DPP) v Keane	[2008] 3 IR 177	Irl	18
The People (DPP) v Kelly	[2005] 1 ILRM 19	Irl	18
The People (DPP) v Kelly	Court of Criminal Appeal 28 June 2010	Irl	142
The People (DPP) v Kelly	Court of Criminal Appeal 9 November 2009	Irl	142

The People (DPP) v Kelly	Court of Criminal Appeal 24 November 2008	Irl	143
The People (DPP) v Keogh	[2009] IECCA 128	Irl	133
The People (DPP) v Kinahan	[2008] IECCA 5	Irl	133
The People (DPP) v Kirwan	[2010] IECCA 43	Irl	135
The People (DPP) v Lernihan	[2007] IECCA 21	Irl	133
The People (DPP) v Long	[2008] IECCA 133	Irl	135
The People (DPP) v Long	[2006] IECCA 49	Irl	135
The People (DPP) v Loving	[2006] 3 IR 355	Irl	19
The People (DPP) v M	[1994] 3 IR 306	Irl	12
The People (DPP) v Maguire	[2008] IECCA 56	Irl	19
The People (DPP) v Malric	[2011] IECCA 99	Irl	133
The People (DPP) v McCann	[2008] IECCA 129	Irl	143
The People (DPP) v McDonnell	[2009] IECCA 16	Irl	137
The People (DPP) v McGinty	[2007] IR 633	Irl	137
The People (DPP) v McGrane	[2010] IECCA 8	Irl	133
The People (DPP) v McGrath	[2008] IECCA 27	Irl	20
The People (DPP) v McMahan	[2011] IECCA 94	Irl	99
The People (DPP) v Murphy	[2010] IECCA 44	Irl	136
The People (DPP) v Murray	[2012] IECCA 60	Irl	20
The People (DPP) v Nelson	Court of Criminal Appeal 31 July 2008	Irl	132
The People (DPP) v O'Dwyer	[2005] 3 IR 134	Irl	18
The People (DPP) v O'C	Court of Criminal Appeal 15 November 2009	Irl	18
The People (DPP) v Ormonde	[2011] IECCA 46	Irl	133
The People (DPP) v Pakur Pakurian	[2010] IECCA 48	Irl	22
The People (DPP) v Power	[2007] 2 IR 509	Irl	79
The People (DPP) v Princs	[2007] IECCA 142	Irl	19
The People (DPP) v Purcell	[2010] IECCA 55	Irl	136
The People (DPP) v Redmond	[2001] 3 IR 390	Irl	26
The People (DPP) v Renald	Court of Criminal Appeal 23 November 2001	Irl	131
The People (DPP) v Roseberry Construction Ltd and McIntyre	[2003] 4 IR 338	Irl	26

The People (DPP) v Rossi and Hellewell	Court of Criminal Appeal 18 November 2002	Irl	132
The People (DPP) v Ryan	[2008] IECCA 63	Irl	136
The People (DPP) v Sheedy	[2000] 2 IR 184	Irl	18
The People (DPP) v Shekale	[2008] IECCA 28	Irl	133
The People (DPP) v Spratt	[2007] IECCA 123	Irl	135
The People (DPP) v Sweeney	Court of Criminal Appeal 12 March 2009	Irl	134
The People (DPP) v Tiernan	[1988] IR 251	Irl	18
The People (DPP) v Vardacardis	Court of Criminal Appeal 20 January 2003	Irl	136
The People (DPP) v Wall	[2011] IECCA 45	Irl	135
The People (DPP) v Walsh	Court of Criminal Appeal 17 December 2009	Irl	142
The People (DPP) v Ward	Court of Criminal Appeal 16 January 2012	Irl	100
The People (DPP) v WC	[1994] 1 ILRM 321	Irl	18
The People (DPP) v WD	[2008] 1 IR 308	Irl	21
The People (DPP) v Whitehead	[2008] IECCA 123	Irl	135
The People (DPP) v Woods	Court of Criminal Appeal 10 December 2010	Irl	18
Thynne, Wilson and Gunnell v United Kingdom	(1991) 13 EHRR 666	ECHR	47
V and T v United Kingdom	(2000) 30 EHRR 121	ECHR	49
Vinter, Bamber and Moore v United Kingdom	European Court of Human Rights 17 January 2012 (Application Nos 66069/09, 130/10 and 1396/10)	ECHR	51
Walker v HM Advocate	2003 SLT 130	UK	111
Weeks v United Kingdom	(1988) 10 EHRR 293	ECHR	47
Whelan and Lynch v Minister for Justice, Equality and Law Reform	[2007] IEHC 374, [2008] 2 IR 142; [2010] IESC 34, [2012] 1 IR 1	Irl	16
Wynne v United Kingdom	(1995) 19 EHRR 333	ECHR	47

INTRODUCTION

A Background: Request by the Attorney General on Mandatory Sentences

1. This Report, which follows the publication of the Commission's *Consultation Paper on Mandatory Sentences*,¹ arises from a request made to the Commission by the then Attorney General under section 4(2)(c) of the *Law Reform Commission Act 1975* which requested the Commission:

“to examine and conduct research and, if appropriate, recommend reforms in the law of the State, in relation to the circumstances in which it may be appropriate or beneficial to provide in legislation for mandatory sentences for offences.”

2. As the Commission noted in the Consultation Paper, the Attorney General's request is clearly wide-ranging in scope. It requires the Commission, firstly, to determine the scope of the term “mandatory sentences.” In addition, the Commission is requested to consider mandatory sentences in general terms, although the Commission notes that existing legislation that already provides for mandatory sentences in connection with specific offences provides a valuable reference point for the analysis required in response to the request. The Commission's third task is to assess whether provision in legislation for such sentences is “appropriate and beneficial.” In order to reach conclusions on that aspect of the Attorney General's request, the Commission has examined the aims of criminal sanctions and relevant sentencing principles in the State. The Report therefore begins in Chapter 1 with a discussion of those aims and objectives before progressing to a detailed review of the existing legislation on mandatory sentences.

B Scope of the Attorney General's Request: “Sentences,” “Offences” and General Principles of Sentencing

3. The first matter addressed by the Commission in preparing this Report was to determine the scope of the term “sentences” in the Attorney General's request. In this respect, the Commission considers that it is important to note that the Oireachtas, the Judiciary and the Executive each play a role in the sentencing process defined in a broad sense. The Oireachtas, which has the sole and exclusive law-making authority in the State,² is primarily responsible for the creation and definition of criminal offences through enacted legislation. It also specifies the relevant sentence, which usually consists of setting out a maximum sentence for an offence, but in some instances it also sets out a mandatory sentence (notably, life imprisonment for murder) or a presumptive sentence (that is, a mandatory sentence to be applied save in exceptional circumstances). The Judiciary is responsible for the determination, based on the aims of the criminal justice system and relevant sentencing principles, of the specific sentence to be imposed in a particular case, unless the offence carries a mandatory sentence. The Executive is responsible for the implementation of sentences imposed and this includes the exercise of statutory powers to commute or remit any sentence imposed by the courts and to grant temporary release to prisoners (which broadly corresponds to a parole system).

4. The term “sentence” has also been given a narrow or a broad interpretation in terms of the sanctioning outcome or outcomes envisaged. Thus, section 1(1) of the *Transfer of Sentenced Persons Act 1995* defines “sentence” narrowly to mean “sentence of imprisonment.” This may be contrasted with, for example, section 106 of the *Criminal Justice Act 2006*, which defines “sentence” to include not just a sentence of imprisonment but also other orders of the court made on conviction, such as a restriction on movement order. This therefore envisages that a “sentence” covers both custodial and non-custodial sanctions; indeed, it is notable that section 99 of the *Criminal Justice Act 2006* regulates the non-custodial suspended sentence. Other important non-custodial sentences include community service orders and fines. An even wider concept of “sentence” would include a probation order made by the District Court under the *Probation of Offenders Act 1907* (one of the most commonly-used sanctions in

¹ Consultation Paper on *Mandatory Sentences* (LRC CP 66-2011). This is referred to as the Consultation Paper in the remainder of this Report.

² Article 15.2.1° of the Constitution of Ireland.

the criminal justice system in Ireland), which can be made without recording a conviction.³ The Commission notes that this wide definition of “sentence”, covering both custodial and non-custodial sanctions and including orders made even where a conviction has not been recorded, is consistent with the general literature on sentencing.⁴

5. The Attorney General’s request refers to “offences” without any apparent limitation. In the context of this Report and in particular the request to consider whether mandatory sentences are “appropriate or beneficial”, the Commission understands that the Attorney General was not requesting that this be considered in relation to all criminal offences. The Commission notes that various terms have been used to distinguish between the most significant criminal offences and those which are less serious. Thus, the term “arrestable offence” refers to offences punishable by a term of imprisonment of 5 years or more;⁵ indictable offences are those for which the accused is entitled as of right to a trial by jury; and summary offences are those heard in the District Court, without a jury, and for which the maximum term of imprisonment permissible is generally 12 months (and/or a fine).

6. On the issue of the sentences and offences envisaged by the Attorney General’s request, therefore, the Commission has concluded that it is required to assess whether mandatory sentences “may be appropriate or beneficial” in general terms and should not confine its review of the law to a very small group of specific offences. At the same time, bearing in mind the very wide potential scope of an examination of all “offences” and all “sentences”, the Commission has also concluded that it should restrict the scope of its review to offences at the higher end of the criminal calendar (such as murder), or which by their nature pose major risks to society (such as organised drugs offences or firearms offences), or which involve specific aspects that merit special attention (for example, consecutive offences committed by the same person). While the examples given here reflect the types of offences for which mandatory sentences, as described below, are currently prescribed in Ireland, the Commission has not confined its analysis to these examples.

7. Indeed, the need to look beyond existing examples is directly connected to the Commission’s conclusion, already mentioned, that it should examine and review the general principles of sentencing. This involved the Commission reviewing relevant developments in the literature on sentencing since its 1996 *Report on Sentencing*⁶ in order to provide a framework for analysing a selection of offences, including those for which mandatory sentences are currently provided. This framework of principles would in turn allow it to determine whether such mandatory sentencing provisions had been “appropriate or beneficial” and, as a consequence, allow it determine whether such provisions would be “appropriate or beneficial” in other settings.

C Scope of the Attorney General’s Request: “Mandatory Sentences”

8. In addition to focusing on certain offences, the Commission also considered that in preparing this Report it was necessary to determine the scope of the term “mandatory sentences.” As with the other aspects of the Attorney General’s request already mentioned, the term could be given a narrow or a broad interpretation. It could be limited to “entirely” mandatory sentences, such as the provision in Irish law of a mandatory life sentence for murder. Alternatively, it could encompass provisions that impose significant sentencing constraints in respect of certain offences or certain types of offender behaviour. Thus, it may be taken to include current statutory provisions that stipulate: presumptive minimum sentences subject to specific exceptions (such as for certain drugs and firearms offences); consecutive

³ See generally: Law Reform Commission *Report on Court Poor Box: Probation of Offenders* (LRC 75-2005).

⁴ See, for example, Ashworth *Sentencing and Criminal Justice* 3rd ed (Butterworths, 2000), Chapter 3, and O’Malley *Sentencing Law and Practice* 2nd ed (Thomson Round Hall, 2006), Chapter 2.

⁵ Section 2(1) of the *Criminal Law Act 1997* defines an “arrestable offence” as “an offence for which a person of full capacity and not previously convicted may, under or by virtue of any enactment, be punished by imprisonment for a term of five years or by a more severe penalty and includes an attempt to commit any such offence.”

⁶ Law Reform Commission *Report on Sentencing* (LRC 53-1996).

sentences for offences committed while on bail; and mandatory sentences for second or subsequent offences. In some jurisdictions, the term could include those provisions that indicate a defined “tariff” (the minimum term of imprisonment that must be served before the prisoner can be considered for release) based on binding sentencing guidelines, as had been the case at one time at federal level in the United States of America.

9. The Commission has concluded that it should not confine its examination to “entirely” mandatory sentences but should review legislative provisions that set down a fixed sentence, or a minimum sentence, following conviction for a particular type of offence. Within that broad definition, a variety of mandatory sentences are already in use in Ireland.

10. The first and clearest example of a mandatory sentence is the entirely mandatory life sentence for murder (and treason).⁷ In the case of a person convicted of “capital murder” (the form of murder for which the death penalty formerly applied), a mandatory minimum sentence of 40 years’ imprisonment applies. In the case of an attempt to commit capital murder, a minimum sentence of 25 years’ imprisonment applies.⁸

11. A second type of mandatory sentence is probably more accurately described as a “presumptive” minimum sentence.⁹ This is the type that applies to certain drugs offences¹⁰ and firearms offences.¹¹ These sentencing regimes require that a court must ordinarily impose a prescribed minimum term of imprisonment. However, it allows the court to impose a sentence below the prescribed minimum term where this is justified by exceptional and specific circumstances. Another example of a presumptive minimum sentence is that which applies to an individual who commits a second or subsequent serious offence within a prescribed period, having previously received a sentence of at least five years’ imprisonment for a first serious offence.¹²

12. A third example of a mandatory sentence is the mandatory minimum sentence which applies where an offender commits a *second or subsequent* specified drugs or firearms offence.¹³ This particularised treatment of recidivist offenders is also evident in the statutory provisions mandating consecutive sentences for offenders who have, for instance, committed an offence while on bail.

D Outline of the Report

13. In Chapter 1, the Commission outlines a conceptual framework within which current Irish mandatory sentencing regimes may be analysed. This chapter suggests that these regimes may be evaluated by reference to three key concepts: 1) the overarching purpose of the criminal justice system (the reduction of criminal conduct); 2) the specific aims of criminal sanctions (deterrence, punishment, reform and rehabilitation, reparation, and incapacitation); and 3) the fundamental principles of justice (the principles of consistency and proportionality). The chapter describes these concepts, and their interaction, in detail. It emphasises, in relation to the two principles of justice, that the courts have sought

⁷ Section 2 of the *Criminal Justice Act 1990*.

⁸ Section 4 of the *Criminal Justice Act 1990*.

⁹ The Irish Penal Reform Trust considers that these sentences are not strictly speaking mandatory sentences but are a type of presumptive sentence, in that there is a presumption that these sentences would apply unless the court considers that they should not apply in a given case: see Irish Penal Reform Trust, *Position Paper on Mandatory Sentencing* (Position Paper 3, May 2009), available at www.iprt.ie. The Commission considers, nonetheless, that such sentences come within the parameters of the Attorney General’s request.

¹⁰ Sections 15A, 15B and 27 of the *Misuse of Drugs Act 1977*, as inserted by sections 4 and 5 of the *Criminal Justice Act 1999* and further amended by section 33 of the *Criminal Justice Act 2007*.

¹¹ Under the *Firearms Act 1925*, as amended by section 42 of the *Criminal Justice Act 2006*.

¹² Section 25 of the *Criminal Justice Act 2007*.

¹³ Section 27(3CCCC) of the *Misuse of Drugs Act 1977*, as inserted by section 84 of the *Criminal Justice Act 2006*, and re-numbered by section 33 of the *Criminal Justice Act 2007*.

to enhance consistency and proportionality in sentencing through the formulation of general guidance regarding: (i) points of departure in the sentencing of certain serious offences; (ii) sentencing ranges for serious offences; and (iii) factors that aggravate and mitigate the gravity of an offence and severity of a sentence. The Commission notes, however, that the Irish sentencing system does not always adhere to a consistent approach in terms of the application of key sentencing aims and principles. It observes that improved structure and consistency in sentencing is desirable and, in turn, assesses various potential options for realising this aim.

14. In Chapter 2, the Commission outlines the historical evolution of the three forms of mandatory sentence under review. As noted in Part C above, these are the entirely mandatory life sentence for murder; minimum sentences for drugs and firearms offences; and minimum sentences for repeat offences. The chapter begins by tracing the historical development of the mandatory life sentence in the United Kingdom, the United States of America, and Ireland. It proceeds to describe the historical evolution of minimum sentences for drugs offences in these countries, before addressing the extension of these sentencing regimes to firearms offences. Chapter 2 then details the development of mandatory sentencing regimes for repeat offences in the United States of America, England and Wales, and Ireland. The chapter concludes by drawing a number of conclusions from the manner in which these sentencing regimes have evolved. These conclusions provide material relevant to the analysis contained in the remaining chapters.

15. Chapter 3 assesses whether the mandatory life sentence for murder complies with the conceptual framework outlined in Chapter 1. The Commission begins by outlining the practical operation of this mandatory sentencing regime. This discussion includes a description of the applicable early release mechanisms and the roles played by the Minister for Justice and the Parole Board in relation to these mechanisms. The chapter then undertakes a comparative analysis of the sentencing regimes that certain other common law countries apply in respect of murder. The Commission concludes by evaluating the mandatory life sentence for murder against the sentencing aims of deterrence and punishment (those which tend to feature most heavily in the continued use of the mandatory life sentence), and the two principles of justice, namely, the principles of proportionality and consistency.

16. Chapter 4 assesses whether presumptive minimum sentences for drugs and firearms offences comply with the conceptual framework outlined in Chapter 1. The Commission begins by examining the practical operation of the presumptive minimum sentencing regimes under: (i) section 15A and section 15B of the *Misuse of Drugs Act 1977*, and (ii) the *Firearms Acts*. This discussion details, among other things, the elements of these offences, the relevant penalties and the applicable early release provisions. Chapter 4 then undertakes a comparative analysis of presumptive and mandatory minimum sentencing regimes enacted in other common law countries. The Commission concludes by evaluating presumptive minimum sentences for drugs and firearms offences against the particular sentencing aims of deterrence, punishment and rehabilitation (those most closely associated with these regimes), and the two principles of justice.

17. Chapter 5 assesses whether presumptive and mandatory sentences for repeat offences comply with the conceptual framework outlined in Chapter 1. The Commission begins by examining the practical operation of: (i) the presumptive minimum sentencing regime prescribed by section 25 of the *Criminal Justice Act 2007* for serious repeat offences; (ii) the mandatory sentencing regime prescribed by section 27(3F) of the *Misuse of Drugs Act 1977* for repeat section 15A and section 15B offences; and the mandatory sentencing regime prescribed for certain repeat firearms offences under the *Firearms Acts*. This discussion details, among other things, the elements of these provisions, the relevant penalties and the applicable early release provisions. The chapter then undertakes a comparative analysis of presumptive and mandatory minimum sentencing regimes prescribed in other common law countries for repeat offences. The Commission concludes by evaluating the Irish presumptive and mandatory sentencing regimes for repeat offences against the aims and principles of sentencing outlined in Chapter 1.

Chapter 6 contains a summary of the recommendations made in this Report.

CHAPTER 1 **CONCEPTUAL FRAMEWORK FOR CRIMINAL SANCTIONS AND SENTENCING**

A Introduction

1.01 In this chapter, the Commission outlines a conceptual framework within which current Irish mandatory sentencing regimes may be analysed. It suggests that these regimes may be evaluated by reference to three key concepts: 1) the purpose of the criminal justice system; 2) the specific aims of criminal sanctions; and 3) the fundamental principles of justice. In Part B, the Commission begins by providing an overview of the general aims of the criminal justice system. It identifies the reduction of crime as the overarching aim of the justice system. It notes that each of the component parts of this system, including the sentencing process, contributes to this aim. In this Part, the Commission observes that the sentencing process may have different attributes (discussed in the next Part), each of which seeks to facilitate crime-reduction. It proceeds to discuss the Court of Criminal Appeal decision in *The People (Attorney General) v Poyning*¹ which illustrates how these attributes may feature in the sentencing process.

1.02 In Part C, the Commission discusses in detail the following aims of the criminal justice system: deterrence, punishment, reformation and rehabilitation, reparation and incapacitation. It notes that while crime-reduction (the core purpose of the justice system) is a constant concern, the specific aims of criminal sanctions may be differently prioritised in individual cases. This Part outlines what each of these aims entails and notes that the extent to which mandatory sentencing regimes further these goals requires consideration.

1.03 In Part D, the Commission discusses the key principles of sentencing, namely that: (a) there should be a consistent approach to sentencing so that like cases should be treated alike, and (b) the criminal sanction should be proportionate to the circumstances of the particular offence and the particular offender. This Part identifies as another key matter that requires consideration, the extent to which mandatory sentencing regimes comply with these principles.

1.04 In Part E, the Commission notes that while the Supreme Court and the Court of Criminal Appeal have sought to increase consistency and proportionality in sentencing, commentators and surveys of sentencing practice call into question whether the aims and principles discussed in Parts C and D are being realised. The Commission discusses proposals to develop a more structured sentencing system in order to address this, including the development of sentencing guidance or guidelines under the auspices of a proposed Judicial Council. The discussion in this chapter thus provides the conceptual framework against which the Commission examines the mandatory and presumptive sentencing regimes that are analysed in Chapters 3 to 5 of the Report. The Commission concludes the chapter by outlining the relevance of the discussed aims and principles to the analysis contained in the remaining chapters.

B Overview of the Aims of the Criminal Justice System and Principles of Sentencing

1.05 A key aim of the criminal justice system is to reduce crime, that is, prohibited and unwanted conduct that is detrimental or harmful to society.² The criminal justice system comprises several

¹ [1972] IR 402.

² The Commission acknowledges that there are many other factors at play in terms of the causes of criminal activity in society, and that the criminal justice system is merely one aspect of how society, including the State, attempts to reduce such activity. These include other policy-related matters such as general economic policy, education policy and employment policy. This Report is confined primarily to a discussion of the role of the criminal justice system. The Commission discusses at paragraph 4.199ff, below, the research of the Health

component parts, each of which contributes to this aim. These parts include the substantive criminal law, which contains a list of prohibited or unwanted conduct that is graded or labelled according to the seriousness with which it is associated, including in terms of the sanctions to be imposed on conviction. The other important component parts of the criminal justice system include the relevant processes and services connected with the system as a whole, notably the Garda Síochána (who operate both as a peace-keeping prevention-based component of the system and also as an investigative force), the prosecutorial process, the trial process, and (in the event of a conviction) the sentencing process and the probation and prisons service. While the system as a whole is intended to reduce crime (including by clearly stating what constitutes criminal activity) and to have in place mechanisms that are at least in part aimed at the prevention of such conduct, many of the components listed operate as salutary after-the-event processes where a crime has been committed.

1.06 The preventive aspect of the criminal justice system is that aspect which seeks to prevent people from *becoming* offenders in the first place.³ The extent to which the criminal justice system is succeeding in this aim is difficult to establish in so far as statistics are more concerned with those who come in contact with the criminal justice system than those who do not. However, an examination of the numbers of people prosecuted in any year suggests that the vast majority of the Irish population does not offend the criminal law in a serious way.⁴ This suggests that the criminal justice system (in tandem with inherent and cultivated values that influence human behaviour) is, for the most part, working. While some people may be more influenced by the fact that certain behaviour has been labelled “criminal”, others may be more influenced by the fact that they feel that certain behaviour is morally wrong. Thus, for instance, a person driving home late at night might stop for a red traffic light even in the absence of any apparent risk of detection or punishment or, indeed, of causing an accident. He or she may accept that this behaviour is morally appropriate as well as being in compliance with the law.

1.07 In this Report, the primary focus of the Commission is on a specific aspect of the criminal justice system, namely, the sentencing process and, in particular, mandatory sentences. (As outlined above at paragraphs 8 to 11, a mandatory sentence is one which applies in all cases regardless of the particular circumstances, whereas a presumptive sentence is one which applies in all cases except where there are specific and exceptional circumstances). The sentencing process is that aspect of the criminal justice system concerned with the determination and application of criminal sanctions to those who have been convicted of offending the substantive criminal law. In the context of reducing prohibited or unwanted conduct, these sanctions are necessarily endowed with deterrent and punitive attributes.⁵

1.08 Even taking what are regarded as low level sanctions, such as fines or community service orders, it is clear that these are intended to have a salutary effect and to bring home to the offender that harm has been done to society. Of course, it is also clear that such sanctions are imposed as an alternative to the other most common sanction, imprisonment, and that a community service order is also intended to convey to the offender that he or she is being “given a chance” because, for example, this was a first time offence or was relatively minor in the scale of criminality. It is therefore intended to mark the seriousness of the past behaviour but also to reflect the expectation that future behaviour can be adjusted positively. A sentence of imprisonment is clearly intended to be a more punitive sanction. However, even so, there is a general expectation that not all criminals convicted of the same offence will receive the same sentence of imprisonment and that, for example, the experienced leader of a group of robbers will receive a longer sentence than the young, first-time member of that same group. While each might receive a custodial sentence, the first-time offender may still be “given a chance” with a shorter term of imprisonment (perhaps even suspended) while the leader may be given a lengthy term. Thus, even when a sentence of imprisonment is imposed, many different attributes are at play; the punitive element arising

Research Board and the British-Irish Council on the link between drugs and crime with a view to informing the development of effective policy responses.

³ McAuley and McCutcheon *Criminal Liability* (Round Hall, Sweet and Maxwell, 2000) at 103.

⁴ *Courts Service Annual Report 2010* at 57-64.

⁵ McAuley and McCutcheon *Criminal Liability* (Round Hall, Sweet and Maxwell, 2000) at 104ff; and O'Malley *Sentencing Law and Practice* (Thomson, Round Hall, 2006) at 31ff.

from loss of liberty is clearly evident, but there are also reformatory, rehabilitative, reparative and incapacitative attributes involved.

1.09 In pursuing the general preventive aim of the criminal justice system, the sentencing process must also comply with what can be described as external constraints that emanate from fundamental principles of justice.⁶ Many of these constraints arise from national constitutional requirements and international or regional human rights standards. Thus, as a member state of the Council of Europe,⁷ Ireland accepts that the death penalty is forbidden as a sanction.⁸ Similarly, other former sanctions such as whipping have been abolished on the basis that they would amount to torture or inhuman and degrading treatment.⁹ In addition, Article 15.5 of the Constitution provides that the Oireachtas is prohibited from declaring acts to be infringements of the law which were not so at the date of their commission. This reflects the fundamental principle that a person must have done something wrong to warrant the imposition of a sanction, and that the list of wrongs must have been signalled in advance to the offender, not after the event.¹⁰ Also of importance in this respect is Article 40.1 of the Constitution, which provides that all citizens shall, as human persons, be held equal before the law. This equality principle requires that there should be a consistent approach to sentencing so that like cases are treated alike, the corollary being that different cases should be treated differently.¹¹ In the literature on sentencing, there is also reference to the principle of proportionality, ie. the requirement that “the punishment must fit the crime and the criminal”.

1.10 The application of many of these features of the criminal justice system and the sentencing process can be seen in one of the leading Irish cases on sentencing, the 1972 decision of the Court of Criminal Appeal in *The People (Attorney General) v Poyning*.¹² In *Poyning*, the defendant was charged with a number of offences related to a single incident, including armed robbery and taking a motor car without authority. He pleaded guilty to both counts and was sentenced to four years’ imprisonment for armed robbery and six months’ imprisonment for the motor car offence. Along with the defendant, two other men were charged in respect of the armed robbery. They also pleaded guilty but were sentenced by a different judge. While that sentencing judge imposed a sentence of six years’ imprisonment on the other two defendants, the sentence of imprisonment was suspended on condition that the defendants enter into a bond to keep the peace for five years. As both entered into this bond, they were released. In those circumstances the defendant appealed against the sentences imposed on him.

1.11 At the hearing of the appeal, counsel for the defendant argued that the result was “a gross inequality of treatment for his client”. Giving its judgment, the Court of Criminal Appeal stated:

“The law does not in these cases fix the sentence for any particular crime, but it fixes a maximum sentence and leaves it to the court of trial to decide what is, within the maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime but in regard to each criminal the court of trial has the right and the duty to decide whether to be lenient or severe. It is for these reasons and with these purposes in view that, before passing sentence, the court of trial hears evidence of the antecedents and character of every convicted person. *It follows that when two persons are convicted together of a crime or of*

⁶ McAuley and McCutcheon *Criminal Liability* (Round Hall, Sweet and Maxwell, 2000) at 105-106. See also: Walker *The Aims of a Penal System (The James Seth Memorial Lecture 1966)* (Edinburgh University Press, 1966).

⁷ See: Article 1 of the Sixth Protocol and Article 2 of the Thirteenth Protocol to the European Convention on Human Rights.

⁸ See: Article 15.5.2° and Article 28.3.3° of the Constitution, which prohibit the imposition of the death penalty.

⁹ See: Article 40.3.1° of the Constitution; and *State (C) v Frawley* [1976] IR 365. See also: Article 3 of the European Convention on Human Rights

¹⁰ See also: Article 7 of the European Convention on Human Rights.

¹¹ See also: Article 14 of the European Convention on Human Rights.

¹² [1972] IR 402.

a series of crimes in which they have been acting in concert, it may be (and very often is) right to discriminate between the two and to be lenient to the one and not to the other. The background, antecedents and character of the one and his whole bearing in court may indicate a chance of reform if leniency is extended; whereas it may seem that only a severe sentence is likely to serve the public interest in the case of the other, having regard both to the deterring effect and the inducement to turn from a criminal to an honest life. When two prisoners have been jointly indicted and convicted and one of them receives a light sentence, or none at all, it does not follow that a severe sentence on the other must be justified.”¹³ (emphasis added)

The Court also added:

“Of course, in any particular case the Court must examine the disparity in sentences where, if all other things were equal, the sentences should be the same; it must examine whether the differentiation in treatment is justified. The Court, in considering the principles which should inform a judge’s mind when imposing sentence and having regard to the differences in the characters and antecedents of the convicted person, will seek to discover whether the discrimination was based on those differences.”¹⁴

The Court of Criminal Appeal held that while it appeared that Poyning’s co-defendants had been treated more leniently, the sentence of penal servitude was an appropriate one and should not be reduced.

1.12 Therefore, *Poyning* reflects the equality and proportionality principles discussed above, which require sentencing to be individualised in so far as the criminal sanction must be proportionate to the particular circumstances of both the offence and the offender. Thus even where, as in this case, each defendant has committed the same crime, the criminal sanction for each may be different because the individual circumstances of each defendant (“background, antecedents and character”) are different. *Poyning* also illustrates that a number of the other factors discussed above are at issue, including “the public interest,” “the deterring effect” and “a chance of reform.” Thus, marking the seriousness of the offence is not simply a matter of ensuring a proportionate sentence for the offender; it is also required to serve the public interest by seeking to reduce prohibited and unwanted conduct in society, as well as inducing the individual offender to reform, whether by a relatively lenient sentence or a relatively severe sentence. As a result, the courts will generally include as part of their deliberations the possibility that through a combination of interventions such as education, therapy and, in some instances, non-custodial sanctions such as community service, the offender will be induced to refrain from committing prohibited or unwanted conduct in the future. The sentencing process also relies, as discussed, on the severity of the sanction imposed to dissuade the particular offender from re-offending and other would-be offenders from offending in the first place.

1.13 As illustrated by *Poyning*, the operation of the sentencing process may therefore be described in the following terms:

1. Sentencing should mark the seriousness of the criminal conduct that has occurred. In general therefore, the more serious the criminal conduct, the more severe the sanction that is likely to be imposed.
2. The seriousness of the conduct is determined by reference to three interlinking factors: (a) the harm caused; (b) the culpability of the offender; and (c) the behaviour of the offender in relation to the offence. This reflects the proportionality requirement that the punishment should fit the individual crime and the individual offender.

¹³ [1972] IR 402 at 408.

¹⁴ *Ibid.* The approach described was adopted in *The People (DPP) v Duffy* [2009] 3 IR 613, where the defendant had been convicted of an offence under the *Competition Act 2002* arising from his participation in a price cartel. The Central Criminal Court (McKechnie J) imposed a suspended sentence on the defendant “solely on the basis... of keeping some alignment” with the suspended sentences which had been imposed upon two members of the same cartel whose level of culpability was comparable to that of the accused. The Court considered that it would be contrary to the principle of equality to require the defendant to serve a custodial sentence against that background.

3. Criminal conduct will, in general, be considered more serious in terms of harm caused where it has caused death or serious injury and will, in general, be considered less serious where it has caused property damage or financial loss. In general, physical harm to other humans is ranked more seriously than property damage or financial loss. Clearly, of course, there are cases where financial loss arising from, for example, fraud may be on such a large scale that it will be regarded as having caused more harm than, for example, a once-off assault.

4. Criminal conduct will be considered more serious in terms of culpability where the offender intended to behave in a particular way, and less serious where he or she was reckless or negligent.

5. Criminal conduct will be considered more serious in terms of the offender's behaviour where he or she has aggravated the situation, for example, by using a weapon, targeting a vulnerable person, breaching a position of trust or being involved in a group or gang.

6. The absence of these aggravating factors does not necessarily amount to a mitigating factor, but the sentencing court may take into account, as mitigating factors, other individual offender behaviour, whether before or after the offence itself, such as whether the case involves a first-time offender (as part of their "background, antecedents and character") or whether the offender pleads guilty (thus avoiding, for example, a potentially difficult cross-examination for the victim or the cost to the public of a long trial).

7. In addition to ensuring a proportionate sentence for the offence and the offender, the sentencing process also involves the general public interest aim of reducing prohibited or unwanted conduct in society. For the individual offender, the sentencing court will consider (with the benefit of a probation report) whether interventions such as education, therapy or non-custodial sanctions such as community service will induce the offender to refrain from committing prohibited or unwanted conduct in the future. The sentencing court will also take into account whether the severity or leniency of the sanction imposed will dissuade would-be offenders from offending in the first place.

1.14 This summary of the sentencing process, as illustrated in the *Poyning* case, reflects the reality that, in respect of virtually all criminal offences, the sentencing court has a wide discretion as to the sentence to be imposed in a specific case. Thus, for most criminal offences, the Oireachtas provides for a range of sentences, from zero to a maximum, leaving to the sentencing judge the specific sentence to be imposed. Some examples are:

- Manslaughter: maximum sentence: life imprisonment (section 5 of the *Offences against the Person Act 1861*)
- Rape: maximum sentence: life imprisonment (section 4 of the *Criminal Law (Rape) (Amendment) Act 1990*)
- Assault causing serious harm: maximum sentence: life imprisonment (section 4 of the *Non-Fatal Offences against the Person Act 1997*)
- Assault causing harm: maximum sentence: five years' imprisonment (section 3 of the *Non-Fatal Offences against the Person Act 1997*)
- Assault: maximum sentence: six months' imprisonment (section 2 of the *Non-Fatal Offences against the Person Act 1997*)
- Robbery: maximum sentence: life imprisonment (section 14 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*)
- Theft: maximum sentence: 10 years' imprisonment (section 4(6) of the *Criminal Justice (Theft and Fraud Offences) Act 2001*)

1.15 In the case of each of these offences, which are clearly among the most serious in the criminal calendar, the Oireachtas has legislated to set the maximum sentence but it has left it to the trial judge to decide the actual sentence to be imposed, applying the sentencing principles described above.

1.16 The Commission has been requested by the Attorney General to examine the small number of instances in which the Oireachtas has prescribed mandatory or presumptive sentences. These include:

- The mandatory life sentence for murder (section 2 of the *Criminal Justice Act 1990*);
- The presumptive minimum sentence of 10 years' imprisonment for the possession or importation of drugs with a certain market value, with intent to sell or supply (section 27 of the *Misuse of Drugs Act 1977*, as amended);
- The presumptive minimum sentences of five years' imprisonment¹⁵ or 10 years' imprisonment¹⁶ for certain offences under the *Firearms Acts*;
- The mandatory minimum sentence of 10 years' imprisonment for a second or subsequent offence of possessing or importing drugs with a certain market value, with intent to sell or supply (section 27(3F) of the *Misuse of Drugs Act 1977*);
- The mandatory minimum sentences of five years' imprisonment¹⁷ or 10 years' imprisonment¹⁸ for second or subsequent specified offences under the *Firearms Acts*; and
- The presumptive minimum sentence of three-quarters of the maximum term provided by law - or 10 years' imprisonment where the maximum term is life imprisonment - for a second or subsequent "serious" offence¹⁹ under the *Criminal Justice Act 2007* (section 25 of the *Criminal Justice Act 2007*).

1.17 The key question addressed by the Commission in this Report, therefore, is the extent to which mandatory or presumptive sentences contribute to a general aim of the criminal justice system: that of reducing prohibited or unwanted conduct. This in turn requires the Commission to examine to what extent such mandatory or presumptive sentencing regimes are consistent with the conceptual framework for criminal sanctions and sentencing, as described already in general terms, and discussed in more detail below in this chapter.

1.18 As a preliminary observation, the Commission notes that, unlike ordinary sentencing provisions which require an examination of the culpability of the offender, the harm caused, and the behaviour of the offender in relation to the particular offence, mandatory and presumptive sentencing provisions tend to focus primarily on the harm caused ahead of culpability and offender behaviour. The extent to which the harm caused may take primacy over other factors depends on whether the sentence is entirely mandatory or presumptive and subject to exceptions. Where the sentence is presumptive, it is more likely that the courts will be able to consider individual factors such as culpability and behaviour.

¹⁵ The offences which attract a five-year presumptive minimum sentence are: (i) possession of a firearm while taking a vehicle without authority (section 26 of the *Firearms Act 1964*, as substituted); (ii) possession of a firearm or ammunition in suspicious circumstances (section 27A of the *Firearms Act 1964*, as substituted); (iii) carrying a firearm or imitation firearm with intent to commit an indictable offence or resist arrest (section 27B of the *Firearms Act 1964*, as substituted); and (iv) shortening the barrel of a shotgun or rifle (section 12A of the *Firearms and Offensive Weapons Act 1990*, as substituted).

¹⁶ The offences which attract a 10-year presumptive minimum sentence are: (i) possession of firearms with intent to endanger life (section 15 of the *Firearms Act 1925*, as substituted by section 42 of the *Criminal Justice Act 2006*); and (ii) using a firearm to assist or aid in an escape (section 27 of the *Firearms Act 1964*, as substituted by section 58 of the *Criminal Justice Act 2006*).

¹⁷ The offences listed above at note 15 attract a mandatory minimum five-year sentence where committed on a second or subsequent occasion.

¹⁸ The offences listed above at note 16 attract a mandatory minimum 10-year sentence where committed on a second or subsequent occasion.

¹⁹ For the purposes of this sentencing regime, "serious offences" are those listed under Schedule 2 to the *Criminal Justice Act 2007*. Among others, these include: murder, certain non-fatal offences against the person, specified firearms and explosives offences, and aggravated burglary.

1.19 In the context of preventing future criminal conduct, mandatory sentencing provisions may also be contrasted with other types of sentencing provision in so far as mandatory sentencing provisions tend to rely more heavily on the severity of the sentence to dissuade future offending, rather than on other mechanisms such as education, therapy or community service. Again, the extent to which the sentencing system relies more heavily on the severity of the sentence to dissuade future offending depends on whether the sentence is entirely mandatory or presumptive and subject to exceptions. As discussed in detail in subsequent chapters, some presumptive sentencing provisions permit sentence reviews where, for instance, the offender is addicted to drugs.

C Aims of the Criminal Justice System and Sanctions

1.20 As noted at paragraphs 1.07 and 1.08, criminal sanctions pursue the following key aims: deterrence, punishment, reformation and rehabilitation, reparation and incapacitation.

(1) Deterrence

1.21 Criminal sanctions are deterrent in so far as they seek to dissuade the particular offender from re-offending (specific deterrence) and would-be offenders from offending in the first place (general deterrence), by signalling the painful consequences that will otherwise result.²⁰ In this regard, it has been asserted that there is a necessary link between punishment and deterrence in so far as you cannot have the former without the latter.²¹ In its 1993 *Consultation Paper on Sentencing*,²² the Commission noted that it was the *certainty* of punishment rather than the *severity* of punishment that gave rise to a deterrent effect.²³ However, it has since been noted that there are other factors, such as the nature of the crime, the target group of the particular sanction, the extent to which the offending behaviour attracts moral condemnation, the extent to which the public has knowledge of the criminal sanction, and the swiftness of the punishment, which may also affect the extent to which a particular criminal sanction deters.²⁴

1.22 The Commission observes that deterrence features strongly in the debate on mandatory and presumptive sentences in so far as it is often advanced as a justification for the enactment of such provisions. It is unclear, however, to what extent (if any) mandatory or presumptive sentences actually deter. Some writers assert that entirely mandatory sentences are ineffective as deterrents. It has been noted, for instance, that countries which retain the death penalty for murder often have high murder rates.²⁵ Other writers note, however, that crimes like murder are exceptional in so far as they are often committed in the heat of the moment when the perpetrators are in not in the frame of mind to contemplate the legal consequences.²⁶ In its 1993 *Consultation Paper on Sentencing*,²⁷ the Commission stated that it found no evidence to suggest that mandatory minimum sentences acted as a deterrent.²⁸ Tonry cites research which, he asserts, establishes that mandatory sentences have either no demonstrable deterrent

²⁰ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 33ff; McAuley and McCutcheon *Criminal Liability* (Round Hall, Sweet & Maxwell, 2000) at 104ff; and Department of Justice, Equality and Law Reform *White Paper on Crime, Discussion Document No.2: Criminal Sanctions* (February 2010).

²¹ McAuley and McCutcheon *Criminal Liability* (Round Hall Sweet and Maxwell, 2000) at 104.

²² Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 2-1993).

²³ *Ibid* at paragraph 4.42.

²⁴ Gabor and Crutcher "Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures" rr2002-1e (Research and Statistics Division, Canadian Department of Justice, 2002) at paragraph 4.3.1.

²⁵ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 34.

²⁶ *Ibid* at 34-35; Walker and Padfield *Sentencing: Theory, Law and Practice* (Butterworths, 2nd ed, 1996) at 97.

²⁷ Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 2-1993).

²⁸ *Ibid.* at paragraph 10.26.

effects or short-term effects that are quickly extinguished.²⁹ He further observes that there has been little impact on the crime rates in American states in which mandatory sentences have been introduced.³⁰

(2) Punishment

1.23 Criminal sanctions are also punitive in so far as they seek to punish the offender for his or her wrong-doing (retribution)³¹ and give formal expression to society's condemnation of his or her behaviour (denunciation).³² The retributive aspect of punishment should be distinguished from vengeance in so far as retribution relates to an action between the State and the offender, rather than the victim and the offender, and is concerned with proportionate punishment determined by reference to objective criteria, rather than emotion or anger.³³ That the punishment should be proportionate to the offence (and the offender) is often associated with "just deserts" theory.³⁴ The denunciatory aspect of punishment, on the other hand, may (as indicated by the Commission in its 1996 *Report on Sentencing*³⁵) be described as a "safety-valve" for victims who might otherwise be tempted to take the law into their own hands.³⁶

1.24 The Commission observes that punishment, comprising retribution and denunciation, is an important aspect of the debate on mandatory and presumptive sentences. The offences for which mandatory sentencing provisions have been enacted tend to be those offences which have a particularly deleterious impact on society, such as murder, drug trafficking, firearms offences and certain repeat offences. It is thus understandable that the Oireachtas should wish to increase the severity of the applicable sanctions through the enactment of mandatory and presumptive sentencing provisions. It is equally understandable that this might also serve a denunciatory aim by affording individual members of society, who might otherwise feel victimised and powerless, an opportunity to express their condemnation of such offences.

(3) Reformation and Rehabilitation

1.25 Criminal sanctions may seek to reform and/or rehabilitate an offender with a view to re-integrating him or her into society.³⁷ Indeed, it has been noted that rehabilitation is an "essential ingredient for consideration in the sentencing of a person"³⁸ and may justify the imposition of a lighter sentence where this would, for instance, facilitate the offender's participation in a rehabilitative programme. Reformatory and rehabilitative programmes seek to address factors which may have contributed to the offender's criminal behaviour and include programmes such as alcohol and drug treatment programmes, counselling

²⁹ Tonry *Sentencing Matters* (Oxford University Press, 1996) at 135ff. Tonry suggests that the real reason for enacting mandatory sentencing provisions is not deterrence: "Supporters of mandatory penalties in anxious times are concerned with political and symbolic goals." (at 159-160).

³⁰ *Ibid* at 137-139.

³¹ Walker *Why Punish?* (Oxford University Press, 1991) at 69ff; O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 31ff; and Department of Justice, Equality and Law Reform *White Paper on Crime, Discussion Document No.2: Criminal Sanctions* (February 2010).

³² O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 43ff; and *R v M(CA)* [1996] 1 SCR 500 at paragraph 81, cited with approval by the court in *R v Latimer* [2001] 1 SCR 3 at 41.

³³ *The People (DPP) v M* [1994] 3 IR 306, 317; and *R v M (CA)* [1996] 1 SCR 500, paragraph 80.

³⁴ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 31.

³⁵ Law Reform Commission *Report on Sentencing* (LRC 53-1996).

³⁶ *Ibid* at paragraph 2.13.

³⁷ Department of Justice, Equality and Law Reform *White Paper on Crime, Discussion Document No.2: Criminal Sanctions* (February 2010).

³⁸ *The People (DPP) v M* [1994] 3 IR 306 at 314.

and vocational programmes.³⁹ Support for the reformative and/or rehabilitative aspects of criminal sanctions is not, however, universal.⁴⁰

1.26 The Commission observes that reform and rehabilitation are rarely, if ever, advanced as justifications for mandatory or presumptive sentencing provisions. On the contrary, reform and rehabilitation are often submitted as “exceptional and specific circumstances” justifying a sentence lower than the sentence prescribed by presumptive sentencing provisions (such as those in the *Misuse of Drugs Act 1977* and the *Firearms Acts*).

(4) Reparation

1.27 Criminal sanctions may be reparative in so far as they require an offender to do something to repair the damage that his or her wrong-doing has inflicted on society.⁴¹ This may take the form of directly or indirectly compensating the victim of the offence. Alternatively, if there is no individual or identifiable victim or, indeed, if the victim is unwilling to accept it, reparation can be made to the community as a whole, for example, through the performance of community service or the payment of a fine into public funds. In this way, reparation may contribute to policies aimed at the reintegration of offenders. It has been noted, however, that a sentencer who discriminates between an offender who can afford to make monetary reparation and an offender who cannot, particularly where the alternative is imprisonment, may be regarded as acting inequitably.⁴²

1.28 Reparation is rarely, if ever, asserted as a justification for mandatory or presumptive sentencing provisions. This may be due to the fact that criminal sanctions which are predominantly reparative in nature are usually proposed as an alternative to a sentence of imprisonment.

(5) Incapacitation

1.29 Criminal sanctions may be incapacitative in so far as they deprive the offender of the opportunity to commit another offence.⁴³ While this may be the effect of certain criminal sanctions, the Commission observes that there is a constitutional objection to introducing a criminal sanction in order to deprive an offender of his or her liberty on the basis of *anticipated* rather than *proven* offending.⁴⁴ Aside from the practical issues (including that it is notoriously difficult to make accurate predictions regarding future behaviour⁴⁵ and that the incapacitative effects of imprisonment are, at best, modest⁴⁶) the courts have clarified that an incapacitative rationale would run counter to the constitutionally protected right to personal liberty and the presumption of innocence.⁴⁷ As will be discussed below, it would also run

³⁹ MacKenzie “What Works. What doesn’t Work. What’s Promising” in Priestley and Vanstone, eds, *Offenders or Citizens? Readings in Rehabilitation* (Willan, 2010) at 245.

⁴⁰ McAuley and McCutcheon *Criminal Liability* (Round Hall Sweet and Maxwell, 2000) at 102-103; Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 2-1993) at paragraph 10.26; and Priestley and Vanstone *Offenders or Citizens? Readings in Rehabilitation* (Willan, 2010) at 107.

⁴¹ Department of Justice, Equality and Law Reform *White Paper on Crime, Discussion Document No.2: Criminal Sanctions* (February 2010); and Cavadino and Dignan *The Penal System - An Introduction* (Sage Publications, 3rd ed, 2002) at 44-45.

⁴² Walker and Padfield *Sentencing: Theory, Law and Practice* (Butterworths, 2nd ed, 1996) at paragraph 9.38.

⁴³ Department of Justice, Equality and Law Reform, *White Paper on Crime, Discussion Document No.2: Criminal Sanctions* (February 2010); and Cavadino and Dignan *The Penal System - An Introduction* (Sage Publications, 3rd ed, 2002) at 44-45.

⁴⁴ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 42.

⁴⁵ *Ibid*; Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 69; and Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 2-1993) at paragraph 4.46.

⁴⁶ Cavadino and Dignan *The Penal System - An Introduction* (Sage Publications, 3rd ed, 2002) at 39.

⁴⁷ *The People (Attorney General) v O’Callaghan* [1966] IR 501 at 508-509; *The People (DPP) v Carmody* [1988] ILRM 370 at 372; *The People (DPP) v Jackson* Court of Criminal Appeal 26 April 1993; *The People (DPP) v*

counter to the principle that a criminal sanction should be proportionate to the circumstances of the particular offence and the particular offender.

1.30 The Commission observes that the issue of incapacitation carries some weight in the debate on mandatory and presumptive sentences. The need to take and keep certain offenders off the streets is often cited in support of these sentencing provisions. While such an argument may carry political weight, it would appear, in light of the foregoing analysis, to be unconstitutional.

(6) Discussion

1.31 It is thus clear that criminal sanctions and sentencing are motivated by a number of factors including the overarching aim of the criminal justice system (the reduction of prohibited or unwanted conduct) and the various aims of criminal sanctions (deterrence, punishment, reform and rehabilitation, reparation and incapacitation). Whereas the overarching aim of the criminal justice system will remain the same in every case, sentencing courts may give priority to one or more of the aims of criminal sanctions depending on the particular circumstances of the individual case. Thus, for instance, the aims of deterrence, punishment and incapacitation will generally feature in cases involving more serious offences which attract more severe sanctions such as a term of imprisonment. As discussed, these aims are therefore often raised as justifications for mandatory and presumptive sentencing provisions which are generally enacted to deal with offences which have a particularly harmful effect on society. By contrast, the aims of reform and rehabilitation and reparation usually feature in cases involving less serious offences which attract less severe sanctions such as a non-custodial sentence. As discussed therefore, these aims are not usually raised in favour of mandatory or presumptive sentencing provisions.

D Principles of Sentencing and Justice

1.32 As noted at paragraph 1.09, in pursuing the general aim of the criminal justice system, the sentencing process must comply with external constraints that emanate from fundamental principles of justice. To begin with, the use of certain criminal sanctions is prohibited because the sanctions are considered to be inhumane under current constitutional and international human rights standards. Likewise, the use of certain other criminal sanctions is not feasible because they would be too costly. The remaining criminal sanctions (in other words, those criminal sanctions which are not considered to be inhumane or too costly) must comply with the two fundamental principles of justice. These are that: (a) there should be a consistent approach to sentencing so that like cases are treated alike, and (b) the criminal sanction should be proportionate to the particular offence (and the particular offender). These principles of consistency and proportionality are closely connected in so far as a consistent approach to sentencing is necessary to ensure that proportionate sentences are imposed in all cases.

(1) Consistency

1.33 The principle of consistency has traditionally been explained in terms of like cases being treated alike and different cases being treated differently.⁴⁸ The corollary of this is that inconsistency arises where like cases are treated differently and different cases are treated alike. It should be reiterated, however, that when we refer to consistency, we are referring to consistency of *approach* rather than consistency of *outcomes*.⁴⁹ In the *Halliday Report*, it was observed that consistency could be viewed as like cases resulting in like *outcomes* but:

“The variety of circumstances in criminal cases... makes this an incomplete definition, and one which can result in undesirable priority being given to apparently uniform outcomes, regardless of the circumstances. A better approach is to seek consistent application of explicit principles and

GK [2008] IECCA 110; *Caffrey v. Governor of Portlaoise Prison* [2012] IESC 4; and *Minister for Justice and Equality v Nolan* [2012] IEHC 249.

⁴⁸ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 49-50.

⁴⁹ *Making Punishments Work - Report of a Review of the Sentencing Framework for England and Wales* (Home Office, 2001) at paragraph 2.21.

standards, recognising that these may result in justifiably *disparate* outcomes.”⁵⁰ [Emphasis added]

In this regard, it has been observed that the challenge posed by the principle of consistency is “to eliminate undue disparity without replacing it with excessive uniformity.”⁵¹

1.34 In its 2004 *Consultation Paper on Prosecution Appeals from Unduly Lenient Sentences in the District Court*,⁵² the Commission took a similar approach by distinguishing between sentencing *disparity* and sentencing *inconsistency*:

“While sentencing *disparity* may be justified, given the nature of the offence and the individual circumstances of the offender, sentencing *inconsistency* is not acceptable, such as where individual judges may differ widely in dealing with similar offenders for similar offences.”⁵³

1.35 The need for a consistent approach becomes obvious when one considers the numerous factors which may influence sentencers.⁵⁴ Ashworth asserts that these factors fall into four broad categories. The first category relates to the views that sentencers may have regarding the facts of the case. The second category relates to the views that sentencers may have regarding the principles of sentencing. In this category, Ashworth includes views regarding the gravity of offences; the aims, effectiveness and relative severity of the available types of sentence; the general principles of sentencing; and the relative weight of aggravating and mitigating factors. The third category relates to views regarding crime and punishment. In this category, Ashworth includes views regarding the aims of sentencing; the causes of crime; and the function of courts passing sentence. The final category relates to the demographic features of sentencers. In this category, Ashworth lists age, social class, occupation, urban or rural background, race, gender, religion, and political allegiance. While sentencers are expected to have developed a high level of resistance to outside influences, the Commission observes that no-one can be entirely immune.

1.36 It has been observed that sentencing is not an exact science so the principle of consistency cannot be applied in absolute terms and some degree of variation is inevitable.⁵⁵ It has been argued that this is a small price to pay for a justice system which guarantees individualised punishment.⁵⁶ However, this argument should not be taken too far as a system which tolerates gross inconsistency is manifestly unfair and risks losing public confidence.⁵⁷ Whereas the normal approach of the Oireachtas to ensuring consistency is to prescribe a maximum sentence only, it might, in such circumstances, feel compelled to circumscribe judicial discretion further by establishing mandatory sentences or rigid sentencing guidelines.⁵⁸

⁵⁰ *Making Punishments Work - Report of a Review of the Sentencing Framework for England and Wales* (Home Office, 2001) at paragraph 2.21.

⁵¹ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 53.

⁵² Law Reform Commission *Consultation Paper on Prosecution Appeals from Unduly Lenient Sentences in the District Court* (LRC CP 33-2004).

⁵³ *Ibid* at paragraph 6.07. O'Malley observes: “Disparity and inconsistency are closely related concepts and... little turns on the difference between them. Both are concerned with the problem of discordance. Arguably, consistency is more concerned with incompatibility of particular decisions with avowed principles or previous practice, whereas disparity is more concerned with inequality and incongruity between particular decisions.” See: O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 49.

⁵⁴ Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 35-36.

⁵⁵ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 52.

⁵⁶ *Ibid*.

⁵⁷ *Ibid* at 52-53.

⁵⁸ *Ibid* at 53.

(2) Proportionality

1.37 In *Whelan and Lynch v Minister for Justice, Equality and Law Reform*,⁵⁹ the High Court (Irvine J) distinguished between two types of proportionality: (a) constitutional proportionality, and (b) proportionality in the context of sentencing. On appeal, this distinction was upheld by the Supreme Court.⁶⁰ Citing the judgment of Costello J in *Heaney v Ireland*,⁶¹ Murray CJ observed in *Whelan and Lynch* that the constitutional doctrine of proportionality:

“...is a public law doctrine with specified criteria, according to which decisions or acts of the State, and in particular legislation, which encroach on the exercise of constitutional rights which citizens are otherwise entitled freely to enjoy, are scrutinised with regard to their compatibility with the Constitution or the law.”

By contrast, “proportionality” in the context of sentencing is a term which is descriptive of the manner in which judicial discretion should, as a matter of principle, be exercised within particular proceedings.

(a) Constitutional Proportionality

1.38 Constitutional proportionality is thus applicable to Acts of the Oireachtas. In the decision of the High Court in *Heaney v Ireland*,⁶² Costello J pronounced the test for constitutional proportionality as follows:

“The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-

- (a) Be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations,
- (b) Impair the right as little as possible, and
- (c) Be such that their effects on rights are proportional to the objective... .”⁶³

1.39 The Supreme Court adopted a similar test in *In re the Employment Equality Bill 1996*:⁶⁴

“In effect a form of proportionality test must be applied to the proposed section. (a) Is it rationally designed to meet the objective of the legislation? (b) Does it intrude into constitutional rights as little as is reasonably possible? (c) Is there a proportionality between the section and the right to trial in due course of law and the objective of the legislation?”⁶⁵

1.40 *Heaney* and *In re the Employment Equality Bill 1996* were preceded by the Supreme Court decision in *Cox v Ireland*.⁶⁶ *Cox v Ireland* has been identified as an important landmark in modern judicial thinking on mandatory sentences.⁶⁷ The plaintiff challenged section 34 of the *Offences Against the State Act 1939*, which provided that any person convicted by the Special Criminal Court of a scheduled offence would forfeit any office or employment remunerated from public funds and be disqualified from holding any such office or employment for a period of 7 years from the date of conviction. The plaintiff, a teacher at a community school, was convicted by the Special Criminal Court of a scheduled offence. As a result,

⁵⁹ [2007] IEHC 374, [2008] 2 IR 142.

⁶⁰ [2010] IESC 34; [2012] 1 IR 1.

⁶¹ *Heaney v Ireland* [1994] 3 IR 593.

⁶² *Ibid.*

⁶³ *Ibid* at 607.

⁶⁴ *In re the Employment Equality Bill 1996* [1997] 2 IR 321.

⁶⁵ *Ibid* at 383.

⁶⁶ *Ibid* at 503.

⁶⁷ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 534.

he lost his post, pension and pay-related social insurance rights and became ineligible to work in a similar post for a period of 7 years.

1.41 Both the High Court and the Supreme Court found section 34 to be unconstitutional. The High Court (Barr J) held that the penalties imposed by section 34 were patently unfair and capricious in nature and that they amounted to an unreasonable and unjustified interference with the personal rights of the plaintiff. The Supreme Court observed that the State was entitled to impose onerous and far-reaching penalties for offences threatening the peace and security of the State but that it must, as far as practicable, protect the constitutional rights of the citizen. It found that the State had failed in this regard as the provisions of section 34 were “impermissibly wide and indiscriminate”. The mandatory penalties contained in section 34 applied to all scheduled offences which included less serious offences and offences of the utmost gravity. Furthermore, there was no way to escape the mandatory penalties even if a person could show that his or her intention or motive in committing the offence bore no relation to considerations of the peace and security of the State.

1.42 More recently, in *Whelan and Lynch v Minister for Justice, Equality and Law Reform*,⁶⁸ the Supreme Court applied the *Heaney* proportionality test to section 2 of the *Criminal Justice Act 1990* which imposes a mandatory life sentence for murder. Confirming that the Oireachtas was empowered to enact legislation setting mandatory penalties, Murray CJ observed that such legislation might be unconstitutional if “there was no rational relationship between the penalty and the requirements of justice with regard to the punishment of the offence specified”.

1.43 The decision in *Cox* may, however, be contrasted with the decision in *Whelan and Lynch*. In *Cox*, the Supreme Court found that the mandatory provision concerned was impermissibly wide and indiscriminate in so far as it applied to all scheduled offences without distinction as to their gravity. In *Whelan and Lynch*, however, the Supreme Court rejected the appellants’ argument that the mandatory provision concerned was unconstitutional in so far as it prevented the judge from exercising his or her discretion to treat differently, different types of murder case. The unique nature of murder was found to justify treating all cases of murder, irrespective of the degree of moral blameworthiness, in the same way.

1.44 As mandatory sentencing provisions have the potential to infringe the rights of the accused to a greater extent than discretionary sentencing provisions, the Commission observes that the doctrine of constitutional proportionality should be stringently applied to all mandatory sentencing provisions. The doctrine of constitutional proportionality thus requires, first, that the mandatory sentencing provision should be rationally connected to the objective it seeks to achieve and should not be arbitrary, unfair or based on irrational considerations. Second, the mandatory provision should impair the rights of the accused as little as possible. Third, there should be proportionality between the mandatory provision and the right to trial in due course of law and the objective of the legislation.

(b) Sentencing Proportionality

1.45 Proportionality in the context of sentencing operates quite differently from constitutional proportionality. Here, proportionality requires that a sentence be proportionate to the gravity of the offence and (as is generally accepted) the circumstances of the offender.⁶⁹ The Irish courts have reaffirmed this aspect of proportionality on numerous occasions, including, as already discussed, in the leading case on sentencing in Ireland, *The People (Attorney General) v Poyning*.⁷⁰ In *The People (Attorney General) v O’Driscoll*,⁷¹ for instance, the Court of Criminal Appeal stated:

“It is... the duty of the Courts to pass what are the appropriate sentences in each case having regard to the particular circumstances of that case – not only in regard to the particular crime but in regard to the particular criminal.”⁷²

⁶⁸ [2007] IEHC 374, [2008] 2 IR 142; [2010] IESC 34, [2012] 1 IR 1.

⁶⁹ O’Malley *The Criminal Process* (Roundhall, 2009) at paragraph 22.02.

⁷⁰ *The People (Attorney General) v Poyning* [1972] IR 402, discussed at paragraph 1.10ff, above.

⁷¹ *The People (Attorney General) v O’Driscoll* (1972) 1 Frewen 351.

⁷² *Ibid* at 359.

1.46 To the same effect, in *The People (DPP) v Tiernan*,⁷³ the Supreme Court was asked to consider a point of law of exceptional public importance,⁷⁴ namely, the guidelines applicable to sentences for the crime of rape. While the Supreme Court refrained from formulating any such guidelines, Finlay CJ observed that “in every criminal case a judge must impose a sentence which in his opinion meets the particular circumstances of the case and of the accused person before him.”⁷⁵

1.47 In *The People (DPP) v M*,⁷⁶ the Supreme Court considered the severity of sentences imposed for a number of counts of buggery, indecent assault and sexual assault. During the course of its consideration, Denham J indicated that sentences should be proportionate in two respects:

“Firstly, they should be proportionate to the crime. Thus, a grave offence is reflected by a severe sentence...”

However, sentences must also be proportionate to the personal circumstances of the appellant. The essence of the discretionary nature of sentencing is that the personal situation of the appellant must be taken into consideration by the court.”⁷⁷

1.48 There are numerous other examples where this principle is applied by the Irish courts.⁷⁸

1.49 For the purpose of formulating proportionate sentences, the courts have adopted a three-tiered approach by which they first identify the range of applicable penalties. Then they locate where on the range of applicable penalties a particular case should lie and finally, they consider the factors which aggravate and mitigate the sentence.⁷⁹ Thus, in the Supreme Court decision in *The People (DPP) v M*,⁸⁰ Egan J stated:

“It must be remembered also that a reduction in mitigation is not always to be calculated in direct regard to the maximum sentence applicable. One should look first at the range of penalties applicable to the offence and then decide whereabouts on the range the particular case should lie. The mitigating circumstances should then be looked at and an appropriate reduction made.”⁸¹

Egan J considered the following mitigating factors: (i) the appellant’s guilty plea, (ii) the likelihood of him reoffending, (iii) the appellant’s age, and (iv) the possibility of rehabilitation. It is clear that “mitigating circumstances”, in this regard, is a reference to circumstances which would mitigate a sentence rather than circumstances which would mitigate the seriousness of an offence.⁸²

1.50 The Commission notes therefore, that Egan J’s approach involves three inter-related steps:⁸³

⁷³ *The People (DPP) v Tiernan* [1988] IR 251.

⁷⁴ Section 29 of the *Courts of Justice Act 1924*.

⁷⁵ *The People (DPP) v Tiernan* [1988] IR 251 at 253.

⁷⁶ *The People (DPP) v M* [1994] 3 IR 306.

⁷⁷ *Ibid* at 316.

⁷⁸ *The People (DPP) v WC* [1994] 1 ILRM 321; *The People (DPP) v Sheedy* [2000] 2 IR 184; *The People (DPP) v Kelly* [2005] 1 ILRM 19; *The People (DPP) v O’Dwyer* [2005] 3 IR 134; *Pudlizsewski v Judge Coughlan* [2006] IEHC 304; *The People (DPP) v H* [2007] IEHC 335; *The People (DPP) v GK* [2008] IECCA 110; *The People (DPP) v Keane* [2008] 3 IR 177; *The People (DPP) v Harty* Court of Criminal Appeal 19 February 2008; *The People (DPP) v O’C* [2009] IECCA 116; and *The People (DPP) v Woods* [2010] IECCA 118.

⁷⁹ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 89ff.

⁸⁰ *The People (DPP) v M* [1994] 3 IR 306.

⁸¹ *Ibid* at 315.

⁸² See: Law Reform Commission *Report on Sentencing* (LRC 53-1996) at paragraphs 3.5-3.8.

⁸³ *The People (DPP) v Crowe* [2010] 1 IR 129. See also: O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 93. O’Malley cites the 2004 *Guideline of the Sentencing Guidelines Council of*

- (i) Identifying the range of applicable penalties;
- (ii) Locating the particular case on that range; and
- (iii) Applying any factors which mitigate or aggravate the sentence.

Each of these steps will be considered in turn.

(i) Identifying the Range of Applicable Penalties

1.51 To determine the range of penalties applicable to the particular offence, the courts consider whether the Oireachtas has provided any guidance by means of, for instance, a statutory maximum or minimum sentence.⁸⁴ Thus, for example, section 14 of the *Criminal Justice (Theft and Fraud Offences) Act 2001* provides that robbery is subject to a maximum penalty of life imprisonment. As a result, a person convicted of robbery may expect to receive a sentence ranging from zero years to life imprisonment, depending on the circumstances of the case and the offender. The fact that robbery is subject to a maximum sentence of life imprisonment also indicates how seriously robbery should be considered, as does the statutory direction that an accused charged with robbery should be tried on indictment.⁸⁵ It is thus fair to assume that robbery, for which an offender is “liable on conviction on indictment to imprisonment for life”,⁸⁶ is a serious offence.

1.52 For some serious offences, excluding those to which entirely mandatory and mandatory minimum sentences apply, the courts have established points of departure regarding the sentence to be imposed. Thus, in the Supreme Court decision in *The People (DPP) v Tiernan*,⁸⁷ Finlay CJ made the following remark regarding the sentence for rape:

“Whilst in every criminal case a judge must impose a sentence which in his opinion meets the particular circumstances of the case and of the accused person before him, it is not easy to imagine the circumstances which would justify departure from a *substantial immediate custodial* sentence for rape and I can only express the view that they would probably be *wholly exceptional*.”⁸⁸ [emphasis added]

Thus a person convicted of rape would ordinarily expect to receive a substantial custodial sentence save where it is shown that there are “wholly exceptional” circumstances.

1.53 Similarly, in the Court of Criminal Appeal decision in *The People (DPP) v Princs*⁸⁹ regarding the sentence for manslaughter, the Court observed:

“[T]he offence of manslaughter, particularly voluntary manslaughter where an unlawful act of violence is involved, should normally involve a *substantial term of imprisonment* because a person has been killed. Only where there are special circumstances and context will a moderate sentence or in wholly exceptional circumstances, a non-custodial sentence, be warranted. Those circumstances are more likely to arise in cases [of] involuntary manslaughter... .” (emphasis added)

Thus a person convicted of manslaughter would ordinarily expect to receive a substantial custodial sentence save where “special circumstances” would justify a moderate sentence or “wholly exceptional circumstances” would justify a non-custodial sentence.

England and Wales on Seriousness and the decision of the English Court of Appeal in *R v Howells* [1999] 1 WLR 307.

⁸⁴ *The People (DPP) v Maguire* [2008] IECCA 56; *The People (DPP) v O’C* [2009] IECCA 116; and *The People (DPP) v Halligan* Court of Criminal Appeal 15 February 2010.

⁸⁵ *The People (DPP) v Loving* [2006] IECCA 28.

⁸⁶ Section 14 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

⁸⁷ *The People (DPP) v Tiernan* [1988] IR 251.

⁸⁸ *Ibid* at 253.

⁸⁹ *The People (DPP) v Princs* [2007] IECCA 142.

1.54 In considering the range of penalties applicable in manslaughter cases, the Court of Criminal Appeal has, on occasion, had regard to statistical information concerning sentences previously imposed for this offence.⁹⁰ In *The People (DPP) v Kelly*,⁹¹ the Director of Public Prosecutions provided the Court with two lists detailing 50 recent sentences specified on foot of pleas to, or convictions for, manslaughter. The Court confirmed that “a trial judge is entitled to request information of this sort and we are glad to have it”.⁹² It also emphasised, however, that such statistical information “is of limited value because it does not give information on the individual crimes or what aggravating or mitigating factors there may have been in any case.”⁹³ The Court further noted that these particular lists related only to cases tried in the Central Criminal Court and, as such, concerned instances where the accused was originally charged with murder and either a plea to manslaughter was accepted by the Director of Public Prosecutions or the accused was acquitted of murder but convicted of manslaughter. The Court acknowledged, therefore, that the statistics supplied were not “a guide to the practice in the Circuit Court where it may be that the manslaughter cases are of a less aggravated kind.”⁹⁴ This statistical information was also taken into account by the Court of Criminal Appeal in *The People (DPP) v Colclough*.⁹⁵

1.55 In *The People (DPP) v Murray*,⁹⁶ the Court of Criminal Appeal considered an appeal against the severity of a sentence of 12 and a half years’ imprisonment for 25 counts of social welfare fraud. Observing that social welfare fraud should not be considered a victimless crime, the Court stated:

“Quite the contrary: offences of this kind strike at the heart of the principles of equity, equality of treatment and social solidarity on which the entire edifice of the taxation and social security systems lean. This is especially so at a time of emergency so far as the public finances are concerned.”

1.56 Emphasising the particular importance of maintaining social solidarity through deterrent measures, the Court indicated that:

“We therefore suggest for the future guidance of sentencing courts that significant and systematic frauds directed upon the public revenue - whether illegal tax evasion on the one hand or social security fraud on the other - should generally meet with *an immediate and appreciable custodial sentence*, although naturally the sentence to be imposed in any given case must have appropriate regard to the individual circumstances of each accused.” (emphasis added)

1.57 Noting, however, that the sentence of 12 years’ imprisonment for the particular offences would infringe the totality principle,⁹⁷ the Court substituted a sentence of 9 years’ imprisonment with the final year suspended. Nevertheless, the message of the Court of Criminal Appeal is clear in so far as it states that a person convicted of an offence against the public purse, in the current economic climate at least, may expect to receive “an immediate and appreciable custodial sentence”.

⁹⁰ For further discussion, see: Lynch “Analysis of Manslaughter Sentencing 2007 - 2012” (Judicial Researchers’ Office, 2013) at 9ff. Available at: www.irishsentencing.ie/en/ISIS/Pages/WP09000222 [Last accessed: 22 May 2013].

⁹¹ *The People (DPP) v Kelly* [2005] IR 321.

⁹² *Ibid* at 331.

⁹³ *Ibid*.

⁹⁴ *Ibid*.

⁹⁵ *The People (DPP) v Colclough* [2010] IECCA 15.

⁹⁶ *The People (DPP) v Murray* [2012] IECCA 60.

⁹⁷ In *The People (DPP) v McGrath* [2008] IECCA 27, for example, the Court of Criminal Appeal stated that the totality test requires the sentencing court, when imposing consecutive sentences for individual offences, to consider whether, overall, the sentences are proportionate in their totality.

1.58 In general, however, the courts have emphasised that they should not constrain their discretion in sentencing by following a fixed policy where none has been prescribed by law. In *The People (DPP) v WC*,⁹⁸ the Central Criminal Court indicated that:

“It is not open to a judge in a criminal case when imposing sentence, whether for a particular type of offence, or in respect of a particular class of offender, to fetter the exercise of his judicial discretion through the operation of a fixed policy, or to otherwise pre-determine the issue.”⁹⁹

1.59 Thus, in *The People (DPP) v Kelly*,¹⁰⁰ where the trial judge had indicated that on the basis of a policy of deterrence he would impose a sentence of 20 years’ imprisonment in cases involving death and serious injury caused by the use of knives, the Court of Criminal Appeal found that he had erred in principle.¹⁰¹

1.60 In some cases, the courts have gone further than establishing points of departure by formulating the ranges of penalties applicable to various combinations of facts. In *The People (DPP) v WD*,¹⁰² for instance, the Central Criminal Court considered cases of rape over a three-year period in which lenient, ordinary, severe and condign punishments had been imposed.¹⁰³

1.61 In the category of lenient punishments, the Court considered cases in which a suspended sentence had been imposed.¹⁰⁴ It noted that a suspended sentence could only be contemplated where the circumstances of the case were “so completely exceptional as to allow the court to approach sentencing for an offence of rape in a way that deviates so completely from the norm established by law.”¹⁰⁵

1.62 In the category of ordinary punishments, the Court considered cases in which a sentence range of three to 8 years had been applied.¹⁰⁶ It noted that a sentence at the upper end of the scale, a sentence of 8 years or more, for which the courts took into account aggravating factors, could be imposed even on a plea of guilty. An offender could expect a sentence at the upper end of the scale where there had been “a worse than usual effect on the victim, where particular violence has been used or where there are relevant previous convictions, such as convictions for violence of some kind.”¹⁰⁷ An offender could expect a sentence of five years’ imprisonment where he or she had pleaded “guilty to rape in circumstances which involve no additional gratuitous humiliation or violence beyond those ordinarily involved in the offence,”¹⁰⁸ whereas he or she could expect a sentence of six or 7 years’ imprisonment where there was no early admission, remorse or early guilty plea.¹⁰⁹

1.63 In the category of severe punishments, the Court considered cases in which a sentence range of 9 to 14 years’ imprisonment had been applied.¹¹⁰ The Court observed that five of the cases involved

⁹⁸ *The People (DPP) v WC* [1994] 1 ILRM 321.

⁹⁹ *Ibid* at 325.

¹⁰⁰ *The People (DPP) v Kelly* [2005] 1 ILRM 18.

¹⁰¹ *Ibid* at 22. See also: *The People (DPP) v Dillon* Court of Criminal Appeal 17 December 2003; *Pudliszewski v Judge Coughlan* [2006] IEHC 304; and *Dunne v Judge Coughlan* High Court 25 April 2005.

¹⁰² *The People (DPP) v WD* [2008] 1 IR 308.

¹⁰³ *Ibid* at 330.

¹⁰⁴ *Ibid* at 319.

¹⁰⁵ *Ibid*.

¹⁰⁶ *Ibid* at 324.

¹⁰⁷ *Ibid*.

¹⁰⁸ *Ibid*.

¹⁰⁹ *Ibid*.

¹¹⁰ *Ibid* at 327.

individual offences of a single count of rape; 9 involved a single attack that generated more than one conviction; and four involved multiple counts.¹¹¹ It noted that previous convictions for a sexual offence were an aggravating factor which would normally result in the imposition of a severe sentence.¹¹² A sentence of 10 or 11 years' imprisonment was unusual, even after a plea of not guilty, unless there were circumstances of unusual violence or premeditation.¹¹³ A sentence range of 9 to 14 years' imprisonment was more likely where the degree to which the offender chose to violate and humiliate the victim warranted it.¹¹⁴

1.64 In the category of condign punishments,¹¹⁵ the Court considered cases in which a sentence range of 15 years' imprisonment to life imprisonment had been imposed.¹¹⁶ The Court observed that 9 involved a single incident that lasted for a considerable number of hours; two involved gang rape; and 11 involved multiple incidents or multiple victims or both.¹¹⁷ It noted that factors such as the nature of the victim (being very young or very old), the effect of the attack and the especial nature of the violence or degradation were characteristic of sentences within this most serious category.¹¹⁸ A life sentence had been imposed where there had been a need to protect the community and where very serious, vicious and degrading sexual crimes had been committed against a victim over a period of years.¹¹⁹ An abuse of trust¹²⁰ and the pursuit of a campaign of rape against prostitutes,¹²¹ for instance, were also seen as aggravating factors.

1.65 In *The People (DPP) v H*,¹²² the Court of Criminal Appeal considered the more significant cases in which lenient, ordinary and serious sentences had been imposed for sexual offences which had been committed between 10 and 40 years before prosecution.

1.66 In *The People (DPP) v Pakur Pakurian*,¹²³ the Court of Criminal Appeal considered the range of punishments that might apply to robbery:

“...[I]n a very well planned commercial robbery one might be looking at eighteen years for the most culpable people, or twelve years for those less culpable, and one might also find that there are cases where because of the particular circumstances such as a mugging which was caused by heroin addiction which has been cured or where the person has entered rehabilitation, or matters of those nature, that the sentence might be significantly less than the seven years sentence, even perhaps a suspended sentence. But in between one finds a range of sentences and the Court is sure there are even ones of more than eighteen years, but a range of sentences which are appropriate.”¹²⁴

¹¹¹ *The People (DPP) v WD* [2008] 1 IR 308 at 324.

¹¹² *Ibid* at 326.

¹¹³ *Ibid*.

¹¹⁴ *Ibid* at 327.

¹¹⁵ The *New Oxford Dictionary of English* (Oxford University Press, 2001) at 383 defines “condign” as: “(of punishment or retribution) appropriate to the crime or wrongdoing; fitting and deserved.”

¹¹⁶ *The People (DPP) v WD* [2008] 1 IR 308 at 319.

¹¹⁷ *Ibid* at 327.

¹¹⁸ *Ibid* at 328.

¹¹⁹ *Ibid* at 329.

¹²⁰ *Ibid* at 330.

¹²¹ *Ibid*.

¹²² *The People (DPP) v H* [2007] IEHC 335.

¹²³ *The People (DPP) v Pakur Pakurian* [2010] IECCA 48.

¹²⁴ *Ibid*.

Thus, depending on the presence of various factors, a person convicted of robbery might expect to receive a sentence in one of the ranges outlined above up to the statutory maximum sentence of life imprisonment.¹²⁵

1.67 The Commission notes that these decisions support the view that it is appropriate that certain offences at the highest end of the scale of gravity should attract an immediate, substantial custodial sentence, save in exceptional circumstances.

(ii) Locating the Particular Case on the Range of Applicable Penalties: culpability, harm caused and offender behaviour

1.68 Having identified the range of applicable penalties, the courts must then locate the particular case on that range. In order to do this, the courts must first determine the seriousness or gravity of the particular case. In *The People (DPP) v GK*,¹²⁶ the Court of Criminal Appeal attempted to identify the factors that must be considered in order to assess the gravity of a particular case:

“Having regard to the jurisprudence of this Court and of the Supreme Court the matters which determine the gravity of a particular offence are the *culpability of the offender*, the *harm caused* and the *behaviour of the offender* in relation to the particular offence.”¹²⁷ [emphasis added]

(I) Culpability

1.69 Regarding *culpability*, it is useful to have regard to the nature of the mental element or *mens rea* which the offender is found, or appears, to have had when committing the offence:¹²⁸

“Intention to cause harm clearly represents the highest level of culpability and the more harm intended, the greater the blameworthiness. Recklessness, in the sense of a conscious disregard of an unjustifiable risk, comes next, and again the greater and more dangerous the risk, the greater the culpability. Negligence would rank as the lowest form of culpability, which is not to say that it should be met with impunity if it has produced serious harm.”¹²⁹

Thus, on a scale of culpability, intention ranks highest, negligence ranks lowest and recklessness ranks somewhere in between.

1.70 In *The People (DPP) v O’Dwyer*,¹³⁰ for example, which concerned careless driving, the Court of Criminal Appeal made the following observation regarding culpability:

“The concept of careless driving covers a wide spectrum of culpability ranging from the less serious to the more serious. It covers a mere momentary inattention, a more obvious carelessness, a more positive carelessness, bad cases of very careless driving falling below the standard of the reasonably competent driver and cases of repeat offending. However, since even a mere momentary inattention in the driving of a mechanically propelled vehicle can give rise to a

¹²⁵ Section 14 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

¹²⁶ *The People (DPP) v GK* [2008] IECCA 110.

¹²⁷ *Ibid.* See: the Court of Criminal Appeal decision in *The People (DPP) v Keane* [2008] 3 IR 177 at 195, which concerned the sentence for rape, in which Murray CJ indicated that: “[t]he law obliges [the sentencing judge] to have regard to all the salient features of the circumstances in which the offence was committed, the nature of the offence and its *impact on the victim and society* so as to evaluate its gravity. The sentencing judge is also obliged to have regard to the particular individual who must be sentenced, his or her personal history and circumstances so that a punishment which is proportionate and just may be imposed.” (emphasis added)

¹²⁸ O’Malley *Sentencing - Towards a Coherent System* (Round Hall, 2011) at 194; and O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 92.

¹²⁹ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 92.

¹³⁰ *The People (DPP) v O’Dwyer* [2005] 3 IR 134.

wholly unexpected death, the court has always to define the degree of carelessness and therefore culpability of the driving.”¹³¹

Thus, for any given offence, the sentencing court must look at the particular circumstances of the case (and the offender) to determine the level of culpability.

1.71 In the same case, the Court considered whether the fact that a death had occurred as a result of the careless driving could be considered an aggravating factor. In this regard, it distinguished between cases in which death had been an unfortunate consequence and cases in which there had been a high risk of death:

“[T]here is a world of difference between a mere momentary inattention in the driving of a mechanical (*sic*) propelled vehicle, which unexpectedly and tragically causes a loss of a life, and grossly careless driving, which, though still short of dangerous driving, hardly surprisingly results in a fatal collision. A rigid adherence in sentencing to an approach which excludes any reference to the death in itself as an aggravating factor, despite the many and various differences in the degrees of careless driving, would not be proportionate.

While the fact of death occurring may be a separate factor in itself, it should not be so in every case where there is a death. The occasions on which it becomes a factor must depend upon the finding of the court on the primary issue of the degree of carelessness and therefore of the culpability of driving.”¹³²

In the particular circumstances of the case, where the primary issue of carelessness revolved around the fact that the applicant had driven with bald tyres, the Court found that it would be disproportionate to regard the death as an aggravating factor in itself. Nevertheless, this case clearly highlights the close connection between: (a) the culpability of the offender, and (b) the harm caused (which will be considered in the next section) in determining the seriousness of the offence.

(II) Harm

1.72 Regarding *harm*, the greater the harm caused, the more serious the offence is likely to be considered.¹³³ However, harm alone would be an unreliable indicator of seriousness.¹³⁴ An offender might cause more harm than he or she intended or, through some form of diminished capacity, might not have fully appreciated the likely consequences of his or her actions. Equally, a person might cause less harm than he or she intended or risked. It has thus been asserted that the test should be the harm that the offender *intended* to cause or *risked* causing where the harm is a reasonably foreseeable consequence.¹³⁵ Thus, as noted at paragraph 1.71, “harm and culpability are inextricably linked”.¹³⁶

1.73 In *The People (DPP) v WD*,¹³⁷ the Central Criminal Court considered the harm caused by a rape in terms of its effect on the victim (which was “somewhat worse than is usual”) in concluding that a sentence at the upper end of the normal range would be appropriate:¹³⁸

“[T]he victim impact statement indicates that the victim had difficulty sleeping at first and suffered panic attacks. Her concentration went as to her studies and she began to panic about all

¹³¹ *The People (DPP) v O'Dwyer* [2005] 3 IR 134 at 148.

¹³² *Ibid* at 152.

¹³³ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 92.

¹³⁴ O'Malley *Sentencing - Towards a Coherent System* (Round Hall, 2011) at 194.

¹³⁵ *Ibid*; and O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 92. See also: *The People (DPP) v Dwyer* [2005] 3 IR 134; and the 2004 *Sentencing Guideline of the Sentencing Guidelines Council of England and Wales on Seriousness*.

¹³⁶ O'Malley *Sentencing - Towards a Coherent System* (Round Hall, 2011) at 194.

¹³⁷ *The People (DPP) v WD* [2008] 1 IR 308.

¹³⁸ *Ibid* at 334.

matters. She lost interest in study and almost dropped out and left her part time job. She suffered a big character change from being outgoing into being closed with family and friends. Now she is uncomfortable in the presence of men and wary while out particularly at night and looking over her shoulder.”¹³⁹

1.74 In *The People (DPP) v GK*,¹⁴⁰ the Court of Criminal Appeal referred to the “serious harm” done to the victim in concluding that the particular aggravated sexual assault lay in “the mid to upper range of seriousness on the scale of gravity of such assaults”:

“Though the victim did not receive any psychological or psychiatric treatment, it is clear from the Victim Impact Statement that the effect of this sexual assault on her was very grave. She was unable to work for four weeks. The cost of treatment to her damaged teeth is €2,900. Her enjoyment of life has been permanently impaired in that her sense of security in society has been lost and she has become overcautious in moving about during daylight hours and is afraid to go out at night unaccompanied. This is a very great imposition in the case of a single lady of twenty five years of age.”

1.75 There are a number of general propositions that may be of assistance in determining the extent of the harm caused in a particular case.¹⁴¹ On any hierarchy of protected rights and interests, life and bodily integrity should rank highest. In addition, personal dignity and autonomy are increasingly recognised as important interests that merit strong legal protection. Similarly, personal liberty should also rank highly.¹⁴² While private property ordinarily ranks next after life, liberty and bodily integrity, for sentencing purposes the important question is not whether the law should protect private property as an institution, but rather the degree of hardship or harm caused by the offence. In other words, the seriousness of a property offence should not be assessed solely by reference to the amount taken but also by reference to the suffering or hardship which the offence caused to the victim. Serious offences involving the violation of fundamental rights may carry a broad presumption in favour of a custodial sentence, but no more than that as mitigating factors may justify the imposition of a more lenient sentence.¹⁴³

(III) Offender Behaviour

1.76 Regarding *offender behaviour*, an offence will be considered more serious where there are aggravating factors arising from the offender’s behaviour when committing the offence.¹⁴⁴ These include the use of a weapon (and the more dangerous the weapon, the more serious the factor);¹⁴⁵ the deliberate procurement of a weapon to commit the offence;¹⁴⁶ the targeting of vulnerable victims;¹⁴⁷ intrusion into a victim’s home;¹⁴⁸ premeditation and planning;¹⁴⁹ participation in a criminal gang;¹⁵⁰ abuse of trust or

¹³⁹ *The People (DPP) v WD* [2008] 1 IR 308 at 334.

¹⁴⁰ *The People (DPP) v GK* [2008] IECCA 110.

¹⁴¹ O’Malley *Sentencing - Towards a Coherent System* (Round Hall, 2011) at 195.

¹⁴² *Ibid* at 196.

¹⁴³ *Ibid* at 194. See: *R v Cox* [1993] 1 WLR 188.

¹⁴⁴ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 92. See generally: *The People (DPP) v WD* [2008] 1 IR 308.

¹⁴⁵ *The People (DPP) v Black* [2010] IECCA 91; *The People (DPP) v Kelly* [2005] 1 ILRM 19; *The People (DPP) v Princs* [2007] IECCA 142; *The People (DPP) v Maguire* [2008] IECCA 56; and *The People (DPP) v Dillon* Court of Criminal Appeal 17 December 2003.

¹⁴⁶ *The People (DPP) v Black* [2010] IECCA 91; *The People (DPP) v Kelly* [2005] 1 ILRM 19; *The People (DPP) v Princs* [2007] IECCA 142; and *The People (DPP) v Maguire* [2008] IECCA 56.

¹⁴⁷ *The People (DPP) v GK* [2008] IECCA 110; *The People (DPP) v Keane* [2008] 3 IR 177; and *The People (DPP) v WD* [2008] 1 IR 308.

¹⁴⁸ *The People (DPP) v Keane* [2008] 3 IR 177.

power;¹⁵¹ infliction of deliberate and gratuitous violence or degradation over and above that needed to commit the offence;¹⁵² commission of the offence for profit or other personal gain; or evidence of hostility towards the victim on racial, religious or other grounds.

1.77 Thus, for example, in *The People (DPP) v Tiernan*¹⁵³ (a case concerning sentencing for rape) the Supreme Court identified the following aggravating factors:

- “(1) It was a gang rape, having been carried out by three men.
- (2) The victim was raped on more than one occasion.
- (3) The rape was accompanied by acts of sexual perversion.
- (4) Violence was used on the victim in addition to the sexual acts committed against her.
- (5) The rape was performed by an act of abduction in that the victim was forcibly removed from a car where she was in company with her boyfriend, and her boyfriend was imprisoned by being forcibly detained in the boot of the car so as to prevent him assisting her in defending herself.
- (6) It was established that as a consequence of the physical trauma involved in the rape the victim suffered from a serious nervous disorder which lasted for at least six months and rendered her for that period unfit to work.
- (7) The appellant had four previous convictions, being:-
 - (a) for assault occasioning actual bodily harm,
 - (b) for aggravated burglary associated with a wounding,
 - (c) for gross indecency, and
 - (d) for burglary.

Of this criminal record, particularly relevant as an aggravating circumstance to a conviction for rape are the crimes involving violence and the crime involving indecency.”¹⁵⁴

In light of these factors, the Supreme Court concluded that this was a particularly serious case of rape.

1.78 This approach was applied by the Court of Criminal Appeal in *The People (DPP) v Roseberry Construction Ltd and McIntyre*,¹⁵⁵ in which the first defendant was a building company and the second defendant was its managing director. The defendants pleaded guilty to charges under the *Safety, Health and Welfare at Work Act 1989* (since replaced by the *Safety, Health and Welfare at Work Act 2005*) related to the death of two persons on the building site for which the company had overall responsibility as main contractor. The defendant company was fined €254,000 (£200,000) for failure to have a safety statement under section 12 of the 1989 Act (since replaced by section 20 of the 2005 Act) and the managing director was fined €50,800 (£40,000) for managerial neglect under section 48(19) of the 1989 Act (since replaced by section 80(1) of the 2005 Act).

1.79 The company appealed against the severity of the fines imposed on it, but the Court of Criminal Appeal dismissed the appeal. The Court applied the general sentencing principle set out in *The People (DPP) v Redmond*¹⁵⁶ that a fine is neither lenient nor harsh in itself but only in regard to the circumstances

¹⁴⁹ *The People (DPP) v GK* [2008] IECCA 110; and *The People (DPP) v Maguire* [2008] IECCA 56.

¹⁵⁰ *The People (DPP) v Tiernan* [1988] IR 250; and *The People (DPP) v Maguire* [2008] IECCA 56.

¹⁵¹ *The People (DPP) v M* [1994] 3 IR 306.

¹⁵² *The People (DPP) v Tiernan* [1988] IR 250; and *The People (DPP) v WD* [2008] 1 IR 308.

¹⁵³ *The People (DPP) v Tiernan* [1988] IR 250.

¹⁵⁴ *Ibid* at 253-254.

¹⁵⁵ *The People (DPP) v Roseberry Construction Ltd and McIntyre* [2003] 4 IR 338.

¹⁵⁶ *The People (DPP) v Redmond* [2001] 3 IR 390.

of the person who must pay it. In this case, the Court noted that the somewhat unusual approach had been taken of stating that the company could pay the fine (it was not going to drive it out of business or anything of that sort) without giving any indication of the level of business which the company conducted. The information which the Court had was the same as the trial judge, namely that it was a medium to large company and that at the time of the fatality it was conducting the building of 90 houses at the building site. The Court concluded that the company “was a substantial, relatively complex and profitable enterprise.”

1.80 The Court of Criminal Appeal then went on to consider the detailed principles it should apply. It approved of the list of aggravating and mitigating factors set out by the English Court of Appeal in *R v F Howe & Son (Engineers) Ltd*,¹⁵⁷ to be taken into account in considering the level of fines to be imposed in prosecutions under the equivalent British *Health and Safety at Work Act 1974*.¹⁵⁸ The aggravating factors included: death resulting from a breach of the Act or Regulations; failure to heed warnings; and risks run specifically to save money.¹⁵⁹ The mitigating factors included: prompt admission of responsibility and a timely plea of guilty; steps to remedy the deficiencies; and a good safety record.¹⁶⁰

1.81 The Court in *Roseberry* also quoted the following comment of the English Court of Appeal in the *Howe* case:¹⁶¹

“Next it is often a matter of chance that death or serious injury results from even a serious breach. Generally where death is the consequence of a criminal act it is regarded as an aggravating feature of the offence, the penalty should reflect public disquiet at the unnecessary loss of life.”¹⁶²

1.82 The Court in the *Roseberry* case commented that what had occurred at the building site “undoubtedly was an unnecessary loss of life.” The Court also rejected the suggestion that the company could in any substantial way mitigate its liability by saying, in effect, “[w]ell the sub-contractor and not myself and not my company, was directly in charge of digging the trench where the fatality occurred.” On this aspect, the Court concluded that it was “perfectly plain... that control of the site had been retained by *Roseberry Construction Ltd*.” The Court added that its failure to have a Safety Statement and the other failures significantly contributed to what occurred; if the Safety Statement had been prepared, the risk would have been formally considered and no doubt something done about it. The Court added:

“It was the failure of any party to take the simple remedial measures that gave rise to the substantial legal and moral guilt which must be regarded as attaching in the circumstances of this case.”¹⁶³

1.83 On this basis, the Court concluded that there had been no error in the fine which had been imposed in the Circuit Criminal Court and that, since the defendant was a successful company, the penalty was not excessive in the circumstances. A significant feature of the decision in the *Roseberry* case was the reference to the specific aggravating and mitigating factors identified in the English *Howe* case.

1.84 Similarly, in *The People (DPP) v Loving*,¹⁶⁴ a child pornography case, the Court of Criminal Appeal referred approvingly to the categorisation of child pornography by the English Court of Appeal in *R*

¹⁵⁷ *R v F Howe & Son (Engineers) Ltd* [1999] 2 All ER 249.

¹⁵⁸ The comparable legislation in Northern Ireland is the *Health and Safety at Work (Northern Ireland) Order 1978*.

¹⁵⁹ *The People (DPP) v Roseberry Construction Ltd and McIntyre* [2003] 4 IR 338 at 340.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *R v F Howe & Son (Engineers) Ltd* [1999] 2 All ER 249 at 254.

¹⁶³ *The People (DPP) v Roseberry Construction Ltd and McIntyre* [2003] 4 IR 338 at 342.

¹⁶⁴ *The People (DPP) v Loving* [2006] 3 IR 355.

v Oliver.¹⁶⁵ In that case, the court suggested the following graduated levels of seriousness in respect of images of child pornography:

1. Images depicting erotic posing with no sexual activity;
2. Sexual activity between children solo or masturbation as a child;
3. Non-penetrative sexual activity between adults and children;
4. Penetrative sexual activity between children and adults;
5. Sadism or bestiality.¹⁶⁶

1.85 The Court in *Loving* also cited with approval the following comments of Rose LJ in the *Oliver* case,¹⁶⁷ where he suggested the following elements as being relevant to the offender's proximity to, and responsibility for, the original abuse:

"Any element of commercial gain will place an offence at a high level of seriousness. In our judgment, swapping of images can properly be regarded as a commercial activity, albeit without financial gain, because it fuels demand for such material. Wide-scale distribution, even without financial profit, is intrinsically more harmful than a transaction limited to two or three individuals, both by reference to the potential use of the images by active paedophiles and by reference to the shame and degradation to the original victims.

Merely locating an image on the internet will generally be less serious than down-loading it. Down-loading will generally be less serious than taking an original film or photograph of indecent posing or activity ..."¹⁶⁸

These examples indicate the influence of developments in other jurisdictions concerning sentencing principles and the appropriate grading of sentences within an offence.

1.86 In its *1996 Report on Sentencing*,¹⁶⁹ the Commission identified a number of factors which would aggravate the seriousness of an offence:¹⁷⁰

"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;

¹⁶⁵ *R v Oliver* (2003) 1 Cr App R 28.

¹⁶⁶ *The People (DPP) v Loving* [2006] 3 IR 355 at 362.

¹⁶⁷ *Ibid.*

¹⁶⁸ *R v Oliver* (2003) 1 Cr App R 28 at 467.

¹⁶⁹ Law Reform Commission *Report on Sentencing* (LRC 53-1996) at Chapter 3.

¹⁷⁰ *Ibid* at paragraph 3.2.

- (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.”

1.87 The Commission also identified a number of factors which would mitigate the seriousness of an offence:¹⁷¹

“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.”

1.88 The Commission is of the view that it would be useful to set out the factors which aggravate and mitigate the seriousness of an offence for the purposes of any arrangements that may be put in place to develop sentencing guidance and guidelines, such as those discussed in more detail below in this Chapter.

(iii) Applying any Factors which Aggravate or Mitigate the Severity of a Sentence

1.89 The factors which aggravate or mitigate the severity of a sentence, as opposed to the seriousness of an offence, are those factors which are likely to affect an otherwise proportionate sentence. In its *1996 Report on Sentencing*,¹⁷² the Commission explained, and underlined the importance of, the distinction:

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

¹⁷¹ Law Reform Commission *Report on Sentencing* (LRC 53-1996) at paragraph 3.2.

¹⁷² Law Reform Commission *Report on Sentencing* (LRC 53-1996) at Chapter 3.

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

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

If there is confusion between the two types of factors a problem arises. If the confused sentencer takes factors which mitigate sentence into account at the 'determination of seriousness' stage then the offender will be found to be less responsible or blameworthy than he or she actually is and the sentence may well give rise to controversy.¹⁷³

1.90 The Commission identified four factors which would ordinarily mitigate the severity of a sentence:

- "1. The offender has pleaded guilty to the offence;
2. The offender has assisted in the investigation of the offence or in the investigation of other offences;
3. The offender has attempted to remedy the harmful consequences of the offence;
4. The sentence, whether by reason of severe personal injury suffered by the offender in consequence of the offence, age, ill-health, or otherwise, would result in manifest hardship or injustice to the offender or his or her dependents."¹⁷⁴

To this list could be added factors such as "previous good character" and "the possibility of rehabilitation".

1.91 The Oireachtas has provided limited guidance regarding the effect of a guilty plea and cooperation with law enforcement authorities. Section 29 of the *Criminal Justice Act 1999* provides that the courts may take a guilty plea into account when sentencing. In this regard, the courts should consider: (a) the stage at which the person indicated an intention to plead guilty, and (b) the circumstances in which this indication was given. Notwithstanding a guilty plea, however, the courts may, in exceptional circumstances, impose the maximum sentence prescribed by law. In Chapter 4, the Commission will consider in greater detail the provisions of the *Misuse of Drugs Act 1977* and the *Firearms Acts* which provide that the courts may have regard to: (i) whether the person pleaded guilty, and (ii) whether the person materially assisted in the investigation of the offence in determining whether to impose a presumptive minimum sentence.

1.92 The courts have provided more detailed guidance regarding the factors which mitigate the severity of a sentence. In *The People (DPP) v Tiernan*,¹⁷⁵ for instance, the Supreme Court indicated that the stage at which a *plea of guilty* was entered was a relevant consideration:

"[I]n the case of rape an admission of guilt made at an early stage in the investigation of the crime which is followed by a subsequent plea of guilty can be a significant mitigating factor. I emphasise the admission of guilt at an early stage because if that is followed with a plea of guilty it necessarily makes it possible for the unfortunate victim to have early assurance that she will not

¹⁷³ *Ibid* at paragraphs 3.5-3.8

¹⁷⁴ *Ibid* at paragraph 3.17.

¹⁷⁵ *The People (DPP) v Tiernan* [1988] IR 250.

be put through the additional suffering of having to describe in detail her rape and face the ordeal of cross-examination.”¹⁷⁶

1.93 In the English case *R v King*,¹⁷⁷ Lord Lane CJ indicated that the extent to which *cooperation with law enforcement authorities* may mitigate the severity of a sentence will depend on a number of factors:

“The quality and quantity of the material disclosed by the informer is one of the things to be considered, as well as the accuracy and the willingness or otherwise of the informer to give evidence against them in due course if required by the court. Another aspect to consider is the degree to which he has put himself and his family at risk by reason of the information he has given; in other words the risk of reprisal. No doubt there will be other matters as well. The reason behind this practice is expediency.”¹⁷⁸

1.94 The extent to which an *attempt to remedy the harmful consequences of an offence* may mitigate the severity of a sentence will also depend on the circumstances of the case.¹⁷⁹ In *The People (DPP) v Princs*,¹⁸⁰ a case concerning the sentence for manslaughter, it was argued in mitigation of the sentence that the respondent had attempted to save the deceased by stemming the flow of blood with towels or bandages. The Court of Criminal Appeal indicated that this merited limited credit as the respondent “never called for outside medical assistance even though he told the Gardaí that the deceased was alive after the stabbing for ten or fifteen minutes.”

1.95 In the same case, the Court of Criminal Appeal indicated that the trial judge had been right to taken into account the fact that *imprisonment would be particularly difficult* for the offender, who was a foreign national.¹⁸¹ Similarly, in *The People (DPP) v H*,¹⁸² a case concerning the sentence for sexual offences which had been committed 30 years before, the Court of Criminal Appeal indicated:

“The age and health of the offender should be looked at. If the offender is so elderly, or so unwell, then prison will be a special burden to bear, the sentence should reflect how a particular term may punish him as much [as] a longer term for a younger offender in reasonable health.”

1.96 In *The People (DPP) v GK*,¹⁸³ the Court of Criminal Appeal distinguished between the effect of “*previous good character*” and the effect of previous convictions:

“This court is satisfied that while previous good character is relevant to the character and circumstances of the accused which may be mitigating factors in terms of sentence previous convictions are relevant not in relation to mitigation of sentence but in aggravation of offence.”

1.97 In *The People (DPP) v Kelly*,¹⁸⁴ a case concerning the sentence for manslaughter, the Court of Criminal Appeal indicated that it would have to “give considerable weight to the absence of previous convictions.”¹⁸⁵ However, in *The People (DPP) v Duffy*,¹⁸⁶ the Central Criminal Court emphasised that the weight to be attached to an absence of previous convictions, and to other potential mitigating factors,

¹⁷⁶ *The People (DPP) v Tiernan* [1988] IR 250 at 255.

¹⁷⁷ *R v King* (1986) 82 Cr App R 120. See: O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 129.

¹⁷⁸ *R v King* (1986) 82 Cr App R 120 at 122.

¹⁷⁹ See: O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 6-33.

¹⁸⁰ *The People (DPP) v Princs* [2007] IECCA 142.

¹⁸¹ *Ibid.* See: O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 129-131.

¹⁸² *The People (DPP) v H* [2007] IEHC 335.

¹⁸³ *The People (DPP) v GK* [2008] IECCA 110.

¹⁸⁴ *The People (DPP) v Kelly* [2005] 1 ILRM 19.

¹⁸⁵ *The People (DPP) v Kelly* [2005] 1 ILRM 19 at 33.

¹⁸⁶ *The People (DPP) v Duffy* [2009] 3 IR 613.

must relate not only to the person convicted but to the offence at issue. Thus, McKechnie J observed that in the context of competition law infringements arising from the operation of a price cartel, an absence of previous convictions would “in general have less weight because of the type of individual likely to be involved and the type of conduct maintained.”¹⁸⁷ In more specific terms, the Court explained that the “generally pernicious nature [of these offences], the fact that the perpetrators knew that their conduct was illegal, and the level of detailed planning and concealment involved in both the network and the activity” meant that an absence of previous convictions would be “of limited application”.¹⁸⁸

1.98 Regarding the *possibility of rehabilitation*, the Supreme Court in *The People (DPP) v M*¹⁸⁹ stated:

“As was stated in the judgments of the Court of Criminal Appeal... an essential ingredient for consideration in the sentencing of a person upon conviction, in any case in which it is reasonably possible is the chance of rehabilitating such person so as to re-enter society after a period of imprisonment...”¹⁹⁰

Having regard to the accused’s age, the stage at which he would re-enter society, the age he would be at that time and the period of life remaining to him, the Court thus concluded that an overall sentence of 18 years’ imprisonment should be reduced to 12 years’ imprisonment.

(3) Discussion

1.99 It is thus clear that in addition to the aims of sentencing, criminal sanctions and sentencing are also framed by the justice principles of consistency and proportionality. It is also clear that the courts have been striving to improve consistency in sentencing by formulating general guidance regarding: (i) points of departure for certain serious offences such as manslaughter (*Princs*), rape (*Tiernan*) and social welfare fraud (*Murray*); (ii) sentencing ranges for offences such as rape (*WD*), sexual offences (*H*) and robbery (*Pakur Pakurian*); (iii) the factors relevant to the determination of the seriousness of an offence (*GK*); and (iv) the factors that are likely to aggravate or mitigate the seriousness of an offence and the severity of a sentence. This is a significant development because, as noted at paragraph 1.32, a consistent approach to sentencing is necessary to ensure that a sentence that is proportionate to the circumstances of the particular offence and the particular offender is imposed in all cases.

1.100 On the basis of this analysis, the Commission considers that a principles-based sentencing system which reflects the importance of consistency and proportionality would lead to sentencing outcomes in which: (1) the most severe sanctions, including lengthy prison sentences, are reserved for the most serious crimes; (2) less severe sanctions, including medium range prison sentences, are reserved for less serious crimes; and (3) the least severe sanctions including fines, probation orders and community service orders are reserved for the least serious crimes.

1.101 In the next Part of this Chapter, the Commission notes, however, that the current Irish sentencing system does not always, in practice, lead to the sentencing outcomes that might be expected in light of the described principles-based approach.

E Towards a Principles-Based Structured Sentencing System

1.102 In Parts B to D, the Commission summarised the key elements of the sentencing system. In this Part, the Commission notes that while the Supreme Court and the Court of Criminal Appeal have been striving to improve the level of consistency and proportionality in sentencing, commentators and surveys of sentencing practice call into question whether these key elements are, in fact, being realised. The Commission also notes that significant proposals to develop a more structured sentencing system have been put forward in order to address this issue, including the development of sentencing guidance or guidelines under the auspices of a proposed Judicial Council. The Commission discusses to what extent such proposals would be of benefit in the context of mandatory and presumptive sentences.

¹⁸⁷ *Ibid* at 635.

¹⁸⁸ *Ibid* at 634.

¹⁸⁹ *The People (DPP) v M* [1994] 3 IR 306.

¹⁹⁰ *Ibid* at 314.

(1) The Problem of a Lack of Structure and Inconsistent Approaches

1.103 It has been noted that Ireland, by contrast with most common law jurisdictions, has a largely unstructured sentencing system¹⁹¹ in which the courts exercise a relatively broad sentencing discretion.¹⁹² Commentators have also referred to the “regional organisation of the lower courts, the dearth of formal contact between them and the undoubted duty of all judges to act independently”¹⁹³ and to the individualised sentencing system, the multiplicity of sentencing aims, and judicial variability.¹⁹⁴ While it has been correctly noted that “[a]vailable data are insufficient to support any reliable conclusion on the existence or extent of sentencing disparity in Ireland”,¹⁹⁵ two studies appear to support the view that this lack of structure may lead to inconsistency in the sentencing process.

(i) 2007 Study

1.104 In a 2007 study,¹⁹⁶ a number of District Court judges were interviewed and asked to respond to several sentencing vignettes.¹⁹⁷ The purpose of the study was to explore: (i) judicial views on sentencing and consistency in sentencing; (ii) the degree of consistency in sentencing between individual judges; and (iii) the reasons for inconsistency, if any, in sentencing practices of individual judges.

1.105 The study made several findings regarding judicial views on sentencing. The judges’ descriptions of sentencing appeared to correspond with the “instinctive synthesis” approach to sentencing.¹⁹⁸ While most judges indicated that there was no tariff or “going rate”,¹⁹⁹ some indicated that judges developed their own views of things or their own particular approaches to certain types of cases and penalties.²⁰⁰ Some judges rejected the idea that consistency in sentencing was possible in an individualised system.²⁰¹ It would appear, however, that “consistency” in this context referred to consistency of outcomes rather than consistency of approach.

1.106 The study also made several findings regarding the degree of consistency in sentencing between individual judges. Overall, there were high levels of inconsistency when the sentencing outcomes of the different District Court judges were compared.²⁰² The degree of inconsistency in sentencing outcomes varied according to the seriousness of the offence.²⁰³ The sentencing outcomes were most consistent for the most serious case whereas they were least consistent for the least serious case. Inconsistency was

¹⁹¹ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 53.

¹⁹² Maguire “Consistency in Sentencing” [2010] JSIJ 14.

¹⁹³ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 54.

¹⁹⁴ Maguire “Consistency in Sentencing” [2010] JSIJ 14 at 18-28.

¹⁹⁵ O’Malley *Sentencing - Towards a Coherent System* (Round Hall, 2011) at 8 and 9.

¹⁹⁶ Maguire “Consistency in Sentencing” [2010] JSIJ 14 at 31ff.

¹⁹⁷ 15 out of a total of 54 District Court Judges participated in the study.

¹⁹⁸ Maguire indicates that this approach involves the judge considering all the relevant factors of the case, including the circumstances of the offence and the offender, and then coming to a decision about the appropriate sentence without indicating the precise weight being attributed to individual factors or groups of factors. Maguire “Consistency in Sentencing” [2010] JSIJ 14 at 34.

¹⁹⁹ Maguire “Consistency in Sentencing” [2010] JSIJ 14 at 34.

²⁰⁰ *Ibid* at 35 and 36. Maguire highlights a “fundamental contradiction” in the logic of the judges: “[W]hile they explicitly recognised that a general tariff would be inconsistent with the need to respond to the uniqueness of each case they did not seem to recognise that the adoption by them of their individual approaches (developed incrementally over a period of time) might also be inconsistent with the need to respond to the uniqueness of each case.” (at 37).

²⁰¹ Maguire “Consistency in Sentencing” [2010] JSIJ 14 at 37.

²⁰² Maguire “Consistency in Sentencing” [2010] JSIJ 14 at 42.

²⁰³ *Ibid*.

most pronounced in relation to the type of penalty judges would impose, and was particularly apparent in relation to the choice between different non-custodial sanctions.²⁰⁴ The less serious the case the more likely the judges were to agree that it warranted a non-custodial sanction, and the more likely they were to disagree about which non-custodial sanction to impose. The more serious the case the more likely the judges were to impose a custodial sanction and the more likely they were to agree about the type of custodial sanction. Even when judges agreed about the type of penalty to impose in a particular case, they disagreed, in some cases quite significantly, about the quantum of penalty to impose.

1.107 At the same time, several general patterns in sentencing were identified.²⁰⁵ In relation to the assault vignette, for instance, one group comprised those who would impose some form of financial penalty; a second group comprised those who would either impose a financial penalty or a more severe penalty such as community service, prison or a suspended sentence; and a third group comprised those who would impose either a community service order, prison sentence or suspended sentence. A general pattern also emerged in respect of sentencing heroin-addicted offenders.²⁰⁶ Most judges indicated that they would offer the offender an opportunity to get drug treatment in order to avoid a prison sentence. In general, if the offender was successful and complied with all the requirements the court had imposed, the judges indicated that he or she should face a non-custodial penalty. However, if the offender was unwilling to engage in drug treatment, the majority of judges indicated that they would impose a prison sentence.²⁰⁷ In addition, a uniform rationale emerged in respect of the imprisonment of persistent offenders.²⁰⁸ Many judges indicated that they would impose an immediate prison sentence principally because the offender had had previous chances yet had refused to change.

1.108 The study concluded that inconsistencies in the sentencing outcomes could be traced back to several discrete factors, all of which related to inconsistency in approach. These included differences in how judges interpreted the facts of the case, especially the seriousness of the offence; differences in the weight they attached to certain factors, in particular aggravating and mitigating factors; differences in judicial views regarding the appropriateness of different penalties for certain offenders and offences; and differences in the sentencing objectives prioritised.²⁰⁹ Maguire thus asserts that reducing inconsistency in Ireland will require “addressing the incoherency of current sentencing policy and law, as well as trying to mitigate the worst effects of judicial variability”.²¹⁰

(ii) 2003 Study

1.109 In 2003, the Irish Penal Reform Trust undertook a study into sentencing patterns in the Dublin District Court.²¹¹ The study was carried out over an 8-week period by two IPRT researchers who observed proceedings in the Dublin District Court. The purpose of the study was to: (i) identify how judges use the sentencing options open to them and the patterns, if any, in their choices; and (ii) determine how often reasons are given for sentences. The study found that judges rarely made explicit connections between custodial sanctions and rationales for imprisonment. When they did speak of rationales, however, they demonstrated no coherent policy. Thus there was little consistency in approach. Researchers also witnessed very different outcomes for cases with very similar factual matrices. For the same minor offence, the penalty ranged from a simple reprimand to a fine to a recorded

²⁰⁴ *Ibid* at 43.

²⁰⁵ *Ibid* at 44.

²⁰⁶ *Ibid* at 45.

²⁰⁷ The author observes, however, that at the time of the research there was only one dedicated Drug Treatment Court in Dublin’s North Inner City and so, in reality, very few of the judges who participated in the research would have been able to refer offenders to this court. Maguire “Consistency in Sentencing” [2010] JSIJ 14 at 45.

²⁰⁸ Maguire “Consistency in Sentencing” [2010] JSIJ 14 at 45-46.

²⁰⁹ *Ibid* at 47.

²¹⁰ *Ibid* at 52.

²¹¹ Hamilton “Sentencing in the District Court: ‘Here be Dragons’” (2005) 15(3) ICLJ 9a.

conviction that restricted employment opportunities and might expose an impecunious offender to the risk of imprisonment. Thus, there was little consistency in outcomes.

(b) Discussion

1.110 As noted at paragraph 1.36, there are certain important advantages to the current system of sentencing, in particular, judicial independence and discretion. Without these vital aspects there would be little justice in sentencing and the Commission thus observes that they should be preserved. The studies discussed, however, suggest that the unstructured nature of the current sentencing system may (in spite of guidance provided by the Oireachtas, the Supreme Court and the Court of Criminal Appeal) give rise to a degree of inconsistency in the application of sentencing aims and principles. This may suggest that the guidance provided is not taking hold and/or is not transmitting down to the lower courts, such as the Dublin and Cork District Courts surveyed in those studies. In addition, it suggests that the reasons for the apparent inconsistencies may not be dealt with either on a once-off basis, such as where the Oireachtas prescribes a mandatory, presumptive or maximum sentence, or on an ad-hoc basis, such as where the Supreme Court or the Court of Criminal Appeal formulates guidance in specific cases. For these reasons, the Commission next considers the option of building on the existing level of structure to improve consistency in sentencing.

(2) Improved Structure and Greater Consistency in Sentencing

1.111 The Commission acknowledges the progress that has been made by the courts and the Irish Sentencing Information System (ISIS) with regard to improving the structure of sentencing. Given the level of inconsistency which remains in the system, however, the Commission observes that the work undertaken by the courts and ISIS might be usefully supplemented and/or supported by a dedicated body, such as a Judicial Council, empowered to formulate sentencing guidance on an ongoing basis.

(a) Judicial Guidance

1.112 Regarding the courts, the Commission observes that the courts have developed their thinking since the decision of *The People (DPP) v Tiernan*,²¹² in which the Supreme Court showed an initial reluctance towards sentencing guidance, at least in respect of the rigidity that sentencing standards or tariffs might entail. As illustrated in Part D above, the Supreme Court and the Court of Criminal Appeal are responsible for much of the judicial guidance on sentencing today. In particular, the Court of Criminal Appeal, through its appellate review power, is uniquely situated to offer effective guidance on many key aspects of sentencing.²¹³

1.113 Despite its advantageous position, however, the reach of the Court of Criminal Appeal is limited in a number of respects. First, the capacity of the Court to formulate sentencing principles is restricted by the range of offences within its jurisdiction.²¹⁴ Typically, it is confined to dealing with appeals against sentence for serious offences and will have little opportunity to consider sentencing practice in the courts of summary jurisdiction.²¹⁵ Second, the Court lacks a sufficient volume of sentencing appeals from which to develop considered and principled sentencing guidance.²¹⁶ Third, even when the opportunity does arise to develop sentencing guidance, it is limited to a case-by-case consideration.²¹⁷ Where guidance is delivered on this basis, sometimes over many years by differently constituted courts, there is a risk that

²¹² *The People (DPP) v Tiernan* [1988] IR 250.

²¹³ O'Malley *Sentencing - Towards a Coherent System* (Round Hall, 2011) at 116ff; and Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 2-1993) at paragraph 3.22.

²¹⁴ O'Malley "Living Without Guidelines" in Ashworth and Roberts, eds, *Sentencing Guidelines: Exploring the English Model*" (Oxford University Press, 2013) [forthcoming]

²¹⁵ *Ibid.*

²¹⁶ O'Malley *Sentencing - Towards a Coherent System* (Round Hall, 2011) at 116ff; and Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 2-1993) at paragraph 3.22.

²¹⁷ O'Malley *Sentencing - Towards a Coherent System* (Round Hall, 2011) at 118ff.

the resulting judgments may be internally consistent, yet inconsistent with each other.²¹⁸ The sentencing ranges specified for one offence may thus be higher than those specified for another offence that would usually be regarded as less grave.²¹⁹ Fourth, the Court of Criminal Appeal operates in an information vacuum²²⁰ in so far as it is, by and large, dependent on the information submitted by counsel and any pre-sentence reports. Finally, it is difficult to compile a comprehensive record of the guidance formulated by the Court of Criminal Appeal as the dissemination of appellate decisions is somewhat unstructured.²²¹

(b) Irish Sentencing Information System

1.114 In addition to the Court of Criminal Appeal, the Irish Sentencing Information System (ISIS) was established on a pilot basis. The results of the pilot project, which was completed in 2010, have been made available on a dedicated website (www.irishsentencing.ie). ISIS, which is broadly similar to information systems in New South Wales and Scotland,²²² is a searchable database of the sentencing decisions of the Dublin, Limerick, and Cork Circuit Criminal Courts.²²³ It is hoped that ISIS will be established on a permanent basis, perhaps as part of a Judicial Council,²²⁴ and that it will assist judges to form preliminary views as to appropriate sentences; to deal with unusual features of cases; and to locate offences on the spectrum of sentences.²²⁵ At the moment, however, the potential of ISIS is limited in a number of respects. The database, which has not been updated since 2010, provides access to a limited selection of sentencing decisions from the Circuit Criminal Court in Dublin and, to a lesser extent, Cork and Limerick.²²⁶ In addition, the database does not provide any formal analysis of the sentencing decisions.

1.115 The Commission notes, however, the announcement by the ISIS Committee, in January 2013, of three new initiatives designed to advance its work in providing sentencing information.²²⁷ Firstly, the Committee has confirmed that ISIS has received the necessary resource support to recommence its work in gathering and providing sentencing information through its online database. Secondly, the Committee has signalled its intention to recommence providing sentencing information in relation to specific issues

²¹⁸ O'Malley "Living Without Guidelines" in Ashworth and Roberts, eds, *Sentencing Guidelines: Exploring the English Model* (Oxford University Press, 2013) [forthcoming]

²¹⁹ *Ibid.*

²²⁰ Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 2-1993) at paragraph 3.23. See also: Hammond "Intuitive Synthesis or Structured Discretion?" (2007) NZLR 211 at 231-232 and Charleton and Scott "Throw Away the Key: Public and Judicial Approaches to Sentencing - Towards Reconciliation", The Martin Tansey Memorial Lecture, the Criminal Courts of Justice, 10 April 2013 at 2-3. Available at: www.acjrd.ie/files/Throw_Away_the_Key_Public_and_Judicial_Approaches_to_Sentencing_-_Towards_Reconciliation_3.pdf [Last accessed: 22 May 2013]

²²¹ O'Malley *Sentencing - Towards a Coherent System* (Round Hall, 2011) at 120ff; and Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 2-1993) at paragraph 3.24.

²²² Conroy and Gunning "The Irish Sentencing Information System (ISIS): A Practical Guide to a Practical Tool" [2009] 1 JSIJ 37 at 38.

²²³ *Ibid.*

²²⁴ O'Malley "Recent Developments in Sentencing". Paper delivered at 13th Annual National Prosecutors' Conference, Dublin Castle, 19 May 2012 at 3.

²²⁵ Conroy and Gunning "The Irish Sentencing Information System (ISIS): A Practical Guide to a Practical Tool" [2009] 1 JSIJ 37 at 53.

²²⁶ The Thornton Hall Project Review Group indicated that it would be desirable to extend the collection of sentencing information through ISIS or a similarly structured system. See: *Report of the Thornton Hall Project Review Group 2011* at 73.

²²⁷ See: "New initiatives on Sentencing Information announced on 27th January 2013" Press Release, 27 January 2013. Available at: www.irishsentencing.ie/en/ISIS/Pages/WP13000002 [Last accessed: 22 May 2013].

and to hold public seminars on matters relevant to sentencing.²²⁸ Thirdly, ISIS has also published three recent analyses,²²⁹ prepared by the Judicial Researchers' Office, of sentencing in cases of: (i) rape, (ii) manslaughter, and (iii) robbery.

(c) Judicial Council

1.116 The Commission observes that a Judicial Council may now be added to this list. In 2011, the Chief Justice established a Judicial Council on an interim basis.²³⁰ This followed the publication in 2010 of the *Scheme of a Judicial Council Bill*.²³¹ This was inspired by the 2000 *Report of the Committee on Judicial Conduct and Ethics* (the Keane Committee) which recommended the establishment of a Judicial Council which would have "functions similar in some respects to those of the judicial commission established in New South Wales."²³² Head 4 of the *Scheme of a Judicial Council Bill* proposes that the members of the Judicial Council would be the Chief Justice, the President of the High Court, the President of the Circuit Court and the President of the District Court. Head 12 proposes the establishment of a Judicial Studies Institute as a committee of the Judicial Council. It also proposes that the functions of the Institute would include the preparation and distribution of Bench Books and the dissemination of information on sentencing.²³³

1.117 By contrast with the courts and ISIS, it is likely that such a Judicial Studies Institute would be in a position to formulate guidance on a regular and on-going basis. This guidance could be informed by wide ranging research and made available to all the courts and the public. Furthermore, as a Judicial Council would be led by members of the judiciary, this process of developing guidance should not take away from the need to preserve judicial independence or judicial discretion.

(d) Developments in Northern Ireland

1.118 The Commission observes that Ireland is somewhat behind the majority of its common law counterparts regarding the development of structured sentencing mechanisms which have, by and large, taken the form of statutory sentencing frameworks.²³⁴ However, in respect of Northern Ireland (a legal jurisdiction which closely resembles our own), Ireland seems to have reached a similar stage in its consideration of how best to achieve a more structured sentencing system.

²²⁸ *Ibid.*

²²⁹ See: www.irishsentencing.ie/en/ISIS/Pages/WP09000222 [Last accessed: 22 May 2013].

²³⁰ See "Work to establish an interim Judicial Council begins" *Courts Service News* Vol 13 Issue 3 (Winter 2011) at 15.

²³¹ Available at: www.justice.ie/en/JELR/General%20Scheme%20Judicial%20Bill.pdf/Files/General%20Scheme%20Judicial%20Bill.pdf [Last accessed: 22 May 2013]. The Government Legislation Programme, Summer Session 2013 (April 2013), Section B, Item 49, available at www.taoiseach.ie, indicates that a Judicial Council Bill is expected to be published in late 2013 [Last accessed: 22 May 2013].

²³² *Report of the Committee on Judicial Conduct and Ethics* (Government Publications, 2000) at 52. The Keane Committee was established on the basis of a recommendation in the *Report of the Working Group on a Courts Commission 1998* (Government Publications, 1998) at 175-176.

²³³ The Thornton Hall Project Review Group raised the possibility of "judicially framed guidelines" forming part of the programme for the proposed Judicial Council. See: *Report of the Thornton Hall Project Review Group 2011* at 73.

²³⁴ England and Wales (*Criminal Justice Act 2003*); Australia [New South Wales (*Crimes (Sentencing Procedure) Act 1999*); Northern Territory (*Sentencing Act*); Queensland (*Penalties and Sentences Act 1992*); South Australia (*Criminal Law (Sentencing) Act 1988*); Tasmania (*Sentencing Act 1997*); Victoria (*Sentencing Act 1991*); Western Australia (*Sentencing Act 1995*); Commonwealth of Australia (*Crimes Act 1914*)]; New Zealand (*Sentencing Act 2002*, as amended by the *Sentencing (Amendment) Act 2007*); and Canada (*Canadian Criminal Code*).

1.119 Traditionally, the courts of Northern Ireland have been guided by the guideline sentencing judgments of the Northern Ireland Court of Appeal and, to a lesser extent, by comparable guidelines from England and Wales. In 2010, the Hillsborough Agreement,²³⁵ which provided for the devolution of justice matters to the Northern Ireland Executive and Northern Ireland Assembly, contained a proposal to establish a sentencing guidelines council. This followed the establishment in 2009 by the Northern Ireland Lord Chief Justice of a Sentencing Working Group, which reported in June 2010.²³⁶ In its report, the Working Group recommended the establishment of a Sentencing Group which would be chaired by a Lord Justice of Appeal and would comprise representatives of the judiciary. The functions of the Working Group would be to: (a) take views on priority areas in which sentencing guidelines were needed, (b) put arrangements in place for guidance to be delivered in those areas, and (c) consider Court of Appeal and first instance sentencing cases which might merit inclusion in the Northern Ireland Sentencing Guidelines and Guidance Case Compendium on the Judicial Studies Board website.²³⁷ Following this, the Lord Chief Justice launched a public consultation on what should be included in a priority list of areas for which sentencing guidelines were needed.²³⁸ As a result of this consultation process, a First Programme of Action on Sentencing was developed. This set out the following categories of offence:

- Domestic violence;
- Serious sexual offences;
- Human trafficking;
- Attacks on public workers, including police officers;
- Attacks on vulnerable people, including the elderly;
- Duty evasion and smuggling;
- Environmental crime in the Crown Court;
- Honour-based crime;
- Tiger kidnapping;
- Intellectual property crime;
- Road traffic offences;
- Hate crime;
- Health and safety offences causing death;
- Manslaughter; and
- Child cruelty and neglect and serious assaults on children.

1.120 Parallel to this, the Northern Ireland Minister for Justice published a *Consultation Document on a Sentencing Guidelines Mechanism* in 2010.²³⁹ This set out three options for a sentencing guidelines mechanism:

- A Sentencing Guidelines Council with responsibility for producing guidelines;
- A Sentencing Advisory Panel with responsibility for drafting guidelines for the approval of the Court of Appeal; and

²³⁵ *Agreement at Hillsborough Castle* 5 February 2010 at 6.

²³⁶ *Monitoring and Developing Sentencing Guidance in Northern Ireland - A Report to the Lord Chief Justice from the Sentencing Working Group* (Sentencing Working Group, 2010).

²³⁷ *Ibid* at 3.

²³⁸ *Lord Chief Justice's Priority Sentencing List - Summary of Responses, Analysis of Consultation and Programme of Action* (2011) at 1.

²³⁹ *Consultation on a Sentencing Guidelines Mechanism* (Northern Ireland Department of Justice, October 2010).

- A mechanism based on measures being introduced by the Lord Chief Justice to enhance procedures for monitoring and developing sentencing practice.

The results of the consultation process seemed to suggest that amongst those who responded the first option was the preferred option, the second option was the second most popular and the third option was the least favoured option.²⁴⁰

1.121 The issue of structured sentencing (and, more particularly, the issue of mandatory sentencing) has arisen on a number of occasions in the Northern Ireland Assembly. In November 2011, a private member's motion, which called for the introduction of mandatory minimum prison sentences for those convicted of violent crimes against older or vulnerable people, was introduced.²⁴¹ In response, the Northern Ireland Minister for Justice expressed the view that sentencing in individual cases was a matter for judicial discretion guided by sentencing guidelines.²⁴² Those guidelines indicated that the courts should include issues such as the vulnerability of the victim as a factor which aggravated the sentence to be imposed. By contrast, mandatory minimum sentences left no room for discretion and thus no allowance for the exceptional case. The Minister also referred to the work being undertaken by the Northern Ireland Department of Justice and the Lord Chief Justice regarding the development of a sentencing guidelines mechanism.

1.122 In June 2012, following the sentencing of those who had been convicted of the murder of Police Constable Stephen Carroll, a private member's motion, which called for the introduction of a 30-year minimum sentence for the murder of PSNI officers, was introduced.²⁴³ In addition, a proposed amendment to the motion called for the establishment of an independent sentencing guidelines council for Northern Ireland.²⁴⁴ In response, the Northern Ireland Minister for Justice indicated that once the Court of Appeal had time to consider an appeal against the sentence imposed on one of the accused, the Department of Justice would launch a review of the legislation governing the determination of tariffs where the court has passed a life sentence.²⁴⁵ Regarding the establishment of an independent sentencing guidelines council, the Minister responded that such a model would be too costly to establish and too costly to maintain in the current economic climate.²⁴⁶ He indicated that, instead, the Lord Chief Justice's initiative would deliver everything a formal sentencing guidelines council could without the unnecessary expenditure.²⁴⁷ In addition, he noted that the Lord Chief Justice, in the interest of community engagement, had agreed to include two lay members in the Sentencing Group.²⁴⁸ He also stated that he would be developing a community engagement strategy to ensure a two-way flow of information on sentencing issues.²⁴⁹ He concluded by indicating that these mechanisms would be reviewed within two years to assess their effectiveness and that if a case existed for a formal sentencing guidance council, he would be prepared to reconsider it at that point.²⁵⁰

²⁴⁰ *Consultation on a Sentencing Guidelines Mechanism - Summary of Responses* (Northern Ireland Department of Justice, March 2011).

²⁴¹ Hansard, Northern Ireland Assembly, 29 November 2011, Volume 69, No 4 at 215ff.

²⁴² *Ibid* at 228.

²⁴³ Hansard, Northern Ireland Assembly, 11 June 2012, Volume 75, No 5 at 299ff.

²⁴⁴ *Ibid* at 301.

²⁴⁵ *Ibid* at 310.

²⁴⁶ Hansard, Northern Ireland Assembly, 11 June 2012, Volume 75, No 5 at 311.

²⁴⁷ *Ibid*.

²⁴⁸ *Ibid*.

²⁴⁹ *Ibid*.

²⁵⁰ *Ibid* at 312.

(3) Conclusions and the Commission's General Approach

1.123 In this Chapter, the Commission has considered the general aim of the criminal justice system (namely, the reduction of prohibited or unwanted conduct) as well as the attributes of criminal sanctions and the principles of justice, in order to provide a conceptual framework for the analysis of the different forms of mandatory sentences to be reviewed in Chapters 3 to 5. In this regard, the Commission identified four main aims of criminal sanctions, namely: (a) deterrence, (b) punishment, (c) reform and rehabilitation, and (d) reparation. The Commission also identified two key aspects of the justice principle, namely: (a) consistency, and (b) proportionality (including constitutional and sentencing proportionality).

1.124 The Commission notes the particular importance of proportionality which requires an individualised approach to sentencing whereby the court has regard to the circumstances of both the offence and the offender. In this context, the Commission fully appreciates (based on the review of the relevant case law in this Chapter) that the Supreme Court and the Court of Criminal Appeal have developed general guidance and, in some instances, specific guidelines, such as the strong presumption in favour of a custodial sentence on conviction for manslaughter, rape and social welfare fraud. These are clearly intended to provide principle-based clarity around likely sentencing outcomes and to reflect comparable developments in many other jurisdictions. The Commission notes the importance of such guidance and guidelines, bearing in mind that the Oireachtas has provided for a very wide discretion as to the actual sentence to be imposed for the majority of criminal offences, including some of the most serious offences, such as manslaughter, rape and fraud, for which the sentence can range from no custodial sentence to a maximum of life imprisonment.

1.125 The Commission has also discussed in this Chapter, the extensive case law in Ireland which indicates that sentencing courts are also conscious of the need to consider a wide range of aggravating and mitigating factors, set out in the Commission's 1996 *Report on Sentencing*,²⁵¹ as well as the individual circumstances of the offender. It is equally clear that since 1996, the courts have also had regard to comparable case law and developments in other jurisdictions concerning the ongoing development of such factors.

1.126 The Commission also notes, however, that in spite of the development and recognition of the general aim of the criminal justice system and the principles of justice, there remain deficiencies in the sentencing system in Ireland. The Commission has discussed the recommendations made in 2000, and reiterated in 2011, that sentencing guidance and guidelines should be developed in an even more structured manner by a proposed Judicial Council. The Commission fully supports those recommendations and notes that such guidance and guidelines could build on the framework provided by the general aims of criminal sanctions, and principles of sentencing, discussed in this Chapter. They would also have the benefit of the guidance and guidelines available from decisions of the Supreme Court and the Court of Criminal Appeal, including those discussed in this Chapter. Such guidance could also build on the growing importance of the Irish Sentencing Information System (ISIS) which, as already discussed, has the potential to provide a significant database of sentencing information for the courts. In this respect, the Commission agrees with the view that ISIS could in time be regarded as a leading model of its type.²⁵²

1.127 In conclusion therefore, the Commission supports the recommendations made in 2000, and reiterated in 2011, that a Judicial Council be empowered to develop and publish suitable guidance or guidelines on sentencing, which would reflect the general aim of the criminal justice system and the principles of sentencing discussed in this Report. The Commission has also concluded, and recommends, that such guidance or guidelines should have regard to: (i) the sentencing guidance and guidelines available from decisions of the Supreme Court and the Court of Criminal Appeal (including those discussed in this Report); (ii) the aggravating and mitigating factors, and individual offender characteristics, identified in the Commission's 1996 *Report on Sentencing* and developed by the courts

²⁵¹ Law Reform Commission *Report on Sentencing* (LRC 53-1996).

²⁵² See generally: O'Malley "Creativity and Principled Discretion over Sentencing a Necessity" Irish Times 19 December 2011.

since 1996; and (iii) information in relevant databases including, in particular, the Irish Sentencing Information System (ISIS).

1.128 The Commission supports the recommendations made in 2000, and reiterated in 2011, that a Judicial Council be empowered to develop and publish suitable guidance or guidelines on sentencing, which would reflect the general aims of criminal sanctions and the principles of sentencing discussed in this Report. The Commission also recommends that such guidance or guidelines should have regard to: (i) the sentencing guidance and guidelines available from decisions of the Supreme Court and the Court of Criminal Appeal (including those discussed in this Report); (ii) the aggravating and mitigating factors, and individual offender characteristics, identified in the Commission's 1996 Report on Sentencing and developed by the courts since 1996; and (iii) information in relevant databases including, in particular, the Irish Sentencing Information System (ISIS).

(4) Structured Sentencing in the Context of Mandatory and Presumptive Regimes

1.129 The Commission acknowledges the importance of a structured sentencing system because, in general terms, such a system is more likely to lead to outcomes that reduce the risk of an inconsistent application of key principles. In particular, a structured system would be more likely to ensure that the principles-based appellate guidance discussed above would be applied in practice. This is important in the context of the general discretion that the Oireachtas has conferred on the courts in respect of such serious offences as manslaughter, rape and fraud, and which the appellate courts have recognised (in the discussed *Princs*, *Tiernan* and *Murray* cases) should be reflected in the general approach to be taken in determining individual sentencing outcomes.

1.130 In Chapter 2, the Commission discusses in detail the history of the development of mandatory and presumptive sentences. This Chapter notes that the development of the mandatory life sentence for murder evolved as a replacement for the death penalty and thus has a very different narrative and can be considered *sui generis*. Bearing in mind that unique history, the Commission makes specific proposals in Chapter 3 in connection with the sentencing regime for murder, which are informed by the principles discussed in this Chapter and the proposed development of a more structured sentencing system.

1.131 The Commission also notes in Chapter 2 that the development of presumptive sentences, notably for certain drugs and firearms offences, differed from that of the mandatory life sentence for murder. The Commission notes that, both internationally and nationally, these sentences were introduced against specific backgrounds, notably the emergence of organised crime. The Commission acknowledges that, to some extent, these sentencing regimes emerged in Ireland against the backdrop of a growing recognition of the significant harm caused to society by such offences, and a wish on the part of the Oireachtas to mark the gravity of these offences by placing severe constraints on sentencing discretion.

1.132 The Commission considers that, in these contexts, the nature of the constraints imposed on sentencing discretion may also have been influenced by the relatively unstructured nature of the sentencing system and the resulting risk of inconsistency identified in the surveys discussed above. In that respect, the Commission considers that the proposals for a principles-based structured sentencing system (as outlined in this Chapter and supported by the Commission) would assist in ensuring that, in practice, there is an appropriate application of relevant sentencing principles. In that respect also, the specific recommendations in Chapter 4 regarding drugs and firearms offences have been influenced by these proposed developments.

1.133 As to mandatory and presumptive sentencing regimes for habitual offenders, the Commission acknowledges in Chapter 2 the much longer history of these statutory interventions. The Commission's specific recommendations in Chapter 5 regarding repeat offences have also been influenced by the discussion of sentencing principles in this Chapter, and by the proposals for a more structured sentencing regime.

CHAPTER 2 HISTORICAL EVOLUTION OF MANDATORY SENTENCES

A Introduction

2.01 In this Chapter, the Commission traces the historical evolution of the three types of mandatory sentence discussed in this Report. Part B outlines the historical evolution of entirely mandatory sentences (specifically, the mandatory life sentence for murder) in the United Kingdom and Ireland. In Part C, the Commission discusses the development of presumptive and mandatory minimum sentences for drugs and firearms offences in the United States of America, the United Kingdom and Ireland. Part D considers the evolution of mandatory sentences for repeat offenders in the United States of America, England and Wales, and Ireland. In Part E, the Commission draws a number of conclusions from the manner in which these sentencing regimes developed.

B Historical Evolution of Entirely Mandatory Sentences

2.02 An entirely mandatory sentence is a mandatory sentence that permits of no exceptions. In Ireland, an entirely mandatory life sentence is prescribed for the offences of: (a) murder;¹ (b) the murder of a designated person such as a member of An Garda Síochána;² and (c) treason. In this section, the Commission considers the historical evolution of the mandatory life sentence for murder in Ireland in comparison to contemporaneous developments in England and Wales.

(1) United Kingdom

(a) England and Wales

(i) Abolition of the Death Penalty

2.03 While capital punishment had been progressively abolished throughout the first half of the 19th century, section 2 of the *Offences Against the Person Act 1861* retained the death penalty as the penalty for murder.³ Section 2 provided that “Upon every Conviction for Murder the Court shall pronounce the Sentence of Death”. The provision applied to all persons convicted of murder but, in reality, the death penalty was commuted to imprisonment or some other form of detention in most cases.

2.04 During the first half of the 20th century, several statutes were enacted which further reduced the circumstances in which the death penalty applied.⁴ In 1908, the death penalty was abolished in respect of children under 16 years of age⁵ and in 1933 the statutory age limit was raised to 18 years.⁶ In 1922, the death penalty was abolished in respect of the killing of a baby by its mother⁷ and in 1938 it was abolished in respect of the killing of a one-year-old child.⁸ There were also a number of high-profile cases

¹ Section 2 of the *Criminal Justice Act 1990*. Section 10 of the *International Criminal Court Act 2006* clarifies that if genocide; a crime against humanity; a war crime; or an ancillary offence under the 2006 Act involves murder, then a mandatory life sentence will apply.

² Section 3 of the *Criminal Justice Act 1990*

³ See: O'Malley “Sentencing Murderers: The Case for Relocating Discretion” (1995) 5(1) ICLJ 31 at 32ff for a comprehensive account.

⁴ Dawtry “The Abolition of the Death Penalty in Britain” (1966) 6 Brit J Criminology 183 at 188.

⁵ *Children and Young Persons Act 1908*.

⁶ *Children and Young Persons Act 1933*.

⁷ *Infanticide Act 1922*.

which captured adverse public attention,⁹ including the case of Edith Thompson and her lover, Frederick Bywaters, in 1923¹⁰ and the case of George Stoner and his lover, Alma Rattenbury, in 1935.¹¹

2.05 A number of attempts were made to abolish the death penalty. In 1929, a Select Committee on Capital Punishment recommended the suspension of the death penalty for a trial period of five years.¹² In 1938, the House of Commons carried an amendment to the abortive *Criminal Justice Bill 1938* which sought to abolish the death penalty entirely.¹³ In 1948, the House of Commons carried an amendment to the *Criminal Justice Bill 1948* which again sought to suspend the death penalty for a period of five years.¹⁴ This was reversed by the House of Lords and, at report stage, a back-bencher, Sydney Silverman, tabled an amendment to the same effect.¹⁵ Each attempt failed.

2.06 In 1949, a Royal Commission on Capital Punishment, the Gowers Commission, was established to consider whether liability to suffer capital punishment for murder should be limited or modified and, if so, to what extent or by what means.¹⁶ In its 1953 Report,¹⁷ the Gowers Commission made a number of recommendations including that the statutory age limit for the death penalty should be raised from 18 to 21 years; that discretion should be given to the jury to decide whether to impose the death penalty or a life sentence; that degrees of murder should not be established; and that the M'Naghten rules governing the insanity defence should be reformed.¹⁸ It has been asserted that the report had a limited impact on policy-makers as its most significant recommendations were subsequently rejected by the government.¹⁹

2.07 In spite of this setback, those in favour of abolition continued to campaign. They were spurred on not least by three controversial cases which raised considerable doubt about the fairness and infallibility of the law relating to murder.²⁰ The first case was that of Timothy Evans who was hanged in 1950 for the murder of his baby daughter, Geraldine, while a count relating to the murder of his wife, Beryl, was left on file.²¹ It later transpired that a neighbour turned Crown Prosecution witness, John Christie, was

⁸ *Infanticide Act 1938*.

⁹ Morris *Crime and Criminal Justice since 1945* (Blackwell, 1989) at 78.

¹⁰ Weis "Not Innocent, Not Guilty; Edith Thompson was an adulterer, a woman consorting below her class. But was that reason enough to hang her for murder?" *The Guardian* 10 November 1993.

¹¹ Joseph "The wife, her teenage lover and a brutal murder that became a Cause Celebre" *Bournemouth Echo* 24 April 2011.

¹² Dawtry "The Abolition of the Death Penalty in Britain" (1966) 6 *Brit J Criminology* 183 at 188.

¹³ *Ibid*.

¹⁴ *Ibid* at 189; and Morris *Crime and Criminal Justice since 1945* (Blackwell, 1989) at 78-80.

¹⁵ Dawtry "The Abolition of the Death Penalty in Britain" (1966) 6 *Brit J Criminology* 183 at 189; and Morris *Crime and Criminal Justice since 1945* (Blackwell, 1989) at 78-80.

¹⁶ Smith "The Penalty for Murder" (1988) 19 *Cambrian Law Review* 5 at 5. Morris asserts that the Government was careful to set the Commission's terms of reference so as to preclude any consideration of abolition itself (see: Morris *Crime and Criminal Justice since 1945* (Blackwell, 1989) at 80).

¹⁷ *Report of the Royal Commission on Capital Punishment 1949-1953* (HMSO, Cmnd 8932, 1953); Morris *Crime and Criminal Justice since 1945* (Blackwell, 1989) at 80; and Dession "The Gowers Report and Capital Punishment" (1954) 29 *NYU L Rev* 1061.

¹⁸ Shute "Punishing Murders: Release Procedures and the 'Tariff', 1953-2004" [2004] *Crim LR* 873 at 874; and Morris *Crime and Criminal Justice since 1945* (Blackwell, 1989) at 81.

¹⁹ Shute "Punishing Murders: Release Procedures and the 'Tariff', 1953-2004" [2004] *Crim LR* 873 at 874.

²⁰ Morris *Crime and Criminal Justice since 1945* (Blackwell, 1989) at 81.

²¹ *R (on the application of Westlake) v Criminal Cases Review Commission* [2004] *EWHC* 2779 (Admin); Morris *Crime and Criminal Justice since 1945* (Blackwell, 1989) at 81-83; Prior "Timothy Evans Family's 60-Year Conviction Wait" *BBC News* 9 March 2010. Available at: <http://news.bbc.co.uk/1/hi/wales/8556721.stm> [Last

responsible for the deaths. The second case was that of Derek Bentley who was sentenced to death in 1952 for the murder of Police Constable Sidney Miles during a robbery.²² Bentley was 19 years of age at the time but had the mental capacity of an 11-year-old. His co-accused, 16-year-old Christopher Craig, who had fired the fatal shot, was sentenced to detention during Her Majesty's pleasure. Notwithstanding a jury recommendation for mercy, Bentley was hanged in 1953.²³ The third case was that of Ruth Ellis who was hanged in 1955 for the murder of her former lover, David Blakely.²⁴ Ellis was a young mother of two, who led a "life that left much to be desired by suburban standards of morality".²⁵ While she did not deny the killing, it was argued on her behalf that she had shot Blakely after he had caused her to miscarry their baby by punching her repeatedly in the abdomen. This did not, however, persuade the court to amend the charge to one of manslaughter.

2.08 In 1956, a motion to retain the death penalty but change the law on murder was defeated in the House of Lords, as was a *Death Penalty (Abolition) Bill* introduced by Sydney Silverman.²⁶ As a compromise, the government introduced a *Homicide Bill* which was later enacted as the *Homicide Act 1957*.²⁷

2.09 The *Homicide Act 1957* implemented some of the recommendations made by the Gowers Commission.²⁸ It limited the scope of murder by abolishing the doctrine of "constructive malice" and extending the defence of provocation to cover words as well as deeds. The Act also provided that in cases involving suicide pacts, a surviving party should be liable only for the manslaughter (as opposed to murder) of the victim. While it did not extend the defence of insanity under the 1843 M'Naghten Rules, the Act did introduce the concept of "diminished responsibility". Furthermore, contrary to the recommendation of the Gowers Commission, it introduced degrees of murder. Certain types of murder, designated "capital murder," would continue to attract the death penalty²⁹ while other types of murder would in future attract a mandatory life sentence. It has been noted that this proved to be an unstable

accessed: 22 May 2013]; and Martin "The Abolition of Capital Punishment" (1964-1965) 13 Chitty's LJ 75 at 78-79.

²² *R v Secretary of State for the Home Department ex parte Bentley* [1993] EWHC QB 2; "The Killing of Derek Bentley" The Guardian 31 July 1998; Allen "Comment: The Shocking Thing is, the Truth about Derek Bentley was there all the Time" The Guardian 31 July 1998; and "Bentley Case Breakthrough" BBC News 6 November 1997. Available at: <http://news.bbc.co.uk/1/hi/uk/24208.stm> [Last accessed: 22 May 2013].

²³ Morris asserts that it was the idea that Bentley should hang while Craig went free that was repugnant to many who were nevertheless in favour of capital punishment (see: Morris *Crime and Criminal Justice since 1945* (Blackwell, 1989) at 81.

²⁴ *R v Ellis* [2003] EWCA Crim 3556; Morris *Crime and Criminal Justice since 1945* (Blackwell, 1989) at 83; "Ruth Ellis murder verdict upheld..." The Guardian 9 December 2003; "Ruth Ellis: Villain or Victim?" BBC News 30 November 1999. Available at: <http://news.bbc.co.uk/1/hi/uk/542186.stm> [Last accessed: 22 May 2013]; and "On this day: 13 July 1955: Crowd outside prison appeals for Mrs Ellis" The Guardian 13 July 2009.

²⁵ Morris *Crime and Criminal Justice since 1945* (Blackwell, 1989) at 83.

²⁶ *Ibid* at 84.

²⁷ *Ibid*.

²⁸ Shute "Punishing Murders: Release Procedures and the 'Tariff', 1953-2004" [2004] Crim LR 873 at 875; Smith "The Penalty for Murder" (1988) 19 Cambrian Law Review 5 at 5-7; and Morris *Crime and Criminal Justice since 1945* (Blackwell, 1989) at 84-85.

²⁹ These included murders committed in the course or furtherance of a theft; murders committed by means of firearms or explosives; murders committed in the course of a lawful arrest; murders committed while effecting or assisting an escape or rescue from legal custody; murders of police officers; murders of prison officers acting in the course of their duty where the murderer was a prisoner at the time of the killing; and multiple murders.

compromise which failed to achieve the support of the senior judiciary and did little to diminish anxieties about the possibility of mistake in capital cases.³⁰

2.10 In 1964, Peter Anthony Allen and Gwynne Owen Evans,³¹ who were hanged for the murder of John West during a robbery, became the last people to suffer the death penalty before abolition in 1965.³²

2.11 In 1965, Sydney Silverman introduced the *Murder (Abolition of Death Penalty) Bill* as a private member's Bill.³³ The Bill completed its passage through Committee Stage in the House of Commons with one amendment that limited its period of operation to five years, unless Parliament by affirmative resolution of both Houses determined otherwise.³⁴ At Committee Stage in the House of Lords, Lord Parker proposed an amendment to the Bill that would replace the mandatory life sentence with a discretionary life sentence.³⁵ While this proposal received some support, it was ultimately defeated. Lord Parker proposed a further amendment that would enable the court to recommend a minimum period which should elapse before the Secretary of State ordered the release of the prisoner on licence.³⁶ This proposal met with greater success.

2.12 The Bill was enacted as the *Murder (Abolition of Death Penalty) Act 1965*. Section 1(1) provided that persons convicted of murder who were aged 18 years or more at the time of the offence would receive an automatic life sentence whereas persons aged less than 18 years would continue to be detained at Her Majesty's Pleasure. Section 1(2) provided that the court could, in imposing a life sentence for murder, recommend a minimum period which should elapse before the Secretary of State ordered the release of the offender on licence. In 1969, Parliament, by affirmative resolution of both Houses, determined that the *Murder (Abolition of Death Penalty) Act 1965* should remain in force without time limit.³⁷

2.13 While the mandatory life sentence remains the penalty for murder in England and Wales, the enactment of the *Murder (Abolition of Death Penalty) Act 1965* did not mark the end of the debate. Over time, public dissatisfaction with the life sentence grew as it came to be understood that those who received a life sentence would, in fact, serve a much shorter period in prison, specifically, in the region of 9 years.³⁸ This led to a reference to the Criminal Law Revision Committee in England and Wales to review the penalty for homicide.³⁹ In its 1973 Report,⁴⁰ the Committee recommended the retention of the

³⁰ Shute "Punishing Murders: Release Procedures and the 'Tariff', 1953-2004" [2004] Crim LR 873 at 875; Smith "The Penalty for Murder" (1988) 19 Cambrian Law Review 5 at 7; and Morris *Crime and Criminal Justice since 1945* (Blackwell, 1989) at 85.

³¹ It would appear that Gwynne Owen Evans's real name was John Robson Walby. See: "Stable murder rate sways MPs to permanently end the death penalty" Lincolnshire Echo 12 December 2006.

³² Edge "The Last Hangings" Daily and Sunday Express 5 August 2011; "Enough rope: Tomorrow it will be 25 years since the last hanging in Britain..." The Guardian 12 August 1989; and "Stable murder rate sways MPs to permanently end the death penalty" Lincolnshire Echo 12 December 2006.

³³ Dawtry "The Abolition of the Death Penalty in Britain" (1966) 6 Brit J Criminology 183; and Blom-Cooper "The Penalty for Murder: A Myth Exploded" [1996] Crim LR 707 at 710.

³⁴ Dawtry "The Abolition of the Death Penalty in Britain" (1966) 6 Brit J Criminology 183 at 184.

³⁵ Dawtry "The Abolition of the Death Penalty in Britain" (1966) 6 Brit J Criminology 183 at 184-185; and Smith "The Penalty for Murder" (1988) 19 Cambrian Law Review 5 at 9.

³⁶ Dawtry "The Abolition of the Death Penalty in Britain" (1966) 6 Brit J Criminology 183 at 185.

³⁷ Shute "Punishing Murders: Release Procedures and the 'Tariff', 1953-2004" [2004] Crim LR 873 at 875; and Smith "The Penalty for Murder" (1988) 19 Cambrian Law Review 5 at 8. See: section 4 of the *Murder (Abolition of Death Penalty) Act 1965*.

³⁸ Smith "The Penalty for Murder" (1988) 19 Cambrian Law Review 5 at 8.

³⁹ This also led to the establishment of the Emslie Committee in Scotland.

⁴⁰ *Report on the Penalty for Murder* (Criminal Law Revision Committee, 1973). The Emslie Committee had reported a year earlier (see: *Report on the Penalties for Murder* (Lord Emslie Committee, 1972)).

mandatory life sentence for murder and a number of procedural clarifications. It expressed the view that the courts should not be required to recommend a minimum term in every case;⁴¹ that any recommendation should not be binding;⁴² that any recommendation should be considered part of the sentence and, therefore, appealable;⁴³ and that the court should not be required to give reasons for its recommendation.⁴⁴ It also expressed the view that the deterrent value of the life sentence would be enhanced and a number of misunderstandings removed if the pronouncement of the court were to reflect the fact that the prisoner sentenced to life imprisonment might be released but would remain liable to imprisonment for the rest of his or her life.⁴⁵

2.14 Subsequently, the Butler Committee on Mentally Abnormal Offenders⁴⁶ and the Advisory Council on the Penal System⁴⁷ recommended, for different reasons, the abolition of the mandatory life sentence and its replacement with a maximum sentence of life imprisonment.⁴⁸ The Advisory Council disliked the life sentence because it was wholly indeterminate. This, it asserted, would have a detrimental effect on the prisoner and place a severe burden on an already pressurised prison system. The Butler Committee, on the other hand, was dissatisfied with the operation of the defence of “diminished responsibility” which, it thought, would be rendered obsolete if the mandatory life sentence was abolished. The Criminal Law Revision Committee returned to consider the mandatory life sentence in its *Report on Offences against the Person* in 1980.⁴⁹ This time, however, the Committee members were almost equally divided between those who favoured the mandatory sentence and those who preferred a discretionary sentence.

(ii) European Convention on Human Rights

2.15 The life sentence for murder in England and Wales has been considered on numerous occasions by the European Court of Human Rights. These cases are primarily concerned with Article 5(1) and Article 5(4) of the European Convention on Human Rights. Two key principles regarding Article 5 have been extracted from the resultant jurisprudence:

“First, the underlying purpose of Article 5 is to protect individuals from being deprived of their liberty arbitrarily: in the context of life sentence prisoners a decision to continue their detention should not be taken arbitrarily. The required protection is achieved through the review mechanism prescribed by Article 5(4). Second, it may be inferred from the jurisprudence that prolonged detention can be justified on the limited grounds of *risk and dangerousness*.”⁵⁰
[Emphasis added.]

⁴¹ *Report on the Penalty for Murder* (Criminal Law Revision Committee, 1973) at 17. By contrast, the Emslie Committee had recommended that the legislation should be amended to oblige courts to recommend a minimum term (see: *Report on the Penalties for Murder* (Lord Emslie Committee, 1972) at paragraph 92).

⁴² *Report on the Penalty for Murder* (Criminal Law Revision Committee, 1973) at 17.

⁴³ *Ibid* at 18.

⁴⁴ *Report on the Penalty for Murder* (Criminal Law Revision Committee, 1973) at 19. By contrast, the Emslie Committee had recommended that the courts should be obliged to give reasons (see: *Report on the Penalties for Murder* (Lord Emslie Committee, 1972) at paragraph 102.)

⁴⁵ *Report on the Penalty for Murder* (Criminal Law Revision Committee, 1973) at 19. The Emslie Committee had come to the same conclusion (see: *Report on the Penalties for Murder* (Lord Emslie Committee, 1972) at paragraph 96).

⁴⁶ *Report of the Committee on Mentally Abnormal Offenders* (HMSO, 1975) Cmnd 6244.

⁴⁷ *Sentences of Imprisonment: A Review of Maximum Penalties* (HMSO, 1978).

⁴⁸ Smith “The Penalty for Murder” (1988) 19 *Cambrian Law Review* 5 at 8-12.

⁴⁹ *Ibid* at 8.

⁵⁰ McCutcheon and Coffey “Life Sentences in Ireland and the European Convention on Human Rights (2006) *Irish Yearbook of International Law* 101 at 103.

2.16 It may be recalled that the mandatory life sentence in the United Kingdom is composed of two parts: a punitive part and a preventative part. (This may be contrasted with the Irish sentencing system which considers life sentences to be wholly punitive.) Once the punitive part of a sentence is served, the continued detention of a prisoner under the preventative part can only be justified on the ground that the prisoner continues to represent a risk or danger to the public. Thus, while the *imposition* of a life sentence may be lawful under Article 5(1), the continued detention of a prisoner may become unlawful where the punitive part of the sentence has been served and the prisoner no longer represents a risk or danger to the public.

2.17 Thus, the European Court of Human Rights established the principle that the continued detention of a prisoner under the preventative part of a life sentence must be periodically reviewed in accordance with Article 5(4) of the European Convention on Human Rights. In *Weeks v United Kingdom*,⁵¹ the applicant had received a discretionary life sentence for armed robbery on the basis that he was a dangerous offender. He had been subsequently released on licence which was revoked when he committed a further offence. The applicant contended that his detention subsequent to the revocation of his licence was contrary to Article 5(1) and that he had not been able to have his continued detention reviewed in accordance with Article 5(4).⁵² The Court acknowledged that the freedom enjoyed by a prisoner on licence was “more circumscribed in law and more precarious than the freedom enjoyed by the ordinary citizen” but held that it qualified as “freedom” for the purpose of Article 5(1).⁵³ The applicant was thus entitled to invoke Article 5(1). Referring to the disturbed and aggressive behaviour of the applicant, the Court found, however, that the decision to revoke his licence and re-detain him had been neither arbitrary nor unreasonable and was, therefore, compatible with Article 5(1).⁵⁴ Once returned to custody and at reasonable intervals thereafter, however, the Court ruled that the applicant was entitled to have his continued detention reviewed in accordance with Article 5(4).⁵⁵

2.18 The European Court of Human Rights initially drew a distinction between discretionary life sentences and mandatory life sentences.⁵⁶ Whereas the discretionary life sentence was composed of both a punitive and a preventative part, the mandatory life sentence was wholly punitive. Thus, periodic review of detention under a mandatory life sentence was not required. In *Wynne v United Kingdom*,⁵⁷ the applicant had received a mandatory life sentence for murder. He had been subsequently released on a life licence during which time he killed a woman. The applicant was convicted of manslaughter and the domestic court imposed a discretionary life sentence and revoked his life licence. Once the punitive part of the discretionary life sentence was served, the applicant contended that he was entitled to have his continued detention reviewed.⁵⁸ The European Court of Human Rights dismissed his claim, holding that his conviction for manslaughter did not affect the continued validity of the mandatory life sentence or its reactivation on his recall. The conviction or, more particularly, the discretionary life sentence merely provided a supplementary legal basis for his detention. Citing *Thynne, Wilson and Gunnell v United Kingdom*,⁵⁹ the Court held that in the context of mandatory life sentences, the guarantee of Article 5(4) was satisfied by the original trial and appeal proceedings.⁶⁰ It thus conferred no additional right to challenge the lawfulness of continuing detention or re-detention following the revocation of a licence. In

⁵¹ *Weeks v United Kingdom* (1988) 10 EHRR 293.

⁵² *Ibid* at paragraph 38.

⁵³ *Ibid* at paragraph 40.

⁵⁴ *Ibid* at paragraph 51.

⁵⁵ *Ibid* at paragraph 61.

⁵⁶ McCutcheon and Coffey “Life Sentences in Ireland and the European Convention on Human Rights (2006) *Irish Yearbook of International Law* 101 at 104.

⁵⁷ *Wynne v United Kingdom* (1995) 19 EHRR 333.

⁵⁸ *Ibid* at paragraph 31.

⁵⁹ *Thynne, Wilson and Gunnell v United Kingdom* (1991) 13 EHRR 666.

⁶⁰ *Wynne v United Kingdom* (1995) 19 EHRR 333 at paragraph 36.

the course of its judgment, the Court distinguished between discretionary life sentences and mandatory life sentences:

“[T]he fact remains that the mandatory sentence belongs to a different category from the discretionary sentence in the sense that it is imposed automatically as the punishment for the offence of murder irrespective of considerations pertaining to the dangerousness of the offender... . That mandatory life prisoners do not actually spend the rest of their lives in prison and that a notional tariff period is also established in such cases ... does not alter this essential distinction between the two types of life sentence.”⁶¹

2.19 In *Thynne, Wilson and Gunnell v United Kingdom*,⁶² the applicants were convicted sex offenders who had been sentenced to discretionary terms of life imprisonment. Having served the punitive parts of their sentences, the applicants complained that they had not been able to have their continued detention periodically reviewed in accordance with Article 5(4).⁶³ Each of the applicants had been found to be suffering from a mental or personality disorder and to be dangerous and in need of treatment. Since the factors of mental instability and dangerousness were susceptible to change over the passage of time, the Court found that new issues of lawfulness could arise during the course of their detention.⁶⁴ Thus, the applicants were entitled to have their continued detention reviewed by a court-like body.

2.20 As a result of this decision, section 34 of the *Criminal Justice Act 1991* introduced a procedure to review the preventive part of a discretionary life sentence.⁶⁵ It also formalised the sentencing procedure so that a judge imposing a discretionary life sentence was now required to specify in open court the punitive part of the sentence. In the *2002 Practice Direction (Criminal Proceedings: Consolidation)*,⁶⁶ it is indicated that it is only in very exceptional circumstances that a judge would be justified in not specifying a tariff. This might occur where the judge considers that the offence is so serious that detention for life is justified by the gravity of the offence alone, irrespective of any risk to the public. In such a case, the judge should state this when imposing the sentence. The tariff is a sentence for the purposes of the *Criminal Appeal Act 1968* and may thus be subject to appeal.⁶⁷

2.21 Over time, the European Court of Human Rights began to question the distinction between discretionary life sentences and mandatory life sentences.⁶⁸ This initially occurred in several cases concerned with juvenile offenders who had been convicted of murder and sentenced to detention during Her Majesty's Pleasure. In *Hussain v United Kingdom*,⁶⁹ the applicant contended that he was entitled to have his continued detention periodically reviewed under Article 5(4).⁷⁰ The Court considered whether a sentence of detention during Her Majesty's Pleasure was more akin to a discretionary life sentence or a mandatory life sentence.⁷¹ The Court observed that the sentence was mandatory in terms of being fixed

⁶¹ *Wynne v United Kingdom* (1995) 19 EHRR 333 at paragraph 35.

⁶² *Thynne, Wilson and Gunnell v United Kingdom* (1991) 13 EHRR 666.

⁶³ *Ibid* at paragraph 64.

⁶⁴ *Ibid* at paragraph 78.

⁶⁵ Emmerson, Ashworth and Macdonald, eds, *Human Rights and Criminal Justice* (Thomson, Sweet & Maxwell, 2007) at 678. The procedure is now governed by section 82A of the *Powers of Criminal Courts (Sentencing) Act 2002*.

⁶⁶ *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 1 WLR 2870.

⁶⁷ *R v Dalton* [1995] 2 Cr App R 340.

⁶⁸ McCutcheon and Coffey “Life Sentences in Ireland and the European Convention on Human Rights (2006) *Irish Yearbook of International Law* 101 at 104.

⁶⁹ *Hussain v United Kingdom* (1996) 22 EHRR 1.

⁷⁰ *Ibid* at paragraph 47.

⁷¹ *Ibid* at paragraph 50.

by law and applicable in all cases where persons under the age of 18 years were convicted of murder.⁷² The Court stated, however, that the decisive issue was whether the nature and purpose of the sentence were such as to require the lawfulness of the detention to be periodically reviewed in accordance with Article 5(4).⁷³ The Court considered that an indeterminate term of detention for a convicted young person, which might be as long as that person's life, could only be justified by considerations based on the need to protect the public.⁷⁴ The Court thus concluded that the applicant's sentence, after the expiration of his tariff, was more comparable to a discretionary life sentence.⁷⁵ The decisive ground for the applicant's detention had been and continued to be his dangerousness to society.⁷⁶ As this was a characteristic which could change over time, the Court held that the applicant was entitled to have his continued detention periodically reviewed by a court-like body in accordance with Article 5(4).⁷⁷

2.22 As a result of this decision, section 28 of the *Crime (Sentences) Act 1997* extended to juvenile offenders sentenced to detention at Her Majesty's Pleasure, the same right as offenders sentenced to discretionary life imprisonment, to have the preventive part of their sentences periodically reviewed by the Parole Board.⁷⁸

2.23 The European Court of Human Rights also began to question the role of the Home Secretary in setting the tariff for sentences such as detention at Her Majesty's Pleasure.⁷⁹ In *V and T v United Kingdom*,⁸⁰ the Court ruled that the fixing of a tariff was a sentencing exercise and that the applicants were thus entitled to the safeguards of Article 6(1) of the European Convention on Human Rights,⁸¹ which required that the determination of civil rights and obligations be conducted by an "independent and impartial tribunal".⁸² As the Home Secretary could not be considered "independent" of the Executive, the Court found that there had been a violation of Article 6(1).⁸³

2.24 As a result of this decision, the Home Secretary relinquished his power to set the tariff for sentences of detention at Her Majesty's Pleasure and this is now set by the trial judge.⁸⁴ The Lord Chief Justice issued a Practice Direction⁸⁵ setting out the various factors which judges should take into account when setting tariff periods for murder by offenders of all ages. It is interesting to note, however, that the

⁷² *Ibid* at paragraph 51.

⁷³ *Hussain v United Kingdom* (1996) 22 EHRR 1 at paragraph 52.

⁷⁴ *Ibid* at paragraph 53.

⁷⁵ *Ibid* at paragraph 54.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*.

⁷⁸ Emmerson, Ashworth and Macdonald, eds, *Human Rights and Criminal Justice* (Thomson, Sweet & Maxwell, 2007) at 679.

⁷⁹ McCutcheon and Coffey "Life Sentences in Ireland and the European Convention on Human Rights (2006) *Irish Yearbook of International Law* 101 at 105.

⁸⁰ *V and T v United Kingdom* (2000) 30 EHRR 121.

⁸¹ *Ibid* at paragraph 111.

⁸² *Ibid* at paragraph 114.

⁸³ *Ibid*.

⁸⁴ Emmerson, Ashworth and Macdonald, eds, *Human Rights and Criminal Justice* (Thomson, Sweet & Maxwell, 2007) at 680.

⁸⁵ *Practice Statement (Life Sentences for Murder)* [2002] Cr App R 457. This has since been replaced by section 269 of the *Criminal Justice Act 2003*. Schedule 22 to the 2003 Act contains transitional provisions for those serving mandatory life sentences whose offences were committed before the Act came into force.

Home Secretary retains a duty to keep the minimum term of every child detained during Her Majesty's Pleasure under review, and may still use the prerogative of mercy to shorten it.⁸⁶

2.25 The distinction between discretionary life sentences and mandatory life sentences finally collapsed in *Stafford v United Kingdom*⁸⁷, when the European Court of Human Rights assimilated the various regimes applicable to discretionary life sentences, mandatory life sentences and sentences of detention during Her Majesty's Pleasure.⁸⁸ The applicant had received a mandatory life sentence for murder. He had been subsequently released on licence and this was revoked when he was convicted of a number of fraud offences. Having served his sentence for the fraud offences, the Parole Board recommended that the applicant be released on licence but this was rejected by the Secretary of State on the ground that there was a risk that the applicant would commit further fraud offences.

2.26 The applicant contended that his continued detention was in breach of Article 5(1).⁸⁹ In this regard, he argued that it was arbitrary to justify indefinite imprisonment by reference to a risk of future non-violent offending, which involved no physical harm to others and bore no relationship to the criminal conduct which had resulted in the mandatory life sentence.⁹⁰ For its part, the Government contended that the mandatory life sentence for murder satisfied Article 5(1) and continued to provide a lawful basis for the applicant's detention.⁹¹ It argued that the mandatory life sentence could be distinguished from the discretionary life sentence as it was imposed as punishment for the seriousness of the offence and was not governed by factors, such as risk and dangerousness, which could change over time.⁹² The applicant further contended that as the basis for his continued detention was the risk of future offending, he was entitled to have his detention reviewed under Article 5(4).⁹³ He argued that, since *Wynne*, the courts in the United Kingdom had so altered their approach to, and understanding of, the mandatory life sentence, that it was no longer possible to argue that the requirements of Article 5(4) were satisfied by the original trial.⁹⁴ The Government, on the other hand, insisted that where mandatory life sentences were concerned, the requirements of Article 5(4) were met by the original trial and appeal proceedings and that no new issues of lawfulness could arise requiring review.⁹⁵

2.27 The Court held that there was no causal connection between the risk of future non-violent offending and the original mandatory life sentence for murder.⁹⁶ The applicant's re-detention was thus in breach of Article 5(1). The Court referred to legal developments in the United Kingdom and concluded that it could no longer be maintained that where mandatory life sentences were concerned, the requirements of Article 5(4) were satisfied by the original trial and appeal proceedings.⁹⁷ Thus, detention beyond the expiry of the tariff period could only be justified by considerations of risk and dangerousness associated with the objectives of the original sentence for murder.⁹⁸ As these elements could change over time, the Court held that the applicant was entitled to have his detention reviewed by a court-like

⁸⁶ *R (Smith) v Secretary of State for the Home Department* [2006] 1 AC 159.

⁸⁷ *Stafford v United Kingdom* (2002) 35 EHRR 32.

⁸⁸ McCutcheon and Coffey "Life Sentences in Ireland and the European Convention on Human Rights" (2006) *Irish Yearbook of International Law* 101 at 105.

⁸⁹ *Stafford v United Kingdom* (2002) 35 EHRR 32 at paragraph 57.

⁹⁰ *Ibid* at paragraph 58.

⁹¹ *Ibid* at paragraph 59.

⁹² *Ibid* at paragraph 59.

⁹³ *Ibid* at paragraph 85.

⁹⁴ *Ibid* at paragraph 85.

⁹⁵ *Ibid* at paragraph 86.

⁹⁶ *Ibid* at paragraph 81.

⁹⁷ *Ibid* at paragraph 87.

⁹⁸ *Ibid*.

body under Article 5(4). As the Secretary of State was not a court-like body, his exclusive power to grant release violated Article 5(4).

2.28 In *Stafford*, the European Court of Human Rights was influenced by legal developments in the United Kingdom regarding life sentences. Having regard to these legal developments, the Court came to the conclusion that the distinction between discretionary life sentences, mandatory life sentences and sentences of detention during Her Majesty's Pleasure could no longer be maintained in respect of tariff-fixing:

“The Court considers that it may now be regarded as established in domestic law that there is no distinction between mandatory life prisoners, discretionary life prisoners and juvenile murderers as regards the nature of tariff-fixing. It is a sentencing exercise. The mandatory life sentence does not impose imprisonment for life as a punishment. The tariff, which reflects the individual circumstances of the offence and the offender, represents the punishment. The Court concludes that the finding in *Wynne* that the mandatory life sentence constituted punishment for life can no longer be regarded as reflecting the real position in the domestic criminal justice system of the mandatory life prisoner.”⁹⁹

While the Court did not expressly confine this statement to the situation pertaining to the United Kingdom, the fact that it followed its consideration of the legal developments in the United Kingdom suggests that this was the intention. It is thus arguable that *Stafford* is not (as some might suggest) an authority for imposing review requirements on mandatory life sentences in countries, such as Ireland, which do not have a tariff system. This argument gains support in the decision of *Kafkaris v Cyprus*,¹⁰⁰ which will be discussed at paragraph 2.96ff.

2.29 The European Court of Human Rights did not have to consider whether the setting of the tariff by the Home Secretary was compatible with Article 6 of the Convention but did note that the role of the Home Secretary had “become increasingly difficult to reconcile with the notion of the separation of powers between the executive and the judiciary.”¹⁰¹ In *R v Secretary of State for the Home Department, ex parte Anderson*,¹⁰² however, the House of Lords ruled that Article 6(1) required the tariff to be fixed by an independent and impartial tribunal. As the Home Secretary was not an independent and impartial tribunal, he should not fix the tariff of the mandatory life sentence for murder.

2.30 The life sentence was again considered in *Vinter, Bamber and Moore v United Kingdom*.¹⁰³ In that case, the applicants were British nationals who had each received a “whole life” order in respect of a mandatory life sentence for murder. The applicants had been sentenced prior to the entry into force of the *Criminal Justice Act 2003* when the practice had been for the Secretary of State, having received recommendations from the trial judge and Lord Chief Justice, to determine the minimum term to be served by a life sentence prisoner. The fact that a whole life order had been imposed meant that the applicants could not expect to be released other than at the discretion of the Secretary of State on compassionate grounds. In general, however, the Secretary of State would review a whole life order once the prisoner had served 25 years’ imprisonment. The *Criminal Justice Act 2003* was introduced to implement a finding by the House of Lords that it was contrary to Article 6 of the European Convention on Human Rights for the Secretary of State to determine minimum terms.¹⁰⁴ Under section 269 of the 2003 Act, it became the responsibility of the trial judge, in accordance with Schedule 21, to determine the minimum term to be served by life sentence prisoners. Under section 276 and Schedule 22, persons

⁹⁹ *Stafford v United Kingdom* (2002) 35 EHRR 32 at paragraph 79.

¹⁰⁰ *Kafkaris v Cyprus* (2009) 49 EHRR 35.

¹⁰¹ *Stafford v United Kingdom* (2002) 35 EHRR 32 at paragraph 78. See: Emmerson, Ashworth and Macdonald, eds, *Human Rights and Criminal Justice* (Thomson, Sweet & Maxwell, 2007) at 682-683.

¹⁰² *R v Secretary of State for the Home Department, ex parte Anderson* [2003] 1 AC 837.

¹⁰³ *Vinter, Bamber and Moore v United Kingdom* European Court of Human Rights 17 January 2012. (Application Nos 66069/09, 130/10 and 1396/10).

¹⁰⁴ *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837.

serving mandatory life sentences, who had received minimum terms under the old system, were entitled to apply to the High Court to have their sentences reviewed. The practice whereby whole life orders were reviewed after 25 years was discontinued.

2.31 The applicants' whole life orders were upheld by the High Court and they applied to the European Court of Human Rights, alleging violations of Article 3, Article 5(4) and Article 7 of the Convention. Regarding Article 3, the applicants made a number of submissions. First, citing *Kafkaris v Cyprus*,¹⁰⁵ they argued that it was clear that the European Court of Human Rights considered that an irreducible life sentence would not merely raise an issue under Article 3, but would in fact violate Article 3. Second, they argued that the English Court of Appeal had erred in *R v Bieber*¹⁰⁶ by distinguishing between irreducible mandatory life sentences and irreducible discretionary life sentences. There was no proper basis in *Kafkaris* for the Court of Appeal to conclude that only an irreducible mandatory life sentence could raise an issue under Article 3. Such a conclusion would, in any case, lead to inconsistent findings where some irreducible life sentences would violate Article 3 because they were mandatory, whereas others would not violate Article 3 because they were discretionary, even though both types of sentence would entail the same hopelessness regarding release. Third, they argued that the Court of Appeal had erred in finding that a violation of Article 3 could not arise at the moment of the imposition of a sentence. They submitted that a violation arose because of the imposition of hopelessness that came with such a sentence. Finally, they argued that the Secretary of State's power of compassionate release was not sufficient to make a life sentence reducible. The second applicant further relied on the fact that he had been promised reviews at various stages of his sentence, and that an irreducible sentence imposed on a young man was very different to one imposed on a much older man, which served to underline the inequality, cruelty and illogicality of irreducible life sentences.

2.32 The Court stated that it was first necessary to consider whether a grossly disproportionate sentence would violate Article 3 and, second, at what point in the course of a life sentence or other very long sentence an Article 3 issue might arise. In relation to the first issue, the Court stated that it was prepared to accept that a grossly disproportionate sentence could amount to ill-treatment contrary to Article 3 at the moment of its imposition. It observed, however, that "gross disproportionality" was a strict test and that it would only be on "rare and unique occasions" that the test would be met.¹⁰⁷

2.33 In relation to the second issue, the Court indicated that, subject to the general requirement that a sentence should not be grossly disproportionate, it was necessary to distinguish between three types of life sentence: (i) a life sentence with eligibility for release after a minimum period has been served; (ii) a discretionary sentence of life imprisonment without the possibility of parole; and (iii) a mandatory sentence of life imprisonment. The Court indicated that the first type of sentence was clearly reducible and thus no issue could arise under Article 3.

2.34 Regarding the second type of sentence, the Court indicated that if a discretionary life sentence was imposed by a court after due consideration of all relevant mitigating and aggravating factors, an Article 3 issue could not arise at the moment it was imposed. Rather, it would only arise when it could be shown that: (i) the applicant's continued imprisonment could no longer be justified on any legitimate penological grounds (such as punishment, deterrence, public protection or rehabilitation); and (ii) the sentence was irreducible *de facto* and *de iure*.

2.35 Regarding the third type of sentence, the Court indicated that a mandatory sentence of life imprisonment without the possibility of parole would require greater scrutiny. The Court observed that the "vice of any mandatory sentence is that it deprives the defendant of any possibility to put any mitigating factors or special circumstances before the sentencing court". This was especially true in respect of a mandatory life sentence without the possibility of parole, a sentence which, in effect, condemned a defendant to spend the rest of his or her days in prison, irrespective of his or her level of culpability and

¹⁰⁵ *Kafkaris v Cyprus* (2009) 49 EHRR 35.

¹⁰⁶ *R v Bieber* [2009] 1 WLR 223.

¹⁰⁷ *Vinter, Bamber and Moore v United Kingdom* European Court of Human Rights 17 January 2012. (Application Nos 66069/09, 130/10 and 1396/10) at paragraph 89.

irrespective of whether the sentencing court considered the sentence to be justified. These considerations did not mean that a mandatory life sentence without the possibility of parole was *per se* incompatible with the Convention, although the trend in Europe was clearly against such sentences, but that such a sentence was much more likely to be grossly disproportionate than any other type of life sentence. In the absence of any such gross disproportionality, an Article 3 issue would arise for a mandatory life sentence without the possibility of parole in the same way as for a discretionary life sentence, that is when it could be shown that: (i) the continued imprisonment of the applicant could no longer be justified on any legitimate penological grounds; and (ii) the sentence was irreducible *de facto* and *de iure*.

2.36 The Court observed that in the present cases, the whole life orders were, in effect, discretionary life sentences without parole. Regarding *de iure* reducibility, the Court noted that once imposed, such sentences were not subject to later review and release could only be obtained from the Secretary of State on compassionate grounds. The policy of the Secretary of State regarding compassionate release appeared to be much narrower than the Cypriot policy on release, which had been considered in *Kafkaris*. First, the policy could conceivably mean that a prisoner would remain in prison even if his continued imprisonment could not be justified on any legitimate penological grounds, as long as he or she did not become terminally ill or physically incapacitated. Second, it was of some relevance that the practice of a 25-year review, which existed prior to the introduction of the *Criminal Justice Act 2003*, had not been included in the reforms introduced by the 2003 Act. No clear explanation had been given for the omission, even though it appeared that a 25-year review, supplemented by regular reviews thereafter, would be one means by which the Secretary of State could satisfy himself that the prisoner's imprisonment continued to be justified on legitimate penological grounds. Third, the Court stated that it doubted whether compassionate release for the terminally ill or physically incapacitated could really be considered release at all, if all that it meant was that a prisoner died at home or in a hospice rather than behind prison walls.

2.37 However, the Court considered that the issue of *de facto* reducibility did not arise for examination in the present cases. First, the applicants had not sought to argue that their whole life orders were grossly disproportionate. Given the gravity of the murders of which they had been convicted, the Court was satisfied that the whole life orders were not grossly disproportionate. Second, none of the applicants had demonstrated that their continued incarceration served no legitimate penological purpose. For each case, the Court was satisfied that detention served the legitimate purposes of punishment and deterrence. The Court thus concluded that there had been no violation of Article 3.

2.38 Regarding Article 5(4), the applicants submitted that the imposition of whole life orders without the possibility of regular review by the courts violated Article 5(4) of the Convention.

2.39 The Court indicated that while continued detention might violate Article 3 if it was no longer justified on legitimate penological grounds and the sentence was irreducible *de facto* and *de iure*, it did not follow that the applicants' detention had to be reviewed regularly in order for it to comply with the provisions of Article 5. Moreover, it was clear from the remarks of the trial judge in respect of the first applicant and the remarks of the High Court in respect of the second and third applicants, that whole life orders had been imposed on them to meet the requirements of punishment and deterrence. Citing a decision of the English Court of Appeal,¹⁰⁸ the Court observed that the practice in England was to impose a whole life order where the offence was so exceptionally serious that just punishment required the offender to be kept in prison for the rest of his or her life. The present applicants' sentences were thus different from the life sentence considered in *Stafford v United Kingdom*,¹⁰⁹ which the Court found was divided into a tariff period (imposed for the purpose of punishment) and the remainder of the sentence (under which continued detention was determined by considerations of risk and dangerousness). Consequently, the Court was satisfied that the lawfulness of the applicants' detention was incorporated in the whole life orders imposed by the domestic courts and no further review was required by Article 5(4). The Court thus found that the applicants' complaints were manifestly ill-founded.

¹⁰⁸ *R v Jones and Others* [2006] 2 Cr App R (S) 19.

¹⁰⁹ *Stafford v United Kingdom* (2002) 35 EHRR 32.

2.40 Regarding Article 7,¹¹⁰ the second applicant submitted that the trial judge had recommended a minimum term of 25 years but had been overruled by the Secretary of State in 1988. This was incompatible with Article 6 of the Convention and should have played no part in the sentencing process. The High Court review, which confirmed the whole life order, thus imposed a more severe penalty than the sentence which had been passed at the time of the offence. The applicant also asserted that it was clear that, in the High Court review, Schedule 21 of the *Criminal Justice Act 2003* (which sets out the means by which a minimum term is to be calculated) had been relied on, even though it established a harsher sentencing regime than that which was applicable when the applicant had been convicted. In order to be compatible with Article 7, the applicant asserted that Schedule 22 of the *Criminal Justice Act 2003*, which provides for the High Court review, should have prohibited the imposition of a minimum term that was higher than the trial judge's recommendation rather than that imposed by the Secretary of State.

2.41 The third applicant conceded that the whole life term was technically available in 1996 when his offences were committed. However, it was very exceptional for whole life orders to be imposed at the time. The whole life order for the murder of two or more persons involving premeditation and/or sexual or sadistic conduct had effectively been introduced by Schedule 21. The High Court had specifically rejected the trial judge's recommendation of 30 years because of Schedule 21. Therefore, he asserted that he too had been sentenced under a harsher statutory framework than existed at the time of the offences.

2.42 The Court observed that the setting of a minimum term was a sentencing exercise and thus attracted the protection of Article 7. However, the Court indicated that it was unable to accept that the process by which the second and third applicants' current whole life orders were imposed had infringed Article 7. First, paragraph 3(1)(a) of Schedule 22 expressly protected against the imposition of a longer minimum term than was initially imposed. Second, there was no evidence that, in practice, this statutory protection had been circumvented by the need to consider the principles in Schedule 21. Schedule 21 might well reflect a stricter sentencing regime than was previously applied for the crime of murder and, if it were determinative of the minimum term to be imposed for offences committed prior to its enactment, might well have violated Article 7. However, this was not the case. In conducting its review under Schedule 22, the High Court was to have regard to both Schedule 21 and the previous recommendations made in respect of a life sentence prisoner by the trial judge and the Lord Chief Justice. The Court indicated that there was nothing objectionable in directing the High Court in this way.

2.43 In a joint partly dissenting opinion, however, three of the judges concluded that there had been a procedural infringement of Article 3 of the European Convention on Human Rights. This was by reason of the absence of some mechanism that would remove the hopelessness inherent in a life sentence, from which there was no possibility of release while the prisoner was still well enough to have any sort of life outside prison.

(b) Northern Ireland

2.44 It has been noted that until the enactment of the *Homicide Act 1957* in England and Wales, which did not extend to Northern Ireland, the law on murder had been the same in Northern Ireland as in England and Wales.¹¹¹ As there were few murder cases, there was little public demand for the law in Northern Ireland to be changed along the lines of the 1957 Act.¹¹² However, this changed in the 1960s when there were two hangings in circumstances which, it has been asserted, would not have resulted in the death penalty had the offences been committed in England.¹¹³

¹¹⁰ Article 7 ECHR: No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

¹¹¹ Osborough "Homicide and Criminal Responsibility Bill (NI) 1963" (1965) 16 NILQ 73 at 73.

¹¹² *Ibid.*

¹¹³ *Ibid.*

2.45 In *Attorney General for Northern Ireland v Gallagher*,¹¹⁴ the defendant was convicted of the murder of his wife. A plea of insanity failed where there was evidence that he suffered from a psychopathic condition; that he was liable to explosive outbursts which could be induced by drink; and that he had been drunk at the time of committing the offence. The Northern Ireland Court of Criminal Appeal referred a point of general public importance to the House of Lords which ruled that a psychopath who goes out to kill knowing that it is wrong, and does kill, cannot escape the consequences by making himself drunk before carrying out the killing.

2.46 In *DPP v Smith*,¹¹⁵ the House of Lords decided that murder could be committed even though the defendant had not possessed the actual intent to kill. It was enough that grievous bodily harm was the natural and probable result of the defendant's actions and that the ordinary, responsible man would have known that. By contrast to the limiting effect of the *Homicide Act 1957* in England, the effect of the *Smith* decision was to expand the concept of murder.¹¹⁶

2.47 Following a campaign by the Northern Ireland Association for the Reform of the Law on Capital Punishment, a private member's bill was introduced into the Stormont Parliament.¹¹⁷ The *Homicide and Criminal Responsibility Bill* proposed a number of reforms, including the abolition of capital punishment. The Bill did not receive a second reading.¹¹⁸

2.48 In 1963, a Bill was introduced to abolish the death penalty in its entirety.¹¹⁹ The 1963 Bill was later enacted as the *Criminal Justice Act (Northern Ireland) 1966*. In its final form, however, the 1966 Act followed the *Homicide Act 1957* in drawing a distinction between capital and non-capital murder.¹²⁰ This was subsequently repealed by the *Northern Ireland (Emergency Provisions) Act 1973*.¹²¹

2.49 Section 1(1) of the *Northern Ireland (Emergency Provisions) Act 1973* abolished the death penalty for murder and replaced it with a mandatory life sentence. Article 5 of the *Life Sentences (Northern Ireland) Order 2001* provides that where a court imposes a life sentence, it must specify the minimum period that must be served by the offender "to satisfy the requirements of retribution and deterrence", before he or she becomes eligible for parole.¹²² Where the offence warranting the life sentence is particularly serious, the court may order a "whole life tariff" if it considers that the offender should be detained for the remainder of his or her natural life.¹²³

2.50 A review of Northern Ireland's criminal justice system was conducted¹²⁴ prior to the commencement of the United Kingdom *Human Rights Act 1998*, and a review of Northern Ireland's sentencing framework was conducted¹²⁵ following the enactment of the United Kingdom *Criminal Justice*

¹¹⁴ *Attorney General for Northern Ireland v Gallagher* [1962] NI 122.

¹¹⁵ *DPP v Smith* [1961] AC 290.

¹¹⁶ Osborough "Homicide and Criminal Responsibility Bill (NI) 1963" (1965) 16 NILQ 73 at 76.

¹¹⁷ Stannard "The View from Ireland" in Reed and Bohlander, eds, *Loss of Control and Diminishment Responsibility - Domestic, Comparative and International Perspectives* (Ashgate Publishing Ltd, 2011) at 161.

¹¹⁸ Osborough "Homicide and Criminal Responsibility Bill (NI) 1963" (1965) 16 NILQ 73 at 76; and Stannard "The View from Ireland" in Reed and Bohlander, eds, *Loss of Control and Diminishment Responsibility - Domestic, Comparative and International Perspectives* (Ashgate Publishing Ltd, 2011) at 161.

¹¹⁹ Stannard "The View from Ireland" in Reed and Bohlander, eds, *Loss of Control and Diminishment Responsibility - Domestic, Comparative and International Perspectives* (Ashgate Publishing Ltd, 2011) at 161-162.

¹²⁰ Section 10 of the *Criminal Justice (Northern Ireland) Act 1966*.

¹²¹ Schedule 5 to the *Northern Ireland (Emergency Provisions) Act 1973*.

¹²² Article 5(1) and (2) of the *Life Sentences (Northern Ireland) Order 2001*.

¹²³ Article 5(3) of the *Life Sentences (Northern Ireland) Order 2001*.

¹²⁴ *Review of the Criminal Justice System in Northern Ireland* (Criminal Justice Review Group, 2000).

¹²⁵ *Consultation on the Review of the Sentencing Framework in Northern Ireland* (Northern Ireland Office, 2005).

Act 2003 in England and Wales. As a result of the recommendations contained in these reviews,¹²⁶ the *Life Sentences (Northern Ireland) Order 2001* was adopted to ensure that the *punitive* or *tariff period* of life sentences was judicially determined¹²⁷ and that the suitability of prisoners for release was assessed by an independent body of judicial character. For this purpose, Part II of the *Life Sentences (Northern Ireland) Order 2001* established the “Life Sentence Review Commissioners”, which were renamed the “Parole Commissioners for Northern Ireland” in 2008.¹²⁸

2.51 Article 5 of the *Life Sentences (Northern Ireland) Order 2001* provides that where a court passes a life sentence it must specify a period to be served by the offender “to satisfy the requirements of retribution and deterrence”. Once this period has been served, the offender may be considered for release by the Parole Commissioners. The Parole Commissioners may only direct the release of the prisoner if the prisoner’s case has been referred to them by the Secretary of State and if they are satisfied that the prisoner’s continued detention is not necessary for the protection of the public from serious harm.¹²⁹ Release is “on licence” and may be revoked by the Secretary of State where this has been recommended by the Parole Commissioners or where the Secretary of State considers it expedient in the public interest to do so.¹³⁰

2.52 As to how to calculate a minimum term, the Northern Ireland Court of Appeal, in *R v Candless*,¹³¹ directed the courts to have regard to the guidance provided by Lord Woolf CJ in his 2002 *Practice Statement (Crime: Life Sentences)*.¹³² The Practice Statement sets out the starting points and the circumstances in which each starting point applies. The starting points range from the “normal starting point” of 12 years’ imprisonment, through the “higher starting point” of 15-16 years, up to 30 years.¹³³ It also sets out the factors which tend to aggravate or mitigate the duration of the minimum term.¹³⁴

2.53 Section 23 of the *Northern Ireland Act 1998*, as amended,¹³⁵ provides that the royal prerogative of mercy is exercisable on the Queen’s behalf by the Northern Ireland Minister for Justice. The royal prerogative of mercy has been mostly superseded by statutory provisions.¹³⁶

(c) Scotland

2.54 The *Murder (Abolition of the Death Penalty) Act 1965* also applied to Scotland.¹³⁷ Section 1(1) of the 1965 Act abolished the death penalty and replaced it with the mandatory life sentence, for a period of

¹²⁶ *Annual Report 2009-2010* (Parole Commissioners of Northern Ireland, 2010) at 4 ff.

¹²⁷ Article 3 of the *Life Sentences (Northern Ireland) Order 2001*.

¹²⁸ Article 46(1) of the *Criminal Justice (Northern Ireland) Order 2008* substituted the name “Parole Commissioners” for “Life Sentence Commissioners”.

¹²⁹ Article 6(4) of the *Life Sentences (Northern Ireland) Order 2001*.

¹³⁰ Article 28(2) of the *Criminal Justice (Northern Ireland) Order 2008*.

¹³¹ *R v Candless* [2004] NI 269 at 274-275.

¹³² *Practice Statement (Crime: Life Sentences)* [2002] 3 All ER 412 at 413-415; [2002] 1 WLR 1789 at 1790-1792.

¹³³ Paragraphs 10 to 19 of the *Practice Statement (Crime: Life Sentences)* [2002] 3 All ER 412 at 413-415; [2002] 1 WLR 1789 at 1790-1792.

¹³⁴ Paragraphs 13 to 19 of the *Practice Statement (Crime: Life Sentences)* [2002] 3 All ER 412 at 413-415; [2002] 1 WLR 1789 at 1790-1792.

¹³⁵ Section 24 of the *Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010*.

¹³⁶ For example, Article 20 of the *Criminal Justice (Northern Ireland) Order 2008* and Article 7 of the *Life Sentences (Northern Ireland) Order 2001* provide for the grant of temporary release on compassionate grounds.

¹³⁷ Tadros “The Scots Law of Murder” in *The Law of Murder: Overseas Comparative Studies* (Law Commission, 2005) at 87-105. Sheehan and Dickson *Criminal Procedure - Scottish Criminal Law and Practice Series* (LexisNexis Butterworths, 2nd ed, 2003) at 329.

five years. This was made permanent by a resolution of the UK Parliament on 31 December 1969. Section 205 of the *Criminal Procedure (Scotland) Act 1995* provides that a person convicted of murder must be sentenced to life imprisonment.

2.55 As in England and Wales, the sentencing court must specify a minimum term to be served by the offender before he or she may be considered for release. Section 3 of the *Prisoners and Criminal Proceedings (Scotland) Act 1993*, as amended,¹³⁸ provides that the sentencing court must specify a “punishment part” to be served by the offender “to satisfy the requirements of retribution and deterrence”.¹³⁹ Once this punishment part has been served, the offender may be considered for release by the Parole Board. The Parole Board may only direct the release of the prisoner if the prisoner’s case has been referred to it by the Secretary of State and if it is satisfied that the prisoner’s continued detention is not necessary for the protection of the public.¹⁴⁰ If the Parole Board considers this to be the case, the Secretary of State must release the prisoner on licence.¹⁴¹

2.56 It is interesting to note that the earliest precursor to section 3 of the 1993 Act was also section 1(2) of the *Murder (Abolition of the Death Penalty) Act 1965*. In 1972, prior to the publication of the report of the Criminal Law Revision Committee in England and Wales, the Lord Emslie Committee published a report in which it reviewed section 1(2) and made a number of recommendations.¹⁴² It concluded that the courts should be required, save in exceptional circumstances, to declare a minimum term;¹⁴³ that any recommendation should be appealable;¹⁴⁴ and that the courts should be required to provide reasons for a particular recommendation or for refraining from making a recommendation.¹⁴⁵

2.57 The superior courts in Scotland have provided guidance regarding the calculation of the punishment part of a life sentence.¹⁴⁶ In *HM Advocate v Boyle and Others*,¹⁴⁷ for instance, the High Court rejected the suggestion made by earlier case law that the “virtual maximum” duration of the punishment part was 30 years.¹⁴⁸ It noted that some cases, for example “mass murders by terrorist action,” might warrant a punishment part of more than 30 years.¹⁴⁹ The High Court agreed with earlier case law,

¹³⁸ *Criminal Justice (Scotland) Act 2003* and *Convention Rights (Compliance) Scotland Act 2001*, as amended by section 16(1), section 16(2), paragraph 14 of Schedule 1 and Schedule 3 to the *Crime and Punishment (Scotland) Act 1997* and the *Convention Rights (Compliance) Scotland Act 2001*.

¹³⁹ Section 2(2) of the *Prisoners and Criminal Proceedings (Scotland) Act 1993*, as amended by section 16(1), section 16(2), paragraph 14 of Schedule 1, and Schedule 3 to the *Crime and Punishment (Scotland) Act 1997* and the *Convention Rights (Compliance) Scotland Act 2001*. See: Slapper and Kelly *The English Legal System: 2009-2010* (Taylor and Francis, 2009) at 513.

¹⁴⁰ Section 2(5) of the *Prisoners and Criminal Proceedings (Scotland) Act 1993*, as amended by section 16(1), section 16(2), paragraph 14 of Schedule 1, and Schedule 3 to the *Crime and Punishment (Scotland) Act 1997* and the *Convention Rights (Compliance) Scotland Act 2001*.

¹⁴¹ Section 2(4) of the *Prisoners and Criminal Proceedings (Scotland) Act 1993*, as amended by section 16(1), section 16(2), paragraph 14 of Schedule 1, and Schedule 3 to the *Crime and Punishment (Scotland) Act 1997* and the *Convention Rights (Compliance) Scotland Act 2001*.

¹⁴² *The Penalties for Murder* (Lord Emslie Committee, 1972).

¹⁴³ *Ibid* at paragraph 92.

¹⁴⁴ *Ibid* at paragraph 98.

¹⁴⁵ *Ibid* at paragraph 102.

¹⁴⁶ *Walker v HM Advocate* 2003 SLT 130; *HM Advocate v Al Megrahi* High Court of Justiciary 24 November 2003; and *Locke v HM Advocate* 2008 SLT 159.

¹⁴⁷ *HM Advocate v Boyle and Others* [2009] HCJAC 89; see also: McDiarmid “Sentencing Murder: Boyle v HM Advocate” (2010) 14 Edin LR 473.

¹⁴⁸ *HM Advocate v Boyle and Others* [2009] HCJAC 89 at paragraph 13. See also: *Walker v HM Advocate* 2003 SLT 130; and *HM Advocate v Al Megrahi* High Court of Justiciary 24 November 2003.

¹⁴⁹ *HM Advocate v Boyle and Others* [2009] HCJAC 89 at paragraph 13.

however, in so far as it indicated that certain murder cases might be of such gravity (such as where the victim was a child or a police officer acting in the course of his or her duty, or where a firearm was used) that the punishment part should be approximately 20 years.¹⁵⁰ The High Court rejected the suggestion that the starting point for the punishment part in most murder cases was 12 years.¹⁵¹ In cases where the offender had armed himself or herself with a sharp weapon, the High Court indicated that, in the absence of exceptional circumstances, a starting point of 16 years would be more appropriate.¹⁵²

2.58 In Scotland, the responsibility for recommending the exercise of the royal prerogative of mercy is devolved to Scottish Ministers by virtue of section 53 of the *Scotland Act 1998*.¹⁵³ The royal prerogative of mercy has been superseded in many instances by statutory provisions.¹⁵⁴ The effect of a pardon is to free the convicted person from the effects of the conviction, but it does not quash the conviction.¹⁵⁵ Pardons are only granted in exceptional circumstances where no other remedy is open to the convicted person.

(2) Ireland

(a) Abolition of the Death Penalty

2.59 Section 2 of the *Offences Against the Person Act 1861* applied in Ireland when it was enacted and was carried over into Irish law on the establishment of the State in 1922. As in England and Wales, the death penalty applied to all persons convicted of murder but was commuted to imprisonment or some other form of detention in many cases. In 1925, Annie Walsh became the last woman to be executed when she and her nephew, Michael Talbot, were hanged for the murder of her elderly husband, Edward Walsh.¹⁵⁶

2.60 From the 1930s onwards, mounting concern regarding the continued presence of the death penalty on the statute books became evident in both Houses of the Oireachtas.¹⁵⁷ The 1937 Constitution of Ireland, however, clearly envisaged the retention of the death penalty as it vested the power to commute a sentence in the President, subject to the advice and consent of the Government.¹⁵⁸ In 1951, Seán MacBride tabled a motion in the Dáil proposing that a Select Committee be appointed to examine the desirability of abolishing the death penalty.¹⁵⁹ The motion was defeated.¹⁶⁰ In 1956, Professor Stanford tabled a motion in the Seanad proposing that the Government consider abolishing the death

¹⁵⁰ *HM Advocate v Boyle and Others* [2009] HCJAC 89 at paragraph 13; see also: *Walker v HM Advocate* 2002 SCCR 1036.

¹⁵¹ *HM Advocate v Boyle and Others* [2009] HCJAC 89 at paragraph 14.

¹⁵² *Ibid* at paragraph 17.

¹⁵³ *Governance of Britain - Review of the Executive Royal Prerogative Powers: Final Report* (Ministry of Justice, 2009) at 17.

¹⁵⁴ For example, section 3 of the *Prisoners and Criminal Proceedings (Scotland) Act 1993* empowers the Secretary of State, on the advice of the Parole Board, to grant temporary release on compassionate grounds.

¹⁵⁵ Sheehan and Dickson *Criminal Procedure - Scottish Criminal Law and Practice Series* (LexisNexis Butterworths, 2nd ed, 2003) at paragraph 443.

¹⁵⁶ "You shall hang by the neck" Irish Independent 21 November 2009; and "British hangman's price drop save Free State a bit of capital" Irish Times 5 January 2012.

¹⁵⁷ O'Malley "Sentencing Murderers: The Case for Relocating Discretion" (1995) 5(1) ICLJ 31 at 32.

¹⁵⁸ Article 13.6 of the Constitution.

¹⁵⁹ O'Malley "Sentencing Murderers: The Case for Relocating Discretion" (1995) 5(1) ICLJ 31 at 32. See: Dáil Debates, Private Members' Business Abolition of Capital Punishment Motion, 21 November 1951, Vol 127; Dáil Debates, Private Members' Business Abolition of Capital Punishment Motion, 5 December 1951, Vol 128; and Dáil Debates, Private Members' Business Abolition of Capital Punishment Motion, 30 January 1952, Vol 129.

¹⁶⁰ Dáil Debates, Private Members' Business, Abolition of Capital Punishment Motion, 30 January 1952, Vol 129.

penalty or suspending it for an experimental period.¹⁶¹ The motion does not appear to have instigated further action.

2.61 In 1954, Michael Manning became the last man to be executed, when he was hanged for the murder of Catherine Cooper.¹⁶² Some months later, Brendan Behan's "The Quare Fellow", a play based on Behan's experience in Mountjoy Prison, opened at the Pike Theatre Club in Dublin.¹⁶³ The "quare fellow" of the title is believed to represent a former prison mate of Behan's, Bernard Kirwan, who was awaiting execution for the murder of his brother. Subsequently, the play was performed at the Theatre Royal Stratford East in 1956. The play has since been described as "an overwhelming indictment of capital punishment"¹⁶⁴ and been credited with contributing to the international debate on capital punishment.¹⁶⁵

2.62 In 1963, the Minister for Justice introduced in the Dáil a *Criminal Justice Bill* which proposed to abolish the death penalty for all crimes except treason, certain military offences and capital murders.¹⁶⁶ In support of the Bill, the Minister referred to international research which had shown that the death penalty was not a strong deterrent in respect of ordinary murder. He observed that many other European countries had already abolished or virtually abolished the death penalty. He indicated that the Government considered that it would be undesirable to retain the death penalty when it was so frequently commuted. In this regard, he observed that there had not been an execution since the execution of Michael Manning in 1954. He noted, however, that these considerations were "not fully valid" in respect of certain political murders as politically motivated offenders would not be deterred by the prospect of imprisonment. The death penalty would thus be retained for this category of murder. The Bill was enacted as the *Criminal Justice Act 1964*.

2.63 Section 1 of the *Criminal Justice Act 1964* abolished the death penalty for all crimes except treason,¹⁶⁷ "capital murder", and certain offences subject to military law.¹⁶⁸ Capital murder consisted of: (i) murder of a member of An Garda Síochána acting in the course of his duty; (ii) murder of a prison officer acting in the course of his duty; (iii) murder done in the course or furtherance of an offence under section 6, 7, 8 or 9 of the *Offences Against the State Act 1939* or in the course or furtherance of the activities of an unlawful organisation within the meaning of section 18 (other than paragraph (f)) of that Act; and (iv) murder, committed within the State for a political motive, of the head of a foreign State or of a member of the government of, or a diplomatic officer of, a foreign State. In respect of non-capital murder, section 2 of the *Criminal Justice Act 1964* imposed a mandatory sentence of penal servitude for life.

¹⁶¹ O'Malley "Sentencing Murderers: The Case for Relocating Discretion" (1995) 5(1) ICLJ 31 at 32. See: Seanad Debate, Capital Punishment Motion, 30 May 1956, Vol 46.

¹⁶² O'Malley "Sentencing Murderers: The Case for Relocating Discretion" (1995) 5(1) ICLJ 31 at 32; McNally "Last hanging in State 50 years ago today" Irish Times 20 April 2004; Mulqueen "An Irishman's Diary" Irish Times 21 April 2009; Rice "Last man hanged in Ireland was drunk and mentally deficient" Sunday Tribune 18 April 2004; "Murderer was the last man to be hanged here" Irish Independent 17 November 2009; and "Victim's family opposed death penalty" Irish News 29 November 2004.

¹⁶³ "Borstal Boy" Irish Times 1 February 2004; "Remembering Behan is a quare delight" Irish Independent 10 July 2010; "A Quare end to hanging" Sunday Mirror 5 February 2006; and "Behan 'ended hanging" The Mirror 6 February 2006.

¹⁶⁴ Eyre and Wright *Changing Stages: A View of British Theatre in the Twentieth Century* (Bloomsbury, 2000).

¹⁶⁵ Dáil Debates, Criminal Justice (No 2) Bill 1990, Second Stage, 1 June 1990, Vol 399, No 6, Col 1230; and Osborough "Homicide and Criminal Responsibility (Northern Ireland) Bill 1963" (1965) NILQ 73 at 78. See also: "A Quare end to hanging" Sunday Mirror 5 February 2006; and "Behan 'ended hanging" The Mirror 6 February 2006.

¹⁶⁶ Dáil Debates, Criminal Justice Bill 1963, Second Stage, 6 November 1963, Vol 205, No 7, Col 997ff, Minister for Justice, Charles Haughey TD.

¹⁶⁷ See: section 1 of the *Treason Act 1939*.

¹⁶⁸ Sections 124, 125, 127 and 128 of the *Defence Act 1954*.

2.64 During the 1980s, there were a number of unsuccessful attempts to remove the remaining traces of capital punishment. In May 1981, a *Criminal Justice Bill* was introduced in the Dáil, which sought to abolish the death penalty for all crimes.¹⁶⁹ The Government opposed the Bill on the grounds that it was not an appropriate time to abolish the death penalty given that there had been much violence directed at members of An Garda Síochána and prison officers in recent years and that it would increase pressure to arm the Gardaí.¹⁷⁰ The Bill was ultimately defeated. Subsequently, in October 1981, the Minister for Justice introduced a *Criminal Justice Bill* in the Seanad, which sought to replace the death penalty with a life sentence and introduce a minimum term of 40 years' imprisonment for treason and capital murder.¹⁷¹ The Bill was passed by the Seanad but before it could get to the Dáil, the Government fell.¹⁷² In 1984, an identical Bill, the *Criminal Justice (Abolition of Death Penalty) Bill*, was introduced in the Seanad.¹⁷³ The Bill was passed in the Seanad but does not appear to have proceeded any further.

2.65 In 1990, the Minister for Justice moved a motion that a similar Bill, the *Criminal Justice (No 2) Bill*, be read a second time.¹⁷⁴ The Minister prefaced the debate by observing that the death penalty had been all but abolished in Ireland and that even though it had been retained for treason and capital murder under the *Criminal Justice Act 1964*, it had not been used since 1954.¹⁷⁵ He thus argued that it could no longer be maintained that the death penalty had a deterrent effect or that in the "unique security situation which has prevailed in this country for the last 20 years", it protected the unarmed members of An Garda Síochána from violence.¹⁷⁶ He also noted that, by abolishing the death penalty, Ireland would be joining the vast majority of "western developed nations" which had already done so.¹⁷⁷ The *Criminal Justice (No 2) Bill* was enacted as the *Criminal Justice Act 1990*.

2.66 Section 1 of the *Criminal Justice Act 1990* abolished the death penalty for all crimes, while section 2 replaced it with a mandatory life sentence.¹⁷⁸ While the 1990 Act abandoned the classification of "capital murder", it continues to distinguish certain types of murder, including the murder of a designated person such as a member of An Garda Síochána.¹⁷⁹ In this regard, section 4 provides that such murders are punishable by a mandatory life sentence and minimum term of 40 years' imprisonment or, in the case of an attempt, a mandatory life sentence and minimum term of 20 years' imprisonment. The rationale for the Oireachtas selecting a period of 40 years as the minimum term of imprisonment was explained by the then Minister for Justice as follows:

"In deciding what penalty to propose in the Bill to replace the death penalty I was guided by a number of concerns. One, by the fact that the offences in question represent... an attack on the institutions of the State. Two, that we have a largely unarmed Garda Force whose only

¹⁶⁹ Dáil Debates, Criminal Justice Bill 1981, First Stage, 5 May 1981, Vol 328, No 9, Col 2150ff, Dr Noel Brown.

¹⁷⁰ *Ibid.*

¹⁷¹ Seanad Debates, Criminal Justice Bill 1981, Second Stage, 15 October 1981, Vol 96, No 3, Col 218ff, Minister for Justice, Jim Mitchell TD.

¹⁷² Seanad Debates, Criminal Justice (Abolition of Death Penalty) Bill 1984, Second Stage, 13 February 1985, Vol 107, No 3, Col 278, Senator Shane Ross.

¹⁷³ Seanad Debates, Criminal Justice (Abolition of Death Penalty) Bill 1984, First Stage, 15 May 1984, Vol 103, Senator Shane Ross.

¹⁷⁴ Dáil Debates, Criminal Justice (No 2) Bill 1990, Second Stage, 1 June 1990, Vol 399, No 6, Col 1194ff, Minister for Justice, Ray Burke TD.

¹⁷⁵ *Ibid.*

¹⁷⁶ Dáil Debates, Criminal Justice (No 2) Bill 1990, Second Stage, 1 June 1990, Vol 399, No 6, Col 1195, Minister for Justice, Ray Burke TD.

¹⁷⁷ *Ibid.*

¹⁷⁸ Section 1 and section 2 of the *Criminal Justice Act 1990*.

¹⁷⁹ Section 3 of the *Criminal Justice Act 1990*. See: O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 244.

protection from those with murderous intent is the statutory protection we can afford them by way of a penalty with deterrent effect. Three, the security situation which exists in this country where there are armed subversive groups operating which represent a particular threat to our democratic institutions. Four, very heavy maximum penalties are already prescribed for the types of crimes which might give rise to the circumstances where a Garda's life is put in danger. For example, the maximum penalty for armed robbery is life imprisonment. An ordinary sentence of life imprisonment for the murder of a Garda is very unlikely, therefore, to have any deterrent effect on an armed robber who is trying to evade capture. Five, what has for many years past been effectively the penalty for capital offences, namely, 40 years imprisonment."¹⁸⁰

2.67 In addition, the *Criminal Justice Act 1990* limits the power to grant early release to offenders convicted of such murders. It precludes the possibility of commuting or remitting the sentence until the minimum period has expired.¹⁸¹ However, it permits the grant of standard remission for good behaviour under the *Prison Rules*.¹⁸² Thus, the minimum period ordered to be served might be reduced by one-fourth. It also permits a limited form of temporary release for "grave reasons of a humanitarian nature".¹⁸³

2.68 The enactment of the 1990 Act "was widely viewed as having brought the debate on sentencing for murder to a satisfactory conclusion".¹⁸⁴ However, it was inevitable in some ways that there would be some public disquiet surrounding the fact that the penalty for murder would no longer be equal to the offence in fact or in effect. As Hardiman J noted in *The People (DPP) v Kelly*,¹⁸⁵ a manslaughter case:

"In cases where there has been a death and especially a death caused by an intentional as opposed to negligent act, unhappiness with the sentence is often expressed in the reflection that even the longest sentence will end at some point, probably while the defendant is still quite young, whereas the suffering and deprivation of the deceased person's family will be permanent. This is very sadly true. But it ignores the fact that under our present sentencing regime, sentences must be proportionate not only to the crime but to the individual offender."¹⁸⁶

In its 1996 Report,¹⁸⁷ the Constitution Review Group recommended that the Constitution should be amended so as to preclude the possibility of the death penalty ever being re-introduced. In 2001 the Constitution was amended at Article 15.5.2 to impose a constitutional ban on the death penalty.¹⁸⁸

(b) Constitutionality

(i) Constitutionality of the Mandatory Life Sentence

2.69 The constitutionality of section 2 of the *Criminal Justice Act 1990* was upheld by the Supreme Court in *Whelan and Lynch v Minister for Justice, Equality and Law Reform*.¹⁸⁹ The appellants argued

¹⁸⁰ Dáil Debates, Criminal Justice (No 2) Bill 1990, Committee and Final Stages, 12 June 1990, Vol 339, No 10, page 22, Minister for Justice.

¹⁸¹ Section 5(1) of the *Criminal Justice Act 1990*.

¹⁸² Section 5(2) of the *Criminal Justice Act 1990*.

¹⁸³ Section 5(3) of the *Criminal Justice Act 1990*. See: Dáil Debates, Criminal Justice (No 2) Bill 1990, Committee and Final Stages, 12 June 1990, Vol 339, No 10, page 22, Minister for Justice.

¹⁸⁴ O'Malley "Sentencing Murderers: The Case for Relocating Discretion" (1995) 5(1) ICLJ 31. In its *Report on Sentencing* (LRC 53-1996) at Recommendation 12, and in its *Report on Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008) at paragraph 1.67, the Law Reform Commission recommended the abolition of the mandatory life sentence for murder.

¹⁸⁵ *The People (DPP) v Kelly* [2005] 1 ILRM 19.

¹⁸⁶ *Ibid* at 29-30. Hardiman J cites *The State (Healy) v Donoghue* [1976] IR 325; *The People (Attorney General) v O'Driscoll* (1972) 1 Frewen 351; and *The People (DPP) v M* [1994] 3 IR 306 in relation to rehabilitation.

¹⁸⁷ *Report of the Constitution Review Group* (Dublin Stationery Office, 1996).

¹⁸⁸ Article 15.5.2° provides: "The Oireachtas shall not enact any law providing for the imposition of the death penalty."

that section 2 offended the *constitutional doctrine of the separation of powers* as it amounted to a sentencing exercise on the part of the Oireachtas in so far as it mandated that a life sentence be imposed for murder. In addition they argued that the imposition of a mandatory life sentence in every murder case offended the *constitutional principle of proportionality* as it deprived the trial judge of discretion as to the sentence to be imposed.

2.70 Addressing the *separation of powers* argument, the Supreme Court upheld the decision of the High Court that it was constitutionally permissible for the Oireachtas to specify the maximum, minimum or mandatory sentence to be imposed following conviction. Citing *Deaton v Attorney General*,¹⁹⁰ the Supreme Court held that:

“[T]he Oireachtas in the exercise of its legislative powers may choose in particular cases to impose a fixed or mandatory penalty for a particular offence. That is not to say that legislation which imposed a fixed penalty could not have its compatibility with the Constitution called in question if there was no *rational relationship* between the penalty and the requirements of justice with regard to the punishment of the offence specified.”¹⁹¹ [Emphasis added.]

2.71 Regarding the *proportionality* argument, the Supreme Court conceded that the crime of murder could be committed in a “myriad of circumstances” and that the “degree of blameworthiness [would] vary accordingly”. It nevertheless upheld the decision of the High Court that the Oireachtas was entitled to promote respect for life by concluding that any murder, even at the lowest end of the scale, was so abhorrent and offensive to society that it merited a mandatory life sentence. In this regard, the Supreme Court observed that the “sanctity of human life and its protection [was] fundamental to the rule of law in any society”. Murder was thus a crime of profound and exceptional gravity:

“In committing the crime of murder the perpetrator deprives the victim, finally and irrevocably, of that most fundamental of rights, the right ‘to be’ and at the same time extinguishes the enjoyment of all other rights inherent in that person as a human being. By its very nature it has been regarded as the ultimate crime against society as a whole. It is also a crime which may have exceptional irrevocable consequences of a devastating nature for the family of the victim.”¹⁹²

2.72 As an alternative to the constitutionality argument, the appellants argued that section 2 of the 1990 Act should be given an interpretation that would accord with the Constitution. They asserted that such an interpretation would require the sentencing court to make a non-binding recommendation as to the minimum term to be served by the offender before he or she would become eligible for temporary release.

2.73 The Supreme Court rejected this argument to the extent that it was asserted that such an interpretation was required by the Constitution. However, it did not reject outright the potential benefits and possibility of introducing such a system:

“Whether the making of any such recommendation would have some advantages from a policy point of view is not obviously a matter for the Court but such a process would not change the existing position in principle.”¹⁹³

2.74 Thus, while it might be outside the jurisdiction of the Supreme Court to introduce a system whereby the sentencing court would be encouraged or required to recommend a minimum term to be served by an offender convicted of murder, it would not, it seems, be outside the jurisdiction of the Oireachtas.

2.75 The view of the Supreme Court was supported by two recent decisions. In *Caffrey v Governor of Portlaoise Prison*,¹⁹⁴ the Supreme Court considered an appeal against a High Court decision¹⁹⁵ to refuse

¹⁸⁹ [2007] IEHC 374, [2008] 2 IR 142; [2010] IESC 34, [2012] 1 IR 1.

¹⁹⁰ *Deaton v Attorney General* [1963] IR 170.

¹⁹¹ *Whelan and Lynch v Minister for Justice Equality and Law Reform* [2012] 1 IR 1; [2010] IESC 34

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

an application for release under Article 40.4.4° of the Constitution. In 2005, the appellant had been transferred to Ireland to serve the remainder of a mandatory life sentence for murder which had been imposed on him in England in 1999. The trial judge had recommended that the appellant should serve a minimum term of 12 years for the purposes of punishment and deterrence, before being considered for parole. The position in England was that imprisonment beyond the point at which the minimum term expired could only be justified if it was preventative detention. As the minimum term had expired in March 2010, the appellant argued that his continued detention in Ireland had no legal basis as preventative detention was not permitted in Ireland.

2.76 The Supreme Court began by considering section 7 of the *Transfer of Sentenced Persons (Amendment) Act 1997* and, in particular, what was meant by the “legal nature” of a sentence. Section 7(1) stated that a reference to the legal nature of a sentence did not include a reference to the duration of such a sentence. The Supreme Court thus observed that it was necessary to consider the nature of a sentence and not merely its duration.

2.77 The Supreme Court stated that the nature of the sentence in issue was imprisonment for life, which meant that even when a person was released from prison the sentence continued to exist. It indicated that the English system of setting tariffs related to the management of life sentences and thus did not affect the nature of the life sentence. Once the appellant was transferred to Ireland, the management of his sentence became the responsibility of the Irish authorities and was governed by Irish law. As a result, the English system of setting tariffs and the 12-year tariff in the particular case were no longer relevant.

2.78 In a dissenting judgment,¹⁹⁶ Fennelly J formulated the core legal issue as being whether the “legal nature” of the life sentence was confined to its duration or whether it extended to include the fact that the trial judge had imposed a minimum tariff of 12 years, the balance of the sentence being justified solely by preventative considerations relating to public protection. Fennelly J observed that:

“The expression legal nature is one of the [sic] broad import. It is clear and is common case that it is distinct from the duration of the sentence. The fact that it is a life sentence relates to its duration, not its nature. It seems clear, beyond any doubt or argument, that the sentence of life imprisonment which was imposed on the appellant is comprised of two distinct elements well-established and recognised in English law. There is a first period, 12 years in this case, called the tariff, which was imposed by way of retribution and general deterrence. That is the punitive element of the sentence. Following the expiry of the tariff period, a prisoner such as the appellant is, when detained in England, serving a part of the sentence which is justified exclusively on grounds of public protection, i.e. to prevent him from committing further crimes during the period of detention.

That, it seems to me, relates to the ‘legal nature’ of the sentence...”

He thus concluded that there was no legal basis for the appellant’s continued imprisonment, which was justified by reference to preventative considerations which were not recognised by Irish law.

2.79 In *Nascimento v Minister for Justice, Equality and Law Reform*,¹⁹⁷ the High Court considered an application for judicial review. The applicant, a Portuguese national, had been convicted of murder and received a mandatory life sentence under section 2 of the *Criminal Justice Act 1990*. He had then applied to the Minister to be transferred to Portugal, under the provisions of the *Transfer of Sentenced Persons Acts 1995 to 2006*. There was no equivalent of a life sentence in Portugal and the Portuguese authorities, in converting the sentence, proposed a sentence of 25 years’ imprisonment, the maximum sentence permissible in Portugal. Following the expiry of this sentence, the applicant would be subject to

¹⁹⁴ *Caffrey v Governor of Portlaoise Prison* [2012] IESC 4.

¹⁹⁵ *Caffrey v Governor of Portlaoise Prison* [2010] IEHC 213.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Nascimento v Minister for Justice, Equality and Law Reform* [2011] 1 IR 1.

no further conditions in respect of his release. The Minister refused the applicant's transfer request on the ground that the 25-year sentence was not appropriate given the gravity of the crime.

2.80 The applicant sought an order of *certiorari* quashing the Minister's decision to refuse his transfer request and a declaration that the refusal was *ultra vires*. He argued that once the conditions set out in section 4(3) of the *Transfer of Sentenced Persons Act 1995* were met, the Minister was obliged to effect a transfer. He further argued that the effect of the Minister's decision was to prevent any transfer, unless there was equivalence of sentence, and this was *ultra vires* his powers under section 4. The applicant also sought declarations that the decision regarding the length of sentence required was properly a judicial decision, and that section 2 of the *Criminal Justice Act 1990* was unconstitutional, in that it contravened the doctrine of proportionality, and (or alternatively) that it was incompatible with section 5 of the *European Convention on Human Rights Act 2003*. Furthermore, the applicant submitted that the Minister's decision was unreasonable, given that 25 years was the maximum sentence under Portuguese law and was longer than the sentence that would be served by most prisoners convicted of murder in Ireland. He also argued that a more rigorous test of anxious scrutiny should apply because of the human rights issues involved, including the applicant's right of access to his family.

2.81 In refusing the reliefs sought, the High Court (Dunne J) made a number of findings which are relevant to the issue of sentencing. First, it held that the power to release a prisoner through a system of temporary or early release was an executive function that did not involve the determination of sentence. The exercise of this power was subject to supervision by the courts, which would only intervene if it could be established that it was being exercised in a capricious, arbitrary or unjust manner.

2.82 Second, the Minister's discretion under section 4 of the 1995 Act could not be exercised without regard to the function of the executive to give effect to sentences imposed by the judiciary. In considering the converted sentence, the Minister could look to its effect to see if it met that obligation and, in doing so, he was not determining sentence contrary to the doctrine of separation of powers as he was not making a decision in relation to the length of time to be served by the applicant in custody.

2.83 Third, section 2 of the *Criminal Justice Act 1990* was not unconstitutional. The doctrine of proportionality did not curtail the right of the Oireachtas to prescribe a mandatory sentence in respect of the offence of murder, which was of the utmost gravity. It was open to the Oireachtas to prescribe a sentence that recognised the gravity of the offence and in doing so, the Oireachtas properly balanced the competing rights involved, namely, the right to life of the victim, society's need for a sentence that reflected that murder was the gravest crime, and the rights of the person convicted. Due regard was had by the Oireachtas to the doctrine of proportionality in only prescribing a mandatory sentence in the most serious case of wrongful killing.

2.84 Fourth, the concept of a mandatory life sentence was not incompatible with the European Convention on Human Rights. A life sentence imposed on a person convicted of murder in Ireland was one imposed by the court and prescribed by the Oireachtas and was not a sentence determined by the Minister. The sentence did not comprise a punishment part and a preventative part which would operate after the expiry of a fixed tariff.

2.85 Finally, a challenge to the regime by which temporary release was granted to those serving life sentences did not come within the scope of section 5 of the *European Convention on Human Rights Act 2003* as what was at issue was the exercise of a discretion, not a statutory provision or rule of law.

(ii) Constitutionality of Temporary Release

2.86 In *Whelan and Lynch v Minister for Justice, Equality and Law Reform*,¹⁹⁸ the appellants challenged the constitutionality of the Executive's power to grant temporary release. They argued that the Minister's power to grant temporary release to prisoners serving life sentences amounted to a sentencing exercise as it determined the actual length of imprisonment. This, they asserted, was incompatible with the *constitutional doctrine of the separation of powers*.

¹⁹⁸ [2007] IEHC 374, [2008] 2 IR 142; [2010] IESC 142, [2012] 1 IR 1.

2.87 The Supreme Court upheld the decision of the High Court that the Minister's power to grant temporary release did not offend the Constitution. Citing a number of precedents, the Supreme Court confirmed that the power to grant temporary release rested exclusively with the Executive. It emphasised that the grant of temporary release was not an indication that the punitive part of the life sentence had been served. It was, instead, the grant of a privilege which was subject to conditions such as an obligation to keep the peace and observe the law. As the mandatory life sentence subsisted for life, temporary release could be terminated at any stage of the prisoner's life for good and sufficient reason, such as a breach of the temporary release conditions. The Supreme Court thus concluded:

"In all these circumstances the Court does not consider that there is anything in the system of temporary release which affects the punitive nature or character of a life sentence imposed pursuant to s. 2. In particular a decision to grant discretionary temporary release does not constitute a termination let alone a determination of the sentence judicially imposed. Any release of a prisoner pursuant to the temporary release rules is, both in substance and form, the grant of a privilege in the exercise of an autonomous discretionary power vested in the executive exclusively in accordance with the constitutional doctrine of the separation of powers."¹⁹⁹

(c) European Convention on Human Rights

(i) Irish Case Law

2.88 In *Whelan and Lynch v Minister for Justice, Equality and Law Reform*,²⁰⁰ the plaintiffs also sought a declaration²⁰¹ that the Irish system of imposing mandatory life sentences for murder was incompatible with the European Convention on Human Rights on three grounds.

2.89 Their first submission relied on Article 3 of the European Convention on Human Rights which provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. They argued that section 2 of the 1990 Act was incompatible with Article 3 in so far as it imposed a mandatory life sentence for all murder convictions. They further argued that they had been subjected to inhuman and degrading treatment in so far as they knew that they would probably be released at some point during their lives but had no way of assessing how or when that release would occur.

2.90 In response, the Supreme Court cited the European Court of Human Rights decision of *Kafkaris v Cyprus*²⁰² and observed that:

- "(a) a mandatory life sentence imposed in accordance with law as punishment for an offence is not in itself prohibited by or incompatible with any Article of the Convention and,
- (b) will not offend against Article 3 of the Convention 'when national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or conditional release of the prisoner' and,
- (c) this requirement may be met even if that prospect of release is limited to the exercise of an executive discretion."²⁰³

Since the Irish system of imposing mandatory life sentences carried with it a prospect of release in the form of an executive discretion, namely, temporary release, the Supreme Court dismissed the appellants' Article 3 submission.

2.91 The applicants' second submission relied on Article 5 of the European Convention on Human Rights. The appellants asserted that the role of the Parole Board and the exercise of the Minister of his power to commute or remit sentence or to direct the temporary release of prisoners serving mandatory

¹⁹⁹ [2012] 1 IR 1 at 26.

²⁰⁰ [2007] IEHC 374, [2008] 2 IR 142; [2010] IESC 34, [2012] 1 IR 1.

²⁰¹ Pursuant to section 5(1) of the *European Convention on Human Rights Act 2003*.

²⁰² *Kafkaris v Cyprus* (2009) 49 EHRR 35, at paragraphs 98-99.

²⁰³ *Whelan and Lynch v Minister for Justice, Equality and Law Reform* [2010] IESC 34, [2012] 1 IR 1 at 32.

life sentences was incompatible with Article 5(1)²⁰⁴ and Article 5(4).²⁰⁵ They argued that the manner in which the Minister, on the advice of the Parole Board, could grant temporary release amounted to a sentencing exercise on the part of the Executive contrary to Article 5(1). They further argued that they had been denied an appropriate mechanism to have their continued detention reviewed on a regular and frequent periodic basis in breach of Article 5(4).²⁰⁶

2.92 Addressing the Article 5(1) submission, the Supreme Court reiterated that the power of the Minister to grant temporary release was an executive function rather than a sentencing exercise. The life sentence subsisted notwithstanding the grant of temporary release which was, in any case, subject to conditions. Thus, the prisoner might be required to continue serving the life sentence if good and sufficient reason, such as a breach of the temporary release conditions, was found to exist. Citing the European Court of Human Rights decision in *Kafkaris v Cyprus*,²⁰⁷ the Supreme Court observed that for detention to be lawful, Article 5(1) required that there be a causal connection between the conviction and the deprivation of liberty. In *Kafkaris*, the European Court had found that a causal connection existed between a conviction for murder and a mandatory life sentence which was wholly punitive.²⁰⁸ Such a connection would not exist where the punitive part of a life sentence which was comprised of both a *punitive* part and a *preventative* part had been served, and the prisoner remained in custody under the preventative part. As life sentences in Ireland were wholly punitive, the Supreme Court ruled that a causal connection existed between a conviction for murder and the mandatory life sentence. The Supreme Court thus dismissed the appellants' Article 5(1) submission.

2.93 Regarding Article 5(4), the Supreme Court accepted that the European Court of Human Rights had ruled that in certain circumstances persons in custody and serving life sentences were entitled to regular reviews of their sentences by a court-like body. It observed, however, that much of the case law of the European Court of Human Rights related to the United Kingdom system of sentencing which was different to the Irish system. In the United Kingdom, life sentences contained two parts. The first part of the sentence, the *punitive or tariff* part, was fixed to reflect the punishment of the offender for the offence. The second part of the sentence, the *preventative* part (which was served after the first part had been served) was calculated having regard to the risk that an offender might pose to the public if released. The European Court of Human Rights had held that under Article 5(4), a prisoner was entitled to have the preventative part of his or her detention regularly reviewed to assess whether he or she posed (or continued to pose) such a risk. As life sentences in Ireland were "wholly punitive", the Supreme Court held that Article 5(4) was not applicable to prisoners serving life sentences in Ireland. The Supreme Court thus dismissed the appellants' Article 5(4) submission.

2.94 The applicants' third submission relied on Article 6 of the European Convention on Human Rights. The appellants asserted that the role of the Parole Board and the process whereby the Minister considered the continued detention of an offender serving a mandatory life sentence contravened their rights under Article 6(1).²⁰⁹ They argued that such continued detention should only be decided by an

²⁰⁴ Article 5(1): Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: a) the lawful detention of a person after conviction by a competent court...

²⁰⁵ Article 5(4): Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

²⁰⁶ This echoes the view taken by the Irish Human Rights Commission in its *Report into the Determination of Life Sentences* (IHRC, 2006) at 3.

²⁰⁷ *Kafkaris v Cyprus* (2009) 49 EHRR 35.

²⁰⁸ *Ibid* at paragraph 121.

²⁰⁹ Article 6(1) of the *European Convention on Human Rights*: [I]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

independent judicial body which would conduct a hearing in public and at which hearing the plaintiffs would be afforded (among other things) adversarial rights.

2.95 Regarding Article 6(1), the Supreme Court observed that no issue had been taken with the procedures before the trial court which had originally sentenced the appellants to life imprisonment. It stated that since the subsequent detention of the appellants was at all times referable to, and a consequence of, the punitive sentence so imposed, no issue arose concerning the compatibility of section 2 of the *Criminal Justice Act 1990* with Article 6 of the European Convention on Human Rights. The Supreme Court thus dismissed the appellants' Article 6(1) submission.

(ii) Case law of the European Court of Human Rights

2.96 The mandatory life sentence for murder under Irish law has not been considered by the European Court of Human Rights. However, in *Kafkaris v Cyprus*,²¹⁰ the European Court of Human Rights considered the Cypriot sentencing system which, like Ireland, does not employ a tariff system. The applicant had received a mandatory life sentence for murder. The domestic courts had ruled that a "life sentence" subsisted for the natural life of the prisoner and not 20 years as had been provided by prison regulations. The applicant argued that his rights had been breached under Article 3 and Article 5.

2.97 Regarding Article 3, the applicant contended that his detention after the date at which he would have qualified for ordinary remission had the sentence been one of 20 years, violated Article 3.²¹¹ In this regard, the applicant argued that the punitive purpose of the life sentence coupled with its mandatory nature constituted inhuman and degrading treatment. He also argued that his detention beyond the date at which he would have otherwise qualified for ordinary remission had left him in a state of distress and uncertainty over his future. For its part, the Government contended that there had been no violation of Article 3 as the applicant had sufficient hope of release having regard to the President's power to remit, suspend or commute sentences and to order conditional release.²¹²

2.98 The Court emphasised that treatment must attain a minimum level of severity if it was to fall within the scope of Article 3.²¹³ In this regard, it noted that any suffering or humiliation must exceed the level of suffering and humiliation inherent in legitimate punishment.²¹⁴ The Court stated that while the imposition of a life sentence was not in itself contrary to Article 3, the imposition of an irreducible life sentence might be.²¹⁵ Thus, a life sentence would not be considered irreducible where national law afforded the possibility of review with a view to commuting, remitting or terminating the sentence or ordering conditional release.²¹⁶ The Court thus ruled that while a life sentence without a minimum term would entail anxiety and uncertainty regarding prison life these were inherent in the nature of the sentence imposed.²¹⁷ Furthermore, while there was no parole board, the President could suspend, remit

²¹⁰ *Kafkaris v Cyprus* (2009) 49 EHRR 35.

²¹¹ *Ibid* at paragraphs 80-86.

²¹² *Ibid* at paragraphs 87-95.

²¹³ *Ibid* at paragraph 96.

²¹⁴ *Ibid* at paragraph 97.

²¹⁵ *Ibid* at paragraph 98.

²¹⁶ *Ibid* at paragraph 99. See also: joint partly dissenting opinion of Judges Tulkens, Cabral Barreto, Fura-Sandstrom, Spielmann and Jebens: "[T]he prospect of release, even if limited, must exist de facto in concrete terms, particularly so as not to aggravate the uncertainty and distress inherent in a life sentence. By 'de facto' we mean a genuine possibility of release. That was manifestly not the case in this instance". (at paragraph O-II4).

²¹⁷ *Ibid* at paragraph 108.

or commute any sentence and order conditional release.²¹⁸ As these constituted prospects for release, the Court found that there had been no inhuman or degrading treatment contrary to Article 3.²¹⁹

2.99 Regarding Article 5(1), the applicant contended that he had exhausted the punitive part of his sentence on the date at which he would otherwise have qualified for ordinary remission.²²⁰ His detention beyond that date was thus arbitrary and disproportionate as there was no evidence to suggest that he represented a danger to the public. The Government submitted that as the mandatory life sentence in Cyprus was not composed of a punitive part and a preventative part, detention was not subject to factors such as risk and dangerousness to the public.²²¹

2.100 The Court accepted that the mandatory life sentence had been imposed “as the punishment for the offence of premeditated murder irrespective of considerations pertaining to the dangerousness of the offender”.²²² It thus held that there was a clear and sufficient causal connection between the conviction and the applicant’s continuing detention.²²³ There was thus no breach of Article 5(1).

2.101 Regarding Article 5(4), the applicant contended that the mandatory nature of life imprisonment coupled with the absence of a parole system violated Article 5(4).²²⁴ The Government submitted that the requirements of Article 5(4) had been incorporated in the original sentence.²²⁵

2.102 The Court found that the Article 5(4) complaint was inadmissible and thus refrained from ruling on the matter.²²⁶ This is unfortunate as it would have been a useful opportunity for the Court to clarify whether the judicial statements in *Wynne* or *Stafford* should apply in countries which do not have a tariff system. It will be recalled that, in *Wynne*, the Court indicated that where a mandatory life sentence was concerned, the requirements of Article 5(1) were satisfied by the original trial and appeal proceedings whereas, in *Stafford*, the Court indicated that this could no longer be considered the case.

2.103 The Court emphasised that in the absence of “a clear and commonly accepted standard amongst the member States”,²²⁷ it is within the margin of appreciation of each Member State to choose its own “criminal justice system, including sentence review and release arrangements”.²²⁸ However, Judge Bratza, in a concurring opinion, expressed the view that the principles outlined in *Stafford* should apply to all Member States, regardless of whether or not they had a tariff system:

“[E]ven in the absence of a tariff system, it appears to me that the Court’s reasoning in the *Stafford* case may not be without relevance to a system such as exists in Cyprus where there is an express power of conditional release which is applicable even in the case of a mandatory life prisoner. The question whether conditional release should be granted in any individual case must ... principally depend on an element of punishment for the particular offence and, if so,

²¹⁸ *Kafkaris v Cyprus* (2009) 49 EHRR 35 at paragraphs 104-105.

²¹⁹ It is interesting to note that a sizeable minority emphasised that a life sentence which impeded the purpose of reintegration might constitute inhuman and degrading treatment. See: joint partly dissenting opinion of Judges Tulkens, Cabral Barreto, Fura-Sandstrom, Spielmann and Jebens (at paragraph O-II13).

²²⁰ *Kafkaris v Cyprus* (2009) 49 EHRR 35 at paragraphs 111-112.

²²¹ *Ibid* at paragraphs 113-116.

²²² *Ibid* at paragraph 120.

²²³ *Ibid* at paragraph 121.

²²⁴ *Ibid* at paragraph 123.

²²⁵ *Ibid* at paragraph 124.

²²⁶ *Ibid* at paragraph 125.

²²⁷ *Ibid* at paragraph 105. See also: the joint partly dissenting opinion of Judges Tulkens, Cabral Barreto, Fura-Sandstrom, Spielmann and Jebens, who did not agree with this statement and identified trends at the Council of Europe, European Union and international criminal justice levels (at paragraphs O-II9-O-II12).

²²⁸ *Ibid* at paragraph 100.

whether the life prisoner poses a continuing danger to society. As the Stafford judgment makes clear, the determination of both questions should in principle be in the hands of an independent body, following procedures containing the necessary judicial safeguards, and not of an executive authority.”²²⁹

2.104 In sum, therefore, it would appear from *Kafkaris* that the Irish approach to the life sentence is broadly consonant with the principles of the European Convention on Human Rights. Like the Supreme Court, the European Court of Human Rights distinguished between countries, such as the United Kingdom, which had a tariff system and countries, such as Cyprus and Ireland, which did not. It emphasised that in the absence of a discernible trend amongst Member States, it was still within the margin of appreciation of each Member State to decide on the system to be adopted in respect of life sentences. This system must still be within the bounds of the Convention, however. The Court stated that a mandatory life sentence would not in itself give rise to issues under Article 3, provided that there was a *de facto* and *de jure* possibility of release. And, in respect of Article 5(1), it stated that where a mandatory life sentence was concerned, there was a sufficient causal connection between the conviction for murder and the continued detention. The position regarding Article 5(4) is, however, less clear.

2.105 Even in the absence of a definitive ruling regarding Article 5(4), a number of observations may be made. As noted at paragraph 2.15, the general purpose of Article 5 is to prevent arbitrariness. In this regard, the position of the European Court of Human Rights is to query the absence of: (i) any judicial involvement in determining the actual length of the term to be served in prison; and (ii) any involvement by a body independent of the Executive in the release decision.

C Historical Evolution of Presumptive Minimum Sentences

2.106 Certain sentencing provisions prescribe a minimum sentence subject to exceptions in specified circumstances. In Ireland, there are two examples of this type of provision. One provides the penalty for certain offences under the *Misuse of Drugs Act 1977* and the other provides the penalty for certain offences under the *Firearms Acts*. In this section, the Commission considers the historical evolution of this type of mandatory sentence, primarily, as it applies to drugs and firearms offences. It would appear that the modern practice of prescribing mandatory sentences for drugs and firearms offences originated in the United States of America and, in turn, influenced sentencing practices in England and Wales, and Ireland.

(1) Mandatory Sentences for Drugs Offences

(a) United States of America

2.107 Drug addiction became a significant issue for legislative consideration in the United States of America at the turn of the 20th century.²³⁰ There were a number of reasons for this. First, as morphine had been freely dispensed to the wounded during the Civil War, there were now thousands of veterans, along with members of their families and friends, who had become addicted to the drug. Second, the practice of smoking opium, which had been popular among Chinese immigrants who had been employed to help build the American railroads, had spread beyond the Chinese population. Third, it had been discovered that heroin, which had been introduced as a cure for morphine addiction in 1898, caused even greater problems than morphine. Fourth, opium and cocaine had been common ingredients in many patented medicines and sodas which were marketed widely throughout the United States prior to the 1900s.

2.108 By the early 20th century, drug addiction had become a widespread problem.²³¹ This led to the enactment of federal laws aimed at controlling the drug problem. Over time, the federal response to the

²²⁹ *Kafkaris v Cyprus* (2009) 49 EHRR 35, concurring opinion of Judge Bratza (at paragraph O-18).

²³⁰ Quinn and McLaughlin “The Evolution of Federal Drug Control Legislation” (1972-1973) 22 *Cath U L Rev* 586 at 588.

²³¹ *Ibid* at 589.

worsening drug problem became more repressive.²³² This began with the imposition of ever-increasing taxes on imported opium, followed by an outright ban on imported opium not required for medical use, and culminated in the enactment of the *Harrison Act 1914*.

2.109 The *Harrison Act* sought to control domestic traffic in narcotics regulating the legal traffic in narcotics and providing criminal sanctions for any illegal trafficking.²³³ It has been noted, however, that an unintended consequence of the *Harrison Act* was the closure of legitimate sources of supply to the addict and a consequential growth in the black market.²³⁴ With the repeal of Prohibition, organised criminal gangs became more involved in the illegal distribution of drugs. The result was an expanding drug problem between 1946 and 1960. In particular, a dramatic increase in drug use amongst minors was a major inspiration for the enactment of the *Boggs Act 1951*.²³⁵

2.110 The *Boggs Act 1951* changed the penalty structure in two ways.²³⁶ First, it made penalties for all drugs offences uniform, no matter how trivial or serious the offence. Second, it made the penalties more severe by introducing mandatory minimum prison sentences and increasing the maximum sentences. A first offence became punishable by a sentence of not less than two or more than five years and a maximum fine of \$2,000. A second offence became punishable by a sentence of not less than five or more than 10 years and a maximum fine of \$2,000. A third or subsequent offence became punishable by a sentence of not less than 10 or more than 20 years. In addition, the Act denied suspension of sentence and any form of probation to a second or subsequent offender.

2.111 In 1956, Congress passed the *Narcotics Control Act 1956* which further modified the sentencing regime for drugs offences. It increased the severity of the sentences applicable to drugs offences²³⁷ but, unlike the *Boggs Act 1951*, it distinguished between serious and less serious offences.²³⁸ In addition, it provided for enhanced penalties for offences exhibiting certain characteristics.²³⁹ Thus, for example, the sale of narcotics to a person under 18 years of age became punishable by a minimum sentence of 10 years and a maximum sentence of life imprisonment or death. Furthermore, it provided that suspension of sentence, probation and parole would be denied to even the first-time offender convicted of a serious drugs offence.²⁴⁰

2.112 During the 1960s, high levels of drug use and experimentation led to large numbers of people being imprisoned for long periods of time.²⁴¹ As a result, mandatory minimum sentences for drugs

²³² Quinn and McLaughlin "The Evolution of Federal Drug Control Legislation" (1972-1973) 22 Cath U L Rev 586 at 625.

²³³ *Ibid* at 593.

²³⁴ *Ibid* at 601.

²³⁵ *Ibid*.

²³⁶ *Ibid* at 619; and *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 2011) at 22.

²³⁷ Mascharka "Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences" (2001) *Florida State University Law Review* 935 at 939; and Quinn and McLaughlin "The Evolution of Federal Drug Control Legislation" (1972-1973) 22 Cath U L Rev 586 at 620.

²³⁸ Quinn and McLaughlin "The Evolution of Federal Drug Control Legislation" (1972-1973) 22 Cath U L Rev 586 at 620.

²³⁹ *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 1991) at Chapter 2; and Quinn and McLaughlin "The Evolution of Federal Drug Control Legislation" (1972-1973) 22 Cath U L Rev 586 at 620.

²⁴⁰ Quinn and McLaughlin "The Evolution of Federal Drug Control Legislation" (1972-1973) 22 Cath U L Rev 586 at 620.

²⁴¹ Mascharka "Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences" [2001] 28 *Florida State University Law Review* 935 at 938.

offences became extremely unpopular.²⁴² In response, Congress passed the *Comprehensive Drug Abuse Prevention and Control Act 1970* which repealed virtually all of the mandatory sentencing provisions applicable to drugs offences.²⁴³

2.113 It has been noted, however, that this did not reflect a general policy disfavouring mandatory sentencing as, in the same year, mandatory sentencing provisions were enacted for certain offences involving firearms and explosives.²⁴⁴ This might have been due to the fact that the late 1960s and early 1970s bore witness to diminishing support for the rehabilitative model of imprisonment and a corresponding renewal of interest in mandatory sentences.²⁴⁵ Under the rehabilitative model, the Parole Board, on the basis of an assessment of the offender's level of rehabilitation, had ultimate discretion regarding the grant of release. Critics observed that, as a consequence, many offenders deemed not to have been sufficiently rehabilitated, served sentences that were disproportionately long and/or disparate by comparison to the sentences served by others convicted of the same or similar offences. In addition, they observed that the efficacy of rehabilitative treatments was in doubt and that it was thus unfair to make release dependent on rehabilitation. In an effort to address these issues, legislators sought to make sentencing more structured by means of mandatory sentencing provisions, among other initiatives.²⁴⁶

2.114 On the state level, this trend began in New York with the enactment of the *Rockefeller Drug Laws* in 1973. This legislation prescribed a mandatory life sentence for the sale or possession of small amounts of narcotic drugs along with mandatory minimum terms of imprisonment ranging from one to 25 years.²⁴⁷ In 1978, Michigan enacted harsh mandatory sentences for drugs offences, including the notorious "650 Lifer Law".²⁴⁸ This law prescribed a mandatory life sentence without parole for offenders convicted of delivering over 650 grammes of heroin or cocaine.²⁴⁹ By 1983, 49 out of 50 states had enacted similar mandatory sentencing provisions.

²⁴² Mascharka "Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences" (2001) *Florida State University Law Review* 935 at 939; *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 2011) at 22; *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 1991) at Chapter 2; and Lutjen "Culpability and Sentencing under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment no longer fits the Crime" (1996) 10 *Notre Dame JL Ethics & Pub Pol'y* 389 at 396. See also: Glick "Mandatory Sentencing: The Politics of the New Criminal Justice" (1979) 43 *Fed Probation* 3.

²⁴³ See also: Glick "Mandatory Sentencing: The Politics of the New Criminal Justice" (1979) 43 *Fed Probation* 3.

²⁴⁴ *Report to Congress: mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 2011) at 23.

²⁴⁵ Glick "Mandatory Sentencing: The Politics of the New Criminal Justice System" (1979) 43 *Fed Probation* 3 at 3-6; Zimring "Sentencing Reform in the States: Some Sobering Lessons from the 1970s" (1981-1982) 2 *N Ill U L Rev* 1 at 2-4; and *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 1991) at Chapter 2.

²⁴⁶ *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 1991) at Chapter 2.

²⁴⁷ Bayer "The Effects of the 1973 Drug Laws on the New York State Courts: A Comment" (1976) 5 *Contemporary Drug Problems* 631 at 631-632; and Glanville "Drug Abuse, Law Abuse, and the Eighth Amendment: New York's 1973 Drug Legislation and the Prohibition against Cruel and Unusual Punishment" (1974-1975) 60 *Cornell L Rev* 638 at 639.

²⁴⁸ See: "Background on Michigan mandatory minimum drug law reforms". Available at: www.famm.org/state/Michigan.aspx [Last accessed: 22 May 2013].

²⁴⁹ In 1987, Michigan introduced mandatory consecutive sentencing provisions which provided that a sentence for a drug offence had to be served consecutively to any other sentence being served for a felony. See: www.famm.org/state/Michigan.aspx [Last accessed: 22 May 2013].

2.115 In 1986, following public outcry regarding the crack cocaine epidemic and, in particular, the spread of AIDS through drug use, Congress passed the *Anti-Drug Abuse Act 1986*.²⁵⁰ Congress expedited the passage of the Act in response to a number of events, including the highly publicized death of the Boston Celtics' player, Len Bias, in 1986.²⁵¹

2.116 The *Anti-Drug Abuse Act 1986* established a new regime of non-parolable, mandatory minimum sentences for drug trafficking offences that linked the minimum penalty to the quantity of drugs involved in the offence.²⁵² The 1986 Act sought to subject larger drug dealers to a 10-year mandatory minimum sentence for a first offence and a 20-year mandatory minimum sentence for a subsequent conviction of the same offence. One kilogramme or more of a mixture or substance containing heroin triggered a 10-year sentence, as did five kilogrammes or more of a mixture or substance containing cocaine. The Act also sought to cover mid-level players by providing for a mandatory minimum sentence of five years which was triggered by weights such as 100 grammes or more of a mixture or substance containing heroin and 500 grammes or more of a mixture or substance containing cocaine. A second conviction for these offences carried a 10-year minimum sentence.

2.117 Controversially, the 1986 Act distinguished between powder cocaine and cocaine base, commonly known as "crack" cocaine, by treating quantities of cocaine base differently to similar quantities of powder cocaine.²⁵³ At the time, crack cocaine was considered to be more dangerous than powder cocaine due to its especially harmful effects on communities where its use had become increasingly prevalent. Thus, for example, under the so-called "100-to-1" ratio, five grammes of crack cocaine triggered a mandatory minimum sentence of five years while 500 grammes of powder cocaine were required to trigger the same sentence. In addition, the 1986 Act increased the penalty enhancements applicable to offenders who sold drugs to persons under 21 years; who employed persons under 18 years; and who possessed certain weapons.²⁵⁴

2.118 In 1988, Congress passed the *Omnibus Anti-Drug Abuse Act 1988*.²⁵⁵ The 1988 Act introduced a mandatory minimum sentence of five years' imprisonment for simple possession of more than five grammes of crack cocaine. In addition, the Act doubled the existing 10-year mandatory minimum sentence to a 20-year mandatory minimum sentence for engaging in a continuing drug enterprise. The Act also extended the mandatory minimum sentences applicable to completed distribution and importation/exportation offences to conspiracies to commit those offences, regardless of the particular offender's level of culpability.²⁵⁶ It has been noted that this measure (designed to catch drug kingpins,

²⁵⁰ Mascharka "Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences" [2001] 28 *Florida State University Law Review* 935 at 941.

²⁵¹ *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 2011) at 23.

²⁵² *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 1991) at Chapter 2.

²⁵³ *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 2011) at 24-25.

²⁵⁴ *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 1991) at Chapter 2.

²⁵⁵ *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 2011) at 25; and *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 1991) at Chapter 2.

²⁵⁶ *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 1991) at Chapter 2; and Mascharka "Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences" [2001] 28 *Florida State University Law Review* 935 at 941.

who rarely had large quantities of drugs in their possession) was more routinely used against low-level drug dealers, look-outs and peripheral conspirators.²⁵⁷

2.119 In 2010, Congress passed the *Fair Sentencing Act 2010*.²⁵⁸ This altered the mandatory minimum sentencing regime applicable to offences involving crack cocaine. It repealed the mandatory minimum sentence for possession of crack cocaine and increased the quantities required to trigger the five-year and 10-year mandatory minimum sentences, from five to 28 grammes and 50 to 280 grammes respectively. The Act also directs the United States Sentencing Commission to provide for higher guideline sentences where certain aggravating factors, such as bribing a law enforcement official, are present. In addition, the Act directs the Sentencing Commission to provide for lower guideline sentences for certain offenders who receive a guideline adjustment for a minimum role.

2.120 It would appear, however, that mandatory sentences for drugs offences are now falling out of favour with many state legislators in the United States. Since 1998, a number of states have either relaxed or repealed their mandatory sentencing provisions.²⁵⁹ In 1998, Michigan abolished the mandatory life sentence for those sentenced after 1998 under the “650 lifer” law and restored parole eligibility for offenders sentenced before 1998.²⁶⁰ Since then, Michigan has repealed almost all of its mandatory minimum sentences for drugs offences.²⁶¹ In 2009, New York amended the *Rockefeller Drug Laws* by repealing most of its mandatory minimum sentences for drug offences and expanding the treatment options for drug offenders.²⁶² Some other states have also expressed support for alternatives to mandatory sentences for drug offences.²⁶³

(b) United Kingdom

2.121 The modern history of mandatory sentences for drug offences, as it relates to the United Kingdom, probably starts with the *Criminal Justice Act 1991*. The *Criminal Justice Act 1991* sought to implement proposals contained in the Government’s 1990 *White Paper on Crime*.²⁶⁴ A broad aim of the 1991 Act had been to promote the principle of proportionality and, through this, achieve greater consistency in sentencing.²⁶⁵ Ashworth notes that while this objective was set out clearly in the 1990

²⁵⁷ Mascharka “Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences” [2001] 28 *Florida State University Law Review* 935 at 941-942.

²⁵⁸ *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 2011) at 29-31.

²⁵⁹ These include: Delaware, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, and South Carolina. See: “State Responses to Mandatory Minimum Laws” (2011) Available at www.famm.org. [Last accessed: 22 May 2013]; and Austin “Criminal Justice Trends - Key Legislative Changes in Sentencing Policy, 2001-2010” (2010). Available at: www.vera.org [Last accessed: 22 May 2013].

²⁶⁰ “State Responses to Mandatory Minimum Laws” (2011). Available at: www.famm.org. [Last accessed: 22 May 2013].

²⁶¹ Austin “Criminal Justice Trends - Key Legislative Changes in Sentencing Policy, 2001-2010” (2010) Available at: www.vera.org. [Last accessed: 22 May 2013]; and “State Responses to Mandatory Minimum Laws” (2011). Available at: www.famm.org. [Last accessed: 22 May 2013].

²⁶² Austin “Criminal Justice Trends - Key Legislative Changes in Sentencing Policy, 2001-2010” (2010). Available at: www.vera.org. [Last accessed: 22 May 2013]; and “State Responses to Mandatory Minimum Laws”. Available at: www.famm.org. [Last accessed: 22 May 2013].

²⁶³ “Drug Sentencing Reform: A Bipartisan Priority” (2011). Available at: www.famm.org. [Last accessed: 22 May 2013].

²⁶⁴ *White Paper on Crime, Justice and Protecting the Public* Cm 965 (HMSO, 1990).

²⁶⁵ Ashworth and Player “Criminal Justice Act 2003: The Sentencing Provisions” (2005) 68 *Mod L Rev* 822 at 822; Fitzgerald “Californication of Irish Sentencing Law” (2008) 18 *ICLJ* 42 at 42; and Bacik “Crime and Punishment - Retribution or Rehabilitation” (2001). Available at:

White Paper, the provisions of the 1991 Act were less clear.²⁶⁶ Within months of its introduction, parts of the 1991 Act had been dismantled and over the years, its provisions, having been rarely cited in judgments, faded into the background.

2.122 In 1993, there was a dramatic change in the penal climate following the murder of James Bulger.²⁶⁷ In 1996, the Government published another *White Paper on Crime*²⁶⁸ in which it: (i) indicated that it would be taking a punitive approach to tackling crime;²⁶⁹ (ii) expressed the view that prison worked;²⁷⁰ and (iii) sought to introduce mandatory sentencing in respect of a number of offences. In particular, it indicated that it was necessary to impose “severe deterrent sentences” on persistent dealers in hard drugs²⁷¹ and thus recommended that the courts be required to impose a minimum sentence of 7 years on those convicted of a third Class A drug trafficking offence.²⁷² The fact that this was a significant departure from the prevailing penal philosophy can be illustrated by the fact that the same Government had, in 1990, stated that prison was just “an expensive way of making bad people worse”.²⁷³ The 1996 White Paper was criticised as reflecting the “increasing managerialism and politicisation of sentencing policy”.²⁷⁴

2.123 The *Crime (Sentences) Bill 1996*, which sought to implement the recommendations contained in the 1996 White Paper, was introduced in the dying months of the Conservative Government.²⁷⁵ The Bill was severely criticised by the House of Lords on the ground that its provisions were unwarranted and unjustified.²⁷⁶ Thomas notes, for instance, the view of Lord Taylor of Gosforth that “never in the history of our criminal law have such far-reaching proposals been put forward on the strength of such flimsy evidence”.²⁷⁷ In March 1996, a General Election was announced. On the one hand, this eased the passage of the 1996 Bill through Parliament by putting the Government under pressure to complete or abandon any bills that were before it while, at the same time, the Opposition did not want to be seen as “soft on crime” in the run up to an election. On the other hand, it gave the House of Lords leverage to force the outgoing Government to accept certain amendments.²⁷⁸ As a result, the Home Secretary agreed to retain a House of Lords’ amendment, which gave the sentencing court discretion not to impose the mandatory minimum sentence on Class A drug traffickers in specified circumstances,²⁷⁹ in return for the Opposition’s agreement to support 17 Government Bills.

www.lawlibrary.ie/viewdoc.asp?Docid=144&Catid=18&StartDate=01+January+2001 [Last accessed: 22 May 2013].

²⁶⁶ Ashworth and Player “Criminal Justice Act 2003: The Sentencing Provisions” (2005) 68 Mod L Rev 822.

²⁶⁷ *Ibid.*

²⁶⁸ *White Paper on Protecting the Public - The Government’s Strategy on Crime in England and Wales* (HMSO, 1996).

²⁶⁹ *Ibid* at 3.

²⁷⁰ *Ibid* at 4.

²⁷¹ *Ibid* at 23.

²⁷² *Ibid* at 49.

²⁷³ Ashworth and Player “Criminal Justice Act 2003: The Sentencing Provisions” (2005) 68 Mod L Rev 822.

²⁷⁴ Henham “Back to the Future on Sentencing: The 1996 White Paper” (1996) 59 Mod L Rev 861.

²⁷⁵ Fitzgerald “Californication of Irish Sentencing Law” (2008) 18 ICLJ 42.

²⁷⁶ *Ibid*; Thomas “The Crime (Sentences) Act 1997” [1998] Crim LR 83; and Thomas *Current Law Statutes* (Sweet and Maxwell, 1997) at 43-3.

²⁷⁷ *Current Law Statutes* (Sweet and Maxwell, 1997) at 43-3.

²⁷⁸ Fitzgerald “Californication of Irish Sentencing Law” (2008) 18 ICLJ 42.

²⁷⁹ The amendment also applied to those sentenced for domestic burglary. See: Henham “Making Sense of the Crime (Sentences) Act 1997” (1998) 61 Mod L Rev 223.

2.124 The *Crime (Sentences) Act 1997* received the Royal Assent on 21st March 1997, the day the UK Parliament was prorogued prior to the General Election on 1st May.²⁸⁰ Its enactment was to mark an evolutionary step in sentencing both in terms of its practical and its symbolic effects. In relation to drugs offences, its practical effect comprised a presumptive ‘three-strikes’ rule that required the imposition of a 7-year sentence - except in specific circumstances - on offenders convicted of a third Class A drug trafficking offence.²⁸¹

2.125 Thomas asserts, however, that the real significance of the 1997 Act was in what it symbolised.²⁸² In his view, it indicated that the Home Secretary, Michael Howard, had little regard for the opinions of the senior judiciary and was more interested in the political impact rather than the practical effect of the legislation. Above all, he asserted that the legislation set “a precedent for the introduction of mandatory minimum sentences for just about any crime.”

2.126 The *Powers of Criminal Courts (Sentencing) Act 2000* replaced the *Crime (Sentences) Act 1997* but, as it was a consolidation Act,²⁸³ made no changes to the substantive law.²⁸⁴ Thus, section 110 of the 2000 Act now governs the presumptive minimum 7-year sentence which applies in respect of a third Class A drug trafficking conviction.²⁸⁵ The practical operation of this sentencing regime will be discussed in greater detail in Chapter 5.

2.127 In January 2012, the Sentencing Council for England and Wales published a new sentencing guideline on drug offences, which will be used by both the Crown Court and the magistrates’ courts.²⁸⁶ The guideline covers the most commonly sentenced offences including importation, production, supply, permitting premises to be used for drug offences, and possession. The Sentencing Council has indicated that, under the new guideline, there are likely to be increased sentence lengths for those guilty of large scale production offences and reduced sentence lengths for so-called drug mules. Sentences for drug mules - “who are usually vulnerable and exploited by organised criminals” - will have a starting point of six years’ imprisonment. The guideline also recognises a new aggravating factor in the context of supply offences, namely, the dealing of drugs to those under the age of 18 years.

2.128 The publication of the guideline followed a public consultation on the Sentencing Council’s draft proposals.²⁸⁷ It was also informed by research into a number of areas including the effects of the draft

²⁸⁰ Henham “Making Sense of the Crime (Sentences) Act 1997” (1998) 61 Mod L Rev 223.

²⁸¹ Section 3 of the *Crime (Sentences) Act 1997*. Section 2 established a presumptive “two-strikes” rule that required the imposition of a life sentence, except in exceptional circumstances, on offenders who had been convicted of a second serious offence. Section 4 established a presumptive “three-strikes” rule that required the imposition of a three-year sentence, except in exceptional circumstances, on offenders who had been convicted of a third domestic burglary.

²⁸² Thomas “The Crime (Sentences) Act 1997” [1998] Crim LR 83.

²⁸³ The *Powers of Criminal Courts (Sentencing) Act 2000* was enacted pursuant to the recommendations of the Law Commission and the Scottish Law Commission contained in the 2000 *Report on the Consolidation of Legislation relating to Sentencing* Cm 4626 SE/2000/15.

²⁸⁴ *Current Law Statutes* (Sweet and Maxwell, 2000) at 6-7.

²⁸⁵ Class A drugs are defined in Part 1 of Schedule 2 to the *Misuse of Drugs Act 1971*. The term “drug trafficking offence” is defined by section 1 of the *Drug Trafficking Act 1994*.

²⁸⁶ Sentencing Council “Courts issued with New Guideline for Sentencing Drug Offenders” Press Release 24 January 2012.

²⁸⁷ *Drug Offences Guidelines Professional Consultation* (Sentencing Council, 2011); *Drug Offences Guidelines Public Consultation* (Sentencing Council, 2011); and *Drug Offences Response to Consultation* (Sentencing Council, 2012).

drug offences guideline,²⁸⁸ public attitudes to the sentencing of drug offences,²⁸⁹ drug offences²⁹⁰ and cases involving drug mules.²⁹¹

(c) Ireland

2.129 Drug misuse and drug trafficking have been longstanding and persistent problems in Ireland.²⁹² It has been noted, however, that the situation deteriorated with the advent of intravenous heroin use in the early 1980s. In addition to the problem of substance addiction, this gave rise to increased criminality and a greater incidence of HIV/AIDS and Hepatitis B and C.²⁹³

2.130 Initially, the *Misuse of Drugs Act 1977* provided for the sole offence of possessing a controlled drug for the purpose of sale or supply,²⁹⁴ for which it prescribed a fine and/or a maximum sentence of 14 years' imprisonment.²⁹⁵ In an effort to combat the worsening drug problem,²⁹⁶ the Oireachtas enacted the *Misuse of Drugs Act 1984* which, among other matters, increased the maximum sentence to life imprisonment.²⁹⁷

2.131 In spite of this, vast quantities of illicit drugs continued to be intercepted at Ireland's frontiers. In November 1995, An Garda Síochána made a record seizure of cannabis at Urlingford, County Kilkenny.²⁹⁸ Despite the size of the seizure and a number of arrests, there were no prosecutions. The Government and, indeed, several community groups made numerous attempts to combat the growing drugs problem but to no apparent avail.²⁹⁹

2.132 In 1995, the Opposition moved a motion requesting the Government to respond to the "drug emergency" by introducing legislation to strengthen the law and penalties for drug importers, distributors

²⁸⁸ *Research into the Effects of the Draft Drug Offences Guideline on Sentencing Practice* Analysis and Research Bulletins (Sentencing Council, 2012).

²⁸⁹ Jacobson, Kirby and Hough *Public Attitudes to the Sentencing of Drug Offences* (Sentencing Council, 2011).

²⁹⁰ *Drugs Offences Analysis and Research Bulletins* (Sentencing Council, 2011).

²⁹¹ *Drug "Mules": Twelve Case Studies* Analysis and Research Bulletins (Sentencing Council, 2011).

²⁹² Burke "Rabbitte Revisited: The First Report of the Ministerial Task Force on Measures to Reduce Demand for Drugs - Ten Years On" (2007) 55 *Administration* 125 at 128.

²⁹³ *First Report of the Ministerial Task Force on Measures to Reduce Demand for Drugs 1996* at 12.

²⁹⁴ Section 15 of the *Misuse of Drugs Act 1977*.

²⁹⁵ Section 27(a) of the *Misuse of Drugs Act 1977* provided that an offender, on summary conviction, would be liable to a fine of £250 and/or a maximum term of 12 months and section 27(b) provided that an offender, on indictment, would be liable to a maximum fine of £3,000 and/or a maximum term of 14 years.

²⁹⁶ Select Committee on Legislation and Security Debates, Criminal Justice (Drug Trafficking) Bill 1996, Committee Stage, 18 June 1996, Mr John O'Donoghue TD.

²⁹⁷ Section 6 of the *Misuse of Drugs Act 1984* inserted a new section 27 into the *Misuse of Drugs Act 1977*. Section 27(3)(a) provided that an offender, on summary conviction, would be liable to a maximum fine of £1,000 and/or a maximum term of 12 months and section 27(3)(b) provided that an offender, on indictment, would be liable to a fine of such amount as the court considers appropriate or a maximum term of life imprisonment or a fine and a lesser period of imprisonment.

²⁹⁸ Dáil Debates, Adjournment Debate - Importation of Illegal Drugs, 9 November 1995, Vol 458, No 1; Cusack and Mooney "Pounds 150m Cannabis Haul may have been bound for UK" *Irish Times* 9 November 1995; Cleary "Drug Force's Major Haul probably aimed at UK" *Irish Times* 11 November 1995; Maher "Gardaí claim Media Leaks thwarted Attempts to Capture Drugs Barons" *Irish Times* 9 December 1995; and Editorial "Divisions in Drugs Response" *Irish Times* 11 December 1995.

²⁹⁹ Burke "Rabbitte Revisited: The First Report of the Ministerial Task Force on Measures to Reduce Demand for Drugs - Ten Years On" (2007) 55 *Administration* 125 at 129.

and suppliers.³⁰⁰ It was proposed that the law should reflect a minimum sentence of 10 years for an offence by an importer or pusher.³⁰¹ However, an amended version of the motion proposed by the Minister for Justice, which excluded this provision, was adopted.

2.133 In 1996, the Oireachtas enacted the *Criminal Justice (Drug Trafficking) Act 1996* which sought to respond to the issue of drug trafficking by increasing Garda powers. During the Oireachtas debates, the Opposition proposed that the Bill be amended to provide for a minimum sentence of 10 years for drug dealers convicted of possessing, for sale or supply, drugs with a street value of £10,000 or more.³⁰² It was asserted that this would address a perceived problem of the courts imposing sentences that were more lenient than intended by the Oireachtas under the *Misuse of Drugs Act 1977*.³⁰³ It was observed that in 1993, out of 71 convictions, three of the sentences were for less than three months; 20 of the sentences were between six and 12 months; 29 of the sentences were between one and two years; four of the sentences were between three and five years; three of the sentences were between five and 10 years; and only one sentence was for more than 10 years.³⁰⁴ The proposed amendment was nevertheless defeated.

2.134 In June 1996, Veronica Guerin, an investigative journalist who had written extensively about the criminal figures involved in the drug trade, was assassinated.³⁰⁵ It was believed that one of the people being investigated by Ms Guerin was responsible. In the period that followed the murder, the Government came under increased pressure to tackle the drugs problem.³⁰⁶ While not everyone was agreed as to the appropriate course of action,³⁰⁷ the Oireachtas responded by enacting the *Proceeds of Crime Act 1996*, following which the Criminal Assets Bureau was established on a statutory basis.³⁰⁸

³⁰⁰ Dáil Debates, Private Members' Business: Drug Abuse Motion, 16 May 1995, Vol 452, No 8, Ms Liz O'Donnell TD, Progressive Democrats Spokesperson for Justice.

³⁰¹ Dáil Debates, Private Members' Business: Drug Abuse Motion, 17 May 1995, Vol 453, No 1, Mr Des O'Malley TD.

³⁰² Select Committee on Legislation and Security Debate, Criminal Justice (Drug Trafficking) Bill 1996, Committee Stage, 18 June 1996, Mr John O'Donoghue TD, Fianna Fáil Spokesperson for Justice.

³⁰³ Select Committee on Legislation and Security Debate, Criminal Justice (Drug Trafficking) Bill 1996, Committee Stage, 18 June 1996.

³⁰⁴ *Ibid.*

³⁰⁵ Dáil Debates, Killing of Dublin Journalist: Statements, 26 June 1996, Vol 467, No 5; and Kennedy "Stunned Political Leaders see Killing as Attack on Democracy" Irish Times 27 June 1996.

³⁰⁶ Burke "Rabbitte Revisited: The First Report of the Ministerial Task Force on Measures to Reduce Demand for Drugs - Ten Years On" (2007) 55 Administration 125 at 130; and "Crime Bosses had to run for Cover after Murder of Journalist" Irish Times 16 March 2001.

³⁰⁷ Browne "Litany of Repressive Measures emanating from the Airwaves is not an appropriate Response" Irish Times 28 June 1996; Walsh "States of Emergency are not the Answer" Irish Times 29 June 1996; "Warnings against extreme Reaction to Murder" Irish Times 2 July 1996; "The Case for a Commission" Irish Times 2 July 1996; "The Response to Organised Crime" Irish Times 3 July 1996; Cusack "Garda unconvinced by Crime Measures" Irish Times 4 July 1996; Holland "Lessons of the Past show Hard Cases make Bad Law" Irish Times 4 July 1996; and "The Debate on Crime" Irish Times 6 July 1996.

³⁰⁸ Tynan, Cusack and Maher "Government prepares Crime Package in Wake of Murder" Irish Times 28 June 1996; Tynan and Maher "Owen to accept FF Bill on freezing Assets of Dealers" Irish Times 1 July 1996; Tynan "Coalition to present Anti-Crime Package later Today" Irish Times 2 July 1996; Kenny "Innocent have Nothing to fear from Justice System Reforms" Irish Times 3 July 1996; Tynan "Dáil to debate Six Law Measures" Irish Times 23 July 1996; and Kennedy "Cabinet bid to pass Four Bills on Organised Crime Today" Irish Times 25 July 1996.

2.135 In 1997, the *Criminal Justice (No 2) Bill 1997* was introduced.³⁰⁹ The Bill proposed to amend the *Misuse of Drugs Act 1977* by creating a presumptive sentencing regime for a new offence of possessing drugs with a value of £10,000 or more with intent to supply.³¹⁰ Elaborating on his rationale for introducing the new offence, the Minister highlighted the “unique nature” of the drugs trade and indicated that the “harsh punishment” would “send an unequivocal message to those engaged in the illegal drugs trade, and to those who might be tempted to engage in it, that we are serious and doing all that we can to eradicate this blight.”³¹¹

2.136 The 1997 Bill was later enacted as the *Criminal Justice Act 1999*. This inserted section 15A³¹² and amended section 27³¹³ of the *Misuse of Drugs Act 1977*. The effect was to create a new offence of possessing controlled drugs having a value of £10,000 or more,³¹⁴ for sale or supply, which was punishable by a presumptive sentence of 10 years.³¹⁵ Section 27(3C) provided that the presumptive sentence would not apply where:

“... the court is satisfied that there are exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make a sentence of not less than 10 years (*sic*) imprisonment unjust in all the circumstances...”

2.137 It is clear that this language was influenced to a great extent by the language used in the *Crime (Sentences) Act 1997* in the United Kingdom. Section 3 of the 1997 Act, which prescribes a presumptive minimum sentence for a third class A drug trafficking offence, provides:

“The court shall impose a custodial sentence for a term of at least seven years except where the court is of the opinion that there are specific circumstances which -
relate to any of the offences or to the offender; and
would make the prescribed custodial sentence unjust in all the circumstances.”³¹⁶

It will be recalled that there was a parallel debate regarding the use of mandatory minimum sentences taking place in the United Kingdom at the time the *Criminal Justice (No 2) Bill 1997* (enacted as the *Criminal Justice Act 1999*) was first proposed in Ireland.

2.138 In 2001, the Department of Justice commissioned a report on the criteria applied by the courts in sentencing offenders under section 15A of the *Misuse of Drugs Act 1977*.³¹⁷ The report concluded that the courts showed a marked reluctance to impose the mandatory minimum sentence of 10 years for fear that it would result in a disproportionate sentence in individual cases. The report, which examined the period between November 1999 and May 2001, observed that a sentence of 10 years or more had been imposed in only three out of 55 cases.

2.139 In 2004, the Government introduced the *Criminal Justice Bill 2004*.³¹⁸ During the second stage of debates, the Government announced that it would be making a series of substantial amendments to the

³⁰⁹ Seanad Debates, *Criminal Justice (No 2) Bill 1997, Second Stage*, 9 December 1997, Vol 153, No 1. See also: Law Reform Commission *Report on the Confiscation of the Proceeds of Crime* (LRC 35-1991).

³¹⁰ Seanad Debates, *Criminal Justice (No 2) Bill 1997, Second Stage*, 9 December 1997, Vol 153, No 1.

³¹¹ Dáil Debates, *Criminal Justice (No 2) Bill 1997 [Seanad], Second Stage*, 11 June 1998, Vol 492, No 3.

³¹² Section 4 of the *Criminal Justice Act 1999*.

³¹³ Section 27(3B) inserted by section 5 of the *Criminal Justice Act 1999*.

³¹⁴ Section 1 of the *Euro Changeover (Amounts) Act 2001* converted this amount to €13,000.

³¹⁵ *Irish Current Law Statutes Annotated 1999* at 10-05.

³¹⁶ Section 3(2) of the *Crime (Sentences) Act 1997*.

³¹⁷ McEvoy *Research for the Department of Justice on the Criteria applied by the Courts in sentencing under S. 15A of the Misuse of Drugs Act 1977 (as amended)* (Department of Justice, 2001).

³¹⁸ Dáil Debates, *Criminal Justice Bill 2004, Second Stage*, 15 February 2005, Vol 597, No 5.

Bill which would, among other matters, strengthen the presumptive sentencing provisions for drug offences.³¹⁹ The amendments were finalised in the wake of the fatal shooting of Donna Cleary in March 2006. The shooting had led to public outcry not only because of the senselessness of the act but also because it transpired that one of those suspected to have been involved had been convicted of an offence under section 15A of the *Misuse of Drugs Act 1997* in 1999.³²⁰ Had he been sentenced to the “mandatory” term of 10 years rather than a term of six years, he would have continued to serve his sentence in 2006. The amended Bill thus proposed a number of changes to the law regarding drug offences,³²¹ two of which are relevant to this Report. First, it proposed to create a new offence of importing drugs with a value of €13,000 or more, which would be punishable by a minimum sentence of 10 years. Second, it proposed to strengthen the existing mandatory sentencing provisions for certain drug trafficking offences by obliging the sentencing court to consider evidence of previous drug trafficking convictions. In its final form, the *Criminal Justice Act 2006* made these and other amendments to the *Misuse of Drugs Act 1977*.

2.140 First, section 81 of the *Criminal Justice Act 2006* amended section 15A by inserting subsection (3A). Section 15A(3A) clarified that *mens rea* regarding the value of the drugs involved was not an element of the offence. Thus, the prosecution needed only to establish that the accused knew that he or she was in possession of drugs with intent to sell or supply and not that he or she knew the value of the drugs involved.³²²

2.141 Second, section 82 of the *Criminal Justice Act 2006* inserted section 15B and section 84 amended section 27. The effect was to create a new offence of importing controlled drugs with a value of €13,000 or more, which would be subject to the same penalty provisions as applicable to offences under section 15A. Previously, the offence of importing controlled drugs had attracted a maximum sentence of 14 years’ imprisonment.³²³ The Minister indicated that it would be strange for this to continue to be the case when an offence under section 15A now attracted a mandatory minimum sentence of 10 years’ imprisonment and a maximum of life imprisonment.³²⁴

2.142 Third, section 84 of the *Criminal Justice Act 2006* inserted subsection (3CC) into section 27. Section 27(3CC)³²⁵ provided that the court, when deciding whether or not the 10-year minimum would be appropriate in a given case, could have regard to: (a) any previous drug trafficking convictions, and (b) the public interest in preventing drug trafficking. While there remained judicial discretion to determine whether regard should, in actual fact, be had to these factors and the weight to be attributed to them, the intention of the Oireachtas to narrow the aperture through which the judiciary could justify the imposition

³¹⁹ Dáil Debates, Criminal Justice Bill 2004, Second Stage, 15 February 2005, Vol 597, No 5.

³²⁰ “Mandatory Drug Offence Terms rarely imposed” Irish Times 7 March 2006; Lally and Reid “Sentences for Drugs, Gun Crimes questioned after Killing” Irish Times 7 March 2006; and Browne “Now that would be a Watershed” Irish Times 8 March 2006.

³²¹ Dáil Debates, Criminal Justice Bill 2004 Motion, 28 March 2006, Vol 617, No 97.

³²² In *The People (DPP) v Power* [2007] 2 IR 509 at 522, the Supreme Court confirmed that even before the insertion of subsection (3A), section 15A had not required the prosecution to establish *mens rea* regarding the value of the drugs. As a result, a number of earlier decisions which had held that *mens rea* was an element of the offence were overruled. See, for example: *The People (DPP) v Charles Portlaoise* Circuit Court 13 July 2004.

³²³ Regulation 4 of the *Misuse of Drugs Regulations 1988* and section 27(6) of the *Misuse of Drugs Act 1977*. Select Committee on Justice, Equality, Defence and Women’s Rights Debates, Criminal Justice Bill 2004, Committee Stage, 11 May 2006.

³²⁴ Select Committee on Justice, Equality, Defence and Women’s Rights Debates, Criminal Justice Bill 2004, Committee Stage, 11 May 2006, Mr McDowell TD.

³²⁵ Now section 27(3D)(c).

of more lenient sentences was clear.³²⁶ In this regard, the Minister observed that in the first five years of the operation of the mandatory sentencing provision, the mandatory minimum sentence had only been applied in 6 percent of convictions although this figure had increased to 21 percent in 2004. The Minister asserted that subsection (3CC) would act as a “counterweight” to the mitigating factors, which included guilty pleas and cooperation, of which the court could take account.³²⁷ He indicated that this sentencing regime would differ from the regular sentencing regime in so far as it would be less bound to the policy of individualised sentencing.³²⁸ A court, when deciding whether or not to impose a 10-year minimum sentence in a given case, should have at the forefront of its consideration the social impact of drug trafficking and view factors, such as the nature of the drugs and the circumstances of the offender, as being of lesser importance.³²⁹

2.143 In 2007, the Government introduced the *Criminal Justice Bill 2007* which made amendments of a technical nature. Section 33 of the *Criminal Justice Act 2007* consolidated the numbering of the subsections of section 27 and inserted subsection (3D)(a) which emphasised the social harm caused by drug trafficking. During the second stage of debates, the Minister reiterated the need for consistency in sentencing and indicated that since “the policy laid out in 1997 has not been adhered to”, there was a need to make this policy more explicit by means of legislation.³³⁰ It is arguable that this approach did not adequately respond to the issue of the minimum term not being applied. At the end of 2007, it was reported that the minimum sentence had been imposed in only three out of 57 cases.³³¹

2.144 These amendments, particularly those introduced by the *Criminal Justice Act 1999* and the *Criminal Justice Act 2006*, marked an important turning point in the Irish sentencing regime which had until 1999 (with the exception of the sentences for murder, capital murder and treason) accorded primacy to judicial discretion in the determination of sentences. Against the backdrop of an escalating drugs problem and a growing realisation that Ireland had become a portal not only to the Irish drugs market but also to the British and European drugs markets,³³² the Oireachtas introduced the presumptive minimum sentences to address an apparent rift which had developed between legislative intent and judicial execution.

2.145 It will be recalled that this move towards a more punitive system of sentencing corresponded to a similar move in the United Kingdom at the same time.³³³

³²⁶ Select Committee on Justice, Equality, Defence and Women’s Rights Debates, Criminal Justice Bill 2004, Committee Stage, 11 May 2006. It is interesting to note that Minister McDowell’s reason for inserting subsection (3CC) - to close the gap between Oireachtas intention and judicial action - was very similar to the reason which had been offered by Minister O’Donoghue for the introduction of presumptive sentencing in respect of offences under section 15A of the *Misuse of Drugs Act 1977*.

³²⁷ *Ibid.*

³²⁸ *Ibid.*

³²⁹ Commentators have noted the difficulty in determining what is in the public interest in preventing drug trafficking. See: *Irish Current Law Statutes* 2006 at 26-84.

³³⁰ Dáil Debates, Criminal Justice Bill 2007, Second Stage, 22 March 2007, Vol 634, No 2, Col 383; Donohoe “New Bill to end Judges’ Discretion in serious Drug Cases” Irish Times 13 March 2007; “Tougher Sentencing on Way in new Crime Package” Irish Independent 13 March 2007; “Ex-Judge knocks new Drug Laws” Irish Independent 14 March 2007; and O’Mahony “McDowell’s Battle with Judiciary not Justified” Irish Times 22 March 2007.

³³¹ Lally “Only Three of 57 Drug Dealers got 10-Year Sentence” Irish Times 30 October 2007.

³³² Burke “Rabbitte Revisited: The First Report of the Ministerial Task Force on Measures to Reduce Demand for Drugs - Ten Years On” (2007) 55 Administration 125 at 127-132; and *First Report of the Ministerial Task Force on Measures to Reduce Demand for Drugs 1996* at 6-15 and 25-26.

³³³ Ashworth “Changes in Sentencing Law” (1997) Crim LR 1.

(2) Mandatory Sentences for Firearm Offences

(a) United States

2.146 The practice of prescribing mandatory sentences for firearms offences appears to have originated in the United States. The constitutional right to bear arms in the United States, however, distinguishes the relationship which the United States has with firearms, from that of other common law countries. Perhaps owing to the constitutional status of this right, it would appear that for many years the primary focus of legislative attention in the United States was on the control of firearms (in terms of licensing manufacture, trade, ownership and possession) rather than on criminal sanctions for offences involving firearms.³³⁴

2.147 In the late 1960s, there appears to have been a shift in legislative focus but the reason for this shift has not been documented in detail. There are, however, a number of possible options. As observed at paragraph 2.113, during the late 1960s and early 1970s, mandatory sentences in general became more popular as support for the rehabilitative model of imprisonment waned.³³⁵ In addition, the 1960s bore witness to a number of high-profile and, indeed, historically significant assassinations. In 1963, President John F Kennedy was shot dead and in 1968, Martin Luther King and Senator Robert F Kennedy were shot dead. It has been asserted, nonetheless, that these events did not inspire the legislative change which occurred but rather put pressure on Congress at crucial points of the process.³³⁶

2.148 In 1968 Congress passed the *Gun Control Act 1968*.³³⁷ The main objectives of the Act were threefold: (i) to eliminate the illicit interstate traffic in firearms and ammunition; (ii) to deny access to firearms to certain groups including minors and convicted felons; and (iii) to end the illicit importation of surplus military firearms and other guns not certified as suitable for sporting uses.³³⁸ During the debates, however, an alternative to stricter controls on firearms was proposed, namely, mandatory sentences for violent crimes committed with guns.³³⁹ This was reflected in the provision of the Act which mandated additional penalties for persons convicted of committing federal crimes with firearms.³⁴⁰

2.149 In 1970 Congress amended the provision to require a mandatory minimum sentence of not less than one year for using or carrying a firearm during the commission of a felony and a mandatory consecutive sentence of two years for a second or subsequent offence.³⁴¹ In addition, Congress introduced a mandatory minimum sentence of one year for using or carrying explosives during the commission of certain other crimes.³⁴²

³³⁴ Zimring "Firearms and Federal Law: The Gun Control Act of 1968" (1975) 4 J Legal Stud 133.

³³⁵ Glick "Mandatory Sentencing: The Politics of the New Criminal Justice System" (1979) 43 Fed Probation 3 at 3-6; Zimring "Sentencing Reform in the States: Some Sobering Lessons from the 1970s" (1981-1982) 2 N Ill U L Rev 1 at 2-4; and *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 1991) at Chapter 2.

³³⁶ Zimring "Firearms and Federal Law: The Gun Control Act of 1968" (1975) 4 J Legal Stud 133.

³³⁷ *Ibid.*

³³⁸ *Ibid* at 149.

³³⁹ *Ibid* at 147.

³⁴⁰ See: 18 USC §924(c). Zimring "Firearms and Federal Law: The Gun Control Act of 1968" (1975) 4 J Legal Stud 133 at 147 and 149.

³⁴¹ *Report to Congress: mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 2011) at 23.

³⁴² 18 USC § 844(h).

2.150 In 1984 Congress amended the provision to require a mandatory minimum sentence of five years for using or carrying a firearm during a “crime of violence”.³⁴³ It also established mandatory sentencing enhancements for possessing dangerous ammunition during drug and violent crimes.

2.151 In 1986 Congress expanded the scope of the provision to include using or carrying a firearm during the commission of a drug trafficking crime.³⁴⁴ In addition, Congress expanded the scope of another provision³⁴⁵ which prescribes a mandatory minimum sentence of 15 years for armed career criminals, to cover firearms possession offences committed by persons who have three convictions for crimes broadly defined as violent felonies and serious drug offences.

2.152 In 1998 Congress amended the provision in three ways.³⁴⁶ First, it amended the statute to require a mandatory minimum sentence of five years if the offender possessed a firearm in furtherance of a crime of violence or drug trafficking crime. Second, it established more severe mandatory minimum sentences for certain offenders depending on whether, in violating the provision, a firearm was “brandished” or “discharged”, requiring mandatory minimum sentences of 7 years and 10 years of imprisonment respectively. Finally, it increased the mandatory minimum sentence for second or subsequent convictions under the provision from 20 years to 25 years, to ensure that more serious offenders were punishable by progressively higher mandatory minimum sentences.

2.153 During the 1970s a number of states also introduced mandatory sentencing provisions for firearms offences. In 1975 Massachusetts passed the *Bartley Fox Amendment* which prescribed a mandatory minimum sentence of one year for the offence of carrying a firearm without the appropriate permit.³⁴⁷ In the same year Florida passed the *Felony Firearm Law 1975* which prescribed a mandatory minimum sentence of three years for possessing a firearm during the commission of 11 specified felonies.³⁴⁸ In 1976 California passed the *Uniform Determinate Sentencing Act 1976* which prescribes certain sentence enhancements of one or two years for possession or use of a firearm, respectively, during the commission of an offence.³⁴⁹ In 1977 Michigan passed the *Felony Firearm Statute 1977* which prescribes an additional two-year sentence for those who possess a firearm while committing a felony.³⁵⁰ A number of other states, including Missouri, Connecticut and Nebraska, also enacted some variant of mandatory sentences for offences involving firearms during this time.³⁵¹

³⁴³ *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 2011) at 25; and Scott Wallace “Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr Jekyll and Mr Hyde” (1993) 57 Fed Probation 9 at 10.

³⁴⁴ *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 2011) at 25-26.

³⁴⁵ 18 USC § 924(e),

³⁴⁶ *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 2011) at 26.

³⁴⁷ Mass Gen Laws Ann ch 269, § 10(c) (Supp 1976). Beha “‘And Nobody can get You out’ - The Impact of a Mandatory Prison Sentence for the Illegal Carrying of a Firearm on the Use of Firearms and on the Administration of Criminal Justice - Part I” (1977) 57 B U L rev 96.

³⁴⁸ Loftin and McDowall “The Deterrent Effects of the Florida Felony Firearm Law” (1984) 75 J Crim L & Criminology 250 at 251.

³⁴⁹ Parnas and Salerno “The Influence behind, Substance and Impact of the New Determinate Setnencing Law in California” 11 UCD L Rev 29; and Lizotte and Zatz “The Use and Abuse of Sentence Enhancement for Firearms Offenses in California” (1986) 49 Law & Contemp Probs 199 at 203-204.

³⁵⁰ Loftin et al “Mandatory Sentencing and Firearms Violence: Evaluating an Alternative to Gun Control” (1982-1983) 17 Law & Soc’y Rev 287; and Heumann and Loftin “Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute” (1978-1979) 13 Law & Soc’y Rev 393 at 395.

³⁵¹ Heumann and Loftin “Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute” (1978-1979) 13 Law & Soc’y Rev 393 at 397 (footnote 9).

(b) England and Wales

2.154 In 2002 the Government published a White Paper entitled *Justice for All*.³⁵² The purpose of the White Paper was to “send the clearest possible message to those committing offences that the criminal justice system is united in ensuring their detection, conviction and punishment.”³⁵³ It incorporated many of the recommendations contained in the 2001 *Halliday Report*,³⁵⁴ which had examined whether the sentencing framework in England and Wales could be changed to improve results, especially by reducing crime, at justifiable expense. While neither the 2002 White Paper nor the 2001 *Halliday Report* referred to mandatory sentencing for firearm offences, there was a sense that a public appetite for a stricter approach to sentencing existed.³⁵⁵

2.155 During a House of Commons debate in late 2002,³⁵⁶ the then Home Secretary was asked whether he was aware of the aim of the London Metropolitan Police to get the minimum sentence for carrying a weapon raised to five years. He responded that he was aware of representations having been made and commented that “[t]here is good reason for treating the issue seriously and considering whether we should add it to the *Criminal Justice and Sentencing Bill*.”³⁵⁷ He was later to rely on this statement as having been an indication of his intention to introduce minimum sentences for gun crime from December 2002.³⁵⁸

2.156 In the United Kingdom, however, firearms legislation has, for the most part, resulted from reactionary responses to specific tragic events. In a 2006 Home Office Report, for instance, it was noted that:

“Since the mid-1980s, a number of significant changes have occurred to the legislative and public policy responses to gun crime and firearms more generally. Automatic weapons having been banned by the Firearms Act 1937, semi-automatic rifles were banned by the Firearms (Amendment) Act 1988 after the massacre of 16 people in Hungerford in 1987. Then a ban on handguns was introduced by the Firearms (Amendment) Act 1997. This followed the Cullen Inquiry ... into the 1996 school massacre in Dunblane, Scotland, in which 16 children and a teacher were shot and killed. Both the Hungerford and Dunblane massacres were committed by lone gunmen with legally owned firearms. The UK now has some of the most restrictive firearm laws in Europe ...”³⁵⁹

2.157 In January 2003 two teenage girls, Charlene Ellis and Latisha Shakespear, were shot dead as they stood outside a New Year’s party in Aston, Birmingham.³⁶⁰ The incident was considered to be indicative of a rising gun culture in England and Wales.³⁶¹ This was confirmed by Home Office figures

³⁵² *Justice for All* Cm 5563 (Home Office, 2002).

³⁵³ *Ibid* at 11.

³⁵⁴ *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (Home Office, 2001).

³⁵⁵ *Justice for All* (Home Office, Cm 5563, 2002) at paragraph 5.2.

³⁵⁶ Hansard, House of Commons, Oral Answers to Questions, 2 December 2002, Column 594.

³⁵⁷ *Ibid*. Even before the provisions regarding mandatory minimum sentences were inserted, the Criminal Justice Bill had been widely criticised by civil liberties’ groups. See: Tempest “Blunkett’s Bill under Fire” *The Guardian* 21 November 2002.

³⁵⁸ Sparrow “Blunkett outlaws Use of Fake Guns” *The Telegraph* 6 January 2003; Vasagar and Ward “Five-Year Jail Terms planned as Rise in Use of Illegal Weapons revealed” *The Guardian* 6 January 2003; and “Blunkett confirms tough new Gun Penalties” *The Guardian* 6 January 2003.

³⁵⁹ Hales, Lewis and Silverstone *Gun Crime: The Market in and Use of illegal Firearms Research Study* 298 (Home Office, 2006) at 7.

³⁶⁰ Oliver “Birmingham Shooting Victims Named” *The Guardian* 3 January 2003.

³⁶¹ Burke, Thompson, Bright, Hinsliff, Barnett and Rowan “Where the Gun rules and the Innocent go in Fear” *The Guardian* 5 January 2003.

released shortly afterward, which showed that there had been a 35 percent increase in gun crime in England and Wales during the 12 months up to April 2002.³⁶² In advance of these figures being released, the Home Secretary confirmed that he would be introducing a mandatory minimum five-year sentence for illegal possession and use of firearms.³⁶³ The announcement met with widespread criticism from the judiciary, who argued that they should be allowed to use their discretion in sentencing offenders, and opposition parties, who argued that the Home Secretary was engaging in “knee-jerk” politics.³⁶⁴ Within a day of his initial announcement, the Home Secretary announced that the proposed legislation would be modified to permit the judiciary to depart from the minimum sentence where there were exceptional circumstances.³⁶⁵

2.158 In 2003 Parliament passed the *Criminal Justice Act 2003*. Arguably, the 2003 Act had been inspired by the proposals contained in the Government’s 2002 White Paper *Justice for All* and the intervening events.³⁶⁶ Section 287 of the *Criminal Justice Act 2003* inserted section 51A of the *Firearms Act 1968*. As detailed at paragraph 4.105, section 51A of the *Firearms Act 1968*, as amended,³⁶⁷ provides for a presumptive minimum sentence of five years for certain firearms offences.

(d) Ireland

2.159 In Ireland, there had long been calls to introduce mandatory sentencing for firearms offences. Calls for “mandatory minimum” sentences for firearms offences were first heard by the Dáil in 1986³⁶⁸ but were dismissed by the Minister for Justice on the basis of possible constitutional problems and the lack of public appetite. A general call for more robust measures against firearms offences was also rejected the following year.³⁶⁹

2.160 In July 1996, following the shooting dead of Garda Jerry McCabe and Veronica Guerin, the Opposition moved a private members’ motion in which they called on the Government to consider, among other matters, the introduction of mandatory minimum sentences for the use of illegal firearms.³⁷⁰ At that time, it was suspected that these offences had been committed by members of subversive and criminal organisations.³⁷¹ The notoriety of these criminal organisations had grown as details of their exploits

³⁶² Allen and Barrett “Huge Increase in Gun Use as Crime Figures Soar” *The Independent* 9 January 2003; Burrell “Tories attack ‘truly terrible’ Rise in Gun Crime” *The Independent*, 10 January 2003; and Vasagar and Ward “Five-Year Jail Terms planned as Rise in Use of Illegal Weapons revealed” *The Guardian* 6 January 2003.

³⁶³ Vasagar and Ward “Five-Year Jail Terms planned as Rise in Use of Illegal Weapons revealed” *The Guardian* 6 January 2003; Sparrow “Blunkett outlaws Use of Fake Guns” *The Telegraph* 6 January 2003; and “Blunkett confirms tough new Gun Penalties” *The Guardian* 6 January 2003.

³⁶⁴ “No 10 backs down on Gun Crime Sentencing” *The Telegraph* 7 January 2003; and Gibb and Ford “Judges Force Retreat on Sentences” *The Guardian* 7 January 2003.

³⁶⁵ “No 10 backs down on Gun Crime Sentencing” *The Telegraph* 7 January 2003; Johnston “Blunkett’s New Five-Year Minimum Jail Term ‘Knee-Jerk Politics’” *The Telegraph* 7 January 2003; and Gibb and Ford “Judges Force Retreat on Sentences” *The Guardian* 7 January 2003.

³⁶⁶ *Criminal Justice Act 2003 - Explanatory Notes* at paragraph 3; and *Towards Effective Sentencing - Fifth Report of Session 2007-2008, Volume I* (House of Commons Justice Committee, 2008) at 7.

³⁶⁷ Section 30 of the *Violent Crime Reduction Act 2006*.

³⁶⁸ Dáil Debates, Oral Answers to Questions, 22 May 1986, Vol 366, Col 2108-9.

³⁶⁹ Dáil Debates, Written Answers - Armed Crime, 28 October 1987, Vol 374.

³⁷⁰ Dáil Debates, Private Members’ Business - Measures against Crime Motion, 2 July 1996, Vol 467, No 7, Liz O’Donnell TD; and “Coalition to present Anti-Crime Package later Today” *Irish Times* 2 July 1996.

³⁷¹ Mayor calls for Action on Guns” *Irish Times* 15 August 1996; “The Law and Justice” *Irish Times* 13 September 1996; “69 Guns seized during Guerin Murder Inquiries” *Irish Times* 9 September 1996; “Garda are now closing in on Guerin Murderers” *Irish Times* 9 October 1996; and Maher “Murdered Drug Dealer linked to two Killings in Dublin” *Irish Times* 9 December 1996.

filtered into the public domain. Their revenue was derived primarily from drug trafficking - a territorial business which was guarded both jealously and ruthlessly. The link between the drugs trade and firearms had become evident as a proliferation of illegal firearms meant that tales of a lethal turf-war were never far from the headlines. Competitors, traitors, potential threats and people in the wrong place at the wrong time were casually and frequently eliminated.³⁷² While the identities of the criminal bosses were known or, at very least, suspected, the sophisticated level at which they operated made detection and prosecution almost impossible. The fact that representatives of two democratic institutions (An Garda Síochána and the Press) should be targeted within such a short space of time was considered by some to be an “attack on democracy” and proof that the crime situation now required a declaration of a “state of emergency”.³⁷³ The climate seemed right to come down heavily on the activities of these organisations. The Government declined, however, to introduce mandatory sentencing in respect of either drug trafficking or firearms offences, preferring instead to focus on the causes of crime, Garda powers and the proceeds of crime.³⁷⁴

2.161 In October 2003, a newly appointed Garda Commissioner, Noel Conroy, addressed the Joint Committee on Justice, Equality, Defence and Women’s Rights and explained the extent of the perceived problem of offences involving firearms:

“I am concerned at the number of homicides and other instances involving the use of firearms. Of the 42 deaths this year, 19 involved the use of firearms. This compares to ten in the year 2002 and nine in the year 2001. There are a number of factors which explain this increase. Some former paramilitary weapons have found their way into the hands of criminal organisations and this has contributed to the general increase in the use of firearms in recent times, in particular in so-called gangland style murders and shootings. There have also been cases where former paramilitaries have turned to crime. Criminal gangs are also known to import firearms with their consignments of drugs and cigarettes and so on.”³⁷⁵

Shortly afterwards, the Department of Justice released figures to the Labour Party Spokesperson on Justice which indicated that there had been a 500 percent increase in murders involving firearms since 1998.³⁷⁶

2.162 In April 2004, the then Minister for Justice announced to the Association of Garda Sergeants and Inspectors that the laws relating to drugs and firearms offences would be strengthened.³⁷⁷ Shortly after the Minister’s announcement, two reports were published which lent credence to popular fears. On 16th April 2004, the Department of Justice released Garda figures which indicated that there had been a substantial increase in firearms offences for the first three months of 2004.³⁷⁸ This was followed by the publication, on 19th April 2004, of an all-Ireland survey commissioned by the National Advisory Committee on Drugs (NACD) in Ireland and the Drug and Alcohol Information and Research Unit (DAIRU) in

³⁷² “Contract Killing costs about Pounds 2000” Irish Times 1 May 1996; O’Connor “Death Toll from Contract Style Killings rises to 12 in Dublin” Irish Times 27 June 1996; and Cusack “Dublin’s Gangsters have got the Killing Habit” Irish Times 7 September 1996.

³⁷³ Dáil Debates, Killing of Dublin Journalist: Statements, 26 June 1996, Vol 467, No 5; and Kennedy “Stunned Political Leaders see Killing as Attack on Democracy” Irish Times 27 June 1996.

³⁷⁴ See, for example: the *Criminal Assets Bureau Act 1996* and the *Proceeds of Crime Act 1996*.

³⁷⁵ Committee on Justice, Equality, Defence and Women’s Rights Debate, Garda Commissioner Presentation, 14 October 2003, Garda Commissioner Noel Conroy; Lally “Conroy says Rise in Use of Guns in Homicides” Irish Times 15 October 2003; and Lally “Gardaí call for Overhaul of Justice System” Irish Times 6 November 2003.

³⁷⁶ Lally “500% Rise in Murders using Guns” Irish Times 19 November 2003.

³⁷⁷ Lally “Gun and Drug Laws to be Toughened Up” Irish Times 6 April 2004; “Mandatory Sentences” Irish Times 7 April 2004; and Coulter “Sentence must be Proportionate to the Crime, say Observers” Irish Times 7 April 2004.

³⁷⁸ Lally “Crime Figures show 6% Drop” Irish Times 17 April 2004; and Brady “Crackdown on Way as Gun Crime Rockets” Belfast Telegraph 17 April 2004.

Northern Ireland, which illustrated the extent to which drug misuse had become a serious problem in Ireland.³⁷⁹ Commenting on the all-Ireland survey, the Minister for Justice stated that the courts “must adopt a tough approach to criminals convicted of drugs or firearms offences, the two of which were inextricably linked.”³⁸⁰ In an apparent reference to the presumptive sentence for offences under section 15A of the *Misuse of Drugs Act 1977*, he commented:

“Our judiciary must understand when the Oireachtas put in place guidelines for the sentencing of people convicted for the commercial distribution of drugs that the parliament was serious and required deterrent sentences in that area, and did not expect that the system of penalties provided was to be regarded as the exception rather than the rule.”³⁸¹

2.163 In 2004, the Government introduced the *Criminal Justice Bill 2004*.³⁸² As noted at paragraph 2.139, during the Second Stage debates, the Government announced that it would be introducing a number of substantial amendments which would, among other matters, provide presumptive sentences for certain firearms offences.³⁸³ The amendments were finalised following the fatal shooting of Donna Cleary in March 2006³⁸⁴ and the *Criminal Justice Bill* was enacted as the *Criminal Justice Act 2006*.

2.164 At the same time, the idea that presumptive sentencing could be used to tackle firearms offences had gained momentum in the United Kingdom which had introduced similar sentencing provisions in the *Criminal Justice Act 2003*.

2.165 The *Criminal Justice Act 2006* amended the Firearms Acts with the result that many firearms offences now carry a presumptive sentence of five or 10 years. The offences which attract a five-year sentence are possession of a firearm while taking a vehicle without authority;³⁸⁵ possession of a firearm or ammunition in suspicious circumstances;³⁸⁶ carrying a firearm or imitation firearm with intent to commit an indictable offence or resist arrest;³⁸⁷ and shortening the barrel of a shotgun or rifle.³⁸⁸ The offences which attract a 10-year sentence are possession of firearms with intent to endanger life;³⁸⁹ and using a firearm to assist or aid in an escape.³⁹⁰

2.166 The *Criminal Justice Act 2006*, in so far as it continued the trend started by the *Criminal Justice Act 1999*, marked an important development in the evolution of sentencing. Whereas presumptive sentencing had previously been limited to the offence of possessing drugs with intent to sell or supply, it

³⁷⁹ Drug Use in Ireland and Northern Ireland: 2002/2003 Drug Prevalence Survey (Health Board (Ireland) and Health and Social Services Board (Northern Ireland), April 2004); and Lally “Report to Show Drug Trade has spread throughout State” Irish Times 19 April 2004.

³⁸⁰ Lally “All-Ireland Survey Shows Fast Rise in Use of Cocaine” Irish Times 20 April 2004; and McDaid “Minister Vows to Get Tough on Drugs” Irish News 20 April 2004.

³⁸¹ Lally “All-Ireland Survey Shows Fast Rise in Use of Cocaine” Irish Times 20 April 2004.

³⁸² Dáil Debates, Criminal Justice Bill 2004: Order for Second Stage, 15 February 2005, Vol 597, No 5.

³⁸³ Dáil Debates, Criminal Justice Bill 2004, Second Stage, 15 February 2005, Vol 597, No 5.

³⁸⁴ Robinson “Calls for Gun-Crime Crackdown as Killings leave Public Reeling” Irish News 8 March 2006; “Time for Action, not Words, on Guns” Irish Times 7 March 2006; O’Halloran “Harney says Firearms Laws will be Amended” Irish Times 9 March 2006; and McMorrow “Ireland in the Grip of Gun Crime” Sunday Tribune 12 March 2006.

³⁸⁵ Section 26 of the *Firearms Act 1964*, as substituted by section 57 of the *Criminal Justice Act 2006*.

³⁸⁶ Section 27A of the *Firearms Act 1964*, as substituted by section 59 of the *Criminal Justice Act 2006*.

³⁸⁷ Section 27B of the *Firearms Act 1964*, as substituted by section 60 of the *Criminal Justice Act 2006*.

³⁸⁸ Section 12A of the *Firearms and Offensive Weapons Act 1990*, inserted by section 65 of the *Criminal Justice Act 2006*.

³⁸⁹ Section 15 of the *Firearms Act 1925*, as substituted by section 42 of the *Criminal Justice Act 2006*.

³⁹⁰ Section 27 of the *Firearms Act 1964*, as substituted by section 58 of the *Criminal Justice Act 2006*.

now applied to a range of drug and firearms offences. As a result, there were now 8 types of offence for which judicial discretion regarding sentencing would be constrained. The Commission observes, however, that the fact that presumptive sentencing was limited to such a specific range of offences gives rise to the inference that: (a) presumptive sentencing was intended to apply in the relatively narrow circumstances of addressing a major challenge to society (such as in the case of certain drugs and firearms offences), and (b) general judicial sentencing discretion was accepted as suitable in other cases.

2.167 In 2007 the *Criminal Justice Act 2007* inserted a subsection³⁹¹ emphasising the social harm caused by the unlawful possession and use of firearms into the sections³⁹² of the Firearms Acts which had created the offences to which the presumptive sentences applied. It has been noted that the purpose of this provision was to reduce the number of situations in which the courts could impose sentences below the presumptive minimum by making clear the intention of the Oireachtas that the presumptive minimum sentence was to be imposed in all but the most exceptional cases.³⁹³

(3) Proposals to Extend the Use of Presumptive Minimum Sentences in Ireland

2.168 The Commission notes that in Ireland recent legislative proposals have sought to extend the use of presumptive minimum sentences beyond specified drugs and firearms offences.

(i) Criminal Justice (Aggravated False Imprisonment) Bill 2012 (Private Member's Bill)

2.169 In January 2012 Fianna Fáil published the *Criminal Justice (Aggravated False Imprisonment) Bill*,³⁹⁴ the provisions of which are clearly influenced by the presumptive sentencing regimes under the *Misuse of Drugs Act 1977* and the Firearms Acts. The Bill would, if enacted, create a statutory offence of “aggravated false imprisonment” (otherwise known as “tiger kidnapping”) which would attract a presumptive minimum sentence of 10 years.³⁹⁵ The presumptive sentence would not apply where there were “exceptional and specific circumstances.” Exceptional and specific circumstances would include: (a) whether the person had pleaded guilty and, if so, the stage at which he or she had indicated the intention to plead guilty and the circumstances in which the indication had been given, and (b) whether the person had materially assisted in the investigation of the offence including by an admission that a criminal organisation existed and the identification of other members of the criminal organisation.³⁹⁶ The presumptive sentence would become a mandatory sentence where the person was convicted of a second or subsequent offence of aggravated false imprisonment.³⁹⁷

(ii) Assaults on Emergency Workers Bill 2012 (Private Members' Bill)

2.170 In October 2012, Fianna Fáil published the *Assaults on Emergency Workers Bill 2012*. This Private Members' Bill sought the introduction of a presumptive minimum sentence of five years' imprisonment for those who: (i) commit an assault causing serious harm to an on-duty emergency worker; (ii) threaten to kill or cause serious harm to an on-duty emergency worker; or (iii) injure an on-duty emergency worker by piercing his or her skin with a syringe.³⁹⁸

³⁹¹ Section 35 to section 39 of the *Criminal Justice Act 2006* inserted subsection (4A) into section 15 of the *Firearms Act 1925*; section 26 of the *Firearms Act 1964*; section 27 of the *Firearms Act 1964*; section 27A of the *Firearms Act 1964*; and section 27B of the *Firearms Act 1964*. Section 40 of the *Criminal Justice Act 2006* inserted subsection (9A) into section 12A of the *Firearms and Offensive Weapons Act 1990*.

³⁹² Section 15 of the *Firearms Act 1925*; section 26 of the *Firearms Act 1964*; section 27 of the *Firearms Act 1964*; section 27A of the *Firearms Act 1964*; section 27B of the *Firearms Act 1964*; and section 12A of the *Firearms and Offensive Weapons Act 1990*.

³⁹³ McIntyre *Irish Current Law Statutes Annotated 2007* at 29-43.

³⁹⁴ Collins “‘Tiger’ Jail Term Proposed” *Irish Times* 27 January 2012.

³⁹⁵ Section 3(1)(c) of the *Criminal Justice (Aggravated False Imprisonment) Bill 2012*.

³⁹⁶ Section 3(2) of the *Criminal Justice (Aggravated False Imprisonment) Bill 2012*.

³⁹⁷ Section 3(3) of the *Criminal Justice (Aggravated False Imprisonment) Bill 2012*.

³⁹⁸ Section 2 of the *Assaults on Emergency Workers Bill 2012*.

2.171 In certain respects, it is again clear that this proposal was influenced by the presumptive sentencing regimes under the *Misuse of Drugs Act 1977* and the *Firearms Acts*. Notably, the Bill provided that a sentencing court would not be required to impose the prescribed minimum penalty where it was satisfied that there were exceptional and specific circumstances relating to the offence or the offender which would make the application of this penalty unjust in all the circumstances.³⁹⁹ In determining whether such circumstances existed, the court would be permitted to take into account any matters which it considered appropriate, including: (a) whether the person pleaded guilty and, if so, the stage at which he or she indicated the intention to plead guilty, and the circumstances in which the indication was given, and (b) whether the person materially assisted in the investigation of the offence.⁴⁰⁰ The proposed sentencing regime did differ from existing presumptive sentencing provisions in so far as it would apply to offenders aged at least 16 years, as opposed to those aged 18 years or over.⁴⁰¹

2.172 During the Dáil debates, the Government opposed the Bill on three grounds. First, it asserted that there was “already legislation in place which is more appropriate and comprehensive”⁴⁰² in its provision of protection to emergency workers. Specifically, reference was made to the provisions of the *Non-Fatal Offences Against the Person Act 1997* which criminalise various forms of assault, threats to kill, and attacks involving syringes.⁴⁰³ The Government also observed that section 19 of the *Criminal Justice (Public Order) Act 1994*, as amended,⁴⁰⁴ affords express statutory protection to emergency workers in the context of offences involving assault or threatened assault.⁴⁰⁵

2.173 Second, the Government acknowledged that the Commission was, at this time, examining the issue of mandatory sentencing and noted that it did not wish to pre-empt the recommendations contained in this Report.⁴⁰⁶ Third, the Government contended that there were a number of technical difficulties with the proposed Bill. These related to: (i) the proposed application of the regime to offenders under the age of 18 years; (ii) the definition of an “emergency worker” for the purposes of the Bill; and (iii) the absence of prescribed maximum penalties under the Bill.⁴⁰⁷ The *Assaults on Emergency Workers Bill 2012* was ultimately rejected by a margin of 91 votes to 42.

2.174 The Commission notes that in addition to the legislative proposals discussed above, there have, in recent years, been calls to introduce mandatory minimum sentences for various other crimes, including assaults against the elderly;⁴⁰⁸ burglary;⁴⁰⁹ car hijacking;⁴¹⁰ child sex abuse;⁴¹¹ dangerous driving;⁴¹² gangland murder;⁴¹³ possession of child pornography;⁴¹⁴ rape;⁴¹⁵ and violent assault.⁴¹⁶

³⁹⁹ Section 3(2) of the *Assaults on Emergency Workers Bill 2012*.

⁴⁰⁰ Section 3(2)(a) to section 3(2)(b) of the *Assaults on Emergency Workers Bill 2012*.

⁴⁰¹ Section 3(1) of the *Assaults on Emergency Workers Bill 2012* provided that the regime would not apply in respect of a “child,” while section 1 defined a “child” as a person under the age of 16 years.

⁴⁰² Dáil Debates, *Assaults on Emergency Workers Bill 2012*, Second Stage, 5 October 2012, Vol 773, No. 11, Minister of State at the Department of the Taoiseach, Paul Kehoe TD.

⁴⁰³ *Ibid.* (See generally: section 2 to section 6 of the *Non-Fatal Offences against the Person Act 1997*).

⁴⁰⁴ Section 185 of the *Criminal Justice Act 2006*.

⁴⁰⁵ Dáil Debates, *Assaults on Emergency Workers Bill 2012*, Second Stage, 5 October 2012, Vol 773, No. 11, Minister of State at the Department of the Taoiseach, Paul Kehoe TD.

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Ibid.*

⁴⁰⁸ Healy “3 year jail for attacking elderly urged” *Irish Times* 19 January 2004.

⁴⁰⁹ Kelpie “Ahern considers prison terms for burglars” *Irish Examiner* 24 September 2009.

⁴¹⁰ Power “Call for mandatory sentencing after latest ‘joyriding’ crash injures eight” *Irish Times* 10 May 2002.

⁴¹¹ Kane “Campaigners call for mandatory sentences for child sex abusers” *Irish Examiner* 17 July 2008.

D Historical Evolution of Mandatory Sentences for Second or Subsequent Offences

2.175 The use of mandatory sentences for second or subsequent offences has a much longer pedigree than the use of mandatory sentences for drugs and firearms offences. Indeed, there are examples of habitual offender laws dating back to 16th century England and colonial America.⁴¹⁷ That said, the modern practice of using mandatory sentences to deal with repeat offenders seems to originate in the United States.

(1) United States

2.176 It has been observed that habitual offender legislation flourished in the United States in the 1920s.⁴¹⁸ In 1926, for instance, New York state enacted *Baume's Law 1926* which prescribed a mandatory life sentence for a third felony conviction. Six other states passed habitual offender legislation in the 1920s. By 1968 23 states had enacted legislation that permitted or mandated life sentences for habitual offenders; 9 states prescribed mandatory minimum sentences ranging from five to 20 years for habitual felons; and each of the remaining states enacted legislative provisions that permitted habitual offenders to be sentenced to extended prison terms.

2.177 It would appear, however, that the modern “three-strikes” movement began in Washington state.⁴¹⁹ Following the murder of Diane Ballasiotes by a convicted rapist who had been released from prison, Washington state enacted the *Persistent Offender Accountability Act 1994*. This provides that any person convicted for the third time of a specified offence must receive a mandatory life sentence without the possibility of parole.⁴²⁰

2.178 It was not long before California became the second state to adopt three-strikes legislation.⁴²¹ The campaign was led by Mike Reynolds, whose daughter, Kimber Reynolds, had been murdered in 1992 by an offender with previous convictions.⁴²² The reform campaign might not have succeeded had it

⁴¹² Hurley “Limerick TD calls for mandatory sentences in dangerous driving cases” Limerick Leader 1 March 2013.

⁴¹³ “FG seeks mandatory 25-year sentence for gangland murders” Irish Examiner 2 February 2010.

⁴¹⁴ O’Keefe “Call for mandatory sentences in child pornography cases” Irish Examiner 2 June 2010.

⁴¹⁵ O’Halloran “Sexton calls for mandatory rape sentences” Irish Times 24 March 2007; and O’Caollai “Call for introduction of minimum sentence for rape” Irish Times 31 January 2013.

⁴¹⁶ Gallagher and Galvin “Someone could get shot” Mayo News 11 December 2012.

⁴¹⁷ Turner et al “‘Three Strikes and You’re Out’ Legislation: A National Assessment” (1995) 59 Fed Probation 16 at 17; and Zimring et al *Punishment and Democracy - Three Strikes and You’re Out in California* (Oxford University Press, 2001) at 4.

⁴¹⁸ Turner et al “‘Three Strikes and You’re Out’ Legislation: A National Assessment” (1995) 59 Fed Probation 16 at 17. See also: Katkin “Habitual Offender Laws” (1971-1972) 21 Buff L Rev 99 at 104.

⁴¹⁹ Austin et al “Three Strikes and You’re Out: The Implementation and Impact of Strike Laws” (US Department of Justice, 2000) at 1; and Zimring et al *Punishment and Democracy - Three Strikes and You’re Out in California* (Oxford University Press, 2001) at 4.

⁴²⁰ Austin et al “Three Strikes and You’re Out: The Implementation and Impact of Strike Laws” (US Department of Justice, 2000) at 15; and Zimring et al *Punishment and Democracy - Three Strikes and You’re Out in California* (Oxford University Press, 2001) at 4.

⁴²¹ Andrus “Which Crime Is It - The Role of Proportionality in Recidivist Sentencing after *Ewing v California*” (2004) 19(1) BYU Journal of Public Law 279 at 284.

⁴²² Vitiello “Three Strikes: Can We Return to Rationality?” (1996-1997) 87 J Crim L & Criminology 395 at 410.

not been for the murder of Polly Klass in 1993 by an offender who had an extensive prior record of violence.⁴²³ The public outcry that followed the event galvanized the Reynolds campaign.

2.179 In November 1994, voters in Georgia passed a ballot measure amending the state's sentencing laws to prescribe a mandatory life sentence without parole for a second conviction of an offence specified in the measure.⁴²⁴ The law supplemented an existing law which permitted the courts to impose the maximum sentence for a second felony conviction and required the courts to impose the maximum sentence for a fourth felony conviction.

2.180 By 1997, 24 states and the Federal government had enacted three-strikes legislation.⁴²⁵

(2) England and Wales

2.181 It was not until transportation was abolished in 1857 that recidivism arose as a significant issue for legislative consideration in the United Kingdom.⁴²⁶ In 1863 the Royal Commission on Penal Servitude concluded that imprisonment was not a sufficient deterrent.⁴²⁷ The reason for this, it asserted, was that the minimum term of three years' penal servitude, which had replaced the minimum term of 7 years for transportation,⁴²⁸ was too short. This led to the enactment of the *Penal Servitude Act 1864* which made five years the new minimum for penal servitude and, under pressure, the Government made 7 years' penal servitude the minimum term for anyone with a previous felony conviction.⁴²⁹ The 1864 Act was criticised as the mandatory minimum terms only applied to those sentenced to penal servitude.⁴³⁰ If the courts considered it to be too severe a punishment, they were free to impose a sentence of ordinary imprisonment, the maximum term of which was two years. Given the enormous gap between the two alternatives, the result was widespread disparity in sentencing by different courts. In 1879 the minimum sentence of 7 years' penal servitude for a second felony conviction was repealed.⁴³¹

2.182 In an effort to respond to this loophole, the *Habitual Criminals Act 1869* was enacted.⁴³² The Bill initially included a clause making 7 years' penal servitude mandatory on a third felony conviction.⁴³³ This was withdrawn when it was conceded that designating the number of convictions as the factor which triggered the mandatory sentence could lead to great hardship. Instead, the 1869 Act provided that all those convicted for a second time of a felony or certain misdemeanours be subject to police supervision for 7 years after they had served their sentences. It further provided that those subject to such

⁴²³ Vitiello "Three Strikes: Can We Return to Rationality?" (1996-1997) 87 J Crim L & Criminology 395 at 411; Zimring et al *Punishment and Democracy - Three Strikes and You're Out in California* (Oxford University Press, 2001) at 5; and Austin et al "Three Strikes and You're Out: The Implementation and Impact of Strike Laws" (US Department of Justice, 2000) at 1.

⁴²⁴ The offences included murder, armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy and aggravated sexual battery.

⁴²⁵ Austin et al "Three Strikes and You're Out: The Implementation and Impact of Strike Laws" (US Department of Justice, 2000) at 1.

⁴²⁶ Section 2 of the *Penal Servitude Act 1857*. Radzinowicz and Hood "Incapacitating the Habitual Offender: The English Experience" (1979-1980) 78 Mich L Rev 1305 at 1308.

⁴²⁷ Radzinowicz and Hood "Incapacitating the Habitual Offender: The English Experience" (1979-1980) 78 Mich L Rev 1305 at 1333.

⁴²⁸ Section 2 of the *Penal Servitude Act 1857*.

⁴²⁹ Radzinowicz and Hood "Incapacitating the Habitual Offender: The English Experience" (1979-1980) 78 Mich L Rev 1305 at 1334.

⁴³⁰ *Ibid.*

⁴³¹ *Prevention of Crimes Act 1879*.

⁴³² Radzinowicz and Hood "Incapacitating the Habitual Offender: The English Experience" (1979-1980) 78 Mich L Rev 1305 at 1334.

⁴³³ *Ibid* at 1335.

supervision should be liable to one year's imprisonment when it was proved summarily before magistrates that they had been acting suspiciously or when they were unable to prove that they had been earning their livelihood by honest means.⁴³⁴ This soon became unworkable.⁴³⁵

2.183 The *Prevention of Crimes Act 1871* was thus enacted.⁴³⁶ This gave the courts discretion to decide whether to make a habitual offender subject to supervision or not. It provided that a twice-convicted offender would be liable, at any time within 7 years of release from prison, to one year's imprisonment if proved to be earning his or her livelihood by dishonest means or acting in certain suspicious circumstances. He or she would not, however, be subject to supervision. The 1871 Act also provided that a twice-convicted offender might be placed under police supervision for 7 years or for any shorter period subject to the same conditions of good behaviour.⁴³⁷

2.184 In 1895, the Gladstone Committee argued in favour of a special sentencing provision to deal with persistent thieves and robbers, who would otherwise serve a succession of short sentences only to be released into the community to re-offend.⁴³⁸ The Committee's proposals led to the enactment of the *Prevention of Crime Act 1908*.⁴³⁹ Section 10 of the *Prevention of Crime Act 1908* empowered the court to impose on an offender with three previous felony convictions, a sentence of preventive detention of not less than five or more than 10 years in addition to the normal sentence for the crime. The practical focus of the 1908 Act changed when the then Home Secretary issued a circular stating that preventive detention should not be imposed for merely repetitive offending but for repetitive offending that is a serious danger to society.⁴⁴⁰

2.185 In 1932, the Dove-Wilson Committee proposed a new type of preventive detention for professional criminals.⁴⁴¹ This led to the enactment of the *Criminal Justice Act 1948*. Section 21 of the *Criminal Justice Act 1948* prescribed for persistent offenders a sentence of not less than five or more than 14 years instead of, rather than in addition to, the normal sentence. Over time, however, the courts found that preventive detention was being imposed for relatively minor offences. In 1962, the Lord Chief Justice issued a Practice Direction to restrict the use of preventive detention.⁴⁴² Following a critical report from the Advisory Council on the Treatment of Offenders in 1963, and a number of other reports which highlighted the minor nature of many of the offences which had attracted a sentence of preventive detention, the sentence fell into disuse.

2.186 In 1965, a White Paper⁴⁴³ proposed the introduction of an extended sentence to deal with persistent offenders who constituted a menace to society.⁴⁴⁴ This led to the enactment of the *Criminal Justice Act 1967*. Section 37 of the *Criminal Justice Act 1967* empowered the courts to extend a

⁴³⁴ Radzinowicz and Hood "Incapacitating the Habitual Offender: The English Experience" (1979-1980) 78 Mich L Rev 1305 at 1341.

⁴³⁵ *Ibid* at 1342.

⁴³⁶ *Ibid* at 1343.

⁴³⁷ *Ibid* at 1344.

⁴³⁸ Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 160; and Radzinowicz and Hood "Incapacitating the Habitual Offender: The English Experience" (1979-1980) 78 Mich L Rev 1305 at 1352ff.

⁴³⁹ Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 160; and Radzinowicz and Hood "Incapacitating the Habitual Offender: The English Experience" (1979-1980) 78 Mich L Rev 1305 at 1361ff.

⁴⁴⁰ Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 161.

⁴⁴¹ *Ibid*; and Radzinowicz and Hood "Incapacitating the Habitual Offender: The English Experience" (1979-1980) 78 Mich L Rev 1305 at 1378ff.

⁴⁴² Practice Direction (Corrective training: Preventative Detention) [1962] 1 All ER 671.

⁴⁴³ *White Paper on the Adult Offender* (Home Office, 1965).

⁴⁴⁴ Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 161; and Radzinowicz and Hood "Incapacitating the Habitual Offender: The English Experience" (1979-1980) 78 Mich L Rev 1305 at 1382ff.

sentence beyond the normal length or, in limited circumstances, beyond the statutory maximum where, having regard to the defendant's record, it was considered that this was necessary to protect the public. However, the courts soon found that the extended sentence was being imposed for relatively minor offences. In addition, it has been noted that at no time did the extended sentence play a significant role in sentencing.⁴⁴⁵

2.187 Section 37 of the *Criminal Justice Act 1967* was replaced by section 28 of the *Powers of Criminal Courts Act 1973*, a statute which consolidated the law on sentencing.⁴⁴⁶ This, in turn, was repealed by the *Powers of Criminal Courts (Sentencing) Act 2000*.

2.188 In 1997, the *Crimes (Sentences) Act 1997* was enacted. Section 2 of the 1997 Act, a provision which was severely criticised during its life,⁴⁴⁷ required the imposition of a life sentence, except in exceptional circumstances, on offenders who had been convicted of a second serious offence. Section 2 was replaced by section 109 of the *Powers of Criminal Courts (Sentencing) Act 2000*, a statute which consolidated the law on sentencing.⁴⁴⁸ In 2000, the Court of Appeal effectively neutralised the "two strikes" rule when it ruled that only in exceptional circumstances could judges take into account whether the offender presented a danger to the public.⁴⁴⁹

2.189 In the 2001 *Halliday Report*, it was observed that the public were frustrated by a criminal justice system which it perceived to be treating "dangerous, violent, sexual and other serious offenders" leniently.⁴⁵⁰ As noted at paragraph 2.154, the Government's 2002 White Paper *Justice for All*⁴⁵¹ incorporated many of the recommendations contained in the 2001 *Halliday Report*.⁴⁵² This, in turn, inspired the *Criminal Justice Act 2003*.

2.190 Section 303 of the *Criminal Justice Act 2003* repealed 109 of the *Powers of Criminal Courts (Sentencing) Act 2000*.⁴⁵³ However, the 2003 Act also established a new sentencing provision for public protection. Section 225 of the 2003 Act required the courts to impose a life sentence for a serious offence⁴⁵⁴ where they were of the opinion that there was a significant risk that the offender would commit further offences causing serious harm to members of the public if released. If the offence was one in respect of which the offender would, apart from section 225, be liable to life imprisonment, and the court considered that the seriousness of the offence, or the offence and one or more offences associated with it, was such as to justify the imposition of a sentence of life imprisonment, the court was required to impose a sentence of life imprisonment. Where an offence was serious but did not attract a life sentence or the current offence was not sufficiently serious, the court was required to impose an indeterminate sentence of imprisonment for public protection (IPP sentence). Section 226 created a similar sentence for offenders under 18 years of age.

2.191 Ashworth and Player were highly critical of section 225 and its neighbouring provisions:

⁴⁴⁵ Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 161.

⁴⁴⁶ *Current Law Statutes* (Sweet & Maxwell, 1973).

⁴⁴⁷ Henham "Making Sense of the Crime (Sentences) Act 1997" (1998) 61 Mod L Rev 223 at 224-225.

⁴⁴⁸ The *Powers of Criminal Courts (Sentencing) Act 2000* was enacted pursuant to the recommendations of the Law Commission and the Scottish Law Commission contained in the 2000 *Report on the Consolidation of Legislation relating to Sentencing* Cm 4626 SE/2000/15.

⁴⁴⁹ Dyer "Ruling neutralises 'Two Strikes' Law" *The Guardian* 10 November 2000.

⁴⁵⁰ *Justice for All* (Home Office, Cm 5563, 2002) at paragraph 5.2.

⁴⁵¹ *Justice for All* Cm 5563 (Home Office, 2002).

⁴⁵² *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (Home Office, 2001).

⁴⁵³ *Mandatory Sentences of Imprisonment in Common Law Jurisdictions* (Department of Justice, Canada) at 14.

⁴⁵⁴ The term "serious offence" is defined by section 224(2) of the *Criminal Justice Act 2003*.

“These are unduly weak provisions to support the severely restrictive sentences that follow. There is no hint of recognition of the well-known fallibility of judgments of dangerousness. There is no requirement on courts to obtain relevant reports on the offender: a requirement to consult a report if there is one is inadequate. Moreover, the presumption applies where there is just one previous conviction of any of more than 150 specified offences, which vary considerably in their seriousness. It is doubtful whether the presumption is compatible with Article 5 of the Convention, insofar as it requires the courts to assume significant risk without investigating the particular facts and reports, and (effectively) places the burden on the defence to negative this.”⁴⁵⁵

2.192 In 2008, the Chief Inspector of Prisons and the Chief Inspector of Probation conducted a review of the IPP sentence.⁴⁵⁶ They observed that section 225 and section 226 had given rise to a large number of new and resource-intensive prisoners being fed into a prison system that was already under strain.⁴⁵⁷ This, they noted, had not only “increased pressure, and reduced manoeuvrability, within the prison system” but had also stretched the Probation Service.⁴⁵⁸ The consequence of this was:

“...IPP prisoners languishing in local prisons for months and years, unable to access the interventions they would need before the expiry of their often short tariff periods. A belated decision to move them to training prisons, without any additional resources and sometimes to one which did not offer relevant programmes, merely transferred the problem. By December 2007, when there were 3,700 IPP prisoners, it was estimated that 13% were over tariff. As a consequence, the Court of Appeal found that the Secretary of State had acted unlawfully, and that there had been ‘systematic failure to put in place the resources necessary to implement the scheme of rehabilitation necessary to enable the relevant provisions of the 2003 Act to function as intended.’⁴⁵⁹

This was by no means a new revelation. Similar comments had been made by the media in the years preceding the publication of the report.⁴⁶⁰

2.193 In 2008, section 225 was amended by section 13 of the *Criminal Justice and Immigration Act 2008*. The amendments provided that the courts would have a power, rather than a duty, to impose an IPP sentence. They further provided that this power may only be exercised where either of two conditions is met, namely, the immediate offence would attract a notional minimum term of at least two years, or the offender had on a previous occasion been convicted of one of the offences listed in the new Schedule 15A to the 2003 Act.⁴⁶¹ Section 14 made similar amendments to section 226.

2.194 In December 2010, the Government published a Green Paper on sentencing titled *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*.⁴⁶² This consultation paper acknowledged that there remained a range of problems with the IPP sentencing regime. Among other things, it observed that: (i) the regime had come to be applied on a much wider basis than had originally been anticipated; (ii) the release rate was very low because offenders were required to satisfy the Parole Board that they did not pose an unmanageable risk to the community and, in practice, this negative

⁴⁵⁵ Ashworth and Player “Criminal Justice Act 2003: The Sentencing Provisions” (2005) 68 Mod L Rev 822 at 835.

⁴⁵⁶ *The Indeterminate Sentence for Public Protection - A Thematic Review* (HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2008).

⁴⁵⁷ *Ibid* at 3.

⁴⁵⁸ *Ibid*.

⁴⁵⁹ *Ibid* at 4.

⁴⁶⁰ See, for instance: “Sentence designed for ‘Public Protection’” *The Telegraph* 20 August 2007.

⁴⁶¹ Inserted by Schedule 5 to the *Criminal Justice and Immigration Act 2008*.

⁴⁶² *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (Ministry of Justice, 2010).

criterion was difficult to prove; (iii) the ability to predict future serious offending is limited, thus calling into question the entire basis upon which these sentences were imposed; (iv) the regime confused the sentencing framework and may have undermined public confidence in so far as the court, the victim and the public had little means of knowing how long an offender would remain in custody; and (v) the larger the number of prisoners subject to these sentences, the more difficult it had become to facilitate their rehabilitation.⁴⁶³

2.195 On the basis of these deficiencies, the Green Paper proposed the restriction of IPP sentences to exceptionally serious cases, specifically, those which would otherwise have merited a sentence of at least 10 years.⁴⁶⁴ Upon publishing the outcome of the consultation process in June 2011, however, the Government went beyond these initial proposals and signalled its intention to urgently review the IPP regime with a view to replacing it with a determinate sentencing framework.⁴⁶⁵

2.196 In December 2012, section 225 and section 226 of the *Criminal Justice Act 2003* were repealed by section 123 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*. In place of the IPP sentence, the 2012 Act introduced a framework which, according to the former Secretary of State for Justice, Kenneth Clarke, was intended to “replace a regime that did not work as it was intended to with one that gives the public the fullest possible protection from serious, violent and sexual crime.”⁴⁶⁶ Broadly speaking, this new regime has three main strands. First, section 122 of the 2012 Act introduced a presumptive life sentence for those described by the then Secretary of State for Justice as “the very serious offenders, the ones who are among the worst of the likely inhabitants of Her Majesty’s prisons.”⁴⁶⁷ As outlined in greater detail at paragraph 5.33, this sentencing regime applies in circumstances where an offender has committed on two separate occasions, two prescribed serious sexual or violent offences, each of which was serious enough to merit a determinate sentence of at least 10 years.

2.197 Second, the then Secretary of State for Justice acknowledged that, following the abolition of the IPP sentence, the penalty most relevant to serious offenders would again be the discretionary life sentence.⁴⁶⁸ He observed that this indeterminate sentence had long been available under the British justice system and that it was the appropriate penalty where the maximum penalty for an offence is life imprisonment and where the offence is sufficiently serious.⁴⁶⁹

2.198 Third, any offender who would previously have received an IPP sentence is eligible to receive an extended determinate sentence where he or she has not received either the presumptive life sentence or the discretionary life sentence. As detailed at paragraph 5.37, this extended sentence, which is “broadly similar”⁴⁷⁰ to that formerly provided by section 227 of the *Criminal Justice Act 2003* was introduced by section 124 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, and consists of a custodial sentence plus a further extended licence period set by the court. The main change effected by this reform is that an offender must now serve at least *two-thirds* of the determinate sentence imposed under this regime or, in some particularly serious cases, must apply to the Parole Board for release and may be detained in prison until the end of the determinate sentence. This provision may apply where the

⁴⁶³ *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (Ministry of Justice, 2010) at 55.

⁴⁶⁴ *Ibid* at 56.

⁴⁶⁵ *Breaking the Cycle: Government Response* (Ministry of Justice, 2011) at 11.

⁴⁶⁶ Hansard, House of Commons, Legal Aid, Sentencing and Punishment of Offenders Bill: 1 November 2011, Column 785.

⁴⁶⁷ Hansard, House of Commons, Legal Aid, Sentencing and Punishment of Offenders Bill: 1 November 2011, Column 788.

⁴⁶⁸ *Ibid*.

⁴⁶⁹ *Ibid*.

⁴⁷⁰ Thomas “The Legal Aid, Sentencing and Punishment of Offenders Act 2012: The Sentencing Provisions” (2012) 8 *Criminal Law Review* 572 at 575.

offender is being sentenced for any serious sexual or violent offence, provided that the court considers that he or she presents a risk of causing serious harm through future reoffending.

2.199 Mandatory sentencing regimes have also been established in England and Wales to deal with repeat offenders convicted of drugs offences or domestic burglary. As discussed in detail at paragraph 5.27ff, section 110 of the *Powers of Criminal Courts (Sentencing) Act 2000* obliges the courts to impose a minimum sentence of 7 years where the offender has been convicted of a third Class A drug trafficking offence.

2.200 The modern history of mandatory sentences for domestic burglary probably starts with the Government's 1996 White Paper.⁴⁷¹ One of the proposals in the White Paper concerned the imposition of a mandatory minimum sentence of three years on offenders convicted of a third domestic burglary.⁴⁷² In the White Paper, the Government observed that burglary, which was a "pernicious and predatory" crime which could have particularly disastrous effects for elderly people, was one of the most commonly occurring offences.⁴⁷³ It noted, however, that in a substantial portion of cases, the courts did not impose a custodial sentence:

"Severe penalties are available for burglary. The maximum sentence is 14 years for burglary of a dwelling, and 10 years in other cases. In cases of aggravated burglary - where the offender has a weapon - the maximum penalty is life imprisonment. But in a substantial proportion of cases, the courts do not impose a custodial sentence on convicted burglars even if they have numerous previous convictions... . The average sentence length imposed on a sample of offenders convicted for the first time of domestic burglary in 1993 and 1994 and given a custodial sentence was only 16.2 months in the Crown Court and 3.7 months in magistrates' courts. Even after 3 or more convictions, the average sentence imposed on conviction in the Crown Court was only 18.9 months; and after 7 or more convictions, 19.4 months. And 28% of offenders convicted in the Crown Court with 7 or more convictions for domestic burglary were not sent to prison at all. At magistrates' courts, 61% of offenders with 7 or more domestic burglary convictions were given a non-custodial sentence in 1993 and 1994."⁴⁷⁴

2.201 As noted at paragraphs 2.123 and 2.124, the *Crime (Sentences) Act 1997* was enacted to implement the proposals contained in the 1996 White Paper.⁴⁷⁵ Section 4 of the *Crime (Sentences) Act 1997* required the imposition of a three-year sentence, except in specific circumstances, on offenders who had been convicted of a third domestic burglary. Section 4 was replaced by section 111 of the *Powers of Criminal Courts (Sentencing) Act 2000* which, as it was a consolidation act,⁴⁷⁶ made no changes to the substantive law.

(3) Ireland

2.202 There are a number of examples of legislative provisions in Irish law which establish a mandatory sentencing regime for repeat offenders. These include provisions in *the Misuse of Drugs Act 1977*, the *Firearms Acts* and the *Criminal Justice Act 2007*.

2.203 The *Prevention of Crime Act 1908* in England and Wales, which provided that a habitual offender should serve no less than five and no more than 10 years in prison, also applied to Ireland. In *The*

⁴⁷¹ *Protecting the Public - The Government's Strategy on Crime in England and Wales* Cm 3190 (Home Office, 1996).

⁴⁷² *Ibid* at 51.

⁴⁷³ *Ibid*.

⁴⁷⁴ *Ibid* at 51-52.

⁴⁷⁵ *Protecting the Public - The Government's Strategy on Crime in England and Wales* Cm 3190 (Home Office, 1996).

⁴⁷⁶ The *Powers of Criminal Courts (Sentencing) Act 2000* was enacted pursuant to the recommendations of the Law Commission and the Scottish Law Commission contained in the 2000 *Report on the Consolidation of Legislation relating to Sentencing* Cm 4626 SE/2000/15.

People (DPP) v Carmody,⁴⁷⁷ however, the Court of Criminal Appeal ruled that in the absence of appropriate facilities in the State for providing such detention, the Act could not be applied in practice.⁴⁷⁸ The 1908 Act was subsequently repealed by the *Criminal Law Act 1997*.⁴⁷⁹

2.204 It was not until 2004 that the option of imposing mandatory sentences on repeat offenders arose again as a significant issue for legislative consideration. During the 2004 Dáil debates on the *Criminal Justice Bill 2004*,⁴⁸⁰ the Opposition proposed an amendment in respect of the provisions dealing with drugs and firearms offences which would remove the power of the judiciary to impose a sentence of less than the statutory minimum where the offender had been convicted of a second or subsequent offence. It was stated that the “get-out clause where a person is convicted of a first offence... should not be applied in the case of a second offence.” During Report Stage, this was elaborated on in respect of firearms offences:

“A person who got away with it, so to speak, under the exceptional circumstances on a first offence would have received sufficient warning that he or she was teetering on the edge of a minimum mandatory sentence if he or she again had anything to do with firearms”.⁴⁸¹

No doubt, this rationale equally applied to drugs offences. Having consulted the Attorney General, the Minister for Justice accepted the amendment.⁴⁸²

2.205 As a result, section 27(3F) was inserted into the *Misuse of Drugs Act 1977*. Section 27(3F) provides that where a person, aged 18 years or over, is convicted of a second or subsequent offence under section 15A or section 15B, the court must impose a sentence of not less than the statutory minimum sentence.

2.206 Similar provisions were also inserted into the *Firearms Acts*. These also prescribe a mandatory minimum sentence for persons, aged 18 years or over, convicted for a second or subsequent time of a firearms offence which attracts a presumptive minimum sentence.⁴⁸³

2.207 In 2007, the *Criminal Justice Bill 2007* was presented to the Dáil. The purpose of the Bill, as indicated by the Minister for Justice, was to “send a clear and unambiguous message” that society was “not prepared to allow organised criminal gangs set about the destruction of families and communities.”⁴⁸⁴ The Minister acknowledged that the Bill contained tough measures but indicated that the measures were “both necessary and proportionate to the threat [of] organised crime.”⁴⁸⁵ McIntyre observes that, at the time, there was also a perception that the criminal justice system had become “unbalanced” in favour of the criminal.⁴⁸⁶

⁴⁷⁷ *The People (DPP) v Carmody* [1988] ILRM 370.

⁴⁷⁸ *Ibid* at 372.

⁴⁷⁹ Section 16 of and Schedule 3 to the *Criminal Law Act 1997*. See: O'Malley “Bail and Predictions of Dangerousness” (1989) 7 *ILT* 41.

⁴⁸⁰ Select Committee on Justice, Equality, Defence and Women's Rights Debates, Criminal Justice Bill 2004, Committee Stage, 3 May 2006, Deputy Jim O'Keeffe.

⁴⁸¹ Dáil Debates, Criminal Justice Bill 2004, Report Stage, 28 June 2006, Vol 622, No 78, Col 1259.

⁴⁸² Dáil Debates, Criminal Justice Bill 2004, Report Stage, 28 June 2006, Vol 622, No 78, Col 1257.

⁴⁸³ Section 15(8) of the *Firearms Act 1925*; section 26(8) of the *Firearms Act 1964*; section 27(8) of the *Firearms Act 1964*; section 27A(8) of the *Firearms Act 1964*; section 27B(8) of the *Firearms Act 1964*; and section 12A(13) of the *Firearms and Offensive Weapons Act 1990*, as inserted by section 42, section 57, section 58, section 59, section 60 and section 61 of the *Criminal Justice Act 2006*.

⁴⁸⁴ Dáil Debates, Criminal Justice Bill 2007, Second Stage, 22 March 2007, Vol 634, No 2, Col 381.

⁴⁸⁵ Dáil Debates, Criminal Justice Bill 2007, Second Stage, 22 March 2007, Vol 634, No 2, Col 382.

⁴⁸⁶ McIntyre *Irish Current Law Statutes 2007* at 29-05; McDermott “Has the Time come to recalibrate the Criminal Trial System?” (2007) 101(3) *Law Society Gazette* 14; and Griffin “Tinkering with Due Process Values” (2007) 101(2) *Law Society Gazette* 14 at 15.

2.208 Section 24 of the 2007 Bill provided that a person who committed any one of a list of scheduled offences and, within 7 years, committed another of those offences would be subject to a penalty of imprisonment equal to at least three quarters of the maximum term laid down by law for that second offence.⁴⁸⁷ Where the second offence carried a potential maximum term of life imprisonment, a sentence of at least 10 years was mandated. This provision was enacted as section 25 of the *Criminal Justice Act 2007*.

2.209 Regarding the scheduled offences, the Minister for Justice indicated that these were “among the most serious known in criminal law” and included “offences typically associated with gangland crime, including, of course, drug-trafficking and firearms offences.”⁴⁸⁸ The Minister stated that, in broad terms, these were racketeering offences and that the inspiration for the inclusion of these provisions was the “Racketeer Influenced and Corrupt Organization, RICO, legislation in the USA”.⁴⁸⁹ He remarked that “these provisions on sentencing are innovative in Irish terms and reflect the need to find new ways to meet the challenge that we face from organised crime.”⁴⁹⁰

2.210 There were a number of events which prompted the introduction of the *Criminal Justice Bill* in 2007. In December 2006, there had been a spate of murders which, the Minister for Justice stated, indicated that “some criminal gangs believed they could act with impunity.”⁴⁹¹ In addition, the Balance in the Criminal Law Review Group, which had been established by the Minister in 2006 to examine a wide range of criminal justice areas,⁴⁹² had just published its interim report.⁴⁹³ The Opposition also referred to two recent reports which had ranked Ireland unfavourably in terms of criminal statistics.⁴⁹⁴ In February 2007, the EU International Crime Survey had published its 2005 report, *The Burden of Crime in the EU*,⁴⁹⁵ which found that Ireland ranked highest with regard to the risk of crime, assaults with force, sexual assaults and robberies.⁴⁹⁶ At around the same time, the Economic and Social Research Institute of Ireland had published crime figures in its 2007 report, *The Best of Times? The Social Impact of the Celtic Tiger*,⁴⁹⁷ which suggested that while the rate of lethal violence in Dublin was not out of line with other European capital cities, it had “increased dramatically when the international trend [was] downward.”⁴⁹⁸

⁴⁸⁷ Section 24 of the *Criminal Justice Bill 2007*. See: Dáil Debates, Criminal Justice Bill 2007, Second Stage, 22 March 2007, Vol 634, No 2, Col 382.

⁴⁸⁸ Dáil Debates, Criminal Justice Bill 2007, Second Stage, 22 March 2007, Vol 634, No 2, Col 383.

⁴⁸⁹ Dáil Debates, Criminal Justice Bill 2007, Second Stage, 22 March 2007, Vol 634, No 2, Col 384. §1961-68 of the *United States Code*. See: Atkinson “‘Racketeer Influenced and Corrupt Organizations’ 18 USC § 1961-68: Broadest of the Federal Criminal Statutes” (1978) 69 J Crim L & Criminology 1 at 1-2.

⁴⁹⁰ Dáil Debates, Criminal Justice Bill 2007, Second Stage, 22 March 2007, Vol 634 No 2, Col 384.

⁴⁹¹ Dáil Debates, Criminal Justice Bill 2007, Second Stage, 22 March 2007, Vol 634, No 2, Col 381; “McDowell’s new Laws are old Promises” Irish Independent 15 February 2007; “Draconian Measures ‘are necessary if we are to curb Gang Crime Epidemic’” Irish Independent 23 March 2007; Brady “Gangland Killings a National Emergency, say Gardaí” Irish Independent 2 April 2007; “Gangland Threat is a National Emergency, Conference told” Irish Independent 5 April 2007; and Bray “Gangland is flourishing, claims FG” Irish Independent 10 April 2007.

⁴⁹² Notably, mandatory sentencing was not one of these areas.

⁴⁹³ McIntyre *Irish Current Law Statutes 2007* at 29-06.

⁴⁹⁴ Dáil Debates, Criminal Justice Bill 2007, Second Stage, 22 March 2007, Vol 634, No 2, Col 394-395, Mr Jim O’Keeffe, Fine Gael Spokesperson on Justice.

⁴⁹⁵ Van Dijk, Manchin, van Kesteren, and Hideg *The Burden of Crime in the EU - A Comparative Analysis of the European Survey of Crime and Safety (EU ICS) 2005* (Gallup Europe, 2007).

⁴⁹⁶ Ireland ranked third highest for burglaries and ranked high for car theft and personal theft.

⁴⁹⁷ Fahey, Russell and Whelan, eds, *Best of Times? The Social Impact of the Celtic Tiger* (IPA, 2007).

⁴⁹⁸ *Ibid* at 252; and Lally “Dublin Murder Rate is fastest growing” Irish Times 20 March 2007.

Arguably, also, the enactment of the *Criminal Justice Act 2006* had exposed a number of criminal justice areas which would require further examination.

2.211 The passage of the 2007 Bill was not without controversy. Due to the fact that the Government had imposed a guillotine on the Dáil debate, the Bill passed through the Dáil and the Seanad by 27th April 2007.⁴⁹⁹ This, it was argued, did not allow sufficient time for the Bill to be debated.⁵⁰⁰ In particular, it was observed that the Irish Human Rights Commission had not had time to examine the Bill,⁵⁰¹ as it was empowered to do by law.⁵⁰²

2.212 In addition, McIntyre notes that the final version of section 25 is a “somewhat watered down” version of that originally proposed.⁵⁰³ In its original form, section 25 did not permit of any exception to the mandatory minimum sentence. It was felt, however, that this might lead to disproportionate sentencing. As a result, section 25 was amended so as to permit the court to disregard the prescribed minimum sentence where it would be disproportionate in all the circumstances of the case.⁵⁰⁴ Furthermore, the original version of section 25 became operable if a prison term of 12 months or more had been imposed for a first offence. It was felt, however, that this was too low a threshold to trigger the minimum sentence. As a result, section 25 was amended so as to raise the threshold to five years’ imprisonment for the first offence. Finally, the original version of section 25 applied to a broader range of scheduled offences, which included both burglary and robbery. It was observed, however, that the range of scheduled offences went beyond what might be committed by persons engaged in “gangland activities.”⁵⁰⁵ As a result, section 25 and Schedule 2 were amended so as to remove burglary and robbery from the list of scheduled offences.⁵⁰⁶

2.213 These amendments were due in no small part to the fact that the Bill had been widely criticised.⁵⁰⁷ The Irish Human Rights Commission, for instance, was of the opinion that the “principles of

⁴⁹⁹ O’Halloran “Criminal Justice Bill passed in Dáil” Irish Times 25 April 2007.

⁵⁰⁰ Collins “Legal Bodies urged to oppose Justice Bill Timing” Irish Times 12 March 2007; “Rushed Legislation” Irish Times 13 March 2007; De Bréadún “Groups criticise ‘rushing through’ of Crime Bill” Irish Times 16 March 2007; O’Regan “McDowell rejects Calls for Time to Debate” Irish Times 30 March 2007; “McDowell’s rushed Bill has more to do with Votes than Crime Fight” Irish Independent 31 March 2007; Donohoe “Unrest triggers Justice Bill Rethink” Irish Times 31 March 2007; “More Debate needed” Irish Times 4 April 2007; Collins “More Time for Justice Bill Debate” Irish Times 6 April 2007; and Walsh “Quinn claims Abuse of Power over Justice Bill” Irish Times 27 April 2007.

⁵⁰¹ “Rights Watchdog warns of ‘Danger of Injustice’” Irish Times 30 March 2007.

⁵⁰² *Human Rights Commission Act 2000*.

⁵⁰³ McIntyre *Irish Current Law Statutes Annotated 2007* at 29-26.

⁵⁰⁴ Dáil Debates, Criminal Justice Bill 2007, Report Stage and Final Stage, 24 April 2007, Vol 636, No 1, Col 122-123, Mr McDowell TD, Minister for Justice.

⁵⁰⁵ Dáil Debates, Criminal Justice Bill 2007, Report Stage, 4 April 2007, Vol 635, No 2, Col 605, Mr O’Keeffe TD, Spokesperson on Justice for Fine Gael.

⁵⁰⁶ Dáil Debates, Criminal Justice Bill 2007, Report Stage, 4 April 2007, Vol 635, No 2, Col 606, Mr McDowell TD, Minister for Justice. The relevant offences are set out in Schedule 2 to the Act: murder; causing serious harm; threats to kill or cause serious harm; false imprisonment; causing explosion likely to endanger life or damage property; possession, etc., of explosive substances; making or possessing explosives in suspicious circumstances; possession of firearm with intent to endanger life; possession of firearms while taking vehicle without authority; use of firearms to assist or aid escape; possession of firearm or ammunition in suspicious circumstances; carrying firearm with criminal intent; shortening barrel of shotgun or rifle; aggravated burglary; drug trafficking offence within the meaning of section 3(1) of the *Criminal Justice Act 1994*; offence of conspiracy; organised crime; commission of offence for criminal organisation; blackmail; extortion; and demanding money with menaces.

⁵⁰⁷ Lally “Crime Package leaves Gangland untamed” Irish Times 14 February 2007; “Responding to Gangland Crime” Irish Times 15 February 2007; McDonald “Hollow Ring to McDowell’s explosive Bill” Irish Independent

proportionality and judicial discretion cast some shadow over the constitutionality of section 24”.⁵⁰⁸ In a similar vein, the Irish Council for Civil Liberties asserted that section 24 might “impinge upon the constitutional duty of judges to ensure that sentences are proportionate to both the gravity of the crime and the personal circumstances of the offender.”⁵⁰⁹ The Law Society⁵¹⁰ and some prominent criminal law practitioners were also quick to voice their concerns regarding proportionality and the separation of powers.⁵¹¹ Having consulted the Council of State, the President decided not to refer the Bill to the Supreme Court and signed the Bill into law.⁵¹²

2.214 Mandatory sentences for repeat offenders have been considered in a number of recent decisions. In *The People (DPP) v McMahon*,⁵¹³ the Court of Criminal Appeal considered an appeal by the DPP against the leniency of a 10-year sentence. The respondent, a psychiatric patient who had stabbed a doctor, had been convicted of assault causing serious harm, contrary to section 4 of the *Non Fatal Offences Against the Person Act 1997*, an offence which carries a maximum life sentence. The respondent had a previous conviction for manslaughter for which he had been sentenced to 10 years’ imprisonment, which had been reduced to 7 years on appeal. The respondent had been released approximately 8 months before committing the section 4 offence. The DPP argued that the maximum sentence of life imprisonment should have been imposed as the respondent presented a clear danger to others.

2.215 The Court of Criminal Appeal indicated that the case raised an important issue, namely, whether sentencing courts were obliged to impose the maximum life sentence where there was evidence that the

16 March 2007; Kenny “Crime Bill has Opposition nicked” Sunday Independent 18 March 2007; “Gangland Bill is Vote-getting Ploy that betrays Civil Rights” Irish Independent 19 March 2007; and “Tackling Complex Problem of Crime” Irish Times 11 October 2007.

⁵⁰⁸ *Observations on the Criminal Justice Bill 2007* (IHRC, 2007) at 15; “Rushed Criminal Justice Legislation may curtail established Human Rights” (IHRC/Law Society, Press Release, 12 October 2007); “Rights Watchdog warns of ‘Danger of Injustice’” Irish Times 30 March 2007; and “IHRC warns Government over rushing Legislation” RTE News 15 October 2007. Available at: www.rte.ie/news/2007/1013/94679-crime/ [Last accessed: 22 May 2013].

⁵⁰⁹ *What’s Wrong with the Criminal Justice Bill 2007?* (ICCL, 2007) at 8; and Kelly “Having a real Impact on serious Crime will require wiser Counsel” Irish Independent 14 March 2007.

⁵¹⁰ Murphy “Criminal Justice Bill should be withdrawn” Irish Times 29 March 2007.

⁵¹¹ “Combating Organised Crime” The Irish Times 21 February 2007 (Pauline Walley SC, Ivana Bacik BL, Brendan Grehan SC, Paddy McCarthy SC, Anthony Sammon SC, Gerry O’Brien SC, Conor Devally SC, Michael O’Higgins SC, Niall Durnin SC, Aileen Donnelly SC, Sean Gillane BL, Dominic McGinn BL, Caroline Biggs BL, Vincent Heneghan BL, Garret Baker BL, and Siobhán Ní Chulacháin BL); Grehan “Criminal Justice Bill increases Erosion of Civil Rights” Irish Times, 26 April 2007; Molony “McDowell faces Lawyers’ Revolt over Bill” Irish Independent 29 March 2007; “Barristers revolt over new Bill” Irish Independent 29 March 2007; Gartland “McDowell to accept Amendments to Bill” Irish Times 29 March 2007; Collins and Molony “Tánaiste shrugs off angry Law Protests over Bill” Irish Independent 30 March 2007; Clifford “Chickening out of the Fight against Crime” Sunday Tribune 1 April 2007; “Lawyers rally the Troops to fight McDowell’s Anti-Gangland Bill” Irish Independent 9 April 2007; Rogers “Elements of Criminal Justice Bill do not stand up to Scrutiny” Irish Times 4 April 2007; Brady “McDowell Fury at Lawyers” Irish Independent 3 April 2007; “Government faces Wrath of Law on the Double, in Row over Money and Crime” Irish Independent 16 April 2007; “Lawyers to fight ‘Draconian’ Measures in new Crime Bill” Irish Independent 17 April 2007; “McDowell’s Bill will lead to Abuses, Lawyers say” Irish Independent 23 April 2007; and Bracken “Irish People ‘apathetic’ about Loss of Civil Rights in the Justice System” Sunday Tribune 14 October 2007.

⁵¹² De Bréadún “President McAleese signs Criminal Justice Bill into Law” Irish Times 10 May 2007; MacConnell “Council of State to meet over new Justice Bill” Irish Times 7 May 2007; and Lavery “President to make Call on Anti-Gang Bill” Sunday Independent 6 May 2007.

⁵¹³ *The People (DPP) v McMahon* [2011] IECCA 94. See also: “Minimum 10-Year Drug Term Reduced for ‘Naive’ Offender” Irish Times 16 January 2012.

respondent presented a clear danger to others. While that could “justify a sentence towards the highest end of the appropriate scale”, the Court observed that it was quite a different thing to argue that a court “must, go beyond any sentence however severe which might be considered normally appropriate to the crime (and the criminal) and impose a life sentence, if it is available”. The argument had not been supported by any Irish case or any jurisdiction in which, in the absence of statutory provision, such orders could be made. In any case, the argument was subject to a number of inherent weaknesses. First, it depended “on the happenstance that the offence before the Court is one which carries a possible life sentence”. Second, a sentence of imprisonment appeared to be an “inappropriately indirect and crude way of dealing with [an] offender suffering from a serious psychiatric illness”. Third, detention of persons on the ground that they posed a threat to the public raised issues of constitutionality and compatibility with the European Convention on Human Rights. In particular, the Court noted:

“The protection of the public is an appropriate factor in the exercise of the sentencing function, but it cannot be extracted from that function to create a self-standing judicially created jurisdiction to impose a form of preventive detention. Whether sentencing courts should have the power to order the detention of individuals deemed to pose an immediate threat to the public, over and beyond any appropriate sentence for the crime committed, is a matter which should be addressed in the first place by detailed legislation by the Oireachtas after appropriate research and debate, and subject to Constitutional and Convention review if appropriate.”

The Court of Criminal Appeal thus dismissed the appeal.

2.216 In *The People (DPP) v Ward*⁵¹⁴ the appellant appealed against the imposition of two life sentences, to be served concurrently. The appellant had been convicted of five offences, namely, assault causing harm, possession of a firearm with intent to cause an indictable offence, robbery and two counts of possession of a firearm with intent to resist arrest on two separate occasions. He had been sentenced to life imprisonment for counts one and two, and to 12 years’ imprisonment for counts three, four and five. The Court of Criminal Appeal indicated that there had been an element of preventative sentencing evident in the decision of the trial judge, which amounted to an error of principle. The trial judge had stated that the imposition of a life sentence was to ensure that the defendant would not be released from prison until the authorities were satisfied that he no longer posed a threat to the community. The Court found that the appellant’s offending warranted a serious but determinative sentence and thus substituted a sentence of 20 years.

E Concluding Observations Regarding the Historical Evolution of Mandatory Sentences

2.217 Parts B to D of this Chapter detailed the historical evolution of the three forms of mandatory sentence under review. The Commission considers that a number of conclusions may be drawn from the manner in which these sentencing regimes developed.

2.218 First, the Commission notes that the mandatory life sentence may be regarded as an evolutionary anomaly. This penalty was specifically introduced to replace the death sentence as the most severe sanction available for the most serious offences. The mandatory life sentence was selected for this purpose as its imposition ensures that those who commit murder continue (in a symbolic sense at least) to pay for the crime with their lives. The mandatory life sentence is therefore an exceptional penalty and one that, in effect, is reserved exclusively for murder.

2.219 Second, the Commission considers that the historical evolution of presumptive minimum sentences may be viewed in two ways. One view is that these regimes are a relatively recent innovation and have largely emerged in response to perceived increases in criminality and particularly egregious incidents. As discussed above, perceived surges in drug-related crime, firearms offences and gangland criminality, in particular, as well as individual high-profile offences have often preceded the introduction of these measures. In this light, the enactment of presumptive minimum sentences may be interpreted as a relatively contemporary development.

⁵¹⁴ *The People (DPP) v Ward* Court of Criminal Appeal 16 January 2012.

2.220 The Commission notes that an alternative view is that these sentencing regimes are, when considered in a broader historical context, the product of a long-standing policy approach. As outlined above, presumptive minimum sentences are typically directed at high-risk forms of criminality that have a particularly grave societal impact. In modern times, drugs offences, firearms offences and gangland crime fit this mould. Historically, however, a similar threat was perceived to derive from 'habitual offenders' - career criminals who specialised in particular forms of crime. In the 19th century, such offenders attracted mandatory sentences under the *Habitual Offender Acts*. These regimes were essentially the precursors to contemporary 'three strike laws' and other sentencing practices directed at those considered to be a particular threat to public safety. In this light, presumptive and mandatory minimum sentences for first-time and repeat offenders may be viewed as the continuation of a long-standing penal policy.

2.221 The Commission observes that although the policy underlying these sentencing regimes is not new, the popularity of this penal approach tends to fluctuate. As discussed in Chapter 1, mandatory sentencing regimes appear to correspond most closely to the aims of deterrence, punishment and incapacitation. Accordingly, these measures generally find favour in a more punitive penal climate in which these objectives receive particular legislative emphasis. It is clear therefore that the various aims of sentencing may be differently prioritised at different times and that the challenge for the Oireachtas is to determine which goal merits immediate emphasis. The Commission observes that prioritising one aim over another will, in general, lead to specific consequences. For example, greater emphasis on deterrence, punishment and incapacitation, rather than rehabilitation, may facilitate problems such as prison over-crowding and may also impair the ability of the justice system to enhance public safety.

2.222 The Commission notes that this issue was highlighted, in 2013, by the Sub-Committee on Penal Reform, established by the Joint Oireachtas Committee on Justice, Defence and Equality. In its *Report on Penal Reform*,⁵¹⁵ the Sub-Committee observed that effective rehabilitative programmes cannot work in over-crowded prison environments.⁵¹⁶ It therefore endorsed the view "that a more effective and genuinely rehabilitative penal policy could be developed if the prison population were reduced by one-third over a reasonable period of perhaps ten years...".⁵¹⁷ The Sub-Committee observed that this "would mean a return to levels of imprisonment in the mid-1990s, before the change in policy which has been identified as increasingly punitive during the 1990s, when mandatory minimum sentences were introduced for a range of offences, and a prison-building regime was embarked upon".⁵¹⁸

2.223 The Commission also observes that where an emphasis on deterrence, punishment and incapacitation leads to problems such as prison overcrowding, this may produce a reaction against the cost entailed by a higher rate of incarceration. A return to a rehabilitative model may in turn coincide with an economic cycle that is focused on ensuring the most effective and efficient allocation of resources within the general criminal justice system. This may include a consideration of the manner in which limited resources are allocated between, on the one hand, the prison service (which has a more punitive purpose) and, on the other hand, the probation service (which has a more rehabilitative purpose).⁵¹⁹

⁵¹⁵ Houses of the Oireachtas, Joint Oireachtas on Justice, Defence and Equality *Report on Penal Reform* (March 2013).

⁵¹⁶ *Ibid* at 23.

⁵¹⁷ *Ibid* at 13.

⁵¹⁸ *Ibid*.

⁵¹⁹ The Commission notes, for example, that in its 2013 *Report on Penal Reform*, the Oireachtas Justice Committee's Sub-Committee on Penal Reform called for a reduction in the prison population and observed that "[i]f the numbers of prisoners are reduced in the prisons, with a subsequent saving of money, such saving should be transferred to the Probation Service." (*Ibid* at 19).

CHAPTER 3 ENTIRELY MANDATORY SENTENCES

A Introduction

3.01 In this chapter, the Commission considers the first type of mandatory sentence identified in the Introduction to the Report, namely, the entirely mandatory sentence. In Ireland, the only entirely mandatory sentence is the mandatory life sentence prescribed for the offences of: (a) murder;¹ (b) the murder of a designated person such as a member of An Garda Síochána;² and (c) treason.³ In Part B, the Commission begins with an examination of how the mandatory life sentence for murder, in conjunction with the Executive power to grant early release, operates in practice. In Part C, the Commission compares the mandatory life sentence in Ireland with similar provisions in other common law countries. In Part D, the Commission concludes by examining the mandatory life sentence against the conceptual framework for criminal sanctions and sentencing.

B The Mandatory Life Sentence for Murder

(1) The Mandatory Life Sentence

3.02 Section 2 of the *Criminal Justice Act 1990* prescribes a mandatory life sentence for murder. Thus, the court must impose a life sentence in every case in which it is proved beyond a reasonable doubt that the defendant, with an intention to kill or cause serious injury, has unlawfully killed another.⁴ Section 4 specifies, however, that if the victim is a designated person under section 3, such as a member of An Garda Síochána, the perpetrator must serve a minimum term of 40 years' imprisonment or 20 years' imprisonment for an attempted murder. This means that every person convicted of murder will receive a mandatory life sentence but only those who have murdered a designated person will be required to spend a minimum term in prison.

(2) The Mandatory Life Sentence and Temporary Release

3.03 Not every person convicted of murder will spend the rest of his or her life in prison. Indeed, a person convicted of murder may expect to be released before his or her "life" sentence expires because the Executive has at its disposal two mechanisms by which it may grant early release to prisoners serving mandatory life sentences. Thus, in order to fully understand the mandatory life sentence, its examination must take place alongside an examination of these early release mechanisms.

(a) Early Release

3.04 Before considering the mechanisms by which the Executive may grant a prisoner serving a mandatory life sentence early release, it should first be noted that most prisoners, other than those sentenced to life imprisonment, are granted early release under the "standard remission" mechanism in

¹ Section 2 of the *Criminal Justice Act 1990*. Section 10 of the *International Criminal Court Act 2006* clarifies that if genocide, a crime against humanity, a war crime or an ancillary offence under the 2006 Act involves murder, then a mandatory life sentence will apply.

² Section 3 of the *Criminal Justice Act 1990*

³ Section 2 of the *Criminal Justice Act 1990*. As the offence of treason is not regularly prosecuted, the Commission does not propose to examine in detail the application of the mandatory life sentence under this provision.

⁴ Section 4 of the *Criminal Justice Act 1964*.

the *Prison Rules 2007*.⁵ This mechanism provides that all prisoners, *excluding prisoners serving life sentences*,⁶ are entitled to earn remission of up to one fourth of their sentences for good behaviour⁷ or up to one third of the sentence by engaging in authorised structured activity, such as training or counselling.⁸ The effect of standard remission is to cause this portion of the sentence to expire.⁹

3.05 As standard remission is not available to prisoners serving mandatory life sentences, it is thus necessary to consider the two other mechanisms by which the Executive may grant early release. The first mechanism (which, in practice, is rarely used) is the power to grant “special remission”. This power is vested in the Executive by Article 13.6 of the Constitution and section 23 of the *Criminal Justice Act 1951*, as amended.¹⁰ The power to grant special remission (which has been described as the modern equivalent of the royal prerogative of mercy¹¹) is the power to commute or remit any sentence. Special remission may be granted at any time at the discretion of the Executive and prisoners have no legal entitlement to it.¹² The effect of special remission is that the offender is no longer subject to punishment for the offence in respect of which he or she was serving the sentence.¹³

3.06 The second (most frequently used) mechanism is the power to grant “temporary release”. This power is vested in the Executive by section 2 of the *Criminal Justice Act 1960*, as amended.¹⁴ The power to grant temporary release, which is broadly equivalent to parole regimes in other jurisdictions, is a

⁵ The *Prison Rules 2007* (SI No. 252 of 2007), made under the *Prisons Act 2007*, revoked and replaced the *Rules for the Government of Prisons 1947* (SR&O No.320 of 1947).

⁶ Rule 59(3) of the *Prison Rules 2007* provides that prisoners serving life sentences are not entitled to this “standard remission.” The exclusion also applies to prisoners committed to prison for contempt of court.

⁷ Rule 59(1) of the *Prison Rules 2007* provides that a prisoner who has been sentenced to (a) a term of imprisonment exceeding one month or (b) terms of imprisonment to be served consecutively the aggregate of which exceeds one month shall be eligible, by good conduct, to earn a remission of sentence not exceeding one quarter of such term or aggregate.

⁸ Rule 59(2) of the *Prison Rules 2007* provides that the Minister for Justice and Equality may grant remission of up to one third of a sentence “where a prisoner has shown further good conduct by engaging in authorised structured activity and the Minister is satisfied that, as a result, the prisoner is less likely to re-offend and will be better able to reintegrate into the community.”

⁹ O’Malley “The Ends of Sentence: Imprisonment and Early Release Decisions in Ireland in Padfield, van Zyl Smith and Dunkel, eds, *Release from Prison: European Policy and Practice* (Willan Publishing, 2010) at 14.

¹⁰ Section 23(1) of the *Criminal Justice Act 1951* as enacted provided that “except in capital cases” the Government may commute or remit, in whole or in part, any punishment imposed by a Court exercising criminal jurisdiction, subject to such conditions as they may think proper. Section 9 of the *Criminal Justice Act 1990* deleted the words “except in capital cases” as part of the abolition of the death penalty. The effect of this was that the Government’s right to commute or remit a prisoner’s sentence applies to any type of case.

¹¹ O’Malley “The Ends of Sentence: Imprisonment and Early Release Decisions in Ireland” in Padfield, van Zyl Smith and Dunkel, eds, *Release from Prison: European Policy and Practice* (Willan Publishing, 2010) at 3.

¹² *Ibid* at 8.

¹³ *Re Royal Prerogative of Mercy upon Deportation Proceedings* [1933] SCR 269 and *R v Veregin* [1933] 2 DLR 362; and O’Malley “The Ends of Sentence: Imprisonment and Early Release Decisions in Ireland” in Padfield, van Zyl Smith and Dunkel, eds, *Release from Prison: European Policy and Practice* (Willan Publishing, 2010) at 5 and 8.

¹⁴ Section 2 of the *Criminal Justice Act 1960*, as substituted by section 1 of the *Criminal Justice (Temporary Release of Prisoners) Act 2003*, provides that the Minister for Justice and Equality may make rules providing for the temporary release, subject to such conditions (if any) as may be imposed in each particular case, of persons serving a sentence of penal servitude or imprisonment, or of detention in Saint Patrick’s Institution, and (as amended by the 2003 Act) sets out the matters which the Minister should consider before granting temporary release. (Section 2 of the 1960 Act was also amended by section 110 of the *Criminal Justice Act 2006* but the terms of this amendment are not relevant to this Report).

discretionary power which may be exercised in favour of prisoners at any time before they qualify for standard remission and prisoners serving life sentences (who, as noted at paragraph 3.05, are not eligible for standard remission). Although it was originally envisaged that temporary release would be granted for short periods for compassionate reasons or to facilitate integration, temporary release also came to function as an early release mechanism for those serving life sentences.¹⁵ Prisoners serving life sentences who are granted temporary release are released for a certain number of years and, unless they breach their release conditions or commit a further offence, can expect to remain at large indefinitely.¹⁶

3.07 There is thus an important distinction to be drawn between early release prisoners who are serving life sentences and early release prisoners who are serving determinate sentences. Prisoners serving life sentences are generally considered for early release under the “temporary release” mechanism. As a result, a life sentence prisoner who has been granted early release may expect to be recalled to prison if he or she breaches the conditions of the release or commits a further offence. By contrast, prisoners serving determinate sentences are generally considered for release under the “standard remission” mechanism which causes the final fourth of the sentence (or, as the case may be, the final third of the sentence) to expire. As a result, a determinate sentence prisoner who has been granted early release is free from recall.

(b) The Parole Board

3.08 In 2001 the Minister for Justice, Equality and Law Reform established the non-statutory Parole Board to review the cases of prisoners serving long-term sentences and to provide advice in relation to the administration of those sentences.¹⁷ The Parole Board may only review cases which have been referred to it by the Minister and which generally concern prisoners serving sentences of 8 years or more. Prisoners serving mandatory life sentences for ordinary murder may be referred to the Parole Board but not prisoners serving sentences for certain offences such as murder contrary to section 3 of the *Criminal Justice Act 1990*.¹⁸

3.09 The Parole Board advises the Minister for Justice by way of recommendation as to whether the prisoner should be released.¹⁹ These recommendations may be accepted or rejected in whole or in part by the Minister for Justice with whom the final decision regarding release lies.²⁰ As discussed at paragraphs 2.101 to 2.104, it is uncertain whether this arrangement is compatible with Article 5(4) of the European Convention on Human Rights. In the absence of a relevant decision of the European Court of Human Rights or the Irish High Court or Supreme Court (who interpret the law in light of the European Convention on Human Rights), it remains unclear whether Article 5(4) entitles those serving wholly punitive life sentences to regular reviews of their detention by an independent, court-like body. If such a review is required, it would appear that the operation of the Parole Board does not satisfy this requirement because it is not independent of the Executive.

3.10 In general, cases are reviewed at the half-way stage of the sentence or after 7 years, whichever comes first. The Commission notes, however, that while the Parole Board has formally indicated that it will review detention after 7 years, in 2004 the then Minister for Justice stated that he would not consider

¹⁵ O'Malley “The Ends of Sentence: Imprisonment and Early Release Decisions in Ireland” in Padfield, van Zyl Smith and Dunkel, eds, *Release from Prison: European Policy and Practice* (Willan Publishing, 2010) at 9.

¹⁶ O'Malley “The Ends of Sentence: Imprisonment and Early Release Decisions in Ireland” in Padfield, van Zyl Smith and Dunkel, eds, *Release from Prison: European Policy and Practice* (Willan Publishing, 2010) at 10.

¹⁷ *Annual Report 2011* (Parole Board, 2012) at 6.

¹⁸ See: Department of Justice and Equality “Life Sentences”. Available at: http://justice.ie/en/JELR/Pages/Life_sentences [Last accessed: 22 May 2013].

¹⁹ *Annual Report 2011* (Parole Board, 2012) at 6.

²⁰ See: Department of Justice and Equality “Parole Board”. Available at: http://justice.ie/en/JELR/Pages/Parole_Board [Last accessed: 22 May 2013].

the case of a prisoner serving a mandatory life sentence until he or she had served 12 to 15 years.²¹ It would appear that the average time spent in custody by prisoners serving a life sentence more than doubled since the 1970s. In 2010, the then Minister for Justice indicated that the average time spent in custody was 17 years for the period 2004 to 2010.²² This compared with an average of 14 years for the period 1995 to 2004; 12 years for the period 1985 to 1994; and just over 7 ½ years for the period 1975 to 1984.²³

3.11 While it is not required to take any specific criteria into account when formulating its recommendations, the Parole Board has adopted the following list of factors:²⁴

- Nature and gravity of the offence;
- Sentence being served and any recommendations by the judge;²⁵
- Period of the sentence served at the time of the review;
- Threat to safety of members of the community from release;
- Risk of further offences being committed while on temporary release;
- Risk of the prisoner failing to return to custody from any period of temporary release;
- Conduct while in custody;
- Extent of engagement with the therapeutic services; and
- Likelihood of period of temporary release enhancing reintegration.

3.12 These factors are broadly similar to those considered by the Minister for Justice in relation to the granting of temporary release under section 2 of the *Criminal Justice Act 1960*, as amended by section 1 of the *Criminal Justice (Temporary Release of Prisoners) Act 2003*. These are:

- The nature and gravity of the offence to which the sentence of imprisonment being served by the person relates;
- The sentence of imprisonment concerned and any recommendations of the sentencing court in relation to it;²⁶
- The period of the sentence of imprisonment served by the person;
- The potential threat to the safety and security of members of the public (including the victim of the offence to which the sentence of imprisonment being served by that person relates) should the person be released from prison;
- Any offence of which the person was convicted before being convicted of the offence to which the sentence of imprisonment being served relates;

²¹ See: McDowell, address at the First Edward O'Donnell McDevitt Annual Symposium - "Sentencing in Ireland" 28 February 2004.

²² Dáil Debates, Written Answers - Crime Levels, 29 April 2010, Vol 707, No 5, Mr Ahern at paragraph 10.

²³ *Ibid.*

²⁴ *Annual Report 2011* (Parole Board, 2012) at 6.

²⁵ This may, for example, be relevant where a prisoner has been sentenced for a sexual or drug-related offence and the judge has recommended that he or she engage in a treatment programme. At present, there is no provision under Irish law which permits a sentencing judge to recommend the minimum term to be served by an offender. This is discussed further at paragraphs 3.77 to 3.84 below.

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- The risk of the person failing to return to prison upon expiration of any period of temporary release;
- The conduct of the person while in custody or while previously on temporary release (whether under the system operated before or after the coming into force of the 2003 Act);
- Any report of, or recommendation made by -
 - (i) a prison governor or person for the time being performing the functions of governor,
 - (ii) the Garda Síochána,
 - (iii) a probation and welfare officer, or
 - (iv) any other person whom the Minister considers would be of assistance in enabling the Minister to make a decision as to whether to grant temporary release to the person concerned;
- The risk of the person committing an offence during any period of temporary release;
- The risk of the person failing to comply with any conditions attaching to his temporary release; and
- The likelihood that any period of temporary release might accelerate the person's reintegration into society or improve his prospects of obtaining employment.

3.13 It can be seen that the Parole Board and the Minister for Justice both take into account a number of factors that are similar, though not identical, to those considered by the judge in the sentencing process. In particular, consideration by the Parole Board and the Minister of the nature and gravity of the offence resemble factors at issue in the sentencing process.²⁷ While the objective of their analysis is to determine whether and when it would be appropriate to release a particular prisoner, where a mandatory life sentence is concerned a consequence of that analysis is that the Minister determines how long that prisoner should remain in prison. This is an unavoidable consequence because the Parole Board and the Minister for Justice should not be blind in their analysis to the seriousness of the particular offender's offence or to the severity of the sentence that he or she is serving. The concerns that this overlaps with considerations that are more appropriate to the judicial sentencing process will be addressed at paragraphs 3.77 to 3.84 below.

C Comparative Analysis

3.14 In this section, the Commission considers how the mandatory life sentence in Ireland compares with the approach taken by other common law countries. As a preliminary observation, it may be noted that in each of these countries there is some version of the prerogative of mercy whereby the Executive, in rare circumstances, may grant the prisoner early release.

(1) Northern Ireland

3.15 As discussed in Chapter 2, section 1(1) of the *Northern Ireland (Emergency Provisions) Act 1973* provides for a mandatory life sentence for murder. The 2000 *Report on the Review of the Criminal Justice System in Northern Ireland*²⁸ recommended that, in relation to all indeterminate sentence cases, including mandatory life sentence cases, sentencing judges should be required to set a period for retribution and deterrence (along the lines already in place in England and Wales, discussed below). The Report considered that in most cases the period would be a fixed term of years, although it also envisaged that some offences might be so serious that a whole life period would be appropriate. The Report recommended that the period would be announced in court and would be subject to appeal in the usual way. The Report also recommended that once this period had been served, it would be the responsibility of an independent body to determine, primarily on grounds of risk, when the prisoner should

²⁷ O'Malley *Sentencing - Towards a Coherent System* (Round Hall, 2011) at 222.

²⁸ *Report on the Review of the Criminal Justice System in Northern Ireland* (Northern Ireland Office, 2000), at paragraph 12.56. The 2000 Report comprised a wide-ranging review of the criminal justice system in the wake of the 1998 Belfast Agreements.

be released. These recommendations were implemented in the *Life Sentences (Northern Ireland) Order 2001*. In the parliamentary debates on the 2001 Order,²⁹ it was noted that in this respect the 2000 Report endorsed the conclusions of a review of Northern Ireland prisons legislation conducted by the UK Government in anticipation of the coming into effect of the UK Human Rights Act 1998. The review concluded that the existing procedures for discretionary life sentence prisoners and those sentenced to detention at the Secretary of State's pleasure could be deemed inconsistent with the requirements of the European Convention on Human Rights (ECHR). The procedures were based on advice on the suitability of the prisoner for release being given to the Secretary of State by the Life Sentence Review Board, a non-statutory body consisting largely of senior officials of the Northern Ireland Office (NIO). It was considered that compliance with the ECHR would require that, once the punitive element of the sentence had been completed, each prisoner should have his or her case reviewed periodically by a judicial body. To have judicial character, the body would need to be independent of the Executive (and of the parties concerned); impartial; and able to give a legally binding direction regarding the prisoner's release. These considerations are reflected in the 2001 Order.

3.16 Article 5(1) of the *Life Sentences (Northern Ireland) Order 2001* provides that where a court imposes a life sentence, it must, unless the case falls within Article 5(3), specify the minimum period that must be served by the offender before he or she becomes eligible for parole. Article 5(2) provides that the minimum period specified under Article 5(1) is intended "to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it." Article 5(3) of the 2001 Order provides that where the offence warranting the life sentence is particularly serious, the court may order that no minimum period is specified at sentencing. The effect of an order under Article 5(3) is that the offender is subject to a "whole life tariff" and is ordered to be detained for the remainder of his or her natural life. Such whole life tariffs are rare.³⁰

3.17 Where a minimum period is specified, since 2001 the question as to whether the offender is to be released on parole is a matter for the Parole Commissioners for Northern Ireland, who are an independent body appointed by the Northern Ireland Department of Justice.³¹ Where the Parole Commissioners determine that the offender may be released on licence, they must make an order to that effect subject to such conditions as they deem appropriate. These conditions attach to the offender for the rest of his or her life, and the offender may be recalled to prison where the conditions are breached. While the formal order of release is made by the Northern Ireland Department of Justice,³² the decision of the Parole Commissioners to release an offender on licence must be complied with by the Department.

3.18 As to how a sentencing judge is to calculate a minimum term under Article 5(1) of the 2001 Order, the Northern Ireland Court of Appeal in *R v Candless*³³ held that the courts are to have regard to the guidance provided in the English 2002 *Practice Statement (Crime: Life Sentences)*.³⁴ The 2002 Practice Statement issued by the English Lord Chief Justice sets out the starting points and the circumstances in which each starting point applies. The starting points range from the "normal starting

²⁹ See *Hansard* HL Deb, 12 July 2001, c1215.

³⁰ In *R v Hamilton* [2008] NICA 27, a whole life tariff had been imposed on the defendant by the trial judge but this was overturned by the Northern Ireland Court of Appeal, which substituted a 35 year minimum period before he could be considered for parole.

³¹ The Parole Commissioners for Northern Ireland were established under the *Criminal Justice (Northern Ireland) Order 2008* and replaced the Life Sentence Review Commissioners who had been established under the *Life Sentences (Northern Ireland) Order 2001*.

³² *Life Sentences (Northern Ireland) Order 2001*, as amended by the *Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010*, which transferred the relevant functions from the Secretary of State for Northern Ireland to the Northern Ireland Department of Justice.

³³ *R v Candless* [2004] NI 269 at 274-275.

³⁴ *Practice Statement (Crime: Life Sentences)* [2002] 3 All ER 412 at 413-415; [2002] 1 WLR 1789 at 1790-1792.

point” of 12 years, through the “higher starting point” of 15 to 16 years, up to 30 years.³⁵ It also sets out the factors which tend to aggravate or mitigate the duration of the minimum term.³⁶

3.19 For the purpose of illustration, it is worth referring to a number of recent sentencing decisions in Northern Ireland. In *R v Howell*,³⁷ Hart J ordered the defendant to serve a minimum term of 21 years in prison for the double murder of the defendant’s wife and the husband of Hazel Stewart, the defendant’s co-accused (see *R v Stewart*, below). Hart J indicated that the defendant had committed a “cold-blooded, carefully planned and ruthlessly executed double-murder” of two people he saw as standing in the way of his “desire” to be with his co-accused, with whom he was involved at that time in an intimate relationship.³⁸ Hart J indicated, however, that the defendant’s sentence had been reduced by 7 years from 28 years because he had confessed to the murders and had agreed to give evidence against his co-accused.

3.20 In *R v Stewart*,³⁹ Hart J ordered the defendant, who had been sentenced to life imprisonment for the same double-murder dealt with in *R v Howell* (above), to serve a minimum term of 18 years. He indicated that the defendant was entitled to some reduction in sentence to reflect the fact that her co-accused, the defendant in *R v Howell*, had masterminded the plot and carried out the killings after persuading her to take part. He noted, however, that Howell had admitted his role, confessed and given evidence against Stewart during her trial. He indicated that Stewart’s plea of not guilty was relevant, as were her repeated attempts to hide from responsibility. He also indicated that Stewart had expressed little remorse for what she had done.

3.21 In *R v Walsh*,⁴⁰ a life sentence was imposed on the defendant for the murder of her elderly neighbour, Maire Rankin, in 2008.⁴¹ Hart J ordered the defendant to serve a minimum term of 20 years in prison, highlighting the sexual maltreatment and degradation of Mrs Rankin’s body after the killing as aggravating factors which would require the court to increase the minimum term to a figure substantially above (the “higher starting point” of) 15 or 16 years.

(2) England and Wales

3.22 As discussed in Chapter 2, section 1(1) of the *Murder (Abolition of the Death Penalty) Act 1965* provides for a mandatory life sentence for murder. The 2002 *Practice Statement (Crime: Life Sentences)* discussed in the Northern Ireland decision *R v Candless*⁴² (see paragraph 3.18) has been replaced by section 269 of the English *Criminal Justice Act 2003*. This provides that where a court imposes a life sentence, it must make an order regarding the minimum term to be served by the offender before he or she may be considered for release by the Parole Board.⁴³ Where the court is of the opinion that, because of the seriousness of the offence, no such order should be made, it must order that the early release provisions are not to apply to the offender.⁴⁴

3.23 As to how to calculate a minimum term, Schedule 21 of the *Criminal Justice Act 2003* sets out the starting points and the circumstances which dictate which starting point applies. Thus, if the court

³⁵ Paragraphs 10 to 19 of the *Practice Statement (Crime: Life Sentences)* [2002] 3 All ER 412 at 413-415; [2002] 1 WLR 1789 at 1790-1792.

³⁶ Paragraphs 13 to 19 of the *Practice Statement (Crime: Life Sentences)* [2002] 3 All ER 412 at 413-415; [2002] 1 WLR 1789 at 1790-1792.

³⁷ *R v Howell* [2010] NICC 48.

³⁸ *R v Howell* [2010] NICC 48 at para. 15.

³⁹ *R v Stewart* [2011] NICC 10.

⁴⁰ *R v Walsh* Belfast Crown Court, 28 October 2011.

⁴¹ Moriarty “Woman Gets 20 Years for Murdering Neighbour” Irish Times 29 October 2011.

⁴² *R v Candless* [2004] NI 269 at 274-275.

⁴³ Section 269(1) and (2) of the *Criminal Justice Act 2003*.

⁴⁴ Section 269(4) of the *Criminal Justice Act 2003*.

considers that the seriousness of the offence is “exceptionally high”, the starting point is a “whole life tariff”.⁴⁵ This starting point may only apply in respect of an offender who was at least 21 years of age when he or she committed the offence.⁴⁶

3.24 If the court considers that the seriousness of the offence is “particularly high”, the starting point is 30 years.⁴⁷ This starting point may only apply where the offender was at least 18 years of age when he or she committed the offence. If the case does not fall within either of the preceding provisions, paragraph 5A of Schedule 21 (discussed below in *R v Kelly*) provides that the starting point is 25 years if the offender took a knife or other weapon to the scene intending to commit any offence (or to have it available to use as a weapon) and then used that knife or other weapon in committing the murder. This starting point only applies, however, where the offender was at least 18 years of age when he or she committed the offence.⁴⁸ For every other case, where the offender was aged 18 years or over at the time of the offence, the starting point is 15 years.⁴⁹ Where the offender is under 18 years of age, the starting point is 12 years.⁵⁰ Schedule 21 also sets out the factors which tend to aggravate or mitigate the duration of the minimum term.⁵¹

3.25 Paragraph 5A of Schedule 21 of the 2003 Act was considered in *R v Kelly*,⁵² in which the English Court of Appeal heard 7 cases where all of the defendants had been convicted of murder involving a knife. The primary issue in the cases was whether the offender “took the knife or other weapon to the scene” within the meaning of paragraph 5A.

3.26 The defendants in the first three cases and the first defendant in the fourth case contended that paragraph 5A should not have been applied. In the first case, K took a knife from the kitchen, went upstairs to the bathroom and broke down the door to get to the victim. He then stabbed him. In the second case, the victim banged on B’s front door and threatened him. B picked up two knives, went out of the house and stabbed the victim who was standing on the pavement. S, the defendant in the third case (the appeal), lived in a bedsit above a factory. He took a knife from the upstairs kitchen in his own premises and went downstairs into the working area of the factory. He walked through an open door, a distance of some 50 metres, and killed the victim. In the fourth case, to the knowledge of all, one knife was taken to the scene by R and a second knife, which was also used, was taken by H from a kitchen drawer and carried to where the victim lay in a bedroom, where he was killed. The Crown accepted that the second knife had not been “taken to the scene”. H submitted that it was unfair to infer from the evidence that he was party to a joint enterprise whereby someone else had brought the first knife to the house and that taking a knife from one part of the house to the bedroom was not, of itself, sufficient to bring the conduct within paragraph 5A.

3.27 The English Court of Appeal held that the seriousness of an offence falling within paragraph 5A was “normally” marginally lower than “particularly high”. Paragraph 5A thus required flexibility of approach. Schedule 21 did not create a stepped sentencing regime with fixed dividing lines between the specified categories. Paragraphs 4(1) and 5(1) identified not the ultimate decision but the “appropriate starting point”, and paragraphs 4(2) and 5(2) specified the cases of murder which would “normally,” but not inevitably, trigger a finding of exceptional or particularly high seriousness. It was also plain from the structure of paragraph 5A, particularly by reference to paragraph 5(2)(b) (“a murder involving the use of a firearm or explosive”), that it was not the legislative intention that every murder involving the use of a knife

⁴⁵ Paragraph 4(1) of Schedule 21 of the *Criminal Justice Act 2003*.

⁴⁶ Paragraph 4(1) of Schedule 21 of the *Criminal Justice Act 2003*.

⁴⁷ Paragraph 5(1) of Schedule 21 of the *Criminal Justice Act 2003*.

⁴⁸ Paragraph 5A(1) - Paragraph 5A(2) of Schedule 21 of the *Criminal Justice Act 2003*, inserted by the *Criminal Justice Act 2003 (Mandatory Life Sentence: Determination of Minimum Term) Order 2010*.

⁴⁹ Paragraph 6 of Schedule 21 of the *Criminal Justice Act 2003*.

⁵⁰ Paragraph 7 of Schedule 21 of the *Criminal Justice Act 2003*.

⁵¹ Paragraph 8 to paragraph 11 of Schedule 21 of the *Criminal Justice Act 2003*.

⁵² *R v Kelly* [2011] 4 All ER 687.

or other weapon to inflict fatal injury should normally fall within the 25-year starting point. Thus, paragraph 5A did not provide an entirely comprehensive framework to govern the starting point for assessment of the determinate term for murders committed with a knife or other weapon. Paragraph 5A was not confined to murders committed with the use of a knife which had been taken out on to, and used on, the streets. Paragraph 5A would also apply to a case where a man walked home, bought a knife on the way and killed his partner in the kitchen. It did not follow that a murder committed with a knife in the offender's home, or in the victim's house, automatically fell outside the ambit of paragraph 5A.

3.28 The Court indicated that a knife taken from the kitchen of a home to another room in the same home was not "taken to the scene" for the purposes of paragraph 5A, even if a locked door was forced open. Accordingly, the first case did not fall within paragraph 5A, since the knife had not been taken to the scene. However, in the circumstances, it did not make a difference to the eventual determination of the minimum term. In the second case, the knife had been taken to the scene and the judge had been correct to choose a starting point of 25 years for the minimum term. In the third case, S had taken the knife to the scene and the judge had been right to find that paragraph 5A applied.

3.29 The fourth case demonstrated the kind of problems that would arise in the context of murders committed with a knife taken to the scene where two or more offenders were convicted of murder on the basis of joint enterprise. Given some of the difficulties which could arise in joint enterprise murders where a weapon was used by one, but only one, of the murderers, the difficulties for sentencing judges were likely to multiply. There would continue to be convictions for multi-handed murders where one or more of the defendants were not aware that a knife or knives were being taken to the scene but, once violence erupted, participated in it and were well aware that the knife would be or was being used with murderous intent. Although guilty of murder, they were not party to the taking of the fatal weapon to the scene. Their offence would be aggravated by the fact that they participated in a knife murder but paragraph 5A would not provide the starting point in the sentencing decision. For those who did take part or were party to the taking of a knife to the scene, then paragraph 5A would not provide the starting point in the sentencing decision. For those who did take part, or who were party to the taking of a knife to the scene, then paragraph 5A would provide the starting point but care had to be taken not to double count the fact that they participated in a knife murder which has already been factored into the normal paragraph 5A starting point. The judge would therefore be required to make the necessary findings of fact to identify the appropriate starting point and thereafter to reach the sentencing decision required by the justice of the case. As to the applicability of paragraph 5A in respect of H in the fourth case, there had been ample evidence of planning for the attack. Furthermore, paragraph 5A was not to be analysed by reference only to the distance that a knife was carried prior to its lethal use. Taking a weapon to the scene, and the implications of such conduct on the sentence for murder, required a broader consideration than whether the attack took place in the kitchen or the bedroom. In the fourth case, H had known that the knife was in R's possession; it was irrelevant that it was H who had used the knife, rather than R. That was the very essence of joint enterprise. Accordingly, the applications for leave to appeal were refused, and the appeal was dismissed.

3.30 In *R v Dobson and Norris*,⁵³ the defendants were sentenced for the racially motivated murder of Stephen Lawrence in 1993.⁵⁴ As the defendants had been less than 18 years of age at the time of the offence, the court (Treacy J) was obliged to sentence them as juvenile offenders and thus impose a sentence of detention at Her Majesty's pleasure. Given their juvenile status, Treacy J observed that an appropriate starting point for the minimum term to be served by each offender was 12 years, which was

⁵³ See: sentencing remarks of Treacy J, Central Criminal Court, 4 January 2012. Available at: www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-dobson-norris-120104.pdf [Last accessed: 22 May 2013]

⁵⁴ As the offence had been committed before the introduction of the *Criminal Justice Act 2003*, the previous sentencing regime applied. This, however, is not a material distinction for the purposes of this discussion.

then adjusted to reflect the aggravating and mitigating factors of the case.⁵⁵ In this regard, Treacy J indicated that:

“The gravity of this case is... of a different order from, for example, a murder committed by one individual upon another as a result of some sudden quarrel. There was a degree of general premeditation; it was a racist crime driven by hatred; it involved a gang of like-minded attackers; a lethal weapon was employed and known in advance to be carried; the victim was completely blameless and helpless.”⁵⁶

3.31 The first defendant was thus ordered to serve a minimum term of 15 years and two months and the second defendant was ordered to serve a minimum term of 14 years and three months.

(3) Scotland

3.32 As discussed in Chapter 2, section 1(1) of the *Murder (Abolition of the Death Penalty) Act 1965* provides for a mandatory life sentence for murder. Section 2 of the *Prisoners and Criminal Proceedings (Scotland) Act 1993*, as amended, provides that the sentencing court must specify a “punishment part” to be served by the offender “to satisfy the requirements of retribution and deterrence”.⁵⁷ Section 2 provides that the punishment part may be any period of years and months even if it is likely that the period will exceed the remainder of the prisoner’s life.⁵⁸

3.33 In *HM Advocate v Boyle and Others*,⁵⁹ the Scottish Court of Appeal rejected the suggestion made in previous Scottish case law⁶⁰ that the “virtual maximum” duration of the punishment part was 30 years.⁶¹ It noted that some cases, for example, “mass murders by terrorist action”, might warrant a punishment part of more than 30 years.⁶² The Court agreed with the previous case law, however, in so far as it indicated that certain murder cases might be of such gravity that the punishment part should be approximately 20 years, such as where the victim was a child or a police officer acting in the course of his or her duty, or where a firearm was used.⁶³ The Court rejected the suggestion that the starting point for the punishment part in most murder cases was 12 years.⁶⁴ In cases where the offender had armed himself or herself with a sharp weapon, the Court indicated that, in the absence of exceptional circumstances, a starting point of 16 years would be more appropriate.⁶⁵

(4) Canada

3.34 In Canada, section 235(1) of the *Criminal Code* provides for a mandatory life sentence for murder. Section 745 of the *Criminal Code* sets out, in some detail, the periods that persons sentenced to life imprisonment must serve before they become eligible for parole. In the case of first degree murder,

⁵⁵ Treacy J stated that had the offence been committed by an adult, he or she would have faced a minimum term of approximately 18 years.

⁵⁶ “Lawrence verdict: ‘Neither of you has shown the slightest regret or remorse’: Judge’s statement” *The Guardian* 5 January 2012.

⁵⁷ Section 2(1) and 2(2) of the *Prisoners and Criminal Proceedings (Scotland) Act 1993*.

⁵⁸ Section 2(3A) of the *Prisoners and Criminal Proceedings (Scotland) Act 1993*.

⁵⁹ *HM Advocate v Boyle and Others* [2009] HCJAC 89. See also: McDiarmid “Sentencing Murder: Boyle v HM Advocate” (2010) 14 Edin LR 473.

⁶⁰ *Walker v HM Advocate* 2003 SLT 130; and *HM Advocate v Al Megrahi* High Court of Justiciary 24 November 2003.

⁶¹ *HM Advocate v Boyle and Others* [2009] HCJAC 89 at paragraph 13. .

⁶² *Ibid.*

⁶³ *Ibid.* See also: *Walker v HM Advocate* 2002 SCCR 1036.

⁶⁴ *HM Advocate v Boyle and Others* [2009] HCJAC 89 at paragraph 14.

⁶⁵ *Ibid* at paragraph 17.

there is an automatic 25-year period of parole ineligibility.⁶⁶ In the case of second degree murder, the minimum period of parole ineligibility is 10 years while the maximum is 25 years.⁶⁷ The period of ineligibility is determined by the trial judge⁶⁸ who may take into account any jury recommendations on the appropriate length.⁶⁹ An offender sentenced to life imprisonment may apply to have the minimum term reduced after serving 15 years.⁷⁰ Once the prisoner serves the period of parole ineligibility, he or she may apply to the Parole Board for parole. The Parole Board will consider whether there are any risks to the public in releasing the prisoner. If released, the prisoner is subject to parole conditions and parole may be revoked if he or she violates those conditions or commits a new offence.

(5) Australia

3.35 In Australia, the penalty for murder varies from jurisdiction to jurisdiction.⁷¹ In five jurisdictions (the Commonwealth of Australia;⁷² the Australian Capital Territory;⁷³ New South Wales;⁷⁴ Tasmania,⁷⁵ and Victoria⁷⁶) the life sentence is a discretionary maximum rather than a mandatory penalty. New South Wales recognises a limited exception in this regard, prescribing a mandatory life sentence for the murder of a police officer, committed while the officer is acting in the course of his or her duty or as a consequence of, or in retaliation for, the execution of that duty.⁷⁷

3.36 In Western Australia, the life sentence is a presumptive penalty for murder. Under this regime, a life sentence need not be applied by the court where: (a) it would be clearly unjust given the circumstances of the offence and the offender; and (b) the offender is unlikely to be a threat to the safety of the community when released from prison.⁷⁸ Where these criteria are fulfilled, the offender will instead be liable to 20 years' imprisonment.⁷⁹ A sentencing court which declines to impose a life sentence for murder must provide written reasons for this decision.⁸⁰

⁶⁶ Section 745(a) of the *Criminal Code*.

⁶⁷ Section 745(b), section 745(b.1) and section 745(c) of the *Criminal Code*.

⁶⁸ Section 745.4 of the *Criminal Code*.

⁶⁹ Section 745.2 of the *Criminal Code*.

⁷⁰ Section 745.6 of the *Criminal Code*.

⁷¹ Leader-Elliott "Fault Elements in Murder - A Summary of Australian Law" in *The Law of Murder: Overseas Comparative Studies* (Law Commission, 2005) at 7-8.

⁷² Division 71.2 of the *Criminal Code Act 1995* (CW). The life sentence appears to be mandatory for offences under divisions 115.1, 268.8 and 268.70 of the *Criminal Code Act 1995* (CW).

⁷³ Section 12(2) of the *Crimes Act 1900* (ACT).

⁷⁴ Section 18(1) of the *Crimes Act 1900* (NSW).

⁷⁵ Section 158 of the *Criminal Code Act 1924* (Tas).

⁷⁶ Section 3 of the *Crimes Act 1958* (Vic).

⁷⁷ Section 19B of the *Crimes Act 1900*, as amended by section 3 of the *Crimes Amendment (Murder of Police Officers) Act 2011*. Section 19B stipulates that in order for the mandatory life sentence to apply: (a) the offender must have known, or ought reasonably to have known, that the victim was a police officer, and (b) the offender must have intended to kill the police officer or have been engaged in a criminal activity that risked serious harm to police officers.

⁷⁸ Section 279(4) of the *Criminal Code 1913*, as replaced by section 10 of the *Criminal Law Amendment (Homicide) Act 2008*.

⁷⁹ *Ibid.*

⁸⁰ Section 279(6) of the *Criminal Code 1913*, as replaced by section 10 of the *Criminal Law Amendment (Homicide) Act 2008*.

3.37 In three jurisdictions (the Northern Territory;⁸¹ Queensland;⁸² and South Australia⁸³) the life sentence is a mandatory penalty for murder. In all jurisdictions, the sentencing court is permitted or required to set a non-parole period that will in normal circumstances result in release before the entire sentence is served.⁸⁴

3.38 The applicable parole system varies from state to state. In the Commonwealth of Australia, the court must fix a non-parole period or make a recognizance release order when it imposes a federal life sentence, unless, having regard to the “nature and circumstances of the offence” and the antecedents of the offender, it considers that neither is appropriate.⁸⁵ In the Australian Capital Territory, the court must set a non-parole period when it imposes a sentence of one year or more, excluding life sentences, unless, having regard to the nature of the offence and the antecedents of the offender, it considers this to be inappropriate.⁸⁶ An offender serving a life sentence may apply for parole after serving 10 years of his or her sentence.⁸⁷ In New South Wales, the standard non-parole period for murder is 20 years, and 25 years where the victim is a designated person.⁸⁸ Where the victim is a police officer, however, an offender must serve the mandatory life sentence “for the term of the person’s natural life.”⁸⁹ In Tasmania, the court must order that an offender sentenced to life imprisonment shall either be ineligible for parole in respect of that sentence or ineligible for parole before the expiration of such a period as is specified in the order.⁹⁰ In Victoria, the court must set a non-parole period where it imposes a life sentence or a sentence of two or more years.⁹¹

3.39 The system also varies among those states which impose a mandatory life sentence. In the Northern Territory, the court must set a standard non-parole period of 20 years when it imposes a life sentence for murder, or 25 years where certain factors are present in the case.⁹² The court may impose a longer non-parole period if that is warranted by the seriousness of the offence or a shorter non-parole period if there are exceptional circumstances. The court may refuse to fix a non-parole period if it considers that the level of culpability is so extreme that the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for his or her natural life. In Queensland, the court must set a standard non-parole period of 20 years when it imposes a life sentence for murder and 30 years if the offender has a previous conviction for murder.⁹³ However, if the victim is a police officer performing his or her duty, or if the offender commits the relevant act or omission in retaliation for actions taken by the victim or another police officer in the performance of his or her duty, a minimum non-parole period of 25 years will apply (unless the individual is granted ‘exceptional

⁸¹ Section 157 of the *Criminal Code Act* (NT), as amended by section 17 of the *Criminal Reform Amendment Act (No 2) 2006* (NT).

⁸² Section 305 of the *Criminal Code Act 1899* (Qld).

⁸³ Section 11 of the *Criminal Law Consolidation Act 1935* (SA).

⁸⁴ Law Reform Commission *Consultation Paper on Mandatory Sentences* (LRC CP 66-2011) at paragraph 2.84.

⁸⁵ Section 19AB of the *Crimes Act 1914* (CW).

⁸⁶ Section 65 of the *Crimes (Sentencing) Act 2005* (ACT).

⁸⁷ Section 288 of the *Crimes (Sentence Administration) Act 2005* (ACT).

⁸⁸ Table in Division 1A of Part 4 of the *Crimes (Sentencing) Procedure Act 1999* (NSW).

⁸⁹ Section 19B(2) of the *Crimes Act 1900*, as amended by section 3 of the *Crimes Amendment (Murder of Police Officers) Act 2011*.

⁹⁰ Section 18 of the *Sentencing Act 1997* (T). Section 18 sets out a list of matters which the court may have particular regard to in making this determination.

⁹¹ Section 11 of the *Sentencing Act 1991*.

⁹² Section 53A of the *Sentencing Act* (NT).

⁹³ Section 181 of the *Corrective Services Act 2006* (Qld), as amended by section 7 of the *Criminal Law Amendment Act 2012*.

circumstances parole' under the *Corrective Services Act 2006*).⁹⁴ In South Australia, the court must set a standard non-parole period of 20 years when it imposes a life sentence for murder.⁹⁵ The court may decline to set a non-parole period if, having regard to the gravity of the offence, the criminal record and behaviour of the offender, and any other circumstances, it considers that it would be inappropriate. In Western Australia, the court must set a standard non-parole period of 10 years where the offender has been sentenced to life imprisonment for murder.⁹⁶

(6) New Zealand

3.40 In New Zealand, section 102 of the *Sentencing Act 2002* provides that life imprisonment is the presumptive penalty for murder. Thus, a person convicted of murder must be sentenced to life imprisonment unless the circumstances of the offence and the offender would render such a sentence “manifestly unjust”.⁹⁷ Section 86E(2) of the 2002 Act provides that the court must impose a life sentence where the murder is a stage-2 or stage-3 offence⁹⁸ and must order that the life sentence be served without parole unless the circumstances of the offence and the offender would render such a sentence “manifestly unjust”.

3.41 Section 84 of the *Parole Act 2002* provides that offenders serving life sentences will become eligible for parole once they have served 10 years' imprisonment, unless the sentencing court has ordered a “non-parole period”.⁹⁹ If a non-parole period has been ordered, offenders become eligible for parole once they have served that period. Section 60 of the *Parole Act 2002* provides that an application may be made to the Parole Board to recall an offender who is on parole or compassionate release. This may be done where the offender poses “an undue risk” to the community, has breached a condition of release or has committed an offence punishable by imprisonment.¹⁰⁰ In addition to parole, section 41 of the *Parole Act 2002* provides that the Parole Board may grant compassionate release to any prisoner who has just given birth or is seriously ill and unlikely to recover.¹⁰¹

(7) United States of America

3.42 In the United States of America, the majority of states have retained the death penalty for either first degree murder or “capital murder”. All of these states require the jury to find that any mitigating factors are outweighed by certain aggravating factors.¹⁰² In the event that this is not the case or, indeed, the death penalty is not sought by the prosecution, these states provide for less severe sanctions such as life imprisonment with or without parole. The few remaining states have abolished the death penalty and instead require the imposition of determinate sentences or life sentences with or without parole.¹⁰³

⁹⁴ Section 305(4) of the *Criminal Code*, as inserted by section 3 of the *Criminal Law Amendment Act 2012*.

⁹⁵ Section 32 of the *Criminal Law (Sentencing) Act 1988* (SA).

⁹⁶ Section 90 of the *Sentencing Act 1995* (WA), as amended by section 19 of the *Criminal Law Amendment (Homicide) Act 2008*.

⁹⁷ Section 102(1) of the *Sentencing Act 2002*.

⁹⁸ See: section 86A to section 86I of the *Sentencing Act 2002* regarding the classification of offences as “stage-1”, “stage-2” and “stage-3” offences; the recording of judicial warnings; and the additional consequences for repeat serious violent offending.

⁹⁹ Section 84 of the *Parole Act 2002* regarding “non-parole periods”.

¹⁰⁰ Section 61 of the *Parole Act 2002*.

¹⁰¹ Section 41(1) of the *Parole Act 2002*.

¹⁰² Finkelstein “Report on Basic Aspects of the Law of Murder in the United States: The Examples of California and New York” in *The Law of Murder: Overseas Comparative Studies* (Law Commission, 2005) at 107.

¹⁰³ Alaska (1957); Connecticut (2012); Hawaii (1957); Illinois (2011); Iowa (1965); Maine (1887); Massachusetts (1984); Michigan (1846); Minnesota (1911); New Jersey (2007); New Mexico (2009); New York (2007); North Dakota (1973); Rhode Island (1984); Vermont (1964); West Virginia (1965); Wisconsin (1853); and District of Columbia (1981). See: the website of The Death Penalty Information Center, www.deathpenaltyinfo.org;

(8) Summary

3.43 From this survey, it is clear that Ireland's common law counterparts have not adopted a unified response in respect of sentencing for murder. Certain patterns do, however, emerge. In the majority of common law countries and jurisdictions, the mandatory life sentence for murder has been retained¹⁰⁴ whereas in a significant minority, a presumptive or discretionary life sentence has been adopted instead.¹⁰⁵ In all common law countries, apart from Ireland, there is a system whereby a person convicted of murder must serve a minimum term before becoming eligible for early release. In addition, release is generally granted through a formal parole system. In some countries and jurisdictions, the minimum term is calculated by the sentencing judge having regard to judicial and/or statutory guidance¹⁰⁶ whereas, in some others, the minimum term is specified by statute.¹⁰⁷

D The Mandatory Life Sentence and the Conceptual Framework

3.44 In this Part, the Commission considers the sentencing system for murder, comprising the mandatory life sentence and early release, against the conceptual framework established in Chapter 1. Specifically, the Commission considers the system by reference to: (1) the aims of sentencing, and (2) the principles of justice.

(1) The Mandatory Life Sentence and the Aims of Sentencing

3.45 In Chapter 1, the Commission observed that, in general, criminal sanctions pursue one or more of a number of aims, namely: deterrence, punishment, reform and rehabilitation, reparation, and incapacitation.¹⁰⁸ The Commission also observed that deterrence and punishment (and incapacitation) tend to feature more in cases involving more serious crimes and, consequently, where sanctions are more severe. These aims feature most heavily in cases involving murder and the mandatory life sentence. The mandatory life sentence seeks to dissuade by coercive means the perpetrator of the murder (and the public at large) from committing another murder and to punish him or her severely for the offence.

3.46 It has been observed, however, that the mandatory life sentence may not adequately meet the aims of deterrence and punishment.¹⁰⁹ Regarding deterrence, it has been noted that some murders are committed in the heat of the moment when the perpetrator does not contemplate the legal consequences of his or her actions.¹¹⁰ In such circumstances, it is unlikely that the prospect of a mandatory life sentence will enter into the perpetrator's mind let alone dissuade him or her from executing his or her intention. As

Ariosto "Connecticut becomes 17th state to abolish the death penalty" CNN 25 April 2012. Available at: http://articles.cnn.com/2012-04-25/justice/justice_connecticut-death-penalty-law-repealed_1_capital-punishment-death-penalty-information-center-death-sentences?_s=PM:JUSTICE. [Last accessed: 22 May 2013]; and "Connecticut abolishes the death penalty" RTE 26 April 2012. Available at: www.rte.ie/news/2012/0426/318516-connecticut-abolishes-the-death-penalty/ [Last accessed: 22 May 2013].

¹⁰⁴ Northern Ireland, England and Wales, Scotland, Canada and four Australian jurisdictions (Northern Territory, Queensland, South Australia and Western Australia).

¹⁰⁵ Five Australian jurisdictions (Commonwealth of Australia, Australian Capital Territory, New South Wales, Tasmania and Victoria) and New Zealand.

¹⁰⁶ For example, Northern Ireland, England and Wales, and Scotland.

¹⁰⁷ For example, Canada (first degree murder) and Australia (New South Wales, Northern Territory, Queensland, South Australia, and Western Australia).

¹⁰⁸ In Chapter 1, it was observed that it would be unconstitutional to pursue incapacitation as a sentencing aim where to do so would involve imprisoning a person for offences that he or she has not yet committed.

¹⁰⁹ As discussed in Chapter 2, this may be down to the unique evolution of the mandatory life sentence, which was introduced as a replacement for the death penalty for murder.

¹¹⁰ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 34-35; Walker and Padfield *Sentencing: Theory, Law and Practice* (Butterworths, 2nd ed, 1996) at 97.

discussed in Chapter 1, however, when examining the issue of deterrence, one must consider that many members of the public may have been inhibited from committing murder by the prospect of a mandatory life sentence.

3.47 Regarding punishment, it has been noted that murder can be committed in a variety of circumstances and involve different levels of moral culpability.¹¹¹ From a retributive perspective, a person with a lower level of moral culpability does not deserve the same punishment as a person with a higher level of moral culpability. (This is discussed in greater detail below at paragraphs 3.49 to 3.57 in the context of consistency and proportionality.) From a denunciatory perspective, the current mandatory life sentence permits society to denounce in uniquely strong terms the offence of murder but leaves little room for society to denounce in more or less strong terms the more or less heinous instances of it. As discussed below at paragraphs 3.77 to 3.84, it may, however, be possible to reflect these differences in culpability if the sentencing judge were permitted to recommend the minimum term to be served by an offender convicted of murder.

(2) The Mandatory Life Sentence and the Principles of Justice

3.48 In Chapter 1, the Commission observed that sentencing must comply with a number of external constraints that emanate from fundamental principles of justice, namely, the principles of: (a) consistency, and (b) proportionality. In this section, the Commission considers the mandatory life sentence for murder by reference to these principles.

(a) The Principle of Consistency and the Mandatory Life Sentence

3.49 In Chapter 1, the Commission observed that the principle of consistency requires a consistent application of the aims and principles of sentencing (consistency of approach) rather than uniformity of sentencing outcomes (consistency of outcomes). To reiterate in brief, consistency of approach requires that like cases should be treated alike and different cases should be treated differently. The corollary of this is that inconsistency arises where like cases are treated differently and different cases are treated alike.

3.50 As discussed in Chapter 2, the mandatory life sentence for murder occupies a relatively unique position in the historical evolution of mandatory sentences in so far as it was introduced as a replacement for a more severe sanction, namely, the death penalty. The mandatory life sentence was considered to be an acceptable alternative to the death penalty as every person convicted of murder would continue (symbolically at least) to pay for the offence with his or her life. Thus from the outset, the focus of the sentence for murder has been on the *outcome* of the sentencing process rather than the *approach* to the sentencing process. As a result, all persons convicted of murder are treated the same regardless of whether there are any distinguishing factors in their circumstances or the circumstances of their offences. The Commission observes that this amounts to different cases being treated alike and is not, therefore, compatible with the principle of consistency. As discussed below at paragraphs 3.77 to 3.84, there may, however, be scope to distinguish individual cases if the sentencing judge were permitted to recommend the minimum term to be served by an offender convicted of murder.

3.51 Furthermore, as sentencing operates in conjunction with early release, the Commission observes that full compliance with the principle of consistency requires that any exacting standard that applies to sentencing should also apply to early release. Arguably, a more consistent approach is taken in respect of early release than in respect of sentencing for murder as the Parole Board and the Minister for Justice consider each case against broadly the same factors, namely, those listed at paragraphs 3.11 and 3.12. This may, however, be jeopardised where, for instance, the Parole Board and the Minister for Justice are: (i) dealing with a case in which the sentence has been imposed following the application of an inconsistent approach, or (ii) influenced by external events. Such external events might include media attention surrounding the circumstances of a particular case that might militate against release on parole or intervening changes in sentencing or early release policy. This risk may, however, be minimised if the Minister for Justice and the Parole Board were to receive guidance from the sentencing judge in the form of a recommended minimum term to be served by the offender.

¹¹¹ O'Malley *Sentencing - Towards a Coherent System* (Round Hall, 2011) at 98.

(b) The Principle of Proportionality and the Mandatory Life Sentence

3.52 In Chapter 1, the Commission noted that the principle of proportionality comprises: (a) constitutional proportionality, and (b) proportionality in sentencing.

(i) Constitutional Proportionality and the Mandatory Life Sentence

3.53 As discussed in Chapter 2, the Supreme Court in *Whelan and Lynch*¹¹² held that section 2 of the *Criminal Justice Act 1990* was compatible with the principle of constitutional proportionality. In this regard, it stated that the Oireachtas was entitled to promote respect for human life by concluding that any murder, even at the lowest end of the scale, was so abhorrent and offensive to society that it merited a mandatory life sentence.

(ii) Proportionality in Sentencing and the Mandatory Life Sentence

3.54 In *Whelan and Lynch*,¹¹³ the Supreme Court made the following remarks regarding proportionality in sentencing and the mandatory life sentence for murder:

“... [T]he duty to impose the sentence which is proportionate or appropriate to the circumstances of the case only arises where a judge is exercising a judicial discretion as to the sentence to be imposed within the parameters laid down by law. It does not arise where a court is lawfully imposing a fixed penalty generally applicable to a particular offence as described in *Deaton v The Attorney General*.”

Thus, where a mandatory sentence is prescribed by statute, the courts are precluded from considering whether the sentence is proportionate to the particular circumstances of the individual case.

3.55 A consequence of prescribing a mandatory sentence is thus to create a system of sentencing in which sentencing proportionality plays a limited role. In Chapter 1, the Commission observed that, for most cases, the courts have adopted a three-tiered approach to formulating proportionate sentences. This requires the courts to: (i) identify the range of applicable penalties; (ii) locate the particular case on that range (by reference to culpability, harm and offender behaviour); and (iii) apply any factors which would mitigate or aggravate the sentence. Even though the outcome of a sentencing hearing for murder is, in general, more severe than the outcome of sentencing hearings for other offences, the sentencing process for murder is much less complex. First of all, there is no need to identify a range of applicable penalties; the only applicable penalty is the mandatory life sentence. Secondly, there is no need to consider where on any such range a particular murder case is located as all cases of murder, irrespective of their particular circumstances, attract the mandatory life sentence. Thirdly, there is no need to consider whether there are any factors which mitigate or aggravate the severity of the sentence. As a result, the courts do not distinguish between cases at the upper end of the scale and cases at the lower end of the scale.

3.56 This reference to a “scale” is not to suggest that some murders are not serious. It is undoubtedly the case that murder *of any description* is a very serious offence. Indeed, by definition, every murder will involve a significant degree of *culpability*, namely, an intention to kill or cause serious injury, and result in an irreparable level of *harm*, namely, the death of the victim.¹¹⁴ Once these requirements are met, however, there may be other factors which could merit differential treatment. Some cases may exhibit a relatively lower degree of culpability where, for instance, the murder was committed in the heat of the moment, whereas other cases may exhibit a relatively higher degree of culpability where, for instance, there is evidence of planning and premeditation. An offender’s behaviour may be less reprehensible where, for instance, he or she tried to save the victim, or more reprehensible where, for instance, he or she tortured the victim over a prolonged period of time before killing him or her. Furthermore, there may be factors such as a guilty plea or material assistance which in the context of other offences might be afforded weight but which cannot be taken into account in murder cases. As discussed below at paragraphs 3.77 to 3.84, there would, however, be scope to reflect the individual circumstances of each

¹¹² *Whelan and Lynch v Minister for Justice, Equality and Law Reform* [2010] IESC 34; [2012] 1 IR 1.

¹¹³ *Ibid.*

¹¹⁴ Section 4 of the *Criminal Justice Act 1964*.

case if the sentencing judge were permitted to recommend a minimum term to be served by an offender convicted of murder.

3.57 As with the principle of consistency, the Commission considers that full compliance with the principle of proportionality requires that any exacting standard that applies to sentencing should also apply to early release. Arguably, a more proportionate approach is taken in respect of early release than in respect of the sentence for murder in so far as the Parole Board and the Minister for Justice consider the individual circumstances of each case. In much the same way as with the principle of consistency, this may be jeopardised where, for instance, the Parole Board and the Minister for Justice are: (i) dealing with a case in which the sentence has been imposed following the application of a disproportionate approach, or (ii) influenced by external events. Such external events might include adverse media attention surrounding the circumstances of a particular case or intervening changes in policy. As discussed below at paragraphs 3.77 to 3.84, this risk may be minimised if the Minister for Justice and the Parole Board were to receive guidance from the sentencing judge in the form of a recommended minimum term to be served by the relevant offender.

(3) Discussion

3.58 In Chapter 2, the Commission observed that the system comprising the mandatory life sentence and early release mechanisms has been considered by the Irish courts and the European Court of Human Rights.

3.59 The constitutionality of the mandatory life sentence was upheld by the Supreme Court in *Whelan and Lynch v Minister for Justice, Equality and Law Reform*.¹¹⁵ Regarding section 2 of the *Criminal Justice Act 1990*, the Supreme Court held that it was not contrary to the constitutional doctrine of the separation of powers for the Oireachtas to prescribe a mandatory sentence for certain offences provided that there was a rational connection between the prescribed sentence and the requirements of justice. It also held that although murder could be committed in a variety of circumstances, it was not contrary to the constitutional principle of proportionality for the Oireachtas to prescribe a mandatory life sentence for all murders as any murder, even at the lowest end of the scale, is so abhorrent and offensive to society that it merits a life sentence.¹¹⁶ The Court also held that a constitutional interpretation of section 2 of the 1990 Act did not require the sentencing courts to make a non-binding recommendation regarding the minimum term to be served by an offender before he or she became eligible for release. It did not, however, reject the possibility that the Oireachtas could introduce such a system. Regarding temporary release, the Supreme Court held that the Minister's power to grant temporary release was not contrary to the constitutional doctrine of the separation of powers as the granting of temporary release was not a sentencing exercise.¹¹⁷

3.60 The compatibility of a mandatory sentencing system with the European Convention on Human Rights was upheld by the European Court of Human Rights (ECtHR) in *Kafkaris v Cyprus*.¹¹⁸ Regarding the mandatory life sentence, the Court ruled that a mandatory life sentence would not in itself give rise to an issue under Article 3 provided that there was a *de facto* and *de jure* possibility of release. It also held that prolonged detention under an entirely punitive life sentence, irrespective of considerations of risk or dangerousness, was compatible with Article 5(1) as there was a clear and sufficient causal connection between the conviction and the continued detention. The Court refrained from ruling on a complaint under Article 5(4), which might have clarified whether, in the case of a mandatory life sentence, the

¹¹⁵ *Whelan and Lynch v Minister for Justice, Equality and Law Reform* [2008] 2 IR 142; [2012] 1 IR 1.

¹¹⁶ See also the decision of the High Court in *Nascimento v Minister for Justice, Equality and Law Reform* [2007] IEHC 358; [2011] 1 IR 1, discussed at paragraphs 2.79 to 2.85 above.

¹¹⁷ See also the Supreme Court decision in *Caffrey v Governor of Portlaoise Prison* [2012] IESC 4; and the High Court decision in *Nascimento v Minister for Justice, Equality and Law Reform* [2007] IEHC 358; [2011] 1 IR 1.

¹¹⁸ *Kafkaris v Cyprus* (2009) 49 EHRR 35.

requirements of Article 5(1) were satisfied by the original trial and appeal proceedings¹¹⁹ or whether a review was required.¹²⁰

3.61 It should be noted, however, that since its decision in *Kafkaris* the ECtHR appears to have modified its position regarding the compatibility of the mandatory life sentence with Article 3. In *Vinter, Bamber and Moore v United Kingdom*,¹²¹ the Court indicated that a mandatory life sentence without the possibility of parole might in itself give rise to an issue under Article 3 where it was considered to be grossly disproportionate. It noted, however, that “gross disproportionality” was a strict test which would rarely be met. This modified position appears to coincide with the recognition by the Court of a trend away from the mandatory life sentence among the Council of Europe Member States. In *Kafkaris*, the Court indicated that in the absence of a discernible trend amongst Member States it was within the margin of appreciation of each Member State to decide on the system it adopted in respect of life sentences. The Court thus concluded that it was acceptable for a Member State such as Cyprus to operate a mandatory life sentence without parole. By contrast, in *Vinter*, the Court observed that the trend in Europe was “clearly against” the mandatory life sentence without parole. While the Court did not conclude that it was no longer acceptable for a Member State to operate a mandatory life sentence without parole, the inference is that if the current tide against the mandatory life sentence continues the Court might develop further the test of “gross disproportionality.”

3.62 Nevertheless, as the law currently stands, it would appear that the system comprising a mandatory life sentence and early release is, in general terms, compatible both with the Constitution of Ireland and with the European Convention on Human Rights (ECHR). (As discussed above at paragraphs 2.101 to 2.104, this is subject to continuing uncertainty as to whether Article 5(4) of the ECHR entitles prisoners serving wholly punitive life sentences to regular reviews of their detention by an independent, court-like body.) In light of the Attorney General’s request, however, there remains the question of whether the current system should be retained, repealed or reformed. Accordingly, the Commission now turns to the arguments that may be made in favour of each of these options. In doing so, it first discusses the mandatory life sentence itself. The Commission then discusses related matters that arise in the context of the arrangements for early release and the extent to which this aspect of the system might be reformed.

(a) The Mandatory Life Sentence for Murder

3.63 The Commission acknowledges that a variety of arguments exist in favour of both the retention and the abolition of the mandatory life sentence for murder. During the public consultation and roundtable discussion which the Commission conducted after the publication of the Consultation Paper, a range of contrasting views were expressed in relation to the persuasiveness of these arguments. Similarly, within the Commission itself, differing views have emerged as to which set of arguments carries greater weight.

3.64 In this section, the Commission first outlines the arguments in favour of retaining the mandatory life sentence for murder. These arguments are considered to be persuasive by a majority of the Commission, President Quirke and Commissioners Baker and Flanagan. The arguments in favour of replacing the mandatory life sentence for murder with a discretionary life sentence are then outlined in turn. These arguments are considered to be persuasive by a minority of the Commission, Commissioners O’Connell and O’Malley.

(i) Arguments in favour of retaining the mandatory life sentence for murder

3.65 In the first place, as observed by the Supreme Court in *Whelan and Lynch v Minister for Justice, Equality and Law Reform*:

¹¹⁹ *Wynne v United Kingdom* (1995) 19 EHRR 333.

¹²⁰ *Stafford v United Kingdom* (2002) 35 EHRR 32.

¹²¹ European Court of Human Rights 17 January 2012 (Application Nos 66069/09, 130/10 and 1396/10).

“[i]n committing the crime of murder the perpetrator deprives the victim, finally and irrevocably, of that most fundamental of rights, the right ‘to be’ and at the same time extinguishes the enjoyment of all other rights inherent in that person as a human being.”¹²²

For this reason, the offence has long “been regarded as the ultimate crime against society as a whole”.¹²³

3.66 Murder is the most serious criminal offence and it is therefore appropriate that it should attract the most severe sanction permissible under Irish law. As discussed at paragraph 2.218 since the abolition of the death penalty by the *Criminal Justice Act 1990*, life imprisonment fits this mould. It is arguable that only this, the most punitive of available penalties, serves to denounce murder as the most heinous offence under Irish law.

3.67 This is not to deny that murder may be committed in a variety of circumstances and that some offenders may be more culpable than others. However, as acknowledged by the Supreme Court in *Whelan and Lynch*, it remains the case that “the crime itself, by its very nature, has always been considered at the highest level of gravity among all forms of homicide or other crimes against the person, whatever the circumstances”.¹²⁴ It may thus be argued that murder, even in its least culpable form, is so repugnant to society that it merits the imposition of a mandatory life sentence. This was the view adopted by the High Court and affirmed by the Supreme Court in *Whelan and Lynch*. In the High Court, Irvine J notably concluded that “there can be nothing offensive in the Oireachtas promoting the respect for life by concluding that any murder even at the lowest end of the scale, is so abhorrent and offensive to society that it merits a mandatory life sentence...”.¹²⁵ As discussed below at paragraphs 3.77 to 3.84, however, differences in culpability could be reflected if the sentencing judge were permitted to recommend the minimum term to be served by an offender convicted of murder.

3.68 A closely related argument is that the provision of a discretionary life sentence for murder would fail to reflect the unique gravity of this form of homicide. At present, life imprisonment is the discretionary maximum penalty for the offence of manslaughter. If both murder and manslaughter were subject to the same penalty regime, it is considered that this would blur the distinction between these offences. As murder alone involves the killing of a person arising from an intention to kill or cause serious injury, it is considered that this should be differentiated by the application of a distinct penalty regime.

3.69 A further argument in favour of retaining the mandatory life sentence for murder is that this penalty facilitates the protection of the public against the risk of further violence on the part of a convicted murderer. Although prisoners serving life sentences will rarely remain in prison for the rest of their natural lives, the fact that they are serving life sentences means that their release is conditional on their good behaviour (as discussed at paragraphs 3.06 and 3.07).¹²⁶ If released, these offenders remain at liberty subject to the conditions of their temporary release under the *Criminal Justice Act 1960*, as amended by the *Criminal Justice (Temporary Release of Offenders) Act 2003*. In addition, they are monitored by the Probation Service of the Department of Justice and can be returned to prison if they breach the terms of their temporary release. By contrast, an individual who has served a determinate sentence cannot, in the event that he or she breaches the terms of their temporary release, be returned to prison on the basis of the original conviction.

(ii) Arguments in favour of repealing the mandatory life sentence for murder

3.70 In the first place, as not all murders are equally heinous, it is considered unjust that an identical penalty should apply in every case. While some murderers may exhibit a level of appalling depravity or sadism, the majority of these offences occur in an emotional context. As the mandatory life sentence

¹²² *Whelan and Lynch v Minister for Justice, Equality and Law Reform* [2010] IESC 34; [2012] 1 IR 1 at 18.

¹²³ *Ibid.*

¹²⁴ *Ibid.* at 19.

¹²⁵ *Whelan and Lynch v Minister for Justice, Equality and Law Reform* [2007] IEHC 374; [2008] 2 IR 142.

¹²⁶ See: *Whelan and Lynch v Minister for Justice, Equality and Law Reform* [2010] IESC 34; [2012] 1 IR 1 at 24-26.

cannot reflect these variations in culpability, it is difficult to reconcile this penalty regime with the principles of consistency and proportionality in sentencing.

3.71 A related argument is that if judges had sentencing discretion for both murder and manslaughter, sentencing practice could reflect the fact that some instances of murder are very close to voluntary manslaughter in terms of culpability.¹²⁷ The Supreme Court noted in *The People (DPP) v Conroy (No. 2)* that:

“[h]aving regard to the multiple factors which enter into consideration of sentence in the case of a homicide, there would not appear to... be any grounds for a general presumption that the crime of manslaughter may not, having regard to its individual facts and particular circumstances be in many instances, from a sentencing point of view, as serious as, or more serious than, the crime of murder.”¹²⁸

3.72 The provision of sentencing discretion for both murder and manslaughter would also offset the possibility that juries may, in some instances, feel tempted to acquit some killers of murder and convict them of manslaughter in order to spare the offender the application of the mandatory life sentence.

3.73 It would not necessarily follow, however, that the substitution of a discretionary life sentence for the mandatory life sentence would erode the distinction between murder and manslaughter as the elements of these homicide offences would remain the same notwithstanding any reform of the applicable punishments.

3.74 A further argument against the retention of the mandatory life sentence is that there is a lack of clarity regarding the consequences of this penalty. While the sentence endures for life in the sense that a released murderer may be recalled to prison for breaching his or her conditions of temporary release, the term ‘life sentence’ is nonetheless misleading. This term suggests that the offender will spend the remainder of his or her life in prison. However, in practice, the sentence specified in court bears no relationship to the punishment which a convicted murderer will undergo. The pronouncement of this penalty therefore provides no meaningful information to the offender, the victim’s family, the media or the public as to what the sentence really means. As those convicted of murder do not in reality receive the same penalty, the argument that there is only one appropriate punishment for this offence is also problematic.

3.75 Finally, if the mandatory life sentence for murder were replaced with a discretionary life sentence, a convicted murderer could still be subjected to ‘life-long’ post-release conditions. An offender who receives a discretionary life sentence is also eligible to be recalled to prison, in the event that he or she breaches the conditions attached to temporary release. In this respect, a discretionary life sentence for murder would afford just as much protection to the public as a mandatory life sentence.

3.76 *The Commission, by a majority, recommends that the mandatory life sentence for murder be retained.*

¹²⁷ See, for example, the Commission’s *Report on Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008) at paragraph 3.68ff. There, the Commission noted that where, for example, a person sets fire to or shoots at an occupied building and the building’s occupants die, this is likely to result in a murder conviction. However, if the accused persuades the jury that he or she genuinely (that is, from his or her subjective perspective) did not intend to kill or seriously injure but only to frighten the occupants, a verdict of voluntary manslaughter could also be reached (at paragraph 3.18). There followed a discussion of whether, to deal with such borderline cases, murder should also be defined to include “recklessness” comprising “extreme indifference to the value of human life.” The Commission acknowledged that this proposed change to the definition of murder had elicited mixed views among consultees, and that a number of practitioners suggested that it could lead to a lack of clarity regarding the elements of the offence of murder (at paragraph 3.23ff). This discussion in the 2008 Report indicates that it may be difficult to find complete consensus as to where a precise line can be drawn between murder and manslaughter.

¹²⁸ *The People (DPP) v Conroy (No. 2)* [1989] IR 161 at 163.

(b) Judicial recommendation at sentencing stage

3.77 The Commission now turns to consider how the mandatory sentencing regime for murder could be reformed by the introduction of a judicial power to recommend a minimum term to be served.

3.78 As discussed at paragraph 3.15ff, in Northern Ireland, a mandatory life sentence for murder is prescribed by section 1(1) of the *Northern Ireland (Emergency Provisions) Act 1973*. Article 5 of the *Life Sentences (Northern Ireland) Order 2001* requires that where a court imposes a life sentence, it must specify the minimum period that must be served by the offender “to satisfy the requirements of retribution and deterrence,” before he or she becomes eligible for parole.¹²⁹ Where the offence is particularly serious, the court may order a “whole life tariff” if it considers that the offender should be detained for the remainder of his or her natural life.¹³⁰ In calculating the minimum term to be served by an offender, the Northern Ireland Court of Appeal, in *R v Candless*,¹³¹ directed the courts to have regard to the guidance provided by Lord Woolf LJ in his 2002 *Practice Statement (Crime: Life Sentences)*. The Practice Statement (as discussed at paragraph 3.18) sets out the starting points, and the circumstances in which each starting point applies, and also outlines the factors which tend to aggravate or mitigate the duration of the minimum term.

3.79 As discussed at paragraph 2.12, in England and Wales, section 1(1) of the *Murder (Abolition of the Death Penalty) Act 1965* provides for a mandatory life sentence for murder. Under section 269 of the *Criminal Justice Act 2003*, a court is required, when imposing a life sentence, to make an order specifying the minimum term to be served by the offender before he or she may be considered for release by the Parole Board.¹³² Where the court is of the opinion that, because of the seriousness of the offence, no such order should be made, it must order that the early release provisions are not to apply to the offender.¹³³ As to how to calculate a minimum term, Schedule 21 of the *Criminal Justice Act 2003* (as discussed at paragraph 3.23ff) sets out the starting points, the circumstances which dictate which starting point applies, and the factors which tend to aggravate or mitigate the duration of the minimum term. The Commission considers that the approach adopted in Northern Ireland is preferable to the more prescriptive legislative model established in England and Wales, under which the appropriate starting points are specified by the *Criminal Justice Act 2003*.

3.80 In the view of the Commission, the Northern Irish experience illustrates the benefits of permitting sentencing courts to pronounce on the relative culpability of convicted murderers. Cases such as *R v Howell*¹³⁴ and *R v Stewart*¹³⁵ (discussed above at paragraphs 3.19 and 3.20) demonstrate that this approach enables the courts to incorporate elements of the principles of proportionality and consistency when sentencing the offence of murder. Furthermore, where courts are afforded scope to acknowledge the various aggravating and mitigating factors which may characterise murder cases, this plays an important role in maintaining public confidence in the sentencing process.

3.81 The Commission also considers that permitting sentencing courts to pronounce on the relative culpability of convicted murderers may reduce two problems associated with the current early release arrangements for murder. The first problem relates to the factors considered by the Parole Board and the Minister for Justice in assessing whether an offender is suitable for release. As discussed at paragraph 3.13, in performing this role, the Parole Board and the Minister for Justice take into account a number of factors that are comparable, though not identical, to those considered in the sentencing

¹²⁹ Article 5(1) and Article 5(2) of the *Life Sentences (Northern Ireland) Order 2001*.

¹³⁰ Article 5(3) of the *Life Sentences (Northern Ireland) Order 2001*.

¹³¹ *R v Candless* [2004] NI 269.

¹³² Section 269(1) and Section 269(2) of the *Criminal Justice Act 2003*.

¹³³ Section 269(4) of the *Criminal Justice Act 2003*.

¹³⁴ *R v Howell* [2010] NICC 48.

¹³⁵ *R v Stewart* [2011] NICC 10.

process. In particular, consideration of the nature and gravity of the offence engages the Parole Board and the Minister for Justice in a process that closely resembles a sentencing exercise.¹³⁶ This is an unavoidable consequence because the Parole Board and the Minister for Justice should not be blind in their analysis to the seriousness of the particular offender's offence or to the severity of the sentence that he or she is serving. The concerns that this overlaps with considerations that are more appropriate to the sentencing process might be alleviated if the Parole Board and the Minister for Justice were to receive guidance from the sentencing judge in the form of a recommended minimum term to be served by the particular offender.

3.82 The second problem relates to the possibility that external events may influence the Minister for Justice or the Parole Board in their consideration of a case for early release. As discussed at paragraph 3.51, it is arguable that a more consistent and proportionate approach is taken in respect of the granting of early release than in respect of sentencing for murder. This is because the Parole Board and the Minister for Justice: (i) consider each case against broadly the same factors, namely, those listed at paragraphs 3.11 and 3.12 (thereby facilitating consistency), and (ii) have regard to the individual circumstances of each case under consideration (thereby facilitating proportionality). This approach may be jeopardised, however, where the Parole Board and the Minister for Justice are: (i) dealing with a case in which the sentence has been imposed following the application of an inconsistent and/or disproportionate approach, or (ii) influenced by external events. Such external events might include adverse media attention surrounding the circumstances of a particular case or intervening changes in sentencing or early release policy. The Commission considers, however, that this risk would be reduced if the Minister for Justice and the Parole Board were to receive guidance from the sentencing judge in the form of a recommended minimum term to be served by the offender.

3.83 The Commission has concluded, therefore, that it would be "appropriate and beneficial" to permit sentencing courts to recommend a minimum term to be served by an offender convicted of murder. As noted at paragraph 3.05, Article 13.6 of the Constitution provides that the power to commute or remit punishment imposed by any court is vested in the President but may also be conferred by law on other authorities. This was done in the *Criminal Justice Act 1951*, which confers the right to remit a sentence on the Government.¹³⁷ For this reason, any judicial indication at sentencing that an offender sentenced to life imprisonment should serve a minimum term is subject to the power of remission of the Executive under Article 13.6 and therefore would constitute a recommendation only that the offender serve such term. The Commission considers that this proposed reform would complement its earlier recommendation that a Judicial Council be empowered to provide guidance on sentencing. It is suggested that, together, these changes would serve to enhance consistency and proportionality in the Irish sentencing process.

3.84 *The Commission recommends that where an offender is convicted of murder, and is therefore sentenced to life imprisonment, legislation should provide that the judge may recommend a minimum term to be served by the offender.*

(c) The establishment of the Parole Board on an independent statutory basis

3.85 As discussed above at paragraphs 2.101 to 2.104, it may be questioned whether the mandatory life sentence for murder and the accompanying early release arrangements comply with Article 5(4) of the European Convention on Human Rights (ECHR). The case-law of the European Court of Human Rights has not addressed the question of whether Article 5(4) entitles prisoners serving wholly punitive life sentences to regular reviews of their detention by an independent, court-like body. For this reason, in *Whelan and Lynch v Minister for Justice, Equality and Law Reform*,¹³⁸ the Supreme Court held that the non-statutory, advisory nature of the Parole Board does not necessarily conflict with the requirements of Article 5 ECHR. The Commission considers, however, that the establishment of the Parole Board on a statutory basis is desirable and welcomes the Government's stated intention to

¹³⁶ O'Malley *Sentencing - Towards a Coherent System* (Round Hall, 2011) at 222.

¹³⁷ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 540.

¹³⁸ *Whelan and Lynch v Minister for Justice, Equality and Law Reform* [2010] IESC 34; [2012] 1 IR 1.

introduce this reform.¹³⁹ It notes that the establishment of a statutory Parole Board would have the benefit of enhancing the consistency and transparency of sentencing outcomes in murder cases. The specification of a recommended minimum term by a sentencing court (as recommended by the Commission in this Report) would, in turn, assist the proposed statutory Parole Board in performing its functions.

3.86 *The Commission recommends that the Parole Board be established on an independent statutory basis, and welcomes the Government's proposal to introduce legislation bringing about this effect.*

¹³⁹ See: Dáil Debates, Written Answers - Parole Board, 18 April 2012, Vol 761, No 3.

CHAPTER 4 PRESUMPTIVE MINIMUM SENTENCES

A Introduction

4.01 In this Chapter, the Commission considers the second type of mandatory sentence identified in the introduction, namely, the presumptive minimum sentence. Two pieces of legislation provide for such a sentencing regime in Ireland: the *Misuse of Drugs Act 1977* and the Firearms Acts. In Part B, the Commission considers the sentencing regime under the *Misuse of Drugs Act 1977*, beginning with an examination of how this regime operates in practice. In Part C, the Commission considers the practical operation of the sentencing regime under the Firearms Acts. Part D considers the use of minimum sentencing regimes in other common law countries. The Commission concludes in Part E by examining each of these presumptive sentencing regimes against the conceptual framework for criminal sanctions and sentencing.

B Presumptive Minimum Sentences under the Misuse of Drugs Act 1977

4.02 There are two offences under the *Misuse of Drugs Act 1977* which attract a presumptive minimum sentence. These are the offences of possessing¹ and importing² controlled drugs, having a value of €13,000 or more,³ with intent to sell or supply. Where a person is convicted of either of these offences, the court must impose a minimum sentence of 10 years⁴ unless there are exceptional and specific circumstances which would make such a sentence unjust in all the circumstances.⁵ In this section, the Commission considers the application of this category of presumptive minimum sentence by examining: (1) the elements of the possession and importation offences, (2) the relevant penalty provisions, (3) the early release provisions, and (4) the particular situation of drug couriers.

(1) Elements of the Offences

4.03 Some of the elements described below are particular to either the possession offence under section 15A of the *Misuse of Drugs Act 1977* or the importation offence under section 15B. Others are common to both offences.

(a) Possession

4.04 The first element of the offence under section 15A (but not section 15B) is “possession” of a controlled drug. While the term possession has not been definitively defined, the legal understanding of the term may be distinguished from the common understanding. Whereas the common understanding might equate “possession” with “custody”, the legal understanding identifies “custody” as being just one aspect of a more complex theory. In this regard, McAuley and McCutcheon observe that possession comprises control or dominion over goods and knowledge of their existence.⁶ Thus, a person may, in legal terms, possess goods regardless of whether or not he or she has custody of them. Where a person has custody and exercises control over goods, he or she is said to have “actual possession” of the

¹ Section 15A of the *Misuse of Drugs Act 1977*, as inserted by section 4 of the *Criminal Justice Act 1999*.

² Section 15B of the *Misuse of Drugs Act 1977*, as inserted by section 82 of the *Criminal Justice Act 2006*.

³ Under section 1 of the *Euro Changeover (Amounts) Act 2001*, the original figure of £10,000 was adjusted to €13,000.

⁴ Section 27(3C) of the *Misuse of Drugs Act 1977*.

⁵ Section 27(3D) of the *Misuse of Drugs Act 1977*.

⁶ McAuley and McCutcheon *Criminal Liability* (Round Hall, Sweet and Maxwell, 2000) at 208-209.

goods.⁷ Where, on the other hand, a person does not have custody of the goods but exercises control over them, he or she is said to have “constructive possession” of the goods. By way of illustration, McAuley and McCutcheon refer to the judgment of Davitt P in *Minister for Posts and Telegraphs v Campbell*.⁸

“... a person cannot, in the context of a criminal case, be properly said to keep or have possession of an article unless he has control of it personally or by someone else. He cannot be said to have actual possession of it unless he personally can exercise physical control over it; and he cannot be said to have constructive possession of it unless it is in the actual possession of someone over whom he has control so that it would be available to him if and when he wanted it... He cannot properly be said to be in control or possession of something of whose existence and presence he has no knowledge.”⁹

4.05 Thus, the term “possession” is broad enough to describe the range of roles played by those involved in the drugs supply chain. At one end of the scale, there are the high-level offenders who manage and direct the supply chain. These may be described as having constructive possession of the drugs as they exercise ultimate control over the supply chain. At the other end of the scale, there are the low-level offenders who, for instance, are coerced into delivering the drugs to their final destination. These may be described as having actual possession of the drugs as they exercise physical control over the drugs.

4.06 The Court of Criminal Appeal has considered the issue of possession in a number of drugs cases. In *The People (DPP) v Gallagher*,¹⁰ the applicant sought to appeal his conviction on the ground that the evidence did not establish that he as a matter of law had ever been in possession of the drugs in question. It was submitted that since the container had been at all times under Garda surveillance, it, together with its contents, had been in the custody and control of the authorities and could not in law, therefore, be described as being in his possession. In rejecting this argument, the Court stated:

“The word ‘possession’ is a common word of the English language and well known to the law. There are many offences concerning unlawful possession such as those relating to firearms, stolen goods, pornography, lethal weapons etc. It is a term which may indeed require particular analysis in certain contexts such as where there is an issue of constructive possession. In this case the context is plain. It is one of actual possession. Possession having been taken of the container on delivery, the men in question opened it and proceeded to unload its contents... [T]hey were exercising physical control over the container and its contents. There could not be a clearer case of actual possession. The fact that the gardaí were involved in a close surveillance operation with a view to arresting those involved in the transportation and unloading of the drugs does not take away from these objective facts and does not in law mean that those involved did not at the time of their arrest have possession of the drugs in question... Surveillance operations based on information and intelligence are part and parcel of policing techniques and it would be ludicrous to suggest that such surveillance operations, which closely monitor illegal activity with a view to arresting the culprits, could in some way exculpate such culprits from responsibility for their actions and in particular mean that they did not have possession of that which was de facto in their possession.”

4.07 In *The People (DPP) v Goulding*,¹¹ the Court of Criminal Appeal considered whether there was sufficient evidence to leave the question of possession to the jury. An independent witness had testified to seeing a package being thrown from the passenger side of a car in which the applicant had been the front-seat passenger. The Court of Criminal Appeal concluded that this constituted sufficient evidence.

⁷ McAuley and McCutcheon *Criminal Liability* (Round Hall, Sweet and Maxwell, 2000) at 208.

⁸ *Minister for Posts and Telegraphs v Campbell* [1966] IR 69.

⁹ *Ibid.* Cited with approval by the Court of Criminal Appeal in *The People (DPP) v Foley* [1995] 1 IR 267 at 286.

¹⁰ *The People (DPP) v Gallagher* [2006] IECCA 110.

¹¹ *The People (DPP) v Goulding* [2010] IECCA 85.

(b) Importation

4.08 The first element of the offence under section 15B (but not section 15A) is “importation” of a controlled drug. While the term “import” has not been defined by the *Misuse of Drugs Act 1977*, as amended, the ordinary meaning of the term is to bring goods or services into a country for sale.¹² In this regard, it may be noted that while it is an offence under section 15B to *import* controlled drugs, it is not an offence under section 15B to *export* controlled drugs. This raises an issue as to whether a person convicted of exporting controlled drugs worth €13,000 or more, like a person convicted of importing the same value of controlled drugs, may attract a presumptive minimum sentence of 10 years.

(c) Controlled Drug

4.09 The second element of the offences under section 15A and section 15B is that the possession or importation must relate to a controlled drug. The term “controlled drug” is defined by section 2(1) of the *Misuse of Drugs Act 1977* as:

“... any substance, product or preparation (other than a substance, product or preparation specified in an order under subsection (3) of this section which is for the time being in force) which is either specified in the Schedule to this Act or is for the time being declared pursuant to subsection (2) of this section to be a controlled drug for the purposes of the Act.”

There is thus no distinction between different types of controlled drugs.

(d) Market Value of €13,000

4.10 The third element of the offences under section 15A and section 15B is that the controlled drug must have a market value of €13,000 or more. The term “market value” is defined as the price that the drug could be expected to fetch on the market for the unlawful sale or supply of controlled drugs.¹³

4.11 Evidence regarding the market value of the drug may be given by a member of An Garda Síochána or an officer of customs and excise who has knowledge of the unlawful sale or supply of controlled drugs.¹⁴ In *The People (DPP) v Hanley*,¹⁵ the applicant had sought leave to appeal his conviction on the ground that the trial judge had erred in admitting evidence from a retired Garda regarding the value of the drugs in question. It was submitted that the effect of section 15A(3) was to prescribe the manner in which the value of the controlled drug had to be proved and that was by means of a Garda witness giving evidence in accordance with the section. The Court of Criminal Appeal rejected this argument and held that section 15A(3) was an “enabling provision”:

“It enables the value of the drugs to be proved by a member of the Garda Síochána or an officer of the Customs and Excise who has knowledge of the unlawful sale or supply of controlled drugs. But what the subsection does not do is say that such evidence may not be adduced in some other manner. It could be adduced by an admission. It could be adduced by some other expert. Certainly any person who would have knowledge of the illegal drug industry may be in a position to satisfy the trial judge that he has the status of an expert and so place himself in a position to give evidence.”

The court found that while the retired Garda witness did not come within section 15A(3), he had proved himself an expert by providing evidence regarding his knowledge and experience of the sale and supply of controlled drugs. Thus, he had been competent to give evidence.

4.12 The use of “market value” as the standard for determining whether an offence under section 15A or section 15B has been committed, and therefore whether the statutory minimum sentence applies, is

¹² New Oxford Dictionary of English (Oxford University Press, 2001) at 918.

¹³ Section 15A(5) and section 15B(5) of the *Misuse of Drugs Act 1977*.

¹⁴ Section 15A(3) and section 15B(2) of the *Misuse of Drugs Act 1977*.

¹⁵ *The People (DPP) v Hanley* [2010] IECCA 99

problematic in a number of respects.¹⁶ By and large, these problems stem from the fact that the market value of any commodity may fluctuate to a significant degree depending on when and where that commodity is sold and how much of that commodity is already on the market.¹⁷ As a result, evidence regarding the market value of drugs is at best an estimate.

4.13 Thus, it may be argued that “market value” is not capable of proof beyond a reasonable doubt. However, that section 15A obliges the prosecution to establish this criterion beyond a reasonable doubt was recently acknowledged by the Supreme Court in *The People (DPP) v Connolly*:¹⁸

“... [P]roof of value is an essential ingredient of the offence under section 15A. It is what distinguishes it from the offence of possession for sale or supply of an unquantified and unvalued amount of drugs. Most importantly, it is what has caused the Oireachtas, subject to exceptional mitigating circumstances, to mark the offence as one of extreme seriousness such as to require imprisonment. This is, of course, subject to the exceptions mentioned in the section. The ingredient of value must be proved to the satisfaction of the jury beyond reasonable doubt.”¹⁹

Given that the market value is not static, it is at least arguable that in most (if not all) cases, there will be a reasonable doubt as to the accuracy of the market value being asserted.²⁰

4.14 The fact that the market value may fluctuate to a significant degree gives rise to a second problem: the risk of arbitrariness. It is not difficult to imagine a situation in which two similarly placed people, convicted of identical offences under section 15A, are sentenced to different terms of imprisonment because the market value in the locality of the first offence is different to the market value in the locality of the second.²¹

4.15 For similar reasons, O’Malley asserts that “market value” is an inappropriate triggering factor.²² In this regard, he observes that minimum sentences are generally triggered by a factor which is additional to, or aggravates, the basic offence. He asserts that these triggering factors should be clearly defined and capable of unequivocal identification. As market value depends on an estimated street value of the drugs, it cannot be clearly defined and is not capable of unequivocal definition.²³

4.16 Finally, it has been noted that the threshold of €13,000 has not been adjusted since its introduction, with the exception of a slight increase when the Euro was introduced.²⁴ This, it is argued,

¹⁶ For a complete analysis, see: Caulkins “Price and Purity Analysis for Illicit Drug: Data and Conceptual Issues” (2005) Heinz Research Paper 25 at 4. Available at: <http://repository.cmu.edu/heinzworks/25> [Last accessed: 22 May 2013]; and McDermott “Price and Purity of Illicit Drugs”. Paper delivered at 13th Annual National Prosecutors’ Conference, Dublin Castle Conference Centre, 19 May 2012.

¹⁷ Ni Raifeartaigh “The Criminal Justice System and Drug Related Offending: Some Thoughts on Procedural Reform” (1998) 4(1) *Bar Review* 15.

¹⁸ *The People (DPP) v Connolly* [2011] IESC 6.

¹⁹ *Ibid.*

²⁰ The process by which market value is determined was considered by the Supreme Court in *The People (DPP) v Connolly* [2011] IESC 6; and the Court of Criminal Appeal in *The People (DPP) v Fynamore* [2008] IECCA 99.

²¹ Ni Raifeartaigh “The Criminal Justice System and Drug Related Offending: Some Thoughts on Procedural Reform” (1998) 4(1) *Bar Review* 15.

²² O’Malley “Further Observations on DPP v Connolly (Part 1 of 3)” 22 February 2011. Available at: www.extempore.ie/2011/02/22/further-observations-on-dpp-v-connolly-part-1-of-3/ [Last accessed: 22 May 2013].

²³ *Ibid.*

²⁴ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 340.

creates a risk of arbitrary and unjust consequences which is mitigated only by the exercise of the limited judicial discretion accorded by section 27.²⁵

(i) *The People (DPP) v Connolly*

4.17 The process by which market value is determined was considered by the Supreme Court in *The People (DPP) v Connolly*.²⁶ The appellant had been charged with an offence under section 15A when 10 packs containing 10 kilogrammes of drugs were found in his car. Five of the 10 packs were analysed and found to contain amphetamine. While the purity of the amphetamine was not tested, the forensic evidence was that “in general” purities fell between 10 percent and 40 percent. On cross-examination, it was conceded that the presence of as little as 1 percent of amphetamine could trigger the results which had been achieved. The crucial issue was whether the threshold market value of €13,000 had been established. If there had been 10 percent of amphetamine in five of the packs, the value of the drugs would have been approximately €72,877.50. However, if there had only been 1 percent of amphetamine, the value would have been €7,287.75 which would not have triggered the statutory minimum sentence.

4.18 In the Circuit Criminal Court, the appellant sought a direction that there was no case to answer on the ground that there was insufficient proof that the drugs were worth €13,000 or more. The trial judge refused the application and sentenced the appellant to 10 years’ imprisonment. The appellant appealed to the Court of Criminal Appeal on the ground that the trial judge had erred in not withdrawing the case from the jury. The Court of Criminal Appeal dismissed the appeal but, pursuant to section 29 of the *Courts of Justice Act 1929*, certified the following question as a question of law of exceptional public importance:

“In a prosecution pursuant to section 15A of the *Misuse of Drugs Act 1977*, for the purpose of ascertaining the amount of a controlled substance present in a powder in a sealed container or in a number of such containers proven by expert evidence to contain that particular controlled substance, may the amount of that controlled substance present in the powder be established by the oral evidence of an expert as to the range within which amounts of that controlled substance in other powders *generally* fell and, if the answer is in the affirmative, must the prosecution disclose to the defence a statement for a report by that expert setting out the facts upon which her or his opinion as to that range is based?” [emphasis added.]

4.19 The Supreme Court considered the limited extent to which the samples had been analysed in so far as the purity of the amphetamine had not been tested. It examined the use of the term “generally” to describe the rate at which purity levels fell between 10 percent and 40 percent. In the absence of any clarification as to what “generally” meant, the Supreme Court concluded that “generally” meant “probably” and that probability was not enough to exclude the possibility that the percentage of amphetamine present could have been as low as 1 percent. The Supreme Court thus set aside the conviction.

4.20 O’Malley commends the Supreme Court for having “reached the right decision ... for the right reason”.²⁷ He notes, however, that:

“It is rather frightening in retrospect to realise that a conviction for a s.15A offence could be based on the probability as opposed to the actuality of drug purity levels. It is all the more worrying in circumstances where conviction carries either a presumptive or mandatory minimum sentence of 10 years’ imprisonment, a matter to which the Supreme Court rightly drew attention. The

²⁵ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 340.

²⁶ *The People (DPP) v Connolly* [2011] IESC 6.

²⁷ O’Malley “Further Observations on DPP v Connolly (Part 1 of 3)” 22 February 2011. Available at: www.extempore.ie/2011/02/22/further-observations-on-dpp-v-connolly-part-1-of-3/ [Last accessed: 22 May 2013].

quashing of the appellant's conviction should be a wake-up call to those charged with furnishing the necessary proofs in trials for s.15A and s.15B offences."²⁸

(ii) *The People (DPP) v Finnermore*

4.21 The process by which market value is determined was considered by the Court of Criminal Appeal in the earlier case of *The People (DPP) v Finnermore*.²⁹ The applicant had been charged with an offence under section 15A when he was found in possession of a number of bags in which amphetamine was detected. The forensic evidence was that tests had been carried out on one of 48 tape-bound plastic packs and a sample of loose white powder found in another bag. The evidence was that amphetamine was the "main component" in the plastic pack and a "major component" of the loose white powder. Further tests were carried out on 16 of the 48 packs and a sample of the loose white powder. The evidence was that there was a "presence of amphetamine". At no point was the purity of the amphetamine analysed.

4.22 The applicant argued that it was not reasonable to ask the jury to accept that on the basis of an analysis of a small portion of the drugs found, all the drugs were, beyond a reasonable doubt, the same. The Court of Criminal Appeal held:

"The question as to what is or is not sufficient analysis, in terms of amount, or the purity of the drugs, must depend on the circumstances of each case. There is no principle or rule of law known to this court which requires that in each and every case, every package must inevitably be individually analysed before a conviction can be considered safe."³⁰

Thus it would appear that an analysis need not be carried out on every pack found in every case. This will, however, depend very much on the circumstances of the particular case. In *Finnermore*, for instance, the Court appeared to attach weight to the fact that the 48 packs had been "wrapped in a substantially identical manner" and placed together while the loose powder was found "without any apparent division or distinction between what was taken for analysis and the remainder of the bulk". The Court noted, however, that in a different case, a more extensive analysis might be required.

4.23 In *The People (DPP) v Connolly*,³¹ the Supreme Court distinguished *Finnermore* on the ground that the forensic evidence in *Finnermore* was that amphetamine was the "main" or "major" component in the samples taken.

(iii) *Mens Rea*

4.24 The *Misuse of Drugs Act 1977*, as amended, provides that *mens rea* regarding the value of the drugs involved is not necessary.³² This ensures that the range of actors in the drugs supply chain may be found guilty of an offence under section 15A or section 15B. At one end of the scale, there are the high-level offenders who undoubtedly know the approximate value of the controlled drugs while, at the other end of the scale, there are the low-level offenders who are less likely to know the value of the drugs

(e) *Intent to Sell or Supply*

4.25 The fourth element of an offence under section 15A (but not section 15B) is that the possession must be motivated by an intention to sell or supply the controlled drugs. However, it is rarely, if ever, necessary for the prosecution to prove intention as section 15A(2) contains a reverse onus provision.

²⁸ O'Malley "Further Observations on DPP v Connolly (Part 1 of 3)" 22 February 2011. Available at: www.extempore.ie/2011/02/22/further-observations-on-dpp-v-connolly-part-1-of-3/ [Last accessed: 22 May 2013].

²⁹ *The People (DPP) v Finnermore* [2008] IECCA 99.

³⁰ *Ibid.*

³¹ *The People (DPP) v Connolly* [2011] IESC 6.

³² See: section 15A(3A) and section 15B(3) of the *Misuse of Drugs Act 1977*.

This permits the court to presume, until satisfied to the contrary,³³ that there was such an intention where, having regard to the quantity of the controlled drug or to such other matters as it considers relevant, it is satisfied that the controlled drug was not intended for immediate personal use.

(2) Penalties

(a) Presumptive Minimum Sentence of 10 Years' Imprisonment

4.26 Section 27(3C) of the *Misuse of Drugs Act 1977*³⁴ provides that where a person is convicted of an offence under section 15A or section 15B, the court must impose a sentence of not less than 10 years.³⁵ Section 27(3C) must, however, be read in conjunction with section 27(3A), which provides that the maximum sentence for an offence under section 15A is life imprisonment, and section 27(3D), which provides that a period shorter than 10 years may be imposed where there are "exceptional and specific circumstances" relating to the offence or the offender.

4.27 The presumptive 10-year minimum should not be used as a benchmark sentence but may be a useful guide as to the gravity of the offences under section 15A. In *The People (DPP) v Renald*,³⁶ the applicant sought leave to appeal against a sentence of five years and argued that once exceptional and specific circumstances were found to exist, the 10-year minimum became irrelevant. The Court of Criminal Appeal rejected this argument:

"Even where exceptional circumstances exist which would render the statutory minimum term of imprisonment unjust, there is no question of the minimum sentence being ignored... even though that sentence may not be applicable in a particular case, the very existence of a lengthy mandatory minimum sentence is an important guide to the Courts in determining the gravity of the offence and the appropriate sentence to impose for its commission. That is not to say that the minimum sentence is necessarily the starting point for determining the appropriate sentence. To do so would be to ignore the other material provisions, that is to say the maximum sentence."³⁷

This passage has been endorsed by the courts on a number of occasions.³⁸

4.28 The Court of Criminal Appeal has also considered the method by which the courts determine the sentence to be imposed in individual cases. In *The People (DPP) v Duffy*,³⁹ the applicant sought leave to appeal against a sentence of six years. In the Circuit Court, the judge had outlined the method by which he would determine the length of the sentence to be imposed. He indicated that he would first assess the length of the sentence on the assumption that there were no mitigating factors. He would then consider the various mitigating factors and reduce the sentence accordingly. If the result was a sentence which was greater than the statutory minimum, that would be the sentence which he would impose. If, on the other hand, the result was a sentence which was less than the statutory minimum, he would consider whether he should increase the sentence to the statutory minimum. The Court of Criminal Appeal upheld this approach and found that it was "essentially in harmony" with the law as explained by Murphy J in *Renald*. It noted that other methods might be equally satisfactory provided that the sentencing judge had

³³ Costello queries whether the term "satisfied to the contrary" requires the accused to establish his or her innocence as a possibility or on the balance of probabilities. See: Irish Current Law Statutes Annotated 1999 at 10-05.

³⁴ As amended by section 33 of the *Criminal Justice Act 2007*; section 84 of the *Criminal Justice Act 2006*; and section 5 of the *Criminal Justice Act 1999*.

³⁵ That the court may impose a sentence greater than 10 years has been confirmed by the Court of Criminal Appeal. See, for example: *The People (DPP) v Hogarty* Court of Criminal Appeal 21 December 2001; and *The People (DPP) v Gilloughly* Court of Criminal Appeal 7 March 2005.

³⁶ *The People (DPP) v Renald* Court of Criminal Appeal 23 November 2001.

³⁷ *Ibid.*

³⁸ See: *The People (DPP) v Botha* [2004] 2 IR 375 at 383; and *The People (DPP) v Ducque* [2005] IECCA 92.

³⁹ *The People (DPP) v Duffy* Court of Criminal Appeal 21 December 2001.

taken account of the statutory minimum as he or she was obliged to do. In subsequent cases, however, the Court of Criminal Appeal has tended to advocate the approach adopted in *Duffy*.⁴⁰ Irrespective of the approach adopted, however, it would appear that best practice requires the sentencing judge to set out clearly the method by which he or she has determined the sentence to be imposed.⁴¹

(b) Exceptional and Specific Circumstances: Mitigating Factors

4.29 Section 27(3D)⁴² of the *Misuse of Drugs Act 1977*, as amended, provides that section 27(3C)⁴³ will not apply where the court is satisfied that there are exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make a sentence of at least 10 years' imprisonment unjust in all the circumstances. By contrast with ordinary mitigating factors, the circumstances contemplated by section 27(3D) must be both exceptional *and* specific.⁴⁴

4.30 The extent to which exceptional and specific circumstances may justify a downward departure from the statutory minimum is not a precise mathematical calculation. In *The People (DPP) v Rossi and Hellewell*⁴⁵ the Court of Criminal Appeal thus noted:

"Firstly it cannot be assumed that ten years is the appropriate sentence from which any discounts are to be calculated. The maximum period is life imprisonment, not to say that these particular offences would have attracted life imprisonment, but it is not correct necessarily to calculate by deduction from ten years and secondly it is not an exercise in a mathematical process where you take three years for one element and then look for a further calculated discount under the headings... ."

Where there is an overlap between various exceptional and specific circumstances, this should not necessarily result in separate reductions of the sentence.⁴⁶ In any case, the sentence imposed should always reflect the gravity of the particular offence.⁴⁷

4.31 Section 27(3D) indicates that exceptional and specific circumstances may include "any matters [which the court] considers appropriate", including whether the person has pleaded guilty to the offence and whether the person has materially assisted in the investigation of the offence. As noted in Chapter 1, a guilty plea and material assistance are, in general, considered to be factors which mitigate the severity of the sentence rather than the seriousness of the offence.

(i) Guilty Plea

4.32 Section 27(3D)(b)(i)⁴⁸ of the *Misuse of Drugs Act 1977*, as amended, provides that a guilty plea may be considered an exceptional and specific circumstance for the purpose of considering whether the statutory minimum sentence of 10 years should apply. The provision recognises, however, that: (a) the stage at which the accused indicates his or her intention to plead guilty;⁴⁹ and (b) the circumstances surrounding that plea⁵⁰ may be relevant to the determination of whether or not the statutory minimum

⁴⁰ In subsequent cases, the Court of Criminal Appeal has tended to advocate the approach in *Duffy*. See: *The People (DPP) v Farrell* [2010] IECCA 116; and *The People (DPP) v Costelloe* [2009] IECCA 28.

⁴¹ See: *The People (DPP) v Nelson* Court of Criminal Appeal 31 July 2008.

⁴² Formerly, section 27(3C).

⁴³ Formerly, section 27(3B).

⁴⁴ *The People (DPP) v Botha* [2004] 2 IR 375 at 384.

⁴⁵ *The People (DPP) v Rossi and Hellewell* Court of Criminal Appeal 18 November 2002.

⁴⁶ *The People (DPP) v Galligan* Court of Criminal Appeal 23 July 2003.

⁴⁷ *The People (DPP) v Henry* Court of Criminal Appeal 15 May 2002.

⁴⁸ Formerly, section 27(3C)(a).

⁴⁹ Section 27(3D)(b)(i)(I), formerly section 27(3C)(a)(i).

⁵⁰ Section 27(3D)(b)(i)(II), formerly section 27(3C)(a)(ii).

should apply. Thus, it has been noted that an early guilty plea merits more credit than a late guilty plea⁵¹ and that an accused who voluntarily pleads guilty will be given more credit than an accused who pleads guilty having been caught red-handed.⁵²

4.33 The Court of Criminal Appeal has, however, cautioned against treating a guilty plea, in and of itself, as an exceptional and specific circumstance. In *The People (DPP) v Ducque*,⁵³ the Court observed:

“First of all there is nothing exceptional about a plea of guilty, it is one of the commonest occurrences in any criminal trial. Secondly, it seems to be at least implied in the judgment of this court delivered by Hardiman J in *Botha* ... that importance must be attached to the conjunctive ‘and, if so’ in the statutory provision so that a plea of guilty can only be relevant to an escape from the mandatory minimum sentence if there are other circumstances which effectively can render the combination of the plea of guilty and those circumstances to be exceptional circumstances. These can include the stage at which the accused indicated the intention to plead guilty, the circumstances in which the indication was given and whether that person materially assisted in the investigation of the offence.”

Thus, the courts will, more often than not, consider a guilty plea in addition to other factors such as material assistance.⁵⁴ The courts may also consider whether there is some additional factor which endows the guilty plea with exceptionality, such as where it is particularly early,⁵⁵ lightens the workload of the courts or assists the prosecution’s case.⁵⁶

4.34 While a guilty plea may result in the imposition of a sentence lower than the presumptive minimum, an accused who pleads “not guilty” will not automatically receive a sentence of at least 10 years.⁵⁷ Similarly, it has been noted that an accused who decides to plead ‘not guilty’ should not be penalised with a more severe sentence.⁵⁸

4.35 In a 2001 Department of Justice report,⁵⁹ McEvoy concluded that section 27 of the *Misuse of Drugs Act 1977* had been reasonably successful in its operation in so far as it had encouraged a very high rate of guilty pleas. During the period November 1999 to May 2001, in all but one of 55 cases, the accused had pleaded guilty. This he attributed to the fact that a conviction following a “not guilty” plea

⁵¹ See: *The People (DPP) v Godspeed* Court of Criminal Appeal 13 July 2009; *The People (DPP) v Coles* [2009] IECCA 144; *The People (DPP) v Brodigan* [2008] IECCA 127; and *The People (DPP) v Benjamin* Court of Criminal Appeal 14 January 2002.

⁵² *The People (DPP) v Delaney* [2010] IECCA 57; *The People (DPP) v Anderson* [2010] IECCA 46; *The People (DPP) v Keogh* [2009] IECCA 128; *The People (DPP) v Nelson* Court of Criminal Appeal 31 July 2008; *The People (DPP) v Kinahan* [2008] IECCA 5; *The People (DPP) v Lernihán* [2007] IECCA 21; *The People (DPP) v Ducque* [2005] IECCA 92; *The People (DPP) v Galligan* Court of Criminal Appeal 23 July 2003; *The People (DPP) v Henry* Court of Criminal Appeal 15 May 2002; and *The People (DPP) v Ormonde* [2011] IECCA 46.

⁵³ *The People (DPP) v Ducque* [2005] IECCA 92.

⁵⁴ See: *The People (DPP) v Renald* Court of Criminal Appeal 23 November 2001; *The People (DPP) v McGrane* [2010] IECCA 8; *The People (DPP) v Kinahan*; [2008] IECCA 5; *The People (DPP) v Howard and McGrath* Court of Criminal Appeal 29 July 2005; *The People (DPP) v Botha* Court of Criminal Appeal 19 January 2004; *The People (DPP) v Galligan* Court of Criminal Appeal 23 July 2003; *The People (DPP) v Alexiou* [2003] 3 IR 513; *The People (DPP) v Benjamin* Court of Criminal Appeal 14 January 2002; and *The People (DPP) v Hogarty* Court of Criminal Appeal 21 December 2001.

⁵⁵ *The People (DPP) v Dermody* [2007] 2 IR 622.

⁵⁶ *The People (DPP) v Farrell* [2010] IECCA 116.

⁵⁷ Smith “Sentencing Section 15A Offences” (2010) 20(1) ICLJ 8; and *The People (DPP) v Duffy* Court of Criminal Appeal 21 December 2001. See also: *The People (DPP) v Malric* [2011] IECCA 99.

⁵⁸ *The People (DPP) v Shekale* [2008] IECCA 28; and *The People (DPP) v Byrne* [2012] IECCA 72.

⁵⁹ McEvoy *Research for the Department of Justice on the Criteria applied by the Courts in sentencing under s.15A of the Misuse of Drugs Act 1977 (as amended)* (Department of Justice, 2001).

would probably have resulted in the imposition of a 10-year sentence. Section 27 had thus saved court time and public funds, freed up Gardaí and resulted in a higher rate of conviction. He noted, however, that there was now a “positive disincentive” to test the prosecution case:

“In a criminal trial anything can go wrong; difficulties can arise with warrants, witnesses may be unavailable for a variety of reasons, there can be a flaw in the chain of evidence, technical errors may be made and so forth. However the consequences of unsuccessfully testing the prosecution case in a s.15A charge are so severe, it would seem that one of the practical effects of the section has been to discourage the vast majority of accused persons from proceeding to trial unless the case against them appears to be obviously flawed.”⁶⁰

4.36 This view was confirmed in the course of the Commission’s consultation process with interested parties, following the publication of the Consultation Paper.

(ii) Material Assistance

4.37 Section 27(3D)(b)(ii)⁶¹ of the *Misuse of Drugs Act 1977*, as amended, provides that material assistance may also be considered an exceptional and specific circumstance for the purpose of determining whether the statutory minimum sentence should apply. Material assistance may take many forms. In *The People (DPP) v Davis*,⁶² Denham J observed that:

“The most basic [form of material assistance] is to admit the offence. Secondly, an admission may be made together with showing the Gardaí drugs, etc, relating to the specific offence in issue. Thirdly, there is a much more significant material assistance where an accused assists the Gardaí in relation to other offences and criminality. This latter is a matter of great public interest, and has been given significant weight in other cases.”

Therefore, an admission or the provision of information regarding the particular offence or other offences may be considered material assistance.

4.38 The Court of Criminal Appeal has cautioned against treating an admission without more as material assistance.⁶³ In general, therefore, an admission must relate to more than just the accused’s own involvement in the offence.⁶⁴ It must, for instance, facilitate the investigation or prosecution of the offence by revealing the full extent of the accused’s involvement or the identity of any others involved.⁶⁵ The Court has indicated that it will have particular regard to situations in which the accused has made an admission where, by doing so, he or she has exposed himself or herself to a risk of death or serious

⁶⁰ McEvoy *Research for the Department of Justice on the Criteria applied by the Courts in sentencing under s.15A of the Misuse of Drugs Act 1977 (as amended)* (Department of Justice, 2001) at 11.

⁶¹ Formerly, section 27(3C)(b).

⁶² *The People (DPP) v Davis* [2008] IECCA 58.

⁶³ *The People (DPP) v Coles* [2009] IECCA 144.

⁶⁴ *Ibid*; and *The People (DPP) v Dermody* [2007] 2 IR 622.

⁶⁵ *The People (DPP) v Sweeney* Court of Criminal Appeal 12 March 2009; *The People (DPP) v Purcell* [2010] IECCA 55; and *The People (DPP) v Brodigan* [2008] IECCA 127. See also: *The People (DPP) v Duffy* Court of Criminal Appeal 21 December 2001 in which the accused expressed a desire to plead guilty to a charge on which he had yet to be returned; *The People (DPP) v Malric* [2011] IECCA 99 in which the applicant named persons who had previously travelled to Europe transporting drugs and the Court of Criminal Appeal considered that her information would be of value to European authorities and could lead to the apprehension of such persons in the future; and *The People (DPP) v Cleary and Brown* [2012] IECCA 32 in which the Court of Criminal Appeal deemed it important that the Gardaí had taken the “unusual” step of furnishing and placing on the court file, a letter recording that each of the applicants had afforded material assistance.

injury.⁶⁶ An admission voluntarily given will merit more credit than an admission where the accused has been caught red-handed.⁶⁷

4.39 Similarly, information which facilitates the investigation or prosecution of an offence may constitute material assistance.⁶⁸ Information regarding those in charge of the operation is particularly sought after.⁶⁹ However, the courts seem to have grown more sympathetic towards those who feel that they cannot provide information for fear of retribution.⁷⁰

(iii) Any Matters the Court considers Appropriate

4.40 Section 27(3D)(b)⁷¹ of the *Misuse of Drugs Act 1977*, as amended, also provides that the court may have regard to “any matters it considers appropriate”. While these matters have not been exhaustively defined in the legislation or elsewhere, there are a number of matters to which the courts’ attention has been frequently drawn. These matters may be divided into two categories: (a) those that mitigate the seriousness of the offence, and (b) those that mitigate the severity of the sentence.

4.41 The matters that mitigate the seriousness of the offence include those relating to culpability (duress, capacity), harm (type, quantity and value of the controlled drugs) and offender behaviour (level of involvement). The fact that an offender was coerced into carrying or holding drugs may be considered an exceptional and specific circumstance.⁷² Similarly, the fact that an offender suffers from an intellectual disability, has low intelligence, or is simply gullible and naive, may constitute an exceptional and specific circumstance.⁷³ Whereas the courts may only have limited regard to the type of controlled drug involved,⁷⁴ the courts must consider the value and quantity.⁷⁵ Finally, the fact that an offender had a low level of involvement in the commission of an offence may be considered an exceptional and specific

⁶⁶ *The People (DPP) v Coles* [2009] IECCA 144.

⁶⁷ *The People (DPP) v McGrane* [2010] IECCA 8.

⁶⁸ *The People (DPP) v Delaney* [2010] IECCA 57; and *The People (DPP) v Galligan* Court of Criminal Appeal 23 July 2003.

⁶⁹ *The People (DPP) v Renald* Court of Criminal Appeal 23 November 2001; *The People (DPP) v Rossi and Hellewell* Court of Criminal Appeal 18 November 2002; and *The People (DPP) v Henry* Court of Criminal Appeal 15 May 2002.

⁷⁰ *The People (DPP) v Anderson* [2010] IECCA 46.

⁷¹ Formerly, section 27(3C).

⁷² *The People (DPP) v Kirwan* [2010] IECCA 43; *The People (DPP) v Spratt* [2007] IECCA 123; and *The People (DPP) v Farrell* [2010] IECCA 116.

⁷³ *The People (DPP) v Alexiou* [2003] 3 IR 513; *The People (DPP) v Sweeney* Court of Criminal Appeal 12 March 2009; and *The People (DPP) v Malric* [2011] IECCA 99.

⁷⁴ *The People (DPP) v Renald* Court of Criminal Appeal 23 November 2001; *The People (DPP) v Farrell* [2010] IECCA 116; *The People (DPP) v Nelson* Court of Criminal Appeal 31 July 2008; *The People (DPP) v Long* [2008] IECCA 133; *The People (DPP) v Long* [2006] IECCA 49; and *The People (DPP) v Gilligan (No 2)* [2004] 3 IR 87 at 92.

⁷⁵ *The People (DPP) v Long* [2008] IECCA 133.

circumstance.⁷⁶ In this regard, the Court of Criminal Appeal has distinguished between those who are vulnerable and those who willingly engaged in the drug trade for financial gain.⁷⁷

4.42 The matters that mitigate the severity of the sentence include previous good character, rehabilitation and the particular burden of a custodial sentence. Thus, the fact that an offender was previously of good character may be considered an exceptional and specific circumstance.⁷⁸ An offender may be treated as being of previous good character where he or she has previous convictions which are either minor and unrelated to drug trafficking,⁷⁹ or which date back some time.⁸⁰ The fact that an offender has sought to overcome a drug addiction⁸¹ or is unlikely to re-offend⁸² may be considered exceptional and specific circumstances. Where certain factors would render a custodial sentence particularly burdensome for an offender (for example, where an offender is a foreign national⁸³ or suffers from ill-health⁸⁴) these may also constitute exceptional and specific circumstances.

(c) Aggravating Factors

4.43 Section 27(3D)(c)⁸⁵ of the *Misuse of Drugs Act 1977*, as amended, provides that the court, when deciding whether it would be unjust in all the circumstances to impose the minimum sentence, may have regard to: (i) any previous drug trafficking convictions, and (ii) the public interest in preventing drug trafficking.

⁷⁶ *The People (DPP) v Alexiou* [2003] 3 IR 513 at 518-519; *The People (DPP) v Botha* [2004] 2 IR 375; and *The People (DPP) v Whitehead* [2008] IECCA 123. See: *The People (DPP) v Long* [2006] IECCA 49; and *The People (DPP) v Henry* Court of Criminal Appeal 15 May 2002 in relation to offenders who have a high level of involvement in the drugs trade. See also: *The People (DPP) v Wall* [2011] IECCA 45 in which the Court of Criminal Appeal took into account the fact that the role of the accused was as a courier and storeman and that he was “not higher up the ladder of organisation of evil trade in contraband”.

⁷⁷ *The People (DPP) v Hogarty* Court of Criminal Appeal 21 December 2001; and *The People (DPP) v Farrell* [2010] IECCA 116.

⁷⁸ *The People (DPP) v Galligan* Court of Criminal Appeal 23 July 2003; *The People (DPP) v Duffy* Court of Criminal Appeal 21 December 2001; and *The People (DPP) v Wall* [2011] IECCA 45.

⁷⁹ *The People (DPP) v Galligan* Court of Criminal Appeal 23 July 2003; *The People (DPP) v McGrane* [2010] IECCA 8; *The People (DPP) v Keogh* [2009] IECCA 128; and *The People (DPP) v Ormonde* [2011] IECCA 46.

⁸⁰ *The People (DPP) v Botha* [2004] 2 IR 375; and *The People (DPP) v Purcell* [2010] IECCA 55

⁸¹ *The People (DPP) v Anderson* [2010] IECCA 46; and *The People (DPP) v Ryan* [2008] IECCA 63. See also: *The People (DPP) v Deans* [2012] IECCA 11, in which the Court of Criminal Appeal was “impressed” by the “significant steps” taken by the appellant to deal with his addiction (particular emphasis was placed on a series of clear urinalysis results obtained by the appellant over the course of several months); and *The People (DPP) v Murphy* [2010] IECCA 44 in which the Court was influenced by the fact that the applicant had not only “made significant progress” in terms of his own rehabilitation but had become an outreach coordinator and was facilitating the rehabilitation of others.

⁸² *The People (DPP) v Renald* Court of Criminal Appeal 23 November 2001; *The People (DPP) v Malric* [2011] IECCA 99; and *The People (DPP) v Wall* [2011] IECCA 45.

⁸³ *The People (DPP) v Renald* Court of Criminal Appeal 23 November 2001; *The People (DPP) v Foster* Court of Criminal Appeal 15 May 2002; *The People (DPP) v Whitehead* [2008] IECCA 123; *The People (DPP) v Malric* [2011] IECCA 99; and *The People (DPP) v Harding* [2011] IECCA 20.

⁸⁴ *The People (DPP) v Kinahan* [2008] IECCA 5; *The People (DPP) v Vardacardis* Court of Criminal Appeal 20 January 2003; and *The People (DPP) v Harding* [2011] IECCA 20.

⁸⁵ Formerly, section 27(3CC).

4.44 Section 27(3D)(c)(i) provides that the court may have regard to any previous drug trafficking offences when determining whether the statutory minimum should apply.⁸⁶ It is unclear what purpose section 27(3D)(c)(i) serves other than to emphasise the pre-existing power of the courts to consider previous convictions.⁸⁷ Smith observes that a matter of greater concern is the extent to which evidence of previous involvement in the drugs trade may be admissible.⁸⁸ In *The People (DPP) v Gilligan*,⁸⁹ for instance, the Court of Criminal Appeal held that the sentencing judge could not have regard to evidence of previous misconduct for which the accused had neither been charged nor convicted and which the accused had not asked to be taken into account. The Court noted, however, that the sentencing court could not “act in blinkers” and was thus entitled, if not obliged, to consider the facts and circumstances surrounding each offence.⁹⁰

4.45 Section 27(3D)(c)(ii) provides that the court may consider whether or not the public interest would be served by the imposition of a sentence of less than 10 years. This provision clearly echoes the words of the Minister for Justice when he stated that the courts should keep in mind the social impact of drug trafficking when determining whether or not to impose the statutory minimum sentence.⁹¹ It has been noted, however, that it may be difficult to determine what is in the “public interest”.⁹² Smith, on the other hand, observes that the provision suggests that a court should consider that the public interest will not always be served by committing an offender to prison.⁹³

(3) Early Release

4.46 The power to grant early release to those who have been convicted of an offence under section 15A or section 15B of the *Misuse of Drugs Act 1977*, as amended, has been restricted. It has been observed that this reflects the “clear policy” of the Oireachtas that the courts should, in the absence of special circumstances, impose a prison sentence of 10 years or longer and that such sentences should be served in their entirety less remission.⁹⁴ Section 27(3H),⁹⁵ however, provides that any sentence imposed for an offence under section 15A or section 15B is subject to ordinary remission for good behaviour which currently stands at one-fourth of the total sentence.

4.47 Thus section 27(3G)⁹⁶ of the *Misuse of Drugs Act 1977*, as amended, provides that the powers of commutation and remission conferred on the Government by section 23 of the *Criminal Justice Act 1951* cannot be exercised in respect of a person sentenced for an offence under section 15A or section 15B.

⁸⁶ Section 27(3B) provides: “The court, in imposing a sentence on a person for an offence under section 15A or 15B of this Act, may, in particular, have regard to whether the person has a previous conviction for a drug trafficking offence.”

⁸⁷ See, for example: *The People (DPP) v Coles* [2009] IECCA 144; and *The People (DPP) v Farrell* [2010] IECCA 116.

⁸⁸ Smith “Sentencing Section 15A Offences” (2010) 20(1) ICLJ 8.

⁸⁹ *The People (DPP) v Gilligan* [2004] 3 IR 87.

⁹⁰ *Ibid* at 91. See also: *The People (DPP) v Long* [2006] IECCA 49; *The People (DPP) v Delaney* Court of Criminal Appeal 28 February 2000; and *The People (DPP) v McDonnell* [2009] IECCA 16.

⁹¹ Select Committee on Justice, Equality, Defence and Women’s Rights Debate, Criminal Justice Bill 2004, Committee Stage, 11 May 2006.

⁹² Irish Current Law Statutes Annotated 2006 at 26-84.

⁹³ Smith “Sentencing Section 15A Offences” (2010) 20(1) ICLJ 8. See also: *The People (DPP) v McGinty* [2007] 1 IR 633 in which the Court of Criminal Appeal noted that where there were “special reasons of a substantial nature and wholly exceptional circumstances”, a suspended sentence might be appropriate in the interests of justice.

⁹⁴ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 333.

⁹⁵ Formerly, section 27(3E).

⁹⁶ Formerly, section 27(3D).

Furthermore, section 27(3I)⁹⁷ provides that the power to grant temporary release conferred by section 2 of the *Criminal Justice Act 1960* may not be exercised until such time as the power to grant commutation or remission has arisen except “for grave reasons of a humanitarian nature”. The period of temporary release must be for such limited period as is justified by those reasons. Such reasons might include serious illness on the part of the offender or an immediate family member, or the death of a close family member.⁹⁸

4.48 Section 27(3J)⁹⁹ provides that the court may list a sentence for review after the expiry of not less than half of the term specified by the court under section 27(3C)¹⁰⁰ or section 27(3F).¹⁰¹ To list a sentence for review, the court must be satisfied that the offender was addicted to drugs at the time of the offence¹⁰² and that the addiction was a substantial factor leading to the commission of the offence.¹⁰³ In this respect, the legislation acknowledges a difference in the lesser culpability of those who become involved in drug dealing in order to feed their own addiction compared to those further up the hierarchy who often have no addiction problem.¹⁰⁴

4.49 Section 27(3K)¹⁰⁵ provides that on reviewing the sentence the court may suspend the remainder of the sentence on any conditions it considers fit and having regard to any matters it considers appropriate. In *The People (DPP) v Finn*,¹⁰⁶ the Supreme Court firmly disapproved of the general practice of imposing reviewable sentences but accepted that sentences imposed for offences under section 15A might continue to have review elements because of the specific statutory authorisation.

4.50 In *The People (DPP) v Dunne*,¹⁰⁷ the Court of Criminal Appeal held that the review power was only available in circumstances where the mandatory minimum sentence had been passed and not where the court had imposed a lesser sentence on the ground that there were exceptional and specific circumstances. This could lead to the illogical consequence of a person subject to the statutory minimum sentence being in a better position than a person not subject to the statutory minimum.¹⁰⁸ It has also been noted that the purpose of the review provision is rehabilitative and that this mechanism should therefore be available to all drug addicts irrespective of the length of the sentence imposed on them.¹⁰⁹

4.51 The review power remains following the amendment to section 27¹¹⁰ which imposes a mandatory minimum sentence of 10 years without exception where the offender is convicted of a second or subsequent offence under section 15A or section 15B.

⁹⁷ Formerly, section 27(3F).

⁹⁸ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 333.

⁹⁹ Now section 15(3J) after the enactment of section 33 of the *Criminal Justice Act 2007*.

¹⁰⁰ Formerly, section 27(3B).

¹⁰¹ Section 27(3F) provides that where a person has been convicted of a second or subsequent offence under section 15A or section 15B, the court *must* impose a 10-year sentence.

¹⁰² Section 27(3J)(a) of the *Misuse of Drugs Act 1977*, as amended.

¹⁰³ Section 27(3J)(b) of the *Misuse of Drugs Act 1977*, as amended.

¹⁰⁴ O'Malley *Sentencing - Towards a Coherent System* (Round Hall, 2011) at 102.

¹⁰⁵ Formerly, section 27(3H).

¹⁰⁶ *The People (DPP) v Finn* [2001] 2 IR 25.

¹⁰⁷ *The People (DPP) v Dunne* [2003] 4 IR 87.

¹⁰⁸ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 334.

¹⁰⁹ *Ibid.*

¹¹⁰ As inserted by section 84 of the *Criminal Justice Act 2006* and re-numbered by section 33 of the *Criminal Justice Act 2007*.

(4) Drug Mules

4.52 The Commission observes that low-level drug mules are more susceptible to being caught under section 15A or section 15B of the *Misuse of Drugs Act 1977* than high-level drug barons. First, it has been noted that drug mules are generally vulnerable and desperate people who have been exploited by those higher up the drugs chain rather than hardened criminals.¹¹¹ They are thus less likely to be adept at evading detection and it has been noted that they are sometimes placed in the direct line of fire in order to divert attention from other transportations. Second, as noted at paragraphs 4.04 to 4.07 and 4.24, the legislative provisions dealing with “possession” and “*mens rea*” are broad enough to capture those operating at the lower end of the drugs chain who are more likely to be in actual possession of the controlled drugs and less likely to know their market value. In addition, while drug mules might benefit from the exceptional and specific circumstance of a “guilty plea”, they are less likely through lack of information or fear to benefit from the exceptional and specific circumstance of “material assistance”.

4.53 Therefore, it has been observed that the majority of those being sentenced under the presumptive sentencing regime are low-level drug mules rather than high-level drug barons.¹¹² During the public consultation and roundtable discussion, practitioners stated that this is their experience. From its own review of the case law in this area,¹¹³ the Commission agrees that this is probably the case.

4.54 The fact that the use of drug mules in the drugs trade is at the very least “popular” has been confirmed by the European Monitoring Centre for Drugs and Drug Addiction. The Centre has made a recent attempt to define the term “drug mule” for use in a European context,¹¹⁴ indicating that the current understanding of the term is:

“A drug courier who is paid, coerced or tricked into transporting drugs across an international border but who has no further commercial interest in the drugs.”¹¹⁵

C Presumptive Minimum Sentences under the Firearms Acts

4.55 As discussed in Chapter 1, the *Criminal Justice Act 2006* amended the Firearms Acts with the result that many firearms offences now carry a presumptive sentence of five or 10 years. In this Part, the Commission considers the application of these categories of presumptive minimum sentence by examining: (1) the elements of the relevant firearms offences, (2) the relevant penalty provisions, and (3) the early release provisions.

(1) Elements of the Offences

(a) Section 15 of the Firearms Act 1925

4.56 Section 15 of the *Firearms Act 1925*, as amended,¹¹⁶ provides that it is an offence to possess or control any firearm or ammunition: (a) with intent to endanger life or cause serious injury to property, or (b) with intent to enable any other person by means of the firearm or ammunition to endanger life or cause serious injury to property, regardless of whether any injury to person or property has actually been caused.

¹¹¹ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 340-341.

¹¹² O'Malley *Sentencing - Towards a Coherent System* (Round Hall, 2011) at 103.

¹¹³ Most of this case law emanates from the Court of Criminal Appeal.

¹¹⁴ “A definition of ‘drug mules’ for use in a European context” (European Monitoring Centre for Drugs and Drug Addiction, 2012) at 10.

¹¹⁵ “A definition of ‘drug mules’ for use in a European context” (European Monitoring Centre for Drugs and Drug Addiction, 2012) at 3.

¹¹⁶ Section 42 of the *Criminal Justice Act 2006*.

(i) Possession or Control

4.57 Neither the term “possession” nor the term “control” is defined by the 1925 Act. As noted at paragraphs 4.04 to 4.07, however, the term “possession” includes actual possession, which denotes having custody and control over an article, and constructive possession, which denotes having control but not custody.¹¹⁷ The fact that the terms “possession” and “control” are separated by the conjunction “or” serves to emphasise that either custody of, or dominion over, the firearms or ammunition will suffice for an offence under section 15.

4.58 The term “possession” is thus broad enough to describe the range of roles played by those involved in firearms offences. At one end of the scale there are the high-level offenders who may be in charge of operations. These may be described as having constructive possession as they have ultimate control over those who possess the firearms or ammunition on their behalf. At the other end of the scale there are the low-level offenders who may, for instance, have been coerced or tricked into hiding firearms or ammunition for someone else. These may be described as having actual possession of the firearms or ammunition as they exercise physical control over the firearms or ammunition.

(ii) Intent to Endanger Life or Cause Serious Injury to Property or Intent to Enable any other Person by means of the Firearm or Ammunition to Endanger Life or Cause Serious Injury to Property

4.59 In addition to possessing or controlling the firearm or ammunition, the offender must intend, personally, to endanger life or cause serious injury to property or to enable someone else to do so. Thus, for example, a person transporting firearms or ammunition who has no intention of using those firearms or ammunition himself or herself, might still be found guilty of an offence under section 15.

(b) Section 26 of the Firearms Act 1964

4.60 Section 112(1) of the *Road Traffic Act 1961* prohibits a person from using or taking possession of a mechanically propelled vehicle without the consent of the owner. Section 26(1) of the *Firearms Act 1964*, as amended,¹¹⁸ provides that a person who contravenes section 112(1) of the *Road Traffic Act 1961* and who, at the time of the contravention, has a firearm or imitation firearm with him or her, is guilty of an offence. Again, it is difficult to determine the exact implications of the elements of this offence as the Court of Criminal Appeal has not examined section 26 in recent times.

(i) Using or Taking

4.61 Section 3(1) of the *Road Traffic Act 1961* provides that the term “use” in relation to a vehicle includes park, which means to keep or leave stationary. Presumably, however, the term also includes “driving”, which means to manage and control and, in relation to a bicycle or tricycle, to ride. In relation to a vehicle, at any rate, it is conceivable that an offender could manage and control a vehicle without personally operating the vehicle. Thus, for example, an offender might manage and control a vehicle where he or she forces the owner to drive by holding a firearm to his or her head.

4.62 The term “take” is not defined by the 1961 Act. A narrow definition of the term might refer to taking *custody* whereas a broader definition might refer to taking *possession* which, as noted at paragraphs 4.04 to 4.07, is not limited to having custody. The narrow definition of “take” implies that an offender must have physical custody of the vehicle whereas the broader definition would allow for situations in which an offender does not have physical custody, such as where the offender, at a remote location from the vehicle, forces the owner to drive by threatening his or her family with a firearm.

(ii) Mechanically Propelled Vehicle

4.63 Section 3(1) of the *Road Traffic Act 1961* provides that the term “mechanically propelled vehicle” means a vehicle intended or adapted for propulsion by mechanical means. This includes: (a) a bicycle or tricycle with an attachment for propelling it by mechanical power, whether or not the attachment is being

¹¹⁷ McAuley and McCutcheon *Criminal Liability* (Round Hall, Sweet and Maxwell, 2000) at 208-209.

¹¹⁸ Section 57 of the *Criminal Justice Act 2006*.

used, and (b) a vehicle the means of propulsion of which is electrical or partly electrical and partly mechanical. It does not, however, include a tramcar or other vehicles running on permanent rails.

(iii) Having with Him or Her

4.64 The term “have” is not defined by the 1964 Act. The fact that the term is used with the words “with him or her” suggests, however, that the offender must have actual possession of the firearm or imitation firearm at the time when he or she is taking the particular vehicle.

(iv) A Firearm or Imitation Firearm

4.65 Section 1(1) of the *Firearms Act 1925*, as amended,¹¹⁹ provides that the term “firearm” means: (a) a lethal firearm or other weapon of any description from which any shot, bullet or other missile can be discharged; (b) an air gun (including an air rifle and air pistol) with a muzzle energy greater than one joule or any other weapon incorporating a barrel from which any projectile can be discharged with such muzzle energy; (c) a crossbow; (d) any type of stun gun or other weapon causing any shock or other disablement to a person by means of electricity or any other kind of energy emission; (e) a prohibited weapon;¹²⁰ and (f) any article which would be a firearm under any of the foregoing paragraphs but for the fact that, owing to the lack of necessary component part or parts or to any other defect or condition, it is incapable of discharging a shot, bullet or other missile or projectile or of causing a shock or other disablement; and (g) except where the context otherwise requires, includes a component part of any article referred to in section 1.

4.66 The term “imitation firearm” is not defined by the Act. Presumably, however, the term includes any article which is calculated, or is reasonably likely, to give the person perceiving it to believe that it is a real firearm. As noted by Finnegan J in *The People (DPP) v Clail*,¹²¹ it makes very little difference to a person who is confronted in the course of a crime with a weapon that, unbeknownst to him or her, it is non-functioning. The crucial issue is that an imitation firearm may be an equally effective means of threatening a person and/or pursuing an ulterior objective.

(c) Section 27 of the Firearms Act 1964

4.67 Section 27 of the *Firearms Act 1964*, as amended,¹²² prohibits the use or production of a firearm or imitation firearm¹²³ for the purpose of resisting arrest¹²⁴ or aiding the escape or rescue of the person or another person from lawful custody.¹²⁵ As the Court of Criminal Appeal has not examined section 27 in recent times, it is difficult to determine the exact implications of the elements of the offence.

(i) Use or Produce

4.68 Neither the term “use” nor the term “produce” is defined by the 1964 Act. The ordinary meaning of the term “use” is to take, hold, deploy or employ.¹²⁶ In *The People (DPP) v Curtin*,¹²⁷ the Court of Criminal Appeal referred to the “use” of the firearm in terms of it having been discharged. The ordinary

¹¹⁹ Section 26 of the *Criminal Justice Act 2006*.

¹²⁰ Section 1 of the *Firearms Act 1925* provides that the term “prohibited weapon” means and includes “any weapon of whatever description designed for the discharge of any noxious liquid, noxious gas, or other noxious thing, and also any ammunition (whether for any such weapon as aforesaid or for any other weapon) which contains or is designed or adapted to contain any noxious liquid, noxious gas, or other noxious thing.”

¹²¹ *The People (DPP) v Clail* [2009] IECCA 13.

¹²² Section 58 of the *Criminal Justice Act 2006*.

¹²³ The meaning of the terms “firearm” and “imitation firearm” have been considered at paragraphs 4.65 and 4.66 and will not be considered again here.

¹²⁴ Section 27(1)(a) of the *Firearms Act 1964*, as amended.

¹²⁵ Section 27(1)(b) of the *Firearms Act 1964*, as amended.

¹²⁶ The New Oxford Dictionary of English (Oxford University Press, 2001) at 2038.

¹²⁷ *The People (DPP) v Curtin* [2010] IECCA 54.

meaning of the term “produce” is to show or provide for consideration, inspection or use.¹²⁸ The fact that the terms “use” and “produce” are separated by the conjunction “or” suggests that either use or production will suffice for an offence under section 27. Thus, for instance, a firearm need not be discharged but may be merely shown for the purpose of section 27.

(ii) For the Purpose of Resisting Arrest or Aiding Escape or Rescue

4.69 The person using or producing the firearm or imitation firearm must be pursuing the objective of resisting arrest, aiding his or her escape or rescue, or aiding the escape of another person.

(d) Section 27A of the Firearms Act 1964

4.70 Section 27A of the *Firearms Act 1964*, as amended,¹²⁹ provides that it is an offence for a person to possess or control¹³⁰ a firearm in circumstances that give rise to a reasonable inference that the person does not possess or control it for a lawful purpose, unless the person does possess or control it for such a purpose. The Court of Criminal Appeal has considered section 27A on a number of occasions but as there was a guilty plea in each case, the Court did not have an opportunity to examine the exact implications of the elements of an offence under section 27A.¹³¹

(i) Firearm

4.71 The meaning of the term “firearm” has been considered at paragraph 4.65 and will not be considered again here. It is interesting to note, however, that section 27A may be distinguished from other provisions of the 1964 Act in so far as it does not refer to imitation firearms.

(ii) Circumstances that give rise to a Reasonable Inference that Possession or Control is not for a Lawful Purpose

4.72 While the expression is not explained by the 1964 Act, it is clear that what is contemplated is that the circumstances surrounding the possession or control would allow a reasonable person objectively to conclude that the possession or control is for the purpose of pursuing an unlawful act. The act of possessing or controlling the firearm may not be the unlawful act contemplated by section 27A as there may be situations in which the offender is legally entitled to possess or control the firearm.

(e) Section 27B of the Firearms Act 1964

4.73 Section 27B of the *Firearms Act 1964*, as amended,¹³² provides that it is an offence for a person to have with him or her, a firearm or an imitation firearm,¹³³ with intent to commit an indictable offence or to resist or prevent the arrest of the person or another person. Again, the Court of Criminal Appeal has considered section 27B on a number of occasions but as there was a guilty plea in each case, the Court did not have an opportunity to examine the exact implications of the elements of an offence under section 27B.¹³⁴

¹²⁸ The New Oxford Dictionary of English (Oxford University Press, 2001) at 1479.

¹²⁹ Section 59 of the *Criminal Justice Act 2006*.

¹³⁰ The meaning of the terms “possession” and “control” have been considered at paragraphs 4.57 and 4.58 and will not be considered again here.

¹³¹ *The People (DPP) v Barry* Court of Criminal Appeal 23 June 2008; *The People (DPP) v Clail* [2009] IECCA 13; *The People (DPP) v Dwyer* Court of Criminal Appeal 9 February 2009; *The People (DPP) v Walsh* Court of Criminal Appeal 17 December 2009; *The People (DPP) v Curtin* [2010] IECCA 54; *The People (DPP) v Fitzgerald* [2010] IECCA 53; *The People (DPP) v Kelly* Court of Criminal Appeal 28 June 2010; and *The People (DPP) v Purcell* [2010] IECCA 55.

¹³² Section 60 of the *Criminal Justice Act 2006*.

¹³³ The meaning of the terms “firearm” and “imitation firearm” have been considered at paragraphs 4.65 to 4.66 and will not be considered again here.

¹³⁴ *The People (DPP) v Heelan* [2008] IECCA 73; *The People (DPP) v Kelly* Court of Criminal Appeal 9 November 2009; and *The People (DPP) v Donovan* Court of Criminal Appeal 28 June 2010.

(i) Have

4.74 The meaning of the term “have” has been considered at paragraph 4.64 and will not be considered again here. It should be noted, however, that by contrast with section 27 which creates the offence of *using* or *producing* a firearm or imitation firearm for the purpose of resisting arrest, section 27B creates the offence of having a firearm or imitation firearm regardless of whether it is used or produced. Thus, the fact that an offender has a firearm or imitation firearm on his or her person may be sufficient for the purposes of section 27B.

(ii) Intent to Commit an Indictable Offence or to Resist or Prevent Arrest

4.75 While this expression has not been explained in the 1964 Act, it is clear that what is contemplated is that the offender should have with him or her, a firearm or imitation firearm for the purpose of committing an indictable offence or resisting or preventing an arrest.¹³⁵ Thus, having the firearm is an element of the overall plan to commit an offence or to resist or prevent an arrest.

(f) Section 12A of the Firearms and Offensive Weapons Act 1990

4.76 Section 12A of the *Firearms and Offensive Weapons Act 1990*, as amended,¹³⁶ provides that it is an offence for a person to shorten the barrel of a shot-gun to a length of less than 61 centimetres¹³⁷ or a rifle to a length of less than 50 centimetres.¹³⁸ Thus, the mere act of shortening the barrel of a shot-gun or rifle is an offence regardless of whether or not there is other criminal intent.¹³⁹

(2) Penalties

4.77 The presumptive sentencing regime under the Firearms Acts is modelled on the presumptive sentencing regime under the *Misuse of Drugs Act 1977*. Thus, many of the observations outlined in respect of the presumptive sentence applicable to offences under the *Misuse of Drugs Act 1977* equally apply to the presumptive sentence applicable to offences under the Firearms Acts.

(a) Presumptive Minimum Sentence of Five Years' or 10 Years' Imprisonment

4.78 Under the Firearms Acts, some offences attract a five-year presumptive sentence while others attract a 10-year presumptive sentence. The offences which attract a five-year presumptive sentence are: (i) possession of a firearm while taking a vehicle without authority;¹⁴⁰ (ii) possession of a firearm or ammunition in suspicious circumstances;¹⁴¹ (iii) carrying a firearm or imitation firearm with intent to commit an indictable offence or resist arrest;¹⁴² and (iv) shortening the barrel of a shotgun or rifle.¹⁴³ Each of these offences is subject to a maximum sentence of 14 years¹⁴⁴ with the exception of the offence of shortening the barrel of a shotgun or rifle, which is subject to a maximum sentence of 10 years.¹⁴⁵ The

¹³⁵ It is arguable, however, that the provision is broad enough to cover situations in which the offender has a firearm or imitation firearm and an unconnected intention to commit an indictable offence or resist or prevent arrest.

¹³⁶ Section 65 of the *Criminal Justice Act 2006*.

¹³⁷ Section 12A(1)(a) of the *Firearms and Offensive Weapons Act 1990*, as amended.

¹³⁸ Section 12A(1)(b) of the *Firearms and Offensive Weapons Act 1990*, as amended.

¹³⁹ The Court of Criminal Appeal has considered section 12A in *The People (DPP) v Kelly* Court of Criminal Appeal 24 November 2008; and *The People (DPP) v McCann* [2008] IECCA 129.

¹⁴⁰ Section 26 of the *Firearms Act 1964*, as substituted by section 57 of the *Criminal Justice Act 2006*.

¹⁴¹ Section 27A of the *Firearms Act 1964*, as substituted by section 59 of the *Criminal Justice Act 2006*.

¹⁴² Section 27B of the *Firearms Act 1964*, as substituted by section 60 of the *Criminal Justice Act 2006*.

¹⁴³ Section 12A of the *Firearms and Offensive Weapons Act 1990*, as substituted by section 65 of the *Criminal Justice Act 2006*.

¹⁴⁴ Section 26(2)(a) of the *Firearms Act 1964*, as amended; section 27A(2)(a) of the *Firearms Act 1964*, as amended; and section 27B(2)(a) of the *Firearms Act 1964*, as amended.

offences which attract a presumptive 10-year sentence are: (i) possession of firearms with intent to endanger life;¹⁴⁶ and (ii) using a firearm to assist or aid in an escape.¹⁴⁷ These offences are subject to a maximum sentence of life imprisonment.¹⁴⁸

4.79 As with the presumptive sentencing regime under the *Misuse of Drugs Act 1977*, it would appear that the courts must have regard to the presumptive sentence even where it does not apply¹⁴⁹ and to the maximum sentence.¹⁵⁰

(b) Exceptional and Specific Circumstances: Mitigating Factors

4.80 Each of the presumptive sentencing provisions under the Firearms Acts provides that the presumptive sentence will not apply where there are exceptional and specific circumstances relating to the offence or the person convicted of the offence, which would make a sentence of not less than five years or 10 years unjust in all the circumstances.¹⁵¹ Exceptional and specific circumstances may include “any matters [the court] considers appropriate”, including whether the person has pleaded guilty to the offence and whether the person has materially assisted in the investigation of the offence. As noted in Chapter 1, a guilty plea and material assistance are in general considered to be factors which mitigate the severity of the sentence rather than the seriousness of the offence.

(i) Guilty Plea

4.81 Subsection (5)(a)¹⁵² of each provision provides that a guilty plea may be considered an exceptional and specific circumstance for the purpose of determining whether the statutory minimum sentence of five or 10 years should apply. The provision recognises, however, that the stage at which the accused indicates his or her intention to plead guilty and the circumstances surrounding that plea may be relevant. Thus, it has been noted that an early guilty plea merits more credit than a late guilty plea¹⁵³ and that an accused who voluntarily pleads guilty will be given more credit than an accused who pleads guilty having been caught red-handed.¹⁵⁴ In any case, a guilty plea will usually be considered in addition to other mitigating factors such as material assistance.¹⁵⁵

(ii) Material Assistance

4.82 Subsection (5)(b)¹⁵⁶ of each provision provides that material assistance may also be considered an exceptional and specific circumstance for the purpose of determining whether the statutory minimum sentence should apply. Presumably, as observed by the Court of Criminal Appeal in relation to the

¹⁴⁵ Section 12A of the *Firearms and Offensive Weapons Act 1990*, as amended.

¹⁴⁶ Section 15 of the *Firearms Act 1925*, as substituted by section 42 of the *Criminal Justice Act 2006*.

¹⁴⁷ Section 27 of the *Firearms Act 1964*, as substituted by section 58 of the *Criminal Justice Act 2006*.

¹⁴⁸ Section 15(2)(a) of the *Firearms Act 1925*, as amended; and section 27(2)(a) of the *Firearms Act 1964*, as amended.

¹⁴⁹ *The People (DPP) v Fitzgerald* [2010] IECCA 53.

¹⁵⁰ *The People (DPP) v McCann* [2008] IECCA 129.

¹⁵¹ Subsection (5) of each provision and subsection (10) of section 12A of the *Firearms and Offensive Weapons Act 1990*.

¹⁵² Subsection (10)(a) of section 12A of the *Firearms and Offensive Weapons Act 1990*.

¹⁵³ *The People (DPP) v Barry* Court of Criminal Appeal 23 June 2008; and *The People (DPP) v Curtin*. [2010] IECCA 54

¹⁵⁴ *The People (DPP) v Clail* [2009] IECCA 13; *The People (DPP) v Dwyer* Court of Criminal Appeal 9 February 2009; and *The People (DPP) v Walsh* Court of Criminal Appeal 17 December 2009.

¹⁵⁵ *The People (DPP) v Barry* Court of Criminal Appeal 23 June 2008.

¹⁵⁶ Subsection (10)(b) of section 12A of the *Firearms and Offensive Weapons Act 1990*.

Misuse of Drugs Act 1977, material assistance may be in the form of an admission¹⁵⁷ or the provision of information.

(iii) Any Matters the Court considers Appropriate

4.83 Subsection (5)¹⁵⁸ also provides that the court may have regard to “any matters it considers appropriate”. While these matters have not been exhaustively defined in the legislation or elsewhere, there are a number of matters to which the courts’ attention has been frequently drawn. As under the *Misuse of Drugs Act 1977*, these matters may be divided into two categories: (a) those that mitigate the seriousness of the offence, and (b) those that mitigate the severity of the sentence.

4.84 The matters that mitigate the seriousness of the offence include those relating to culpability (duress, naivety), harm (discharge of firearm) and offender behaviour (level of involvement). The fact that an offender was coerced into committing a firearms offence¹⁵⁹ or was naive¹⁶⁰ may be considered exceptional and specific circumstances. Similarly, the fact that the offender did not discharge the weapon may be considered an exceptional and specific circumstance.¹⁶¹ Finally, the fact that an offender had a low level of involvement in the commission of the offence may be considered an exceptional and specific circumstance.¹⁶²

4.85 The matters that mitigate the severity of the sentence include previous good character¹⁶³ and personal circumstances, such as the youth of the offender, personal traumas suffered by the offender, family support and the possibility of rehabilitation.¹⁶⁴

(c) Aggravating Factors

4.86 Subsection (6)¹⁶⁵ of each provision provides that the court may, when deciding whether or not to impose the statutory minimum sentence, have regard to: (i) any previous convictions for firearms’ offences, and (ii) the public interest in preventing firearms’ offences.

4.87 The existence of previous convictions for an offence under the *Firearms Acts 1925 to 2006*, the *Offences Against the State Acts 1939 to 1998*, or the *Criminal Justice (Terrorist Offences) Act 2005*, may justify an upward departure from the statutory minimum. Subsection (3) and subsection (6)(a)¹⁶⁶ of each provision provides that the court may have regard to such previous convictions when determining whether the statutory minimum should apply.¹⁶⁷ The Court of Criminal Appeal will, in any case, take a dim view of previous convictions.¹⁶⁸

4.88 Subsection (6)(b) of each provision provides that the court may consider whether or not the public interest would be served by the imposition of a sentence of less than the presumptive minimum.

¹⁵⁷ In *The People (DPP) v Curtin* [2010] IECCA 54 for instance, the Court of Criminal Appeal referred to the fact that the accused had admitted that he had pressurised his two co-accuseds into taking part in the offence.

¹⁵⁸ Subsection (10) of section 12A of the *Firearms and Offensive Weapons Act 1990*.

¹⁵⁹ *The People (DPP) v Barry* Court of Criminal Appeal 23 June 2008.

¹⁶⁰ *The People (DPP) v Kelly* Court of Criminal Appeal 23 June 2009.

¹⁶¹ *The People (DPP) v Fitzgerald* [2010] IECCA 53.

¹⁶² *The People (DPP) v Barry* Court of Criminal Appeal 23 June 2008; and *The People (DPP) v Purcell* [2010] IECCA 55.

¹⁶³ *The People (DPP) v Barry* Court of Criminal Appeal 23 June 2008.

¹⁶⁴ *The People (DPP) v Kelly* Court of Criminal Appeal 23 June 2009.

¹⁶⁵ Subsection (11) of section 12A of the *Firearms and Offensive Weapons Act 1990*.

¹⁶⁶ Subsection (8) and (11)(a) of section 12A of the *Firearms and Offensive Weapons Act 1990*.

¹⁶⁷ See: *The People (DPP) v Dwyer* Court of Criminal Appeal 9 February 2009.

¹⁶⁸ *The People (DPP) v Donovan* Court of Criminal Appeal 28 June 2010; and *The People (DPP) v Kelly* Court of Criminal Appeal 29 June 2012.

4.89 Factors including the nature of the firearm,¹⁶⁹ the fact that it was brandished in a crowded place and the fact that it was discharged, have justified the imposition of sentences longer than the presumptive minimum sentence.¹⁷⁰ The fact that the offender possessed more than one firearm¹⁷¹ and the fact that he or she possessed a firearm and drugs have also aggravated the minimum sentence.¹⁷²

(3) Early Release

4.90 Like section 27 of the *Misuse of Drugs Act 1977*, section 27C of the *Firearms Act 1964*, as amended, restricts the power to grant early release to those who have been convicted of an offence under the Firearms Acts.¹⁷³ Specifically, section 27C(2) restricts the power to commute or remit punishment; section 27C(3) restricts the power to grant remission for good behaviour; and section 27C(4) restricts the power to grant temporary release. By contrast with the *Misuse of Drugs Act 1977*, however, section 27C does not permit the court to list a sentence for review.

D Comparative Analysis

4.91 In this Part, the Commission considers the use of mandatory and presumptive minimum sentences in other common law countries.

(a) Northern Ireland

4.92 In Northern Ireland, in addition to the mandatory life sentence for murder, there are presumptive sentences for certain firearms offences and public protection but not for drugs offences.¹⁷⁴

(i) Firearms Offences

4.93 The use of firearms is regulated by the *Firearms (Northern Ireland) Order 2004*, as amended.¹⁷⁵ Article 70 stipulates that the courts must impose a minimum sentence of five years on offenders aged 21 years or over and a minimum sentence of three years on offenders aged less than 21 years, unless there are “exceptional circumstances relating to the offence or to the offender which justify its not doing so”.¹⁷⁶

4.94 The offences to which the mandatory sentencing regime applies are: (i) the possession, purchase or acquisition of a handgun without holding a firearm certificate or otherwise than as authorised by a firearm certificate;¹⁷⁷ (ii) the possession, purchase, acquisition, manufacture, sale or transfer of certain controlled firearms or ammunition;¹⁷⁸ (iii) the possession of a firearm or ammunition with intent to

¹⁶⁹ The courts do not, in general, distinguish between real and imitation firearms. See: *The People (DPP) v Clail* [2009] IECCA 13. However, the Court of Criminal Appeal does distinguish between shotguns and other firearms on the basis that shotguns come “towards the top end” of the “hierarchy of weapons”. See: *The People (DPP) v Walsh* Court of Criminal Appeal 17 December 2009.

¹⁷⁰ *The People (DPP) v Fitzgerald* [2010] IECCA 53; and *The People (DPP) v Curtin* [2010] IECCA 54.

¹⁷¹ *The People (DPP) v Kelly* Court of Criminal Appeal 24 November 2008.

¹⁷² *The People (DPP) v Purcell* [2010] IECCA 55.

¹⁷³ Section 27C(1) provides that section 27C applies to section 15 of the *Firearms Act 1925*; sections 26 to 27B of the *Firearms Act 1964*; and section 12A of the *Firearms and Offensive Weapons Act 1990*.

¹⁷⁴ The *Misuse of Drugs Act 1971* applies to Northern Ireland. (The *Criminal Justice Act 2003* does not apply in this regard). Section 25 of the *Misuse of Drugs Act 1971* provides that the punishments applicable to offences under the Act are set out in Schedule 4. Section 25(2) clarifies, however, that the periods and sums of money referred to in Schedule 4 are maximum terms of imprisonment and maximum fines. It would thus appear that drug offences in Northern Ireland do not attract mandatory minimum penalties.

¹⁷⁵ See: Schedule 2 to the *Violent Crime Reduction Act 2006*.

¹⁷⁶ Article 70(2) - (4) of the *Firearms (Northern Ireland) Order 2004*.

¹⁷⁷ Article 3(1)(a) of the *Firearms (Northern Ireland) Order 2004*.

¹⁷⁸ Section 45(1)(a), section 45(1)(aa), section 45(1)(b), section 45(1)(c), section 45(1)(d), section 45(1)(e), section 45(1)(g), and section 45(2)(a) of the *Firearms (Northern Ireland) Order 2004*.

endanger life or cause serious damage to property or to enable another person to do so;¹⁷⁹ (iv) the use of a firearm or imitation firearm to resist arrest;¹⁸⁰ (v) the carrying of a firearm with intent to commit an indictable offence or to resist arrest or to prevent the arrest of another;¹⁸¹ (vi) the carrying or discharge of a firearm in a public place,¹⁸² and (vii) trespass in a building with a firearm or imitation firearm.¹⁸³

4.95 The stated purpose of the *Firearms (Northern Ireland) Order 2004* is to provide a legislative framework for the control of firearms which is effective and proportionate and strikes a balance between public safety and the reasonable expectations of legitimate shooting enthusiasts.¹⁸⁴ The order was prepared following the publication of a review conducted by the Northern Ireland Office.¹⁸⁵ The Review was inspired by the *Criminal Justice Act 2003*, which made a number of changes to the sentencing framework in England and Wales, and to a lesser extent by the 2000 *Review of the Criminal Justice System in Northern Ireland*.¹⁸⁶ The Review examined Northern Ireland's firearms legislation, the *Firearms (Northern Ireland) Order 1981*, and recommendations contained in the Cullen Inquiry into the 1996 Dunblane Massacre.¹⁸⁷

(ii) Public Protection

4.96 Two minimum sentencing provisions apply in respect of "dangerous" offenders who are perceived to pose a significant risk to members of the public.

4.97 Article 13 of the *Criminal Justice (Northern Ireland) Order 2008* requires the imposition of a life sentence for a specified "serious offence",¹⁸⁸ where the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences. Under this Article, a life sentence must be imposed: (a) where the offence is one in respect of which the offender would, apart from Article 13, be liable to a life sentence, and (b) if the court is of the opinion that the seriousness of the offence, or of the offence and one or more offences associated with it, justifies the imposition of such a sentence.¹⁸⁹

4.98 Where the serious offence does not fulfil these conditions, the court must impose an "indeterminate custodial sentence" if it considers that an "extended custodial sentence" (discussed below at paragraph 4.101) would be inadequate for the purpose of protecting the public from serious harm occasioned by the commission by the offender of further specified offences.¹⁹⁰ An indeterminate custodial sentence consists of a sentence of imprisonment (or detention, in the case of an offender under the age of 21 years) for an indeterminate period. When imposing this penalty, the court is required to specify a period of at least two years as the minimum term required to satisfy the requirements of retribution and deterrence.¹⁹¹ An offender sentenced under Article 13 will be released on licence when: (i) he or she has served this minimum period, and (ii) the Parole Commissioners have directed that he or

¹⁷⁹ Section 58 of the *Firearms (Northern Ireland) Order 2004*.

¹⁸⁰ Section 59 of the *Firearms (Northern Ireland) Order 2004*.

¹⁸¹ Section 60 of the *Firearms (Northern Ireland) Order 2004*.

¹⁸² Section 61(1) of the *Firearms (Northern Ireland) Order 2004*.

¹⁸³ Section 62(1) of the *Firearms (Northern Ireland) Order 2004*.

¹⁸⁴ Explanatory Memorandum to the *Firearms (Northern Ireland) Order 2004*.

¹⁸⁵ *Review of the Sentencing Framework in Northern Ireland* (Northern Ireland Office, 2004).

¹⁸⁶ *Review of the Sentencing Framework in Northern Ireland* (Northern Ireland Office, 2004) at 1-2.

¹⁸⁷ *Public Inquiry into the Shootings at Dunblane Primary School on 13 March 1996* Cm 3386 (1996).

¹⁸⁸ Schedule 1 to the *Criminal Justice (Northern Ireland) Order 2008* sets out an extensive list of "serious offences" for the purposes of this regime. All of the offences listed are violent and/or sexual offences.

¹⁸⁹ Article 13(2) of the *Criminal Justice (Northern Ireland) Order 2008*.

¹⁹⁰ Article 13(3) of the *Criminal Justice (Northern Ireland) Order 2008*.

¹⁹¹ *Ibid.*

she be released.¹⁹² This direction may only be given where the Commissioners are satisfied that it is no longer necessary for the protection of the public from serious harm that the offender should be confined.¹⁹³ Remission may not be granted under the prison rules to an offender sentenced under Article 13.¹⁹⁴

4.99 The fact that Article 13 bears a remarkable resemblance to section 225 of the *Criminal Justice Act 2003* (which, as discussed at paragraph 2.196, was repealed in 2012) may be explained by reference to the findings of the 2000 *Review of the Sentencing Framework in Northern Ireland*. The Review referred to the fact that section 225 of the *Criminal Justice Act 2003* had introduced extended and indeterminate public protection sentences for offenders convicted of specified sexual or violent offences who were assessed as dangerous by the sentencing court.¹⁹⁵ It observed, however, that the 2003 Act did not apply to Northern Ireland and that there remained as a result a gap in Northern Irish law in respect of such offenders:

“The Review identified a gap in provision in Northern Ireland for the management of dangerous, violent and sexual offenders who continue to pose a risk to the public at their automatic release date. Under existing provision it is only where offenders have been given a mandatory or discretionary life sentence that assessment of the risk they pose to the public enables their continued detention in custody. Consultation respondents considered this an important public protection issue which needed to be addressed. Therefore we now introduce indeterminate and extended custodial sentences in Northern Ireland.”¹⁹⁶

4.100 Although Article 13 was inspired by section 225 of the *Criminal Justice Act 2003*, it would appear that the difficulties associated with the IPP sentence in England and Wales have not materialised in the context of the Northern Irish legislation. In July 2012, Criminal Justice Inspection Northern Ireland published its Report on *The Management of Life and Indeterminate Sentence Prisoners in Northern Ireland*. This Report found that “the legislative basis for managing indeterminate sentenced prisoners in Northern Ireland was good, and had been informed by serious pitfalls that arose in England and Wales.”¹⁹⁷ The Commission observes that one apparent difference between the two sentencing models is that the regime which operates in Northern Ireland requires the court to first consider whether the imposition of an “extended custodial sentence” (discussed below) would be sufficient to protect the public from serious harm. Where this is the case, an indeterminate custodial sentence may not be imposed.

4.101 Article 14 of the *Criminal Justice (Northern Ireland) Order 2008* requires the imposition of an “extended custodial sentence” for a “specified violent offence”¹⁹⁸ or “specified sexual offence”.¹⁹⁹ This obligation applies where the sentencing court is of the opinion that: (i) there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences, and (ii) in the event that the specified offence is a “serious offence”, the court is not required by Article 13 to impose a life sentence or an indeterminate custodial sentence.²⁰⁰

4.102 Under Article 14, an “extended custodial sentence” is a sentence of imprisonment (or detention, in the case of an offender under the age of 21 years) which is equal to the aggregate of: (a) the

¹⁹² Article 18(3) of the *Criminal Justice (Northern Ireland) Order 2008*.

¹⁹³ Article 18(4) of the *Criminal Justice (Northern Ireland) Order 2008*.

¹⁹⁴ Article 13(7) of the *Criminal Justice (Northern Ireland) Order 2008*.

¹⁹⁵ *Proposed Draft Criminal Justice (Northern Ireland) Order 2007 - Equality Screening Forms* (Northern Ireland Office, 2007) at 7.

¹⁹⁶ *Ibid* at 8.

¹⁹⁷ *The Management of Life and Indeterminate Sentence Prisoners in Northern Ireland* (Criminal Justice Inspection Northern Ireland, 2012) at vi.

¹⁹⁸ A “specified violent offence” is an offence listed in Part 1 of Schedule 2 to the Order.

¹⁹⁹ A “specified sexual offence” is an offence listed in Part 2 of Schedule 2 to the Order.

²⁰⁰ Article 14(1) of the *Criminal Justice (Northern Ireland) Order 2008*.

“appropriate custodial term”, which means a term of *at least 12 months*, not exceeding the statutory maximum, which the court considers appropriate, and (b) a further period for which the offender is to be subject to a licence and which is of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences.²⁰¹ The extension period imposed must not exceed five years in the case of a “specified violent offence” or 8 years in the case of a “specified sexual offence”.²⁰² As a whole, the term of an extended custodial sentence may not exceed the statutory maximum sentence for the relevant offence.²⁰³

4.103 An offender sentenced under Article 14 will become eligible for release only after he or she has served *half* of the custodial sentence imposed by the court.²⁰⁴ An offender who has served the entirety of the “appropriate custodial term” must be released unless he or she has previously been recalled while on licence. Remission may not be granted under the prison rules to an offender sentenced under Article 14.²⁰⁵

(b) England and Wales

4.104 It has been observed that mandatory sentencing in the United Kingdom reflects the attention which was paid to recidivist offenders in the 1990s, and which resulted in the enactment of “three-strikes” statutes in the United States.²⁰⁶ In England and Wales, in addition to the mandatory life sentence for murder, there are presumptive minimum sentences for certain repeat drug offences; repeat serious violent and/or sexual offences; repeat domestic burglaries; firearms offences; and aggravated knife offences. Those sentencing regimes which apply only in respect of repeat offenders are considered in Chapter 5. In this section, the Commission focuses on those provisions which create a “one-strike” rule so that a presumptive or mandatory sentence applies where an offender is convicted for the first time of a specified offence.

(i) Firearms Offences

4.105 Section 51A²⁰⁷ of the *Firearms Act 1968*, as amended,²⁰⁸ prescribes a presumptive minimum sentence of five years’ imprisonment for an offender, aged at least 21 years,²⁰⁹ who is convicted of a specified firearms offence. These offences are: (i) possession, purchase, acquisition, manufacture, sale or transfer of a firearm;²¹⁰ (ii) using another person to mind a dangerous prohibited weapon;²¹¹ (iii) possession of a firearm with intent to injure;²¹² (iv) possession of a firearm with intent to cause fear of

²⁰¹ Article 14(4) of the *Criminal Justice (Northern Ireland) Order 2008*.

²⁰² Article 14(8) of the *Criminal Justice (Northern Ireland) Order 2008*.

²⁰³ Article 14(9) of the *Criminal Justice (Northern Ireland) Order 2008*.

²⁰⁴ Article 18(2) of the *Criminal Justice (Northern Ireland) Order 2008*.

²⁰⁵ Article 14(12) of the *Criminal Justice (Northern Ireland) Order 2008*.

²⁰⁶ *Mandatory Sentences of Imprisonment in Common Law Jurisdictions* (Department of Justice, Canada) at 14.

²⁰⁷ Inserted by section 287 of the *Criminal Justice Act 2003*.

²⁰⁸ Section 30 of the *Violent Crime Reduction Act 2006*.

²⁰⁹ Section 51A(4)(a) of the *Firearms Act 1968*, as modified by Article 2 of *The Firearms (Sentencing) (Transitory Provisions) Order 2007* (SI 2007/1324). An offender aged 18, 19 or 20 years will receive a minimum sentence of five years’ detention in a young offender institution (section 51A(4)(a), as modified by Article 2 of *The Firearms (Sentencing) (Transitory Provisions) Order 2007* (SI 2007/1324)). An offender under the age of 18 years will receive a minimum sentence of three years’ detention in a young offender institution (section 51A(5)(ii) of the *Firearms Act 1968*).

²¹⁰ Section 5(1) and section 5(1A) of the *Firearms Act 1968*.

²¹¹ Section 29 of the *Violent Crime Reduction Act 2006*.

²¹² Section 16 of the *Firearms Act 1968*.

violence;²¹³ (v) use of a firearm to resist arrest;²¹⁴ (vi) carrying a firearm with criminal intent;²¹⁵ (vii) carrying a firearm in a public place;²¹⁶ and (viii) trespassing in a building with a firearm.²¹⁷ The minimum term must be imposed unless there are exceptional circumstances which would justify the court not doing so.²¹⁸ It would appear that a guilty plea will not result in a reduction of the sentence imposed for an offence under section 51A.²¹⁹ Ashworth observes that this is a feature which renders section 51A “a particularly severe provision.”²²⁰

(ii) Threats made with offensive weapons or articles with blades or points

4.106 Section 1A of the *Prevention of Crime Act 1953*²²¹ prescribes a presumptive minimum sentence of six months’ imprisonment for an adult offender²²² convicted of threatening another person with an offensive weapon in public.²²³ Under this sentencing regime, the minimum penalty must be imposed unless the court considers that there are particular circumstances which relate to the offence or the offender which would make the application of the minimum sentence unjust in all the circumstances.²²⁴

4.107 Section 139AA of the *Criminal Justice Act 1988*²²⁵ prescribes a presumptive minimum sentence of six months’ imprisonment for an adult offender²²⁶ convicted of threatening another person with an

²¹³ Section 16A of the *Firearms Act 1968*.

²¹⁴ Section 17 of the *Firearms Act 1968*.

²¹⁵ Section 18 of the *Firearms Act 1968*.

²¹⁶ Section 19 of the *Firearms Act 1968*.

²¹⁷ Section 20(1) of the *Firearms Act 1968*.

²¹⁸ It has been noted that this ground for not imposing the presumptive minimum term was taken from section 109 of the *Powers of Criminal Courts (Sentencing) Act 2000*, which formerly imposed an automatic life sentence for a second serious offence. By contrast, section 110 or section 111 of the 2000 Act, which impose a three-year term for a third Class A drug trafficking offence or domestic burglary, permit the court to not impose the minimum term if it would be unjust to do so in all the circumstances. Arguably, the concept of exceptional circumstances which would justify the court not imposing the minimum sentence is a lower threshold than exceptional circumstances which would make the minimum term unjust in all the circumstances: Current Law Statutes (Sweet and Maxwell, 2003) at 44-262.

²¹⁹ Richardson, ed, *Archbold 2010* (Sweet and Maxwell, 2010) at 5-261.

²²⁰ Ashworth *Sentencing and Criminal Justice* (Cambridge University Press, 5th ed, 2010) at 27

²²¹ Inserted by section 142 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*.

²²² Where the offender is 16 or 17 years of age, section 1A(6) of the *Prevention of Crime Act 1953* (inserted by section 142 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*) requires the court to impose a detention and training order of at least four months.

²²³ Under section 1A of the *Prevention of Crime Act 1953* (inserted by section 142 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*), this offence is committed where an individual: (a) has an offensive weapon with him or her in a public place; (b) unlawfully and intentionally threatens another person with the weapon; and (c) does so in such a way that there is an immediate risk of serious physical harm to that other person.

²²⁴ Section 1A(5) of the *Prevention of Crime Act 1953*, inserted by section 142 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*.

²²⁵ Inserted by section 142 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*.

²²⁶ Where the offender is 16 or 17 years of age, section 139AA(8) of the *Criminal Justice Act 1988* (inserted by section 142 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*) requires the court to impose a detention and training order of at least four months.

offensive weapon or an article with a blade or point in a public place or on school premises.²²⁷ Once again, the minimum penalty must be imposed unless the court considers that there are particular circumstances which relate to the offence or the offender which would make the application of the minimum sentence unjust in all the circumstances.

4.108 Where an offender pleads guilty to either of these aggravated knife offences, the court may reduce the sentence which it would otherwise have imposed.²²⁸ It may not, however, reduce the sentence below 80 percent of the minimum term provided by law.

4.109 In introducing these sentencing provisions, the then Secretary of State for Justice stated that these presumptive penalties were intended “to stop people believing that knife crime will not be punished properly in the criminal justice system.”²²⁹ It remains to be seen whether, in practice, this sentencing regime will produce the desired deterrent effect. Certain commentators have emphasised that in the moment of drawing a knife, few offenders consider the legal ramifications of their actions.²³⁰ Rather, they suggest that the lives of many such offenders are so chaotic and violent that they are more fearful of each other and the prospect of being stabbed, than of the penal consequences of carrying a knife themselves.²³¹

(c) Scotland

4.110 In Scotland, in addition to the mandatory life sentence for murder, there are mandatory minimum sentences for certain drug and firearms offences. The mandatory minimum sentence prescribed for certain drug offences is considered in Chapter 5 as this applies only in respect of repeat offenders.

(i) Firearms Offences

4.111 Section B4 of the *Scotland Act 1998* provides that the power to legislate in relation to firearms is reserved to Westminster. Thus, the control of firearms is regulated by the *Firearms Act 1968*, as amended by the *Criminal Justice Act 2003*. Section 51A²³² of the *Firearms Act 1968* introduces a mandatory sentencing regime in respect of certain firearms offences. It stipulates that the Scottish courts must impose a minimum sentence of three years upon offenders aged 16 to 20 years, and five years upon those aged over 20 years. These minimum terms must be imposed unless there are exceptional circumstances which would justify the court not doing so.

4.112 As noted at paragraph 4.105, section 51A(1A)²³³ of the *Firearms Act 1968* provides that the offences to which these presumptive sentences apply are: (i) possession of a firearm with intent to

²²⁷ Under section 139AA of the *Criminal Justice Act 1988* (inserted by section 142 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*) this offence is committed where a person: (a) has an article to which the section applies with him or her in a public place or on school premises, (b) unlawfully and intentionally threatens another person with the article, and (c) does so in such a way that there is an immediate risk of serious physical harm to that other person.

²²⁸ Section 142 of the *Criminal Justice Act 2003*, as amended by paragraph 16 of Schedule 26 to the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*.

²²⁹ Hansard, House of Commons, Legal Aid, Sentencing and Punishment of Offenders Bill, 2 December 2011, Column 1044, Kenneth Clarke MP.

²³⁰ In particular, see commentary from Michael Turner QC: “Tougher Prison Sentences for Violent Crime in Force” BBC 3 December 2012. Available at: www.bbc.co.uk/news/uk-20576580 [Last Accessed: 22 May 2013]. See also: Hansard, House of Commons Public Bill Committee, Legal Aid, Sentencing and Punishment of Offenders Bill, 12 July 2011, Column 16, Frances Crook, Chief Executive of the Howard League for Penal Reform.

²³¹ Hansard, House of Commons Public Bill Committee, Legal Aid, Sentencing and Punishment of Offenders Bill, 12 July 2011, Column 16, Frances Crook, Chief Executive of the Howard League for Penal Reform.

²³² Inserted by section 287 of the *Criminal Justice Act 2003*.

²³³ Inserted by section 30 of the *Violent Crime Reduction Act 2006*.

injure;²³⁴ (ii) possession of a firearm with intent to cause fear of violence;²³⁵ (iii) use of a firearm to resist arrest;²³⁶ (iv) carrying a firearm with criminal intent;²³⁷ (v) carrying a firearm in a public place;²³⁸ and (vi) trespassing in a building with a firearm.²³⁹

(ii) Other

4.113 Section 206(1) of the *Criminal Procedure (Scotland) Act 1995* provides that no person shall be sentenced to imprisonment by a court of summary jurisdiction for a period of less than five days.²⁴⁰

(d) United States of America

4.114 Most American states have presumptive or mandatory sentencing regimes in respect of drugs and/or firearms offences. Many states apply presumptive or mandatory sentencing regimes in respect of other offences as well. In general, second or subsequent offences will attract enhanced penalties; some of these regimes are considered in Chapter 5.

(i) Alabama

(I) Drug Offences

4.115 In Alabama, §13A-12-215 of the *Penal Code* prescribes a minimum sentence of 10 years for selling, furnishing or giving a controlled substance to a person under the age of 18 years. §13A-12-231 prescribes various minimum terms, ranging from three years to life imprisonment without parole, for drug trafficking.²⁴¹ §13A-12-231(13) stipulates that an additional penalty of five years must be imposed for drug trafficking while in possession of a firearm. §13A-12-250 stipulates that an additional penalty of five years must be imposed for selling drugs within a three-mile radius of a school, college or university. §13A-12-270 stipulates that an additional penalty of five years must be imposed for selling drugs within a three-mile radius of a housing project. §13A-12-233 prescribes a minimum term of 25 years without parole for running a drug trafficking enterprise and life without parole for a second offence.

(II) Firearms Offences

4.116 §13A-5-6 of the *Penal Code* prescribes a minimum sentence of 20 years for the commission of a Class A felony with a firearm and 10 years for the commission of a Class B or Class C felony. §13A-11-60 stipulates that an additional penalty of three years must be imposed for possession and sale of brass or steel Teflon-coated handgun ammunition.

(III) Other

²³⁴ Section 16 of the *Firearms Act 1968*.

²³⁵ Section 16A of the *Firearms Act 1968*.

²³⁶ Section 17 of the *Firearms Act 1968*.

²³⁷ Section 18 of the *Firearms Act 1968*.

²³⁸ Section 19 of the *Firearms Act 1968*.

²³⁹ Section 20(1) of the *Firearms Act 1968*.

²⁴⁰ Section 16 of the *Criminal Justice and Licensing (Scotland) Act 2010*, which does not appear to have been commenced, proposes to raise the term to 15 days.

²⁴¹ §13A-12-232(b) provides that the court may suspend or reduce the mandatory minimum prison term required by statute, but only if: (1) the mandatory minimum required by statute is not life without parole; (2) the prosecuting attorney files a motion requesting a reduced or suspended sentence; and (3) the offender provides substantial assistance in the arrest or conviction of any accomplices, accessories, co-conspirators or principals. In addition, §15-18-8(a)(1) (any prison sentence under 20 years except for Class A and B felony child sex offences) permits (but does not require) judges to impose a split sentence in which only part of the sentence is served and the rest of the sentence is suspended, if “the judge presiding over the case is satisfied that the ends of justice and the best interests of the public as well as the defendant will be served” by splitting the sentence.

4.117 Minimum sentences are also prescribed in respect of: (i) a fourth or subsequent conviction for driving under the influence within a five-year period;²⁴² (ii) driving under the influence with a passenger under 14 years of age;²⁴³ (iii) robbery of a pharmacy;²⁴⁴ (iv) second or subsequent offences of domestic violence;²⁴⁵ (v) terrorism;²⁴⁶ (vi) certain sexual offences against children;²⁴⁷ (vii) hate crimes;²⁴⁸ (viii) falsely reporting an incident;²⁴⁹ and (ix) possession, transportation, receipt or use of a destructive device, explosive, bacteriological or biological weapon.²⁵⁰ There are also provisions dealing with habitual offenders.²⁵¹

(ii) Maine

(I) Drugs Offences

4.118 In Maine, §1105-A of the *Penal Code* prescribes a variety of minimum sentences, ranging from one year to four years, for trafficking a scheduled drug: (i) with a child under the age of 18 years or with the aid or conspiring of a child under the age of 18 years; (ii) in circumstances where the offender has a prior conviction for a Class A, Class B or Class C drug offence; (iii) in circumstances where the offender is in possession of a firearm; or (iv) on a school bus or within 1,000 feet of a school zone.

4.119 §1105-B prescribes a minimum sentence of two years for trafficking or furnishing a counterfeit drug: (i) to a child under the age of 18 years; (ii) in circumstances where the offender has a prior conviction for a Class A, Class B or Class C drug offence; (iii) in circumstances where the offender is in possession of a firearm; or (iv) in circumstances where death or serious bodily injury is subsequently caused by the use of the drug.

4.120 §1105-C prescribes a variety of minimum sentences, ranging from one year to two years, for furnishing a scheduled drug: (i) to a child under the age of 18 years or with the aid or conspiring of a child under the age of 18 years; (ii) in circumstances where the offender has a prior conviction for a Class A, Class B or Class C drug offence; (iii) in circumstances where the offender is in possession of a firearm; or (iv) on a school bus or within 1,000 feet of a school zone.

4.121 §1105-D prescribes a variety of minimum sentences, ranging from one year to four years, for cultivating marijuana plants: (i) in circumstances where the offender has a prior conviction for a Class A, Class B or Class C drug offence; (ii) in circumstances where the offender is in possession of a firearm; (iii) with the aid or conspiring of a child; or (iv) within 1,000 feet of a school zone.²⁵²

²⁴² §32-5A-191f(h).

²⁴³ §32A-5A-191(j).

²⁴⁴ §13A-8-51(2) and §13A-8-52.

²⁴⁵ §13A-6-130 and §13A-6-131.

²⁴⁶ §13A-10-152.

²⁴⁷ §15-20-21(5); §13A-5-6(4) and (5); §13A-5-110; and §13A-6-111.

²⁴⁸ §13A-5-13.

²⁴⁹ §13A-11-11.

²⁵⁰ §13A-7-44.

²⁵¹ *Habitual Felony Offender Act*.

²⁵² §1252(5-A)(B)-(C) provides that the courts may depart from the mandatory minimum sentences if they find substantial evidence for all three of the following elements: (1) Imposition of the mandatory term will result in substantial injustice to the defendant; (2) failure to impose the mandatory term will not have an adverse effect on public safety; and (3) failure to impose the mandatory term will not appreciably impair the deterrent effect of the mandatory sentence. Then the court must find two additional elements: (1) the defendant is an appropriate candidate for an intensive supervision programme, but would be ineligible if given a mandatory sentence; and (2) based on the defendant's background, attitude and prospects for rehabilitation and the

(II) *Firearms Offences*

4.122 §1252(5) prescribes a minimum sentence of four years for committing a Class A crime while using a firearm against a person; two years for committing a Class B crime while using a firearm against a person; and one year for committing a Class C crime while using a firearm against a person.

(iii) *Virginia*

(I) *Drugs Offences*

4.123 In Virginia, §18.2-248.1(d) of the *Penal Code* prescribes a minimum sentence of five years for the sale or distribution of marijuana, where it is the offender's third or subsequent felony. §18.2-248 prescribes a variety of minimum sentences, ranging from three years to 40 years, for distributing or transporting marijuana. §18.2-255(A,i) prescribes a variety of minimum sentences, ranging from two years to five years, for selling a certain amount of marijuana to a minor. §18.2-255(A,ii) prescribes a variety of minimum sentences, ranging from two years to five years, for selling a certain amount of marijuana, where the minor assists in distribution.

4.124 §18.2-248 prescribes a variety of minimum sentences, ranging from 20 years to life, where there is a continuing criminal enterprise grossing specified amounts of money. §18.2-248 also prescribes a variety of minimum sentences, ranging from 20 years to life, for the distribution of certain quantities of certain drugs as part of a continuing criminal enterprise. §18.2-248 also prescribes a variety of minimum sentences, ranging from three years to 20 years, for the distribution of certain quantities of certain drugs. §18.2-248(C) prescribes a minimum sentence of five years for a third or subsequent offence of selling or possessing with intent to sell or distribute Schedule I or Schedule II drugs. §18.2-248(C1) prescribes a minimum sentence of three years for a third or subsequent offence of manufacturing metamphetamine.

4.125 §18.2-248.01 prescribes a variety of minimum terms, ranging from three years to 10 years for transporting Schedule I or Schedule II drugs to the Commonwealth. §18.2-255.2 prescribes a minimum sentence of one year for a second or subsequent offence of distributing controlled substances on school property. §18.2-248.5(A) prescribes a minimum sentence of six months for the offence of selling or distributing anabolic steroids. §18.2-248(H) prescribes a minimum sentence of 20 years for the distribution of a Schedule I or II drug.²⁵³

(II) *Firearms Offences*

4.126 §18.2-53.1 prescribes a minimum sentence of three years for using a firearm in the commission of a felony and five years for a second or subsequent offence. §18.2-308.4(B) and (C) prescribe minimum sentences of two to five years for possessing or selling certain types of drug while possessing a firearm. §18.2-308.2(A) prescribes minimum sentences of two to five years for possession or transportation of a firearm where the offender is a convicted felon. §18.2-308.2:2(M) prescribes a minimum sentence of five years for the provision of more than one firearm to an ineligible person. §18.2-308.1(B) prescribes a minimum sentence of five years for the use of a firearm on school property.

(III) *Other*

4.127 Minimum sentences are also prescribed in respect of: (i) the illicit possession, importation, sale or distribution of cigarettes;²⁵⁴ (ii) certain types of assault;²⁵⁵ (iii) escape from a correctional facility;²⁵⁶ (iv)

nature of the victim and offence, imposing the mandatory sentence would frustrate the general purpose of sentencing.

²⁵³ §18.2-248 provides that if the defendant has no prior conviction, did not use violence or the threat of violence, the offence did not result in death or serious bodily injury and the defendant was not a central figure in the criminal enterprise and provided substantial assistance to the government prior to sentencing, the five and 20 year mandatory minimums will not apply for manufacturing. §18.2-248.1 provides that if the individual can prove that he or she trafficked marijuana only with the intent to assist an individual and not to profit, he or she will be sentenced for committing a class 1 misdemeanour.

²⁵⁴ §3.2-4212(D,i) and §3.2-4212(D,ii).

²⁵⁵ §18.2-51.1; §18.2-57(A); §18.2-57(B); §18.2-57(C); and §18.2-57(D).

identity theft;²⁵⁷ (v) certain gang-related offences in a school zone;²⁵⁸ (vi) certain types of manslaughter;²⁵⁹ (vii) certain types of sexual offence against children;²⁶⁰ (viii) violations of certain protective orders;²⁶¹ (ix) certain types of sexual assault;²⁶² driving while intoxicated;²⁶³ (x) operating a vehicle while licence revoked;²⁶⁴ (xi) reckless driving causing death;²⁶⁵ (xii) certain types of hate crime;²⁶⁶ and (xiii) certain types of vandalism.²⁶⁷ There is also a provision dealing with habitual offenders.²⁶⁸

(iv) Federal

(I) Drugs Offences

4.128 §841(a), §841(b)(1)(A) and §2D1.1 of the *Penal Code* prescribe a variety of minimum sentences, ranging from five years to life, for manufacturing, distributing or possessing drugs, with intent to distribute. The sentences escalate for second and subsequent offences. §846, §2D1.1, §2D1.2, §2D1.5 - §2D1.13, §2D2.1, §2D2.2, §2D3.1 and §2D3.2 stipulate that the mandatory minimum sentence for the underlying offence be imposed for attempts and conspiracies to commit any drug trafficking or possession offence.

4.129 §848(a) and §2D1.5 prescribe a minimum sentence of 20 years for a continuing criminal enterprise and 30 years for a second or subsequent offence. §848(b) and §2D1.5 prescribe a minimum sentence of life for acting as principal administrator, organiser or leader of a continuing criminal enterprise. §848(e) and §2d1.5 prescribe a minimum sentence of 20 years for engaging in a continuing criminal enterprise and intentionally killing an individual or law enforcement officer.

4.130 §859 and §2D1.2 prescribe a minimum sentence of one year or the minimum required by §841(b), whichever is longer, for distribution of drugs to persons under the age of 21 years. §860(a) and §2D1.2 prescribe a minimum sentence of one year or the minimum required by §841(b), whichever is longer, for distribution of a controlled substance near a school or similar facility; three years or the minimum required by §841(b), whichever is longer, for a second offence; and the minimum required by §841(b)(1)(A) for a third offence. §861 and §2D1.2 prescribe the minimum required by §841(b)(1)(A) for the employment or use of persons under 18 years in drug operations. §861(b), §861(c) and §2D1.2 prescribe a minimum sentence of one year for knowingly and intentionally employing or using a person under the age of 18 years in drug operations; one year for a second offence; and the minimum required by §841(b)(1)(A) for a third offence.

4.131 §861(f) and §2D1.2 prescribe a minimum sentence of one year for knowingly or intentionally distributing a controlled substance to a pregnant individual. §960(a), §960(b) and §2D1.1 prescribe a variety of minimum sentences, ranging from five years to life, depending on whether it is a first or subsequent offence, for the unlawful importation or exportation of drugs. §963, §2D1.1, §2D1.2, §2D1.5-

²⁵⁶ §53.1-203(1).

²⁵⁷ §18.2-186.4.

²⁵⁸ §18.2-46.2.

²⁵⁹ §18.2-36.1(B) and §18.2-36.2(B).

²⁶⁰ §18.2-374.1:1(C); §18.2-374.1(B,1); §18.2-374.1(B,2); §18.2-374.1(B,3); §18.2-374.1(B,4); §18.2-374.3(C); and §18.2-374.3(D).

²⁶¹ §16.1-253.2.

²⁶² §18.2-61(A,iii); §18.2-67.1(A,1); §18.2-67.2(A,1); §18.2-67.5:2; and §18.2-67.5:3.

²⁶³ §18.2-266; §46.2-341.24; §46.2-357(B,1); §46.2-357(B,2); and §46.2-357(B,3).

²⁶⁴ §46.2-301; §46.2-391(D,1); §46.2-391(D,2a, i); §46.2-391(D,2a,ii); and §46.2-391(D,3).

²⁶⁵ §46.2-865.1(A,2).

²⁶⁶ §18.2-121; §18.2-57(A); and §18.2-57(B).

²⁶⁷ §18.2-154.

²⁶⁸ §19.2-297.1.

§2D1.13, §2D2.1, §2D2.2, §2D3.1 and §2D3.2 prescribe the same mandatory minimum sentence for the underlying offence as for attempts and conspiracies to commit any offence of importation or exportation.

(II) Firearms Offences

4.132 §924(c)(1)(A)(i) and §2K2.4 stipulate that an additional penalty of five years must be imposed for using or carrying a firearm during a crime of violence or drug trafficking crime. §924(c)(1)(A)(ii) and §2K2.4 stipulate that an additional penalty of 7 years must be imposed for brandishing a firearm during a crime of violence or drug trafficking crime. §924(c)(1)(A)(iii) and §2K2.4 stipulate that an additional penalty of 10 years must be imposed for discharging a firearm during a crime of violence or drug trafficking crime. §924(c)(1)(B)(i) and §2K2.4 stipulate that an additional penalty of 10 years must be imposed for possessing a firearm that is a short-barrelled rifle or shotgun. §924(c)(1)(B)(ii) and §2K2.4 stipulate that an additional penalty of 30 years must be imposed for possessing a machinegun, destructive device or firearm equipped with a silencer or muffler.

4.133 §924(c)(1)(C)(i) and §2K2.4 stipulate that an additional penalty of 25 years must be imposed for a second or subsequent conviction under §924(c)(1)(A). §924(c)(1)(C)(ii) and §2K2.4 prescribe a minimum sentence of life for a second or subsequent conviction under §924(c)(1)(A), with a machine gun, destructive device or firearm equipped with a silencer or muffler. §924(c)(5)(A) and §2K2.4 stipulate that an additional penalty of 15 years must be imposed for possession or use of armour-piercing ammunition during a crime of violence or drug trafficking crime. §924(e)(1) and §2K2.4 prescribe a minimum sentence of 15 years for possession of a firearm or ammunition by a fugitive offender or addict, who has three convictions for violent felonies or drug offences. §929(a)(1) and §2K2.4 stipulate that an additional penalty of five years must be imposed for carrying a firearm during a violent offence or drug trafficking crime.

(III) Other

4.134 Minimum sentences are also prescribed for: (i) certain immigration offences;²⁶⁹ (ii) identity theft;²⁷⁰ (iii) sexual offences against children;²⁷¹ (iv) production, possession or use of fire or explosives;²⁷² (v) airplane hijacking;²⁷³ (vi) obstruction of justice;²⁷⁴ (vii) illegal food stamp activity;²⁷⁵ (viii) kidnapping;²⁷⁶ (ix) hostage-taking;²⁷⁷ (x) bank robbery, racketeering, and organised crime;²⁷⁸ (xi) fraud, bribery and white collar crime;²⁷⁹ (xii) piracy;²⁸⁰ (xiii) certain types of assault or battery;²⁸¹ (xiv) interference with civil service

²⁶⁹ §1324(a)(2)(B)(i) and §2L1.1; §1324(a)(2)(B)(ii) and §2L1.1; and §1326(b)(3) and §2L1.2.

²⁷⁰ §1028A(a)(1) and §2B1.6; and §1028A(a)(2) and §2B1.6.

²⁷¹ §1591(b)(1), §2G1.1, §2D2.1 and §2G1.3; §1591(b)(2), §2G1.1, §2D2.1 and §2G1.3; §2251A(a) and §2G2.3; §2251A(b) and §2G2.3; §2241(c) and §2A3.1; §2250(c) and §2A3.6; §1466A(a), §1466A(b) and §2G2.2; §2251(a), §2251(e) and §2G2.1; §2251(b), §2251(e) and §2G2.1; §2251(c), §2251(e), §2G2.1 and §2G2.2; §2251(d), §2251(e) and §2G2.2; §2252(a)(1), §2252(a)(3) and §2G2.2; §2252(a)(2) and §2G2.2; §2252(a)(4) and §2G2.2; §2252A(a)(1) to §2252A(a)(4), §2252A(a)(6) and §2G2.2; §2252A(a)(5) and §2G2.2; §2252A(g) and §2G2.2; §2257(i) and §2G2.5; §2260(a) and §2G2.1; §2260(b) and §2G2.2; §2260A and §2A3.5; §2422(b), §2G1.1 and §2G1.3; §2423(a) and §2G1.3; §2423(e) and §2G1.3; §3599(e)(1); and §3599(c)(1).

²⁷² §1245(b); §229A(a)(2); §33(b), §2A2.1, §2A2.2, §2B1.1 and §2K1.4; §844(f)(1), §2K1.4 and §2X1.1; §844(h), §2K1.4 and §2K2.4; §844(i) and §2K1.4; §844(o) and §2K2.4; and §2272(b) and §2M6.1.

²⁷³ §46502(a)(2)(A), §2A5.1 and §2X1.1; §46502(a)(2)(B), §2A5.1 and §2X1.1; §46502(b)(1)(A), §2A5.1 and §2X1.1; §46502(b)(1)(B), §2A5.1 and §2X1.1; and §46506(1) and §2A5.3.

²⁷⁴ §192; §390; §13a and §2B1.1; §13b; §15b(k); and §195(3) and §2N2.1.

²⁷⁵ §2024(b)(1) and §2B1.1; and §2024(c) and §2B1.1.

²⁷⁶ §1201(g)(1) and §3559(f)(2).

²⁷⁷ §1203(a), §2A4.1 and §2X1.1.

²⁷⁸ §225(a), §2B1.1 and §2B4.1; §1956(h) and §2S1.1; and §2113(e), §2A1.1 and §2B3.1.

²⁷⁹ §4221 and §2B1.1; §622 and §2C1.1; §447; §220(e); §617; §630; and §8.

examinations;²⁸² (xv) stalking in violation of a restraining order;²⁸³ (xvi) treason;²⁸⁴ (xvii) failure to report seaboard saloon purchases;²⁸⁵ (xviii) practice of pharmacy and sale of poisons in China;²⁸⁶ (xix) navigable water regulation violation;²⁸⁷ (xx) deposit of refuse or obstruction of navigable waterway;²⁸⁸ (xxi) deposit of refuse in New York or Baltimore harbours;²⁸⁹ (xxii) violation of merchant marine act;²⁹⁰ (xxiii) refusal to operate railroad or telegraph lines;²⁹¹ (xxiv) sale or donation of HIV positive tissue or bodily fluids to another person for subsequent use other than medical research;²⁹² (xxv) and trespassing on federal land for hunting or shooting.²⁹³ As discussed in Chapter 5, there are also provisions dealing with habitual offenders.²⁹⁴

(IV) *United States Sentencing Commission Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (2011)*

4.135 In October 2011, the United States Sentencing Commission prepared a report on mandatory sentences pursuant to a congressional directive in section 4713 of the *Hate Crimes Prevention Act 2009*.²⁹⁵ The Sentencing Commission was thus required to assess the compatibility of mandatory minimum penalties with the federal guideline system and to discuss mechanisms other than mandatory minimum sentencing laws by which Congress might take action with respect to sentencing policy.

4.136 In the Report, the Sentencing Commission indicated that while there was a spectrum of views among its members regarding mandatory minimum penalties, it uniformly believed that a strong and effective sentencing guidelines system best serves the purposes of the *Sentencing Reform Act*. The Sentencing Commission stated, however, that if Congress decided to exercise its power to direct sentencing policy by enacting mandatory minimum penalties, such penalties should: (1) not be excessively severe, (2) be narrowly tailored to apply only to those offenders who warrant such punishment, and (3) be applied consistently.

4.137 The Sentencing Commission observed that certain mandatory minimum provisions apply too broadly and/or are set too high to warrant the prescribed minimum penalty for the full range of offenders who could be prosecuted under the particular criminal statute. Different charging and plea practices have thus developed in various districts and resulted in the disparate application of certain mandatory minimum penalties.

²⁸⁰ §1651; §1652; §1653; §1655; §1658(b); and §1661.

²⁸¹ §1389.

²⁸² §1917.

²⁸³ §2261(b)(6) and §2M1.1.

²⁸⁴ §2381 and §2A6.2.

²⁸⁵ §283 and §2T3.1.

²⁸⁶ §212.

²⁸⁷ §410

²⁸⁸ §411 and §2Q1.3.

²⁸⁹ §441.

²⁹⁰ §58109(a).

²⁹¹ §13.

²⁹² §1122.

²⁹³ §414

²⁹⁴ §3559(c)(1).

²⁹⁵ *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 2011).

4.138 The Sentencing Commission asserted that this disparity can largely be traced to the structure and severity of mandatory minimum penalties. It observed that mandatory minimum provisions typically use a limited number of aggravating factors to trigger the prescribed penalty, without regard to the possibility that mitigating circumstances surrounding the offence or the offender might justify a lower sentence. For such a sentence to be reasonable in every case, it observed, the factors triggering the mandatory minimum penalty must always warrant the prescribed mandatory minimum penalty, regardless of the individualised circumstances of the offence or the offender. It noted that this cannot be the situation for all cases and thus suggested that Congress should consider whether a statutory “safety valve” mechanism, similar to the one available for certain drug trafficking offenders, might be appropriately tailored for low-level, non-violent offenders convicted of other offences carrying mandatory minimum penalties.

4.139 By contrast with mandatory minimum penalties, the Sentencing Commission observed that sentencing guidelines prescribe proportional, individualised sentences, based on many factors relating to the seriousness of the offence and the criminal history and other characteristics of the offender. It concluded that this multi-dimensional approach to sentencing seeks to avoid the problems inherent in the structure of mandatory minimum penalties and, for this reason, best serves the purposes of the *Sentencing Reform Act*.

(e) Canada

4.140 Under the first Canadian *Criminal Code* of 1892, mandatory minimum sentences applied in respect of six offences, most of which related to corruption.²⁹⁶ In recent decades, however, Canada has witnessed a marked increase in the use of this mode of punishment.²⁹⁷ Minimum sentences are now prescribed for certain drug offences, firearms offences, sexual offences committed against children, and serious fraud. In this section, the Commission considers the application of these sentencing regimes to offenders convicted for the first time of a specified offence. The enhanced minimum penalties applicable to repeat offenders are addressed in Chapter 5.

(i) Drug Offences

4.141 Numerous drug offences attract a mandatory minimum sentence under the *Controlled Drugs and Substances Act*, as amended.²⁹⁸

4.142 First, a minimum sentence of one year applies where the following offences are committed in prescribed circumstances: (i) trafficking in a substance listed in Schedule I or Schedule II to the Act or any substance represented or held out to be such a substance,²⁹⁹ and (ii) possessing a substance listed

²⁹⁶ Crutcher “Mandatory Minimum Penalties of Imprisonment: An Historical Analysis” (2000-2001) 44 *Crim. L.Q.* 279 at 280.

²⁹⁷ *Ibid* at 279.

²⁹⁸ Section 39 - section 46 of the *Safe Streets and Communities Act*.

²⁹⁹ Section 5(1) of the *Controlled Drugs and Substances Act*.

Schedule I lists the following substances, as well as their preparations, derivatives, alkaloids and salts: (i) opium poppy; (ii) coca; (iii) phenylpiperidines; (iv) phenazepines; (v) amidones; (vi) methadols; (vii) phenalkoxams; (viii) thiambutenes; (ix) moramides; (x) morphinans; (xi) benzazocines; (xii) ampromides; (xiii) benzimidazoles; (xiv) phencyclidine; (xv) piritramide; (xvi) fentanyls; (xvii) tilidine; (xviii) methylenedioxypropyvalerone; and (xix) methamphetamine. The substance referred to in Schedule 2 to the Act is cannabis, including its preparations, derivatives and similar synthetic preparations. Not included are non-viable cannabis seed, with the exception of its derivatives, or mature cannabis stalks that do not include leaves, flowers, seeds or branches; and fiber derived from such stalks.

Section 5(3)(a.1) of the *Controlled Drugs and Substances Act*, as inserted by section 39 of the *Safe Streets and Communities Act*, further specifies that this regime will not apply where the subject matter of the offence is a substance included in Schedule II in an amount not more than that set out for that substance in Schedule VII.

in Schedule I or Schedule II to the Act for the purpose of trafficking.³⁰⁰ The minimum sentence must be imposed where: (a) the person committed the offence for the benefit of, at the direction of, or in association with, a criminal organization; (b) the person used, or threatened to use, violence in committing the offence; (c) the person carried, used, or threatened to use a weapon in committing the offence; or (d) the person was convicted of a designated substance offence, or served a prison sentence for a designated substance offence, within the previous 10 years.³⁰¹ These offences attract an enhanced minimum sentence of two years if one of the following aggravating factors is present: (a) the person committed the offence in or near a school, on or near school grounds, or in or near any other public place usually frequented by persons under the age of 18 years; (b) the person committed the offence in a prison or on its grounds; or (c) the person used the services of a person under the age of 18 years, or involved such a person, in committing the offence.³⁰²

4.143 Second, a minimum sentence of one year also applies where the following offences are committed in specified circumstances: (i) importing and exporting a substance listed in Schedule I in an amount that is not more than one kilogram, or a substance listed in Schedule II,³⁰³ and (ii) possessing, for the purpose of exportation, a substance listed in Schedule I in an amount that is not more than one kilogram, or a substance listed in Schedule II.³⁰⁴ The court must impose the minimum sentence where: (a) the offence was committed for the purpose of trafficking; (b) the perpetrator, while committing the offence, abused a position of trust or authority; or (c) the person had access to an area that is restricted to authorised persons and used that access to commit the offence.³⁰⁵ Where the subject matter of either offence is a substance listed in Schedule I, in an amount that is more than one kilogram, a minimum sentence of two years applies.³⁰⁶

4.144 Third, the offence of producing a substance listed in Schedule I³⁰⁷ ordinarily attracts a minimum sentence of two years.³⁰⁸ However, if one of the following aggravating factors is present, the court is required to impose a minimum sentence of three years: (a) the person used real property belonging to a third party in committing the offence; (b) the production constituted a potential security, health or safety hazard to persons under the age of 18 years who were in the location where the offence was committed or in the immediate area; (c) the production constituted a potential public safety hazard in a residential area; or (d) the person set or placed a trap, device or other thing that is likely to cause death or bodily harm to another person in the location where the offence was committed or in the immediate area, or permitted such a trap, device or other thing to remain or be placed in that location or area.³⁰⁹

³⁰⁰ Section 5(2) of the *Controlled Drugs and Substances Act*.

³⁰¹ Section 5(3)(a)(i) of the *Controlled Drugs and Substances Act*, as amended by section 39 of the *Safe Streets and Communities Act*.

³⁰² Section 5(3)(a)(ii) of the *Controlled Drugs and Substances Act*, as amended by section 39 of the *Safe Streets and Communities Act*.

³⁰³ Section 6(1) of the *Controlled Drugs and Substances Act*.

³⁰⁴ Section 6(2) of the *Controlled Drugs and Substances Act*.

³⁰⁵ Section 6(3)(a) of the *Controlled Drugs and Substances Act*, as amended by section 40 of the *Safe Streets and Communities Act*.

³⁰⁶ Section 6(3)(a.1) of the *Controlled Drugs and Substances Act*, as amended by section 40 of the *Safe Streets and Communities Act*.

³⁰⁷ Section 7(1) of the *Controlled Drugs and Substances Act*.

³⁰⁸ Section 7(2)(a) of the *Controlled Drugs and Substances Act*, inserted by section 41 of the *Safe Streets and Communities Act*.

³⁰⁹ Section 7(3) of the *Controlled Drugs and Substances Act*, inserted by section 41 of the *Safe Streets and Communities Act*.

4.145 The offence of producing a substance listed in Schedule II³¹⁰ (other than marijuana) attracts a minimum sentence of one year if the production is for the purpose of trafficking.³¹¹ A minimum sentence of 18 months applies if the production is for the purpose of trafficking and if any of the aggravating factors listed in section 7(3) of the Act (as outlined at paragraph 4.144) apply.³¹² Where the subject matter of the offence is cannabis, the Act prescribes minimum sentences ranging from six months to three years. The applicable minimum sentence is determined by the number of plants produced and whether any of the aggravating factors listed in section 7(3) of the Act are present.³¹³

4.146 Section 10 of the *Controlled Drugs and Substances Act* provides that a court may delay sentencing an offender convicted of any of the foregoing offences in order to enable the offender to participate in a drug treatment court program approved by the Attorney General, or to attend a treatment program approved by the province under the supervision of the court. If the offender successfully completes such a program, the court is not required to impose the prescribed minimum sentence.

4.147 Dupuis observes that vigorous debate surrounded the introduction of these minimum sentences.³¹⁴ On one side, it was argued that mandatory sentencing for drug offences: (i) addresses the (perceived) problem of judges prioritising the rehabilitation of offenders over crime deterrence and the right of law-abiding citizens to go about their lives without fear; (ii) destroys the criminal infrastructure that keeps the crime cycle going; (iii) encourages addicts to choose drug treatment programmes rather than go to prison; (iv) is an important deterrent and denouncement by society; and (v) incapacitates offenders by keeping them off the streets. On the other side, it was argued that mandatory sentencing: (i) strips judges of discretion in sentencing; (ii) risks turning Canadian prisons into “US-style inmate warehouses”; (iii) draws funds away from social programmes; and (iv) has not proven to be an effective deterrent.³¹⁵ Concerns have also arisen that this sentencing regime will impact most heavily on marginalised groups (particularly aboriginal people) who are already disproportionately represented in the Canadian prison system.³¹⁶

(ii) Firearms Offences

4.148 The Canadian *Criminal Code* prescribes mandatory minimum sentences for certain offences involving firearms and/or other weapons.

4.149 First, the following offences attract a minimum one-year sentence: (i) using a firearm in the commission of an offence;³¹⁷ (ii) using an imitation firearm in the commission of an offence,³¹⁸ (iii)

³¹⁰ Section 7(1) of the *Controlled Drugs and Substances Act*.

³¹¹ Section 7(a.1)(i) of the *Controlled Drugs and Substances Act*, inserted by section 41 of the *Safe Streets and Communities Act*.

³¹² Section 7(a.1)(ii) of the *Controlled Drugs and Substances Act*, inserted by section 41 of the *Safe Streets and Communities Act*.

³¹³ Section 7(2)(b) of the *Controlled Drugs and Substances Act*, inserted by section 41 of the *Safe Streets and Communities Act*.

³¹⁴ Dupuis *Legislative Summary of Bill S-10: An Act to Amend the Controlled Drugs and Substances Act and to make related and consequential Amendments to other Acts* (Parliament, No 40-3-S10E, 2010) at 15. Available at: www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=s10&source=library_prb&Parl=40&Session=3&Language=E#n20. [Last accessed: 22 May 2013].

³¹⁵ See also: McLemore “Why Canada should reject the Bill S-10” (Human Rights Watch, 2011).

³¹⁶ Bernstein and Drake “In Canada’s ‘war on drugs,’ aboriginals are the biggest victims” *National Post* 6 November 2012; Everett-Green “Law and Disorder: What Bill C-10 could mean for Canada’s native people” *The Globe and Mail* 17 February 2012; and Sewrattan “Apples, Oranges and Steel: The Effect of Mandatory Minimum Sentences for Drug Offences on the Equality Rights of Aboriginal Peoples” (2013) 46(1) *UBC Law Review* 121.

³¹⁷ Section 85(1) and Section 86(3)(a) of the *Criminal Code*.

possession of a weapon obtained by the commission of an offence;³¹⁹ (iv) trafficking of a prohibited or restricted weapon;³²⁰ (v) possession of a prohibited or restricted weapon for the purpose of weapons trafficking;³²¹ (vi) making an automatic firearm;³²² and (vii) importing or exporting a prohibited weapon, a restricted weapon, or any component or part designed exclusively for use in the manufacture of, or assembly into, an automatic firearm, knowing it is unauthorised.³²³

4.150 Second, the following offences attract a minimum sentence of three years: (i) possession of a prohibited or restricted firearm with ammunition;³²⁴ (ii) weapons trafficking;³²⁵ (iii) possession of a firearm, prohibited weapon, restricted weapon, prohibited device, any ammunition or any prohibited ammunition for the purpose of weapons trafficking;³²⁶ and (iv) importing or exporting a firearm, a prohibited device or any prohibited ammunition, knowing it is unauthorised.³²⁷ Third, where a firearm is used in the commission of the offence, the following offences attract a minimum sentence of four years: (i) causing death by criminal negligence;³²⁸ (ii) manslaughter;³²⁹ (iii) attempted murder;³³⁰ (iv) recklessly discharging a firearm;³³¹ (v) sexual assault with a weapon (threats to a third party or causing bodily harm);³³² (vi) kidnapping;³³³ (vii) hostage-taking;³³⁴ (viii) robbery;³³⁵ and (ix) extortion.³³⁶

4.151 Fourth, where a restricted or prohibited firearm is used in the commission of the offence, or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organisation, the following offences attract a minimum sentence of five years: (i) attempted murder;³³⁷ (ii) recklessly discharging a firearm;³³⁸ (iii) sexual assault with a weapon (threats to a third party or causing bodily harm);³³⁹ (iv) aggravated sexual assault;³⁴⁰ (v)

³¹⁸ Section 85(2) and Section 86(3)(b) of the *Criminal Code*.

³¹⁹ Section 96(1) and Section 96(2) of the *Criminal Code*.

³²⁰ Section 99(1) and Section 99(2)(a) of the *Criminal Code*.

³²¹ Section 100(1) and Section 100(2)(a) of the *Criminal Code*.

³²² Section 102(1) and Section 102(2) of the *Criminal Code*.

³²³ Section 103(1) and Section 102(3)(a) of the *Criminal Code*.

³²⁴ Section 95(1) and Section 95(2)(a)(i) of the *Criminal Code*.

³²⁵ Section 99(1) and Section 99(2)(a) of the *Criminal Code*.

³²⁶ Section 100(1) and Section 100(2)(a) of the *Criminal Code*.

³²⁷ Section 103(1) and Section 103(2)(a) of the *Criminal Code*.

³²⁸ Section 220(a) of the *Criminal Code*.

³²⁹ Section 236(a) of the *Criminal Code*.

³³⁰ Section 239(a.1) of the *Criminal Code*.

³³¹ Section 244.2(1) and Section 244.3(b) of the *Criminal Code*.

³³² Section 272(1) and Section 272(2)(a.1) of the *Criminal Code*.

³³³ Section 279(1) and Section 279(1.1)(a.1) of the *Criminal Code*.

³³⁴ Section 279.1(1) and Section 279.1(a.1) of the *Criminal Code*.

³³⁵ Section 344(1)(a)(i) and Section 344(a.1) of the *Criminal Code*.

³³⁶ Section 346(1) and Section 346(1.1)(a.1) of the *Criminal Code*.

³³⁷ Section 239(1)(a)(i) of the *Criminal Code*.

³³⁸ Section 244.2(1) and Section 244.2(3)(a)(i) of the *Criminal Code*.

³³⁹ Section 272(1) and Section 272(2)(a)(i) of the *Criminal Code*.

³⁴⁰ Section 273(1) and Section 273(2)(a)(i) of the *Criminal Code*.

kidnapping;³⁴¹ (vi) hostage-taking;³⁴² (vii) robbery;³⁴³ and (viii) extortion.³⁴⁴ Finally, the offences of: (i) sexual assault with a weapon (threats to a third party or causing bodily harm);³⁴⁵ and (ii) aggravated sexual assault, also attract a minimum sentence of five years.³⁴⁶

4.152 The Commission observes that the operation of this minimum sentencing regime has given rise to controversy. On one side, proponents have asserted that these provisions necessarily respond to a growth in gun violence in urban centres, particularly in the context of gang-related activities.³⁴⁷ On the other side, critics have argued that these provisions are of doubtful deterrent value³⁴⁸ and excessively constrain judicial discretion.³⁴⁹

4.153 In two recent cases concerning firearms offences, sentencing courts have refused to impose the minimum penalties prescribed by the *Criminal Code*, asserting that these punishments are grossly disproportionate. In the first such instance, the Ontario Superior Court concluded that the three-year minimum sentence provided for the possession of a prohibited or restricted firearm with ammunition violated the *Charter of Rights and Freedoms*.³⁵⁰ In the second instance, the Ontario Court of Justice declared the minimum three-year sentence prescribed for the trafficking of a prohibited or restricted weapon to be unconstitutional.³⁵¹ Both rulings are currently under appeal.³⁵²

(iii) Sexual Offences against Children

4.154 The Canadian *Criminal Code* also prescribes mandatory minimum sentences for certain sexual offences, where these are perpetrated against children.

4.155 First, the following offences attract a minimum sentence of 90 days' imprisonment: (i) householder permitting sexual activity with a child aged 16 or 17 years;³⁵³ (ii) making sexually explicit material available to a child;³⁵⁴ and (iii) exposure of genitals for a sexual purpose to a child under 16 years

³⁴¹ Section 279(1) of the *Criminal Code*.

³⁴² Section 279.1(1) and Section 279.1(2)(a)(i) of the *Criminal Code*.

³⁴³ Section 344(1)(a)(i) of the *Criminal Code*.

³⁴⁴ Section 346(1) and Section 346(1.1)(a)(i) of the *Criminal Code*.

³⁴⁵ Section 272(1) and Section 272(2)(a.2) of the *Criminal Code*.

³⁴⁶ Section 273(1) and Section 273(2)(a.2) of the *Criminal Code*.

³⁴⁷ See: "Toronto shootings prompt Toews to criticize courts" CBC News 18 July 2012. Available at: www.cbc.ca/news/politics/story/2012/07/18/pol-cp-toews-toronto-shooting-political-reaction.html [Last accessed: 22 May 2013].

³⁴⁸ See, for example: Editorial "Responding to Gun Violence" (2006) 51(2) *The Criminal Law Quarterly* 129.

³⁴⁹ See, for example: Submission of the National Criminal Justice Section of the Canadian Bar Association "Bill C-2 - Tackling Violent Crime Act" November 2007 at 5. Available at: www.cba.org/cba/submissions/pdf/07-56-eng.pdf [Last accessed: 22 May 2013].

³⁵⁰ See: Humphreys "Tory gun laws in jeopardy after judge rejects 'outrageous' mandatory sentence" National Post 13 February 2012.

³⁵¹ See: O'Toole "Ontario judge strikes down mandatory minimum sentence for first-offence gun trafficking" National Post 6 July 2012.

³⁵² See: Seymour "Judge refuses to sentence man to 'grossly disproportionate' mandatory minimum" Ottawa Citizen 1 May 2013.

³⁵³ Section 171(1)(a) of the *Criminal Code*.

³⁵⁴ Section 171.1(1) and Section 171.1(2) of the *Criminal Code*. A minimum sentence of 90 days applies where the offender is convicted on indictment. If convicted summarily, the offender will attract a minimum sentence of 30 days.

of age.³⁵⁵ Second, the following offences attract a minimum sentence of six months' imprisonment: (i) possession of child pornography;³⁵⁶ (ii) accessing child pornography;³⁵⁷ (iii) parent or guardian procuring sexual activity with a child aged 16 or 17 years;³⁵⁸ (iv) householder permitting sexual activity with a child under 16 years of age;³⁵⁹ and (v) prostitution of a person under 18 years of age.³⁶⁰

4.156 Third, the following offences attract a minimum one-year sentence of imprisonment: (i) sexual interference with a child under 16 years of age;³⁶¹ (ii) invitation to sexual touching to a child under 16 years of age;³⁶² (iii) sexual exploitation of a child aged 16 or 17 years;³⁶³ (iv) bestiality in the presence of a child or inciting a child to commit bestiality;³⁶⁴ (v) making child pornography;³⁶⁵ (vi) distribution etc. of child pornography;³⁶⁶ (vii) parent or guardian procuring sexual activity with a child under 16 years of age;³⁶⁷ (viii) luring a child;³⁶⁸ (ix) agreement or arrangement for the commission of a sexual offence against a child;³⁶⁹ and (x) sexual assault of a child under 16 years of age.³⁷⁰

³⁵⁵ Section 173(2) of the *Criminal Code*. A minimum sentence of 90 days applies where the offender is convicted on indictment. If convicted summarily, the offender will attract a minimum sentence of 30 days.

³⁵⁶ Section 163.1(4) of the *Criminal Code*. A minimum sentence of six months applies where the offender is convicted on indictment. If convicted summarily, the offender will attract a minimum sentence of 90 days.

³⁵⁷ Section 163.1(4.1) of the *Criminal Code*. A minimum sentence of six months applies where the offender is convicted on indictment. If convicted summarily, the offender will attract a minimum sentence of 90 days.

³⁵⁸ Section 170(b) of the *Criminal Code*.

³⁵⁹ Section 171(b) of the *Criminal Code*.

³⁶⁰ Section 212(4) of the *Criminal Code*.

³⁶¹ Section 151 of the *Criminal Code*. A minimum sentence of one year applies where the offender is convicted on indictment. If convicted summarily, the offender will attract a minimum sentence of 90 days.

³⁶² Section 152 of the *Criminal Code*. A minimum sentence of one year applies where the offender is convicted on indictment. If convicted summarily, the offender will attract a minimum sentence of 90 days.

³⁶³ Section 153(1) and Section 153(1.1) of the *Criminal Code*. A minimum sentence of one year applies where the offender is convicted on indictment. If convicted summarily, such an offender will attract a minimum sentence of 90 days.

³⁶⁴ Section 160(3) of the *Criminal Code*. A minimum sentence of one year applies where the offender is convicted on indictment. If convicted summarily, such an offender will attract a minimum sentence of six months.

³⁶⁵ Section 163.1(2) of the *Criminal Code*. A minimum sentence of one year applies where the offender is convicted on indictment. If convicted summarily, such an offender will attract a minimum sentence of six months.

³⁶⁶ Section 163.1(3) of the *Criminal Code*. A minimum sentence of one year applies where the offender is convicted on indictment. If convicted summarily, such an offender will attract a minimum sentence of six months.

³⁶⁷ Section 170(a) of the *Criminal Code*.

³⁶⁸ Section 172.1(1) and Section 172.1(2) of the *Criminal Code*. A minimum sentence of one year applies where the offender is convicted on indictment. If convicted summarily, such an offender will attract a minimum sentence of 90 days.

³⁶⁹ Section 172.2(1) and Section 172.2(2) of the *Criminal Code*. A minimum sentence of one year applies where the offender is convicted on indictment. If convicted summarily, the offender will attract a minimum sentence of 90 days.

³⁷⁰ Section 271 of the *Criminal Code*. A minimum sentence of one year applies where the offender is convicted on indictment. If convicted summarily, the offender will attract a minimum sentence of 90 days.

4.157 Fourth, the offence of “living on the avails” of the prostitution of a person under 18 years of age attracts a minimum sentence of two years.³⁷¹ Fifth, the following offences attract a minimum sentence of five years: (i) incest with a child under 16 years of age;³⁷² (ii) aggravated offence of living on the avails of the prostitution of a person under 18 years of age;³⁷³ and (iii) trafficking of a person under 18 years of age.³⁷⁴ Sixth, where the offender kidnaps, commits an aggravated assault or aggravated sexual assault against, or causes death to, the victim during the commission of the offence, the offence of trafficking a person under 18 years of age attracts a minimum sentence of six years’ imprisonment³⁷⁵

4.158 The Canadian Ministry of Justice contends that these provisions ensure that the need to strongly deter and denounce the sexual exploitation of children is consistently reflected in sentencing.³⁷⁶ The Ministry argues that this is achieved by virtue of the fact that “the starting point for any sentence calculation must be a sentence of imprisonment... .”³⁷⁷ By contrast, however, critics of this sentencing regime assert that there is little evidence to suggest that mandatory sentencing effectively deters child sexual abuse.³⁷⁸ The constraints placed on judicial discretion, and the corresponding risk of disproportionate punishment, are also emphasised by these commentators.³⁷⁹

(iv) Fraud

4.159 Section 380 of the Canadian *Criminal Code*³⁸⁰ prescribes a minimum sentence of two years’ imprisonment for any offender who by deceit, falsehood or other fraudulent means, defrauds the public or any person (whether ascertained or not) of any property, money, valuable security or service, where the total value of the subject-matter exceeds one million dollars. It has been observed that the introduction of this provision reflected a move by the Canadian government to treat white collar crime more seriously.³⁸¹

(f) Australia

4.160 In Australia, mandatory sentencing has a long history.³⁸² During the 18th and 19th centuries, mandatory sentencing was used for a wide variety of offences.³⁸³ However, during the 19th century, this approach was largely abandoned in favour of parliament setting the maximum penalty, with the sentencing judge responsible for determining the appropriate sentence for the individual offender.³⁸⁴ In

³⁷¹ Section 212(2) of the *Criminal Code*.

³⁷² Section 155(1) and Section 155(2) of the *Criminal Code*.

³⁷³ Section 212(2.1) of the *Criminal Code*.

³⁷⁴ Section 279.011(1) of the *Criminal Code*.

³⁷⁵ Section 279.011(1) of the *Criminal Code*.

³⁷⁶ Hansard, House of Commons, Bill C-22, An Act respecting the mandatory reporting of Internet child pornography by persons who provide an Internet service, 3 December 2010, col 1034.

³⁷⁷ *Ibid.*

³⁷⁸ See, for example: Canadian Criminal Justice Association “Brief to the Standing Committee on Justice and Human Rights ... An Act to Amend the Criminal Code (Sexual Offences Against Children)” (January 2011). Available at: www.ccja-acjp.ca/en/c54en.html [Last accessed: 22 May 2013].

³⁷⁹ *Ibid.*

³⁸⁰ Inserted by section 2 of the *Standing up for Victims of White Collar Crime Act*.

³⁸¹ Wong, Aagaard and Shapiro “Minimum Mandatory Jail Sentence for Fraud over C€1 Million” (5 July 2011). Available at: www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=1355 [Last accessed: 22 May 2013].

³⁸² Roche “Mandatory Sentencing” No 138 Trends & Issues in Crime and Criminal Justice, (Australian Institute of Criminology, 1999) at 1.

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*

recent years, it would appear that the use of mandatory and presumptive sentencing is again becoming increasingly commonplace. The Commission notes, as a preliminary observation, that a persistent criticism of these sentencing regimes is that indigenous adults are much more likely to be affected than non-indigenous adults.³⁸⁵

(i) Commonwealth

(1) People Smuggling

4.161 At federal level, only one Act, the *Migration Act 1958*, provides for mandatory minimum sentences. Under section 236B, the court is required to impose a sentence of at least five years' imprisonment for: (i) the offence of "aggravated people smuggling" (where the offence is committed in relation to at least five people), and (ii) the "aggravated offence of false documents and false or misleading information etc. relating to non-citizens" (where the offence is committed in relation to at least five people). A mandatory minimum sentence of 8 years applies for an aggravated offence of people smuggling which involves exploitation or the danger of death or serious harm to those smuggled, or where (as discussed at paragraph 5.66) one of the foregoing offences is committed on a second or subsequent occasion. Under this sentencing regime, the court is required to fix a minimum non-parole period of three years, or five years if the conviction is for a repeat offence.³⁸⁶ The prescribed minimum penalties will not apply, however, where it is established on the balance of probabilities that the offender was under 18 years of age when the offence was committed.

4.162 The Commission observes that significant controversy surrounds the operation of section 236B of the *Migration Act 1958*. Many commentators,³⁸⁷ including several members of the Australian judiciary,³⁸⁸ have criticised this mandatory sentencing regime on the basis that it has led to the imposition of disproportionate sentences on low-level offenders.

(ii) New South Wales

4.163 Sentencing in New South Wales is regulated by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*, which amended the *Crimes (Sentencing Procedure) Act 1999*.³⁸⁹ This legislation does not appear to prescribe mandatory minimum sentences for any offence.³⁹⁰ However, section 54A to section 54D of the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* does create standard non-parole periods for a number of offences, including armed robbery but not drug offences. When sentencing an offender for one of these offences, the court must, if it decides that imprisonment is appropriate, be guided by the minimum non-parole period. This arrangement restricts judicial discretion with respect to the duration of custody, while leaving a court free to impose a non-custodial sanction.

³⁸⁵ *Ibid* at 1-2.

³⁸⁶ *Same Crime, Same Time* Report 103 (Australian Law Reform Commission, 2006) at 539.

³⁸⁷ See for example: Bagaric & Pathinayake "Mandatory Harsh Penalties for People Smugglers in Australia: Time for Reform" (2012) 76(6) *Journal of Criminal Law* 493; Williams "Minimum sentence, maximum injustice" *Sydney Morning Herald* 6 December 2011; "Bid to end Australian mandatory sentencing for people smugglers" *Radio Australia* 20 January 2012. Available at: www.radioaustralia.net.au/international/radio/onairhighlights/bid-to-end-australian-mandatory-sentencing-for-people-smugglers [Last accessed: 22 May 2013]; and "Lawyers Speak out against mandatory sentencing" *The New Lawyer* 20 August 2012. Available at: www.thenewlawyer.com.au/comment---debate/lawyers-speak-out-against-mandatory-sentencing [Last accessed: 22 May 2013].

³⁸⁸ See: Marcus "People smuggler given minimum sentence" *ABC News* 16 August 2012. Available at: www.abc.net.au/news/2012-08-16/people-smuggler-given-minimum-sentence/4202688 [Last accessed: 22 May 2013]; Flatley "Judge slams mandatory sentence for people smugglers" *Sydney Morning Herald* 11 January 2012; and Dodd "People smuggling laws in the dock" *The Australian* 23 March 2012.

³⁸⁹ *Mandatory Sentences of Imprisonment in Common Law Jurisdictions* (Department of Justice, Canada) at 29.

³⁹⁰ As noted at paragraph 3.35, however, New South Wales has recently introduced an entirely mandatory life sentence for the murder of a police officer in certain circumstances.

(iii) Northern Territory

4.164 In the Northern Territory, presumptive minimum sentences are prescribed for certain first-time violent offences and drug offences. Imprisonment is also the mandatory penalty for certain sexual offences. As discussed in Chapter 5, the Northern Territory provides enhanced presumptive penalties for second or subsequent violent offences, while repeat transgressions of a domestic violence order also attract a presumptive minimum sentence.

4.165 The Commission observes that mandatory sentencing regimes have been a source of particular controversy in the Northern Territory. Most notably, the *Sentencing Act 1995*, as amended in 1997, had prescribed mandatory sentences in respect of a broad range of property offences. The Act provided for a minimum sentence of 14 days' imprisonment for a first offence; 90 days for a second offence and one year for a third offence.³⁹¹ The same amendments also imposed mandatory minimum 28-day terms of imprisonment on juvenile repeat property offenders (aged 15 or 16 years) with escalating penalties for subsequent offences. When this sentencing regime was associated with a number of deaths in prison, a grass roots campaign led to its amendment and eventual repeal in 2001.³⁹²

(l) Violent Offences

4.166 Under the *Sentencing Act*, the Northern Territory prescribes a presumptive sentencing regime in respect of certain violent offences. First, where an offender who has not previously been convicted of a violent offence³⁹³ is convicted of a crime classified as a "Level 5"³⁹⁴ offence, he or she must receive a minimum three-month term of imprisonment.³⁹⁵ Second, where an offender is convicted of a crime classified as a "Level 4"³⁹⁶ offence, he or she must receive a minimum three-month sentence, irrespective of whether he or she has previously been convicted of a violent offence.³⁹⁷ Third, an offender convicted of a "Level 3"³⁹⁸ offence, who has not previously been convicted of a violent offence, must receive a

³⁹¹ Roche "Mandatory Sentencing" No 138 Trends & Issues in Crime and Criminal Justice (Australian Institute of Criminology, 1999) at 1-2.

³⁹² *Mandatory Sentences of Imprisonment in Common Law Jurisdictions* (Department of Justice, Canada) at 25.

³⁹³ A "violent offence" is defined by subdivision 1 of Division 6A of the *Sentencing Act* (as replaced by section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*) as: (a) an offence against a provision of the *Criminal Code* listed in Schedule 2; or (b) an offence which substantially corresponds to such an offence under (i) a law that has been repealed; or (ii) a law of another jurisdiction (including a jurisdiction outside Australia). The offences listed in Schedule 2 include terrorism, manslaughter, attempted murder, common assault, unlawful stalking and robbery.

³⁹⁴ A "Level 5" offence is defined as including the following offences under the *Criminal Code*: (a) causing serious harm under section 181; or (b) causing harm under section 186; common assault under section 188 (if the offence is committed in circumstances mentioned in section 188(2), other than paragraph (k)), assault on a worker under 188A; assault on police officer under section 189A; assault on administrator or judge or magistrate under section 190; assault on member of aircraft crew under section 191; assault with intent to commit an offence under section 193; or assault with intent to steal under section 212, if (i) commission of the offence involves the actual or threatened use of an offensive weapon; and (ii) the victim suffers physical harm as a result of the offence.

³⁹⁵ Section 78D of the *Sentencing Act*, inserted by section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*.

³⁹⁶ A "Level 4" offence is defined as: an offence against section 188A [assault on a worker] or section 189A [assault on administrator or judge or magistrate] of the *Criminal Code* if: (a) the victim suffers physical harm as a result of the offence; and (b) the offence is not a "Level 5" offence.

³⁹⁷ Section 78DB of the *Sentencing Act*, inserted by section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*.

³⁹⁸ A "Level 3" offence is defined as an offence against section 188 of the *Criminal Code* [common assault] if the offence: (a) is committed in circumstances mentioned in section 188(2), other than paragraph (k); and (b) the offence is not a "Level 5" offence.

custodial sentence in circumstances where the victim suffers physical harm as a result of the offence.³⁹⁹ Any offender convicted of a “Level 2”⁴⁰⁰ offence must also receive a custodial sentence, irrespective of whether he or she has previously been convicted of a violent offence.⁴⁰¹ A sentencing court may not suspend a term of imprisonment imposed in accordance with these provisions.⁴⁰²

4.167 The obligation to impose a minimum penalty of a specified period will not apply where the court is satisfied that the circumstances of the case are exceptional.⁴⁰³ In determining whether the circumstances are exceptional, the court may have regard, in particular, to any victim impact statement or victim report presented to the court, and any other matters which it considers relevant.⁴⁰⁴ The following circumstances may not be regarded as exceptional circumstances: (a) that the offender was voluntarily intoxicated at the time of committing the offence, or (b) that another person was involved in committing the offence, or coerced the offender to commit the offence.⁴⁰⁵ Equally, where the offender is under the age of 18 years, the court will not be required to impose a prescribed minimum sentence of a specified period upon him or her.⁴⁰⁶ Where exceptional circumstances are present or where the offender is under the age of 18 years, the court is nonetheless required to specify a custodial sentence and this may not be suspended.⁴⁰⁷

4.168 In May 2013, the proviso was introduced that a sentencing court may not suspend a minimum term prescribed under this regime.⁴⁰⁸ According to the Northern Territory Government, this reform was intended to facilitate the protection of vulnerable victims of violent crime.⁴⁰⁹ The Government has argued, in particular, that the chief benefit of this amendment was that it would signal to serious and repeat violent offenders, as well as victims of crime, that those who perpetrate violent offences will serve actual prison time. It would appear that this amendment was therefore intended to further the particular sentencing aims of deterrence and retribution.

³⁹⁹ Section 78DC of the *Sentencing Act*, inserted by section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*.

⁴⁰⁰ A “Level 2” offence is defined as an offence against section 186 of the Criminal Code [causing harm] if: (a) the victim suffers physical harm as a result of the offence; and (b) the offence is not a “Level 5” offence.

⁴⁰¹ Section 78DE of the *Sentencing Act*, inserted by section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*.

⁴⁰² See: section 78DG(c) and section 78DH(c) of the *Sentencing Act*, inserted by section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*.

⁴⁰³ Section 78DI of the *Sentencing Act*, inserted by section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Ibid.*

⁴⁰⁶ See: section 78DH(2) of the *Sentencing Act*, inserted by section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*.

⁴⁰⁷ See: section 78DI(2)(b) and section 78DH(2)(b) of the *Sentencing Act*, inserted by section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*.

⁴⁰⁸ Section 78DH of the *Sentencing Act*, inserted by section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*.

⁴⁰⁹ Legislative Assembly of the Northern Territory, *Sentencing Amendment (Mandatory Minimum Sentences) Bill 2012*, Second Reading, 29 November 2012, Mr Elferink. See: <http://notes.nt.gov.au/lant/hansard/hansard12.nsf/WebbySubject/4F84E713E3F06F1F69257B2700054889?op=endocument> [Last accessed: 22 May 2013].

4.169 The Commission notes that this presumptive sentencing regime has been criticised by certain commentators who maintain that these provisions are liable to impact disproportionately on Aboriginal offenders.⁴¹⁰

(II) *Drug Offences*

4.170 Section 37 of the *Misuse of Drugs Act* provides that a 28-day presumptive minimum sentence must be imposed for a number of drug offences. The court is not required to impose the sentence if, having regard to the particular circumstances of the offence or the offender, the court is of the opinion that the penalty should not be imposed.

(III) *Sexual Offences*

4.171 Under the *Sentencing Act*, a sentencing court is required to impose a custodial term upon an offender convicted of a specified sexual offence.⁴¹¹ The sentence imposed may be suspended in part, but not as a whole.⁴¹²

(iv) *Queensland*

4.172 In Queensland, certain firearms offences attract a mandatory minimum sentence of imprisonment.

(I) *Firearms Offences*

4.173 The *Weapons Act 1990*, as amended,⁴¹³ provides that where specific aggravating factors are present, certain firearms offences will attract a mandatory minimum sentence.

4.174 First, the offence of unlawfully possessing a firearm will attract a minimum sentence of either 9 months⁴¹⁴ or 18 months⁴¹⁵ (depending on the weapons involved) where an adult offender uses the firearm

⁴¹⁰ Thompson "Mandatory sentencing regime draws more flak" ABC News 15 February 2013. Available at: www.abc.net.au/news/2013-02-15/mandatory-sentencing-law-reaction/4521380 [Last accessed: 22 May 2013]; "NT's new sentencing laws attacked" Nine News 15 February 2013. Available at: www.news.ninemsn.com.au/national/2013/02/15/18/01/nt-s-new-sentencing-laws-attacked [Last accessed: 22 May 2013]; and "Prescribed minimum mandatory sentences are the very antithesis of just sentences" Criminal Lawyers Association of the Northern Territory Press Release. Available at: www.clant.org.au/index.php/news [Last accessed: 22 May 2013].

⁴¹¹ Section 78BB of the *Sentencing Act*. This sentencing regime will be triggered by the following sexual offences, specified under Schedule 3 to the Act: (i) an offence against section 125B [possession of child abuse material] or 125C [publishing indecent articles] of the *Criminal Code*, where the offender is an individual; (ii) an offence against section 127 [sexual intercourse or gross indecency involving child under 16 years], 128 [sexual intercourse or gross indecency with child over 16 years under special care], 130 [sexual intercourse or gross indecency by provider of services to mentally ill or handicapped person], 131 [attempts to procure child under 16 years], 131A [sexual relationship with child], 132 [indecent dealing with child under 16 years], 134 [incest] or 138 [bestiality] of the *Criminal Code*; (iii) an offence against section 188 [common assault] of the *Criminal Code*, where the circumstance of aggravation specified in section 188(2)(k) exists [indecent assault]; and (iv) an offence against section 192 [sexual intercourse and gross indecency without consent] or section 192B [coerced sexual self-manipulation] of the *Criminal Code*.

⁴¹² Section 78BB(b) of the *Sentencing Act*.

⁴¹³ *Weapons and Other Legislation Amendment Act 2012*.

⁴¹⁴ A minimum sentence of 9 months will apply where an offender unlawfully possesses a category A, B or M weapon and uses the firearm to commit an indictable offence. Weapons are categorised under the *Weapons Categories Regulation 1997*.

⁴¹⁵ A minimum sentence of 18 months will apply where an offender: (i) unlawfully possesses 10 or more weapons at least five of which are category D, E, H or R; (ii) unlawfully possesses 10 or more weapons; or (iii) unlawfully possesses a category C or E weapon, and uses the firearm to commit an indictable offence. Weapons are categorised under the *Weapons Categories Regulation 1997*.

to commit an indictable offence.⁴¹⁶ This offence will attract a minimum sentence of either six months⁴¹⁷ or one year⁴¹⁸ where an adult offender unlawfully possesses the firearm for the purpose of committing or facilitating the commission of an indictable offence.⁴¹⁹ A minimum sentence of one year is also prescribed for the unlawful possession of a short firearm in a public place, without a reasonable excuse.⁴²⁰ Second, the offence of unlawfully supplying weapons will attract a minimum sentence of either two and a half years⁴²¹ or three years⁴²² where at least one of the weapons is a short firearm and the person does not have a reasonable excuse for unlawfully supplying the firearm.⁴²³ Third, the offence of unlawfully trafficking in weapons will attract a minimum sentence of either three and a half years⁴²⁴ or five years⁴²⁵ where at least one of the weapons is a firearm and the offender does not have a reasonable excuse for unlawfully carrying on the business.⁴²⁶

4.175 Section 185B of the *Corrective Services Act 2006*⁴²⁷ stipulates that an offender who receives a minimum sentence under the *Weapons Act 1990* will not be eligible for parole until the prescribed minimum term has been served.

4.176 The introduction of this minimum sentencing regime was proposed in the aftermath of a series of shootings in South East Queensland.⁴²⁸ It would appear that most of these high-profile incidents were related to ongoing feuding between rival motorcycle gangs.⁴²⁹

⁴¹⁶ Section 50(1) of the *Weapon Act 1990*, as amended by section 15 of the *Weapons and Other Legislation Amendment Act 2012*.

⁴¹⁷ A minimum sentence of six months will apply where the offender unlawfully possesses a category A, B or M weapon for the purpose of committing or facilitating an indictable offence.

⁴¹⁸ A minimum sentence of one year will apply where the offender (i) unlawfully possesses 10 or more weapons at least five of which are category D, E, H or R; (ii) unlawfully possesses 10 or more weapons; or (iii) unlawfully possesses a category C or E weapon, for the purpose of committing or facilitating an indictable offence. Weapons are categorised under the *Weapons Categories Regulation 1997*.

⁴¹⁹ Section 50(1) of the *Weapon Act 1990*, as amended by section 15 of the *Weapons and Other Legislation Amendment Act 2012*.

⁴²⁰ *Ibid.*

⁴²¹ A minimum sentence of two and a half years will apply if the offender: (i) unlawfully supplies a category D, H or R weapon; (ii) the weapon is a short firearm; and (iii) the person does not have a reasonable excuse for unlawfully supplying the weapons. Weapons are categorised under the *Weapons Categories Regulation 1997*.

⁴²² A minimum sentence of three years will apply if the offender: (i) unlawfully supplies five or more weapons at least one of which is a category D, E, H or R weapon; (ii) at least one of the weapons is a short firearm; and (iii) the person does not have a reasonable excuse for unlawfully supplying the weapons. Weapons are categorised under the *Weapons Categories Regulation 1997*.

⁴²³ Section 50B(1) of the *Weapons Act 1990*, as amended by section 16 of the *Weapons and Other Legislation Amendment Act 2012*.

⁴²⁴ A minimum sentence of three and a half years will apply if the offender: (i) unlawfully trafficks a category A, B, C, D or E weapon, a category M crossbow or explosives; (ii) at least one of the weapons is a firearm; and (iii) the offender does not have a reasonable excuse for carrying on the business. Weapons are categorised under the *Weapons Categories Regulation 1997*.

⁴²⁵ A minimum sentence of five years will apply if the offender: (i) unlawfully trafficks a category H or R weapon; (ii) at least one of the weapons is a firearm; and (iii) the offender does not have a reasonable excuse for carrying on the business. Weapons are categorised under the *Weapons Categories Regulation 1997*.

⁴²⁶ Section 65(1) of the *Weapons Act 1990*, as amended by section 17 of the *Weapons and Other Legislation Amendment Act 2012*.

⁴²⁷ Inserted by Part 2 of the *Weapons and Other Legislation Amendment Act 2012*.

4.177 According to the Queensland Government, these mandatory sentencing provisions were intended to provide a strong deterrent to the unlawful use of firearms. The Minister for Police and Community Safety expressed the view that the pre-existing repercussions of illegal weapons use were “weak” and that minimum sentences were required to “send a clear message that trafficking, supply, unlawful possession and use of illegal firearms will not be tolerated.”⁴³⁰ On the other hand, however, the value of these provisions has been disputed by a number of commentators, including the Queensland Law Society.⁴³¹ Reiterating its longstanding view that “mandatory sentencing laws are unfair, unworkable and run contrary to Australia’s international treaty obligations”, the Society has expressed concern that this regime will: (i) unduly fetter judicial discretion, leading to injustice in individual cases; (ii) reduce the proportion of guilty pleas, increasing costs, delays, and the stress to victims and other witnesses; and (iii) impact disproportionately on the most marginalised members of society.⁴³² The Society has also noted that there is a lack of evidence to demonstrate that mandatory sentencing provides a deterrent effect, and that these regimes have in fact failed to reduce crime in other Australian states and common law countries.⁴³³

(v) South Australia

4.178 South Australia does not appear to prescribe a mandatory or presumptive minimum sentence for any offence.

(vi) Tasmania

4.179 Likewise, Tasmania does not appear to provide a mandatory or presumptive minimum sentence for any offence.

(vii) Victoria

4.180 Victoria prescribes mandatory minimum sentences for certain offences involving the causation of fire in a country area.

(i) Causing a Fire in a Country Area

4.181 Section 39A of the *Country Fire Authority Act 1958* prescribes a minimum three-month sentence of imprisonment for the offence of causing a fire in a country area in extreme conditions of weather. In addition, section 39C prescribes a minimum one-year sentence of imprisonment for the offence of causing a fire in a country area with intent to cause damage.

(viii) Western Australia

4.182 As will be discussed in Chapter 5, Western Australia applies a mandatory minimum sentencing regime in respect of repeat burglary offenders. Where perpetrated for the first time, certain forms of assault also attract a minimum sentence in this state.

(i) Assaults against Public Officers

⁴²⁸ Dixon *Proposed Changes to Offence Provisions in the Weapons Act 1990 (Qld)* (Queensland Parliamentary Library and Research Service, 2012) at 1.

⁴²⁹ *Ibid.*

⁴³⁰ “Newman Government tough on firearms” Press Release 28 November 2012. Available at: <http://statements.qld.gov.au/Statement/2012/11/28/newman-government-tough-on-firearms> [Last accessed: 22 May 2013].

⁴³¹ See: Withey and Howells “Newman’s mandatory sentencing plan a ‘knee-jerk reaction’” ABC News 1 May 2012. Available at: www.abc.net.au/news/2012-05-01/newmans-mandatory-sentencing-plan-a-kneejerk-reaction/3982560 [Last accessed: 22 May 2013].

⁴³² Queensland Law Society “Weapons and Other Legislation Amendment Bill 2012” 8 November 2012. Available at: www.parliament.qld.gov.au/documents/committees/LACSC/2012/Weapons/submissions/002-QldLawSociety.pdf [Last accessed: 22 May 2013].

⁴³³ *Ibid.*

4.183 Section 297 of the *Criminal Code* provides a mandatory minimum sentence for the commission, in prescribed circumstances, of grievous bodily harm against a member of one of a number of specified classes of public officer.⁴³⁴ Under this section, a sentencing court must impose a minimum sentence of 12 months' imprisonment upon an adult offender or three months' imprisonment or detention, as it sees fit, upon an offender aged 16 or 17 years. The court may not suspend any sentence imposed under this regime and must record a conviction against the offender.

4.184 Section 318 of the *Criminal Code* provides a mandatory minimum sentence for the commission, in prescribed circumstances, of a serious assault resulting in bodily harm to a member of one of a number of specified classes of public officer.⁴³⁵ Under this section, a sentencing court must impose a minimum sentence of six months' imprisonment on an adult offender, or three months' imprisonment or detention, as it sees fit, on an offender aged 16 or 17 years. Where the perpetrator was at least 18 years of age at the time of the offence and was at, or immediately before or immediately after the commission of the offence, armed with any dangerous or offensive weapon or instrument, or in company with another person or persons, he or she will attract a minimum sentence of 9 months' imprisonment. When sentencing an offender under section 318, the court may not suspend any term of imprisonment imposed and must record a conviction against the person.

4.185 It has been emphasised by the Government of Western Australia that since the introduction of these mandatory sentencing provisions in September 2009, reported assaults against police officers have declined significantly.⁴³⁶ Whether this decrease is attributable to the new sentencing regime is, however, uncertain. The Sentencing Advisory Council of Tasmania has observed that shortly prior to the introduction of these provisions, the Western Australian police changed their policy regarding single officer patrols so that officers were no longer to be rostered, directed or encouraged to patrol alone.⁴³⁷ This has been identified as a factor which may have contributed to the decrease in reported assaults on police officers.⁴³⁸ The Council has also noted that assaults in public places declined during the years 2009-2011, matching the pattern regarding assaults against police officers for the same period.⁴³⁹ This decline in assault offences occurred not only in Western Australia but in Tasmania, and has been

⁴³⁴ Specifically, section 297(8) of the *Criminal Code* provides that this sentencing regime will apply where: (a) the victim is a police officer, prison officer or security officer performing a function of his or her office or employment; (b) the offence is committed against a police officer, prison officer or security officer on account of his or her being such an officer, or on account of his or her performance of a function of his or her office or employment; (c) the victim is an ambulance officer performing his or her duties as such; (d) the victim is a contract worker who is providing court security services or custodial services under the *Court Security and Custodial Services Act 1999* (WA); or (e) the victim is a contract worker providing services under Part IIIA of the *Prison Act 1981* (WA).

⁴³⁵ Specifically, section 318(5) of the *Criminal Code* provides that this sentencing regime will apply where the victim, who suffers bodily harm as a result of an assault, is a police officer, prison officer or security officer who is: (i) performing a function of his or her employment; (ii) assaulted on account of being such an officer or on account of his or her performance of such a function; or (iii) performing a function of a public nature conferred on him or her by law, or assaulted on account of his or her performance of such a function. The minimum sentence also applies where an assault resulting in bodily harm is committed against: (i) an ambulance worker who is performing his or her duties as such; (ii) a contract worker who is providing court security services or custodial services; or (iii) a contract worker who is performing functions under Part IIIA of the *Prisons Act 1981*.

⁴³⁶ "Reported assaults against police continue to decline" Press Release 23 June 2011. Available at: www.mediastatements.wa.gov.au/pages/StatementDetails.aspx?listName=StatementsBarnett&StatId=4369 [Last accessed: 22 May 2013]

⁴³⁷ Sentencing Advisory Council *Assaults on Emergency Service Workers* (Consultation Paper No. 2, June 2012) at 27.

⁴³⁸ *Ibid* at 28.

⁴³⁹ *Ibid*.

attributed by the Tasmanian police to a general decline in all areas of crime throughout Australia during this period.⁴⁴⁰

4.186 In October 2012, the Western Australia Police Union expressed concern that prison sentences had only been imposed in 38 percent of the 87 finalised cases involving assaults on public officers.⁴⁴¹ In 36 percent of cases, the charge was instead downgraded, resulting in the imposition of a non-custodial penalty.⁴⁴² In response to the misgivings expressed by the Police Union, the Criminal Lawyers' Association of Western Australia insisted that the number of downgraded charges accorded with proper prosecuting guidelines. These guidelines require that the public interest and the prospects of conviction be considered in each individual case.⁴⁴³ The Association maintains that it is inevitable that the mandatory sentencing regime will be taken into account in considering whether it is in the public interest to pursue a charge.⁴⁴⁴

(ix) New Zealand

4.187 As outlined in Chapter 5, New Zealand applies a mandatory sentencing regime in respect of certain repeat offences. However, where committed by an offender for the first time, no offence would appear to attract a mandatory minimum sentence.

(g) Summary

4.188 A comparative analysis of common law countries that have introduced minimum sentencing regimes is of interest. As illustrated in Chapter 2, it is clear that the enactment of presumptive minimum sentences for drugs and firearms offences in this State was, to some extent, influenced by sentencing reforms in the United States of America and the United Kingdom, in particular. Traditionally, it has also been the consistent approach of the Commission to engage in comparative analysis when evaluating potential options for law reform in this State.

4.189 Equally, however, the Commission cautions against relying too heavily on the example set by other common law jurisdictions. It should be noted that the rationale for introducing minimum sentencing regimes varies from country to country and that these provisions are often the product of circumstances and cultural factors specific to the jurisdiction in question. The Commission notes, therefore, that it is important to independently assess any proposed extension of mandatory sentencing to ensure that any reform would be consistent with the key sentencing aims and principles identified in Chapter 1.

E Presumptive Minimum Sentences and the Conceptual Framework

4.190 In this Part, the Commission considers presumptive minimum sentences against the conceptual framework established in Chapter 1. Specifically, the Commission considers this category of mandatory sentence against: (1) the aims of sentencing, and (2) the principles of justice.

(1) Presumptive Minimum Sentences and the Aims of Sentencing

4.191 The Commission has observed that criminal sanctions pursue one or more of a number of aims including deterrence, punishment, reform and rehabilitation and reparation. The Commission has also observed that deterrence and punishment tend to feature more heavily in cases involving more serious crimes and, consequently, more severe sanctions. Likewise, it is ostensibly these aims which feature most heavily in cases involving those offences which attract presumptive minimum sentences. Specifically, these presumptive sentences seek to: (i) dissuade by coercive means, the offender from committing another drugs or firearms offence and to punish him or her severely for the offence that he or she has committed, and (ii) dissuade the public at large from committing the relevant drugs or firearms

⁴⁴⁰ *Ibid.*

⁴⁴¹ Banks "Backroom deals' letting thugs off lightly" *The West Australian* 29 October 2012.

⁴⁴² *Ibid.*

⁴⁴³ *Ibid.*

⁴⁴⁴ *Ibid.*

offences. It is arguable, however, that these presumptive sentences are not adequately meeting these aims.

(a) Misuse of Drugs Act 1977

4.192 The Commission observes that, for various reasons, the presumptive sentencing regime under the *Misuse of Drugs Act 1977* may not adequately meet the aim of deterrence. At one end of the scale, there are the high-level offenders who, it would seem, shield themselves from detection and prosecution by means of complex and constantly evolving networks of distributors. It is unlikely that many of these high-level offenders would be deterred by the prospect of a presumptive 10-year sentence when they are unlikely to be subjected to it.

4.193 At the other end of the scale, there are the low-level drug mules whose involvement in the drugs trade is generally secured by means of exploitation and/or coercion. It is unlikely that these offenders would be deterred by the prospect of a presumptive minimum sentence as many of them will not be in a position (through incapacity, foreign nationality etc) to assess the legal consequences of their actions and many others will be more afraid of the consequences of refusal. The Court of Criminal Appeal has observed that in addition to these offenders who have been “exploited to work as drug couriers for a pittance”, many of those appealing sentences imposed under this regime “are themselves drug addicts struggling to escape from the terrors of their addiction.”⁴⁴⁵ This is significant in so far as mandatory sentences are understood to have a very limited deterrent impact on those who are seeking to support a drug addiction through criminality.⁴⁴⁶ In particular, Mascharka notes that as drug addicts are often prepared to risk victimisation, overdose, the transmission of diseases, and toxicity and impurities in the drug in order to feed their addiction, they are unlikely to be deterred by the prospect of lengthy imprisonment.⁴⁴⁷

4.194 Admittedly, it may be the case that having once served a sentence for their role as a drug mule, some of these offenders will be less willing to perform that role again. Given that there is a virtually limitless pool of vulnerable and desperate potential candidates,⁴⁴⁸ however, it is unlikely that this would have a significant impact on the overall rate of drug trafficking.

4.195 The Commission also observes that the presumptive sentencing regime under the *Misuse of Drugs Act 1977* may not adequately meet the aim of punishment. From a retributive perspective, it would seem unjust that the range of actors involved in drug trafficking should be subject to the same presumptive sentencing regime regardless of their level of moral culpability or involvement. This regime creates a parallel system of sentencing whereby offenders who were in possession of controlled drugs worth €13,000 or more are liable to be punished more severely than others involved in the illicit drugs trade. The market value of the drugs is therefore prioritised at the expense of other factors relevant to culpability, such as the role, motive and state of mind of the offender.⁴⁴⁹ This regime would appear to

⁴⁴⁵ *The People (DPP) v Byrne* [2012] IECCA 72.

⁴⁴⁶ Mascharka “Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences” (2001) 28(4) *Florida State University Law Review* 935 at 948; Odeh “Emerging from the Haze of America’s War on Drugs and Examining Canada’s New Half-Baked Laws” (2013) 36(1) *Fordham International Law Journal* 198 at 211-212.

⁴⁴⁷ Mascharka “Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences” (2001) 28(4) *Florida State University Law Review* 935 at 948.

⁴⁴⁸ *Overview 3: Drugs and Crime in Ireland* (Health Research Board, 2006) at 109. See also: Tonry *Sentencing Matters* (Oxford University Press, 1996) at 141. Tonry observes that due to the economic deprivation of many potential drug mules, practitioners and researchers consider this form of criminality to be “uniquely insensitive to the deterrent effects of sanctions.” He notes that despite risks of arrest, imprisonment, injury and death, drug trafficking is perceived to offer disadvantaged people economic and other rewards which far outweigh any available in the legitimate economy.

⁴⁴⁹ See: Vincent and Hofer “The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings” (Federal Judicial Center, 1994) at 13.

create a risk that an individual offender may receive a level of punishment disproportionate to his or her culpability. The courts are permitted to impose a sentence lower than the presumptive minimum sentence where there are *exceptional and specific circumstances*. This goes some way towards ensuring that offenders do not receive disproportionate sentences.

4.196 Similar observations may be made regarding the denunciatory aspect of this sentencing regime. As this regime prioritises the market value of the drugs at the expense of other factors relevant to culpability, it creates a risk that an individual offender may be denounced more forcefully than is warranted by his or her culpability.

4.197 The Commission observes that rehabilitation is another aim that is built into the presumptive sentencing regime under the *Misuse of Drugs Act 1977*. As discussed at paragraph 4.48, section 27(3J) provides that the court may list a sentence for review after half of the term has expired. To list a sentence for review, the court must be satisfied that the offender was addicted to drugs at the time of the offence and that this was a substantial factor leading to the commission of the offence. It has been noted, however, that this provision is limited to the extent that it only applies to offenders who have received the minimum sentence of 10 years or more.⁴⁵⁰

4.198 It is thus questionable whether the presumptive sentencing regime under the *Misuse of Drugs Act 1977* is contributing to the overall aim of the criminal justice system, namely, the reduction of prohibited or unwanted conduct. Indeed, while it is possible that offending rates might be higher in the absence of these provisions, it has been noted that recorded levels of drug crime have increased greatly during the period in which these presumptive sentences have been in force.⁴⁵¹ This tends to support the view that the objective of reducing drug-related crime is unlikely to be achieved solely through criminal law enforcement.

4.199 The Commission notes that in 2006 the Health Research Board (HRB) examined the nature of the link between drugs and crime with a view to informing the development of effective policy responses.⁴⁵² The study employed four explanatory models: (i) the psycho-pharmacological model;⁴⁵³ (ii) the economic-compulsive model;⁴⁵⁴ (iii) the systemic model;⁴⁵⁵ and (iv) the common-cause model.⁴⁵⁶ This

⁴⁵⁰ *The People (DPP) v Dunne* [2003] 4 IR 87; and O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 334.

⁴⁵¹ O'Malley *Sentencing - Towards a Coherent System* (Round Hall, 2011) at 103.

⁴⁵² *Overview 3: Drugs and Crime in Ireland* (Health Research Board, 2006). Available at: www.hrb.ie/uploads/tx_hrbpublications/Drugs_and_crime_in_Ireland-Overview_3.pdf. [Last accessed: 22 May 2013]

⁴⁵³ The psycho-pharmacological model proposes that the effects of intoxication cause criminal (especially violent) behaviour or that aggression and crime can be caused, for example, by the effects of withdrawal or sleep deprivation. In this regard, the HRB indicated that international evidence was inconclusive and Irish research limited. (See: *Overview 3: Drugs and Crime in Ireland* (Health Research Board, 2006) at 12)

⁴⁵⁴ The economic-compulsive model assumes that drug users need to generate illicit income from crimes such as robbery, burglary and prostitution to support their drug habit. In this regard, the HRB indicated that Irish research supports the argument that there is an economic motivation to commit crime to purchase drugs. (See: *Overview 3: Drugs and Crime in Ireland* (Health Research Board, 2006) at 12)

⁴⁵⁵ The systemic model explains drug-related crime as resulting from activities associated with the illegal drug market. In this regard, the HRB indicated that local studies show that there is a connection between local drug markets and significant levels of community disturbance and anti-social behaviour. (See: *Overview 3: Drugs and Crime in Ireland* (Health Research Board, 2006) at 12)

⁴⁵⁶ The common-cause model suggests that there is no direct causal link between drugs and crime but that both are related to other factors including socio-economic deprivation. In this regard, the HRB indicated that Irish research has consistently revealed that underlying social factors, such as educational disadvantage, poverty and inequality contributed to both problematic drug use and crime. (See: *Overview 3: Drugs and Crime in Ireland* (Health Research Board, 2006) at 12)

analysis suggested, among other things, that: (i) well-resourced treatment services, such as methadone substitution, can have a positive impact on criminal behaviour; (ii) local policing partnerships which acknowledge that fear of retribution is a deterrent to crime-reporting are essential to addressing drug-related crime in deprived areas; and (iii) addressing socio-economic circumstances is an essential part of dealing with the problem of drugs and crime. The HRB concluded that while activities aimed at supply control, combined with efforts to reduce the demand for drugs, remain essential policy goals, the development of an Irish crime-reduction strategy needs to appreciate the complexity of the drugs-crime nexus.⁴⁵⁷ In particular, it emphasised that while law enforcement activities may have contributed, among other things, to the relative containment of illicit drug use, there is little evidence that such approaches have halted the expansion of illicit drug markets or reduced associated criminal activities for any sustained period.⁴⁵⁸

4.200 The research conducted by the HRB indicates that policies designed to counter illicit drug dependence have a key contribution to make to the reduction of crime. Of particular interest in this respect, is the work of the Misuse of Drugs work sector of the British-Irish Council (BIC). The Commission notes that in January 2012 the Member Administrations of the BIC confirmed their commitment to actively encouraging a renewed focus on recovery from drug dependence in future drug strategies.⁴⁵⁹ The work sector, which is led by the Irish administration, further agreed that Member Administrations will work together to evaluate and share successful approaches to this challenge. At the summit meeting held in January 2012, Ministers discussed drug treatment measures and strategies that have been put in place in each administration to facilitate the path of recovery. The Council noted that a more ambitious inter-agency approach was needed involving individual care plans to better address the holistic needs of clients. A discussion paper titled *Recovery from Problem Drug Use* was also welcomed by the various delegations in attendance. The Commission notes that in 2012 the BIC also considered issues such as: (i) the misuse of prescription drugs; (ii) the misuse of new psychoactive substances; and (iii) cycles of problem substance abuse among young people.⁴⁶⁰

(b) Firearms Acts

4.201 The Commission observes that there has been little commentary in the literature on presumptive sentencing under the Firearms Acts. Given, however, that it was modelled on the presumptive sentencing regime under the *Misuse of Drugs Act 1977*, many of the comments made in relation to the *Misuse of Drugs Act 1977* also apply to the Firearms Acts.

4.202 The presumptive sentencing regime under the Firearms Acts may not, for instance, adequately meet the aim of deterrence. In this regard, Campbell observes that presumptive sentencing as a means of deterring gun crime assumes that the offender has made a rational decision to commit the offence.⁴⁶¹ She notes, however, that expressions of masculinity and social deprivation are also contributing factors and firearms offenders might respond better to an educational and psychological approach rather than a legal approach.⁴⁶²

4.203 In addition, the Commission observes that this sentencing regime may not appropriately pursue the aim of punishment. The Firearms Acts prioritise one aggravating factor, namely, the existence of a prior relevant conviction under the Acts, at the expense of other factors relevant to culpability. In this regard, the regime may run the risk of inflicting disproportionate punishment upon a particular offender. The Commission acknowledges, however, that the courts may undertake a downward departure from the

⁴⁵⁷ *Overview 3: Drugs and Crime in Ireland* (Health Research Board, 2006) at 110.

⁴⁵⁸ *Ibid* at 109.

⁴⁵⁹ See: "Communiqué of the British Irish Council Meeting 13-01-12". Available at: www.taoiseach.gov.ie/eng/News/Archives/2012/Taoiseach's_Press_Releases_2012/Communiqu%C3%A9_of_the_British_Irish_Council_Meeting_13-01-12.html [Last accessed: 22 May 2013]

⁴⁶⁰ See: www.britishirishcouncil.org/areas-work/misuse-drugs [Last accessed: 22 May 2013]

⁴⁶¹ Campbell "Responding to Gun Crime in Ireland" (2010) 50 *Brit J Criminology* 414 at 422.

⁴⁶² *Ibid* at 429.

presumptive minimum sentence on the basis of factors which constitute *exceptional and specific circumstances*. This goes some way towards ensuring that offenders do not receive disproportionate sentences.

4.204 Similar observations may be made regarding the denunciatory aspect of this sentencing regime. As the Firearms Acts prioritise the existence of a prior relevant conviction at the expense of other factors relevant to culpability, this regime creates a risk that an individual offender may be denounced more forcefully than is warranted by his or her culpability.

(2) Presumptive Minimum Sentences and the Principles of Justice

4.205 The Commission has observed that sentencing must also comply with a number of external constraints that emanate from fundamental principles of justice, namely, the principles of: (a) consistency, and (b) proportionality. In this section, the Commission considers the presumptive sentencing regimes under the *Misuse of Drugs Act 1977* and the Firearms Acts against these principles.

(a) The Principle of Consistency and Presumptive Minimum Sentences

4.206 The Commission has observed that the principle of consistency requires a consistent application of the aims and principles of sentencing (consistency of approach) rather than uniformity of sentencing outcomes (consistency of outcomes). Consistency of approach thus requires that like cases should be treated alike and different cases should be treated differently. The corollary of this is that inconsistency arises where like cases are treated differently and different cases are treated alike.

(i) Misuse of Drugs Act 1977

4.207 The Commission observes that there are a number of ways in which the presumptive sentencing regime under the *Misuse of Drugs Act 1977* may run the risk of being inconsistent.

4.208 First, as discussed in Chapter 2, the presumptive 10-year minimum sentence under the *Misuse of Drugs Act 1977* was introduced (against the backdrop of an escalating drugs problem) to address the perceived leniency of the sentencing courts in drug trafficking cases. Thus, at the outset at least, the primary focus of the presumptive sentencing regime for drug trafficking offences was the *outcome* of the sentencing process rather than the *approach* to the sentencing process.

4.209 Second, the Commission considers that using the market value of the controlled drugs as the triggering factor for the presumptive sentence, may have implications for consistency in sentencing. It has been noted that the factor which engages a mandatory sentencing regime should be clearly defined and unequivocal.⁴⁶³ By contrast, it has been observed that:

“[The market value] was, and remains, an unacceptably casual and unscientific manner of establishing the nature and quantity of drugs involved in any given case. By virtue of their illegality and the clandestine manner in which they circulate, prohibited substances cannot be valued, except in the crudest terms, like other commodities. Street value may vary over time and, also, from one part of the country to another. There can be no guarantee that the amount of drugs (or any particular kind of drug) that could be bought for £10,000 in 1999 would approximate to what can now be bought for €13,000.”⁴⁶⁴

There is therefore a risk that similarly situated offenders may be treated differently on the basis of an unreliable evaluation of the controlled drugs they possessed. In addition, as the market value threshold has not changed since 1999, there is a risk that if the market value of drugs inflates over time, which it is likely to do, more and more lower-level offenders will be caught by the provision.

⁴⁶³ O'Malley “Further Observations on DPP v Connolly (Part 1 of 3)” 22 February 2011. Available at: www.extempore.ie/2011/02/22/further-observations-on-dpp-v-connolly-part-1-of-3/ [Last accessed: 22 May 2013].

⁴⁶⁴ O'Malley *Sentencing - Towards a Coherent System* (Round Hall, 2011) at 104. O'Malley suggests that this may be grounds for a constitutional challenge to the *Misuse of Drugs Act 1977*. See: O'Malley *Sentencing - Towards a Coherent System* (Round Hall, 2011) at 105.

4.210 Third, the Commission observes that aside from the unreliability of the “market value” threshold, the fact that this threshold creates a “sentencing cliff” (whereby a small difference in facts may lead to a significant difference in sentence⁴⁶⁵) arguably requires the adoption of a different sentencing approach in respect of similarly situated offenders. An offender convicted of a section 15A or section 15B offence involving drugs worth at least €13,000, may expect to receive a minimum 10-year sentence save where there are exceptional and specific circumstances. However, by contrast, where the drugs at issue were worth even marginally less than €13,000, an offender may cite *any* mitigating factors and potentially receive a reduction in sentence on the basis of these factors. This regime may thus require the courts to adopt a different sentencing approach in respect of individuals whose conduct and level of culpability are virtually identical. Indeed, the fact that *mens rea* regarding the value of the drugs is not an element of the offence, arguably compounds the risk that similarly culpable offenders may be treated differently.

4.211 Fourth, at a broader level, inconsistency may result from the fact that judicial discretion is constrained in the sentencing of certain drugs and firearms offences, while the sentencing of most other offences, including more serious ones, is largely discretionary.⁴⁶⁶

4.212 Fifth, the Commission observes that the courts’ power to list a sentence for review creates an inconsistent system in so far as it only applies to offenders who have received the minimum sentence.

4.213 The Commission notes, however, that the presumptive sentencing regime under the *Misuse of Drugs Act 1977* permits the courts to take some account of distinguishing factors in individual cases, at least in so far as they constitute exceptional and specific circumstances. This goes some way towards ensuring that different cases are treated differently.

(ii) Firearms Acts

4.214 The Commission observes that similar comments may be made in respect of the presumptive sentencing regime under the Firearms Acts.

4.215 Like the regime under the *Misuse of Drugs Act 1977*, the presumptive sentencing regime under the Firearms Acts was introduced in response to an apparent increase in firearms offences. Arguably, the decision to address the issue by means of more severe sentencing suggests that, at the outset at least, the primary focus of the regime was the *outcome* of the sentencing process rather than the *approach* to the sentencing process. The Commission notes, however, that the presumptive sentencing regime under the Firearms Acts permits the courts to take some account of distinguishing factors in individual cases, at least in so far as they constitute exceptional and specific circumstances. As noted at paragraph 4.213, this goes some way towards ensuring that different cases are treated differently.

4.216 As discussed at paragraph 4.211, however, it may be considered inconsistent that judicial discretion should be constrained in the sentencing of certain drugs and firearms offences, while a largely discretionary approach is permitted in the context of other offences of equal or greater gravity.

(b) The Principle of Proportionality and Presumptive Minimum Sentences

4.217 The Commission has observed that the principle of proportionality comprises: (a) constitutional proportionality, and (b) proportionality in sentencing.

⁴⁶⁵ See: Vincent and Hofer “The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings” (Federal Judicial Center, 1994) at 25.

⁴⁶⁶ O’Malley *Sentencing - Towards a Coherent System* (Round Hall, 2011) at 66. The Sentencing Advisory Council of Victoria makes a similar point, noting that:

“where mandatory sentencing is applied only to select offences (as is generally the case), it may actually interfere with the hierarchy of sanctions. It may artificially increase the severity of sanctions for some types of conduct while not doing so for conduct of similar blameworthiness that is not targeted by the regime.”

[*Sentencing Matters: Mandatory Sentencing* (Sentencing Advisory Council of Victoria, 2008) at 12].

(i) Constitutional Proportionality and Presumptive Minimum Sentences

4.218 As discussed in Chapter 3, the Supreme Court has ruled that the Oireachtas is entitled to prescribe a mandatory sentence whenever it considers that a mandatory sentence is an appropriate penalty.⁴⁶⁷ It thus follows that the Oireachtas is entitled to prescribe a presumptive minimum sentence whenever it considers that such a sentence is an appropriate penalty.

(ii) Sentencing Proportionality and Presumptive Minimum Sentences

4.219 The Commission has observed that the principle of proportionality in sentencing requires an individualised approach to sentencing whereby the court has regard to the circumstances of both the offence and the offender.

(I) Misuse of Drugs Act 1977

4.220 The Commission observes that there are a number of ways in which the presumptive sentencing regime under the *Misuse of Drugs Act 1977* may give rise to disproportionate sentencing.

4.221 In the first instance, the Commission observes that the presumptive sentencing regime under the *Misuse of Drugs Act 1977* is a relatively severe system of sentencing. It creates a “one-strike rule”⁴⁶⁸ whereby any offender who is found to have been in possession of controlled drugs worth €13,000 or more, may expect to receive a sentence of 10 years to life save where there are exceptional and specific circumstances. By international standards, this prescribed minimum term is very long.⁴⁶⁹ Furthermore, the severity of this system is compounded by the fact that the *Misuse of Drugs Act 1977* limits the circumstances in which such an offender may be granted early release.

4.222 Second, those who are in favour of mandatory sentences typically focus on the most serious cases, with little regard to the less serious cases to which the sentences also apply.⁴⁷⁰ By constraining the ability of the courts to punish offenders on an individualised basis, these regimes create an increased risk of disproportionate sentencing.⁴⁷¹ In particular, the regime under the *Misuse of Drugs Act 1977* would appear to entail a danger that low-level offenders may be treated like high-level offenders. Indeed, as they are easier to detect, it has been noted that the majority of those being sentenced under the presumptive regime are low-level drug mules rather than high-level drug barons.⁴⁷²

(II) Firearms Acts

4.223 The Commission observes that similar comments may be made in respect of the presumptive sentencing regime under the Firearms Acts. This regime also imposes a relatively severe “one-strike” rule and, to the extent that it constrains judicial discretion, creates a risk of disproportionate sentencing.

(3) Discussion

⁴⁶⁷ *Deaton v Attorney General* [1963] IR 170, 181; and *State (P Woods) v Attorney General* [1969] IR 385, 403-404.

⁴⁶⁸ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 340.

⁴⁶⁹ O'Malley “Time Served: The Impact of Sentencing and Parole Decisions on the Prison Population” at 4 (Paper delivered to the Irish Penal Reform Trust, Morris Hotel, Dublin, 28 June 2010). Available at: www.iprt.ie/files/Tom_OMalley_Presentation_IPRT_Open_Forum_28062010.pdf [Last accessed: 22 May 2013].

⁴⁷⁰ O'Malley *Sentencing - Towards a Coherent System* (Round Hall, 2011) at 103.

⁴⁷¹ This risk of disproportionality received judicial acknowledgement in *The People (DPP) v Heffernan* Court of Criminal Appeal 10 October 2002. In that instance, the Court observed that:

“It has to be realised that the effect of the statute is to trammel judicial discretion in a case such as this and that the Oireachtas have, for reasons that seem to them sufficient, indicated a minimum sentence of a substantial nature in respect of these offences. *They have presumably in doing so considered the fact that such sentence might be regarded as harsh in certain circumstances and on certain individuals.*” (own emphasis).

⁴⁷² O'Malley *Sentencing - Towards a Coherent System* (Round Hall, 2011) at 103.

4.224 In Chapter 1, the Commission noted that drugs and firearms offences have a particularly deleterious impact on society. It is therefore understandable that the Oireachtas should wish to increase the severity of the sanctions applicable to these offences through the enactment of presumptive minimum sentences. The Commission further recognised that the provision of presumptive minimum sentences may be seen to afford individual members of society, who might otherwise feel victimised and powerless, an opportunity to express their condemnation of such offences.

4.225 The Commission observes, however, that having regard to the aims and principles of sentencing outlined in Chapter 1, there is a need to ensure that these provisions achieve their stated objectives and that, as a result, they facilitate the reduction of crime (the paramount aim of the criminal justice system). From the analysis undertaken in Part E, it would appear that this is not the case; the Commission has identified seven problems which characterise the presumptive minimum sentencing regimes applicable to drugs and firearms offences.

4.226 The first problem relates to the category of offenders that are being prosecuted and sentenced. In relation to the *Misuse of Drugs Act 1977*, at least, it would appear that many of those coming before the courts are low-level drug mules rather than high-level drug barons.

4.227 The second problem relates to the aims of sentencing, in particular, the aims of deterrence, punishment and rehabilitation. In this regard, the Commission has observed that the presumptive sentencing regimes under the *Misuse of Drugs Act 1977* and the Firearms Acts may not adequately meet these aims.

4.228 The third problem is a related problem. Where the presumptive sentencing regimes are not meeting the aims of sentencing, it is questionable whether they are furthering the overall aim of the criminal justice system, namely, to reduce prohibited or unwanted conduct.

4.229 The fourth problem relates to the principles of justice, namely, the principles of consistency and proportionality. In this regard, the Commission has noted that the presumptive sentencing regimes under the *Misuse of Drugs Act 1977* and the Firearms Acts may give rise to inconsistent and disproportionate sentencing.

4.230 The fifth problem relates to the argument that minimum sentences are not a cost-effective response to crime. Regarding mandatory minimum sentences for drug offences, the Rand Corporation has noted that for the same amount of money, a more effective method would be to strengthen enforcement under the previous sentencing regime or to increase treatment for heavy drug-users.⁴⁷³

4.231 The sixth problem relates to the argument that there is incongruence between the sentences applicable to drugs offences and the sentences applicable to firearms offences. In this regard, Smith observes:

“[A]s a sentencing procedure [sentencing section 15A offences] can lead to unfairness for those who come before the courts. Whilst it is accepted that the dangers of drugs and their threat to society can never be underestimated, it is unclear why those who are caught with firearms are only subject to a presumptive mandatory sentence of five years. Whereas, those vulnerable persons in society who are used as couriers are subject to the presumptive 10 year mandatory minimum. It is accepted that exceptional and specific circumstances tend to guide judges away from the 10 years in appropriate circumstances, but nonetheless the figure is constantly present in [the] sentencing judge’s mind.”⁴⁷⁴

⁴⁷³ Rand Corporation “Are Mandatory Minimum Drug Sentences Cost-Effective?” 1997. See also: Irish Penal Reform Trust *Mandatory Sentencing* (IPRT Position Paper 3, 2009).

⁴⁷⁴ Smith “Sentencing Section 15A Offences” (2010) 20(1) ICLJ 8. See also: O’Malley “Presumptive Minimum Sentences for Assault Offences found Constitutional in France” (15 March 2011). Available at: www.extempore.ie/2011/03/15/presumptive-minimum-sentences-for-assault-offences-found-constitutional-in-france/ [Last accessed: 22 May 2013].

In a broader sense, it would also appear to be inconsistent that certain drugs and firearms offences attract a presumptive minimum sentence, whereas many other offences of equal or greater gravity attract neither a presumptive nor mandatory sentencing regime.

4.232 The final problem relates to the argument that mandatory sentencing regimes are too rigid to keep abreast of evolving penal philosophy. As discussed in the Consultation Paper, the views of sentencers regarding matters such as the seriousness of a particular offence and the appropriateness of various non-custodial and custodial sanctions may evolve over time.⁴⁷⁵ Mandatory sentencing regimes are incapable of keeping pace with these developments.

4.233 In light of this analysis, the Commission recommends that the existing presumptive sentencing regimes applicable to drugs and firearms offences be repealed. In the Consultation Paper, the Commission observed that it had not been established that presumptive minimum sentences for drugs and firearms offences had succeeded in reducing criminality. The Commission affirms this view. As these regimes do not appear to further the sentencing aims of deterrence, retribution and rehabilitation, it is unlikely that they further the overarching goal of crime-reduction.

4.234 In addition to the apparent failure of these regimes to reduce criminality, the Commission notes that these provisions have, in practice, produced a number of counter-productive results. First, having expanded upon the analysis contained in the Consultation Paper, the Commission considers that these sentencing regimes are not consistent with the fundamental principles of justice discussed in Chapter 1, namely, the principles of consistency and proportionality in sentencing. As discussed in Part E, these provisions appear to require an inconsistent approach to sentencing in so far as the courts are constrained in their ability to treat like cases alike and different cases differently. Similarly, in constraining the ability of the courts to take account of the individual circumstances of each offender, it would appear that these regimes create a risk of disproportionate sentencing.

4.235 Second, in the context of drug trafficking offences, in particular, it would appear that the introduction of presumptive minimum sentences has primarily affected low-level “drug mules” rather than the most culpable participants in the illicit drugs industry. As discussed in Part B, during the public consultation and roundtable discussion, practitioners stated that high-level offenders have adapted to this sentencing scheme and are largely shielding themselves from prosecution through the use of low-level offenders as couriers. This view is consistent with the Commission’s own review of the case law in this area and, in particular, with the observations of the Court of Criminal Appeal in the case of *The People (DPP) v Byrne* (see paragraph 4.193 above). It may have initially been thought that some “drug mules” would have been in a position to provide valuable evidence in relation to those criminal actors higher up the organisational structure. However, during the consultation process, practitioners stated that this has occurred in very few, if any, instances. This is because drug mules tend not to be members of the criminal organisation and are chosen for that very reason. Indeed, those closely involved with the practical application of this sentencing regime noted that there was a strong incentive for drug mules to plead guilty rather than run the risk of becoming witnesses for the prosecution. This is because the legislation provides for the non-application of the presumptive minimum sentence where a person pleads guilty. This further aspect of the regime also explains why the majority of those imprisoned under this provision are low-level offenders as opposed to influential high-level participants in the illicit drugs trade.

4.236 In recommending the repeal of these presumptive sentencing regimes, the Commission proposes that the development of a more structured, guidance-based sentencing system (as envisaged in the recommendations made in Chapter 1) would provide an appropriate alternative to these provisions. In the context of drug-related crime, in particular, the Commission also considers that law enforcement efforts may be beneficially supplemented by other initiatives, such as those highlighted in the research conducted by the Health Research Board and the Misuse of Drugs work sector of the British-Irish Council (see paragraphs 4.199 and 4.200).

4.237 Having regard to this conclusion regarding the existing presumptive sentencing regimes for drugs and firearms offences, the Commission agrees with the view, provisionally adopted in the Consultation Paper, that the introduction of additional presumptive minimum sentences would not be an “appropriate or

⁴⁷⁵ Law Reform Commission *Consultation Paper on Mandatory Sentences* (LRC CP 66-2011) at paragraph 1.66.

beneficial” response to other forms of criminality. The Commission notes (as discussed at paragraphs 2.168 to 2.174) that presumptive sentencing regimes have been proposed in recent years in Ireland in respect of a number of offences, such as assaults against emergency workers and aggravated false imprisonment. However, as discussed above, it has not been established that presumptive minimum sentences achieve the relevant sentencing aims of deterrence, retribution and rehabilitation. As a result, these regimes are not likely to facilitate a reduction in criminal conduct. The Commission therefore recommends that the use of presumptive minimum sentences not be extended to other offences under Irish law.

4.238 The Commission recommends that the following be repealed: (i) the presumptive minimum sentencing regime applicable to drugs offences under section 27(3C) of the Misuse of Drugs Act 1977, and (ii) the presumptive minimum sentencing regime applicable to firearms offences under section 15 of the Firearms Act 1925; section 26, section 27, section 27A and section 27B of the Firearms Act 1964; and section 12A of the Firearms and Offensive Weapons Act 1990. The Commission also recommends that the use of presumptive minimum sentencing regimes not be extended to other offences.

4.239 The Commission also recommends that a more structured, guidance-based sentencing system (as envisaged in the recommendations made in Chapter 1) would provide an appropriate alternative to these provisions. In the context of drug-related crime, the Commission also considers that law enforcement efforts may be beneficially supplemented by other initiatives, such as those highlighted in the research conducted by the Health Research Board and the Misuse of Drugs work sector of the British-Irish Council.

CHAPTER 5 MANDATORY SENTENCES FOR SECOND OR SUBSEQUENT OFFENCES

A Introduction

5.01 In the Consultation Paper, the Commission observed that in very select situations, legislation provides guidance as to how repeat offenders should be sentenced for second or subsequent offences.¹ Section 11(1) of the *Criminal Justice Act 1984*,² for example, provides that any sentence imposed on a person for an offence committed while he or she is on bail, must run consecutively to any sentence passed on him or her for the prior offence. Section 13(1) of the *Criminal Law Act 1976* also provides that any sentence passed on a person for an offence committed while he or she is serving a sentence, must run consecutively to the sentence that he or she is serving.

5.02 In this chapter, the Commission focuses on the imposition of *presumptive or mandatory sentences* for second or subsequent offences. In Ireland, there are three examples of this type of sentencing regime; these are prescribed by: (i) the *Criminal Justice Act 2007*; (ii) the *Misuse of Drugs Act 1977*; and (iii) the Firearms Acts. Part B to Part D of this chapter examines the practical operation of these sentencing regimes. Part E considers the approaches adopted by other common law countries in respect of the sentencing of repeat offenders. The Commission concludes in Part F by examining presumptive and mandatory sentences for second or subsequent offences against the conceptual framework for criminal sanctions and sentencing.

B Presumptive Sentence for a Second or Subsequent Offence under the Criminal Justice Act 2007

5.03 Subject to specified conditions, section 25(1) of the *Criminal Justice Act 2007* prescribes a presumptive minimum sentence for the commission of a second or subsequent serious offence listed under Schedule 2 to the Act. In this Part, the Commission considers the application of this regime by examining: (1) the elements which trigger the presumptive minimum sentence, (2) the relevant penalty provisions, and (3) the early release provisions.

(1) Elements which Trigger the Presumptive Minimum Sentence

5.04 In this section, the Commission is not concerned with the particular elements of the offences listed in Schedule 2 to the *Criminal Justice Act 2007*. These offences are not relevant to the operation of this presumptive sentencing regime except in so far as a second or subsequent conviction for any such offence will trigger the regime. In this respect, section 25 of the 2007 Act differs from the presumptive penalty provisions under the *Misuse of Drugs Act 1977* and the Firearms Acts.

(i) Age

5.05 Section 25(1) provides that the offender must be at least 18 years of age on the dates on which he or she is convicted of the first and subsequent scheduled offences. Presumably, this subsection was intended to ensure that the presumptive minimum sentence would not apply to juvenile offenders.³ The reference to the 'date of conviction' means, however, that an offender who *commits* a scheduled offence

¹ Law Reform Commission *Consultation Paper on Mandatory Sentences* (LRC CP 66-2011) at paragraph 4.04.

² As amended by section 22 of the *Criminal Justice Act 2007*.

³ Fitzgerald "Californication of Irish Sentencing Law" (2008) ICLJ 42 at 45.

while under the age of 18 years, but who attains this age by the date of *conviction*, may still be subject to section 25.

(ii) Prior Scheduled Offence

5.06 Section 25(1)(a) states that the offender must have been convicted on indictment of an offence listed in Schedule 2 to the 2007 Act. Section 25(4) provides that the prior offence may be one committed before or after the commencement of section 25. Thus, it appears that the provision may in certain circumstances apply retrospectively.⁴

5.07 The offences included in Schedule 2 may be described as serious offences and are particularly likely to be committed by those involved in gangland activities.⁵ This is unsurprising in the sense that the 2007 Act (as discussed at paragraphs 2.209 and 2.210) was intended to respond to the particular problems posed by gangland crime. Nonetheless, it is not a requirement of this regime that the scheduled offences be committed in relation to such activities; rather, the presumptive sentence may apply regardless of whether there is any such connection. The Commission considers that this is in order as the scheduled offences are, of themselves, serious enough to merit severe penalties.

(iii) Five Year Sentence of Imprisonment

5.08 Section 25(1)(b) states that the offender must have been sentenced to imprisonment for at least five years for the prior offence. This provision was intended to distinguish between more serious and less serious incidents of the crimes listed in Schedule 2. In this respect, the Commission notes that it is also the case that “serious”⁶ and “arrestable”⁷ offences are defined by reference to a five-year term of imprisonment. The 2007 Act does stipulate, however, that the presumptive sentencing regime will not apply where the sentence for the prior offence has been wholly⁸ or partially⁹ suspended, or where the conviction has been quashed on appeal or otherwise.¹⁰

(iv) Subsequent Scheduled Offence

5.09 Section 25(1)(c) provides that the offender must be convicted on indictment of a subsequent offence listed in Schedule 2 to the 2007 Act. It is not a requirement of the sentencing regime that this offence be connected with gangland activities or to the prior scheduled offence. Section 25(4) states, however, that the subsequent offence must have been committed after the commencement of section 25.

⁴ McIntyre “Criminal Justice Act 2007 (Annotated)” (2007) ICLSA.

⁵ The offences listed in Schedule 2 to the *Criminal Justice Act 2007* are: (i) murder; (ii) causing serious harm; (iii) threats to kill or cause serious harm; (iv) false imprisonment; (v) causing explosion likely to endanger life or damage property; (vi) possession, etc., of explosive substances; (vii) making or possessing explosives in suspicious circumstances; (viii) possession of firearm with intent to endanger life; (ix) possession of firearms while taking vehicle without authority; (x) use of firearms to assist or aid escape; (xi) possession of firearm or ammunition in suspicious circumstances; (xii) carrying firearm with criminal intent; (xiii) shortening barrel of shotgun or rifle; (xiv) aggravated burglary; (xv) drug trafficking offence within the meaning of section 3(1) of the *Criminal Justice Act 1994*; (xvi) offence of conspiracy; (xvii) organised crime; (xviii) commission of offence for criminal organisation; (xix) blackmail; (xx) extortion; and (xxi) demanding money with menaces.

⁶ Section 1 of the *Bail Act 1997* defines a “serious offence” as an “offence specified in the Schedule for which a person of full capacity and not previously convicted may be punished by a term of imprisonment for a term of 5 years or by a more serious penalty.”

⁷ Section 2 of the *Criminal Law Act 1997* defines an “arrestable offence” as “an offence for which a person of full capacity and not previously convicted may, under or by virtue of any enactment, be punished by imprisonment for a term of five years or by a more severe penalty... .”

⁸ Section 25(5)(a) of the *Criminal Justice Act 2007*.

⁹ Section 25(5)(b) of the *Criminal Justice Act 2007*.

¹⁰ Section 25(6) of the *Criminal Justice Act 2007*.

If the subsequent scheduled offence is murder, or a drugs or firearms offence that attracts a presumptive minimum sentence under the *Misuse of Drugs Act 1977* or the Firearms Acts, section 25 will not apply.¹¹

5.10 The fact that section 25 refers to the date on which the offender was *convicted* of the prior offence (as opposed to the date on which the offence was committed) reflects the rationale that the offender should be addressed by reference to his or her previous interaction with the law. If reference was made to the date of commission, the offender might not have had an interaction with the law and therefore might not be expected to have learned from his or her punishment.

(v) Within a Period of 7 Years

5.11 Section 25(1)(c)(ii) provides that the subsequent offence must be committed within 7 years of the date of conviction for the first offence. This excludes any period of imprisonment in respect of the first or subsequent offence. The period of 7 years thus appears to relate to the time during which the offender was at liberty following the date of conviction.

5.12 Alternatively, section 25(1)(c)(ii) states that the offence may be committed during any period of imprisonment in respect of the first or subsequent offence. It thus appears that, in such circumstances, the subsequent offence may be committed during a period exceeding 7 years, depending on the length of the term of imprisonment.

(2) Penalty for Subsequent Scheduled Offence

5.13 In the above circumstances, section 25(1) of the *Criminal Justice Act 2007* prescribes a presumptive minimum sentence of at least three quarters of the maximum term provided by law for the subsequent offence. If the offence carries a maximum sentence of life imprisonment, a presumptive minimum term of 10 years will apply. The severity of the presumptive penalty will therefore depend on the nature of the subsequent offence.

5.14 Section 25(3) provides, however, that the minimum sentence need not be applied where the court is satisfied that its imposition would be “disproportionate in all the circumstances of the case”. This provision appears to impose a lower threshold than the “exceptional and specific circumstances” proviso under the *Misuse of Drugs Act 1977* and the Firearms Acts. As a result, it has been observed that this aspect of the sentencing regime “will probably deprive [it] of much of [its] punitive bite”¹² and that section 25 is therefore “essentially discretionary”.¹³

(3) Early Release

5.15 The power to grant early release to those convicted of a second or subsequent scheduled offence under section 25 of the *Criminal Justice Act 2007* has been restricted. Section 25(13) states that the powers of commutation and remission granted to the Government by section 23 of the *Criminal Justice Act 1951* cannot be exercised in respect of an offender sentenced in accordance with section 25. Section 25(13) does provide, however, that a sentence imposed under section 25 will remain subject to ordinary remission for good behaviour which currently stands at one-quarter of the sentence. Section 25(15) states that the power to grant temporary release¹⁴ may not be exercised until such time as the power to grant commutation or remission has arisen, except “for grave reasons of a humanitarian nature”. Where temporary release is granted, it will be for such limited period of time as is justified by those reasons. It should also be noted that section 25 does not permit the court to list a sentence for review.

¹¹ Section 25(2) of the *Criminal Justice Act 2007*.

¹² O'Malley “Sentencing Recidivist Sex Offenders: A Challenge for Proportionality” (2008). Paper delivered at Conference on Recent Developments in Criminal Law, Trinity College Dublin, December 2008 and subsequently published in Bacik and Heffernan, eds, *Criminal Law and Procedure: Current Issues and Emerging Trends* (Firstlaw, 2009) at 106-132.

¹³ Collins “And Throw Away the Key” (2007) 101(7) *Law Society Gazette* 36 at 38-39.

¹⁴ This power is granted by section 2 of the *Criminal Justice Act 1960*.

C Mandatory Sentence for a Second or Subsequent Offence under the Misuse of Drugs Act 1977

5.16 Section 27(3F) of the *Misuse of Drugs Act 1977*, as amended,¹⁵ states that where an adult offender is convicted of a second or subsequent offence under section 15A or section 15B of the 1977 Act, the court must specify a sentence of not less than the statutory minimum sentence. In this Part, the Commission considers the practical implications of this sentencing regime.

(1) Operation of the Mandatory Sentencing Regime under section 27(3F) of the Misuse of Drugs Act 1977

5.17 The mandatory minimum sentence prescribed by section 27(3F) of the *Misuse of Drugs Act 1977* applies where a person has been convicted of two or more offences under section 15A, two or more offences under section 15B, or two or more offences under section 15A and section 15B. This regime does not require that a sentence of at least the presumptive minimum term have been imposed for the initial offence. It is arguable therefore, that the prior crime could be relatively minor. Furthermore, this regime does not stipulate any particular time frame within which the second offence must be committed. Therefore a significant period of time could elapse between the first and second offence.

5.18 The presumptive minimum sentence must be imposed in the case of a second or subsequent section 15A or section 15B offence; no exception is permitted.¹⁶

5.19 It appears that subsection (3G) to subsection (3K) (discussed at paragraphs 4.47 and 4.49) continue to apply in relation to persons convicted of a second or subsequent offence. While the power to grant early release is therefore restricted, the power to list a sentence for review is maintained.

D Mandatory Sentence for a Second or Subsequent Offence under the Firearms Acts

5.20 The Firearms Acts, as amended, require the imposition of a mandatory minimum sentence upon an adult offender who is convicted of a second or subsequent specified firearms offence.¹⁷ In this Part, the Commission considers the practical operation of this sentencing regime.

(1) Operation of the Mandatory Sentencing Regime under the Firearms Acts

5.21 The mandatory minimum sentence prescribed under the Firearms Acts applies where a person is convicted on a subsequent occasion of a firearms offence which would, in the case of a first conviction, attract a presumptive minimum sentence. This regime does not require that a sentence of at least the presumptive minimum term have been imposed for the prior offence. The prior offence could be relatively minor. Furthermore, this regime does not stipulate a particular time frame within which the subsequent offence must be committed. Thus, in *The People (DPP) v Clail*,¹⁸ the Court of Criminal Appeal observed that it was obliged to impose the prescribed minimum sentence in circumstances where the prior firearm offence had been committed in 1990.

5.22 The presumptive minimum sentence must be imposed in the case of a second or subsequent firearms offence; no exception is permitted.¹⁹

5.23 It appears that section 27C²⁰ of the *Firearms Act 1964* (discussed at paragraph 4.90) continues to apply in relation to persons convicted of second or subsequent offences. The power to grant early release is thus restricted.

¹⁵ Section 27(3F) was substituted by section 33 of the *Criminal Justice Act 2007*.

¹⁶ Section 27(3E) of the *Misuse of Drugs Act 1977*

¹⁷ Section 15(8) of the *Firearms Act 1925*; section 26(8) of the *Firearms Act 1964*; section 27(8) of the *Firearms Act 1964*; section 27A(8) of the *Firearms Act 1964*; section 27B(8) of the *Firearms Act 1964*; and section 12A(13) of the *Firearms and Offensive Weapons Act 1990*, as inserted by section 42, section 57, section 58, section 59, section 60 and section 61 of the *Criminal Justice Act 2006*.

¹⁸ *The People (DPP) v Clail* [2009] IECCA 13.

¹⁹ Subsection (12) of section 12A of the *Firearms and Offensive Weapons Act 1990*.

E Comparative Analysis

5.24 In this Part, the Commission considers the use of mandatory (and presumptive) sentences for second or subsequent offences in other common law countries.

(a) Northern Ireland

5.25 Although Northern Ireland applies a mandatory sentencing regime in respect of certain firearms offences and “serious offences”, it does not apply such a scheme in respect of second or subsequent offences.

(b) England and Wales

5.26 In England and Wales, there are three examples of presumptive sentencing regimes applicable to repeat offenders. These sentencing regimes are prescribed for certain repeat drug offences, repeat domestic burglaries, and for the purposes of public protection.

(i) Drugs Offences

5.27 Section 110 of the *Powers of Criminal Courts (Sentencing) Act 2000* prescribes a minimum sentence of 7 years’ imprisonment for an offender, aged at least 21 years, who is convicted of a third Class A drug trafficking offence, committed when he or she was at least 18 years of age.²¹ Where an offender is under the age of 21 years and is convicted of a third class A drug trafficking offence, committed when he or she was at least 18 years of age, the court must impose a minimum sentence of 7 years’ detention in a young offender institution. For the purposes of this regime, one of the prior drug trafficking offences must have been committed by the offender after he or she was convicted of the other.

5.28 Under section 110(2), a sentence of less than 7 years may only be imposed where there are “specific circumstances” relating to the offences or the offender which would make it “unjust in all the circumstances” to apply the minimum sentence. While the 2000 Act does not define what is meant by “specific circumstances”, section 110(3) obliges the court, where it finds that such circumstances exist, to expressly state what these are.

5.29 Section 152(3) of the 2000 Act permits the court to impose a sentence of not less than 80 percent of the minimum term prescribed, where the accused has indicated an intention to plead guilty.²² In determining whether to exercise this option, the court is required to take into account the stage at which the accused indicated this intention and the circumstances surrounding that indication.²³ It has been asserted, however, that the court is entitled to take advantage of section 152 *whenever* an offender has pleaded guilty, even in circumstances where the intention to plead guilty was not indicated in advance of the trial.²⁴ Where the court does rely on section 152 in imposing a sentence lower than the prescribed minimum, it must indicate how it arrived at that sentence and what allowance has been made for the plea.²⁵

(ii) Domestic Burglary

5.30 Section 111 of the *Powers of Criminal Courts (Sentencing) Act 2000* prescribes a minimum sentence of three years’ imprisonment for an offender, aged at least 21 years, who is convicted of a third domestic burglary, committed when he or she was at least 18 years of age. Where an offender under the age of 21 years is convicted of a third domestic burglary, committed when he or she was at least 18 years of age, the court must impose a minimum sentence of three years’ detention in a young offender

²⁰ Section 27C was inserted by section 61 of the *Criminal Justice Act 2006*.

²¹ Class A drugs are defined in Part 1 of Schedule 2 to the *Misuse of Drugs Act 1971*. The term “drug trafficking offence” is defined by section 1 of the *Drug Trafficking Act 1994*.

²² See also section 144 of the *Criminal Justice Act 2003*.

²³ Section 152(1) of the *Powers of Criminal Courts (Sentencing) Act 2000*.

²⁴ *Current Law Statutes* (Sweet and Maxwell, 2000) at 6-105.

²⁵ Section 152(2) of the *Powers of Criminal Courts (Sentencing) Act 2000*.

institution. For the purposes of this regime, one of the prior burglary offences must have been committed by the offender after he or she was convicted of the other.²⁶ The obligation to impose the minimum sentence will apply unless the court considers that there are particular circumstances relating to the offences or the offender which would make it unjust in all the circumstances to impose the minimum penalty.²⁷

5.31 Once again, section 152(3) of the 2000 Act permits the court to impose a sentence of not less than 80 percent of the minimum term prescribed, where the accused has indicated an intention to plead guilty.²⁸ In determining whether to exercise this option, the court is required to take into account the stage at which the accused indicated this intention and the circumstances surrounding that indication.²⁹ As previously noted, it has been asserted, however, that a court is entitled to take advantage of section 152 *whenever* an offender has pleaded guilty, even though the intention to plead guilty was not indicated in advance of the trial.³⁰ Where a court does rely on section 152 in imposing a sentence lower than the prescribed minimum, it must indicate how it arrived at that sentence and what allowance has been made for the plea.³¹

5.32 As discussed at paragraphs 2.200 and 2.201, the presumptive three-year minimum sentence was introduced in response to a perception that the courts were imposing unduly lenient sentences for burglary offences. It is debatable, however, whether the enactment of this sentencing regime has addressed this perceived problem. In 2007, for example, 79 percent of offenders convicted of a third domestic burglary did not receive the three-year presumptive minimum sentence.³² Wasik notes that these statistics:

“indicat[e] that judges are not held in sway to the criminal record [of a repeat burglary offender], despite the section’s emphasis on that aspect of the sentencing decision, and that they look at all the circumstances before deciding on the appropriate sentence for the new offence.”³³

(iii) Public Protection

5.33 Section 224A of the *Criminal Justice Act 2003*³⁴ applies a presumptive ‘two-strike’ sentencing regime in respect of certain serious offenders. This regime requires a sentencing court to impose a life sentence upon an adult offender who is convicted of an offence listed in Part 1 of Schedule 15B,³⁵ where both the “sentence condition” and “previous offence condition” (discussed below) are fulfilled. Section 244A(2) grants the court discretion not to impose the life sentence where there are particular circumstances which relate to the offence, the previous offence, or the offender, which would render the application of this penalty unjust in all the circumstances.

5.34 For the purposes of section 224A, the “sentence condition” requires that the second offence must be serious enough to justify the imposition of a sentence of at least 10 years’ imprisonment.³⁶ In

²⁶ Section 111(1) of the *Powers of Criminal Courts (Sentencing) Act 2000*.

²⁷ Section 111(2) of the *Powers of Criminal Courts (Sentencing) Act 2000*.

²⁸ See also: section 144 of the *Criminal Justice Act 2003*.

²⁹ Section 152(1) of the *Powers of Criminal Courts (Sentencing) Act 2000*.

³⁰ *Current Law Statutes* (Sweet and Maxwell, 2000) at 6-105.

³¹ Section 152(2) of the *Powers of Criminal Courts (Sentencing) Act 2000*.

³² Hope “Four-Fifths of Repeat Burglars do not receive Minimum Jail Term, say Tories” *The Telegraph* 4 February 2009.

³³ Wasik “Dimensions of Criminal History” in Roberts and von Hirsch, eds, *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Oxford: Hart, 2010) at 176.

³⁴ Inserted by section 122 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*.

³⁵ Part 1 of Schedule 15B lists 44 offences, many of which relate to terrorism, the use of firearms, homicide, and sexual crimes (particularly against children).

³⁶ Section 224A(3) of the *Criminal Justice Act 2003*.

considering whether this condition is met, the court must contemplate the sentence that it would have imposed but for section 224A, disregarding any extension period that it would have applied under section 226A.³⁷ Thomas notes that because the sentencing court must be willing to impose a sentence of at least 10 years having taken account of all relevant considerations (including the offender's plea), the 'sentence condition' sets a "very high threshold"³⁸ for the imposition of a life sentence.

5.35 The "previous offence condition" stipulates that the offender must, at the time when the second offence was committed, have a prior conviction for an offence listed in any part of Schedule 15B³⁹ and have received a "relevant life sentence" or a "relevant sentence of imprisonment" for that prior offence.⁴⁰ Section 224A(5) clarifies that a "relevant life sentence" is one where the offender was not eligible for release during the first five years (not taking into account any period spent on remand or bail). Any extended sentence⁴¹ or other determinate sentence of imprisonment or detention⁴² will be considered relevant where the custodial term was at least 10 years. Section 224A(9) provides that any reduction in sentence for the purpose of taking account of time spent on remand, either in custody or on bail, is to be disregarded when considering whether the "previous offence condition" has been met. Thomas suggests that very few offenders are likely to satisfy both the "sentence condition" and the "previous offence condition" and that, as a result, "the imposition of a new-style automatic life sentence will be a rare event indeed."⁴³

5.36 The presumptive life sentence prescribed by section 224A has been described as a "most peculiar provision".⁴⁴ Although referred to as a 'mandatory' provision by the Government,⁴⁵ it is clear that a life sentence need only be imposed under this regime where it would be just in all the circumstances of the case. As the courts will always seek to impose a sentence that is just in the circumstances, the purpose of this reform has been called into question.⁴⁶

³⁷ Subject to certain conditions, section 226A permits the imposition of extended sentences upon certain violent or sexual offenders who are aged at least 18 years.

³⁸ Thomas "The Legal Aid, Sentencing and Punishment of Offenders Act 2012: The Sentencing Provisions" (2012) 8 Criminal Law Review 572 at 573.

³⁹ In addition to the 44 offences listed in Part 1, Schedule 15B lists under Part 2, the crime of murder and any offence that was abolished (with or without savings) prior to the Schedule coming into force and which would, if committed on the relevant day, have constituted an offence specified in Part 1 of the Schedule. For the purposes of section 224A(4), the 'relevant day' is that on which the offender was convicted of the offence referred to in section 224A(1)(a). Part 3 of the Schedule further lists an array of offences under service law, while Part 4 includes any offence for which the person was convicted in Scotland, Northern Ireland or a member state other than the United Kingdom and which, if committed in England and Wales at the time of conviction, would have constituted an offence specified in Part 1 or Part 2 of the Schedule.

⁴⁰ Section 224A(4) of the *Criminal Justice Act 2003*.

⁴¹ Section 224A(6) of the *Criminal Justice Act 2003*.

⁴² Section 224A(8) of the *Criminal Justice Act 2003*.

⁴³ Thomas "The Legal Aid, Sentencing and Punishment of Offenders Act 2012: The Sentencing Provisions" (2012) 8 Criminal Law Review 572 at 573. See also: Picton "The Effect of the Changes in Sentencing of Dangerous Offenders Brought About by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the Mystery of Schedule 15B" (2013) 5 Criminal Law Review 406 at 408.

⁴⁴ Anthony Lloyd "Two strikes and then a mandatory life sentence? No" *The Guardian* 19 March 2012.

⁴⁵ See: Hansard, House of Commons, Legal Aid, Sentencing and Punishment of Offenders Bill, 1 November 2011, Column 788.

⁴⁶ Anthony Lloyd "Two strikes and then a mandatory life sentence? No" *The Guardian* 19 March 2012.

5.37 Subject to certain conditions,⁴⁷ section 226A of the *Criminal Justice Act 2003*⁴⁸ permits the application of an extended sentence to an adult offender⁴⁹ who is convicted of a specified violent offence⁵⁰ or a specified sexual offence.⁵¹ Under this regime, an “extended sentence of imprisonment” is a sentence the term of which is equal to the aggregate of: (a) the appropriate custodial term that would (apart from this section) be imposed in compliance with section 153(2) of the *Criminal Justice Act 2003*, and (b) a further period (the “extension period”) for which the offender is to be subject to a licence.⁵² While this sentencing regime does not prescribe a minimum sentence, section 246A of the *Criminal Justice Act 2003*⁵³ provides that an offender sentenced under this regime will not be eligible for release on licence until he or she has served *at least two-thirds* of the custodial term imposed, as opposed to one-half of the sentence, as had formerly been the case.⁵⁴

(c) Scotland

5.38 In Scotland, certain repeat drug offences attract a presumptive minimum sentence of imprisonment.

⁴⁷ In order for an extended sentence to be imposed, the following criteria must be fulfilled: (i) the court must consider that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences; (ii) the court must not be required by section 224A or section 225(2) of the *Criminal Justice Act 2003* to impose a life sentence for the offence; and (iii) “condition A” or “condition B” must be met. “Condition A” is that, at the time the offence was committed, the offender must have been convicted of an offence listed in Schedule 15B to the Act. “Condition B” is that, if the court were to impose an extended sentence of imprisonment, the term that it would specify as the appropriate custodial term would be at least four years.

⁴⁸ Inserted by section 124 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*.

⁴⁹ Section 226B of the *Criminal Justice Act 2003* provides for a comparable extended detention regime which is applicable to offenders under the age of 18 years, who are convicted of a specified violent or sexual offence.

⁵⁰ A “specified violent offence” is defined by section 224 of the *Criminal Justice Act 2003* as an offence specified in Part 1 of Schedule 15 to the Act. Among the offences listed in that Part are: (i) manslaughter; (ii) false imprisonment; (iii) threats to kill; (v) robbery or assault with intent to rob; and (v) attempted murder or conspiracy to commit murder. Section 226A(10) and Section 226B(8) of the *Criminal Justice Act 2003* clarify that references to a “specified violent offence” include an offence that was abolished before 4 April 2005, and which would have constituted such an offence if committed on the day on which the offender was convicted of the offence.

⁵¹ A “specified sexual offence” is defined by section 224 of the *Criminal Justice Act 2003* as an offence specified in Part 2 of Schedule 15 to the Act. Among the offences listed in that Part are: (i) rape; (ii) intercourse with girl under 16; (iii) incest; (iv) indecent assault; and (v) keeping a brothel. Section 226A(10) and Section 226B(8) of the *Criminal Justice Act 2003* clarify that references to a “specified sexual offence” include an offence that was abolished before 4 April 2005, and which would have constituted such an offence if committed on the day on which the offender was convicted of the offence.

⁵² The Act specifies that the extension period must be a period of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences. However, in the case of a specified violent offence, the extension period may not exceed five years, while in the case of a specified sexual offence it may not exceed 8 years. Furthermore, the term of an extended sentence of imprisonment must not exceed the term that, at the time the offence was committed, was the maximum term permitted for the offence.

⁵³ Inserted by section 125 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*.

⁵⁴ Thomas “The Legal Aid, Sentencing and Punishment of Offenders Act 2012: The Sentencing Provisions” (2012) 8 *Criminal Law Review* 572 at 576; and Picton “The Effect of the Changes in Sentencing of Dangerous Offenders Brought About by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the Mystery of Schedule 15B” (2013) 5 *Criminal Law Review* 406 at 409.

(i) *Drug Offences*

5.39 Section 205B of the *Criminal Procedure (Scotland) Act 1995*⁵⁵ requires the court to impose a minimum sentence of 7 years' imprisonment on a person, aged at least 21 years, who is convicted of a third class A drug trafficking offence, committed when he or she was at least 18 years of age. Where the offender is at least 18 years of age but under the age of 21 years, the court must impose a minimum 7-year term of detention in a young offender institution.⁵⁶ For the purposes of this regime, the age of the offender at the time when he or she committed the two prior drug trafficking offences is irrelevant.⁵⁷ However, one of the two prior offences must have been committed after the offender was convicted of the other.⁵⁸ A sentencing court is obliged to impose the prescribed minimum sentence unless it considers that there are specific circumstances relating to any of the offences or the offender which would make the application of that penalty unjust.⁵⁹

(d) *United States of America*

5.40 As discussed in Chapter 2, mandatory sentencing regimes for repeat offenders achieved renewed popularity in the United States following the onset of the "three-strikes movement" in the early 1990s. At present, it appears that at least 26 American states apply some form of mandatory "strike" law in respect of offenders convicted of second or subsequent, specified offences.⁶⁰ It has been observed, however, that significant variations exist among these sentencing regimes. Stemen, Rengifo and Wilson note that these laws tend to differ in terms of: (i) the number of prior convictions required to trigger a mandatory sentence; (ii) whether both the prior and present offences must involve violence; (iii) the type of prior adjudication required to trigger these regimes (for example, states differ as to whether a prior conviction is sufficient or whether the accused must have served a term of imprisonment in respect of that conviction); (iv) the time limits placed on when these prior adjudications must have occurred; and (v) the sentences available under these laws.⁶¹

5.41 In considering the operation of these mandatory sentencing regimes, the Commission will necessarily focus on a limited number of examples. Specifically, attention will be given to the approaches adopted in Washington (the state which spearheaded the modern 'three-strikes' movement) and California and Georgia, the states which have made greatest use of these sentencing regimes.⁶² The position adopted by the Federal Government in relation to repeat offender laws will also be considered.

(i) *Washington*

5.42 The *Persistent Offender Accountability Act* provides that an offender convicted for the third time of a designated felony⁶³ must receive a sentence of life imprisonment without parole.⁶⁴ This regime

⁵⁵ Inserted by section 2(1) of the *Crime and Punishment (Scotland) Act 1997*.

⁵⁶ Section 205B(2) of the *Criminal Procedure (Scotland) Act 1995*.

⁵⁷ Section 205B(1)(b)(iii) of the *Criminal Procedure (Scotland) Act 1995*.

⁵⁸ Section 205(B)(1)(c) of the *Criminal Procedure (Scotland) Act 1995*.

⁵⁹ Section 205(B)(3) of the *Criminal Procedure (Scotland) Act 1995*.

⁶⁰ Bazelon "Arguing Three Strikes" *New York Times* 21 May 2010; and Chemerinsky "Cruel and Unusual: The Story of Leandro Andrade" (2003-2004) 52(1) *Drake Law Review* 1 at 5.

⁶¹ Stemen, Rengifo and Wilson *Of Fragmentation and Ferment: The Impact of State Sentencing Policies on Incarceration Rates, 1975-2002* (Vera Institute of Justice, 2005) at 107.

⁶² Schiraldi, Colburn and Lotke, *Three Strikes and You're Out: An Examination of the Impact of 3-Strike Laws 10 Years after their Enactment* (Justice Policy Institute, 2004) at 4. The authors note that as of 2004, California, Georgia and Florida were the only states to have imprisoned more than 400 people under their three-strikes provisions.

⁶³ RCW 9.94A.030 provides, at paragraph (32), that more than 20 felonies - and attempts to commit these felonies - may qualify as strike offences. These include various forms of assault (including assault in the second degree and assault of a child in the second degree), homicide offences (including first degree and second degree manslaughter and controlled substance homicide), sexual offences (including third degree

operates retrospectively in so far as offences committed prior to its enactment may constitute ‘strikes’ on the record of the offender where they are comparable to any of the designated offences.⁶⁵ Federal convictions from other states may also qualify where they relate to conduct similar to that entailed by a designated offence.⁶⁶ The Act stipulates that at least one of the prior convictions must have occurred before the commission by the offender of any of the other designated offences.⁶⁷

5.43 Austin et. al assert that Washington is representative of most other states in that its law produced a relatively narrow strike zone and requires three strikes in order for a mandatory life sentence to apply.⁶⁸ The Commission notes, however, that Washington does impose a ‘two-strikes’ law upon certain repeat sex offenders. This regime applies to those who are convicted of a specified sexual offence,⁶⁹ the commission of which was preceded by at least one conviction (whether in the state or elsewhere) for another specified sexual offence or for a federal offence, out-of-state offence, or offence under prior Washington law, which is comparable to a specified sexual offence.⁷⁰ Where subject to this ‘two-strikes’ law, an offender must be sentenced to life in prison without parole.⁷¹

5.44 It has been observed that low-level offenders have been most affected by the ‘three-strikes’ sentencing regime enacted in Washington.⁷² In particular, commentators have highlighted the fact that second degree robbery is the most common ‘third-strike’ offence.⁷³ As this offence poses little risk of physical injury, some commentators, including the Washington Sentencing Guidelines Commission, have recommended that this offence (along with certain forms of second degree assault) be removed from the list of designated ‘strike’ offences.⁷⁴

rape and sexual exploitation), and vehicular offences (including certain forms of vehicular homicide and vehicular assault).

⁶⁴ RCW 9.94A.570 specifies that a mandatory life sentence without the possibility of release is the penalty applicable to ‘persistent offenders’ (as defined by RCW 9.94A.030, see below).

⁶⁵ RCW 9.94A.030, at paragraph (32), sub-paragraph (u).

⁶⁶ *Ibid.*

⁶⁷ RCW 9.94A.030, paragraph (37)(a)(ii).

⁶⁸ Austin, Clark, Hardyman and Henry *Three Strikes and You’re Out: The Implementation and Impact of Strike Laws* (National Criminal Justice Reference Service, 2000) at 15.

⁶⁹ RCW 9.94A.030, paragraph (37), sub-paragraph (b)(i) lists the relevant sexual offences as follows: (a) rape in the first degree; (b) rape of a child in the first degree; (c) child molestation in the first degree; (d) rape in the second degree; (e) rape of a child in the second degree; and (e) indecent liberties by forcible compulsion. Where a finding of sexual motivation is made, the following offences also qualify: (a) murder in the first degree; (b) murder in the second degree; (c) homicide by abuse; (d) kidnapping in the first degree; (e) kidnapping in the second degree; (f) assault in the first degree; (g) assault in the second degree; (h) assault of a child in the first degree; (i) assault of a child in the second degree; (j) burglary in the first degree; and (k) an attempt to commit any of the foregoing crimes.

⁷⁰ RCW 9.94A.030, paragraph (37)(b)(i) and paragraph (37)(b)(ii).

⁷¹ RCW 9.94A.570.

⁷² O’Hagan “Three-strikes life terms fewer than expected” *Seattle Times* 17 August 2004.

⁷³ *Ibid.*; and McCarthy *Recent Developments on Washington’s “Three Strikes” Law* (Office of Legislative Research, 2009).

⁷⁴ McCarthy *Recent Developments on Washington’s “Three Strikes” Law* (Office of Legislative Research, 2009); Shapiro “Life in Prison for Stealing \$48?: Rethinking Second-Degree Robbery as a Strike Offense in Washington State” (2010-2011) 34(3) *Seattle University Law Review* 935; and Lee and Colgan *Washington’s Three Strikes Law: Public Safety & Cost Implications of Life Without Parole* (Columbia Legal Services, 2011).

(ii) California

5.45 Section 667⁷⁵ of the *Penal Code* provides that in sentencing an offender who has one prior conviction for a violent felony⁷⁶ or a serious felony,⁷⁷ for *any* subsequent felony, a court must impose a term of imprisonment which is at least twice the term already provided as punishment for the current felony.⁷⁸ Such an offender must complete at least 80% of his or her sentence before being eligible for release⁷⁹ or 85% of his or her sentence where convicted of a violent felony.⁸⁰

5.46 In its original form, section 667 also required that an offender with two or more violent and/or serious felony convictions, who was subsequently convicted of *any* felony offence, receive an indeterminate life sentence with a minimum term calculated to be the greater of: (i) three times the term otherwise provided for the current felony conviction; (ii) 25 years; or (iii) the term provided for the current charge plus any applicable sentence enhancements.⁸¹ The fact that non-violent and/or non-serious felony convictions were sufficient to trigger these enhanced penalties, led to controversial sentencing outcomes⁸² and contributed to a widespread perception of the Californian ‘three-strikes’ model as the most severe in the United States.⁸³

5.47 On 6 November 2012, California chose to modify this particularly contentious aspect of its ‘three-strikes’ regime. By a margin of 68.6 percent to 31.4 percent, voters approved Proposition 36 which amended the ‘three-strikes’ law so that, ordinarily, an offender with two or more violent and/or serious felony convictions will attract a sentence of twice the term provided as punishment for any subsequent felony of which he or she is convicted.⁸⁴ In order to trigger an indeterminate life sentence, an offender must now be convicted of a serious and/or violent felony and have two prior convictions for serious and/or violent felonies. Alternatively, *any* felony conviction may still attract an indeterminate life sentence where

⁷⁵ This sentencing regime is also provided for by section 1170.12 of the *Penal Code*. The latter contains a nearly identical version of the ‘strike law’ enacted by the legislature, and was enacted by voters under Proposition 184 on 8 November 1994.

⁷⁶ For the purposes of this regime, more than 23 “violent felonies” are listed in section 667.5(c) of the *Penal Code*.

⁷⁷ For the purposes of this regime, more than 40 “serious felonies” are listed in section 1192.7(c) of the *Penal Code*.

⁷⁸ Section 667(e)(1) of the *Penal Code*.

⁷⁹ Section 667(c)(5) of the *Penal Code*.

⁸⁰ Section 2933.1 of the *Penal Code*.

⁸¹ Section 667(e)(2A) of the *Penal Code*.

⁸² See, for example: *Lockyer v Andrade* 583 US 63 (2003) in which the United States Supreme Court upheld a sentence of 50 years’ imprisonment, imposed for a third strike offence which consisted of the theft of five children’s video tapes. For critical commentary, see: Chemerinsky “Cruel and Unusual: The Story of Leandro Andrade” (2003-2004) 52(1) *Drake Law Review* 1; Grosskreutz “Strike Three: Even Though California’s Three Strikes Law Strikes out Andrade, There are no Winners in this Game” (2003-2004) 43 *Washburn Law Journal* 429; and Trevino “Andrade v Attorney General of California: Gross Disproportionality in Sentencing - A Standard for Reviewing Eighth Amendment Challenges on Cruel and Unusual Punishments” (2004) 29(1) *Oklahoma City University Law Review* 463.

⁸³ See, for example: Goldin “California Three Strikes Law: A Violation of International Law and a Possible Impediment to Extradition” (2009) 15(2) *Southwestern Journal of International Law* 327 at 330; Samaha *Criminal Law* (Cengage Learning, 2010) at 67; and Mackey and Levan *Crime Prevention* (Jones and Bartlett Publishers, 2011) at 240.

⁸⁴ Sankin “California Prop 36, Measure Reforming State’s Three Strikes law Approved by Wide Majority of Voters” 7 November 2012. Available at: www.huffingtonpost.com/2012/11/07/california-prop-36_n_2089179.html [Last accessed: 22 May 2013].

the perpetrator has a previous conviction for one of the most serious offences in the criminal calendar, such as murder, attempted murder, rape, child molestation or a felony involving the use of a firearm.⁸⁵

5.48 Under the Californian ‘three-strikes’ regime, probation may not be granted for the current offence, nor may execution or imposition of the sentence be suspended for any prior offence.⁸⁶ Diversion may not be granted to an offender sentenced under this regime nor will he or she be eligible for commitment to the California Rehabilitation Centre.⁸⁷

5.49 Section 667(f)(2) provides that a prosecuting attorney may move to dismiss an allegation of a prior conviction for a strike offence in the furtherance of justice or if there is insufficient evidence to prove the prior conviction. If the court is satisfied that there is insufficient evidence to prove the prior conviction, it may dismiss or strike the allegation. Section 667(g) aims to limit the discretion of system officials by prohibiting the use of prior felony convictions in plea bargaining.

5.50 While the Californian ‘three-strikes’ regime has been eased to some extent by the approval of Proposition 36, the greatly enhanced penalties imposed on second-strike and third-strike offenders continue to render this law severe. The California State Auditor has estimated that those imprisoned under this regime serve sentences which, on average, are nine years longer due to the requirements of the law.⁸⁸ Accordingly, certain commentators identify this sentencing scheme as a key contributor to the well-documented problem of overcrowding in Californian prisons.⁸⁹ It is notable that, as of April 2009, prisoners serving sentences under this regime comprised approximately 25% of the total inmate population in Californian penal institutions.⁹⁰

5.51 In addition to these ‘three-strikes’ provisions, section 667.7 of the *Penal Code* imposes a mandatory sentencing regime on “habitual offenders”. Under this regime, a “habitual offender” is defined as any person convicted of a felony in which he or she inflicted great bodily injury on another person, or personally used force which was likely to inflict great bodily injury, and who has previously served two or more prison terms for a specified offence.⁹¹ A habitual offender who has served two prior prison terms will receive a life sentence for the current offence and, at a minimum, will not be eligible for parole until 20 years have been served. A habitual offender who has served three or more prior prison terms will receive a sentence of life imprisonment without parole.

5.52 Section 667.71 of the *Penal Code* establishes a mandatory sentencing regime for habitual sexual offenders. A habitual sexual offender is defined as a person who has previously been convicted of

⁸⁵ Section 667(e)(C) of the *Penal Code*.

⁸⁶ Section 667(c) of the *Penal Code*.

⁸⁷ Section 667(c) of the *Penal Code*.

⁸⁸ *California Department of Corrections and Rehabilitation: Inmates Sentenced under the Three Strikes Law and a Small Number of Inmates Receiving Specialty Health Care Represent Significant Costs* (California State Auditor, 2010) at 27.

⁸⁹ See, for example: Grosskreutz “Strike Three: Even Though California’s Three Strikes Law Strikes out Andrade, There are no Winners in this Game” (2003-2004) 43 Washburn Law Journal 429 at 454-455; and *California Department of Corrections and Rehabilitation: Inmates Sentenced under the Three Strikes Law and a Small Number of Inmates Receiving Specialty Health Care Represent Significant Costs* (California State Auditor, 2010) at 30.

⁹⁰ *California Department of Corrections and Rehabilitation: Inmates Sentenced under the Three Strikes Law and a Small Number of Inmates Receiving Specialty Health Care Represent Significant Costs* (California State Auditor, 2010) at 21.

⁹¹ Section 667.7(a) lists at least 20 offences which may trigger this regime. These include: various homicide offences (including murder and manslaughter); sexual offences (including various forms of rape); assault offences (including assault with intent to commit murder and assault with a deadly weapon); and violent property offences (including robbery involving the use of force or a deadly weapon and carjacking involving the use of a deadly weapon).

one or more specified sexual offences⁹² and who is convicted in the current proceedings of another such offence. Under this regime, a habitual sexual offender must be punished by imprisonment in the state prison for a term of 25 years to life.

5.53 It has been observed that in the majority of cases, the sentencing regime applicable to habitual offenders has been supplanted by the state's "three-strikes" law.⁹³

(iii) Georgia

5.54 Section 17-10-7(a) of the *Penal Code* prescribes a mandatory sentence for an offender convicted of a felony offence, who has previously been convicted of a felony offence in the state or an offence in another American state, which, if committed in Georgia, would be a felony. Under this regime, such an offender must be sentenced to the maximum term prescribed for the current offence provided that, unless otherwise provided by law, the trial judge may in his or her discretion probate or suspend the maximum sentence prescribed for the offence.

5.55 Section 17-10-7(c) prescribes a mandatory sentence in respect of an offender who is convicted of a fourth or subsequent felony, having previously been convicted in Georgia of three felonies, or having been convicted under the laws of another American state of three offences which would be felonies if committed in Georgia. This sentencing regime provides that such an offender must be sentenced to the maximum term provided for the current offence, and will not be eligible for parole until this maximum sentence has been served.

5.56 Distinct from this general class of felonies are 7 offences which have been designated "serious violent felonies" by the Georgia legislature. The offences of murder; armed robbery; kidnapping; rape; aggravated child molestation; aggravated sodomy; and aggravated sexual battery attract a "two-strike" sentencing arrangement. Under section 17-10-7(b)(2) of the *Penal Code*, an offender convicted of a serious violent felony (for which he or she is not sentenced to death) who has previously been convicted of a serious violent felony in the state, or who has been convicted in another American state of an offence which would be a serious violent felony if committed in Georgia, must receive a sentence of life imprisonment without parole. This sentence may not be suspended, stayed, probated, deferred, or withheld. Such an offender will not be eligible for any form of pardon, parole or early release administered by the State Board of Pardons and Paroles, or any sentence-reducing measure under a program administered by the Department of Corrections, except as may be authorized by any existing or future constitutional provisions.

5.57 Heyer observes that in terms of the number of offences required to trigger a life sentence without parole, "Georgia's two strikes law is the harshest version of a three strikes law to emerge out of the 1990s..."⁹⁴ The same commentator emphasises, however, that because this regime covers a narrow range of offences, and because these serious, violent offences would attract a lengthy sentence irrespective of the two-strikes law, this regime has not significantly impacted on Georgia's overall prison population.⁹⁵

⁹² The following offences are listed under section 667.71: "(a) rape... ; (b) spousal rape... ; (c) rape, spousal rape, or sexual penetration, in concert, in violation of section 264.1; (4) Lewd or lascivious act... ; (5) sexual penetration, in violation of subdivision (a) or (j) of Section 289; (6) continuous sexual abuse of a child... (7) sodomy... (8) oral copulation, in violation of subdivision (c) or (d) of Section 288a; (9) kidnapping, in violation of subdivision (b) of section 207; (10) kidnapping... to commit specified sex offenses... ; (11) kidnapping... with the intent to commit a specified sexual offense ; (12) aggravated sexual assault of a child... ; and (13) an offense committed in another jurisdiction that includes all of the elements of an offense specified in this subdivision."

⁹³ See: Bill Lockyer, Attorney General, *Opinion No. 99-322* (22 December 1999) at 2-3.

⁹⁴ Heyer "Comparing the Strike Zones of "Three Strikes and You're Out" Laws for California and Georgia, the Nation's Two Heaviest Hitters" (2012) 45 *Suffolk University Law Review* 1217 at 1237.

⁹⁵ *Ibid* at 1238.

(iv) Federal Government

5.58 At federal level, 18 USC 3559(c) prescribes a mandatory life sentence in respect of an offender convicted of a serious violent felony⁹⁶ who has at least two prior state or federal serious violent felony convictions, or who has one or more of these convictions plus one or more state or federal serious drug convictions.⁹⁷ Other than the first such offence, each serious violent felony or serious drugs offence must have been committed after the conviction of the offender of the preceding serious violent felony or serious drugs offence.

5.59 Section 3559(e) also requires that a person convicted of a federal sex offence⁹⁸ in which a minor is the victim (who is not sentenced to death for that offence) be sentenced to life imprisonment if he or she has a prior federal or state conviction for a sex offence in which a minor was the victim. In this context, a “prior conviction” means a conviction for which the sentence was imposed before the conduct constituting the subsequent federal sex offence occurred.

(e) Canada

5.60 In Canada, certain repeat firearms offences attract a mandatory minimum sentence of imprisonment.

(i) Firearms Offences

5.61 Under the *Criminal Code*, an offender will attract an enhanced minimum sentence where: (a) he or she has a prior conviction for a specified firearms offence, or for using a firearm in the commission of a specified violent offence, and (b) he or she is subsequently convicted of another such offence.⁹⁹

5.62 First, where this constitutes his or her *second* conviction for a specified offence, an offender convicted of one of the following firearms offences will attract a minimum one-year sentence: (i)

⁹⁶ A “serious violent felony” means: (i) a Federal or State offence, by whatever designation and wherever committed, consisting of murder...; manslaughter other than involuntary manslaughter...; assault with intent to commit murder...; assault with intent to commit rape; aggravated sexual abuse and sexual abuse...; abusive sexual contact...; kidnapping; aircraft piracy...; robbery [subject to subsection 3559(c)(3)(A)]...; carjacking...; extortion; arson [subsection 3559(c)(3)(B)]; firearms use; firearms possession...; or attempt, conspiracy, or solicitation to commit any of the above offenses; and (ii) [subject to subsection 3559(c)(3)(A)] any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.

⁹⁷ A “serious drug offence” means: (i) an offense that is punishable under section 401(b)(1)(A) or 408 of the Controlled Substances Act (21 U.S.C. 841 (b)(1)(A), 848) or section 1010(b)(1)(A) of the Controlled Substances Import and Export Act (21 U.S.C. 960 (b)(1)(A)); or (ii) an offense under State law that, had the offense been prosecuted in a court of the United States, would have been punishable under section 401(b)(1)(A) or 408 of the Controlled Substances Act (21 U.S.C. 841 (b)(1)(A), 848) or section 1010(b)(1)(A) of the Controlled Substances Import and Export Act (21 U.S.C. 960 (b)(1)(A)).

⁹⁸ The term “Federal sex offence” means an offense under section 1591 (relating to sex trafficking of children); section 2241 (relating to aggravated sexual abuse); section 2242 (relating to sexual abuse); section 2244(a)(1) (relating to abusive sexual contact); section 2245 (relating to sexual abuse resulting in death); section 2251 (relating to sexual exploitation of children); section 2251A (relating to selling or buying of children); section 2422(b) (relating to coercion and enticement of a minor into prostitution) [subject to section 3559(e)(3)]; or section 2423(a) (relating to transportation of minors) [subject to section 3559(e)(3)].

⁹⁹ A conviction for *any* of the offences listed above in paragraphs 5.62 to 5.64 will be recognised as a ‘previous conviction’ where an offender is being sentenced for an offence listed in paragraphs 5.62 - 5.63. However, where an offender is being sentenced for using a firearm in the commission of one of the violent offences listed in the paragraph 5.64, only a prior conviction for using a firearm in the commission of such an offence will constitute a ‘previous conviction.’

possession of a firearm knowing its possession is unauthorised,¹⁰⁰ and (ii) possession of a prohibited weapon, device or ammunition knowing its possession is unauthorised.¹⁰¹ Alternatively, where this constitutes his or her *third or subsequent* conviction for a specified offence, a conviction for either of these possession offences will attract a minimum sentence of two years less a day.

5.63 Second, where this constitutes his or her *second or subsequent* conviction for a specified offence, an offender convicted of one of the following offences will attract a minimum sentence of three years: (i) using a firearm in the commission of an offence,¹⁰² and (ii) using an imitation firearm in the commission of an offence.¹⁰³ Third, where this constitutes his or her *second or subsequent* conviction for a specified offence, an offender convicted of one of the following offences will attract a minimum sentence of five years: (i) possession of a prohibited or restricted firearm with ammunition;¹⁰⁴ (ii) weapons trafficking;¹⁰⁵ (iii) possession of a firearm, a prohibited device, any ammunition or any prohibited ammunition for the purpose of weapons trafficking;¹⁰⁶ and (iv) importing or exporting a firearm, a prohibited device or any prohibited ammunition, knowing it is unauthorized.¹⁰⁷

5.64 Finally, an offender who uses a firearm in the commission of certain violent offences will attract a minimum sentence of 7 years where: (a) this is his or her second or subsequent conviction for using a firearm in one of these violent offences, and (b) prescribed circumstances exist. Specifically, this provision will apply where the firearm used is restricted or prohibited or where any firearm is used in connection with a criminal organisation.¹⁰⁸ Where a firearm is thus used in their commission, the following offences attract the prescribed minimum 7-year sentence: (i) attempted murder;¹⁰⁹ (ii) discharging a firearm with intent;¹¹⁰ (iii) recklessly discharging a firearm;¹¹¹ (iv) sexual assault with a weapon (threats to a third party or causing bodily harm);¹¹² (v) aggravated sexual assault;¹¹³ (vi) kidnapping;¹¹⁴ (vii) hostage-taking;¹¹⁵ (viii) robbery;¹¹⁶ and (ix) extortion.¹¹⁷

¹⁰⁰ Section 92(1) of the *Criminal Code*.

¹⁰¹ Section 92(2) of the *Criminal Code*.

¹⁰² Section 85(1) of the *Criminal Code*.

¹⁰³ Section 85(2) of the *Criminal Code*.

¹⁰⁴ Section 95(1) of the *Criminal Code*.

¹⁰⁵ Section 99(1) of the *Criminal Code*.

¹⁰⁶ Section 100(1) of the *Criminal Code*.

¹⁰⁷ Section 103(2) of the *Criminal Code*.

¹⁰⁸ Raaflaub *Legislative Summary LS-525E: Bill C-10: An Act to Amend the Criminal Code (Minimum Penalties for Offences Involving Firearms) and to Make a Consequential Amendment to another Act* (Parliamentary Information and Research Service, 2007) at 10. Available at: www.parl.gc.ca/Content/LOP/LegislativeSummaries/39/1/c10-e.pdf [Last accessed: 22 May 2013].

¹⁰⁹ Section 239 of the *Penal Code*.

¹¹⁰ Section 244 of the *Penal Code*.

¹¹¹ Section 244.2 of the *Penal Code*.

¹¹² Section 272 of the *Penal Code*.

¹¹³ Section 273 of the *Penal Code*.

¹¹⁴ Section 279 of the *Penal Code*.

¹¹⁵ Section 279.1 of the *Penal Code*.

¹¹⁶ Section 344 of the *Penal Code*.

¹¹⁷ Section 346 of the *Penal Code*.

(f) Australia

5.65 Certain Australian jurisdictions prescribe mandatory or presumptive sentences for specified repeat offences. The Commission observes, however, that these jurisdictions tend to differ in terms of the offences to which these sentencing regimes are applied.

(i) Commonwealth

(l) People Smuggling

5.66 At federal level, section 236B of the *Migration Act 1958* prescribes a mandatory minimum sentence for a repeat offence of aggravated people smuggling, and a repeat offence involving the aggravated use of false documents or misleading information in relation to non-citizens. For the purposes of this regime, a conviction qualifies as a “repeat offence” if, in proceedings after the commencement of section 236B (whether in the same proceedings relating to the offence or in previous proceedings), a court: (i) has convicted the person of another of the foregoing offences, or (ii) has found, without recording a conviction, that the person has committed another such offence. Section 236B specifies that an offender to whom this regime applies must receive a minimum sentence of 8 years. The court must also set a non-parole period of five years. This regime will not apply, however, where it is established on the balance of probabilities that the offender was under the age of 18 years when the offence was committed.

(ii) New South Wales

5.67 New South Wales does not impose a mandatory sentencing regime in respect of repeat offenders. The state does, however, grant sentencing courts the discretion to declare an offender to be a “habitual criminal”, in which case a minimum penalty will apply.

5.68 Section 4(1) of the *Habitual Criminals Act 1957* provides that a sentencing judge may pronounce any person, aged at least 25 years, to be an “habitual criminal” where he or she is convicted on indictment,¹¹⁸ having, on at least two prior occasions, served separate terms of imprisonment as a consequence of convictions for indictable offences.¹¹⁹ In these circumstances, a further sentence may then be imposed on the offender in addition to that applicable for the current offence. This additional term of imprisonment must be for a period of at least five years and may not exceed 14 years. The judge may pronounce an offender to be a “habitual criminal” if satisfied that it is expedient with a view to his or her reformation, or to the prevention of crime, that he or she be detained in prison for a substantial period.

5.69 The Judicial Commission of New South Wales notes that sentencing courts very rarely pronounce offenders to be “habitual criminals” under the 1957 Act.¹²⁰

¹¹⁸ Section 4(2) clarifies that this regime may also apply in respect of an offender convicted summarily of an indictable offence punishable summarily only with his or her consent (provided that the other necessary criteria are fulfilled). Where such an offender is convicted summarily before a Magistrate, the Magistrate may - in addition to passing sentence for the instant crime - direct that an application be made by a registrar of the District Court to a judge to have the offender pronounced to be an habitual offender.

¹¹⁹ Section 4(3) of the *Habitual Criminals Act 1957* clarifies that this sentencing regime may apply regardless of whether the previous convictions or terms of imprisonment took place in New South Wales and regardless of whether they occurred before or after the commencement of the Act. The regime may also apply irrespective of whether any previous term of imprisonment was served as a consequence of a conviction for an indictable offence committed before or after any previous pronouncement of the individual as a habitual offender under this Act, or the *Habitual Criminals Act 1905–1952*. For the purposes of this regime, “indictable offences” will not, however, include indictable offences that were dealt with summarily without the consent of the offender.

¹²⁰ Judicial Commission of New South Wales *Sentencing Bench Book* at paragraph 2-250. Available at: www.judcom.nsw.gov.au/publications/benchbks/sentencing/purposes_of_sentencing.html#content [Last accessed: 22 May 2013].

(iii) Northern Territory

5.70 The Northern Territory provides a presumptive sentencing regime in respect of certain repeat violent offences, as well as repeat violations of a domestic violence order.

(I) Second or Subsequent Violent Offences

5.71 Under the *Sentencing Act*, enhanced presumptive sentences apply in respect of second or subsequent violent offences. First, where an offender who has previously been convicted of a violent offence¹²¹ is subsequently convicted of a crime classified as a “Level 5”¹²² offence, he or she must receive a minimum one-year term of imprisonment.¹²³ Second, an offender convicted of a “Level 3”¹²⁴ offence, who has previously been convicted of a violent offence, must receive a minimum three-month sentence.¹²⁵ An offender convicted of a “Level 1”¹²⁶ offence, who has previously been convicted of a violent offence, must receive a custodial sentence.¹²⁷ A sentencing court may not suspend a term of imprisonment imposed in accordance with these provisions.¹²⁸

5.72 The obligation to impose a minimum penalty of a specified period will not apply where the court is satisfied that the circumstances of the case are exceptional.¹²⁹ In determining whether the circumstances are exceptional, the court may have regard, in particular, to any victim impact statement or victim report presented to the court, and any other matters which it considers relevant.¹³⁰ The following circumstances may not be regarded as exceptional circumstances: (a) that the offender was voluntarily intoxicated at the time of committing the offence, or (b) that another person was involved in committing the offence, or

¹²¹ A “violent offence” is defined by subdivision 1 of Division 6A of the *Sentencing Act* (as replaced by section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*) as: (a) an offence against a provision of the *Criminal Code* listed in Schedule 2; or (b) an offence which substantially corresponds to such an offence under (i) a law that has been repealed; or (ii) a law of another jurisdiction (including a jurisdiction outside Australia). The offences listed in Schedule 2 include terrorism, manslaughter, attempted murder, common assault, unlawful stalking and robbery.

¹²² A “Level 5” offence is defined as including the following offences under the *Criminal Code*: (a) causing serious harm under section 181; or (b) causing harm under section 186; common assault under section 188 (if the offence is committed in circumstances mentioned in section 188(2), other than paragraph (k)), assault on a worker under 188A; assault on police officer under section 189A; assault on administrator or judge or magistrate under section 190; assault on member of aircraft crew under section 191; assault with intent to commit an offence under section 193; or assault with intent to steal under section 212, if (i) commission of the offence involves the actual or threatened use of an offensive weapon; and (ii) the victim suffers physical harm as a result of the offence.

¹²³ Section 78DA of the *Sentencing Act*, inserted by section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*.

¹²⁴ A “Level 3” offence is defined as an offence against section 188 of the *Criminal Code* [common assault] if the offence: (a) is committed in circumstances mentioned in section 188(2), other than paragraph (k); and (b) the offence is not a “Level 5” offence.

¹²⁵ Section 78DD of the *Sentencing Act*, inserted by section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*.

¹²⁶ A “Level 1” offence is defined as “any other violent offence” which does not fall within the scope of the definitions provided for “Level 5”, “Level 4”, “Level 3” and “Level 2” offences.

¹²⁷ Section 78DF of the *Sentencing Act*, inserted by section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*.

¹²⁸ See: section 78DG(c) and section 78DH(c) of the *Sentencing Act*, inserted by section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*.

¹²⁹ Section 78DI of the *Sentencing Act*, inserted by section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*.

¹³⁰ *Ibid.*

coerced the offender to commit the offence.¹³¹ Equally, where the offender is under the age of 18 years, the court will not be required to impose a prescribed minimum sentence of a specified period in respect of him or her.¹³² Where exceptional circumstances are present or where the offender is under the age of 18 years, the court is nonetheless required to specify a custodial sentence and this may not be suspended.¹³³

(II) *Repeat Violations of Domestic Violence Order*

5.73 Section 121 of the *Domestic and Family Violence Act 2007* prescribes a presumptive minimum sentence of 7 days' imprisonment for a second or subsequent violation of a domestic violence order by an adult. This minimum penalty does not apply, however, if no harm was caused and if the court is satisfied that it is not appropriate to record a conviction and to sentence the person in the circumstances of the offence.¹³⁴ Section 122 applies the same presumptive minimum penalty to an offender aged between 15 and 18 years who breaches a domestic violence order, having previously been convicted of this offence. Once again, the presumptive minimum sentence does not apply if no harm was caused and if the court is satisfied that it is not appropriate to record a conviction and to sentence the person in the circumstances of the offence, including, as a result of the age of the offender.

(iv) **Queensland**

(I) *Serious Child Sex Offences*

5.74 Part 9B of the *Penalties and Sentences Act 1992*¹³⁵ prescribes a mandatory sentence for an offender convicted of a repeat serious child sex offence. A "serious child sex offence" is an offence listed in Schedule 1A to the Act,¹³⁶ committed against a child under the age of 16 years, and in circumstances in which an offender convicted of the offence would be liable to life imprisonment. Counselling or procuring the commission of such an offence also qualifies as a serious child sex offence.¹³⁷

5.75 This sentencing regime applies where an offender with a prior conviction for a serious child sex offence is convicted of a subsequent serious child sex offence.¹³⁸ The offender must have committed both the prior and subsequent offences when he or she was an adult.¹³⁹ Such an offender, despite any other penalty imposed by the *Criminal Code*, is liable to a life sentence which cannot be mitigated or varied under any law, or is liable to an indefinite sentence which shall continue until a court orders, upon

¹³¹ *Ibid.*

¹³² See: section 78DH(2) of the *Sentencing Act*, inserted by section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*.

¹³³ See: section 78DI(2)(b) and section 78DH(2)(b) of the *Sentencing Act*, inserted by section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*.

¹³⁴ Section 121(3) of the *Domestic and Family Violence Act 2007*. This provision came into force on 1 July 2008. Under previous legislation there was no proviso regarding the non-application of the presumptive minimum sentence.

¹³⁵ Inserted by Part 3 of the *Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012*.

¹³⁶ The offences listed in Schedule 1A are: (i) unlawful sodomy; (ii) owner etc. permitting abuse of children on premises; (iii) carnal knowledge with or of children under 16; (iv) taking child for immoral purposes; (v) incest; (vi) maintaining a sexual relationship with a child; (vii) rape; (viii) sexual assaults; (ix) unlawful anal intercourse; (x) incest by man; and (xi) carnal knowledge of girls under 16.

¹³⁷ Section 161D of the *Penalties and Sentences Act 1992*, inserted by Part 9B of the *Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012*.

¹³⁸ Section 161E of the *Penalties and Sentences Act 1992*, inserted by Part 9B of the *Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012*.

¹³⁹ Section 161E(1)(a) of the *Penalties and Sentence Act 1992*, inserted by Part 9B of the *Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012*.

review, that the indefinite term of imprisonment be discharged.¹⁴⁰ Where an offender is sentenced to life imprisonment under this regime, section 181A of the *Corrective Services Act 2006* provides that he or she must serve a minimum non-parole period of 20 years.

5.76 The Commission notes that this sentencing regime was introduced in response to a high level of public concern regarding the adequacy of sentences imposed upon those who sexually offend against children.¹⁴¹ In a letter to the Parliamentary Legal Affairs and Community Safety Committee, the Queensland Department of Justice emphasised that previous efforts to reflect this outrage and to appropriately denounce repeat child sex offenders were perceived to have failed. In particular, a 2012 report by the Sentencing Advisory Council illustrated that legislative amendments made in 2003 and 2010 had not produced the desired effect of increasing: (i) the proportion of offenders receiving a custodial term for sexual offences against children, or (ii) the length of the sentences received by these offenders.¹⁴²

5.77 The provision of mandatory sentences for serious child sex offences has attracted divergent views. On one side, certain child protection advocates have welcomed this legislation on the basis that it may serve to incapacitate incorrigible offenders.¹⁴³ On the other side, however, there are those who dispute the claim that this regime will enhance child safety. Among those to express concern regarding this reform were the Queensland Police Service who warned that: (i) because the same mandatory sentence would apply in respect of both murder and repeat child sex offences, offenders may be incentivised to kill their victims in order to evade punishment; (ii) the regime may prompt a reduction in the reporting of child sex offences, particularly in cases where the witness makes a complaint with a view to stopping the abuse rather than with the aim of ensuring that the offender is punished; and (iii) the regime may lead to more matters being contested in court, thereby worsening the impact on victims.¹⁴⁴ Other criticisms which have been made of this legislation relate to: (i) the constraints which mandatory sentencing regimes place on judicial discretion; (ii) the lack of persuasive evidence that these regimes deter criminality; and (iii) the tendency for these sentencing provisions to impact disproportionately on minority groups.¹⁴⁵

(v) South Australia

5.78 South Australia does not appear to impose a mandatory sentencing regime for any repeat offence. In certain circumstances, however, the state does grant sentencing courts the discretion to impose a sentence on a repeat offender, which is not proportionate to the current offence for which he or she is being sentenced.

¹⁴⁰ Section 161E(2) of the *Penalties and Sentence Act 1992*, inserted by Part 9B of the *Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012*.

¹⁴¹ See: Legal Affairs and Community Safety Committee *Criminal Law (Two Strike Child Sex Offenders) Amendment Bill 2012* Report No 2 (July 2012) at 4. Available at: www.parliament.qld.gov.au/documents/committees/LACSC/2012/CriminalLawChildSexOffenders/rpt2-July2012.pdf [Last accessed: 22 May 2013].

¹⁴² *Ibid.*

¹⁴³ *Ibid* at 25-26. Available at: www.parliament.qld.gov.au/documents/committees/LACSC/2012/CriminalLawChildSexOffenders/rpt2-July2012.pdf [Last accessed: 22 May 2013].

¹⁴⁴ Queensland Police Service *Submission on the Criminal Law (Two Strikes Child Sex Offenders) Amendment Bill 2012* (28 June 2012). Available at: www.parliament.qld.gov.au/documents/committees/LACSC/2012/CriminalLawChildSexOffenders/submissions/016-QPS.pdf [Last accessed: 22 May 2013].

¹⁴⁵ See: Legal Affairs and Community Safety Committee *Criminal Law (Two Strike Child Sex Offenders) Amendment Bill 2012* Report No 2 (July 2012) at 40-42. Available at: www.parliament.qld.gov.au/documents/committees/LACSC/2012/CriminalLawChildSexOffenders/rpt2-July2012.pdf [Last accessed: 22 May 2013].

5.79 Division 2A of the *Criminal Law (Sentencing) Act 1988* permits sentencing courts to declare an offender to be a “serious repeat offender”¹⁴⁶ where he or she (whether as an adult or as a youth) has been convicted of a “serious offence”¹⁴⁷ on at least three separate occasions. The offender must have received a sentence of imprisonment (other than a suspended sentence) for those offences or, if a penalty has yet to be imposed, a sentence of imprisonment (other than a suspended sentence) must be the appropriate penalty. Alternatively, this declaration may be made in respect of an offender who (whether as an adult or as a youth) has committed and been convicted on at least two separate occasions of a “serious sexual offence”¹⁴⁸ against a person under the age of 14 years. An offence will not be regarded as a “serious offence” or a “serious sexual offence” unless the maximum penalty prescribed is, or includes, a term of imprisonment of at least five years.

5.80 If a person is convicted of a serious offence or a serious sexual offence and he or she is liable, or becomes liable as a result of the conviction, to a declaration that he or she is a “serious repeat offender”, the court: (a) must consider whether to make that declaration, and (b) if of the opinion that his or her history of offending warrants a particularly severe sentence in order to protect the community, should make that declaration. Where the declaration is made or where the offender has previously been declared a “serious repeat offender”: (a) the court is not bound to ensure that the sentence it imposes is proportionate to the current offence, and (b) any non-parole period fixed in relation to the sentence must be at least four-fifths the length of the sentence.

(iv) Tasmania

5.81 Tasmania does not appear to prescribe a mandatory sentence for any repeat offence.

(v) Victoria

5.82 Victoria does not appear to prescribe a mandatory or presumptive sentencing regime for any second or subsequent offence. Part 2A of the *Sentencing Act 1991* does, however, permit a sentencing court to impose a sentence on an offender who has previously been convicted of two or more sexual offences (for which he or she received a sentence of imprisonment or detention in a youth justice centre) which is not proportionate to the immediate offence. The Act specifies that when sentencing such an offender, the court must regard the protection of the community as the principal purpose for which the sentence is imposed.¹⁴⁹

¹⁴⁶ Division 2A also establishes a parallel sentencing regime whereby a youth may be declared to be a “recidivist young offender.”

¹⁴⁷ Section 20A of the *Criminal Law (Sentencing) Act 1988* defines a “serious offence” as: (a) a serious drugs offence; (ab) an offence against a law of the Commonwealth dealing with the unlawful importation of drugs into Australia; (b) one of the following offences: (i) an offence under Part 3 of the *Criminal Law Consolidation Act 1935*; (ii) robbery or aggravated robbery; (iii) home invasion; (iv) damage to property by fire or explosives; (v) causing a bushfire; (vi) an offence against a corresponding previous enactment substantially similar to any of the foregoing offences; (v) a conspiracy or attempt to commit any of the foregoing offences; (c) an offence that is committed in circumstances in which the offender uses violence or a threat of violence for the purpose of committing the offence, in the course of committing the offence, or for the purpose of escaping from the scene of the offence; or (d) an offence against the law of another State or a Territory that would, if committed in this State, be a serious offence.

¹⁴⁸ Section 20A of the *Criminal Law (Sentencing) Act 1988* defines a “serious sexual offence” as any of the following serious offences: (i) an offence against section 48, 48A, 49, 50, 56, 58, 59, 60, 63, 63B, 66, 67, 68 or 72 of the *Criminal Law Consolidation Act 1935*; (ia) an offence against a corresponding previous enactment substantially similar to any of the aforementioned offences; (ii) an attempt to commit or an assault with intent to commit any of those offences; or (b) an offence against the law of another State or a Territory corresponding to any of the aforementioned offences.

¹⁴⁹ Section 6D of the *Sentencing Act 1991*.

(vii) Western Australia

(l) Domestic Burglary

5.83 Section 401(4) of the *Criminal Code* provides that an adult convicted for the third or subsequent time of a home burglary must receive a minimum 12-month sentence of imprisonment. A juvenile convicted of this offence for the third or subsequent time must receive a minimum 12-month term of imprisonment or detention. The Aboriginal Justice Council has noted that this mandatory sentence has had no impact on burglary rates but has had a disproportionate impact on Aboriginal offenders appearing before the courts.¹⁵⁰

(g) New Zealand

5.84 In New Zealand, a three-stage mandatory sentencing regime applies in respect of repeat serious violent offenders.¹⁵¹

(i) Serious Violent Offences

5.85 Under section 86B of the *Sentencing Act 2002*, a first warning is issued to an offender who is convicted of a “serious violent offence”,¹⁵² where he or she was at least 18 years of age when the offence was committed, and where he or she did not have any previous warnings under the Act. This first warning must alert the offender to the enhanced consequences (detailed below) which he or she will face if subsequently convicted of another serious violent offence, committed after that warning.

5.86 Section 86C applies to an offender who has received a first warning, but not a final warning, and who is convicted of a subsequent serious violent offence, other than murder. Such an offender must receive a warning detailing the enhanced consequences which will follow if he or she is subsequently convicted of a further serious violent offence, committed after that warning. Additionally, if the sentence imposed on the offender for the current offence is a determinate sentence of imprisonment, the court must order that he or she serve the full term of the sentence. Where the relevant offence is murder, section 86E requires the court to sentence the offender to life imprisonment and order that this sentence be served without parole, unless it is satisfied that, given the circumstances of the offence and the offender, this would be manifestly unjust. If the court does decline to make this order, it must explain its reasons in writing and instead impose a sentence in accordance with section 103 of the *Sentencing Act 2002*. Section 103 stipulates that the minimum term ordered may not be less than 10 years, and must be the minimum term that the court considers necessary to satisfy all or any of the following purposes: (a) holding the offender accountable for the harm done to the victim and community; (b) denouncing the conduct of the offender; (c) deterring the offender or other persons from committing the same or a similar offence; or (d) protecting the community from the offender.

5.87 Under section 86D, an offender who has received a final warning must, where committed for trial for a subsequent serious violent offence, be committed to the High Court for that trial. If convicted, only the High Court (or the Court of Appeal or Supreme Court on an appeal) may sentence him or her for the offence. The sentence which must be imposed for the current offence, other than where the offence in question is murder, must be the maximum term prescribed for that offence. The court must order that the offender serve the entirety of this sentence without parole, unless it considers that it would be manifestly unjust to make that order, in which case, it must give its reasons in writing.

5.88 If the relevant offence is manslaughter, the court must order that the offender serve a minimum term of 20 years, unless it considers that given the circumstances of the offence and the offender, this

¹⁵⁰ Morgan, Blagg and Williams *Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth* (Aboriginal Justice Council, December 2001).

¹⁵¹ Section 86A to section 86I of the *Sentencing Act 2002*, inserted by section 6 of the *Sentencing and Parole Reform Act 2010*.

¹⁵² Under section 86A, a “serious violent offence” is defined as including 40 separate offences. Among those listed are various serious sexual offences (including forms of sexual violation and indecent assault); homicide offences (including murder and manslaughter); assault offences (including wounding with intent to injure and aggravated injury); and property offences (including aggravated burglary and robbery).

would be manifestly unjust. If the court does decline to make this order, it must again explain its reasons in writing. Furthermore, it must instead order that the offender serve a minimum term of 10 years. If the offence is murder, section 86E requires the court to sentence the offender to life imprisonment without parole, unless it is satisfied that this would be manifestly unjust, given the circumstances of the offence and the offender. Once again, if the court does decline to make this order, it must give written reasons for this and instead impose a minimum sentence of 20 years. In turn, however, if the court is satisfied that a minimum sentence of 20 years would, given the circumstances of the offence and the offender, be manifestly unjust, it must instead impose a sentence in accordance with section 103. If a minimum sentence of 20 years is thus not imposed, the court must again give its reasons for this in writing.

5.89 In New Zealand, the enactment of this “three-strikes” regime proved politically divisive.¹⁵³ On one side, proponents of this reform argued that these provisions would serve to protect the community from incorrigible individuals who are unwilling to desist from violent offending.¹⁵⁴ On the other side, the concerns most commonly expressed by opponents were that this regime: (a) was at odds with the principle of proportionality in sentencing; (b) was of doubtful deterrent value; (c) was likely to lower public confidence in the judiciary; (d) was likely to lead to a substantial decrease in guilty pleas, adversely affecting victims; and (e) was likely to disproportionately affect members of the Maori community who are already over-represented in the criminal justice system.¹⁵⁵ In respect of the last of these concerns, it has been noted that as of May 2012, Maori offenders accounted for 47% of the male recipients of first strikes and 58% of the female recipients of first strikes.¹⁵⁶

(h) Summary

5.90 A comparative analysis of the common law countries that have introduced mandatory (or presumptive) sentencing for repeat offences is of interest. As illustrated in Chapter 2, it is clear that the enactment in this State of mandatory minimum sentences for repeat offences was to some extent influenced by sentencing reforms in the United States of America and the United Kingdom, in particular. Traditionally, it has been the consistent approach of the Commission to engage in comparative analysis when evaluating potential options for law reform in this State.

5.91 Equally, however, the Commission cautions against relying too heavily on the example set by other common law jurisdictions. It should be noted that the rationale for introducing minimum sentencing

¹⁵³ The *Sentencing and Parole Reform Act 2010* was passed with 63 votes in favour and 58 votes against. The Labour, Green, Maori and United Future Parties opposed the legislation while the National and ACT Parties supported it. Oleson “New Zealand’s Three-Strikes Law”. Presentation delivered at Stockholm Criminology Symposium, 13 June 2012. Overview available at: www.criminologysymposium.com/download/18.4dfe0028139b9a0cf4080001588/WED11+Oleson,+James.pdf [Last accessed: 22 May 2013].

¹⁵⁴ Hansard, Questions to Ministers, “Three Strikes Legislation” - Reasons for Government Support, 4 May 2010, Vol 662, Page 10653.

¹⁵⁵ See, for example: Rethinking Crime and Punishment “Submission on the Sentencing and Parole Reform Bill” March 2010. Available at: www.rethinking.org.nz/images/newsletter%20PDF/Issue%2070/06%20Final%20Second%20Submission%20Sentencing%20and%20Parole%20Reform%20%20Bill.pdf [Last accessed: 22 May 2013]; New Zealand Law Society “Submission on Sentencing and Parole Reform Bill (Revised)” March 2010. Available at: www.lawsociety.org.nz/__data/assets/pdf_file/0018/20817/sentencing-and-parole-reform-bill.pdf [Last accessed: 22 May 2013]; and New Zealand Human Rights Commission “Submission on the Sentencing and Parole Reform Bill” 5 March 2010. Available at: www.hrc.co.nz/hrc_new/hrc/cms/files/documents/19-Mar-2010_15-38-41_Sentencing_and_Parole_Reform_Submission_2_Final.pdf [Last accessed: 22 May 2013].

¹⁵⁶ See: Oleson “New Zealand’s Three-Strikes Law”. Presentation delivered at Stockholm Criminology Symposium, 13 June 2012. Overview available at: www.criminologysymposium.com/download/18.4dfe0028139b9a0cf4080001588/WED11+Oleson,+James.pdf [Last Accessed: 22 May 2013]; and Collins “Maori, Pacific offenders high on three-strikes watch” *The New Zealand Herald* 3 December 2012.

regimes varies from country to country and that these provisions are often the product of circumstances and cultural factors specific to the jurisdiction in question. The Commission notes, therefore, that it is important to assess any proposed extension of mandatory sentencing to ensure that any reform would be consistent with the key sentencing aims and principles identified in Chapter 1.

F Mandatory and Presumptive Sentences for Second or Subsequent Offences and the Conceptual Framework

5.92 In this Part, the Commission considers mandatory and presumptive sentences for second or subsequent offences against the conceptual framework established in Chapter 1. Specifically, these sentencing regimes will be evaluated by reference to: (1) the aims of sentencing, and (2) the principles of justice.

(1) Mandatory and Presumptive Sentences for Second or Subsequent Offences and the Aims of Sentencing

5.93 The Commission has observed that criminal sanctions pursue one or more of a number of aims including deterrence, punishment, reform and rehabilitation and reparation. The Commission has also noted that the aims of deterrence and punishment tend to feature more heavily in those cases involving more serious crimes and, consequently, more severe sanctions. Likewise, it is ostensibly these aims which feature most heavily in those cases involving second or subsequent offences subject to presumptive or mandatory sentences. These sentencing regimes seek to dissuade the offender by coercive means, from committing further offences and to punish him or her severely for committing a second or subsequent offence of the type specified. It is not clear whether these regimes adequately meet these aims.

(a) Criminal Justice Act 2007

5.94 The Commission observes that the sentencing regime under section 25 of the *Criminal Justice Act 2007* is unlikely to fulfil the aim of deterrence. As discussed at paragraph 1.22, some commentators maintain that neither mandatory sentences nor lengthy prison sentences in general are effective deterrents. (Indeed, the fact that section 25 seeks to address those who commit a subsequent offence of the type already subject to a significant sentence arguably supports the view that in many cases lengthy imprisonment does not deter). Kazemian cites research which she asserts illustrates that incarceration has either no effect or undesirable effects on subsequent offending.¹⁵⁷

5.95 Section 25 would appear to be consistent with the sentencing aim of punishment. From a retributive perspective, this sentencing regime permits society to punish more severely instances of serious repeat offending. It does not necessarily preclude the courts from differentiating between more and less culpable cases of repeat offending. A particularly culpable repeat offender may be subjected to a more severe sentence than the prescribed minimum. Similarly, a less culpable repeat offender may receive a sentence lower than the presumptive minimum where the court considers that it would be disproportionate in all the circumstances of the case to apply the minimum penalty. As noted at paragraph 5.14, this proportionality test appears to pose a lower threshold than the “exceptional and specific circumstances” criterion applicable under the *Misuse of Drugs Act 1977* and the Firearms Acts.

5.96 Similar observations may be made regarding the denunciatory aspect of this sentencing regime. Section 25 permits society to forcefully denounce instances of serious repeat offending. In accordance with the proportionality test included in this provision, an individual offender need only be denounced in accordance with his or her particular level of culpability.

(b) Misuse of Drugs Act 1977

5.97 The Commission considers it unlikely that the mandatory sentence applicable to repeat offenders under the *Misuse of Drugs Act 1977* facilitates deterrence. It has already been noted that in general the

¹⁵⁷ Kazemian “Assessing the Impact of a Recidivist Sentencing Premium” in Roberts and von Hirsch, eds, *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Oxford: Hart, 2010) at 241.

deterrent effect of mandatory sentencing is questionable. In the specific context of drug trafficking, however, the Commission notes that the effectiveness of such a regime appears particularly doubtful.

5.98 First, the Commission observes that the prospect of a mandatory sentence for a second or subsequent offence is unlikely to deter high-level actors within the drug trafficking trade. As discussed at paragraph 4.235, these offenders appear to have adapted to this penal approach by developing complex distribution networks that enable them to evade detection and prosecution. As these high-level offenders are rarely apprehended, it seems unlikely that either the prospect of a presumptive sentence for a first offence, or a mandatory sentence for a subsequent offence, will deter them from engaging in this form of criminality.

5.99 Second, as discussed at paragraph 4.194, the Commission observes that even if the prospect of a mandatory sentence may deter some low-level offenders from risking a second or subsequent conviction, this regime is unlikely to further the goal of general deterrence. As there will in all probability remain a plentiful supply of willing replacements, this sentencing regime is unlikely to impact significantly on the overall rate of drug-trafficking.

5.100 The Commission observes that the sentencing regime for repeat offenders under the *Misuse of Drugs Act 1977* may not appropriately pursue the aim of punishment. From a retributive perspective, this regime restricts the ability of the courts to punish repeat drug trafficking offenders in accordance with their level of culpability. The most culpable repeat offenders may be punished more heavily through the imposition of a sentence greater than the mandatory minimum. However, by prioritising two aggravating factors, namely, the existence of a prior conviction under section 15A or section 15B, and the value of the drugs involved, at the expense of any factors which might justify a downward departure from the prescribed minimum, this regime risks certain repeat offenders receiving a disproportionate sentence.

5.101 Similar observations may be made regarding the denunciatory aspect of this sentencing regime. This regime prioritises two aggravating factors at the expense of any factors which might justify a downward departure from the prescribed minimum sentence. This creates a risk that an individual offender may be denounced more forcefully than is warranted in the circumstances.

5.102 The Commission observes that rehabilitation is another aim which is built into the mandatory sentencing regime under the *Misuse of Drugs Act 1977*. As discussed at paragraph 4.48, section 27(3J) provides that a sentencing court may list a sentence for review after half of the term has expired. To list a sentence for review, the court must be satisfied that the offender was addicted to drugs at the time of the offence and that this was a substantial factor leading to the commission of the offence. This provision also stipulates that only an offender who has at least received the minimum 10-year sentence may have his or her sentence listed for review. As the minimum sentence must be imposed in all cases in which an offender receives a second or subsequent conviction under section 15A or section 15B, this criterion will be fulfilled in every such instance. The Commission therefore observes that this sentencing regime may, to some extent, further a rehabilitative aim.

(c) Firearms Acts

5.103 The Commission considers that the mandatory sentence applicable to repeat offenders under the Firearms Acts is unlikely to facilitate deterrence. It has been noted that in general the deterrent effect of mandatory sentencing is questionable. In the specific context of firearms offences, however, the Commission notes that the effectiveness of such a regime is open to particular doubt. As discussed at paragraph 4.202, mandatory sentencing regimes operate on the premise that the decision to offend is fully rational. In the context of firearms offences, however, this approach may be overly simplistic, disregarding complex potential contributing factors such as expressions of masculinity and social deprivation.

5.104 The Commission also observes that the sentencing regime for repeat offenders under the Firearms Acts may not appropriately pursue the aim of punishment. From a retributive perspective, the Firearms Acts prioritise one aggravating factor, namely, the existence of a prior relevant conviction under the Acts, at the expense of any factors which might justify a downward departure from the prescribed minimum sentence. This regime therefore risks certain repeat offenders being punished in a manner disproportionate to their level of culpability.

5.105 Similar observations may be made regarding the denunciatory aspect of this sentencing regime. This regime prioritises two aggravating factors at the expense of any factors which might justify a downward departure from the prescribed minimum sentence. This creates a risk that an individual offender may be denounced more forcefully than is warranted in the circumstances.

(2) Mandatory Sentences for Second or Subsequent Offences and the Principles of Justice

(a) The Principle of Consistency and Mandatory and Presumptive Sentences for Second or Subsequent Offences

5.106 The Commission has observed that the principle of consistency requires a consistent application of the aims and principles of sentencing (consistency of approach) as opposed to uniformity of sentencing outcomes (consistency of outcomes). Consistency of approach thus requires that like cases should be treated alike and different cases should be treated differently. The corollary of this is that inconsistency arises where like cases are treated differently and different cases are treated alike.

(i) Criminal Justice Act 2007

5.107 The Commission notes that, at first sight, the sentencing regime applicable to repeat offenders under the *Criminal Justice Act 2007* appears to adhere to the principle of consistency. First, although this regime applies in respect of a broad range of scheduled offences, three specific elements must be satisfied in order for the presumptive penalty to apply. As previously outlined, this regime requires that: (i) both the initial and subsequent offence must have been committed by an offender aged at least 18 years; (ii) the initial offence must have attracted a sentence of at least five years' imprisonment; and (iii) the subsequent offence must have been committed within 7 years of the date of conviction for the initial offence. The inclusion of these requirements goes some way towards ensuring that the regime only applies in respect of similar cases. Second, the fact that a sentencing court may disregard the presumptive penalty where its application would be "disproportionate in all the circumstances of the case" appears to provide that different cases need not be treated uniformly. A less culpable repeat offender need not be subjected to the same minimum penalty as a more serious offender. Instead, the court may consider any mitigating factors that exist in his or her favour and impose a sentence that more appropriately reflects his or her culpability.

5.108 Nonetheless, the Commission considers that the presumptive nature of this sentencing regime conflicts with the principle of consistency. As discussed at paragraphs 2.209 and 2.210, section 25 was enacted with a view to punishing more severely those offences typically associated with gangland criminality. It therefore prioritises the realisation of consistent sentencing outcomes at the expense of a consistent sentencing approach. By introducing a specific statutory regime for this particular group of offences, section 25 may divert the courts from the key objective of adopting a consistent sentencing approach to all instances of repeat offending. Indeed, from its discussions with interested parties since the publication of the Consultation Paper, the Commission is not aware that section 25 has been applied in any case to date. Practitioners have, however, emphasised to the Commission that in accordance with the aims and principles of sentencing discussed in Chapter 1, higher sentences are in any event imposed on repeat offenders than would be imposed on first-time offenders. To that extent, section 25, if it were to be applied, would arguably bring confusion and add little or nothing to established sentencing practice. The Commission therefore considers that the structured, guidance-based sentencing system envisaged in the recommendations made in Chapter 1, would provide a more consistent approach to the sentencing of repeat offenders.

(ii) Misuse of Drugs Act 1977

5.109 The Commission considers that the mandatory sentence applicable to repeat offenders under the *Misuse of Drugs Act 1977* may conflict with the principle of consistency. As discussed at paragraph 2.204, this regime was introduced to ensure that offenders who avoided the prescribed minimum sentence upon being convicted of a first section 15A or section 15B offence, would not evade this penalty if subsequently convicted under either provision. It is clear therefore, that the focus of this regime was, initially at least, the outcome of the sentencing process rather than the approach to this process. The Commission observes, however, that unlike the presumptive regime under the *Criminal Justice Act 2007*, the regime under the *Misuse of Drugs Act 1977* does not temper this focus by permitting the courts to

treat dissimilar cases differently. Instead, there appear to be three ways in which this sentencing regime may produce inconsistency.

5.110 First, this regime may require the courts to adopt an inconsistent approach to the sentencing of similarly situated repeat drug offenders. This problem stems from the use of the “market value” criterion as the triggering element for the regime. As discussed at paragraphs 4.12 to 4.15, evidence regarding the market value of drugs is at best an estimate as the market value of any commodity may fluctuate depending on when and where it is sold and how much of that commodity is already available. Nonetheless, whether a repeat offender is considered to fall foul of this threshold will determine whether the court is free to take into account any mitigating factors which may justify the imposition of a sentence of less than 10 years. There is a risk therefore, that similarly situated repeat offenders may be treated differently on the basis of an unreliable evaluation of the drugs in their possession.

5.111 Second, the Commission reiterates that in addition to the unreliability of this “market value” threshold, it creates a “sentencing cliff” whereby a small difference in facts may lead to a significant difference in sentence. Arguably, this mandates the adoption of a different sentencing approach in respect of similarly situated repeat offenders. As previously outlined, a repeat offence involving drugs worth at least €13,000 will attract a minimum sentence notwithstanding any mitigating factors. However, by contrast, where the drugs at issue were worth even marginally less than €13,000, a repeat offender may cite any relevant mitigating factors and potentially receive a lower sentence. This regime may thus require the courts to adopt a different sentencing approach in respect of individuals whose conduct and level of culpability are virtually identical. Indeed, the fact that *mens rea* regarding the value of the drugs is not an element of the offence arguably compounds the risk that similarly culpable offenders may be treated differently.

5.112 Third, the Commission notes that this regime may require the courts to adopt a sentencing approach to certain repeat drug offenders, which is at odds with the approach adopted in respect of other recidivist offenders. In particular, it has been noted that it would appear to be inconsistent that:

“[t]he sentencing of virtually all other offences, including more serious ones, remains discretionary. ... A person caught in possession of, say, €15,000 worth of cocaine who had previously been convicted of a similar offence must now receive a prison sentence of 10 years or longer. Yet, another person appearing in an adjoining court on the same day on a manslaughter, rape or robbery charge might well receive a much shorter sentence, even though he had previous convictions for similar offences. Violent offences of this nature usually attract heavy prison sentences, but courts are always entitled to exercise leniency when there are clear and exceptional mitigating factors. The repeat section 15A offender may also be able to point to exceptional mitigating factors but, unlike the person convicted of a serious violent offence, he can receive no leniency on that account... ”¹⁵⁸

(iii) Firearms Acts

5.113 The Commission observes that the regime applicable to repeat offenders under the Firearms Acts was introduced to ensure that those who avoided the presumptive sentence when first convicted of a specified offence would not evade this penalty if subsequently convicted of such an offence. It is thus clear that the focus of this regime was, initially at least, the outcome of the sentencing process rather than the approach to this process.

5.114 Furthermore, as previously discussed, it is arguably inconsistent that this regime requires the courts to adopt a sentencing approach to repeat firearms offenders which is at odds with the approach adopted in respect of other recidivist offenders.

(b) The Principle of Proportionality and Mandatory and Presumptive Sentences for Second or Subsequent Offences

5.115 The Commission has observed that the principle of proportionality comprises: (a) constitutional proportionality, and (b) proportionality in sentencing.

¹⁵⁸ O'Malley *Sentencing - Towards a Coherent System* (Round Hall, 2011) at 66.

(i) Constitutional Proportionality and Mandatory and Presumptive Sentences for Second or Subsequent Offences

5.116 As discussed in Chapter 3, the Supreme Court has confirmed that the Oireachtas is entitled to prescribe a mandatory sentence whenever it considers this to be an appropriate penalty. It follows therefore, that mandatory or presumptive sentences for second or subsequent offences do not offend the constitutional doctrine of proportionality.

(ii) Sentencing Proportionality and Mandatory Sentences for Second or Subsequent Offences

5.117 The Commission has observed that the principle of proportionality in sentencing requires an individualised approach to sentencing whereby the court has regard to the circumstances of both the offence and the offender.

(iii) Criminal Justice Act 2007

5.118 The Commission observes that the sentencing regime under section 25 of the *Criminal Justice Act 2007* does not conflict with the principle of proportionality in sentencing. This regime expressly permits a sentencing court to disregard the presumptive minimum sentence where the application of this penalty would be “disproportionate in all the circumstances of the case”.

(iv) Misuse of Drugs Act 1977

5.119 The Commission considers that the mandatory sentencing regime under section 27(3F) of the *Misuse of Drugs Act 1977* poses a particular risk of disproportionate sentencing. This risk stems from the fact that the regime permits of no exceptions to the imposition of the minimum sentence. Instead, it prioritises two aggravating factors, namely, the fact of a previous section 15A or section 15B conviction, and the market value of the drugs involved, without regard to the possible presence of any mitigating factors which might justify a downward departure from the prescribed minimum. For such a sentence to be proportionate in every case, the aggravating factors which trigger the sentencing regime must always warrant the application of the prescribed minimum penalty.¹⁵⁹ It cannot be guaranteed, however, that this will be the case in every instance of repeat offending.

(v) Firearms Acts

5.120 The Commission observes that similar comments may be made in respect of the mandatory sentencing regime applicable to repeat offenders under the Firearms Acts. This regime prioritises one aggravating factor, namely, the fact of a previous relevant conviction under the Acts, at the expense of any mitigating factors which may justify a downward departure from the prescribed minimum sentence. Accordingly, this sentencing regime creates a risk of disproportionate sentencing.

(3) Discussion

5.121 In Chapter 1, the Commission acknowledged that repeat offending has a particularly deleterious impact on society. It is understandable therefore, that the Oireachtas should wish to increase the severity of the sanctions applicable to these offences through the enactment of mandatory minimum sentences. The Commission further recognised that the provision of mandatory sentences may be seen to afford individual members of society, who might otherwise feel victimised and powerless, an opportunity to express their condemnation of such offences.

5.122 The Commission reiterates, however, that having regard to the aims and principles of sentencing outlined in Chapter 1, there is a need to ensure that these provisions achieve their stated objectives and that, as a result, they facilitate the reduction of crime (the paramount aim of the criminal justice system). From the analysis undertaken in Part F, it would appear that this is not the case; the Commission has identified six problems which characterise the mandatory and presumptive minimum sentencing regimes currently applicable to certain repeat offences. Many of these problems also arise,

¹⁵⁹ See: *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 2011) at 346.

and have therefore been discussed, in the context of the presumptive minimum sentences applicable to certain first-time drugs and firearms offences.

5.123 The first problem relates to the aims of sentencing, in particular, the aims of deterrence and punishment. In this regard, the Commission has observed that the mandatory sentencing regimes under the *Misuse of Drugs Act 1977* and the Firearms Acts may not adequately meet these aims.

5.124 The second problem is a related problem. Where these mandatory sentencing regimes are not meeting the aims of sentencing, it is questionable whether they are furthering the overall aim of the criminal justice system, namely, the reduction of prohibited or unwanted conduct.

5.125 The third problem relates to the principles of justice, namely, the principles of consistency and proportionality. In this regard, the Commission has noted that the mandatory sentencing regimes under the *Criminal Justice Act 2007*, *Misuse of Drugs Act 1977* and the Firearms Acts may give rise to inconsistent sentencing. The provisions under the *Misuse of Drugs Act 1977* and the Firearms Acts also appear to create a particular risk of disproportionate sentencing.

5.126 The fourth problem relates to the argument that minimum sentences are not a cost-effective response to crime. As discussed at paragraph 4.230, in the context of minimum sentences for drug offences, the Rand Corporation has noted that for the same amount of money, a more effective method would be to strengthen enforcement under the previous sentencing regime or to increase treatment for heavy drug-users.¹⁶⁰

5.127 The fifth problem relates to the argument outlined at paragraph 4.231 that there is an incongruence between the sentences applicable to drug offences and the sentences applicable to firearms offences. In a broader sense, it would also appear to be inconsistent that certain repeat drug and firearms offences attract a mandatory sentence, whereas many other repeat offences of equal or greater gravity do not.

5.128 The final problem relates to the argument that mandatory sentencing regimes are too rigid to keep abreast of evolving penal philosophy. As noted in the Consultation Paper, the views of sentencers regarding matters such as the seriousness of a particular offence and the appropriateness of various non-custodial and custodial sanctions may evolve over time.¹⁶¹ Mandatory sentencing regimes are incapable of keeping pace with these developments.

5.129 In light of this analysis, the Commission recommends that the existing mandatory and presumptive sentencing regimes applicable to repeat offences be repealed. As discussed above, it has not been established that these sentencing provisions have succeeded in reducing criminality.

5.130 In addition to the apparent failure of these regimes to reduce criminality, the Commission notes that these provisions may, in practice, produce a number of counter-productive results. First, having expanded upon the analysis contained in the Consultation Paper, the Commission considers that these sentencing regimes are inconsistent with the fundamental principles of justice discussed in Chapter 1, namely, the principles of consistency and proportionality in sentencing. As discussed in Part F, these provisions appear to require an inconsistent approach to sentencing in so far as the courts are constrained in their ability to treat like cases alike and different cases differently. Similarly, in restricting the ability of the courts to take account of the individual circumstances of each offender, the regimes under the *Misuse of Drugs Act 1977* and the Firearms Acts appear to create a risk of disproportionate sentencing.

5.131 In recommending the repeal of these mandatory and presumptive minimum sentencing regimes, the Commission proposes that the development of a more structured, guidance-based sentencing system (as envisaged in the recommendations made in Chapter 1) would facilitate an appropriate, alternative response to the relevant offences. In the context of drug-related crime, in particular, the Commission also considers that law enforcement efforts may be beneficially supplemented by alternative initiatives, such

¹⁶⁰ Rand Corporation "Are Mandatory Minimum Drug Sentences Cost-Effective?" 1997. See also: Irish Penal Reform Trust *Mandatory Sentencing* (IPRT Position Paper 3, 2009).

¹⁶¹ Law Reform Commission *Consultation Paper on Mandatory Sentences* (LRC CP 66-2011) at paragraph 1.66

as those highlighted in the research conducted by the Health Research Board and the Misuse of Drugs work sector of the British-Irish Council (see paragraphs 4.199 and 4.200).

5.132 Finally, the Commission agrees with the view, provisionally adopted in the Consultation Paper, that the introduction of additional mandatory or presumptive minimum sentences would not be an “appropriate or beneficial” response to other forms of repeat offending. As discussed above, it has not been illustrated that mandatory or presumptive sentences for repeat offending achieve their intended sentencing aims and, as a result, that these regimes are likely to reduce criminal conduct. The Commission therefore recommends that the use of mandatory or presumptive minimum sentences not be extended to other forms of repeat offending.

5.133 The Commission recommends that the following be repealed: (i) the presumptive sentencing regime applicable to serious repeat offences under section 25 of the Criminal Justice Act 2007; (ii) the mandatory minimum sentencing regime applicable to repeat drug offences under section 27(3F) of the Misuse of Drugs Act 1977; and (iii) the mandatory minimum sentencing regime applicable to repeat firearms offences under section 15(8) of the Firearms Act 1925; section 26(8), section 27(8), section 27A(8), and section 27B(8) of the Firearms Act 1964; and section 12A(13) of the Firearms and Offensive Weapons Act 1990. The Commission also recommends that the use of presumptive or mandatory minimum sentencing regimes not be extended to other forms of repeat offending.

5.134 *The Commission also recommends that a more structured, guidance-based sentencing system (as envisaged in the recommendations made in Chapter 1) would provide an appropriate alternative to these provisions.*

CHAPTER 6 SUMMARY OF RECOMMENDATIONS

6.01 The recommendations made by the Commission in this Report are as follows:

6.02 The Commission supports the recommendations made in 2000, and reiterated in 2011, that a Judicial Council be empowered to develop and publish suitable guidance or guidelines on sentencing, which would reflect the general aims of criminal sanctions and the principles of sentencing discussed in this Report. The Commission also recommends that such guidance or guidelines should have regard to: (i) the sentencing guidance and guidelines available from decisions of the Supreme Court and the Court of Criminal Appeal (including those discussed in this Report); (ii) the aggravating and mitigating factors, and individual offender characteristics, identified in the Commission's 1996 *Report on Sentencing* and developed by the courts since 1996; and (iii) information in relevant databases including, in particular, the Irish Sentencing Information System (ISIS). [paragraph 1.128]

6.03 The Commission, by a majority, recommends that the mandatory life sentence for murder be retained. [paragraph 3.76]

6.04 The Commission recommends that where an offender is convicted of murder, and is therefore sentenced to life imprisonment, legislation should provide that the judge may recommend a minimum term to be served by the offender. [paragraph 3.84]

6.05 The Commission recommends that the Parole Board be established on an independent statutory basis, and welcomes the Government's proposal to introduce legislation bringing about this effect. [paragraph 3.86]

6.06 The Commission recommends that the following be repealed: (i) the presumptive minimum sentencing regime applicable to drugs offences under section 27(3C) of the *Misuse of Drugs Act 1977*, and (ii) the presumptive minimum sentencing regime applicable to firearms offences under section 15 of the *Firearms Act 1925*; section 26, section 27, section 27A and section 27B of the *Firearms Act 1964*; and section 12A of the *Firearms and Offensive Weapons Act 1990*. The Commission also recommends that the use of presumptive minimum sentencing regimes should not be extended to other offences. [paragraph 4.238]

6.07 The Commission also recommends that a more structured, guidance-based sentencing system (as envisaged in the recommendations made in Chapter 1) would provide an appropriate alternative to these provisions. In the context of drug-related crime, the Commission also considers that law enforcement efforts may be beneficially supplemented by other initiatives, such as those highlighted in the research conducted by the Health Research Board and the Misuse of Drugs work sector of the British-Irish Council. [paragraph 4.239]

6.08 The Commission recommends that the following be repealed: (i) the presumptive sentencing regime applicable to serious repeat offences under section 25 of the *Criminal Justice Act 2007*; (ii) the mandatory minimum sentencing regime applicable to repeat drug offences under section 27(3F) of the *Misuse of Drugs Act 1977*; and (iii) the mandatory minimum sentencing regime applicable to repeat firearms offences under section 15(8) of the *Firearms Act 1925*; section 26(8), section 27(8), section 27A(8), and section 27B(8) of the *Firearms Act 1964*; and section 12A(13) of the *Firearms and Offensive Weapons Act 1990*. The Commission also recommends that the use of presumptive and mandatory minimum sentencing regimes should not be extended to other forms of repeat offending. [paragraph 5.133]

6.09 The Commission also recommends that a more structured, guidance-based sentencing system (as envisaged in the recommendations made in Chapter 1) would provide an appropriate alternative to these provisions. [paragraph 5.134]