



IPRT Submission to the Law Reform Commission

Consultation on Suspended Sentences

April 2018

About IPRT

Established in 1994, the Irish Penal Reform Trust (IPRT) is Ireland's leading non-governmental organisation campaigning for rights in the penal system and the progressive reform of Irish penal policy. Our vision is one of respect for human rights in the penal system, with prison as a sanction of last resort. We are committed to respecting the rights of everyone in the penal system and to reducing imprisonment. We work towards progressive reform of the penal system based on evidence-led policies and on a commitment to combating social injustice.

1 (a) Since the suspended sentence is compatible with a number of sentencing aims (deterrence, retribution, denunciation, rehabilitation, reparation, incapacitation and avoidance of immediate imprisonment) do you think that the suspended sentence should primarily serve one sentencing aim (such as specific deterrence, avoidance of prison or rehabilitation) or should the suspended sentence continue to serve a broader range of sentencing aims?

1(b) To what extent do you think, the principle of avoidance of prison is an appropriate factor to be taken into consideration when deciding whether to impose a suspended sentence?

Domestically, the adoption of the principle of imprisonment as a last resort in Ireland has been a recommendation that dates as far back as 1985 when the State published an *Inquiry into the Penal System* most commonly referred to as the 'Whitaker Report.'¹ It can be argued that imprisonment as a last resort is now recognised as a central feature and guiding principle of domestic penal policy.² It would therefore be consistent with current and emerging policy that the principle of avoidance of prison should be a consideration when deciding whether to impose a suspended sentence.

In his opening address at the Law Society Human Rights Conference 2017, the Minister for Justice and Equality, Charlie Flanagan recognised the importance of this principle:

*"I am a firm believer that prison should be reserved as a last resort and this approach must be complemented with viable alternatives to custody. Such alternatives focus on addressing offending behaviour in the community in a way that best meets society, offenders and victims."*³

In its final report published in September 2014, the Strategic Review Group of Penal Policy (SRGPP) expressed similar sentiments stating that imprisonment should be '*reserved for the most serious of offenders and offences.*'⁴ The SRGPP highlighted the need to change the perception that imprisonment is the only form of punishment.⁵ A similar point is made in the literature internationally:

*"It needs to be realised that despite the person not being immediately incarcerated, a suspended sentence is still punishment, as that person will have been subjected to prosecution, conviction and sentencing (all while facing the real possibility of time in prison) and will be left with the stigma attached to a sentence on their record as a suspended sentence is regarded as equivalent to a sentence of imprisonment."*⁶

¹ *Report of the Committee of Enquiry into the Penal System*, 1985, Government of Ireland: Dublin.

² Strategic Review of Penal Policy (2014) *Final Report*, <http://www.justice.ie/en/JELR/Pages/PB14000244> & Joint Committee on Justice, Defence and Equality (2013) *Report on Penal Reform*, <http://www.justice.ie/en/JELR/Pages/PB14000244>

³ Merrion Street (2017) *Opening address by Minister Flanagan at the Law Society Annual Human Rights Conference*, https://merrionstreet.ie/en/News-Room/Speeches/Opening_address_by_Minister_Flanagan_at_Law_Society_Annual_Human_Rights_Conference_2017.html

⁴ Strategic Review of Penal Policy (2014) *Final Report*, p.12, <http://www.justice.ie/en/JELR/Pages/PB14000244>

⁵ Strategic Review of Penal Policy (2014) *Final Report*, pp.91-92

<http://www.justice.ie/en/JELR/Pages/PB14000244>

⁶ Bartels, L. (2010) An Examination of the arguments for and against the use of suspended sentences 12 *Flinders Law Journal* 119 at 143 cited in *Balanced Justice, Suspended Sentences: Should they be abolished?* www.balancedjustice.org

The SRGPP noted the need to reduce the State's over-reliance on prison as a form of punishment:

*"Reducing reoffending behaviour and reliance on prison are key aims of the penal system and in pursuing those aims, law and practice in the area of penal policy should be just, proportionate and humane."*⁷

The SRGPP conceived that unsupervised community sanctions, including that of the suspended sentence without supervision, were *'appropriate in the vast majority of cases'* and recommended the development and expansion of community sanctions.⁸

Similar to the SRGPP, the Oireachtas Joint Committee on Defence, Justice and Equality in its *Report on Penal Reform*⁹ (2013) highlighted concerns about the rapid increase in the prison population in Ireland at that time. The Committee recommended that the Government adopt a 'decarceration strategy' with the objective of reducing the prison population by one-third over a ten-year period. By meeting this goal, the State saves significant costs associated with imprisonment in the long-term which could be directed towards early intervention and prevention services. The Committee recommended that the State look at best practice in Finland, where imprisonment rates experienced a steady decline as a result of pro-active policy-making.¹⁰ On the other hand, as demonstrated in New Zealand, the number of people being sent to prison increased by 23% following the abolition of the suspended sentence.¹¹

However, not only does imprisonment as a last resort now find expression in a number of areas of Irish policy, it is an emerging norm internationally. To take just one example, in 2017 the United Nations Economic and Social Council adopted a resolution entitled *Promoting and encouraging the implementation of alternatives to imprisonment as part of comprehensive crime prevention and criminal justice policies*.¹²

The Council of Europe¹³ also published a number of recommendations aimed at reducing the reliance on imprisonment as punishment. The preamble to the European Prison Rules 2006¹⁴ states that *"no one shall be deprived of liberty save as a measure of last resort."*

IPRT also believes that the principle of imprisonment as a last resort, which has already been adopted in national policy should be enshrined in domestic legislation and that emphasis should be placed on having a variety or a hierarchy of sentencing options that are evidence informed,

⁷ Strategic Review Group of Penal Policy (2014) *Final Report*, p.8

<http://www.justice.ie/en/JELR/Pages/PB14000244>

⁸ Strategic Review Group of Penal Policy, 2014, *Final Report*, p.44

<http://www.justice.ie/en/JELR/Pages/PB14000244>

⁹ Joint Committee on Justice, Defence and Equality (2013) *Report on Penal Reform*,

<http://www.justice.ie/en/JELR/Pages/PB14000244>

¹⁰ Houses of the Oireachtas Joint Committee on Justice, Defence & Equality, *Report on Penal Reform*, 2013, p.12

¹¹ Sentencing Advisory Council (2010) *Suspended Sentences in Victoria: Monitoring Report*, p.23.

¹²

https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_26/CCCPJ_Res_Dec/ECOSOC_Draft_Res_Dec/ECOSOC_Draft_Res_II_-_2017.pdf

¹³ See Council of Europe (2017) *Compendium of conventions, recommendations and resolutions relating to prisons and community sanctions and measures* <https://rm.coe.int/compendium-of-conventions-recommendations-and-resolutions-relating-to-/1680714781>

¹⁴ <https://rm.coe.int/european-prison-rules-978-92-871-5982-3/16806ab9ae>

proportionate to the offence committed, with flexibility to take consideration of the individual circumstances.

Added to that, there are a number of benefits¹⁵ to the suspended sentence as a sentencing option:

- The suspended sentence has a ‘symbolic’ effect as it recognises the seriousness of an offence through the formal imposition of a prison sentence but avoids the damage which accompanies a sentence of imprisonment
- The suspended sentence has a protective effect - it supports the continuation of an individual’s links with the community and minimises the disruption that any term of imprisonment can cause.
- Research¹⁶ in Australia has found that recidivism rates for offenders on a suspended sentence are lower than for individuals serving a prison sentence
- Suspended sentences are a flexible sentencing option and may assist in controlling and reducing the prison population
- Further research¹⁷ shows that there is no evidence to support the view that individuals imprisoned were less likely to re-offend than those given a suspended sentence.
- The same research found that individuals who had experience of imprisonment were more likely to re-offend than individuals given a suspended sentence.

Perhaps most importantly, a suspended sentence, if used correctly, is a way of providing structured support and assistance to an offender and thus can have a strong rehabilitative effect.

IPRT’s discussion paper *Community Service in Ireland*¹⁸ (2017) highlights the benefits of community sanctions and illustrates the harms that even short periods of imprisonment can have including its institutional effects. The core principle of “imprisonment as a last resort” recognises that prison causes a number of serious social harms:

- Separation of offender from their families and their communities;
- Loss of housing;
- Disruption to education, training or employment;
- Disruption of access to community based healthcare, mental health care or addiction treatment;
- Exacerbation of existing health or mental health issues; and
- Creation of future barriers to reintegration into society upon release including accessing work, training, education, housing and more.

Non-custodial sentencing options allow more and better scope for rehabilitation and treatment.¹⁹ The Ministry of Justice in England and Wales prepares reports on the relative effectiveness of

¹⁵ Balanced Justice (2013) *Suspended Sentences: Should they be abolished?* www.balancedjustice.org

¹⁶ Bartels L. ‘An Examination of the arguments for and against the use of suspended sentences’ (2010) 12 *Flinders Law Journal* 119 at 122, 124, 129-130; Bartels L. and Rice S. ‘Reviewing reforms to the law of suspended sentences in the Australian Capital Territory (2012) 14 *Flinders Law Journal*, 253 at 255-256 cited in Balanced Justice, *Suspended Sentences: Should they be abolished?* www.balancedjustice.org

¹⁷ Lulham, R. Weatherburn D., and Bartels L. (2009) The recidivism of offenders given suspended sentences: A comparison with full-time imprisonment, *No. 136 Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research at 10.

¹⁸ Irish Penal Reform Trust (2017) *Community Service in Ireland: A Qualitative Exploration of one alternative to short-term imprisonment*, <http://www.iprt.ie/contents/3201>

¹⁹ Smart Justice (2011) *Suspended Sentences*, www.smartjustice.org.au

different sentencing options. In matched sample comparisons, it found that custodial sentences of less than 12 months had higher rates of reconvictions than suspended sentences.²⁰ Within this context, the avoidance of prison is an appropriate and relevant factor to be considered when deciding to impose a suspended sentence.

2(a) Should certain offences carry a presumption of custody? Do you agree that all those considered in this chapter should attract the presumption? Are there other offences you would add to the list?

2 (b) What circumstances do you consider to be exceptional to justify the imposition of a suspended sentence where there is otherwise a presumption of a custodial sentence? Are there any other circumstances that should be taken into account when deciding whether to impose a suspended sentence for an offence that falls within the upper range on the scale of seriousness?

IPRT does not believe that a presumption of custody is appropriate for the majority of offences. Imprisonment should be reserved only for the most serious, violent offences. Even within the most serious category of crime, that of murder, there is a broad range of potentially relevant matters pertinent to both the circumstances of the offence and the offender - from the case of “assisted euthanasia” or “mercy killing” to pre-meditated murder. Many Western countries have introduced mandatory minimum sentences in the past 20 years and most have done this despite evidence as to the injustice and ineffectiveness of such measures.²¹ A severe mandatory sentencing regime, can only have an inflationary impact on prison numbers.²²

The most compelling argument against mandatory or presumptive sentences is that by removing or restricting judicial discretion, it denies the courts of the opportunity to choose sentences which are fair, proportionate and that reflect all the relevant circumstances of specific cases.²³ This approach does not prevent consistency, nor does it forbid the custodial option where appropriate- but it does promote the dual principles of fairness and proportionality.

It is IPRT’s position that presumptive minimum sentences that for example, currently apply to drugs and firearm offences in Ireland should be repealed. IPRT’s view on this type of sentencing is in line with previous findings made by both the Law Reform Commission²⁴ (2013) and the Strategic Review Group on Penal Policy²⁵ (2014) which both recommended that no further presumptive minimum sentencing regimes should be introduced and that there should be a review of the current sentencing regime that applies to drugs offences and firearm offences in Ireland.

IPRT has previously highlighted the ineffectiveness of mandatory and presumptive sentencing in acting as a crime prevention measure.²⁶ Research from the United States of America illustrates that where this form of sentencing has been introduced, the crime rate has not decreased.²⁷

²⁰ Scottish Centre for Crime and Justice Research (2013) *International Review of Conditional Sentences*, p.5 <http://www.sccjr.ac.uk/wp-content/uploads/2013/01/Conditional-Sentences-FINAL-january-2013.pdf>

²¹ O’Malley, T. (2011) *Sentencing towards a Coherent System*, Roundhall, p.71.

²² O’Malley, T. (2011) *Sentencing towards a Coherent System*, Roundhall, p.85.

²³ O’Malley, T. (2011) *Sentencing towards a Coherent System*, Roundhall, p.65.

²⁴ Law Reform Commission (2013) *Mandatory Sentences*, <http://www.lawreform.ie/fileupload/Reports/r108.pdf>

²⁵ <http://www.justice.ie/en/JELR/Pages/PB14000244>

²⁶ IPRT Position Paper 3 (2013) *Mandatory Sentencing*, http://www.iprt.ie/files/IPRT_Position_Paper_3_-_Mandatory_Sentencing_updated.pdf

²⁷ Tonry, M., 1996, *Sentencing Matters*, Oxford University Press.

Furthermore, research²⁸ has shown that there is no evidence imprisonment exerts a greater deterrent effect than a suspended sentence of imprisonment.

Other issues associated with this form of sentencing are set out in IPRT's position paper on *Mandatory Sentences*²⁹ (2013). Where presumptive provisions exist, efforts made by the judiciary and legal professionals to avoid their application may result in a perception of unfairness and risks undermining the integrity of the system.

In order to ensure a more proportionate and fair sentencing practice, IPRT has long advocated for:

- (i.) Establishment of sentencing guidelines
- (ii.) Judicial explanation of sentences
- (iii.) Judicial supervision of sentences

Sentencing guidelines are used in England and Wales where the judiciary must follow any relevant guidelines under the *Coroners and Justice Act 2009* 'unless it is contrary to the interests of justice in doing so.'³⁰ Sentencing guidelines are developed through a rigorous process of consultation. These guidelines aim to support the judiciary to determine a suitable sentence. However they allow for departure from the guideline in appropriate cases.

The SRGPP recommended that the judiciary provide written reasons for the imposition of a custodial sentence.³¹ The Group recommended that this requirement should be incorporated into Irish statute.³² IPRT also advocates that judges should provide written information as to why an individual receives a particular sentence. Recent comparative research undertaken on community service orders and short term (less than 12 months) prison sentences in Ireland identifies major disparities across district courts jurisdictions in sentencing practice.³³ If judges were to provide written reasons, this would facilitate analysis of sentencing patterns and trends and provide for greater transparency in sentencing practice.

Finally, IPRT advocates that oversight or judicial supervision of sentences should be carried out which would in turn promote public confidence in the judiciary.³⁴

²⁸ Rohan L., Weatherburn, D. and L. Bartels (2009) *The Recidivism of Offenders Given Suspended Sentences: A Comparison with Full-Time Imprisonment*.

²⁹ IPRT Position Paper 3 (2013) *Mandatory Sentencing*, http://www.iprt.ie/files/IPRT_Position_Paper_3_-_Mandatory_Sentencing_updated.pdf

³⁰ See Sentencing Council website <https://www.sentencingcouncil.org.uk/>

³¹ Strategic Review of Penal Policy (2014) *Final Report*, p.94.
<http://www.justice.ie/en/JELR/Strategic%20Review%20of%20Penal%20Policy.pdf/Files/Strategic%20Review%20of%20Penal%20Policy.pdf>

³² *Ibid.*, p.94.

³³ O'Hara, K. (2016) *Examining the Comparative Use, Experience and Outcome of Community Service Orders as alternatives to Short Term Prison Sentences in Ireland*

³⁴ IPRT Position Paper 3 (2013) *Mandatory Sentencing*, available at <http://www.iprt.ie/position-papers>.

3(a) Do the courts usually apply the O’Keeffe and Mah-Wing principles when deciding to impose a suspended sentence and when determining the custodial term of such a sentence?

3(b) Should the O’Keeffe and Mah-Wing principles be enshrined in legislation?

3(c.) Is there a need for a mechanism to monitor the use of suspended sentences and the revocation of such sentences?

IPRT believes there is need for a mechanism to monitor the use of suspended sentences and revocations of suspended sentences, as well as the application and efficacy of all other forms of sentencing options. This would support and inform policy creation and service provision. Enhancing data collection and analysis including the monitoring of sentencing trends and outcomes is outlined as a penal policy objective by the SRGPP:

“The Review Group is strongly of the view that the availability of information on sentencing and precedents needs to be improved. In this regard the Review Group supports the valuable work commenced by the judiciary through the Irish Sentencing Committee. The Group also recommends that the Central Statistics Office, in consultation with the Courts Service and the judiciary be requested to produce information on sentencing outcomes with a view to providing public information and informing policy development.”

IPRT advocates that all criminal justice sanctions should have built-in monitoring mechanisms to review and evaluate the use and effectiveness of a sanction, including that of suspended sentences. IPRT welcomes the publication of Heads of the *Judicial Council Bill 2017* to promote excellence and high standards of conduct among the judiciary. While there is mention of the Judicial Studies Institute having the function of disseminating information on sentencing in the current Heads of the Bill, to date there has been little progress on actually implementing this recommendation.³⁵ The monitoring of sentencing data, including the use and revocation of suspended sentences, would help track and identify key issues and trends while supporting and informing evidence based penal policy. We also believe the need for publication of sentencing data on a regular and consistent basis as the Irish Sentencing Information System set out to do.

4(a) Where should the suspended sentence be located on the hierarchy of penalties assuming immediate imprisonment to be the most severe penalty?

4(b) Is the fully suspended sentence properly regarded as a lenient sentence?

4(c) Can the monitoring and enforcement of the conditions of a fully suspended sentence or part-suspended sentences (except where there is a breach by the commission or subsequent offence) be improved?

The suspended sentence occupies an unusual position in the sentencing hierarchy in that it’s imposition allows the court to both signify the gravity and seriousness with which they view the offence while also avoiding the step of immediate imprisonment while maintaining an element . The suspended sentence thus has a unique utility in the sentencing exercise. It would, not be correct to

³⁵ Department of Justice & Equality, (2018) *5th Report of the Penal Policy Review Implementation Oversight Group to the Minister for Justice & Equality*
http://www.justice.ie/en/JELR/4th_Report_of_the_Penal_Policy_Review_Implementation_Oversight_Group_to_the_Minister_for_Justice_and_Equality.pdf/Files/4th_Report_of_the_Penal_Policy_Review_Implementation_Oversight_Group_to_the_Minister_for_Justice_and_Equality.pdf

characterize the sentence as “lenient” or as one which has “no consequences”. If imposed appropriately it can be experienced as both severe and effective.

Information on conditions should always be provided both verbally and in writing by the courts including the potential consequences of non-compliance. Collated and published statistics on compliance rates and/or breaches and a general breakdown of reasons for breaches would help inform and support evidence-based policy and service provision. Where relevant, this data may also help identify gaps in necessary support provision for individuals, to ensure conditions are reasonable and that individuals are assisted to meet any specific conditions attached to a suspended sentence, for example, access to housing, addiction services or an education/training programme.

In 2017, IPRT published our report *Progress in the Penal System: A Framework for Penal Reform*.³⁶ One of the key actions that IPRT advocates for is that the Department of Justice and Equality and other relevant criminal justice stakeholders develop an agreement to collect and publish data to support evidence-based policy as recommended by the Strategic Review Group of Penal Policy.

5 (a) Is full or part suspension of a custodial sentence appropriate to reflect factors which mitigate the seriousness of the offence as well as factors which are personal to the offender at the time of the sentence?

5(b) Are there any factors which are particularly relevant for the purpose of deciding if a custodial sentence should, be fully or partly suspended?

5(c) Is there any merit in having an exhaustive or non-exhaustive list of factors justifying the suspension of sentence set out in legislation or in some other formal source such as a guideline?

We believe that the proportionality principle requires that one consider both the circumstances of the offence but also those of the offender when sentencing. Once a judge has decided the type of penalty to impose, consideration and due weight must be given, where appropriate, to any mitigating factors related to the individual’s circumstances and the circumstance of the offence that might warrant a reduction in the severity of the otherwise proportionate sentence.³⁷

It is possible to accept that the offence itself meets the threshold where a prison sentence is appropriate but that there is a reason particular to the offender which means that imprisonment would be unnecessary or inappropriate. From consulting with practitioners we have identified a number of typical cases³⁸ where this is a reasonable approach to take –(1) the first time offender (2) the young offender (3) the female offender (4) the “last chance” argument.

Relevant factors particular to the offender might include (but are not limited to) admission of guilt, acknowledgment of harm, cooperation with the Garda investigation, restitution, some degree of rehabilitation, victim awareness, willingness to engage in available Probation Service supports and services. In addition, there is actually a principle of sentencing law (applied sparingly) that provides that a prison should be avoided if at all possible where to imprison would disproportionately affect others. This is particularly relevant in the case of women who offend. Finally there is the case of those who are at last making a serious effort at significant rehabilitation - “the last chance principle”

³⁶ Irish Penal Reform Trust (2017) *Progress in the Penal System: A Framework for Penal Reform*, <http://www.iprt.ie/contents/3208>

³⁷ Maguire, N. (2016) ‘Sentencing’ in *Routledge Handbook of Irish Criminology*, p.304.

³⁸ This is not an exhaustive list

as provided for in DPP-v- Jennings. Typically a suspended sentence in this situation is imposed with heavy conditions.

The Prison Reform Trust (2007) has highlighted the significant role that mitigating factors play in the sentencing process and argued that *'justice is best served by an individualised approach to sentencing which allows personal mitigation to play a full part.'*³⁹ The same report recommended the need for guidance such as that provided by the Sentencing Council on principles of personal mitigation including what should and should not be a relevant factor in the sentencing decision-making process.

The system should be flexible and allow for judicial discretion where individual circumstances should be considered on a case by case basis. We have referenced a number of factors above. However, more broadly, IPRT would like to highlight two populations who have a unique set of needs that are important to consider during the sentencing stage:

(1.) Women

The SRGPP (2014) highlighted that *'criminal sanctions imposed on women, in particular imprisonment, can have a detrimental effect on the lives of their dependents.'*⁴⁰ It recommended that sentencing courts should take account the impact of imprisonment on family, in particular that of children.

Without wishing to reinforce gendered stereotyping, IPRT acknowledges that women are often but not always primary caregivers and are largely characterised as presenting a *'low risk'* to society.⁴¹ Yet any period of imprisonment may have damaging effects on children, sometimes resulting in children being placed into the State care system. With the Irish State having ratified the UN Convention on the Rights of the Child (CRC) in 1992, IPRT believes that the judiciary have a responsibility to consider Article 3 ('best interests' principle) of the child at sentencing stage where the individual is a primary caregiver.

The consideration of a primary caregiver's responsibility was evident in a judgement of the South African Constitutional Court of Appeal.⁴² A 35-year-old mother of three, was sentenced to a 5 year suspended sentence in 1996, however during this time she was reconvicted and was sentenced to four years imprisonment. The matter went to the Constitutional Court of Appeal which considered whether the sentencing court had paid sufficient attention to the constitutional provision that in all matters concerning children, the children's interests shall be paramount. Sachs J came to the conclusion that sufficient and informed attention was not given to the interests of the children during the sentencing process and that further enquiries should have been made on this issue, and the information gained should have been weighed up against the sentence. Hence, Sachs J stressed the seriousness of M's crimes, yet considered that correctional supervision would be better suited to the circumstances in this case, due to the fact that she was a primary caregiver.

(2.) Young Adults

³⁹ Jacobson J & M. Hough (2007) *Mitigation: The Role of Personal Factors in Sentencing*, vii, Prison Reform Trust.

⁴⁰ Strategic Review Group on Penal Policy (2014) *Final Report*, p.66

⁴¹ Joint Probation Service-Irish Prison Service Strategy 2014-2016, *An Effective Response to Women who Offend*, p.2

⁴² S v M [2007] ZACC 18.

Young adults aged 18-24 are a particular cohort that should also be considered within this context. There are two⁴³ primary reasons why there should be a discrete approach to this age group in the Irish criminal justice system.

(1.) Scientific evidence shows that the human brain and maturity continues to develop beyond adolescence and into an individual's mid-twenties and with a lower capacity for self-regulation.

(2.) Socio-economic factors also place particular young adults at risk of offending behaviour. In all cases, a young person's age and maturity levels should be taken into account as a mitigating factor in determining an appropriate penalty.

IPRT advocates for a discrete youth criminal justice approach. This approach is informed by international best practice where juvenile sanctions have been extended to the 18-21 age category in many jurisdictions. For more on this see IPRT (2015) *Turnaround Youth: Young Adults (18-24) in the Criminal Justice System: The Case for a Distinct Approach*.

Considering the breadth of potentially relevant circumstances relating to both the offence and offender, IPRT would favour a non-exhaustive list of factors justifying the suspension of a sentence set out within guidelines.

6 (a.) Do you think a specific sentencing regime is required for those who commit corporate related offences?

6 (b.) Do you think it is appropriate or not appropriate to send individuals convicted of corporate-related offences, who are generally non-violent and do not pose an immediate physical threat to society, to prison? Why or why not?

IPRT's view is that imprisonment should be used as a last resort for everyone. The integrity and credibility of the law is undermined when there is a public perception that minor offending in one category is punished harshly and serious offending in another category is not being punished adequately or at all. Therefore, criminal law should treat all offenders in an equitable manner irrespective of whether they are "white collar" or "street offenders." By developing a sentencing regime specifically directed at those who commit corporate related offences we may in effect create a two tiered system of justice based on the attributes of the individual rather than objective proportionality, penal moderation and fairness.

IPRT can see no reason why a specific sentencing regime is required for corporate related offences rather than those offences being dealt with within a set of guidelines that are based on broader principles of proportionality and penal moderation. Again, we reiterate that the principles of proportionality and penal moderation should guide sentencing practice. IPRT reiterates the value of exploring the potential of sentencing guidelines which would provide the judiciary with guidance related to various offences.

⁴³ IPRT (2015) *Turnaround Youth: Young Adults (18-24) in the Criminal Justice System: The Case for a Distinct Approach*, available at <http://www.iprt.ie/contents/2733>

7(a) Do you think a suspended sentence can or should be capable of being combined with a community service order (CSO)?

7(b) Do you think a suspended sentence would be appropriate where the offence is too serious for a CSO, or the offender is not suitable for a CSO but the offence is not serious enough to warrant an immediate and/or lengthy sentence of imprisonment?

7(c) Do you think compensation orders should be regarded as a factor justifying suspension? Why or why not?

7 (d.) Do you think a compensation order should be capable of amounting to a factor mitigating the seriousness of an offence? Why or why not?

The Criminal Justice (Community Service)(Amendment) Act 2011 requires a judge who is considering the imposition of a sentence of imprisonment of 12 months or less to consider instead the imposition of a community service order. The defendant must be both suitable for this sanction and must also consent to this. On the other hand, where a person is sentenced to imprisonment the sentence may be suspended in whole or in part, this may be subject to conditions and there is no requirement of consent.

The proposal to allow these orders to be combined may give rise to a concern about “net-widening” or even double punishment. In addition, pragmatic challenges are likely – how would the temporal restrictions on the community service order be reconciled with the suspended portion of the sentence? If it was only part suspended how would the prison time reconcile with the requirement to perform work in the community? Our research on the use of community service orders in Ireland has identified a number of problems with the existing regime with community service being-utilised as an alternative to imprisonment and clear variability in the use of community service orders across court jurisdictions in Ireland. For further see <http://www.iprt.ie/contents/3201>

IPRT has reservations that the use of compensation orders may result in further uneven application of criminal law. The uneven application of criminal law is currently evident through forms of uneven policing, uneven imprisonment and responses to white collar crime. This uneven application compounds the link between social exclusion and crime as marginalised people are targeted, criminalised and treated differently to others by the law and its institutions. IPRT has concerns that using compensation orders as a factor justifying suspension may result in similar effects, resulting in a two-tiered system between those who can and cannot pay.

8 – Section 99 Criminal Justice Act 2006

According to the Bar Review November 2015, the section has triggered a considerable amount of litigation.⁴⁴ As O’Donnell J recently observed: *“Only one thing is clear and beyond dispute: s.99 is in need of urgent and comprehensive review.”*⁴⁵

The key provisions of s. 99, providing for "automatic" and mandatory consideration of whether a suspended sentences should be activated following conviction for an offence committed during the currency of that sentence, were struck down in April 2016 following the High Court's decision and finding of unconstitutionality in *Moore v. DPP*. A number of cases followed and it is our understanding that a judicial review on the issue *Wansboro v DPP & Governor of Mountjoy Prison* is currently under appeal to the Supreme Court and is listed for hearing on 1st May 2018.

⁴⁴ <https://www.lawlibrary.ie/rss/barreview/5-2015.pdf>

⁴⁵ <https://www.lawlibrary.ie/rss/barreview/5-2015.pdf>

The current situation appears to be that suspended sentences can only be "manually" reactivated following application by the Gardaí or Probation Service. In our consultations with practitioners it is our understanding that this has created unacceptable legal uncertainty as in their experience these applications are made inconsistently.

The lack of an automatic mechanism means that suspended sentences do not operate as they are intended. This creates unacceptable uncertainty and we are receiving reports that judiciary are now far less likely to impose suspended sentences now that there is no possibility of automatic reactivation and immediate custodial sentences are being used in their place. The Criminal Justice (Suspended Sentences of Imprisonment) Act 2017 contains provision to address this but has not yet been commenced.