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ISSUE 1 General Sentencing Principles and Suspended Sentences

Your views are sought on the following questions:

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?

ISSUE 1: DRCC RESPONSE

Our response to the questions presented for each Issue is informed by the experiences of the women and men accessing the services of the Dublin Rape Crisis Centre (DRCC) who are victims of sexual violence and either had interactions with the Criminal Justice System, or have considered engaging in the process.

Sexual violence can have harmful and lasting consequences not only for the victims, but for their families and their communities. In the aftermath of sexual violence, victims can face extremely difficult and painful emotions and experiences. The effects of the trauma can be short-term or last long after the rape or sexual assault. We are also mindful in the DRCC of a number of points: victims may experience none, some or many of the possible impacts of the sexual violence at different times; there is no particular way a victim should look and act; impacts are not signs of illness, deficiencies or weakness, nor are they characteristics of the individual; they are responses to traumatic events. It is a particular type of crime where the majority of perpetrators know their victims and where many are intimate partners or family members. In 2016¹, less than 10% of adult victims of childhood sexual abuse had

¹ <http://www.drcc.ie/wp-content/uploads/2016/08/Updated-DRCC2016-Statistics.pdf>

been abused by strangers; 50% had been abused by a relative. Where adults had suffered sexual violence, intimate partners were responsible for 17% of the incidents reported to us while fewer than 30% of rapes and sexual assaults were by a stranger. These figures follow patterns similar to those of previous years. The intimacy or familiarity between perpetrator and victim, particularly where the victim engages with the criminal justice system, is likely to disrupt the social circles of the victim in a way that is an additional punishment and hurt which does not occur in most other types of crime. From our experience, victims will engage in the criminal justice system for one or some or all of the reasons outlined as sentencing aims above, depending on the person. Reflecting our clients' perspective and based on our experience, we submit that the broader range of sentencing aims should continue.

This response overlaps with our response to issue 2. From our perspective, given the seriousness of rape, a suspended sentence neither adequately censures the offence nor does it reflect the gravity of it. In order to underline its seriousness, a conviction of rape always requires a custodial sentence to signify how reprehensible the offender's actions were and through the sentence passed, endeavour to deter others from committing similar offences. Suspended sentences may be appropriate for less serious sexual offences in situations where the views and rights of the victim are central to the sentencing process.

ISSUE 2 The Presumption of an Immediate Custodial Sentence for Specific Offences and Offenders

Your views are sought on the following questions:

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?

2(c) What range of exceptional circumstance should justify the full or partial suspension of a sentence of imprisonment where an offence carries a presumption of immediate custody?

ISSUE 2: DRCC RESPONSE

2(a) We note the Commission's reference to *The People (DPP) v Tiernan* where the Supreme Court held that rape involves such a serious attack on the human dignity and bodily integrity of the victim that it should, save in exceptional circumstances be punished with a substantial and immediate custodial sentence, even in the absence of aggravating factors. We submit that the offence of rape or other serious sexual abuse should always carry a presumption of custody.

2(b) In light of the seriousness of the crime and the serious and long lasting impact on the victim, and in the public interest, we submit that there are no circumstances which justify the imposition of a suspended sentence in cases of rape and the most serious sexual abuse. Many of our clients and callers are frustrated by what they see as an inadequate sentence for these heinous crimes. Their dissatisfaction with a sentence can result from a perception that the sentence had little relevance to the harm they had endured.

And if that sentence were to be a suspended sentence it could be perceived that the sentence was less connected to the existing harm suffered by them and more about the offender's future behaviour. In other words the punishment only becomes relevant if the offender were to commit another crime.

This reminds us to raise the issue of the lack of transparent, accessible, current sentencing guidelines which would allow for a greater understanding by victims of the rationale for sentencing and would, in addition, be guidance for more consistent sentencing.

ISSUE 3 Principles Governing the use of Suspended Sentences

Your views are sought on the following questions:

3(a) Do the courts usually apply the O’Keefe 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’Keefe 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?

ISSUE 3: DRCC RESPONSE

3(c) If suspended sentences were a feature of sentencing for less serious sexual crime, there would be some value in monitoring the use of suspended sentences to ensure their proper and correct use and to act as a form of protection of the victim of the prior crime or others. In the light of the often close relationship of a perpetrator and victim, it might assist the victim in reporting breaches of the terms of the suspension of a sentence where the person might be otherwise unwilling to make a further report.

ISSUE 4 Locating the Suspended Sentence within the Range of Available Penalties

Your views are sought on the following questions:

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 fully suspended or part-suspended sentences (except where there is a breach by the commission of subsequent offence) be improved?

4(d) Which body or bodies are most appropriate or best equipped to undertake the monitoring of suspended sentences?

ISSUE 4: DRCC RESPONSE

4(b) A suspended sentence can be viewed as having a dual determination; on the one hand it allows the court to mark the seriousness of the offence, while permitting a more lenient outcome than a custodial sentence. It functions as a warning to desist from criminal activity without sanction; however a breach of the conditions will trigger the sentence. For the victims of sexual offences, who have the trauma of the harm and the trauma of being the main or only complainant in a court prosecution, it will certainly be regarded as a lenient sentence.

For our clients and callers however it is the harm to them of the sexual crime that needs to be properly explored in order to inform sentencing. While victims of rape and other sexual assaults may report injuries and issues arising thereafter, it should also be remembered that rape doesn't always involve physical force. The most common and lasting effects of rape involve emotional and psychological trauma.

4(d) The police and probation services would be best equipped to monitor suspended sentences but realistically, given how stretched they already are, we question whether they would be able to do so within current resources.

ISSUE 5 Mitigating Factors and Factors Justifying Suspension

Your views are sought on the following questions:

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

ISSUE 5: DRCC RESPONSE

According to the research available, about 8% of rapes are reported to the Gardaí and many of those never make it to trial. The justice system is hard on the victims of sexual crime who have suffered serious violence and still are witnesses who can be cross examined and whose credibility will often be challenged in the court hearing. One of the most frustrating things for our callers and clients is in relation to sentencing and their perception of a lack of an effective sentence against rape - a sentence that recognises the hurt and harm done to them; a sentence that both reflects the gravity of the offence committed against them and deters others from committing such crimes. Perceptions around sentencing are also important from a public confidence perspective. To this end, we repeat our submission that rape and other serious sexual assaults are not appropriate for suspended sentences. For less serious sexual offences, where a suspended sentence may be under consideration, the rights and needs of the victim should be a particularly relevant factor. We believe that guidelines on this and other aspects of sentencing should be established.

ISSUE 6 Suspended Sentences and Corporate-Related Offences

Your views are sought on the following questions:

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?

6(c) Under what circumstances do you think it is appropriate or not appropriate to impose an immediate sentence of imprisonment for corporate-related offences, including competition offences and health.

ISSUE 7 Combining Suspended Sentences with Other Orders

Your views are sought on the following questions:

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?

ISSUE 7: DRCC RESPONSE

While compensation may have a place in recognising the harm done to the victim, it would not be suitable to be able to trade compensation against a custodial sentence or, to put it another way, to allow someone with money to buy their way out of prison. Any such trade-off could put pressure on victims, would disadvantage poorer people and would devalue the penalty for serious sexual crime. In previous cases where a money payment was perceived to lead to a non-custodial sentence, we were contacted by many victims, some of whom were our own clients, who were deeply disappointed in the criminal justice system as a result.

ISSUE 8 Section 99 of the Criminal Justice Act 2006

Your views are sought on the following questions:

8(a) Do you think that the common law power to suspend a sentence of imprisonment should be expressly repealed?

8(b) Do you think there should be a limit on the length of the custodial sentence that may be suspended?

8(c) Do you think the operational period of a suspended sentence should be limited in length to, for example, 5 years?

8(d) Do you think that the operational period of a suspended sentence should not exceed the length of the actual sentence of imprisonment that is imposed?

8(e) Do you think there should be a list of conditions of suspension set out in legislation?

8(f) Do you think that the subsequent – or triggering – offence should continue to be any offence or should it, at the very least, be an offence that is punishable with imprisonment?

8(g) Do you think that section 99(17) of the Criminal Justice Act 2006, which provides for the activation of a suspended sentence – in whole or in part – where the individual that is subject to the suspended sentence breaches a condition of suspension during the operational period, represents a more general power to activate a suspended sentence, in that the commission of a subsequent offence could also be activated under section 99(17)?