

LAW SOCIETY SUBMISSION



ISSUES PAPER ON SUSPENDED SENTENCES

LAW REFORM COMMISSION

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ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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1. Introduction

- 1.1. This submission details the views of the Law Society (“the Society”) in relation to the eight issues identified by the Law Reform Commission in their Issues Paper on Suspended Sentences. The Issues Paper examines the principles and procedures applied by the courts when considering the imposition of suspended sentences as well as the triggering of custody.
- 1.2. This submission is based on the views of members of the Society’s Criminal Law Committee. The Committee is comprised of solicitors who have extensive experience and expertise in the practice of criminal law and a comprehensive understanding of the manner in which the Irish criminal justice system operates.
- 1.3. The Society believes that it is important that criminal justice reform achieves the right balance between increasing protections for the public and victims of crime while, at the same time, protecting the rights of those facing criminal charges and those convicted of crime facing sentencing. It is crucial that fair procedures as guaranteed by the Constitution, European Convention on Human Rights and EU Charter on Fundamental Rights are applied.
- 1.4. The Society agrees with the Law Reform Commission’s view that suspended sentences, where used appropriately, are an important and beneficial sentencing option (paragraph 3, Issues Paper).

2. Issue 1 – General Sentencing Principles & Suspended Sentences

Question 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?

- 2.1. Suspended sentences should continue to serve a broader range of sentencing aims.

Question 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?

- 2.2. The principle of avoidance of prison is not an appropriate single factor to be taken into consideration when deciding whether to impose a suspended sentence. While the Society notes the United Kingdom Home Office's findings that prison is "an expensive way of making bad people worse" (paragraph 1.15, Issues Paper), a custodial sentence must be a sentence of last resort having taken all other relevant factors into consideration; the principle of avoidance of prison should be one of a set of factors.

3. Issue 2 – The presumption of an immediate custodial sentence for specific offences and offenders

Question 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?

- 3.1. The Society believes that certain offences must carry a presumption of custody and notes the importance of the word "presumption".
- 3.2. The Society agrees with the Law Reform Commission that all those offences considered in this chapter should attract a presumption of custody. These offences are manslaughter, rape, assault causing harm and serious harm as well as serious fraud offences.
- 3.3. The Society recommends including unprovoked assaults on unknown victims not known to, or not in the company of, the offender. For example, a presumption of custody should apply in circumstances where a person is attacked walking down the street by an unknown person.

Question 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?

- 3.4. The Society agrees with the Law Reform Commission that Stone’s analysis is as relevant today as it was when he carried out evidence-based research over twenty years ago (paragraph 2.43, Issues Paper).
- 3.5. The Society supports the division of “exceptional circumstances” into two categories, namely offence-based exceptionality and non-offence-based exceptionality (which generally focuses on the circumstances of the offender, or third parties) (paragraph 2.45, Issues Paper).
- 3.6. In relation to offence-based exceptionality, the Society recommends that the impact on the victim be considered and the voices of victims must be heard in sentencing decisions. However, consistency must be achieved when considering the weight to attach to individual statements.
- 3.7. In relation to non-offence-based exceptionality, the Society supports the first and third exceptional circumstances which include seeking treatment and acknowledgement of improved circumstances and efforts which might be undermined by immediate custody. However, the Society does not support exceptional circumstances as requiring consideration of the tragic circumstances of a convicted person’s individual life (such as the degree of sadness, sickness, childhood abuse or disadvantage in their lives). Rather, tragic circumstances might be considered as potential mitigating factors with regard to the length of the presumptive custodial sentence.

Question 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?

- 3.8. The Society does not support the introduction of an prescribed list or range of “exceptional circumstances”. The Society recommends that judicial discretion be envisaged for instances of unforeseen exceptional circumstances that might arise such as financial and emotional difficulties (paragraph 2.47, Issues Paper).

4. Issue 3 - Principles governing the use of suspended sentences

Question 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?

- 4.1. The Society is not in a position to answer this question definitively as it requires statistical analysis of sentencing decisions.
- 4.2. It may be that the principle that the court must eliminate all community sanctions before deciding that there is a case for imprisonment (paragraph 3.05, Issues Paper) is not followed consistently in all cases.
- 4.3. It is likely that these principles are applied more consistently in the higher courts. The Society agrees with the Law Reform Commission conclusion that the principles governing the use of suspended sentences may be applied differently in the District Court and the Circuit Court where the majority of suspended sentences are imposed (paragraph 3.17, Issues Paper).

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

- 4.4. The Society does not support the enshrining of these principles in legislation and notes the need for adequate development and resourcing of alternative community sanctions. The Society supports a guidance approach which ensures continued judicial discretion.

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

- 4.5. The Society supports the introduction of a mechanism to monitor the use of suspended sentences and the revocation of such sentences such as the proposed sentencing information committee in section 18 of the Judicial Council Bill 2017. In addition, the Society recommends the introduction and adequate resourcing of a mechanism within An Garda Síochána and the probation services to monitor compliance with the terms of a suspended sentence.

5. Issue 4 – Locating the suspended sentence within the range of available penalties

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

- 5.1. It is important to locate the suspended sentence within the range of available penalties. The Society agrees that such designation is not a straightforward task given the considerable difference of opinion (paragraph 4.01, Issues Paper).
- 5.2. The Society supports the Law Reform Commission’s conclusion to locate a suspended sentence just below immediate imprisonment on the range of available penalties (paragraph 4.06, Issues Paper).

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

- 5.3. The Society does not believe that a fully suspended sentence should be regarded as a lenient sentence. The “Sword of Damocles” element of the sanction can represent a real deterrent and punishment with the threat of imprisonment being regarded by some as punishment in itself (paragraph 4.03, Issues Paper). The Court of Appeal has regarded suspended sentences as amounting to an onerous sanction even though an immediate deprivation of liberty is not applied (paragraph 4.04, Issues Paper).

Question 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?

- 5.4. As already mentioned, the Society recommends the introduction and adequate resourcing of a mechanism within An Garda Síochána and the probation services to monitor compliance with the terms of a suspended sentence. Such monitoring should include the enforcement of the conditions of suspended sentences. The Society believes that monitoring and enforcement would greatly improve if information about suspended sentences applied to convicted persons was more readily available to An Garda Síochána and/or probation officers.

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

- 5.5. The Society recommends a blended approach to monitoring which designates responsibility to the state agency best suited to carry out such monitoring. For example, if a condition of a suspended sentence relates to behaviour, such as not being a nuisance to a neighbour, while some crossover between civil and criminal jurisdictions

might be required, An Garda Síochána would be the best placed to monitor compliance. Conditions such as monitoring of urinalysis, engagement with treatment or participating in counselling would likely be best monitored by the probation services.

6. Issue 5 – Mitigating factors and factors justifying suspension

Question 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?

- 6.1. The Society does not believe that full or part-suspension of a custodial sentence is 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 the sentence. The headline offence must determine the seriousness of the sentence, taking into account any factors which mitigate or aggravate the seriousness of the offence and suspension is appropriate to mitigation personal to the accused.

Question 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?

- 6.2. Yes, there are factors that are particularly relevant, such as those that reduce a person's culpability and those that point to motivation to change behaviour for the better in the future. The relevance of a suspended sentence becomes greater, the less likely it is that there will be reoffending behavior,

Question 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?

- 6.3. The Society prefers a model whereby jurisprudence informs guidance development and notes the potential limiting effect of exhaustive or non-exhaustive lists of factors set out in legislation.

7. Issue 6 – Suspended sentences and corporate-related offences

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

- 7.1. The Society does not believe that a specific sentencing regime is required for corporate-related offences.

Question 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?

- 7.2. The Society notes the recent trends emerging in case law which suggest that the current approach to sentencing in corporate-related offences may be changing in recognition of the harm caused by such offences with a shift away from lenient penalties to suspended sentences (paragraph 6.06, Issues Paper). Moreover, there may be circumstances where it is 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.

Question 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.

- 7.3. It is not straightforward to prescribe in advance the circumstances; however, it is likely connected with the severity of the harm caused and the public interest benefit of deterring similar corporate crime in the future.

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