



RCNI Submission on Law Reform Commission

Issues Paper on Suspended Sentences

(IP 12-2017)

October 2017

1.0 Introduction – Rape Crisis Network Ireland

Rape Crisis Network Ireland (RCNI) is a specialist information and resource centre on rape and all forms of sexual violence. The RCNI role includes the development and coordination of national projects such as using our expertise to influence national policy and social change, and supporting and facilitating multi-agency partnerships. We are owned and governed by our member Rape Crisis Centres who provide free advice, counselling and other support services to survivors of sexual violence in Ireland.

1.1 Introduction – LRC Issues Paper on Suspended Sentences – Format of Submission:

Rape Crisis Network Ireland is very glad to have the opportunity to comment on the Law Reform Commission Issues Paper on Suspended Sentences (LRC IP 12-2017). This Submission will address each Issue relevant to survivors of sexual violence in turn, in the order in which each Issue appears in the Issues Paper. For ease of reference, the Issues and the Questions will be set out before the RCNI responses to the Questions. (The Submission has been set out in this format due to difficulties involved in filling in answers to questions in the original online document.

Readers of this Submission may wish to refer to other RCNI policy documents which examine the area of Suspended Sentences: (1) RCNI Position Paper on Legal Recommendations from “Rape and Justice in Ireland” (May 2012)¹ and (2) RCNI Submission on the Strategic Review of Penal Policy, (February 2013)².

2.0 List of Relevant Issues, Questions Posed on each Issue and RCNI Responses:

2.1 ISSUE 1: General Sentencing Principles and Suspended Sentences

QUESTION 1:

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?

RCNI Response: RCNI’s view is that **partly suspended sentences** for sexual crimes may provide a suitable framework for specific deterrence and rehabilitation in particular,

¹ Available online through this weblink: <http://www.rcni.ie/wp-content/uploads/RCNILEgalRecommendationsPositionPaperMay12.pdf>

² Available online through this weblink: <http://www.rcni.ie/wp-content/uploads/RCNI-Submission-SRPP-February-2013-LPD-Final-Word.pdf>

because of their great flexibility as to the number and variety of conditions which may be imposed. These are the two aims of a period of suspension which may benefit both individual victims of the crime and society in general, by helping to prevent recidivism through individually tailored conditions of attendance at specialist programmes, good behaviour, avoidance of certain named places, people and activities, and so on. Attendance at specialist sex offender programmes, and/or individual specialist therapy where appropriate, have the potential to effect real and lasting changes in offenders' behaviour, in addition. Such positive changes can result in prevention of some of the gravest and most damaging offences. Other conditions can reduce the risk of re-offending by addressing individual risk factors (e.g. propensity to abuse drugs or alcohol, poor anger management). If appropriate conditions are in place, the ability of the Probation Service and An Garda Síochána to manage the risk posed by sex offenders in the community is much increased, and the risk posed by these offenders by these offenders is proportionately reduced.

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?

RCNI Response: Our view is that avoidance of prison is only appropriate, if at all, in the most exceptional circumstances with regard to convictions for sexual offences. We are also aware that there are now many opportunities for sex offenders to address their behaviour through the Building Better Lives programme in our prisons. Therefore, we do not think that in sexual cases, avoidance of prison is an appropriate factor to be taken into consideration when deciding whether or not to impose a **fully or partly** suspended sentence.

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

QUESTION 2:

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?

RCNI Response: In our view, all the other principal sexual offences, as well as rape, should carry a presumption of custody. They include: aggravated sexual assault, sexual assault, defilement offences, grooming offences, other offences related to child exploitation and offences against "protected persons". These offences are all of the utmost gravity, as they have extreme and long-lasting negative impacts on so many aspects of their victims' lives.

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?

RCNI Response: In our view, the most legitimate "exceptional" circumstances which might justify the imposition of a **fully** suspended sentence for any crime of sexual violence are those which are put forward by, or on behalf of, the victim(s) of the crime, provided that the sentencing judge is satisfied that the circumstances are not advanced as a result of

manipulation or coercion by the convicted person and/or others acting on his behalf, but are put forward by the victim's own free will.

We also believe that a **fully** suspended sentence should never be imposed without the victim having had a reasonable opportunity to put forward his/her views on whether such a sentence is appropriate, and a victim's expressed opposition to a **fully** suspended sentence should be accorded significant weight by the sentencing judge.

In our view, other "exceptional circumstances" in which a sentence might be **fully** suspended might include those where there is little or no risk of future offending by the convicted person (e.g. because there is reliable and unequivocal medical evidence that he is incapacitated due to a terminal illness). However, in such circumstances the sentencing judge should still attach significant weight to a victim's expressed wish that the sentence should not be fully suspended.

We would particularly object to any argument for a **fully** suspended sentence in a sexual case to the effect that the offending behaviour happened a long time ago, is now stale, should not be punished because the offender has turned his life around since, and so on, because we are very well aware that for many victims of sexual violence, particularly sexual violence inflicted when they were children, it can take months, years and even decades to find the courage to report the offences to the Gardaí. It can take as long, or longer, for the victim to overcome or even come to terms with the devastating effects of sexual offending. We are also well aware that sex offenders often carry out offences over years or decades and that in the absence of any meaningful engagement with an effective programme of treatment, there is always at least some risk of re-offending during the period of suspension, in the absence of incapacity through terminal illness or otherwise.

With regard to any argument for a **fully** suspended sentence based on the offending behaviour being at the lower end of the scale of gravity, it should be remembered that these offences could still have had, and likely did, a serious effect on their victim(s), though in terms of the kind of offence and/or its maximum sentence in law, they are not regarded as being at the higher end of the scale of gravity. As a general rule, this kind of argument should not be entertained **unless** the Court is satisfied that the behaviour has had (and/or will continue to have) essentially minor effects only on the victim(s) **and** it is beyond question at the lower end of the scale in nature. Determination to reform is important too. If there is evidence that serious efforts have been made to address the behaviour by the time of sentence, especially in circumstances where the Court is satisfied that minimal harm has been caused to the victim, the Court might consider a fully suspended sentence. In this situation also, the views of the victim(s) should be given significant weight.

A **partly** suspended sentence, in our view, may be considered for an offence which falls within the upper range on the scale of seriousness, if there is strong evidence that a period of suspension with appropriate conditions, is likely to result in successful rehabilitation of the convicted person **and/or** in specific deterrence from this kind of crime. In our view, the standpoint of the victim on such a sentence should be sought always, and where the victim opposes such sentence, his/her views should be accorded due weight by the sentencing judge.

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?

RCNI Response: With regard to **full** suspension of sentences imposed for the most serious sexual offences: Generally speaking, only those exceptional circumstances which are put forward by the victim, and a small range of others which do not involve **any** risk of reoffending **and** in which the victim acquiesces, should justify this kind of sentence for a sexual offence, in our view. If the offending behaviour is regarded by the Court as being less serious, **and** the Court is satisfied that it has not caused, and/or will not cause, any serious harm to the victim(s), a **full** suspension might be considered. Evidence of a real determination to reform his behaviour on the part of the offender is important in such a case, and as always in our view, careful account must be taken of the victim's wishes with regard to the proposed full suspension.

With regard to **partial** suspension, these can be justified by strong evidence that a period of suspension with appropriate conditions, is likely to result in successful rehabilitation of the offender and/or his/her specific deterrence from this kind of crime. This implies that the offender is willing and able to commit to whatever conditions of attendance at specialist programmes, etc, is deemed to be appropriate to achieve this rehabilitation and/or specific deterrence, and also, that such programmes [etc] are made available to him/her.

2.3 ISSUE 3: Principles Governing the use of Suspended Sentences

QUESTION 3:

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?

RCNI Response: We do not have any information relevant to the application of the first *O'Keefe/Mah-Wing* principle that "a court should not impose a suspended sentence unless it is satisfied that the offence is sufficiently serious to merit a sentence of imprisonment", as far as sexual offences are concerned.

As far as the second *Mah-Wing* principle that "a term of imprisonment should never be increased merely because it is to be suspended" is concerned, we do not have any up to date objective information. With regard to the rape of adults only, we are aware from findings in "Rape and Justice in Ireland"³ (RAJI) that during the sample period 2000 to 2005, 74% of the 111 rape sentences studied were suspended, fully or partly. These figures include only a tiny number of fully suspended sentences.

For Section 2 rape, the offence which attracted the overwhelming majority of sentences in the sample, there is very little difference between the **actual** (ie sentence **after** the period of suspension is subtracted) length of custodial sentence depending on whether it followed a

³ "Rape and Justice in Ireland" (RAJI), 2009, by Hanly C, Healy, D & Scriver, S, Liffey Press, Dublin (Report in book form of research carried out on attrition in adult rape cases from 2000 to 2006), pp 307-310. See in particular *Table 6.39: Effect of Suspension Periods*, on p 310.

trial or a guilty plea, across two measures, the median and the mean (84 as opposed to 83 months and 94.96 as opposed to 96.57 months, respectively). There is slightly more difference between the **theoretical** (ie sentence **before** the period of suspension is subtracted) length of custodial sentence depending on whether it followed a trial or a guilty plea, across the same two measures (96 as opposed to 102 months and 109.04 as opposed to 111.55 months, respectively).

However, we also note with interest that across every one of five measures (minimum sentence, maximum sentence, median, mean and standard deviation), the **theoretical** sentence is shorter following a trial than following a guilty plea. This suggests that to some small degree during this period, judges imposing sentences for Section 2 rape tended to deviate from the *Mah-Wing* principle that an overall sentence should not be increased because a portion of it is to be suspended, where sentence followed a guilty plea.

Our recent experience as supporters of victims of sexual violence, tell us that since the sample in RAJI was studied, fully suspended sentences for the gravest sexual offences remain very rare, while partly suspended sentences are still very much the norm for these offences. However, we do not gather formal statistics on this point.

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

RCNI Response: While we do not have a firm view on this point, it seems to us that well-drafted, clear legislation would make the law in this area easier to understand for victims, witnesses and their supporters, and would make it easier for our judges to implement. Any legislation should leave no room for ambiguity, as it is extremely stressful for those who have survived the trauma of sexual violence and the rigours of one criminal justice process, to have to undergo an additional ordeal in the form of an appeal against sentence based on the faulty application of sentencing principles.

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

RCNI Response: Our view is that this would be very useful to all concerned, victims, those supporting them, prosecutors, and judges, as well as defendants and their legal representatives. Such a mechanism should be founded on the best international practice in efficient and accurate data collection and analysis, and the results of this analysis should be kept up to date and should be freely available.

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

QUESTION 4:

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

RCNI Response: The **partly** suspended sentence should be located immediately underneath immediate imprisonment, and the **fully** suspended sentence should be located immediately below the **partly** suspended sentence.

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

RCNI Response: Yes, it is so regarded for sexual crimes, in the view of victims, those who support them, and also as far as can be gathered from the number of unduly lenient sentences for sexual offences which are appealed successfully by the DPP, in the view of the DPP and the Courts. In our view, given the severity and enduring nature of the effects of sexual crimes on their victims, this is entirely appropriate.

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?

RCNI Response: We do not have specific information on this point. However, our view is that effective monitoring and enforcement of conditions of suspended sentences is of vital importance. If there is no effective enforcement of conditions, fully or partly suspended sentences will be regarded particularly by those who already have a criminal record, as “getting off” and will do nothing to reduce re-offending and little to encourage rehabilitation.

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

RCNI Response: It seems to us that these bodies should be those already charged with assessing and managing risks posed by released sex offenders to the community, ie the Probation Service acting in tandem with An Garda Síochána.

2.5 ISSUE 5: Mitigating Factors and Factors Justifying Suspension

QUESTION 5:

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?

RCNI Response: With regard to the most serious sexual offences, our view is that factors which mitigate the seriousness of an offence should be left out of account whenever a judge must decide whether to impose a **fully** suspended sentence. Such a sentence might be considered for offending behaviour which is at the lower end of the scale **both** in its nature **and** in its effects on its victim. In our view, the range and gravity of the effects of an offence on its victim should be at the centre of any assessment of its seriousness.

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?

RCNI Response: Again with regard to sexual offences, our view is that the views of the victim(s) should be given significant weight in any formal source of guidance to judges who must decide whether to impose a fully or partly suspended sentence.

With regard to **fully** suspended sentences, in our view they should not be handed down for the most serious sexual crimes, if that is against the victim’s wishes, **unless** there are truly exceptional circumstances, such as there being no, or practically no, risk of re-offending, and in such cases, the views of the victim should still be given significant weight by the sentencing judge. These circumstances are rare.

Where the offending behaviour is less serious not just in law but also in terms of its effect on the victim(s), a **fully** suspended sentence might possibly be considered. In our view, determination on the part of offender to reform his/her behaviour is important in such a case, as we have set out in response to QUESTION 2 above, as are the views of the victim(s), which should be given significant weight.

With regard to **partly** suspended sentences, in our view the most relevant factors to be considered are (1) whether (as indicated in response to QUESTION 2 above) there is strong evidence that a period of suspension with appropriate conditions, is likely to result in successful rehabilitation of the offender and/or his/her specific deterrence from this kind of crime, and (2) the victim's views on whether such a sentence is appropriate.

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?

RCNI Response: These two options are not mutually exclusive: a legislative provision could be drafted to the effect that a sentencing judge must have regard to the current guidelines on sentencing for a particular crime or category of crime. It seems to us that any list of factors justifying the suspension of sentence would need to be specific to the offence, or to the category of offence. We think it would be beneficial to have a dedicated guideline for sentencing in sexual cases, setting out clearly the circumstances in which fully suspended sentences, and partly suspended sentences, are justified, as far as possible.

That said, a non-exhaustive list of factors is likely to be more acceptable to our sentencing judges and to be regarded as being in the interests of justice, as it allows for novel circumstances to be taken into account. The precise mechanism by which the list of factors is taken into account is less important than its acceptance by those who must use it. We think judges should be encouraged to contribute to every stage of the development and maintenance of such guidelines (they all have to be revised regularly).

2.6 ISSUE 6: Suspended Sentences and Corporate-Related Offences

QUESTION 6:

RCNI has no responses to make to Question 6.

2.7 ISSUE 7: Combining Suspended Sentences with Other Orders

QUESTION 7:

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

RCNI Response: No. A suspended sentence should not be imposed where an immediate prison sentence is not warranted. This would contravene the *O'Keefe/Mah-wing* principle outlined under QUESTION 7 above in any event – as imposing a CSO implies that the threshold for a custodial sentence to be imposed, has not been reached.

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?

RCNI Response: It may in very exceptional circumstances be justifiable to impose a fully suspended sentence for a serious sexual offence, and in somewhat less exceptional but still infrequent circumstances to impose such a sentence for a less serious sexual offence (see Responses to QUESTIONS 2 and 5 above). It may be justifiable to impose a partly suspended sentence in other circumstances. In either case, the threshold for the imposition of an immediate custodial sentence should be presumed to have been reached. It follows that in our view, a suspended sentence should never be imposed unless the offence is serious enough to warrant an immediate and/or lengthy sentence of imprisonment.

With regard to Post-Release Supervision Orders under the Sex Offenders Act 2001 as amended, it seems to us that these are not a substitute for partly suspended sentences but may work well in tandem with them to assist with managing the risk posed by released sex offenders, and with their supervision and rehabilitation. There is a useful checklist of the advantages and disadvantages of both PRSO's and partly suspended sentences, to be found in a paper published by the Department of Justice and Equality in 2009 entitled "The Management of Sex Offenders: a Discussion Document"⁴

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

RCNI Response: No. In our view, this would be wrong in principle. It would mean that convicted persons who are rich enough to pay compensation would escape imprisonment. This is not fair to other less well off persons convicted of the same crime. It would also mean that money would be equated with deprivation of liberty as a punishment. For victims of sexual offences, this would be unlikely to represent real retribution or punishment. In fact, our experience is that most victims view compensation not as a substitute for imprisonment but as a form of restitution at best and as a minimisation of their suffering at the hands of the offender and/or a more or less blatant attempt on his/her part to avoid a well-deserved custodial sentence, at worst. They do not see it as a punishment which is appropriate to the gravity of the offending behaviour.

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?

RCNI Response: No, not in sexual cases at least. A compensation order is made at the discretion of the sentencing judge, takes into account the ability of the offender to pay it and may be set aside or reduced by another judge on the application of the offender. It does not reflect any remorse, apology or serious effort at rehabilitation on the part of the offender.

2.8 ISSUE 8: Section 99 of the Criminal Justice Act 2006

⁴ Accessible through the following weblink:

<http://www.justice.ie/en/JELR/FINAL%20REPORT.pdf/Files/FINAL%20REPORT.pdf>

QUESTION 8:

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

RCNI Response: Yes. If it is, there can be no confusion about what is and what is not allowed in relation to suspended sentences. However, the statutory provisions should reflect the current flexibility of the common law power to suspend sentences of imprisonment.

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

RCNI Response: In principle, no, so as to allow maximum flexibility to the sentencing judge and to those who must supervise the offender during the period of suspension. However, the period of part suspension for a serious sexual offence should not be so long that there is no element of appropriate punishment or deterrence in the sentence sufficient to mark the gravity of the offending behaviour.

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

RCNI Response: See Response to last question.

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?

RCNI Response: In principle, no, it should not.

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

RCNI Response: No, because that would reduce the flexibility of the nature and number of conditions which may be imposed. A compromise might be an **open** list of conditions which identifies all the most common conditions which have been found by Gardai and Probation officers to be useful for specific deterrence and/or rehabilitation purposes. Any condition identified by either Gardai or Probation as essential or useful should be included on this list.

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?

RCNI Response: It should continue to be any offence. This is simpler for everyone concerned. More importantly, if any offence can be a triggering offence, it means that offenders will be deterred not just from imprisonable offences (e.g.) but also from those which cause harm but are not imprisonable (purchasing sexual services, for example). In our view, this is desirable.

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)?

RCNI Response: The relevant Section is reproduced here for convenience. (From the Issues Paper Consolidated Version, including changes which will be made by the incoming Criminal Justice (Suspended Sentences of Imprisonment) Act 2017, not yet in force⁵):

[Criminal Justice Act 2006] Section 99(17): “A court shall, where it is satisfied that a person to whom an order under subsection (1) applies has contravened a condition of the order, revoke the order unless it considers that in all of the circumstances of the case it would be unjust to so do, and where the court revokes that order, the person shall be required to serve the entire of the sentence originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any period of that sentence already served in prison and any period spent in custody pending the revocation of the said order”.

RCNI’s tentative view is that this Section means that if an order made under section 99(1) is revoked under section 99(17), then it no longer has any effect into the future. Therefore if the judge decides that in all the circumstances of the case it would be unjust to revoke the order, it continues in being, and in such a case, it would be possible either for a subsequent breach of a condition of the order, or for the commission of a subsequent offence, to result in a separate application for revocation of the order. However, if the judge decides instead to revoke the order, and to require the person to serve all or part of the original sentence of imprisonment, the order does not continue in being, and accordingly, there can be no further possibility of a subsequent breach of a condition or of the subsequent commission of an offence during the remainder of the original sentence, resulting in the order for suspension being revoked.

RCNI/LPD/1

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Working towards a society free from abuse

⁵ As of COB 20 October 2017