# Legal Recommendations

# From “Rape and Justice in Ireland”

# RCNI Position Paper

**May 2012**

## 1.0 Introduction to RCNI Position Paper on Legal Recommendations from "Rape and Justice in Ireland"[1]

### Rape Crisis Network Ireland

**Rape Crisis Network Ireland** (RCNI) is a specialist **information and resource** centre on rape and all forms of sexual violence with a proven capacity in strategic leadership. The RCNI role includes the development and coordination of national projects including expert data collection, using our expertise to influence **national policy and social change** and supporting **Rape Crisis Centres** to reach best practice standards. We are the representative umbrella body for our member Rape Crisis Centres who provide **free advice, counselling and support** for survivors of **sexual abuse** in Ireland.

### 1.1 Rationale, Scope and Structure of this Paper

Following the publication of "Rape and Justice in Ireland" (RAJI) in late 2009, Rape Crisis Network Ireland began to plan a strategy to forward the implementation of as many of its recommendations as possible. Legal reforms are an important part of this strategy. Some major changes to criminal law and procedure are the subject of two other RCNI position papers containing proposals through which other RAJI recommendations on Reducing Delay and Previous Sexual History Evidence, respectively, could be implemented. This document discusses most of the remaining specific legal recommendations in RAJI and puts forward detailed proposals for their implementation.

This paper is structured as follows: it is divided into sections. Each RAJI recommendation is quoted in full at the head of the section, the discussion then follows, and the proposals are at the end of that section. The order of the sections follows the usual timeline of the criminal justice process, from bail to sentencing and beyond.

### 1.2 Bail:

**RAJI Recommendation 13:**"Bail in rape cases should always be subject to strict conditions which are swiftly and rigorously enforced. At a minimum, defendants should be required to be of good behaviour, to stay away from the complainant unless absolutely necessary and to stay within the jurisdiction of the Irish courts. Bail should not be granted to a defendant who has been convicted of rape."

The District/Circuit/High/Central Criminal Court judge, as appropriate, has responsibility for the correct application of the current bail laws and/or any bail conditions to help ensure the safety of the complainant pending and during the trial and after conviction up to sentence.

[1] "Rape and Justice in Ireland" is the research report in book form of a large-scale longitudinal study of the reasons for attrition in rape cases at the three stages of Reporting, Prosecution and Trial Process, commissioned by the RCNI and undertaken by the National University of Ireland Galway team led by RAJI authors Conor Hanly BL, Stacey Scriver and Deirdre Healy, published in 2009 by the Liffey Press and available through the RCNI website, www.rcni.ie

Until the Bail Act 1997 came into force, our judges could only refuse bail where there were concerns that the accused person would not appear in court for trial, and/or that he/she would interfere with evidence, witnesses or jurors in the trial, if released on bail. Since Section 2 of BA 1997 came into force, a judge may now refuse bail to a person charged with a "serious offence" as defined by the Act, on a third ground, namely that he/she is satisfied that "such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person".[2]

While this provision from BA 1997, now amended by the Criminal Justice Act 2007 Sections 5 and 6, is broadly welcomed, RCNI submits that there is scope to include further restrictions in cases of rape and aggravated sexual assault, as follows:

**Before Conviction:**

- strict conditions which include a condition not to contact the victim and/or any other family member, directly or indirectly, except with the permission of the Court, should be the norm whenever a person is granted bail on a charge of sexual crime. In other words, the circumstances in which such conditions are not imposed should be exceptional;
- If a judge is satisfied, on application by a senior member of An Garda Siochana, that one or more incidents of victim intimidation and/or harassment have occurred while the accused person is on bail, whether carried out by the alleged offender or by others acting on his behalf, and whether against the victim or against others associated with him/her, this should result in the withdrawal of the right to bail for the accused;
- a person who is not charged with a serious offence should be refused bail, if the court is satisfied, on account of his/her criminal record and/or other matters proved against him/her, that "such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person";

**After Conviction:**

- At a minimum, there should be no presumption in favour of bail once an accused person has been convicted of rape and/or aggravated sexual assault pending sentence; bail should only be granted after conviction for these offences in **truly exceptional** circumstances;
- There should be an obligation on prosecuting lawyers to elicit and put forward the views of the victim on bail for the accused to the judge, after conviction;
- Any bail granted post-conviction should continue to be subject to strict conditions, as outlined above; and
- Section 2 BA 1997 should be amended further to effect these changes.

### 1.3 Conduct of Trial: Judges' Charge to Jury in Rape Cases

[2] Section 2(1) Bail Act 1997: "Where an application for bail is made by a person charged with a serious offence, a court may refuse the application if the court is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person….", available online at http://www.oireachtas.ie/documents/bills28/acts/1997/a1697.pdf

**RAJI Recommendation 16:** "There should be a statutory obligation on judges to instruct juries that a conclusion that the complainant acted foolishly does not of itself make her wholly or partially responsible for the rape."

In the view of the RCNI, such an instruction to the jury would go some distance to address the prevalent myth that responsibility for guilt in a criminal trial can and sometimes should, be shared between the accused person and the complainant. However, rather than draw the attention of the jury in every case to the details of the complainant's behaviour, RCNI submits that the instruction itself should be worded more generally and should be in essence, a small expansion of the traditional instructions on standard of proof and the jury's role in the trial. It should emphasise that:

(1) The standard of proof is a high one, as now;
(2) Their task is to decide whether the prosecution has proved its case against the accused beyond reasonable doubt, as now;
(3) In so deciding, they do not have to and should not consider whether anyone other than the accused bears any part of the responsibility for the crime of which he stands accused.

### 1.4 Conduct of Trial: Personal Cross Examination of Complainants in Sexual Violence Trials

**RAJI Recommendation 20: "**A defendant in a rape case should be forbidden by statute to conduct a personal cross-examination of the complainant".

RCNI believes that victims of sexual violence should not have to submit to cross-examination by the accused in person. Accused persons can and have used this opportunity principally to humiliate and re-traumatize the victim[3]. In our view, this is a flagrant and unjustifiable infringement of the complainant's rights with potentially serious consequences for her mental health and well-being. It also has potentially serious consequences for the reporting of rape generally, as the fear of personal cross-examination can act as a powerful deterrent to victims of sexual violence considering making a complaint, or considering withdrawing a complaint already made.

**Accused: does he/she have a right to cross-examine the complainant in person?**

**Irish Constitution and Criminal Law:** It seems clear from the history of the Irish criminal justice system that the **right** of the accused is not to represent himself, but to be represented by an advocate. There can be no doubt about the paramountcy of the right of the accused to a fair trial as expressed in our Constitution[4] and interpreted by our Courts[5].

[3] See for example in Ireland, the case of DPP vs Mariusz & Pawel Ludecke in the Central Criminal Court, reported in the Irish Times, 7 July 2005, in which the accused cross-examined the complainant in person at great length during a trial which lasted 31 days in total, and in England, the case of R v Edwards (1996), in which the accused cross-examined the complainant in person over a six-day period, cited in Rape and Justice in Ireland, supra, pp 353-4, which in turn quoted from Rock, P. 2004. *Constructing Victims' Rights: The Home Office, New Labour and Victims*, Clarendon Press, Oxford, pp 348-9.

[4] Article 38.1 of Bunreacht na hEireann: "...right to a trial in accordance with law.."

The right to legal representation is part of the bundle of specific rights which have been recognized by our Courts as essential to a fair trial for the accused[6], however neither our case law nor our statutory provisions recognize any right to represent oneself in person as opposed to through a lawyer. Even if there were, should it not be qualified as far as personal cross-examination in a sexual violence crime case is concerned, at the very least? As a leading academic writer has put it: "It is incumbent upon the State…to provide for an effective remedy for victims that does not require them to be brutalized a second time by cross examination by the accused in person."[7]

**European Convention on Human Rights[8]:**

**Article 6: Right to a Fair Trial [Extract]:**

**"…..**3 Everyone charged with a criminal offence has the following minimum rights:
……c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;……."

These two "minimum rights", to defend oneself in person or through legal assistance, and to examine or have examined witnesses against oneself, indicate that an accused person might be able to rely on European law to uphold a claim that he has a right to cross-examine a complainant in person – at first glance. In fact, it appears from the case law that the European Court of Human Rights interprets self-representation and representation by a lawyer as alternatives which can fulfill the requirements of these subparagraphs equally well. See the case of Croissant vs Germany, for instance,[9] in which it was held that it was for the trial judge to determine whether or not the accused person should have legal representation against his expressed wishes, in the interests of justice. In the event, the

[5] DPP vs D, [1994] IR 465, SC, per Denham J: "The applicant's right to a fair trial is one of the most fundamental constitutional rights afforded to persons. On a hierarchy of constitutional rights it is a superior right.", at page 474 and see also similar dicta in DPP v Z [1994] 2 IR 476.

[6] The State (Healy) v. Donoghue [1976] I.R. 325, per O'Higgins C.J., at page 350:"If the right to be represented is now an acknowledged right of an accused person, justice requires something more when, because of a lack of means, a person facing a serious criminal charge cannot provide a lawyer for his own defence. In my view the concept of justice under the Constitution, or constitutional justice … requires that in such circumstances the person charged must be afforded the opportunity of being represented. This opportunity must be provided by the State. …"

[7] Conor Hanly in his paper, "Finding Space for Victims", available online at http://www.lawsociety.ie/documents/committees/hr/conference_papers/Finding%20Space%20for%20Victim.pdf

[8] English text of ECHR is available online at: http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf

[9] *Croissant v. Germany* (1993) 16 E.H.R.R. 135. Full text of the judgment is available online at: http://legislationline.org/documents/action/popup/id/8260, Summary available online at: http://sim.law.uu.nl/sim/caselaw/Hof.nsf/2422ec00f1ace923c1256681002b47f1/03121e37aab1a94bc1256640004c1922?OpenDocument

accused did not satisfy the Court that there was any risk of prejudice to his case resulting from the Court's appointment of a lawyer to represent him, and the proceedings were allowed to stand.

In this age of State-funded legal aid for expert representation before the criminal courts, it cannot be said with any degree of credibility that an accused person is at a disadvantage if he is represented by counsel or solicitor as opposed to representing himself[10]. In fact, his right to a fair trial under our own Constitution as interpreted by a long line of authorities, means in practice that his representative will be given enough time to prepare his defence thoroughly, and this protection is reinforced by Article 6 of the European Convention on Human Rights at subparagraphs 3 (a) and (b), which cites the following minimum rights for the accused:

"...a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b to have adequate time and facilities for the preparation of his defence;…"

RCNI's view is that only a statutory prohibition on personal cross-examination of the complainant by the accused would ensure that there was no possibility that she/he would have to endure the trauma of any questioning by the accused in person. Accordingly, we recommend that such a statutory prohibition be introduced as soon as possible.

### 1.5 Sentencing of Sex Offenders:

**1.5.1 RAJI Recommendation 17:** "The apparent judicial hostility to consecutive sentences needs to be justified or abandoned."

**Background:** In theory, consecutive sentences may be imposed where two offences of which the offender is convicted on the same occasion do not arise out of "a single transaction"[11]. In practice, consecutive sentences are very unusual in the Irish criminal justice system. RAJI[12] reported that only 2% of all sentences for more than one offence in its sample were consecutive, and the proportion of consecutive sentences for sexual offences

[10] There is support for this concept in this European case: Doorson vs the Netherlands 29, (1996) 22 EHRR 330, at paragraph 70:
"It is true that Article 6.....does not explicitly require the interests of witnesses in general, and those of complainants called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8.. of the Convention. Such interests of witnesses and complainants are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or complainants called upon to testify".

[11] RAJI page 306, citing Thomas O'Malley's 2006 book, O'Malley, T. 2006. *Sentencing Law and Practice*, 2nd ed., Thomson Round Hall, Dublin, which in turn cites another earlier authority: "Sentencing theory holds that sentences for offences committed as part of a single transaction should run concurrently, while sentences for offences that do not form part of a single transaction should run consecutively (O'Malley, 2006: para.7-01, citing Thomas, 1979: 53)..." The second reference is to Thomas, D.A. 1979. *Principles of Sentencing*, 2nd ed., Heinemann, London.

[12] RAJI page 307; see note 1 for full reference

has not changed materially since then. Concurrent sentencing for sexual offences is the norm, whether or not the offences arose out of a "single transaction". [13]

**Concurrent Sentencing for Multiple Sexual Offences: What is the Victims' Perspective?**

Concurrent sentences in respect of **two or more different victims of the same offender** can be a very bitter pill to swallow for those victims. It often seems to them that the harm done to them by the offender is not reflected adequately or fairly by a sentence which runs concurrently to another. This translates for many victims into the sense that society as a whole has not acknowledged fully the extent of that harm. Another common experience for victims is the feeling that if the offender only got a concurrent sentence after they themselves have been put through the mill of prolonged, hostile and demeaning cross-examination, - it was hardly worth putting themselves through such an ordeal. A case which illustrates this point very clearly is one cited in "Rape and Justice in Ireland", DPP vs Byrne (1995)[14], in which the offender was sentenced to ten years for the rape of one woman, and ten years for the unrelated rape of another woman, the two sentences to run concurrently.

Of course, concurrent sentencing can also arise in relation to **two or more offences against the same victim.** Indeed, sexual violence against a child often takes the form of a long series of offences over months or years. The effects of such abuse are extremely damaging and far-reaching for the victim. Concurrent sentencing, where only a small sample of the offending behaviour is represented, does not reflect the seriousness of these effects for many victims. It is difficult for them to feel that society has acknowledged the true extent of the wrong done to them in these circumstances, and difficult also for them to feel that their courage in coming forward has been rewarded.

Such reactions are entirely valid, natural and understandable. It hardly needs saying that none of them is likely to encourage more victims of sexual violence to come forward and report what has happened to them to the Gardai.

**Concurrent Sentencing for Multiple Sexual Offences: Is it in the interests of justice generally?**

This question is more difficult. In addition to the concerns of victims, there is a public policy argument that to impose concurrent sentences in virtually all circumstances in effect encourages multiple offending, as there is little risk that each separate offence would result in a discrete sentence on conviction. While this is impossible to measure scientifically, we can say with some confidence that concurrent sentencing regardless of circumstances sends out the wrong message to prospective and actual perpetrators of sexual violence. That message is that multiple sexual violence offences, which in any event are reported and

[13] see RAJI pages 305 to 307, full reference at note 1

[14] *DPP v. Byrne* [1995] 1 I.L.R.M. 279, cited in RAJI at page 306

prosecuted in small numbers relative to their prevalence[15], can be committed without the fear of a greatly increased prison sentence as compared to that imposed for a single offence.

The usual counter-arguments run as follows:

(1) If consecutive sentencing were the norm in many cases of historic child sexual abuse, with multiple counts and multiple victims, the overall sentence would be likely to be an American-style **multiple of an offender's maximum lifespan**. In fact, it would mean the term of their actual life for many serial abusers. As there would be no prospect of temporary or early release, there would be little or no incentive for these sex offenders to engage in sex offender programmes or other positive interventions in prison. A related utilitarian point is that it would cost an enormous amount of public money to warehouse these prisoners for such a long time.

(2) Consecutive sentencing, particularly for multiple offences against one or more victims, can arrive at a result which offends the **proportionality principle** which is a cornerstone of our sentencing practice. This principle has been elaborated in our case-law, for example in the recent Court of Criminal Appeal judgment in the case of D P P vs P O'C[16]. In essence, the length of sentence should be proportionate to the nature of the crime and to the circumstances of the offender. What is proportionate therefore, will depend on the aggravating and mitigating factors of the particular offence, as well as on the offender's personal circumstances and background, including his "tactical decisions" during the lifetime of the proceedings and his own previous convictions, if any. DPP vs P O' C also makes it clear that the victim's circumstances may also be relevant.

(3) Consecutive sentencing remains as much subject to the **totality principle** as concurrent sentencing. As the authors of RAJI point out:[17]the total aggregate period to which the offender is sentenced should be assessed in terms of proportionality.[18]

[15] The only major prevalence study of sexual violence in Ireland is: McGee, H., Garavan, R. de Barra, M., Byrne, H. and Conroy, R. 2002. *The SAVI Report: Sexual Abuse and Violence in Ireland*, The Liffey Press, Dublin. This study reported figures of 6% overall reporting sexual assault experienced as adults to the Guards, while the overall figures for those reporting child sexual abuse to the Guards as adults, was 8% (SAVI, xxxvii),

[16] [2009] IECCA 116 (Judgment of Mrs Justice Denham).

[17] P 306 RAJI

[18]RAJI cites this case as authority for this: *People (DPP) v. TB* [1996] 3 I.R. 294.

DPP vs P O'C is interesting for another reason: it states that "there is no rule of law……that a person who commits a series of offences within a few years' time span if imprisoned on one offence will receive concurrent sentences for the other offences carried out at about the same time [but not charged at that time]..". The result of this case was that an earlier three year sentence for indecent assault was upheld, the last year only being suspended on conditions, even though that sentence was for an offence which had been carried out in the same time period as several others in respect of which the offender had already served a prison sentence. While the Court accepted the submission of the DPP's representative that the "sentence imposed in this case does not equate to a consecutive sentence", in essence it did treat that case as one where a separate, ie consecutive, sentence, ought to be imposed.

RAJI[19]cites the single case in its sample where concurrent sentences were substituted for consecutive ones on appeal[20]. However, as in D P P vs P, this appeal against sentence did not reduce the overall length of the sentence at all.

An important issue is whether concurrent sentencing in all but the most unusual cases[21], leads to unduly short sentences. The indications from RAJI are that this is not likely to be the case at least as far as rape offences are concerned, as the mean length of sentence for rape in its sample is nearly 9 years, and the median length is over 8 years. Another indicator that sentences for rape offences are not unduly short is the comparison with other English-speaking jurisdictions in RAJI: only the United States had longer mean sentence lengths for rape than Ireland.[22]

RCNI recommends that current sentencing practice be modified to this extent at least: where different victims are concerned, consecutive sentencing should be the norm, to vindicate and recognise the harm that has been done to **all** these victims. The proportionality and totality principles can then be applied to the overall length of sentence, so that individual victims can be confident that the harm done to him/her is acknowledged by our criminal justice system. It is clear from the RAJI findings and from our more recent sentencing cases that our judiciary is willing to impose a lengthy overall sentence in an appropriate case[23]. However, the harm done to **every** victim concerned also needs to be

[19] See full reference for RAJI (Rape and Justice in Ireland) at note 1

[20] See RAJI page 307 (no case name given)

[21] RAJI cites DPP vs McKenna (no.2) (2002) 2 I.R. 345, as an example of this at pages 306/7. The Court of Criminal Appeal indicated where in its view, consecutive sentences might be appropriate: "[eg] sexual misconduct with different persons or over a much longer period of time than is the case here and that, perhaps too, the misconduct would have been attended with circumstances of depravity beyond the actual act of intercourse"

[22] P 330 RAJI

[23] The case of DPP vs GK [2008] IECCA 110 illustrates this: a sentence of 16 years was substituted for an initial life sentence for aggravated sexual assault by an offender previously convicted of two rapes, judgement

recognized clearly at the sentencing stage, both in the overall length of sentence imposed and in the reasons given by the judge for his/her decisions on sentence.

Such a principle in respect of **unrelated offences to different victims** at least, could form part of a sentencing regime informed by sentencing guidelines for sexual offences. RCNI's view is that such guidelines could build in the necessary flexibility to take account of the wide range of different circumstances surrounding offences, the offender, and the victim. RCNI also recommends that any departure from consecutive sentencing for unrelated offences involving different victims should be justified and explained fully and clearly in the judge's announced reasons for his/her decisions on sentence.

The cumulative damaging effect of many offences in relation to the **same** victim should also be reflected in the overall length of sentence imposed and in the reasons given by the judge for his/her decisions on sentence. While American-style "multiple lifetime" sentencing is alien to the Irish system, nevertheless it is possible for our own sentencing system to reflect the increased gravity of multiple offences against a single victim, while still respecting the proportionality and totality principles.

RCNI recommends that new sentencing guidelines for sexual offences should cover this situation in some detail, not least because it is a very common one. A starting point might be to consider consecutive sentencing for **offences of different types** against the same victim, particularly when the gravity of the offences has increased over time. This would go some way towards recognizing the extent of the harm done to the victim in the sentence.

### 1.5.2 RAJI Recommendation 18: "The interaction between suspended sentences and post-release supervision orders should be examined."

The authors of RAJI make the point that part-suspended sentences and post-release supervision orders may be imposed on the same offender, and question whether it is necessary to have two separate regimes in respect of the same need for control and supervision of the behaviour of sex offenders after release from prison. These two regimes were not designed in the first place to complement each other and when they are both imposed on the offender, the results can seem illogical. For example: if an offender is obliged to be of good behaviour during the period of suspension in accordance with Section 99 of the Criminal Justice Act 2006 which governs part-suspended sentences, does it make sense for the Court to impose a period of post-release supervision on him also? As the authors of RAJI put it, [24] "..if such supervision is necessary, is this not tantamount to an admission that the offender's bond to be of good behaviour is insufficient? If so, it is surely

available online at:
http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/bc6a7728aa9d4c788025749f0054a46e?OpenDocument

[24] Page 334 RAJI

arguable that [the offender] was an unsuitable candidate for a suspended sentence in the first place".

**Post-Release Supervision Orders and Part-Suspended Sentences Contrasted**

The first and most obvious answer to this charge is that it does not consider an important purpose of probation supervision in general, that is, to provide supports to the offender to help him/her in the process of rehabilitation and reintegration into society after release. In addition, the Sex Offenders Act 2001 sets out the factors which the judge must consider when deciding whether to impose a post-release supervision order on a sex offender. These include "the need to rehabilitate or further rehabilitate the offender" (Section 28(2)(d) of the Sex Offenders Act 2001 as amended).[25]

Secondly, part-suspended sentences and post-release supervision orders are different in terms of duration. A part-suspended sentence is a term of imprisonment whose length is fixed in accordance with the long-established principles of proportionality and totality described above. It is part-suspended on conditions for which the penalty is the activation of the remaining portion of the sentence. However, the original sentence cannot be extended by the imposition of a new sentence as a sanction for the breach. Post-release supervision orders, on the other hand, begin once the fixed term of imprisonment comes to an end. The sum of the term of imprisonment and the supervision period cannot exceed the maximum sentence for the offence concerned, but there is no other automatic restriction on the length of the supervision. As the offences of rape and aggravated sexual assault all carry maximum life sentences, the post-release supervision order can extend for a very long time after release.

Thirdly, procedure in the case of breach of each kind of sentence is different. In the case of part-suspended sentences, the procedure is flexible, in that any new conditions which suit the circumstances of the case may be imposed, and swift, in that any detected breach of conditions of the suspension can trigger a rapid hearing in front of the sentencing judge and a rapid return to prison, if the breach is proved. If a breach of a post-release supervision order is suspected, it has to be investigated, charged and tried as a summary offence. This means that the procedure on breach is slow and the sanction imposed, if any, does not necessarily reflect the seriousness of the breach. It has some flexibility, in that existing conditions may be varied or removed, but not added to. It does mean that in effect, the original sentence can be extended by a maximum of twelve months as a sanction for the breach[26].

[25] The same subsection also lists the prevention of further sexual offences and the protection of the public from serious harm from the offender as other factors to be taken into account.

[26] See Appendix 1 for a list of the advantages and disadvantages of each type of sentence, taken from "The Management of Sex Offenders Discussion Document"(2009) put together by the Working Group on the

Fourthly, the Probation Service is not necessarily involved when part-suspended sentences are imposed, but always is when post-release supervision orders are included in the sentence.

Finally, the sentencing judge is under no obligation to consider whether any term of imprisonment involving a sex offender should be part-suspended, but he/she must consider whether to impose a post-release supervision order when sentencing a sex offender.

**Part-Suspended Sentences and Post-Release Supervision Orders: Unnecessary Duplication?**

It is clear that these two kinds of sentences may be imposed on the same sex offender, and that he/she could be subject to supervision on two separate bases on release from prison. Each kind of sentence can have a wide variety of different conditions attached, and there is no requirement that they be the same, or that they should complement each other. Of course in practice, a sex offender would not be expected to attend two sets of probation appointments or two identical treatment programmes, after release – even if this were desirable, the resources are unlikely to be made available for such duplication.

As in practice there would not be duplication of supervision and/or treatment resources, the issue becomes whether there is any **risk management** advantages to the present sentencing regime? RCNI believes that there are, and that there is also more which could be done to ensure that these two sentences work better together.

**Risk Management Advantages of Part-Suspended Sentences imposed with Post-Release Supervision Orders:**

- Continuation of supervision, treatment, and other conditions necessary to prevent further offending and to further the rehabilitation and reintegration into society of the sex offender – these two sentences when imposed together, provide a framework through which such continuation is possible **if appropriate, for a lengthy period beginning from the time of release;**
- Part-suspended sentences, like temporary release following a positive recommendation by the Parole Board, provide a **powerful incentive for compliance** with their conditions, as the sex offender can have the remainder of his sentence activated on proof of breach of any of these conditions, quickly and simply. As has been pointed out, the activation period of a part-suspended sentence is likely to exceed 12 months, the maximum additional penalty for breach of a post-release supervision order, in many cases.[27] This incentive comes into play at a challenging time for most sex offenders, the period immediately after release.

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Integrated Management of High Risk (Sex) Offenders, available online at: http://www.justice.ie/en/JELR/FINAL%20REPORT.pdf/Files/FINAL%20REPORT.pdf

[27] See Appendix 1 above

- In turn, compliance with supervision, treatment and other conditions means that risk management should be straightforward for the Guards and the Probation Service, and that new problems can be dealt with swiftly as they emerge. This in turn will **reduce the level of risk** to the community in general from that offender;
- The flexibility of the part-suspended sentencing option means that new conditions can be added on to the original sentence if the need arises, quickly and simply. This has obvious advantages from a risk management perspective.
- While the **current post-release supervision order regime** is less flexible and more cumbersome, especially when a breach is suspected – and therefore may be less effective as an incentive towards compliance with its conditions – nevertheless **it is useful from a risk management perspective**, as it can extend a long time after the fixed term of imprisonment comes to an end.
- This also means that the overall period of judicial supervision of the sex offender can extend many years after the sentence is imposed, if necessary.

**RCNI recommends that the following changes be made to our sentencing laws in order to ensure that effective risk management of released sex offenders is facilitated by our sentencing regime as much as possible:**

- There should be an obligation on sentencing judges to consider whether a part-suspended sentence with appropriate conditions, should be imposed on a sex offender, in every case;
- In the case of sex offenders, the criteria to decide whether such a sentence should be imposed should be the same as those which the judge must consider when deciding whether to impose a post-release supervision order;[28]
- Where the judge does decide to impose both a part-suspended sentence and a post-release supervision order, he/she should consider the conditions for both sentences together and make clear why he/she is imposing each condition in open Court;
- To enable the judge to make his/her decision on sentencing on as well-informed basis as possible, there should be an obligation on the sex offender to co-operate with any pre-sanction assessment by the Probation Service necessary for the preparation of its Pre-Sanction Report, or other pre-sanction report directed to be prepared by the judge by another person or body which the judge decides is necessary;
- if the offender does not comply with this requirement to co-operate, his sentence could be increased as a consequence;
- Any set of conditions attached to **either** a part-suspended sentence **or** a post-release supervision order, should include as standard a general condition that the offender comply with **all** of the specific conditions imposed
- Our laws should be amended to make it possible for a judge to **add new** conditions to existing post-release supervision orders, where appropriate, quickly and simply, on the application of a Probation Officer; - it is a reasonable criticism of the present regime that post-release supervision conditions imposed at the

[28] Section 28 SOA 2001, available online at: http://www.oireachtas.ie/documents/bills28/acts/2001/a1801.pdf

time of sentence may be irrelevant or insufficient, years later when the offender is released;
- Our laws should also be amended to enable potential breaches of post-release supervision orders to be brought before a judge **swiftly and easily;**
- Maximum penalties for breach of post-release supervision orders should be increased to reflect the **gravity** of these breaches, where appropriate.

**Where there is no Part-Suspended Sentence and/or Post Release Supervision Order imposed, and the Sex Offender is not subject to Temporary Release conditions:**

It is important to note that there is a cohort of released sex offenders who are not subject to any supervision regime after release, but who should also be supervised and supported effectively to ensure that in their case, the **risk of re-offending** is also managed and if possible, reduced. RCNI recommends therefore that:

- **All** sex offenders should be subject to a minimum period of supervision on release from prison, whether or not a part-suspended sentence and/or post-release supervision order has been imposed;
- It should be possible for the Probation Service to apply to add, vary or remove any condition at any point during that period;
- The Probation Service should have the option to apply to have this minimum period of probation extended, in an appropriate case; and
- There should be appropriate penalties for failure to comply with such supervision.

These changes will mean that over time, there will be a more unified system of Court, Probation and Garda supervision of sex offenders from the point of release until many years later, if necessary.

### 1.6 Compensation for Complainants in the Criminal Courts:

**RAJI Recommendation 23:** "It is recommended that section 6 of the Criminal Justice Act 1993 be amended to clarify and strengthen the victim compensation procedures. Compensation should be considered in every case in which a crime has been shown to have been committed.

To ensure that this is done, it is recommended that a statutory obligation to seek compensation on behalf of the complainant be imposed upon the DPP".

**Court-Ordered Compensation From Convicted Person to Complainant under Section 6 of the Criminal Justice Act 1993:**

There are several difficulties about this statutory scheme from the point of view of the victim of crime:

- Section 6 of the Criminal Justice Act 1993 is **not mandatory**. There is no obligation on the sentencing judge and/or the prosecuting lawyer, to raise the issue of compensation of the complainant by the convicted person.

- If compensation is raised at sentence, or the judge considers it of his/her own motion, he/she must also consider the **means of the convicted person** who must pay it. While compensation under this Section can cover a wide range of losses, it can be paid in instalments, and the convicted person can apply at any time after the sentence to have those instalments reduced, or even abolished, if his/her means diminish.
- These limitations mean that it is questionable whether any compensation payable to the complainant under this Section for the damage caused to him/her by the crime could be described as "fair and appropriate"[29], or as "adequate"[30], given the extensive and varied nature of the damage caused by sexual crime;
- Section 6 takes effect before sentence is passed and therefore, is likely to impact on the sentence handed down.

RCNI recommends as an interim measure that this Section be amended to introduce an obligation on the judge to consider whether compensation may be awarded in each case, and also, an obligation on the lawyer representing the DPP to seek compensation for the complainant from the judge. However, we think that there is a danger under the present compensation arrangements that some sex offenders may in effect succeed in buying themselves out of a jail sentence. It cannot be right in principle that convicted persons with more money should have a means of avoiding imprisonment which is denied to those with less money. It would be better, in our view, to separate compensation applications on behalf of the victim of crime altogether from the sentencing process[31].

In the longer term, a statutory scheme should be established, by which a victim of crime may access some amount of compensation from the State where a person is convicted in the criminal courts of a crime of violence, but has no means to pay compensation to their victim. This scheme should operate quickly and simply, and it should not be necessary for the victim to instruct a lawyer to represent them.

**Compensation for Complainants in Sexual Crime Cases under the Criminal Injuries Compensation Scheme:**

This Scheme is a non-statutory means of assessing and providing a measure of State compensation to victims of violent crime, in the absence of an identified perpetrator who has been convicted. It is also questionable whether it could be said to provide either "fair and appropriate" or "adequate" compensation to these victims. It does not cover compensation for pain and suffering, and has many other limitations. At a minimum, the

[29] To use the wording of the 2004 EU Directive on Compensation for Victims of Crime

[30] To use the wording of Article 15(2) of the new EU Directive on Victims of Crime, cited above: "Member States shall take measures to encourage to provide adequate compensation to victims"

[31] This view was supported by James Hamilton, then DPP, in his speech at the launch conference of RAJI in 2009: "In my opinion the procedure for ordering compensation to a victim should follow sentencing and not be taken into account in determining sentencing. It should not be regarded as a part of the punishment inflicted on the offender but rather as a recompense to the victim. Section 6 should in my view be amended to so provide in its application to rape cases and indeed offences of personal violence generally"

Scheme should be put on a statutory basis, should include compensation for pain and suffering, and should relax such exclusions and restrictions as the very short time limit (3 months after crime) and the necessity to make a report to the Guards soon afterwards, and expunge altogether the following: no compensation for some victims who shared accommodation with the perpetrator at the time of the crime, diminished or no compensation if the actions of the victim were held to cause or to contribute to the crime, and diminished or even no compensation if the Tribunal is satisfied that the "conduct of the victim, his character or his way of life make it inappropriate" [to make any or a full award].

**Rape Crisis Network Ireland**
**May 2012**

**LPD/5**

# Appendix 1:

## Extract from the Joint Working Group on the Management of High Risk Sex Offenders Discussion Document, January 2009:[32]

"Post-Release Supervision

4.7.6 The system of post-release supervision orders [is set out in].. Part 5 of the Sex Offenders Act 2001[...]. Provision for the Post Release Supervision Order was a major step forward in that it allowed court-sanctioned supervision of offenders after their custodial sentence had expired.[....]

4.7.7 The advantages of the regime are as follows:

- it applies after the sex offender has finished his/her sentence and has been released back into the community;
- consideration must be given by the courts to impose a post release supervision order in the case of every sex offender convicted before the courts;
- the Probation Service are automatically involved;
- there is a penal sanction for non compliance; and
- there is judicial authority for the supervision.

4.7.8 The disadvantages which are mainly procedural are as follows:

- the decision to impose such an order and the conditions attached thereto are made at the time of sentencing which can be several years before the order takes effect;
- consequently the conditions may not be as relevant as they should be;
- while the order can be varied, it is unclear as to whether any new conditions could be imposed that could take account of developments and assessments in the intervening period; one option is to clarify this in new legislation;
- if the offender does not comply, a new prosecution has to be initiated in the District Court; The process can be slow and the outcome of a successful revocation not fully predictable. It is therefore not necessarily effective in motivating higher risk offenders and not necessarily responsive to more imminently dangerous situations; and
- post-release supervision orders are unlikely to act as an incentive for prisoners to undertake interventions, during their incarceration, aimed at addressing those factors that put them at risk of re-offending on release.

Part suspended sentences

4.7.9 The sentencing court has the power to suspend the execution of the sentence in whole or in part and make the suspension subject to conditions. The statutory provision for making an order to this effect is Section 99 of the Criminal Justice Act 2006. The person must be of good behaviour and the court may impose other conditions such as a requirement that the person cooperate with the Probation Service and undergo treatment or psychological counselling. The Probation Service may, at any time prior to

[32] Published 2009 and available online at:

the expiration of the sentence, apply to the court to impose new conditions. An example of a part-suspended sentence is a sentence of 8 years imprisonment with the last two years suspended. The offender would be released after serving the equivalent of a 6 year sentence and serve two years in the community subject to fulfilling the conditions set. A breach of the conditions results in re-imprisonment for the balance of the custodial sentence. Part-suspended sentences can apply to all categories of offender, including sex offenders.

4.7.10 The advantages of part-suspended sentences are as follows:

- they are flexible and the court has discretion to tailor them for individual offenders;
- they can be varied easily: if the latest assessment or other developments prior to release suggests a change is required, a Probation Officer can apply to court;
- the sanction for non-compliance is likely to be more effective. (This is because it is a more flexible approach than bringing a criminal prosecution. An application to the court can be made by the Garda Síochána, the Probation Service or a Prison Governor and will be heard by the court that imposed the original sentence. Furthermore, the outstanding suspended part of the sentence in most cases will involve a longer period of imprisonment than the maximum 12 months that can be imposed in a prosecution for non-compliance with a Post-Release Supervision Order); and
- there is judicial authority for the supervision.

4.7.11 The disadvantages are as follows:

- there is no obligation on the court to consider imposing a part suspended sentence in sex offender's cases;
- and the Probation Service are not automatically involved...."