

AN ANALYSIS OF SENTENCING PROVISIONS IN THE CRIMINAL JUSTICE ACT, 2006

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INTRODUCTION

There are a number of provisions in the Criminal Justice Act, 2006 relating to sentencing. One of the major effects the Act has on sentencing is to further erode the discretion of the courts in imposing sentence by introducing new mandatory minimum sentence provisions and strengthening existing provisions. The concept of a mandatory minimum term of imprisonment was quite alien to our system of criminal justice until the provisions of section 5 of the Criminal Justice Act, 1999 were enacted. The Court of Criminal Appeal has recently described this measure as “a revolutionary alteration superimposed on the conventional principles of sentencing”¹.

Part 5 of the Act, for example, introduces new mandatory minimum sentence provisions for certain firearms offences.² The Act completely erodes the discretion of the courts not to impose such minimum sentences where a person is being sentenced for a second offence.³ Part 8 of the Act continues to erode judicial discretion in sentencing for certain drug trafficking offences.⁴ Section 99 of the Act operates to restrict a judge’s power to suspend the whole or part of a “mandatory term of imprisonment” including a mandatory minimum term of imprisonment.⁵

Part 9 of the Act contains a number of provisions establishing what may be termed a “drug offenders’ register” similar to the so-called “sex offenders’ register”.

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¹ *The People (D.P.P.) v. Dermody*, Court of Criminal Appeal, unreported, Hardiman J., 21 December 2006.

² See, for example, s. 42 of the Criminal Justice Act, 2006.

³ s. 42 (7).

⁴ s. 84 (d).

⁵ s. 99 (1).

In particular, Part 10 of the Act contains a number of provisions relating to sentencing generally. These provisions allow for the suspension of the whole or part of a sentence of imprisonment and a new order known as a “Fine and Deferral Order”. Part 10 also creates a new order that can be imposed on offenders convicted of certain offences in the District Court or the Circuit Court known as a “Restriction on Movement Order” (RMO) and for the electronic monitoring of an offender who is subject to a RMO. Part 10 also contains provisions relating to the electronic monitoring of prisoners released on temporary release. Parts 9 and 10 of the Act came into force on 2nd October 2006, apart from the provisions with regard to electronic monitoring⁶.

In this article I propose to examine the provisions of Part 10 of the Act in detail and then to focus on the provisions of Parts 8 and 9 of the Act relating to drug trafficking offences.

I. PART 10: SENTENCING

A. *Suspended Sentences*

Section 99 of the Act provides a statutory framework for the courts to suspend the execution of a sentence, in whole or in part, subject to the person entering into a recognisance to comply with certain conditions. This will provide a statutory foundation to the already established practice of the courts to suspend terms of imprisonment either in whole or in part.

The concept of a suspended sentence⁷ was considered by the Supreme Court in the case of *O’Brien v. Governor of Limerick Prison*.⁸ O’Flaherty J. drew a distinction between: (a) a wholly suspended sentence, (b) a sentence, the latter part of which is suspended, and (c) a Butler Order. The court noted that the jurisdiction to suspend a sentence is “obviously a very beneficial jurisdiction for judges to possess” and said:

⁶ S.I. 390 of 2006.

⁷ On the history of suspended sentences in this jurisdiction, see: Osborough, “A Damocles Sword Guaranteed Irish” (1982) *Irish Jurist* 221. As O’Flaherty J. noted in the case of *O’Brien v. Governor of Limerick Prison* [1997] 2 I.L.R.M. 349, 353 (S.C.): “the development of the suspended sentence was an invention of the Irish judiciary”.

⁸ [1997] 2 I.L.R.M. 349 (S.C.).

The court does not propose to pass any general judgment on the desirability, or otherwise, of this jurisdiction: except to note that it is there and provided it is used for some tangible purpose such as to effect the reintegration of the accused into society, or to protect certain members of society from certain forms of crimes, or some such object, the matter should be left reside in the individual discretion of the judge of trial...⁹

At some point it became the practice of the courts to impose a sentence with a condition attached that the offender be brought back before the sentencing judge, having served the initial part of the sentence. In this way, the sentencing judge would retain seisin of the case. If the offender's conduct had been satisfactory, the sentencing judge would consider suspending the remainder of the sentence imposed. This type of sentence is often referred to as a Butler Order from the judgment of Butler J. in the case of *The State (Woods) v. Attorney General*.¹⁰ The order was controversial and considered undesirable by the Court of Criminal Appeal in the case of *The People (D.P.P.) v. Cahill*.¹¹ The power of the courts to impose suspended sentences with review dates attached was thought to be unconstitutional by the Supreme Court in the case of *The People (D.P.P.) v. Finn*.¹² This was despite the distinction Walsh J. drew in the case of *The People (D.P.P.) v. Aylmer*.¹³ between the executive power to commute sentences and the judicial power to suspend sentences and to impose certain conditions in relation to a sentence.

While the practice of setting a review date when imposing sentence appears to have ceased since the decision of the Supreme Court in *Finn*, courts still routinely apply the suspended sentence *simpliciter i.e.* suspending the sentence imposed either wholly or in part.

⁹ [1997] 2 I.L.R.M. 349, 353 (S.C.).

¹⁰ [1969] I.R. 385 (S.C.).

¹¹ [1980] I.R. 8.

¹² [2001] 2 I.R. 25 (S.C.).

¹³ [1995] 2 I.L.R.M. 624 (S.C.).

1. Terms of the suspension order

Section 99 (2) provides that where the court makes an order suspending the execution of a sentence (a “suspension order”) it shall be a condition of the order that the person is to keep the peace and be of good behaviour during: (a) the period of suspension of the sentence concerned, or (b) in the case of an order that suspends the sentence in part only, the period of imprisonment and the period of suspension of the sentence concerned. This condition must be specified in the order.

Section 99 (3) provides that the court may impose such other conditions in relation to the suspension order as the court considers appropriate having regard to the nature of the offence, and that which will reduce the likelihood of the person, in respect of whom the order is made, committing any other offence. So, for example, a condition that the offender complies with a curfew between 8 p.m. and 8 a.m. could be considered appropriate if the offence s/he was convicted of was a breach of the peace or violent disorder outside a nightclub at closing time. Such a condition would also reduce the likelihood of the person committing any other offence.

Section 99 (4) lists a number of additional conditions the court may impose when imposing a *partly* suspended sentence, such as that the person cooperate with the probation and welfare service or undergo treatment for addiction. Any condition imposed with the suspension order must be specified in the order.

A probation and welfare officer may, at any time before the expiration of a sentence of a court to which a suspension order applies, apply to the court for the imposition of any of the conditions referred to in subsection 4 in relation to the order.¹⁴

A copy of any order made under this section shall be given to An Garda Síochána and the governor of the prison to which the person may be committed.¹⁵ If the court imposes one or more of the conditions set out in subsection 4, a copy of the order must also be given to the probation and welfare service.¹⁶ Presumably a

¹⁴ s. 99 (6).

¹⁵ s. 99 (7).

¹⁶ s. 99 (8).

copy of the order may also be given to the convicted person, but this appears not to be provided for in section 99.

These provisions are to be welcomed as valuable tools for the courts to aid and supervise the rehabilitation of an offender. Of course, adequate resourcing, particularly of the prison and probation and welfare services, is a condition precedent to the successful rehabilitation of offenders.

2. Consequences for breach of a suspension order

The Court of Criminal Appeal in the case of *The People (D.P.P.) v. Stewart*¹⁷ indicated that where a sentencing judge suspends a sentence and the person breaches the conditions of the bond the sentencing judge has the power to activate the sentence. The court said “it is not mandatory to do so in that a judge may decline to do so if the court considers that the breach might be described as trivial or *de minimis*”. On the other hand, the court found that a court cannot activate only part of the sentence which was suspended and that the court is constrained in imposing the whole of the sentence suspended.

Section 99 (9) now provides for the following procedure. Where a person to whom a suspension order applies is convicted of an offence during the period of suspension, then the court shall, after imposing sentence for the offence committed, remand the person in custody or on bail to the next sitting of the court that made the suspension order.¹⁸ In those circumstances, the court that made the order shall revoke the suspension order¹⁹ unless it considers that the revocation would be unjust in all the circumstances. If the court revokes the order, the person shall be

¹⁷ Court of Criminal Appeal, unreported, Hardiman J., 1 December 2004.

¹⁸ Presumably if a person is convicted of an offence, committed while subject to a suspension order, before the same court which imposed the original suspension order, the court may deal with the matter without having to remand the person to the next sitting of the same court. Note, however, the decision of the High Court (McCracken J.) in the case of *Dignam v. Judge Groarke*, High Court, unreported, 17 November 2000. A court has jurisdiction to revoke a suspension of a sentence if the conditions attached are breached. However, the principles of natural justice apply and if those principles are not complied with, a court may be acting outside of its jurisdiction.

¹⁹ s. 99 (10).

required to serve the entire sentence of imprisonment originally imposed by the court, or such *part* of the sentence as the court considers just, less any period already served for the original offence. Where an order is revoked a right of appeal shall lie to the court that would have jurisdiction to hear an appeal against conviction and sentence.²⁰

Section 99 (11) provides that a sentence (other than a life sentence) imposed in respect of an offence committed while the person was subject to a suspension order and during the period of suspension shall not commence until the expiration of the original sentence imposed for the first offence. In other words, a sentence imposed for an offence committed while a person is subject to a suspension order should be a consecutive sentence.

If a member of An Garda Síochána or the governor of a prison has reasonable grounds for believing that a person to whom a suspension order applies has contravened the condition to keep the peace and be of good behaviour, s/he may apply to the court to fix a date for the hearing of an application to revoke the order.²¹ Equally, a probation and welfare officer may apply to have a date fixed for the hearing of an application to revoke if s/he has reasonable grounds for believing that a person has contravened a condition imposed by the suspension order.²² Notice is then given to the defendant in relation to the hearing of the application to revoke.²³ If the defendant does not appear the court may issue a bench warrant.²⁴ The court shall revoke the order where it is satisfied that a person has contravened a condition of the suspension order unless the court considers that it would be unjust to do so in all the circumstances of the case. If the court revokes the order, the person shall be required to serve the entire sentence of imprisonment originally imposed by the court, or such part of the sentence as the court considers just, less any period already served.²⁵

²⁰ s. 99 (12).

²¹ s. 99 (13).

²² s. 99 (14).

²³ s. 99 (15). As to the service of the notice, see s. 99 (18).

²⁴ s. 99 (16).

²⁵ s. 99 (17).

3. *Effect of a suspension order on temporary release and remission*

Section 99 (19) provides that this section shall not affect the operation of section 2 of the Criminal Justice Act, 1960 which allows the Minister to make rules for the temporary release of prisoners. Neither will the section affect the operation of Rule 38 of the Rules for the Government of Prisons 1947 which provide for remission for “industry and good conduct”.

Section 99 (19) calls to mind the judgment of the Supreme Court in the case of *O’Brien v. Governor of Limerick Prison*.²⁶ In that case, Lavan J. in the Central Criminal Court imposed a 10 year prison sentence on O’Brien and suspended the final six years of the sentence. In an inquiry under Article 40.4.2 of the Constitution, the issue was whether the applicant was entitled to a period of remission on his sentence deducted from the period of four years imprisonment which he was required to serve. “From a perusal of the transcript of proceedings ... it [was] quite clear that Lavan J. intended that the accused would serve four years, without any remission”.²⁷ The court concluded that the terms of the Prison Rules “clearly contemplate that the period of imprisonment should be identical with the period of the sentence”.²⁸ The court found that the type of sentence imposed by the sentencing judge in this case could not be reconciled with the terms of the Rules and such a sentence should not be imposed. The court found that in this case the term of imprisonment was four years and that was “the period of imprisonment in respect of which remission must be calculated”.²⁹

²⁶ [1997] 2 I.L.R.M. 349 (S.C.).

²⁷ [1997] 2 I.L.R.M. 349, 352 (S.C.).

²⁸ [1997] 2 I.L.R.M. 349, 356 (S.C.).

²⁹ [1997] 2 I.L.R.M. 349, 356 (S.C.). Rule 38 (1) provides as follows: “A convicted prisoner sentenced to imprisonment, whether by one sentence or cumulative sentences, for a period exceeding one calendar month, shall be eligible, by industry and good conduct, to earn a remission of a portion of his imprisonment, not exceeding one-fourth of the whole sentence, provided that the remission so granted does not result in the prisoner being discharged before he has served one month.” Note remission is of a portion of *imprisonment* which must not exceed one quarter of the *whole sentence*. There are undoubted difficulties in applying Rule 38 to suspended sentences. However, in *O’Brien’s*

Presumably, section 99 (19) means that remission will continue to be calculated in respect of the period of imprisonment the accused person is required to serve. In other words, if a court makes an order under section 99 and imposes a 10 year sentence with the final six years suspended, the period of imprisonment will be four years and remission will be calculated in respect of that period, unless, of course, the court has cause to revoke the suspension order.

Section 99 also does not affect the provisions of section 27 (3G) and (3H) of the Misuse of Drugs Act, 1977 which allow the courts to review a sentence imposed in certain circumstances.³⁰

B. Fine and Deferral Order

Section 100 of the 2006 Act provides for a new “fine and deferral of sentence order” (FDO). Where a person is convicted of an offence and is liable to *both* a term of imprisonment and a fine, the court may take the following course of action. The court may: (a) impose a fine and (b) make an order (i) deferring the passing of a sentence of imprisonment and (ii) specifying the term of imprisonment it would propose to impose should the person fail or refuse to comply with the order to pay the fine and comply with any conditions in the order including that the person be of good behaviour and keep the peace.³¹

The court shall not make such an order unless it is satisfied that: (a) the person consents to the sentence of imprisonment being deferred; (b) the person gives an undertaking to comply with any conditions specified in the order; and (c) having regard to the nature of the offence and all the circumstances of the case it would be in the interests of justice to make the order. A copy of the order must be given to the person and An Garda Síochána.³²

case if the general practice was to allow remission of a quarter of the prisoner’s term of *imprisonment*, this would have amounted to one year. This would not have exceeded one quarter of the *whole sentence* (in this case the whole sentence was 10 years) and so the period of remission of one year would have complied with the provisions of Rule 38 (1).

³⁰ s. 99 (19) (b).

³¹ s. 100 (1) and (3) (b).

³² s. 100 (4).

1. The review date

The order must specify a date on which the court proposes to pass sentence should the person contravene the order.³³ The date must fall within six months of making the order. This date is called the “specified date” in the Act and is a review date to determine if the person has complied with the conditions specified in the order. The person must be given notice to attend court on the review date not later than one month before the review date.³⁴ If the person does not attend the hearing on the review date the court may issue a bench warrant.³⁵ At the hearing, the court shall discharge the person and not impose the prison sentence proposed if the court is satisfied that the person has complied with the conditions specified in the order.³⁶

On the other hand, if the court is satisfied that the person has contravened a condition in the order, the court may impose the proposed prison sentence, or such lesser term as the court considers just in all the circumstances. However, the court may decide it would be unjust to impose a prison sentence and may instead discharge the person.³⁷

If, before the review date, a member of An Garda Síochána has reasonable grounds for believing that a person has contravened a condition of the order s/he may apply to the court to fix a date for the hearing of an application for an order imposing the term of imprisonment specified in the order.³⁸ The person must be notified in writing of this hearing and is required to attend the hearing.³⁹ If s/he does not attend the hearing, the court may issue a bench warrant.⁴⁰

A FDO is essentially a suspended sentence with a fine imposed. It allows the court to impose a fine on an offender and if

³³ s. 100 (3).

³⁴ s. 100 (5). As to the service of the notice, see s. 100 (13).

³⁵ s. 100 (6).

³⁶ s. 100 (11).

³⁷ s. 100 (12).

³⁸ s. 100 (7), (10).

³⁹ s. 100 (8). As to the service of the notice, see s. 100 (13).

⁴⁰ s. 100 (9).

the offender does not pay the fine, a threatened period of imprisonment can be imposed for the offence.

Table 1

Can the court make a Fine and Deferral Order?		Yes	No
STEP 1	Is the offender liable to a fine and imprisonment in respect of this offence?	Proceed to Step 2	No
STEP 2	Does the offender consent to the sentence of imprisonment being deferred?	Proceed to Step 3	No
STEP 3	Does the offender give an undertaking to comply with any conditions in the order?	Proceed to Step 4	No
STEP 4	Having regard to the nature of the offence and all the circumstances of the case is it in the interests of justice to make the order?	YES	NO

C. Restriction on Movement Order

Section 101 provides for a new “restriction on movement order” (RMO). This order may be made where a person of 18 years or more is convicted summarily of an offence specified in Schedule 3.⁴¹ The offences specified in Schedule 3 are certain offences under the Criminal Justice (Public Order) Act, 1994 and the Non-Fatal Offences Against the Person Act, 1997. If the court

⁴¹ The range of offences do not include s. 4 or s. 5 public order offences which can only be punished by a fine. The offences are as follows:

1. *Criminal Justice (Public Order) Act, 1994*

- s. 6 (threatening, abusive or insulting behaviour in public place)
- s. 8 (failure to comply with direction of member of Garda Síochána)
- s. 11 (entering building, etc., with intent to commit an offence)
- s. 13 (trespass on building, etc.)
- s. 16 (affray)
- s. 19 (assault or obstruction of peace officer)

2. *Non-Fatal Offences Against the Person Act, 1997*

- s. 2 (assault)
- s. 3 (assault causing harm)
- s. 9 (coercion)
- s. 10 (harassment)

considers it appropriate to impose a term of imprisonment of three months or more, it may, as an alternative to a term of imprisonment, make a RMO.

Section 101(2) provides that a RMO may restrict the offender's movements to such extent as the court thinks fit. In particular, the order may include a provision: (a) requiring the offender to be in such place(s) as may be specified for such period(s) in each day or week as may be specified and/or, (b) requiring the offender not to be in such place(s) or class(es) of place(s) at such times or during such periods as may be specified. However, the court may not require the offender to be in any place or places for a period or periods of more than 12 hours in any one day.

Section 101 (4) provides that a RMO may specify such conditions as the court considers necessary for the purpose of ensuring that the offender will keep the peace and be of good behaviour and will not commit any further offences while the order is in force.

The court shall not make a RMO unless it considers, having regard to the offender and his or her circumstances, that s/he is a suitable person in respect of whom the order should be made. For that purpose, the court may request a probation and welfare officer to prepare a report on the offender.⁴² In addition, the court shall not make the order unless the offender agrees to comply with its requirements.⁴³

A RMO may be made for any period of not more than six months.⁴⁴ During that period the offender must keep the peace and be of good behaviour.⁴⁵

The court must consider the following factors when determining the period(s) during which an offender shall *be* in a specified place(s):

⁴² s. 101 (8).

⁴³ s. 101 (11).

⁴⁴ s. 101 (3). Section 104 provides that where more than one RMO is in force in respect of an offender at any time the period during which the offender is required to be in a specified place(s) shall not be for a period of more than six months.

⁴⁵ s. 101 (3).

- (a) the nature and circumstances of the offence;
- (b) any educational course, training, employment or other activity in which the offender is participating;
- (c) that as far as practicable the provisions do not conflict with the practice by the offender of his or her religion.⁴⁶

The consent of the owner, or the person in charge, of the place(s) concerned is also required before the order can be made.⁴⁷

In determining the place(s) or class(es) of place(s) that the offender is required *not to be* and the times and periods to be specified in the order the court shall have regard to the following factors:

- (a) the nature and circumstances of the offence;
- (b) the time that the offender committed the offence;
- (c) the place where the offence was committed;
- (d) the likelihood of the offender committing another offence in the same or similar place(s) or class(es) of place(s).⁴⁸

The RMO must specify the restrictions that are to apply to the offender's movements and must also specify:

- (a) the period during which it is in force;
- (b) the period(s) in each day or week during which the offender shall be in any specified place or places;
- (c) the time at which, or periods during which, the offender shall not be in any specified place(s) of class(es) of place(s).⁴⁹

There is also a requirement in section 101 (11) for the court to explain to the offender in ordinary language: (a) the effect of the order and any requirements included in the order; (b) the consequences which may follow any failure by the offender to comply with the requirements of the order; and (c) that the court

⁴⁶ s. 101 (6).

⁴⁷ s. 101 (9).

⁴⁸ s. 101 (7).

⁴⁹ s. 101 (5).

has power to vary the order on the application of certain persons mentioned in section 103.

Certified copies of the order must be sent to: (a) the offender; (b) the member in charge of the Garda station for the area where the offender resides or is to reside while the order is in force; and (c) an authorised person responsible under section 102 for monitoring the offender's compliance with the order, if applicable.⁵⁰

2. Electronic monitoring

Part 10 also provides for electronic monitoring of offenders or prisoners released on temporary release. Under section 112 of the Act, the operation of such electronic monitoring may be arranged as the Minister considers appropriate and the section clearly envisages this being operated by the private sector.

Section 102 provides for electronic monitoring of an offender's movements where the offender is subject to a RMO. In circumstances where the offender's movements are to be monitored electronically, the RMO shall include:

- (a) a provision making an authorised person responsible for the monitoring of the offender's compliance with the order; and
- (b) a requirement that the offender shall, either continuously or for such periods as may be specified, have an electronic monitoring device attached to his or her person for the purpose of enabling the monitoring of his or her compliance with the order.⁵¹

3. Variation of a RMO

Section 103 allows for an application to be made to vary a RMO by substituting another period or time or another place for

⁵⁰ s. 101 (12). Para. (c) did not come into force on 2nd October 2006 and has yet to be given a commencement date.

⁵¹ s. 102 did not come into force on 2nd October 2006 and has yet to be given a commencement date.

any period, time or place specified in the order. This application may be made in writing by the following persons:

- (a) the offender;
- (b) the owner or person in charge of, or adult person habitually residing at, the place(s) specified in the order;
- (c) a member of an Garda Siochana;
- (d) a person authorised to electronically monitor the offender's compliance with the order.

The application must be on notice to the offender and such other persons as appropriate.⁵² If a person objects to the variation, the court must hear that person.⁵³ If the order is varied, the court shall cause certified copies to be sent to all the persons listed above as appropriate.⁵⁴

The jurisdiction to vary an order under section 103 may be exercised by a judge of the District Court or Circuit Court for the time being assigned to the district or circuit in which the offender resides or is to reside while the RMO is in force.⁵⁵

4. Failure to comply with a RMO

Section 105 provides that a member of An Garda Siochana or an authorised person responsible for monitoring the offender's compliance with a RMO may apply to the court on the basis that the offender has failed to comply with the order or any condition in the order. Where the court is satisfied that the offender has failed, without reasonable excuse, to so comply, the court may act as follows:

- (a) if the order was made by a court in the district or circuit in which the offender resides or is to reside while the order is in force, the court may

⁵² s. 103 (2).

⁵³ s. 103 (3).

⁵⁴ s. 103 (4).

⁵⁵ s. 103 (5).

- (i) direct the offender to comply with the order or any condition;
 - (ii) revoke the order and make another RMO; or
 - (iii) revoke the order and deal with the case in any other way in which it could have been dealt with before the order was made; or
- (b) if the order was made by a court in another district or circuit, the court may remand the offender on bail to a sitting of that court to be dealt with as above.

In deciding on the appropriate action in respect of the non-compliance, the court must consider the extent to which, and the period during which, the offender has complied with the order concerned and any condition of the order.

5. Certain restrictions in making a RMO

Section 5 of the Criminal Justice Act, 1951⁵⁶ provides that where two or more sentences passed by the District Court are ordered to run consecutively the aggregate term of imprisonment shall not exceed two years. Section 106 of the 2006 Act provides that where two or more sentences, one of which is a RMO, are passed on an offender by the District Court and ordered to run consecutively, the aggregate of the period during which the RMO is in force and the period of any term of imprisonment shall not exceed two years.

This situation might arise where D is convicted of a public order offence in respect of which a RMO can be made and a more serious offence, *e.g.* a relatively serious section 2 assault. The court may decide it is appropriate to impose a RMO in respect of the public order offence but to sentence D to a term of imprisonment in respect of the assault. The court may wish to order the RMO to operate consecutively to the sentence imposed for the assault. The aggregate period in this circumstance cannot exceed two years.

Section 104 of the 2006 Act provides that where more than one RMO is in force in respect of an offender the periods a person

⁵⁶ As amended by s.12 of the Criminal Justice Act, 1984.

shall be subject to such orders cannot exceed six months. Subject to that limitation, a second RMO may be concurrent with or additional to the first order.⁵⁷

Table 2

Can the Court make a Restriction on Movement Order?		Yes	No
STEP 1	Is the offender over 18?	Proceed to Step 2	No
STEP 2	Is the offence listed in Schedule 3?	Proceed to Step 3	No
STEP 3	Is it appropriate to impose a term of imprisonment of 3 months or more?	Proceed to Step 4	No
STEP 4	Is the offender a suitable person in respect of whom the order should be made? (If necessary request a Probation Report)	Proceed to Step 5	No
STEP 5	Does the offender agree to comply with the terms of the order?	YES	NO

II. PARTS 8 AND 9 – PROVISIONS RELATING TO DRUG TRAFFICKING OFFENCES

Part 8 of the Criminal Justice Act, 2006 contains a number of provisions relating to the Misuse of Drugs Act, 1977, as amended. These provisions affect the prosecution and sentencing of a person for the offence of possession of drugs in excess of €13,000⁵⁸ for sale or supply.⁵⁹ A new offence is also created under a new section 15B of the Misuse of Drugs Act, 1977 of *importing* controlled drugs with a market value of €13,000 or more⁶⁰. Part 9 of the Act requires persons convicted of certain drug trafficking offences to comply with certain notification

⁵⁷ ss. 104 (2) and (3).

⁵⁸ The original amount was IR£10,000 but this was converted to €13,000 by the Euro Changeover (Amounts) Act, 2002.

⁵⁹ Under s.15A of the Misuse of Drugs Act, 1977.

⁶⁰ Section 82 of the 2006 Act.

requirements after serving their sentence of imprisonment. These provisions are similar to the provisions of Part 2 of the Sex Offenders Act, 2001. A new offence is also created of supplying drugs into prisons or places of detention.⁶¹

A. Part 8 – Misuse of Drugs

1. Penalty Provisions

Section 84 of the 2006 Act provides that the penalty provisions in section 27 of the Misuse of Drugs Act, 1977 (as amended by section 5 of the Criminal Justice Act, 1999),⁶² which

⁶¹ Section 83 of the 2006 Act. Note also s. 196 of the Act which increases the maximum penalties for an offence under s. 6 (2) of the Criminal Law Act, 1976.

⁶² Section 5 of the Criminal Justice Act, 1999 introduced the following subsections into s. 27 of the Misuse of Drugs Act, 1977. The words in italics are the amendments introduced by the Criminal Justice Act, 2006.

“(3A) Every person guilty of an offence under section 15A or 15B of *this Act* shall be liable, on conviction on indictment—

(a) *to imprisonment for life or such shorter period as the court may determine, subject to subsections (3B) to (3CC) of this section or, where subsection (3CCCC) of this section applies, to that subsection, and*

(b) at the court's discretion, to a fine of such amount as the court considers appropriate.

(3AA) *The court, in imposing sentence on a person for an offence under s. 15A or s. 15B of this Act, may, in particular, have regard to whether the person has a previous conviction for a drug trafficking offence.*

(3B) Where a person (other than a child or young person) is convicted of an offence under section 15A or s. 15B of *this Act* the court shall, in imposing sentence, specify as the minimum period of imprisonment to be served by that person a period of not less than 10 years imprisonment.

(3C) Subsection (3B) of this section shall not apply where the court is satisfied that there are exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make a sentence of not less than 10 years imprisonment unjust in all the circumstances and for this purpose the court may have regard to any matters it considers appropriate, including—

(a) whether that person pleaded guilty to the offence and, if so,

(i) the stage at which he indicated the intention to plead guilty, and

apply to an offence under section 15A shall also apply to an offence under section 15B. Section 27 of the 1977 Act provides that a person convicted on indictment may be imprisoned for life

(ii) the circumstances in which the indication was given,
and

(b) whether that person materially assisted in the investigation of the offence.

(3CC) The court, in considering for the purposes of subs. (3C) of this section whether a sentence of not less than 10 years imprisonment is unjust in all the circumstances, may have regard, in particular, to –

(a) whether the person convicted of the offence concerned was previously convicted in respect of a drug trafficking offence, and

(b) whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence.

(3CCC) Subsections (3B) to (3CC) of this section apply and have effect only in relation to a person convicted of a first offence under section 15A or 15B of this Act (other than a person who falls under paragraph (b) of subsection (3CCCC) of this section), and accordingly references in those first-mentioned subsections to an offence under section 15A or 15B of this Act are to be construed as references to a first such offence.

(3CCCC) Where a person (other than a child or a young person) –

(a) is convicted of a second or subsequent offence under section 15A or 15B of this Act, or

(b) who is convicted of a first offence under one of those sections and has been convicted under the other of those sections, the court shall, in imposing sentence, specify as the minimum period of imprisonment to be served by that person a period of not less than 10 years.

...

(3G) In imposing a sentence on a person convicted of an offence under section 15A of this Act, a court-

(a) may inquire whether at the time of commission of the offence the person was addicted to one or more controlled drugs, and

(b) if satisfied that the person was so addicted at that time and that the addiction was a substantial factor leading to the commission of the offence, may list the sentence for review after the expiry of not less than one-half of the period specified by the court under subsection (3B) of this section.

(3H) On reviewing a sentence listed under subsection (3G) (b) of this section, the court -

(a) may suspend the remainder of the sentence on any conditions it considers fit, and

(b) in deciding whether to exercise its powers under this subsection, may have regard to any matters it considers appropriate.”

or such shorter period as the court may determine, and also provides for the so-called “mandatory minimum 10 year sentence”, although, as the Chief Justice said in a recent case, the use of the term “mandatory” is misleading.⁶³

The 2006 Act makes a number of significant amendments to the penalty provisions in section 27 of the 1977 Act. A new subsection 3CCCC is introduced which appears to absolutely require a mandatory minimum 10 year sentence to be imposed if a person is convicted of a *second offence*, and any subsequent offence, under section 15A or section 15B.⁶⁴ The subsection uses the word *shall*. In other words, the provisions in section 27 (3C) giving the courts some degree of discretion (*e.g.* if the offender pleads guilty or assists the police in their inquiries) will not apply where a person already has a conviction under section 15A or 15B. This provision will further restrict the discretion of the courts in sentencing for these offences and allows no provision for extraordinary circumstances except where the offender is a child or a young person.

A new section 27 (3AA) is introduced into the Misuse of Drugs Act, 1977 whereby the court may, in imposing sentence for an offence committed under section 15A or 15B, have particular regard to whether the person has a *previous conviction* for a drug trafficking offence.

A new subsection 3CC is also introduced. The court when considering whether a sentence of not less than 10 years (for a first offence) is unjust in all the circumstances may have regard to the following two factors:

- (a) whether the person convicted of the offence concerned was previously convicted in respect of a drug trafficking offence; and

⁶³ See *The People (D.P.P.) v. McGinty*, Court of Criminal Appeal, unreported, Murray C.J., 3 April 2006. The Court of Criminal Appeal has described the provisions of s. 27 as being “a revolutionary alteration superimposed on the conventional principles of sentencing”: *The People (D.P.P.) v. Dermody*, Court of Criminal Appeal, unreported, 21 December 2006.

⁶⁴ If a person has a conviction under s. 15A and is later convicted under s.15B this would be treated as a second or subsequent offence for the purposes of subs. 3CCCC.

- (b) whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence.

The term “drug trafficking offence” is defined in section 3 (1) of the Criminal Justice Act, 1994.⁶⁵

The aim of these amendments is to highlight the fact that a person has previous convictions for drug trafficking offences. This fact may be considered by the court when: (a) imposing sentence and (b) when deciding whether or not to impose the minimum 10 year sentence. In his speech to the Dáil on 28th March 2006 the Minister declared that the purpose of these amendments was:

...that, as against mitigating factors such as cooperation and a guilty plea, the court will also be required to take account of previous drug trafficking

⁶⁵ As amended by s. 7 of the Criminal Justice Act, 1999 and s. 86 of the Criminal Justice Act, 2006. "Drug trafficking offence" means any of the following:

- “(a) an offence under any regulations made under section 5 of the Misuse of Drugs Act, 1977, involving the manufacture, production, preparation, importation, exportation, supply, offering to supply, distribution or transportation of a controlled drug,
(b) an offence under section 15 of that Act of possession of a controlled drug for unlawful sale or supply,
(bb) an offence under section 15A of that Act [possession of controlled drugs in excess of €13,000 for unlawful sale or supply]
(bbb) an offence under section 15B (importation of controlled drugs in excess of [€13,000]) of that Act,
(c) an offence under section 20 of that Act (assisting in or inducing the commission outside the State of an offence punishable under a corresponding law),
(d) an offence under the Customs Acts in relation to the importation or exportation of a controlled drug or in relation to the fraudulent evasion of any prohibition, restriction or obligation in relation to such importation or exportation,
(e) an offence under section 31 of this Act in relation to the proceeds of drug trafficking,
(f) an offence under section 33 or 34 of this Act, or
(g) an offence of aiding, abetting, counselling or procuring the commission of any of the offences mentioned in paragraphs (a) to (f) of this definition or of attempting or conspiring to commit any such offence or inciting another person to do so”.

convictions ... [which] will be a counter balance to any reduction that may have been felt to be appropriate.⁶⁶

2. What is the “public interest”?

It is not clear if the expression “the public interest in preventing drug trafficking” in subsection 3CC is intended to mean either: (a) the general deterrence factor a substantial prison sentence for drug trafficking offences would have on the community generally, or (b) the preventative effect a substantial prison sentence would have on the activities of an individual offender. The jurisprudence of the Irish courts to date would seem to indicate certain restrictions in applying subsection 3CC, in particular the importance given to the principle of proportionality in sentencing. The principle of proportionality has been considered by the courts in a number of sentencing cases.⁶⁷ Many cases have referred to the *constitutional* nature of the principle of proportionality.⁶⁸ Since the provisions of the 2006 Act will have to be interpreted in harmony with the Constitution and in the

⁶⁶ Available at: <http://www.justice.ie>

⁶⁷ *The People (D.P.P.) v. Kelly*, Court of Criminal Appeal, unreported, Hardiman J., 5 July 2004, *The People (D.P.P.) v. Redmond* [2001] 3 I.R. 390 (S.C.); *The People (D.P.P.) v. McCormack* [2000] 4 I.R. 356; *The People (D.P.P.) v. Sheedy* [2000] 2 I.R. 184; *The People (D.P.P.) v. M.* [1994] 3 I.R. 306 (S.C.); *The People (D.P.P.) v. W.C.* [1994] 1 I.L.R.M. 321; *The State (Healy) v. Donoghue* [1976] I.R. 325; *The People (Attorney General) v. O'Driscoll* (1972) 1 Frewen 351.

⁶⁸ In particular see the judgment of Flood J. in the case of *The People (D.P.P.) v. W.C.* [1994] 1 I.L.R.M. 321, which was cited with approval by Murray C.J. in the recent case of *Osmanovic v. D.P.P.* (Supreme Court, unreported, 25 July 2006). See also the judgment of Denham J. in the case of *The People (D.P.P.) v. M.* [1994] 3 I.R. 306 and the judgment of Hamilton C.J. in the case of *Rock v. Ireland* [1997] 3 I.R. 484. Note also the judgment of Costello J. in the case of *Heaney v. Ireland* [1994] 3 I.R. 593. O'Malley in his work *Sentencing Law and Practice* (2nd ed., Round Hall Sweet & Maxwell, 2006) notes at p. 88 that: “The question of whether proportionality is actually mandated by the Constitution has yet to be argued in detail before the superior courts, although ... it is difficult to foresee a rejection of the proposition that such a mandate exists.”

context of extant sentencing jurisprudence it is worthwhile to review a number of judgments in the area.

The idea of imposing a long prison sentence to prevent the offender committing further offences was previously considered *anathema* by the courts. In the case of *The People (D.P.P.) v. Carmody*,⁶⁹ the Court of Criminal Appeal quashed a sentence of six years imposed on two offenders who pleaded guilty to charges of burglary. The Court of Criminal Appeal said the sentencing judge was attempting to procure reform by prevention but that, in the absence of statutory provisions, this was not acceptable. As Walsh J. noted in the seminal case of *The People (Attorney General) v. O' Callaghan*⁷⁰:

... it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted or that in any circumstances he should be deprived of his liberty upon only the belief that he will commit offences if left at liberty, save in the most extraordinary circumstances carefully spelled out by the Oireachtas and then only to secure the preservation of public peace and order or the public safety and the preservation of the State in a time of national emergency or in some situation akin to that.⁷¹

The principles underlying sentencing policy in this jurisdiction were eloquently expressed by Gannon J. in the case of *The State (Stanbridge) v. Mahon*.⁷² The learned judge offered the following explanation of the “public interest” in sentencing offenders:

⁶⁹ [1988] I.L.R.M. 370.

⁷⁰ [1966] I.R. 501.

⁷¹ [1966] I.R. 501, 516–517.

⁷² [1979] I.R. 214.

The first consideration in determining the sentence is the *public interest*, which is served not merely by punishing the offender and showing a deterrent to others but also by affording a compelling inducement and an opportunity to the offender to reform. The punishment should be appropriate not only to the offence committed but also to the particular offender.⁷³

In *The People (D.P.P.) v. Gilligan*,⁷⁴ the Court of Criminal Appeal reduced a sentence of 28 years for possession to 20 years on the basis that the original sentence was disproportionate to the offence charged. In that case, the issue was whether the sentencing judge could have regard to “the overall evidence of the activities of an accused in determining the gravity of the individual charges in respect of which he has been convicted”.⁷⁵ The court considered the judgment of the Court of Appeal in England in the case of *R. v. Kidd*⁷⁶ where it was held that:

A defendant is not to be convicted of any offence with which he is charged unless and until his guilt is proved. Such guilt may be proved by his own admission or (on indictment) by the verdict of a jury. He may be sentenced only for an offence proved against him (by admission or verdict) or which he has admitted and asked the court to take into consideration when passing sentence.

While the Court of Criminal Appeal accepted the reasoning in that case, it acknowledged that a sentencing judge cannot “act in blinkers”. However, the court was adamant that the sentencing judge must “scrupulously respect” the “dividing line” between taking into account surrounding circumstances, including

⁷³ [1979] I.R. 214, 218 (emphasis added). See also the judgment of Walsh J. in the case of *The People (D.P.P.) v. O’Driscoll* (1972) 1 Frewen 351 at 359.

⁷⁴ [2004] 3 I.R. 87.

⁷⁵ [2004] 3 I.R. 87, 91.

⁷⁶ [1998] 1 W.L.R. 604.

evidence of other offences, and sentencing an accused for offences for which there has been no conviction.⁷⁷

It was also said in *Kidd* that to allow a sentencing judge to form his own judgment of the evidence he has heard would be to circumvent the right to trial by jury, which, of course, in Ireland is a constitutional right.

The Special Criminal Court in imposing sentence on Gilligan noted the “wretchedness” and the “haemorrhage of harm that is unlikely to heal even in a generation” which the accused was presumed to have caused. The Court of Criminal Appeal, however, said that this language “would certainly seem to imply that the court had overstepped the line between considering surrounding circumstances and in effect sentencing for criminal activities of which the applicant had not been convicted”.⁷⁸

In light of the strong line of authority requiring proportionality in sentencing, it would not appear that subsection 3CC will be capable of displacing that important principle. As O’Malley notes in his learned work on sentencing:

... proportionality must always determine the upper limits of deserved punishment. Within those limits, considerations of deterrence and the risk of re-offending may, in appropriate circumstances, influence the nature and quantum of punishment.⁷⁹

Sentencing courts always consider previous convictions in any event. “The public interest in preventing drug trafficking” is, no doubt, also present in the minds of sentencing judges when they consider the appropriate and proportionate penalty to impose. As the Chief Justice noted in the recent case of *McGinty*⁸⁰:

There is no doubt that the possession of illegal drugs for the purpose of sale or supply, particularly

⁷⁷ [2004] 3 I.R. 87, 91.

⁷⁸ [2004] 3 I.R. 87, 92.

⁷⁹ O’Malley, *Sentencing Law and Practice*, (2nd ed., Round Hall Sweet & Maxwell, 2006) at p. 101.

⁸⁰ Court of Criminal Appeal, unreported, Murray C.J., 3 April, 2006.

in any significant quantity, is a very serious offence which of itself would normally warrant a custodial sentence ... a judge sentencing a person for such an offence should also have regard to the gravity attached to this by the Oireachtas in providing for a maximum sentence of life imprisonment and a minimum of 10 years imprisonment ... Thus, even in cases where a trial judge properly concludes that the subsection (3B) as regards the minimum term of imprisonment does not apply to the particular case before him or her, the appropriate sentence should normally involve a term of imprisonment, including, depending on the circumstances, a very substantial term of imprisonment.⁸¹

In another recent *ex tempore* judgment of the Court of Criminal Appeal the Chief Justice noted that:

The trial judge is...entitled to take into account the impact of an offence, as the courts normally do, on society generally and the sentencing court is perfectly entitled, again as they have traditionally done, to take into account the impact of the offence in the local community, the growth of a particular offence in the local community and to impose a sentence which is *proportionate* to the need to deter the commission of certain offences which may be spreading or becoming more frequent in the local community...⁸²

The provisions of Part 9 of the 2006 Act (discussed below), establishing what may be termed a “drug offenders’ register”, should also be noted in this context. The fact of being subjected to the notification requirements of Part 9 of the Act should, in itself, have a preventative effect on any future offending by a person convicted of a “drug trafficking offence”. The courts should

⁸¹ Court of Criminal Appeal, unreported, Murray C.J., 3 April, 2006, at p. 4.

⁸² *The People (D.P.P.) v. Dunbar*, Court of Criminal Appeal, unreported, Murray C.J., 23 October 2006, at p. 5 (emphasis added).

consider the effect of being subjected to these notification requirements when imposing sentence. Indeed, the notification requirements of Part 9 of the Act may offset any perceived need to impose a lengthy prison sentence for these types of offences in order to deter future offending. To use the language of section 84 of the 2006 Act, “the public interest in preventing drug trafficking” may well be served by imposing a sentence of less than 10 years bearing in mind that any sentence in excess of 12 months for a drug trafficking offence now incurs an obligation to be subject to the notification requirements of Part 9 of the Act for at least 3 years following release from prison where the offender is of full age.

There seems to be a common misperception that the courts are disregarding the “minimum 10 year sentence” for section 15A offences and that the legislative provisions are not operating as effectively as they should be. Certainly the Minister for Justice shares that misperception. In his speech to the Dáil on 24th May 2006, the Minister appealed to the judiciary to fully implement the provisions of section 27. He also declared that he would not be happy until the specific derogations in the legislation are availed of “in only a minority of cases”. However, research by Mr. Patrick McEvoy B.L., commissioned by the Department of Justice, Equality and Law Reform, shows that in most cases offenders are pleading guilty to section 15A offences to avoid a lengthy prison sentence.⁸³ In the cases analysed in that research, only one offender did not plead guilty. The Minister claims that the minimum 10 year sentence is only being imposed in 21 per cent. of cases⁸⁴. It would be interesting to know in how many of the

⁸³ See research carried out by Mr. Patrick McEvoy B.L., (15th February 2005). Available at <http://www.justice.ie>. Of 55 cases analysed by Mr. McEvoy, only one offender did not plead guilty. These cases covered the period between 1999, when the provisions were introduced, and 2001. This research is mentioned in the judgment of the Court of Criminal Appeal in the case of *The People (D.P.P.) v. Dermody*, Court of Criminal Appeal, unreported, Hardiman J., 21 December 2006.

⁸⁴ According to *The Irish Times*, on 29th November 2006, 10 out of 80 offenders eligible to receive a minimum sentence of 10 years were sentenced to 10 years or more in 2005. However, there is no indication how many of the 70 offenders sentenced to less than 10 years pleaded guilty.

other 79 per cent. are offenders pleading guilty. The provisions of section 27 encourage offenders to plead guilty and so avoid the minimum 10 year sentence. If large numbers of offenders are pleading guilty to section 15A offences, then this indicates that the penalty provisions in section 27 are having an important effect on the prosecution of these offences, bearing in mind that guilty pleas help ensure the efficient administration of the criminal justice system. Furthermore, the judiciary are acting in a manner consistent with the legislation in applying the specific derogations in cases where defendants plead guilty and cannot be accused of ignoring the law passed by the Oireachtas.

Moreover, there is also an incentive for offenders to materially assist the gardai in their investigations. As Mr. McEvoy notes in his research:

Indeed in all but a few cases the accused provided some form of assistance to the gardai and even in cases where the accused provided little by way of co-operation in relation to his or her contacts or associates the court appeared to accept that the accused had a genuine fear for his own safety.⁸⁵

The Court of Criminal Appeal has consistently stressed the requirement for sentencing judges to carefully consider the minimum 10 year provisions in section 27. In the case of *The People (D.P.P.) v. Renald*,⁸⁶ the court offered the following guidance on sentencing for a section 15A offence:

Even where exceptional circumstances exist which would render the statutory minimum term of imprisonment unjust, there is no question of the minimum sentence being ignored. Perhaps the most important single factor in determining an appropriate sentence is the ascertainment of the gravity of the offence as determined by the Oireachtas. Frequently an indication as to the

⁸⁵ See research carried out by Mr. Patrick McEvoy B.L., (15th February 2005). Available at <http://www.justice.ie/>.

⁸⁶ Court of Criminal Appeal, unreported, Murphy J., 23 November 2001.

seriousness of the offence may be obtained from the maximum penalty imposed for its commission. ... What is even more instructive is legislation which, as in the present case, fixes a mandatory minimum sentence. Even though that sentence may not be applicable in a particular case the very existence of a lengthy mandatory minimum sentence is an important guide to the Courts in determining the gravity of the offence and the appropriate sentence to impose for its commission... If the Court is satisfied that factors exist which would render the mandatory minimum sentence unjust then the Court is not required to impose it but the existence of such matters or circumstances does not reduce the inherent seriousness of the offence. It remains the task of the Court to impose a sentence which is appropriate having regard to the relevant circumstances and also the fundamental gravity of the offence as determined by the Oireachtas and reflected in the sentences which it has prescribed.⁸⁷

3. Can a suspended sentence be imposed for a section 15A offence?

Section 99 of the 2006 Act appears to provide that a mandatory term of imprisonment (including a mandatory minimum term) may not be suspended. Presumably this provision will not apply where a court determines that it is not appropriate to impose the minimum period of imprisonment and in those

⁸⁷ In another case, *The People (D.P.P.) v. Hogarty*, Court of Criminal Appeal, unreported, 21 November 2001, the Court of Criminal Appeal said that where it is appropriate to depart from the minimum 10 year sentence, the sentencing judge should assess the overall gravity of the offence, determine the appropriate sentence and then make whatever discounts are appropriate. It is not permissible, however, to “count down” from the 10 year sentence as if that were the presumptive sentence to be imposed in every case since in some cases a more severe penalty may be required, bearing in mind the maximum sentence is life imprisonment.

circumstances a lesser sentence can be imposed which may be suspended in appropriate cases.

Notwithstanding the provisions of section 27 of the 1977 Act, the courts have recognised that in “wholly exceptional” cases a suspended sentence may be appropriate. A suspended sentence was upheld in the case of *The People (D.P.P.) v. Alexiou*.⁸⁸ In the recent case of *The People (D.P.P.) v. McGinty*,⁸⁹ the Court of Criminal Appeal again upheld a five year suspended sentence on an accused who had pleaded guilty and who had no previous convictions. The exceptional circumstance in this case justifying the suspension of the sentence was the offender’s extraordinarily successful participation in a programme at Coolmine drug treatment centre. In a passage where he referred to the “public interest”, Murray C.J. said:

In carrying out this difficult balance as to where the *public interest* best lay the trial judge clearly decided that its interests were best served by permitting the respondent to see through his rehabilitation to a probably successful conclusion. Such rehabilitation was more likely to ensure that the respondent would be a law abiding citizen in the future than if his rehabilitation programme was terminated by a prison sentence.⁹⁰

This recent case indicates that the “public interest” can vary considerably from case to case. In this case, the public interest clearly lay with the offender being given a suspended sentence in order to support his efforts at rehabilitation. In a different case, one involving an experienced drug dealer working in the upper echelons of the drugs trade for example, no doubt the public interest would include imposing a substantial sentence of up to life imprisonment. It may be that the courts will take an enlightened approach in interpreting the meaning of the phrase “the public interest in preventing drug trafficking” and continue to

⁸⁸ [2003] 3 I.R. 513.

⁸⁹ Court of Criminal Appeal, unreported, Murray C.J., 3 April 2006.

⁹⁰ Court of Criminal Appeal, unreported, Murray C.J., 3 April 2006, at p. 11 (emphasis added).

consider rehabilitative factors in sentencing offenders for drug trafficking offences.

The provisions in the 2006 Act are unnecessary since the courts are keenly aware of the need to consider previous convictions and the public interest in sentencing drug offenders. These provisions will result in nothing more than “window dressing” and will fail to address the underlying problem of drug trafficking in society. Instead of making unnecessary laws, more resources should be put into supporting treatment and rehabilitation programmes for drug offenders.

B. Part 9: The Drug Offenders’ Register

Part 9 of the Act came into force on 2nd October 2006. Part 9 of the Act creates, what has been termed, a new “drug offenders’ register” similar to the so-called “sex offenders’ register”. The word “register”, however, is not used in the Act. Instead, the Act refers to “obligations of drug trafficking offenders to notify certain information”.

The obligations under this Part arise if a person is convicted on indictment of a “drug trafficking offence” after the commencement of this part of the Act.⁹¹ Section 88 of the Act explains that the term “drug trafficking offence” has the meaning ascribed to it in section 3 (1) of the Criminal Justice Act, 1994⁹² but that a person must have been sentenced to a period of more than one year before the obligations under this Part of the Act arise. Section 89 (2) provides that a person is also subject to the requirements of Part 9 of the Act if the person has been convicted on indictment of a drug trafficking offence before the commencement of Part 9 and, at that commencement, the sentence to be imposed on the person has yet to be determined.⁹³

⁹¹ s. 89 (1). Part 9 of the Act came into force on 2nd October 2006 by means of S.I. 390 of 2006.

⁹² See above at n. 65.

⁹³ Note the decision of the Central Criminal Court in the case of *The People (D.P.P.) v. Cawley* [2003] 4 I.R. 321. In that case Herbert J. issued a certificate pursuant to s. 14 (1) of the Sex Offenders Act, 2001 requiring the convicted person to be subject to the requirements of Part 2 of that Act where the offence was committed *before* the commencement of the Act but the person had been convicted and sentenced after the Act came into operation. It was held that the

Section 89 (3) provides for a situation where on the commencement of Part 9 a sentence has been imposed and either: (a) the person is serving the sentence in prison; (b) the person is temporarily released; or (c) the sentence is otherwise still in force or current. In those circumstances, a member of An Garda Síochána, not below the rank of superintendent, may apply to the Circuit Court for an order that the person concerned comply with the requirements of Part 9 of the Act. The court may grant the order if it considers that the interests of the common good so require and that it is appropriate in all the circumstances of the case. Such an application must be made within two months of the commencement of Part 9, or such longer period as the court shall permit.

1. Periods for which a person is subject to the requirements of Part 9

Section 90 of the Act provides that a person is subject to the requirements of Part 9 of the Act for certain limited periods of time depending on the length of the sentence imposed in respect of the offence concerned. The periods are as follows:

- 12 years if the sentence imposed is one of imprisonment for life;
- seven years if the sentence imposed is more than 10 years but not one of life imprisonment;
- five years if the sentence imposed is more than five years but not more than 10 years;
- three years if the sentence imposed is more than one year but not more than five years;
- one year if the sentence imposed is one of imprisonment for any term, the operation of the whole of which is suspended.⁹⁴

requirements of Part 2 of the Act undoubtedly inflicted a detriment on a convicted person but this was not a penalty and therefore did not impose a heavier penalty on the accused than that which was applicable at the time the offences were committed (at pp. 334, 335).

⁹⁴ s. 90 (3).

The requirements under Part 9 do not arise if a person is sentenced to 12 months imprisonment or less.

If the court *suspends* a sentence imposed and then revives the operation of the term, then the relevant period required by section 90 applies having regard to the whole period of imprisonment prescribed by the sentence. Thus, if the court sentences D to two years imprisonment suspended, D is subject to the requirements of Part 9 for one year. But if the court reactivates D's suspended sentence, then D is subject to the requirements of Part 9 for a period of three years.

If the court suspends part of the sentence imposed, then the part of the term the operation of which is not suspended shall be regarded as the term of imprisonment imposed for the purpose of determining the period for which the person is subject to the requirements of Part 9. If the court revives the operation of that part of the sentence which was suspended, then one considers the whole period imposed in determining the period the person will be subject to the requirements of Part 9.⁹⁵

The relevant periods of time for which a person may be subject to the requirements of Part 9 are halved if the person convicted of the offence is under 18 years at the time sentence is imposed.⁹⁶

Table 3

Sentence imposed for a drug trafficking offence	Period an offender <i>over</i> 18 is subject to Part 9	Period an offender <i>under</i> 18 is subject to Part 9
Life Imprisonment	12 years	6 years
More than 10 years, less than life	7 years	3 ½ years
More than 5 years, not more than 10 years	5 years	2 ½ years
More than 1 year, not more than 5 years	3 years	1 ½ years
Whole of sentence suspended	1 year	6 months
12 months or less	Not applicable	Not applicable

⁹⁵ s. 90 (5).

⁹⁶ s. 90 (4).

If a person is or has been sentenced in respect of two or more drug trafficking offences and the sentences imposed are *consecutive* or partly concurrent, then the offender will be subject to the requirements of Part 9 for the relevant period calculated by reference to the aggregate of those sentences after making such deduction necessary (in the case of partly concurrent sentences) to ensure that no period is calculated more than once.⁹⁷

Upon the conviction of an offender for an offence giving rise to the requirements of Part 9 of the Act, the court is under an obligation under section 96 to issue a certificate. This certificate must be issued to the person convicted, the Garda Síochána and (if necessary) the Governor of the prison in which the person is to be imprisoned. The certificate must state that the person has been convicted of an offence giving rise to the obligations required by Part 9, the sentence, if any, imposed, and that the person has, or may, become subject to the requirements of Part 9.

If the sentence is varied on appeal, then the period for which a person will be subject to the requirements of Part 9 will be determined by the sentence imposed on appeal.⁹⁸ If the conviction is quashed on appeal, then the person shall cease to be subject to the requirements of Part 9.⁹⁹

2. What are the requirements under Part 9?

The requirements under Part 9 are set out in section 92. The requirements are to notify to An Garda Síochána certain facts within seven days from the “relevant date”. If the “relevant date” occurs before the commencement of Part 9, then the obligation is to notify within seven days from the commencement of Part 9.

The “relevant date” is defined in section 87 to mean the date of conviction for the drug trafficking offence concerned. Note that the requirement to notify accrues from the date of conviction and not the date of sentence. In theory, a person is subject to the requirements of Part 9 from the moment of conviction. If sentence is postponed, it may happen that because a sentence of 12 months or less is imposed the offender will cease to be under the

⁹⁷ s. 90 (6).

⁹⁸ s. 90 (8).

⁹⁹ s. 90 (7).

obligations of Part 9, since those obligations do not arise unless the person is sentenced to a period of more than 12 months. This is an anomaly in the legislation and should be amended. The “relevant date” should be the date sentence is imposed.

The details which the person must notify the Gardai are: (a) his or her name and, where s/he also uses one or more other names, each of those names, and (b) his or her home address. The notice must also include the person’s date of birth.¹⁰⁰ Where a subsequent notification is required, that notice must include the person’s date of birth and his or her name(s) and address on the relevant date.¹⁰¹

A person will be subject to the requirements of Part 9 for such period of time required by section 90. However, section 92 (7) requires one to disregard any period of time when the person concerned is: (a) remanded in custody; (b) serving a sentence in prison; or (c) temporarily released under section 2 of the Criminal Justice Act, 1960. For example, if D is convicted of a drug trafficking offence and sentenced to four years imprisonment, he is under an obligation to notify his date of birth, name(s) and address to An Garda Siochana within seven days of his conviction. He is subject to the requirements of Part 9 for the period of three years. However, if he is serving a prison sentence from the date of conviction that period is disregarded, so in fact D will, in effect, be subject to the requirements of Part 9 for a period of three years from the date he is released from prison (provided such release is not temporary release).

A person is also required to notify An Garda Siochana certain information within seven days of the following events:

- (a) the person using a name which is not the name, or one of the names, last previously notified to An Garda Siochana;
- (b) any change of address;

¹⁰⁰ s. 92 (6).

¹⁰¹ s. 92 (6).

- (c) the person's having resided or stayed, for a qualifying period,¹⁰² at any place in the State, the address of which has not been notified to the Garda Siochana, as being his or her current home address; or
- (d) the person's return to an address in the State, having, immediately prior to such return, been outside the State for a continuous period of seven days or more.

If the person intends to leave the State for a continuous period of seven days or more, s/he shall notify An Garda Siochana of that intention and if known, the address of the place outside the State s/he intends to stay at.¹⁰³ If the person did not have the intention of leaving the State for a period of seven days, but is outside the State for a continuous period of seven days, the person is required to notify the Gardai before the expiry of a further period of seven days (reckoned from the 7th day that the person is outside the State) with the address of the place the person is residing at outside the State unless the person returns to the State before the expiry of that further period of seven days.¹⁰⁴

Section 92(8) provides that a person may submit the necessary notification to An Garda Siochana:

- (a) by attending in person at any Garda station which is a divisional or district headquarters and notifying orally a member of An Garda Siochana at the station of the matters concerned; or
- (b) by sending, by post, a written notification of the matters concerned to any Garda station which is a divisional or district headquarters (the onus of proof of posting shall lie on the person subject to these requirements¹⁰⁵); or
- (c) by such other means as may be prescribed.

¹⁰² "Qualifying period" means: (a) a period of seven days, or (b) two or more periods, in any 12 months, which, taken together, amount to seven days. See s. 92 (11).

¹⁰³ s. 92 (3).

¹⁰⁴ s. 92 (4), (5).

¹⁰⁵ s. 92 (9).

Notification must be acknowledged in writing and shall be in the form prescribed.¹⁰⁶

3. Discharge from obligation to comply with the requirements of Part 9

Section 93 provides that if a person is subject to the requirements of Part 9 for a period of 12 years or more (or, if the person was under 18 at the time of sentence, for a period of six years or more) that person may apply to the Circuit Court¹⁰⁷ for an order discharging the person from the obligation to comply with those requirements on the ground that the interests of the common good are no longer served by his or her continuing to be subject to them.

Eight years (or four years if the person was under 18 at the time of sentencing) must elapse from the date of the person's release from prison before such an application can be made.¹⁰⁸ The applicant must notify the superintendent of An Garda Síochána of the district in which the person ordinarily resides before making this application.¹⁰⁹ An Garda Síochána shall be entitled to appear at the hearing of this application.¹¹⁰

The court shall make the order applied for if it considers that it is appropriate to do so in all the circumstances of the case.¹¹¹ The court may have regard to any matter that appears to it to be relevant and, in particular, have regard to the character of the applicant, his or her conduct after conviction and the offence concerned.¹¹² Curiously, section 92 (9) provides that proceedings under this section *shall* be heard otherwise than in public. Surely, a discretionary provision that the proceedings *may* be heard otherwise than in public would have been sufficient.

¹⁰⁶ s. 92 (10).

¹⁰⁷ s. 93 (8): the application should be made in the circuit where the applicant ordinarily resides or has his or her most usual place of abode.

¹⁰⁸ s. 93 (2).

¹⁰⁹ s. 93 (3).

¹¹⁰ s. 93 (4).

¹¹¹ s. 93 (5).

¹¹² s. 93 (6).

If the conviction is quashed on appeal, then the person shall cease to be subject to the requirements of Part 9.¹¹³

4. Offences under Part 9

Section 94 creates two summary offences. The first offence is committed if a person fails, without reasonable excuse, to comply with the requirements of Part 9.¹¹⁴ The offence is committed on the day on which s/he first fails, without reasonable excuse, to comply with the requirements and the person continues to commit the offence throughout any period during which the failure continues. A person shall not be prosecuted under that provision more than once in respect of the same failure.¹¹⁵ A statement on oath by a member of An Garda Síochána that no notification of the matters concerned was given by the defendant shall, until the contrary is shown, be evidence that no such notification was given.¹¹⁶ The member of An Garda Síochána must be a member not below the rank of sergeant who, from his or her evidence to the court, the court is satisfied: (a) is familiar with the systems operated by An Garda Síochána for recording the fact that particular information has been received by them, and (b) has made all proper enquiries whether notification by the defendant was received.¹¹⁷

The second offence is committed if a person notifies to An Garda Síochána any information which s/he know to be false or misleading in any respect.¹¹⁸

The penalties provided for these offences are, on summary conviction, a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both.¹¹⁹

¹¹³ s. 89 (7).

¹¹⁴ s. 94 (1) (a).

¹¹⁵ s. 94 (2).

¹¹⁶ s. 94 (4).

¹¹⁷ s. 94 (5).

¹¹⁸ s. 94 (1) (b).

¹¹⁹ s. 94 (3).

5. Application of Part 9 to certain offences committed outside the State

Section 95 provides that a person may be subject to the requirements of Part 9 if a person commits an offence outside the State and the offence concerned would constitute a drug trafficking offence under the law of the State and the person at the time of or after the conviction becomes resident in the State. Section 97 contains provisions with regard to proof of foreign convictions.

6. Likely effect of Part 9

The effect of Part 9 will be to assist An Garda Síochána to monitor the movements of convicted drug trafficking offenders. It clearly imposes a considerable burden on offenders, who have served their time, to constantly notify the gardai of their movements around, in and out of the country and changes of address, *etc.* It would not appear that the details of the so-called “register” will be made available to members of the public.

The constitutionality of the provisions of Part 2 of the Sex Offenders Act, 2001, which are similar to the provisions of Part 9 of the 2006 Act, was upheld in the case of *Enright v. Ireland*.¹²⁰ In that case, Finlay Geoghegan J. in the High Court found that the requirements of the Sex Offenders Act, 2001 on a person convicted of a sexual offence did not form part of the penalty or punishment for the offence. However, subsequent comments from the Court of Criminal Appeal in the case of *N.Y.*¹²¹ appeared to regard the requirements under the 2001 Act as a “burden” that could be considered by the sentencing judge when imposing sentence. In the case of *G.D.*,¹²² the Court of Criminal Appeal noted that the accused had been placed on the “sex offenders’

¹²⁰ [2003] 2 I.R. 321. In the case of *The People (D.P.P.) v. Cawley* [2003] 4 I.R. 321 Herbert J. held that the notification requirements under the Sex Offenders Act, 2001 “undoubtedly inflicted a detriment” on a convicted person but did not amount to a penalty.

¹²¹ [2002] 4 I.R. 308. This judgment was handed down the day after the judgment in *Enright*.

¹²² Court of Criminal Appeal, unreported, McCracken J., 13 July 2004.

register” “which is in itself a punishment”. The matter was much clarified by the judgment of Clarke J. in the case of *P.H. v. Ireland*.¹²³ In the course of his judgment he said:

The range of matters which can properly be taken into account in sentencing is, of course, extremely wide. For many years courts imposing sentence have properly taken into account the fact that conviction of the offence concerned may well have led to serious adverse consequences for the accused wholly independent of the criminal process ... I am not satisfied that the Court of Criminal Appeal, in the judgments to which I have been referred, was doing anything other than indicating that the provisions of the 2001 Act were amongst the “relevant circumstances” which should be taken into account when imposing sentence.¹²⁴

Thus, while the requirements of the 2001 Act are not to be regarded as part of the punishment or penalty for the offence, their effect on the offender can be considered by the sentencing judge in determining a proportionate sentence¹²⁵.

Support for that proposition can also be gleaned from the judgment of the Supreme Court in the recent challenge to the constitutionality of section 1 (1) of the Criminal Law (Amendment) Act, 1935.¹²⁶ In the course of his judgment in that case, Hardiman J. said:

In *D.P.P. v. Redmond* [2001] 3 I.R. 390 the Court of Criminal Appeal held that the totality of the punitive consequences of an offence had to be considered. Enrolment on this register is a very

¹²³ High Court, unreported, Clarke J., 16 February 2006.

¹²⁴ High Court, unreported, Clarke J., 16 February 2006, para. 7.7.

¹²⁵ See the judgment of Court of Criminal Appeal in the case of *D.P.P. v. Redmond* [2001] 3 I.R. 390 where the court referred to the concept of “cumulative punishment”. See further O’Malley, *Sentencing Law and Practice* (2nd ed., Round Hall Sweet & Maxwell, 2006) at pp. 95 – 101.

¹²⁶ *C.C. v Ireland*, Supreme Court, unreported, Hardiman J., 23 May 2006.

formalised stigma. It would be a matter of intense shame to any individual, and, unfortunately to his family. It is something a person would wish to conceal even after many years. There have been tabloid newspaper demands to have the contents of the register published, and persons on the equivalent register in the United Kingdom have been physically attacked. So, unfortunately, have persons erroneously thought to be sexual offenders. Enrolment on the register would be incompatible with admission to various professions and occupations, such as that of school teacher. One can be enrolled on the register only as a result of a conviction. In all the circumstances I have no hesitation in regarding compulsory enrolment on the register as a *punitive consequence* of conviction.¹²⁷

Whether the notification requirements are to be regarded as part of the penalty for an offence or not the court in this case clearly accepted that certain types of offences attract greater degrees of social stigma than other offences. Sexual offences, in particular, attract a high level of public opprobrium and revulsion and a conviction for a sexual offence carries serious consequences for a person's future livelihood and acceptance in society.

Similarly, a conviction for a drug offence is a serious matter. For example, a student convicted of such an offence may be expelled from school or college, or be denied a visa to live or work in another country. A conviction would also seriously impair a person's future employability in certain professions. Being subject to the requirements of Part 9 is unique to those convicted of certain drug trafficking offences and could be regarded as an additional burden, which could be weighed in the balance by the sentencing judge when imposing sentence. Ironically, this factor may well result in judges being reluctant to impose lengthy prison sentences, since the longer the sentence imposed, the longer a person will be required to comply with Part 9 following release

¹²⁷ *C.C. v Ireland*, Supreme Court, unreported, Hardiman J., 23 May 2006, at p. 19 (emphasis added)

from prison. We may see a rise in the number of sentences being wholly suspended so that the offender would only be subject to Part 9 for a period of 12 months. Alternatively, courts may sentence certain offenders to a period of 12 months or less in order that those offenders would not become subject to the requirements of Part 9. As the Court of Criminal Appeal said in the case of *The People (D.P.P.) v. Clarkin*¹²⁸ “a trial judge is entitled to be lenient if he considers that it is just to do so in all the circumstances of any particular case”. As noted above the effect of Part 9 of the 2006 Act should also be taken into account when considering “whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence” than 10 years for a section 15A or 15B offence. Being subject to the requirements of Part 9 of the Act will, in itself, have a preventative effect on any future re-offending. That consequence may well justify the imposition of a lesser sentence if courts truly aim to impose a proportionate sentence having regard to the circumstance of the offence and the offender.

Only time will tell if the provisions of Part 8 and Part 9 of the Act will have the effect of increasing the severity of sentences for drug offenders or result in other, perhaps unanticipated, consequences.

¹²⁸ Court of Criminal Appeal, unreported, 2 October 2003.