



Comhairle na mBreithiúna
The Judicial Council

**INFORMATION NOTE ACCOMPANYING THE DRAFT GUIDELINE ON THE
APPLICATION OF SECTION 40 OF THE DOMESTIC VIOLENCE ACT 2018**

The Sentencing Guidelines and Information

INFORMATION NOTE ACCOMPANYING DRAFT GUIDELINE

INTRODUCTION

1. One of the tasks of the Sentencing Guidelines and Information Committee, under the Judicial Council Act 2019, is to prepare sentencing Guidelines. Under s.91 of the Act, Guidelines may relate to sentencing generally or to sentences in respect of a particular offence, a particular category of offence or a particular category of offender. For the purpose of preparing draft Guidelines the Committee may consult with such persons as it considers appropriate.
2. In preparing a draft Guideline the Committee must take account of a range of matters including the need to promote consistency in sentences, the impact of decisions of the courts relating to sentences on the victims of the offences concerned, the protection of victims of crime, the promotion of public confidence in the criminal justice system, the financial costs involved in the execution of different types of sentences and their relative effectiveness in the prevention of re-offending.
3. Where a Guideline has been proposed by the Committee, its approval and adoption depend on the process provided for under the Judicial Council Act 2019. It may be that the procedure currently prescribed by the Act will be amended in the light of the decision of the Supreme Court in *Delaney v. Personal Injuries Assessment Board* [2024] IESC 10.

4. A judge must, in imposing a sentence, have regard to any relevant Guideline made under the Act unless they consider, for stated reasons, that to do so would be unjust in the exceptional circumstances of the case.
5. **This proposed Guideline relates primarily to a particular category of offence – the offences captured by s. 40 of the Domestic Violence Act 2018.** That section is relevant to offences committed in a context where the victim and the offender are or were married, or are or were in a civil partnership, or are or were in an intimate relationship. Such a relationship (here referred to as a “relevant relationship”) between the offender and the victim must be seen as a factor that aggravates sentence. In sentencing for offences covered by the section, the sentence ultimately imposed must, where there is a relevant relationship, be greater than would otherwise be the case (although it can never exceed the maximum sentence provided for in statute). The draft Guideline covers only offences where such a relationship exists, and does not deal with offences of violence in other contexts.
6. Before the enactment of the section, sentencing judges would generally have seen abuse of trust, confidence or a dominant position within an intimate relationship as aggravating factors in relation to most of the offences covered by s. 40. What is new is that this principle must now be applied systematically to the specified offences, and there is now a specific requirement for a heavier sentence than might otherwise have been imposed. This Guideline is intended to assist judges in complying with that requirement in sentencing the various kinds of offences concerned. Because of the different considerations that arise in cases concerning offenders who are children, the Guideline applies only to offenders aged 18 and over.

THE NATIONAL CONTEXT

7. The Committee has considered certain publications of non-governmental organisations as well as official data.
8. It is recognised that domestic violence is a gendered crime, affecting significantly greater numbers of female victims. It should, however, be understood that offending of this nature can and does occur against women, men and people of all genders. According to the Garda Síochána, 23% of victims of domestic abuse in the years 2019 to 2021 were male (Report on Domestic, Sexual and Gender Based Violence, 2022).
9. In 2023 Women's Aid received 35,570 disclosures which concerned abuse of women. The abuse is categorised under four headings. Lawyers are of course familiar with the criminal law relating to physical abuse (7,851 disclosures) and sexual abuse (1,448) but there are further headings.
10. There were 21,974 disclosures of "emotional" abuse – these included the social isolation of the woman, stalking and monitoring her both physically and online, and threats to kill her (or her children or a member of her family). There were 4,297 disclosures of "economic" abuse (such as denying the woman access to the household income, controlling her income, refusing to pay maintenance for children). For lawyers, the terms "emotional" and "economic" might, possibly, obscure the fact

that such behaviours are all capable of amounting to serious crimes. It is essential that they be given due consideration.

11. As of the 31st October 2023, the Probation Service was working with approximately 368 cases, referred by the courts, where intimate partner violence was involved. The most common offences involved were assaults and breaches of safety or barring orders. 94% offenders were male and 94% of the intimate partners concerned were female.
12. The Central Statistics Office conducted a Sexual Violence Survey in 2022, with the objective of providing high quality national prevalence data on sexual violence. This is intended to act as a new baseline for the levels of sexual violence in Ireland. The term “sexual violence” was defined as covering a range of non-consensual experience from non-contact non-consensual (such as being made to view pornographic material, or to pose suggestively for photographs) to non-consensual sexual intercourse. “Violence” does not necessarily involve physical force but can mean behaviour having a “marked” or “powerful” effect.
13. Some of the data gathered in the survey is of clear relevance. Younger people report having experienced sexual violence in their lifetimes at a significantly higher rate than older people. Whether this is because offending behaviour of this nature has increased, or because younger people are more likely to disclose their experience, it may indicate a likelihood of increasing reporting of criminal behaviour.

14. Women report significantly higher rates of experience of sexual violence than men.

Thus, 65% of women aged between 18 and 24 report having experienced sexual violence at least once in their lifetimes, compared to 33% of men of that age. Women also report higher rates for experience of sexual violence in adulthood (39%) than men (12%).

15. Respondents who had experienced sexual violence in adulthood with a non-partner

only were over three times more likely (55%) to disclose it than those who experienced it with a partner only (16%). This demonstrates that those who are victims of offences coming within the broad definition of sexual violence while in a relevant relationship may find it very difficult to disclose their experience to law enforcement personnel. That factor may mean that in many of the cases that come before the courts there will have been a pattern of abusive behaviour covering a lengthy period of time. The reasons for non-reporting during that period may be complex, ranging from fear of the abuser to fear of social stigma.

THE EUROPEAN CONTEXT

16. The Victim's Rights Directive (Directive 2012/29/EU of the European Parliament and of the Council, 25th October 2012) establishes certain minimum standards on the rights, support and protection of victims of crime. It identifies the seriousness of violence committed in a close relationship in Recital (18) in the following terms:

“Where violence is committed in a close relationship, it is committed by a person who is a current or former spouse, or partner or other family member

of the victim, whether or not the offender shares or has shared the same household with the victim. Such violence could cover physical, sexual, psychological or economic violence and could result in physical, mental or emotional harm or economic loss. Violence in close relationships is a serious and often hidden social problem which could cause systematic psychological and physical trauma with severe consequences because the offender is a person whom the victim should be able to trust. Victims of violence in close relationships may therefore be in need of special protection measures. Women are affected disproportionately by this type of violence and the situation can be worse if the woman is dependent on the offender economically, socially or as regards her right of residence.”

17. Under Article 2 of the European Convention on Human Rights (which protects the right to life), the State is obliged to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person. The criminal law system must have an adequate deterrent effect. Under Article 3 the State is obliged to take measures designed to ensure that individuals are not subjected to ill-treatment amounting to degrading treatment by private individuals. Vulnerable individuals, in particular, are entitled to State protection in the form of effective deterrence. Physical violence and psychological pressure can be sufficiently serious to amount to ill-treatment within the meaning of Article 3. Offences within the context of close relationships may also engage Article 8 (the right to respect for private and family life).

18. The Istanbul Convention (the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence) requires State parties to take the necessary legislative measures to ensure that offences covered by the Convention are punishable by effective, proportionate and dissuasive sanctions. Article 46 of the Convention lists, among other matters to be considered as aggravating factors, the fact that an offence was committed against a former or current spouse or a person cohabiting with the victim. It is a further aggravating factor if the offence was committed in the presence of a child. In 2023 GREVIO (the Group of Experts on Action against Violence against Women and Domestic Violence) issued an evaluation report on Ireland's implementation of the Convention. Its findings indicate that there is at least a perception that the Irish courts deal leniently with offences of this nature, although without reference to specific data.

SECTION 40 OF THE DOMESTIC VIOLENCE ACT 2018

19. Section 40 provides that where a court is determining the sentence to be imposed on a person for a "relevant offence", and the offence was committed against a "relevant person", that fact is to be treated as an aggravating factor. The sentence must be greater than it would have been if the victim was not a "relevant person". This requirement does not apply, however, if the court considers that there are exceptional circumstances that justify not applying it.

20. A "relevant person" is someone who is, or used to be, a spouse or civil partner of the offender or, although not the spouse or partner, is someone who is or was in an intimate relationship with the offender.

21. The “relevant offences” listed in the section are categorised and described briefly in the Appendix to the Guideline. The relevant legislation should be consulted for the exact legal definition of any offence. Guideline judgments are referred to where applicable.
22. It should be noted that the offence of coercive control (section 39 of the Domestic Violence Act 2018) is *excluded* from the s.40 list. “Coercive control” is committed by a person who knowingly and persistently engages in controlling or coercive behaviour that has a serious effect on a relevant person. A “serious effect” is where the behaviour causes the relevant person to fear that violence will be used against them, or where it causes them serious alarm or distress that has a substantial adverse effect on their usual day-to-day activities.
23. It is, however, the case that many of the considerations identified in the Guideline will be relevant to sentencing for the offence of coercive control.

MATTERS TO BE TAKEN INTO ACCOUNT IN PREPARING DRAFT GUIDELINES

24. Under s.91 of the Judicial Council Act 2019, the Committee is obliged to have regard to the following matters in preparing draft sentencing guidelines in respect of a particular category of offences:
- (a) Sentences that are imposed by the courts,
 - (b) The need to promote consistency in sentences imposed by the courts,
 - (c) The impact of decisions of the courts relating to sentences on the victims of the offences concerned,

(d) The need to promote public confidence in the system of criminal justice,
and

(e) The financial costs involved in the execution of different types of sentence
and the relative effectiveness of them in preventing re-offending.

25. As far as paragraph (a) is concerned, there is no data available to the Committee with respect to the application of s.40 of the Domestic Violence Act 2018. Each of the offences discussed above may also of course be committed in a context that does not involve a relevant relationship, where s.40 would not be applicable. At present, no statutory body involved in the criminal justice process collects data in a way that enables cases where there is such a relationship to be separated out from cases where there is not, so any differences in the outcomes cannot be assessed. However, as of June 2024 the Garda PULSE system records the relationship between victims and offenders under a number of headings which include relationships within s.40 and records certain incidents as having “domestic violence” as the motive.

26. The Committee will endeavour to obtain such data as may become available about cases that progress through the court system to the sentencing stage, and will endeavour to establish a system for counting such cases within the court process.

27. The Committee can, however, say with confidence that the existence of a relevant relationship has generally been seen as an aggravating factor where one party to the relationship commits an offence against the other. One example is the only case of marital rape dealt with by the Court of Appeal since the enactment of s.40. The Court did not refer to the section (which may not have been in force at the date of sentence

in the trial court) but specified as aggravating factors the significant breach of trust and the fact that the victim was humiliated and degraded in her own home.¹

28. The Committee has prepared this draft guideline in the interest of the promotion of consistency in the application of s.40, as contemplated by paragraph (b).

29. Under paragraph (c), the Committee has had regard to the impact of sentencing decisions on victims of offences covered by s.40, with particular reference to the assessment of the gravity of an offence and questions that may arise as to the views of victims in relation to sentence and as to the role of compensation.

30. With regard to paragraph (d), the Committee is of the view that a publicly available Guideline will, by assisting sentencing judges to take a consistent approach, promote public confidence in the sentencing of offences within this category.

31. The Committee has had regard to the matters specified in paragraph (e). It is conscious that non-custodial options such as probation or community service and, for that matter, suspended terms of imprisonment are less costly than incarceration.² The Committee also notes that in general probation is a cost-effective system when employed in appropriate cases and situations and specifically in terms of reducing risk of repeat offending. However, the range of offences covered by s.40 includes several extremely serious offences in respect of which it is not possible to say that significant periods of imprisonment should be rare or exceptional.

¹ *People (DPP) v. T.S.* [2019] IECA 252

² In the calendar year 2022 the average annual cost of an available, staffed prison space was €84,067.

32. The Committee has conducted a consultation process amongst agencies, bodies and persons with particular experience and expertise in this area. It wishes to thank the following for their assistance:

ADAPT Kerry Women's Refuge & Support Services

Amber Women's Refuge

Barnardos

Courts Service - Circuit & District Operations Office

Cuan

Director of Public Prosecutions

Domestic Violence Response

Dr Eithne Dowds – Queen's University

Galway Rape Crisis Centre

Garda Corporate Services Office

Irish Penal Reform Trust

Laois Domestic Abuse Service

Meath Women's Refuge & Support Services

MOVE Ireland

Rape Crisis Centres

Dr Susan Leahy – University of Limerick

The Probation Service

Women's Aid