A Study of District Court Judges Views on Sentencing and the Sentencing of Relationship Violence

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Executive Summary

Large caseloads and long court lists are two of the challenges perceived by District Court judges as reducing the time and flexibility that they have to consider the appropriate sentence. Pressure to progress the list is an important overarching consideration that judges feel compelled to factor into their decisions around sentencing in order to avoid delays and the impact that this might have on the defendants' right to a fair trial. A case in point is the decision to request a pre-sanction report and the potential delays this might lead to. Another key challenge identified by judges in this study was the difficulty of accessing the timely and accurate information they considered essential for making their sentencing decision.

The challenges inherent in making decisions under extreme time pressures and with limited information are compounded by weak structural and contextual supports including a lack of bespoke sentencing guidance relevant to the types of cases dealt with in the District Court, the absence of a dedicated system of appellate review for the District Court, the under-resourcing of prosecutors whose duty it is to assist judges in information on sentencing, and a very limited programme of judicial induction, training and continued professional development in the area of sentencing. These challenges combined make it more difficult for District Court judges to stay up to date with new laws, processes and legal procedures.

The introduction of a bespoke system of support that caters specifically for the needs of District Court judges would significantly enhance their ability to overcome many of the challenges they currently face when sentencing in the busiest and most diverse court in the Irish legal system.

Despite these challenges, this study found a marked difference in attitudes of District Court judges from previous research carried out over a decade ago in that most judges now adopt a structured approach to sentencing with reference to the principle of proportionality and only a minority following an instinctual synthesis approach. Similarly, most judges interviewed for this study value consistency in sentencing and welcome the provision of more sentencing information, guidance and training on a wide range of sentencing issues.

A key point that emerged from judicial perspectives on the sanctions at their disposal was the consensus amongst judges that the system for the enforcement of fines is not fit for purpose, that judges are reluctant to impose fines and are sometimes more amenable to imposing a contribution to charity and/or a compensation order. The underlying problem from a judicial perspective appears to be the low probability that the fines imposed will ever be paid. How judges should navigate the potential lack of equity in sentencing in relation to persons who do not have the financial means to pay a fine, contribution to charity or compensation order emerged as an important area that requires sentencing guidance.

District Court judges interviewed in this study have a low level of awareness of the range of community sanctions at their disposal and highlighted several other obstacles limiting their use of community sanctions including: the lack of availability of and delays associated with getting pre-sanction reports and their perceptions that community sanctions are not always

suited to people appearing before them as many have substance misuse issues and serious mental health problems that make them unsuitable for these sanctions.

Additionally, District Court judges opined that often a prison sentence is the only suitable penalty for people with multiple convictions, largely because multiple convictions increase the seriousness of even relatively minor offences to the point where no other sanction is suitable.

In order to support judges in the District Court and address the key challenges highlighted above the Sentencing Guidelines and Information Committee (SGIC) should prioritise the following key recommendations:

Key recommendations related to the sentencing of criminal offences in the District Court

- Develop sentencing guidelines specific to the District Court based on the general sentencing jurisprudence of the superior courts. Guidelines should be specifically adapted to the types of cases and circumstances typically heard in the District Court and the following areas should be prioritised:
    - the adoption of a structured approach to sentencing, and the various steps involved in this with specific examples based on typical cases tried and sentenced in the District Court;
    - the different points on the scale of severity for the more serious offences heard in the District Court and appropriate penalties incorporating the full range of financial, supervisory and custodial sanctions available to the District Court;
    - role of previous convictions in sentencing in the context of the District Court with particular emphasis on cases with large volumes of previous convictions where the offence itself is relatively minor;
- Regular updates on Court of Appeal and Supreme Court sentencing jurisprudence reported with specific discussion of their relevance in the context of the District Court.
- Regular provision of feedback of outcomes of District Court sentencing appeal decisions.
- Annual updates to Sentencing Bench Books with information on the full range of sentencing disposals available to judges sentencing in the District Court.
- The provision of sentencing information for the District Court on the various community sanctions overseen by the Probation Service to inform judges about the range of different supervisory sanctions, what they involve as well as the relative success of the different sanctions in helping people desist from crime.

Ireland does not have a specifically designated or specialist domestic violence court. By default more than design, there are at least two different approaches underpinning the sentencing of breaches of domestic violence orders in the Irish District Court. One in which judges have full access to the original civil application for the protective order and another in which they have no previous knowledge of the family law file.

The majority of judges interviewed expressed the view that relationship violence cases are different to other criminal cases due to the relationship between the parties and the sensitivities and complexities that this gives rise to.

Analysis of the sentencing vignettes showed that some judges tended to adopt a family law solution approach rather than one based purely on the ordinary sentencing principles when sentencing section 33 offences. This study therefore found a divergence of approach amongst District Court judges in terms of how they approach the sentencing of breaches of domestic violence orders which was principally related to the different court contexts in which they operate.

The SGIC can support the adoption of a more coherent and uniform approach to the sentencing of domestic violence offences under section 33 by the provision of a bespoke programme of sentencing information, guidance and training relevant to the section 33 types of cases that typically appear in the District Court. The majority of judges would welcome information, training and sentencing guidance from the SGIC in relation to sentencing of domestic abuse cases in the courts and see the absence of such training as a gap in provision that should be filled.
While some judges consider physical abuse as more aggravating than psychosocial or emotional abuse, there was strong evidence that judges were motivated to adopt approaches that they believed would protect victims.

While many judges noted that controlling behaviour was a common feature of section 33 cases in the District Court a majority appeared to believe that the reason very few section 39 prosecutions were taken in the District Court was because the offence of coercive control was too serious to be heard in that court.

Key recommendations related to the sentencing of relationship violence in the District Court

- Sentencing information and training for District Court judges on how to identify different forms of abuse and their respective impacts on victims/survivors and their children. Information and training on recognising the various forms that domestic abuse can take and their respective harms is directly relevant to sentencing judges to enable them to correctly assess the nature of the harm involved in the domestic abuse and thus the seriousness of the offence.

- The provision of a dedicated Sentencing Domestic Abuse Bench Book for District Court judges which will provide a one stop shop for all the sentencing information and guidance they need when sentencing section 33 offences and of other criminal offences involving domestic abuse.

- Sentencing guidance for District Court judges on how to approach the sentencing of section 33 cases that sets out the various considerations that

judges should be aware of when assessing the harm caused by the breach of the protective order, the various levels of culpability of the convicted person, and the range of aggravating and mitigating factors that should be considered when assessing the overall level of seriousness of the offence. The guideline should also offer clarity on the range of personal factors and circumstances that might legitimately be considered in terms of mitigation of headline sentence.

- Sentencing guidance for District Court judges on how to assess the harm caused by the breach of the protective order and/or involved in cases involving domestic abuse should focus on helping judges to recognise and assess the impact of the various harms that are evidenced in a particular case including psychological, emotional, financial, and physical harms. The assessment of harm caused by the offence goes directly to the question of the seriousness of the case which along with culpability is a major component of arriving at the headline sentence in accordance with the principle for proportionality in Irish sentencing law.

- Sentencing guideline for District Court judges on what action, if any, is appropriate for District Court judges to take when child welfare concerns arise during a criminal prosecution for domestic abuse such as in a prosecution of and/or sentencing for a section 33 offence. The guidance should set out specifically where judges stand vis-à-vis the requirements of all adults to report child welfare concerns under the Children First National Guidance 2017.

1. Introduction

1.1 Objective

This research was commissioned by the Sentencing Guidelines and Information Committee (SGIC) of the Judicial Council, established by the Judicial Council Act 2019. The key functions of the SGIC include the preparation and submission of draft sentencing guidelines to the Judicial Council; the monitoring of the operation of sentencing guidelines; the collation and dissemination of information on sentences imposed by the courts; and the conduct of research on sentencing imposed by the courts. As part of its ongoing work, the SGIC identified sentencing in the District Court as an area in need of further research and the findings and recommendations of this study aim to inform, support and strengthen the evidence base for the work of the SGIC. The SGIC has classified work connected with this research as confidential pursuant to Section 41 of the Judicial Council Act 2019.

1.2 Research Objectives

The primary aim of this research was to identify District Court judges' views and experiences of the various aspects of the sentencing process in the District Court. The study explored both systematic issues and particular issues related to sentencing in cases of relationship violence in the context of offences committed under section 33 of the Domestic Violence Act 2018.

The research had three main objectives:

- To ascertain District Court Judges' views on the issues of concern and challenges in approaches to and arriving at sentencing in criminal matters in the District Court.
- To ascertain concerns and challenges in (the same) Judges' approaches to arriving at decisions in specific cases of Relationship Violence and Abuse.
- To ascertain (the same) Judges' views on how sentencing in the District Court might be better supported, including their views regarding the work of the SGIC in relation to sentencing guidelines and sentencing information.

1.3 Research Methodology

As the main purpose of the research was to gather qualitative information on views and experiences of District Court Judges on various aspects of sentencing in the District Court, this study employed two research methods traditionally associated with sentencing research, semi-structured interviews and sentencing vignettes. In-depth semi-structured interviews were designed and employed to elicit judicial perspectives on the issues identified under the three research objectives. Alongside the interview schedule, a selection of vignettes was used

to explore judicial responses to the sentencing of criminal cases typically dealt with in the District Court and section 33 cases involving the sentencing of breaches of protection and safety orders under the Domestic Violence Act 2018. Judges were asked to respond to the vignettes which provided them with situated contexts in which to explore how various criminal law cases particularly those involving relationship violence and abuse, are dealt with by the courts. The research instruments (see Appendix I for the Interview Schedule & Vignettes) were agreed with the SGIC before seeking Ethical Approval from the South East Technological University.

The SGIC of the Judicial Council commissioned this research and it played a significant role in access to and recruitment of participants in this study. In total thirteen District Court Judges (20 per cent of all sitting DCJs) participated in the research and interviews took place between July 2022 and January 2023. A purposive approach to sampling was initially adopted whereby attempts were made to recruit judges from different geographical areas and from different types of district. However, as this was not forthcoming, a convenience sample was sought which involved the SGIC extending invitations to participate in the research to all District Court judges. Judges were given the choice between being interviewed in person and or zoom. Notwithstanding this extra element of flexibility, arranging a suitable time for judges to participate in the research interviews proved challenging. In some instances, last minute changes to court schedules, the over-run of a particularly busy court or the physical distance between the interviewer and the judicial participant meant the interviews had to be re-scheduled or cancelled altogether. Given these constraints, the sample is reasonably representative and includes male and female judges, judges assigned to provincial and multi-court districts and moveable judges with experience throughout various court districts in Ireland. The interviews lasted on average one hour and a half, discussions were in-depth and open, and the judges who participated in this study did so with a spirit of generosity and transparency.

As a result, a significant dataset comprising thirteen interviews and a total of 1379 minutes with each interview ranging from one hour and two hours with the overall average length of interviews across judges being one hour and forty-six minutes. Once transcribed, the interviews and responses to the vignettes were coded and analysed thematically using NVivo. The research was analysed following Miles and Huberman's three step approach to analysing qualitative data including "data reduction, data display and conclusion drawing/verification".[1]

[1] Miles B. Matthew and Michael A. Huberman, *An Expanded Sourcebook: Qualitative Data Analysis*, (2nd edn, Sage Publications, 1994) p.10.

1.4 Ethical Approval

All elements of the project were subject to independent ethical review by the School of Humanities Ethics Committee at South East Technological University. A number of key ethical considerations were highlighted and addressed in the study's Consent and Information Sheet (see Appendix III) all research participants received. These included the need: that all study participants receive adequate information about the nature and purpose of the project and are made aware that their participation in the project is voluntary; that all participants be informed that their participation is voluntary and will be made aware that there will be no adverse consequences if they do not participate in any part of the research; that a secure and GDPR compliant data management system will be adopted to guarantee participant confidentiality throughout the project and to ensure that no identifying information (including information on the court districts) will be used in any publicly disseminated material.

1.5 Study limitations

The findings of this study should be seen in light of a number of limitations. First, the lack of available statistical data and research data on the sentencing of domestic violence cases in Ireland, particularly those prosecuted under section 33 of the Domestic Violence Act 2018, meant that the research was not informed by any prior understanding of the Irish sentencing practices in domestic violence cases. Second, while the use of sentencing vignettes provide a valuable situated context in which to explore various themes regarding the sentencing of relationship violence they are hypothetical in nature and therefore cannot capture the full reality or all of the variables actually involved in passing sentencing in court. Third, interviews are a traditional research method in the social sciences that allow research participants to tell us what we they think and what they do but they do not provide us with the opportunity to observe what the participants actually do in practice. Given the sensitive nature of domestic violence some participants may have provided socially desirable responses to the questions posed rather than their true views.

1.6 Structure of Report

Chapter 2 of this report sets out the research context by exploring the legal framework for sentencing in Ireland as well as recent trends in Irish sentencing practices. It introduces the District Court, explores the challenges of sentencing in this District Court within the context of limited sentencing guidance and briefly examines previous research on District Court judges sentencing perspectives. Chapter 2 then examines the Domestic Violence Act 2018, definitions of domestic violence and different models of domestic violence emerging from research, the challenges facing victims/survivors of domestic violence and the prosecution of breaches of domestic violence offences under the Act. This chapter briefly examines the data available on domestic violence prosecutions and previous studies that provide insight on

domestic violence order applications in the District Court. Chapter 2 concludes by providing a summary of the main questions arising from a review of the research context.

Chapter 3 introduces the first findings chapter that examines the main challenges judges in the District court face when approaching the sentencing of criminal offences. It highlights the limited availability of information necessary for passing sentencing and the enormous pressure judges operate under in terms of the long court lists and high caseloads. This chapter then examines judicial perspectives on sentencing guidelines and reports on the sentencing guidance that judges in the District Court would ideally like to have available. Recommendations are listed immediately following findings they relate to and the chapter closes by presenting preliminary conclusions.

Chapter 4 presents the research findings on judicial perspectives on the various sentencing disposals available to them in the District Court. It begins by exploring judicial understandings of the relationship between decisions on jurisdiction and determinations of sentencing. Chapter 4 then explores judicial perspectives on financial penalties, community sanctions and custodial sanctions finishing with an exploration of the principle that prison should be used as a last resort. Recommendations are listed immediately following findings they relate to and the chapter closes by presenting preliminary conclusions.

Chapter 5 presents findings on judicial perspectives on the sentencing of domestic violence particularly the sentencing of section 33 offences. This chapter begins by exploring whether judges perceive section 33 offences as being different to other criminal offences. It then explores judicial perspectives on the involvement of probation service and other professionals in the sentencing of section 33 offences and explores judicial experiences with section 39 prosecutions and their knowledge and awareness of section 40 of the Domestic Violence Act 2018. It examines judicial views on training on the dynamics of family violence and their interest in accessing further information on sentencing practice in this area. Chapter 5 then examines judicial perspectives on why section 33 prosecutions often fail and closes by presenting preliminary conclusions. As with previous chapters, recommendations are listed immediately following findings they relate to.

Chapter 6 explores how judges responded to the two sentencing vignettes they were presented with. The findings in relation to each vignette are presented separately and begin with an analysis of the overall sentencing approaches of judges to each vignette. The aggravating and mitigating factors judges found relevant are then highlighted and then the key themes emerging from each vignette and the questions accompanying them, are examined. This chapter briefly examines notable findings that emerged from an analysis of both the interviews and vignettes and then closes by presenting preliminary conclusions. Recommendations are listed immediately following findings they relate to.

Chapter 7 sets out the main conclusions of the research within the context of the three research objectives of the study and then summarises the main training, guidance, guidelines, policy and further research recommendations relevant to each research objective.

2. Research context

2.1 Introduction

This section will introduce the District Court and then it will briefly summarise some of the most important recent trends emerging in policy and practice in order to contextualise the findings of this research within the broader understanding of transformations in the operation of the courts and criminal justice system.

2.2 Sentencing in Ireland

Ireland has an individualised system of sentencing in which judges exercise a broad sentencing discretion.[2] Ireland is one of the few remaining common law jurisdictions that has not yet introduced some form of sentencing guidelines. Similarly, there is no statutory sentencing framework of sentencing that judges can look to for sentencing guidance, existing statutory provisions in relation to sentencing are limited with a few exceptions to indicating maximum sentences (expressed in terms of imprisonment and fines). The last two decades have seen a burgeoning growth of mandatory and presumptive minimum sentencing laws introduced, these remain the exception rather than the rule. Over two decades ago the Irish sentencing system was described as one of the most unstructured in the common law world and with some exceptions this remains the case today.[3] Since the foundation of the state, the main structuring influence in sentencing has been the work of the Irish judiciary in developing the principle of proportionality which is the main sentencing guidance that judges rely upon in Ireland. Recent transformative developments include the decision of the Court of Criminal Appeal (now the Court of Appeal) to issue sentencing guideline judgments setting out indicative sentencing ranges for a variety of offences and the introduction of the Judicial Council, in 2019, which is tasked with introducing sentencing guidelines.

While other jurisdictions have adopted a sentencing framework via legislation[4], in Ireland the principle of proportionality was developed at common law by the superior courts and is now universally regarded as the key guiding principle for judges approaching sentencing. While a key characteristic of Irish sentencing is its discretionary nature, there is a clear expectation that in exercising this discretion judges allow themselves to be guided by the essential

[2] Tom O'Malley, *Sentencing Law and Practice* (Thomson Round Hall, 2nd edn, 2006) [3.06]; Niamh Maguire, Consistency in sentencing (2010) 2 *Judicial Studies Institute Journal* [2010] 14

[3] O'Malley, *Sentencing Law and Practice* (Thomson Round Hall, 2nd edn, 2006) [3.06]

[4] Niamh Maguire, Sentencing, in C. Hamilton et al (edns) *Routledge Handbook of Irish Criminology* (Routledge, 2016).

principles of sentencing law which are firmly established in the jurisprudence of the Irish criminal law. One of the clearest, and most quoted statements of the principle of proportionality was set out by Denham J in the Supreme Court *The People (DPP) v M:*[5]

> Sentences should be proportionate. Firstly, they should be proportionate to the crime. Thus, a grave offence is reflected by a severe sentence…However, sentences must also be proportionate to the personal circumstances of the appellant…Thus have assessed what is the appropriate sentence for a particular crime it is the duty of the court to consider then the particular circumstances of the convicted person. It is within this ambit that mitigating factors fall to be considered.

As the Law Reform Commission recently noted, the 'need for greater consistency in sentencing has been a recurring theme of the past three decades'.[6] Academic studies have consistently highlighted a lack of consistency in Irish sentencing outcomes which can be traced to a lack of consistency of approach to sentencing.[7] Maguire's empirical study on sentencing in the District and Circuit Courts found that District Court judges exhibited a strong working ideology based on the uniqueness of the individual case, whereby judges prioritised their discretionary sentencing powers to do justice in individual cases over the need for consistency in sentencing.[8] Maguire concluded by noting the steps that could be taken to reduce sentencing inconsistency and increase the coherency of Irish sentencing law such as: the provision of better training to new judges; the provision of more detailed sentencing guidance from the legislature (such as a statutory sentencing framework prioritising sentencing aims): the provision of more detailed sentencing guidance from the superior courts (such as guideline judgments); and improvements in the Irish system of appellate review in sentencing, particularly as it relates to the District Court.[9] The Law Reform Commission in its *Report on Mandatory Sentences* in 2013 highlighted the need to address inconsistency and recommended the establishment of a Judicial Council empowered to develop and publish suitable guidance or guidelines on sentencing.[10]

One year later, the sentencing guidelines landscape in Ireland underwent significant transformation when the Court of Criminal Appeal decided to issue guideline type judgments indicating broad sentencing ranges for certain offences.[11] This effectively overturned a marked reluctance on the part of the Supreme Court first highlighted in the *People (DPP) v Tiernan*[12]to issue guideline judgments setting out sentencing on the basis that there was

[5] [1994] 2 IR 306 306, at 316-318.

[6] Law Reform Commission, *Report on Suspended Sentences*, (LRC 53-1996), [4.50]

[7] Niamh Maguire, Consistency in Sentencing (2010) 2 *Judicial Studies Institute Journal* 14; Claire Hamilton, Sentencing in the District Court: 'Here Be Dragons (2005) *Irish Criminal Law Journal* 15(3); Ian O'Donnell, A Comment on Sentencing (2000) 10(3*) Irish Criminal Law Journal* 2.

[8] Ibid Maguire (n 7) p.31

[9] Ibid Maguire (n 7) p.31

[10] Law Reform Commission, *Report on Mandatory Sentences*, (LRC 108-2013)

[11] The People (DPP) v Ryan [2014] 2 ILRM 98 (firearms offences); *The People (DPP) v Fitzgibbon* [2014] 2 ILRM 116 (causing harm contrary to section 4 of the Non-Fatal Offences against the Person Act 1997).

[12] [1988] I.R. 250; [1989] I.L.R.M. 149

inadequate information on extant sentencing practice and therefore reliable conclusions could not be reached on starting points or ranges and on the desire not to interfere with judicial sentencing discretion. The Court of Criminal Appeal changed this position 26 years later, when in a series of appeal cases in 2014, it ushered in what O'Malley called a 'quiet revolution' by indicating its willingness to introduce sentencing guideline judgments.[13] O'Malley opined at the time that this change in direction was related to changes in the legal community's attitudes towards the need for consistency, explaining that judges and lawyers are much more accepting of the need for consistency in sentencing, providing sentencing discretion is still maintained.[14]

The Court of Criminal Appeal set out the role of the superior appeal courts in offering sentencing guidance and the role of the prosecutor in assisting sentencing judges. In the *People (DPP) v Ryan*[15] it said that appeal courts can go beyond reviewing individual sentences and offer guideline judgments indicating starting points and sentence ranges for specific types of offences. The Court of Appeal noted that the legislature had set a minimum presumptive sentence of five years and it went on to set out for the first time in Irish legal history three different sentence ranges for firearm offences—the lower end of the scale (five to seven years), the middle of the range (7 to 10 years) and the higher end of the scale (10 to 14 years). The Court of Criminal Appeal also noted that the sentencing ranges it proposed should not be set in stone but should be responsive to insights from research.[16] In relation to the duty of prosecutors, the court noted that prosecutors have a duty to assist sentencing judges by providing accurate and full information necessary for sentencing including relevant facts and relevant penalty ranges. Furthermore, it noted that as well as an obligation to provide such information that prosecutors could also advise the court on previous sentences in similar cases. This means that prosecutors are now required to indicate what punishment they believe the offence warrants based on an assessment of previous similar cases. Since then, the Court of Appeal[17] and the Supreme Court[18]have issued a number of offence specific guideline judgments in an attempt to increase consistency in sentencing. The adoption of a

[13] Tom O'Malley, 'A quiet revolution occurred this month: sentencing guidelines were introduced', Irish Times, March 31, 2014. Available at: https://www.irishtimes.com/news/crime-and-law/a-quiet-revolution-occurred-this-month-sentencing-guidelines-were-introduced-1.1741707

[14] ibid

[15] [2014] 2 I.L.R.M. 98

[16] Tom O'Malley, Sentencing: Guidance and Guidelines, Annual National Prosecutors' Conference, 7th December 2019, 1-18. Available at: https://www.dppireland.ie/app/uploads/2019/12/Sentencing-Guidelines-and-Guidance-Tom-OMalley.pdf

[17] See for example People (DPP) v Casey and Casey [2018] IECA 121, [2018] 2 IR 337 (residential burglary offences); The People (DPP) v Byrne [2018] IECA 120 (robbery and aggravated burglary); The People (DPP) v Samuilis [2018] IECA 316 (largescale cultivation of cannabis; possessing a controlled drug for sale or supply); The People (DPP) v Siobhan Maguire [2018] IECA 310 (fraud).

[18] The People (DPP) v Mahon [2019] IESC 24; [2019] 2 ILRM 81 (manslaughter); The People (DPP) v FE [2019] IESC 85 (rape)

more active role in issuing guideline judgments aimed at increasing consistency has significantly transformed the coherence of Irish sentencing law and has no doubt contributed to an increase in consistency of approach and outcome in the criminal courts with one exception.

However, the types of cases heard in the District Court are considerably less serious in nature than those that typically come before the Court of Appeal. This means that many of the guideline judgments setting out ranges are not directly applicable to the types of cases sentenced in the District Court.

2.3 Sentencing in the District Court

The Irish District Court is referred to as the workhorse of the criminal justice system as it disposes of the largest number of criminal cases that come before the Irish criminal courts. In 2020 there were 382,455 incoming criminal offences and the District Court resolved 194, 796 of them.[19] The majority of resolved offences were summary offences (153, 964) but the District Court also dealt with the majority of indictable offences triable summarily (40, 832 in 2020) as well as sending cases forward for trial (21, 538) in 2020.[20] Despite its very high caseload, only 64 judges (including its President) serve the District Court. Indeed, Ireland has one of the lowest ratio of judges per head of the population in the Council of Europe.[21] Despite dealing with the largest volume of criminal cases in Ireland, the District Court is not particularly well served in terms of sentencing guidance. While the development of guideline judgments by the Court of Appeal is welcome these guideline judgments have little relevance to judges in the District Court who technically sentence minor offences which are by definition much less serious than offences dealt with by higher criminal courts for which the Court of Appeal has identified sentencing ranges.

Similarly, the District Court has no effective system of appellate review. A sentence imposed in the District Court cannot be appealed to the Court of Appeal but must instead be appealed to the Circuit Court. An appeal against sentence only can be taken under section 50 of the Courts (Supplemental Provisions) Act, 1961. Alternatively, an appeal against the conviction and the sentence can be taken under section 18(1) of the Courts of Justice Act, 1982. However, this is a de novo appeal which is in effect a total rehearing of the case and may have little, if any, relevance to the case originally heard in the District Court. In relation to either type of appeal, there is no formal feedback mechanism to the District Court judge who imposed sentence and so District Court judges are deprived of a potentially useful form of

[19] Courts Service, *Annual Report 2020*, available at: https://www.courts.ie/acc/alfresco/b47652ff-7a00-4d1f-b36d-73857505f860/Courts_Service_Annual_Report_2020.pdf/pdf#view=fitH. Accessed on Monday 14th February 2022.

[20] Ibid

[21] European Commission for the Efficiently of Justice, *European judicial systems CEPEJ Evaluation Report*. Available at: https://rm.coe.int/rapport-evaluation-partie-1-francais/16809fc058. Accessed 14th February 2022.

feedback and guidance. An inhibiting factor of these types of appeal is that the Circuit Court can increase, as well as decrease, the sentence on appeal. Either way, a fundamental weakness of the Irish sentencing system is that the District Court, which deals with the largest volume of sentencing hearings of any court on an annual basis in Ireland, has no formal mechanism for relaying the results of appeals back to District Court judges and therefore neither type of appeal offers any real guidance or feedback.

The District Criminal Court is the only court in which there is no prosecution right of appeal against unduly lenient sentences passed in the District Court. This issue was considered by the Law Reform Commission in its *Consultation Paper on prosecution appeals against unduly lenient sentences* in 2004[22], and again in its *Report on prosecution appeals and pre-trial hearings*[23] in 2006. In the *Report*[24], the Commission reversed its position in the *Consultation Paper* and decided against the introduction of a prosecution right of appeal against undue leniency due to the lack of information on sentencing in the District Court, arguing that it would be practically impossible for an appellate court to determine whether or not the sentence imposed in the District Court represented a substantial departure from the principle of proportionality[25]. It is not clear why this same reason did not apply in the Circuit Court for which sentencing data is equally unavailable. However, it recommended other reforms that might enhance the reliability of sentences in the District Court including an enhanced role of the prosecutor in the provision of sentencing precedents to the court, the introduction of a sentencing information system, as well as a requirement that judges give reasons for the imposition of a custodial sentence. Unfortunately, in the intervening decade and a half since these recommendations were made, none have yet been implemented. One question that this research might provide insight into is the extent to which prosecutors assist judges in the provision of sentencing precedents in the District Court.

The Judicial Council Act 2019 provided for the establishment of the Sentencing Guidelines and Information Committee which is tasked with preparing and submitting draft sentencing guidelines for review to the Board of the Judicial Council and with monitoring the operation of sentencing guidelines.[26] The sentencing 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 and it may specify a range of sentences that a court should consider.[27]Judges will be required to have regard to the sentencing guidelines relevant to the offence before them unless they consider that to do so would be contrary to the interests of

[22] Law Reform Commission, *Consultation Paper on Prosecution appeals from unduly lenient sentences in the District Court,* (LRC CP 33-2004).

[23] Law Reform Commission, *Report on Prosecution appeals and pre-trial hearings,* (LRC 91-2006)

[24] Ibid (note 22) [6.46]

[25] Ibid (note 23) [3.23]

[26] Section 23(2) of the Judicial Council Act 2019

[27] Section 91 (1) and (2) of the Judicial Council Act 2019

justice and state the reasons for departures in their decision.[28]Furthermore, section 93 of the 2019 Act provides that nothing in the Act will be construed as operating to interfere with (a) the performance by the courts of their functions or (b) the exercise by a judge of his or her judicial functions which most likely means that judicial discretion to impose sentences without inappropriate interference is preserved. A key aim of this study is to capture the perspectives of District Court judges on sentencing and sentencing guidelines at the very beginning of this journey.

Over a decade ago, Maguire[29] interviewed District Court judges about their approach to sentencing, their views about consistency in sentencing and sentencing guidelines, amongst other topics. At the time of the research in 2008 there were 54 serving District Court judges and the District Court caseload was considerably higher than it is today: it dealt with 482,203 summary offences (compared to 153,964 in 2020); 68,491 indictable cases triable summarily (compared with 40,832 in 2020) and sent forward for trial 12,965 cases (compared to 21,538 in 2020).[30] Maguire recruited 15 District Court judges to participate in the research, which involved semi-structured interviews and sentencing vignettes. Judges described the process of arriving at a sentencing as a complex and at times, difficult task. Their descriptions of how they approached sentencing appeared to be consistent with the "instinctual synthesis" approach to sentencing whereby all relevant factors of the case, including the circumstances of the offence and the offender, are considered before arriving at a sentence and, without indicating the precise weight attributed to specific factors or groups of factors.[31] Few mentioned or referred to the principle of proportionality as a source of guidance or as something that helps to structure their approach to sentencing.

Maguire's research also highlighted that District Court judges shared a strong working ideology that prioritised the uniqueness of the individual case over the need for consistency in sentencing.[32] They believed that anything less than responding to the uniqueness of the case would be contrary to justice.[33] District Court judges' views on consistency in sentencing were quite mixed: "some judges implicitly rejected the idea that consistency in sentencing was possible in an individualised system…. [while]…others were more explicit in their rejection of the possibility of consistency".[34] Many judges described how, in the absence of sentencing guidance they had incrementally developed their own sentencing policies or preferences. District Court judges expressed mixed views about the importance of consistency in sentencing and some identified judicial independence, the lack of sentencing guidelines and training as factors related to inconsistency in sentencing.[35] While the proposed research is not specifically concerned with judicial views about consistency in sentencing, it

[28] Section 92

[29]Ibid (note 2) Maguire, 1-41.

[30] Court Service, *Annual Report 2008*, p.65

[31] ibid (note 2), Maguire, 21.

[32] Ibid.

[33] Ibid.

[34] ibid (note 2) Maguire, 39.

[35] Ibid.

does aim to understand the challenges that judge of the District Court face when passing sentence in criminal cases and to capture their perspectives on sentencing guidelines and the other supports and sources of guidance that might assist them in their sentencing role.

When previously asked about the sentencing guidance that they relied upon very few District Court judges mentioned the principle of proportionality whereas several noted the importance of probation reports (pre-sanction reports).[36] Research on the role of pre-sentence reports in the Irish criminal justice system found that judges find probation reports to be an enormously helpful aide to sentencing and welcome sentencing recommendations they offer but noted that the geographic variation in the use of probation reports across different courts had serious repercussions for fairness and consistency in sentencing.[37] An important research question for this study is to ascertain which sources of guidance, if any, judges in the District Court currently reply upon and the types of guidance they might find helpful in the future. More specifically, given the lack of sentencing guidance for District Court judges today it would be interesting to see if judges continue to rely upon probation reports and if their knowledge and awareness of the principle of proportionality has increased.

Questions arising:

Do prosecutors assist judges with the provision of sentencing precedents in the District Court? To what extent, if any, have the views of District Court judges changed in relation to consistency and sentencing guidelines? What sources of sentencing guidance do judges in the District Court rely on? Do judges adopt an instinctual synthesis or a structured approach to sentencing? What sources of guidance would District Court judges find most useful?

2.4 Recent Trends in the use of custodial and community sanctions in Ireland

While Ireland has a relatively low to average rate of imprisonment compared with our European neighbours, we typically have one of the highest rates of frequency of use of imprisonment.[38] While our rate of imprisonment per head of population remains relatively low compared with our Council of Europe (COE) neighbours[39], the frequency with which we send people to prison is well above average when compared with other COE countries.[40] This suggests that we use prison more frequently than our neighbours but for much shorter prison sentences. This is borne out by the most recent Council of Europe Penal Statistics on the frequency of prison use for 2019[41] which show that Ireland is in the very high category (more

[36] Ibid (note 2) Maguire, 38.

[37] Nicola Carr, and Niamh Maguire, 'Pre-sentence Reports and Individualised Justice: Consistency, Temporality and Contingency.' (2017) 14 *Irish Probation Journal,* 52-71.

[38] Niamh Maguire, 'When is Prison a Last Resort? Definitional Problems and Judicial Interpretations'. (2014) 24(3) *Irish Criminal Law Journal*, 62-72

[39] Marvelo F. Aebi, and Natalia Delgrande, Council of Europe Annual Penal Statistics, Prison Populations, SPACE I 2020 Enquiry, (Strasbourg: Council of Europe, 2020), 4.

[40] Ibid (note 38), Maguire, 63.

[41] Ibid (note 39), 6.

than 25% higher than the European median value) and yet in the very low category for average length of imprisonment in months (more than 25% lower than the European median value). In recognition of this tendency to over-rely on prison and under-use community sanctions, a consensus has emerged in the Irish criminal justice literature that Ireland uses prison too frequently and particularly for minor offences.[42]

Over a decade ago, the *Strategic Review of Penal Policy*[43] observed that the Courts needed access to appropriate non-custodial sanctions that must be "cost effective, credible and command public confidence in managing both who impose a general risk of re-offending and those presenting a real risk of harm and danger to the public" as a prerequisite to reducing the reliance on imprisonment. Recent legislative attempts to reduce reliance on imprisonment have not been successful[44] and the Criminal Justice (Community Sanctions) Bill published in 2014 which promised to overhaul and update legislation in the area of community sanctions has not yet been finalised. The Community Return Scheme[45], a back-door conditional early release scheme has had more success in reducing the prison population in Ireland than legislative attempts. While the relative proportion of persons sentenced to community penalties has increased in Ireland over the past three decades[46], this has not reduced reliance on imprisonment, with the prison population and prison overcrowding continuing to rise over the last few years.[47] Indeed, a simultaneous growth in both custodial and non-custodial sanctions reflects penal trends across Europe. Research on the use of imprisonment and community sentences across Europe shows that the number of persons sentenced to imprisonment and community sentences in many countries across Europe increased simultaneously over the previous decade and a half.[48]

Judicial perspectives on sentencing law and the principle of last resort are also pertinent to understanding the relative use of custodial and non-custodial sanctions by the courts. While the Department of Justice's policy document *Report of the Penal Policy Review Group*

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[42] Niamh Maguire, When is Prison a Last Resort? Definitional Problems and Judicial Interpretations (2014) 24 *Irish Criminal Law Journal*, 62-72; Nicola Carr (2016) Community Sanctions and Measures, in Deirdre Healy et al (eds) *The Routledge Handbook of Irish Criminology.* (Routledge, 2016) 319-336)

[43] Department of Justice and Equality, *Strategic Review of Penal Policy: Final Report*, Dublin: DOJE (2014), 44.

[44] Recent legislative attempts to reduce reliance on imprisonment include: the Fines (Payment and Recovery) Act 2014 which promotes the sparing use of prison for fine defaulters and introduces a requirement to take their financial circumstances into account when setting the level of their fine; the Criminal Justice (Community Service Order) (Amendment) Act 2011 requires judges to consider imposing a community service order in cases where it considers a prison sentence of 12 months or less is appropriate.

[45] Gerry McNally and Andrew Brennan, Community Return: A unique opportunity, (2015) 12 *Irish Probation Journal*, 141–159.

[46]Deirdre Healy and Ian O'Donnell (2005), 'Probation in the Republic of Ireland: Contexts and challenges', (2005) 52 (1) *Probation Journal*, 56–68.

[47] Irish Penal Reform Trust, *Progress in the Penal System (PIPS) A framework for penal reform (2022)*. Available at: https://www.iprt.ie/site/assets/files/7216/progress_in_the_penal_system_2022_-_draft_9_web.pdf

[48] Marcelo F. Aebi, Natalia Delgrande, and Yann Marguet, Have community sanctions and measures widened the net of the European criminal justice systems? (2015) 17(5) *Punishment and Society,* 575-597.

recommended that the last resort principle should be incorporated into Statute,[49] previous research in the District Court shows that the last resort concept is not always fully applied by judges in practice. While District Court judges generally approve of the principle in theory, in practice they often depart from the spirit of the principle to deal with what they believe to be the exigencies of the case, one of the most important of which is persistence.[50] A majority of District Court judges interviewed identified three sets of circumstances in which they would start from the assumption that prison was the appropriate sanction, rather than the last resort and these included: (1) for serious offences, (2) for persistent offenders, and (3) when no other penalties were appropriate.[51] One classic justification was that previous non-custodial sanctions had not worked and as a result they were no longer suitable, leaving imprisonment as the only suitable option.[52]

The same study found that judges expressed a high level of confidence in the community service order but emphasised that it was not suitable for offenders who have substance misuse issues.[53] Research[54] carried out two decades ago suggested that a high proportion of persons sent to prison tend to have mental health and addiction issues and this has recently been confirmed by research carried out by the Irish Penal Reform Trust.[55] A key question that this research might answer is whether judges still regard the community service order and other non-custodial sanctions as unsuitable for persons with mental health problems and addictions. Additionally previous research has highlighted the significant geographic variation in both the use of probation reports and the use of community sentences and that community sentences appear to be used more frequently in areas with higher use of probation reports.[56]

Research on the use of probation reports in the District Court found that districts with high levels of requests for probation reports tended to have higher use of community penalties and that while requesting a report lengthened the period of time it took for the case to reach a conclusion, reports offered value beyond their formal function as a sentencing aide.[57] This is because reports provide a 'momentary pause in the larger process during which the client has the opportunity to make a choice about whether or not they wish to engage by

[49] Department of Justice and Equality, *Strategic Review of Penal Policy: Final Report*, Dublin: DOJE (2014, 91 – 92.

[50] Ibid (note 38) Maguire, 79.

[51] Ibid, (note 38) Maguire, 78-81.

[52] Ibid, (note 38) Maguire, 76.

[53] Ibid (note 38) Maguire, 77.

[54] Harry Kennedy, Stephen Monks, Katherine Curtain, Brenda Wright, Sally Linehan, Dearbhla Duffy, Conor Teljeur and Alan Kelly. *Mental Health in Irish Prisons: Psychiatric Morbidity in Sentenced, Remanded and Newly Committed Prisoners*, (National Forensic Mental Health Service, 2004)

[55] Irish Penal Reform Trust, Progress in the Penal System (PIPS) 2022. Available at: https://www.iprt.ie/site/assets/files/7214/progress_in_the_penal_system_2022.pdf

[56] Ibid (note 37) 52-71.

[57] Ibid (note 37) 52-71.

demonstrating willingness and capacity to change'.[58] It also found that probation reports 'potentially offer benefits to clients by encouraging and facilitating their engagement with various supports and services' to the extent that they resemble a type of intervention in themselves.[59]

Questions arising:

Do District Court judges agree with the principle that prison should be used as a last resort and if so, do they still have difficulties adhering to this principle in their sentencing practices?

Do District Court judges view community service orders and other sanctions as not suitable for persons with mental health problems and addictions? What are District Court judges' views of probation reports and community sanctions including probation orders, supervision during deferment of sentence and community service orders?

2.5 The sentencing of domestic violence offences in the District Court

This section briefly sets out the available data on the incidence of domestic violence in Ireland and then examines the legal framework for domestic violence prosecutions by examining the relevant provisions of the Domestic Violence Act 2018. It then briefly explores how domestic abuse and coercive control are defined before exploring recent prosecutions in the new offence of coercive control. The experience of domestic abuse victims/survivors in Irish courts is then explored. Finally, this chapter looks briefly at the guidance issued by the superior courts on sentencing in cases involving relationship violence.

Prevalence of Domestic Violence in Ireland

There is no one agency tasked with the collection of comprehensive statistics on the incidence and prevalence of domestic violence in Ireland. Instead, we must draw upon a number of different data sources to construct an impression of the extent and nature of domestic violence in Ireland. Since the Victims Directive in 2017, An Garda Síochána have a duty to record on PULSE if there is a domestic violence motive associated with any violent or sexual offences.[60] A number of reports from the CSO on the quality of crime statistics showed that this was not initially happening in the first few years following the requirement, [61]this appears

[58] Ibid (note 37) 65.

[59] Ibid (note 37) 68.

[60] An Garda Síochána, Domestic, Sexual and Gender Based Violence: A Report on Crime Levels and Garda Siochana Operational Measures. Available at: https://garda.ie/en/about-us/our-departments/office-of-corporate-communications/news-media/an-garda-siochana-domestic-sexual-and-gender-based-violence-report-sept-22.pdf

[61] Central Statistic Office, '*Review of the Quality of Recorded Crime Statistics*' (2020) Available at: https://www.cso. ie/en/statistics/crimeandjustice/reviewofthequalityofrecordedcrimestatistics/ (Accessed 21 February 2023)

to be remedied in recent years.[62] While the preponderance of statistical and research evidence supports the fact that the victims of domestic abuse are predominantly women[63]and that perpetrators are predominantly men, domestic abuse is also experienced by men at the hands of female perpetrators, and of course within same sex couples and by children of all genders.

The collection of systematic, comprehensive and disaggregated data is a requirement of the implementation of Article 11.1 of the Istanbul Convention. An Garda Síochána's Domestic Abuse Intervention Policy introduced in 2017 indicates that all domestic abuse incidents be recorded on PULSE in the appropriate way. However, a review by the CSO in 2017 found of a sample of 100 assaults and 100 sexual offences reported in 2017 that while 41 involved a domestic or family relationship between the alleged perpetrator and the victim disclosed in the descriptive fields, only 19 of these incidents were marked with a domestic violence tag meaning they would be identifiable for statistical purposes.[64] Indeed, the same report found that the relationship between the victim and the perpetrator had been recorded in less than 500 incidents reported to the police in 2017.

- An EU-wide survey by the European Fundamental Rights Agency (FRA) reported that 14 per cent of women in Ireland from the age of 15 had experienced physical violence by a partner.[65] Breaking this down further, 31 per percent of Irish women experienced psychological violence by a partner and 6 per cent had experienced sexual violence by a partner current or former.
- Women's Aid estimates that 1 in 4 women in Ireland have been abused by a current or former partner.[66]In a 2020 report focused on relationship abuse in young people between 18 and 25, Women's Aid found that 1 in 5 young women and 1 in 11 young men have been subjected to domestic abuse by a current or former partner by the age of 25.[67] In 2022 Women's Aid reported 31,229 frontline contacts and 33,990 disclosures of abuse - which included 5,412 reports of abuse of children.[68] Between

[62]Ibid (note 60)

[63] Kirsten L. Anderson, Gendering coercive control. (2009) 15(12) *Violence Against Women* 1444–1457; Paul McGorrery and Marilyn McMahon, Prosecuting controlling or coercive behaviour in England and Wales: Media reports of a novel offence*. (2019) 21(4) Criminology and Criminal Justice*, 566– 584.

[64] Central Statistics Office, Review of the Quality of Recorded Crime Statistics (December 2018) at pp. 21-22.

[65] European Union Fundamental Rights Agency (FRA). 'Violence against women: An EU-wide survey (2014). Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-vaw-survey-main-results-apr14_en.pdf

[66] Women's Aid, 'National and International Statistics' (2022) Available at: https://www.womensaid.ie/about/policy/natintstats.html#X-201209171229530 (Accessed 21 February 2023).

[67] Women's Aid, One In Five Women Report (2020). Available at: One-in-Five-Youn-Women-Report-2020.pdf (womensaid.ie)

[68] Women's Aid, *Annual Impact Report 2022*. Available at: https://www.womensaid.ie/app/uploads/2023/06/Womens-Aid-Annual-Impact-Report-2022.pdf. (Accessed 23 August 2023). P.12

1996 and July 2023 261 women have died violently in Ireland, 87% were killed by a man known to them.[69]In 2022, 12 women died violently in Ireland

- A recent report from An Garda Síochána[70] shows that domestic violence 'is primarily gender based and has shown increases over the last nine years'. Between 2019 and 2021 the report found that a domestic violence motive was recorded for 90 per cent of all female victims of Murder/ Manslaughter/Infanticide, and 43 per cent of all female victims of Attempts/Threats to Murder/ Assaults, Harassments and Related Offences.[71] During the same period the equivalent for male victims was 11 per cent. In relation to incidents of violent and threatening behaviour[72], offenders are more likely to be male for both female and male victims. From 2019 to 2020, when females were the victims, males were the suspected offender in 74 per cent of incidents and in relation to 94 per cent of incidents when the incident relates to domestic violence. When a male is a victim of threatening and violent behaviour, another male is alleged offender in 88 per cent of incidents.
- The gendered nature of domestic violence was confirmed in the findings of a recent report commissioned by the Department of Justice on familicide.[73]

The Domestic Violence Act 2018

The Domestic Violence Act 2018 (the "2018 Act") was enacted in May 2018 and commenced in January 2019. The impetus for the legislative change was the need to implement the *Istanbul Convention*[74] which was ratified by the Irish government on March 8, 2019. This legislation revised and updated the protections afforded to victims of domestic violence, and introduced new offences of coercive control and forced marriage. However, it did not fully incorporate all the requirements under the *Istanbul Convention* despite a call from the Irish Human Rights Commission (IHRC) for it to do so.[75] Important omissions highlighted by the IHRC include the failure to: criminalise psychological and emotional harm; introduce gender specific protections including gender guidelines and gender-sensitive procedures to ensure concerns around protection specific to women can be established. The 2018 Act has also been critiqued for continuing to treat domestic violence as largely a 'private' matter to be

[69] Women's Aid, *Femicide Watch 1996-2023*. Available at: https://www.womensaid.ie/app/uploads/2023/07/Womens-Aid-Femicide-Watch-1996-2023.pdf

[70] Ibid (note 60) p. 10.

[71] Ibid (note 60) p.8.

[72] Ibid (note 60) p.9

[73] Department of Justice, *A Study on Familicide & Domestic and Family Violence Death Reviews*, June 2022. Available at: https://www.gov.ie/pdf/?file=https://assets.gov.ie/259211/8390d71a-7a42-4b49-b508-21316d6e2b35.pdf

[74] The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence

[75] Irish Human Rights and Equality Commission, Statement on the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence, July 2019. Available at:Statement-on-Ratification-of-CoE-Convention-on-Preventing-and-Comating-Violence-Against-Women-and-Domestic-Violence.pdf (ihrec.ie)

addressed by victims seeking protective orders rather than by the State taking a proactive approach to address the public wrongs involved.[76]This is because the main form of legal protection available to victims of domestic violence under the 2018 Act is a domestic violence/protective order under the 2018 Act and the victim/survivor must apply for this themselves in a family law court.[77] There are a range of different protective orders that can be applied for in civil proceedings in the family law court including: a safety order (s.6), a barring order (s.7), an interim barring order (s.8), an emergency barring order (s.9) and a protection order (s.10). These orders are referred to as domestic violence orders or protective orders. A breach of such an order is prohibited under section 33 of the 2018 Act and while the order is civil in nature, a breach of the order is a criminal offence.

Prosecution of section 33 offences in the District Court

Section 33.1(a) itself provides that a respondent who contravenes a safety order, barring order, an interim barring order, an emergency barring order or a protection order commits an offence. Section 33.1(b) further provides that a respondent who—while a barring order, emergency barring order or interim barring order is in force, refuses to permit the applicant or a dependent person to enter in the place to which the order relates and remain in the property that the order relates to, commits an offence. If convicted, the respondent will be liable on summary conviction to a class B fine or to imprisonment for a term not exceeding 12 months, or both. Section 33.2 provides that section 33.1 is without prejudice to the law relating to contempt of court or any other liability, civil or criminal, that may also arise. Thus section 33 explicitly preserves the court's powers in relation to civil and criminal contempt. The objective of civil contempt of court is coercive, designed to compel the person to comply with the civil order and most likely to arise in this context. The process is a very straightforward one of a judge finding contempt where there is non-observance of a court order, and ensuring that the person has the capacity to fulfil the order.[78] Then, a custodial order is possible.

Breaches of domestic violence/protection orders are usually investigated and prosecuted by An Garda Síochána (AGS) although the Director of Public Prosecutions may also have involvement. Where a complaint is made to a member of An Garda Síochána by or on behalf of the applicant who has been granted an order under the 2018 Act, that member where they have reasonable belief that an offence is or has been committed, can arrest the respondent concerned without warrant. A 2019 Women's Aid consultation with victims/survivors of domestic abuse found that An Garda Síochána's response to domestic violence calls was

[76] Susan Leahy, Still a private matter? Evaluating the Irish State's response to domestic abuse. (2023) 37(1) *International Journal of Law, Policy and The Family*, 1-20.

[77] The relevant factors that the shall have regard to are contained in s.5 of the 2018 Act and include any history of violence or convictions for offences involving violence, exposure of a dependent person to violence inflicted by the respondent on the applicant, any previous order under the Domestic Violence Acts, cruelty to animals or destruction of the applicants property.

[78] Meath County Council v Hendy [2020] IEHC 142.

inconsistent and that the rating of AGS by participants of the survey ranged from very poor to excellent. [79]

Prosecution of section 39 offences in the District Court

Section 39 of the Domestic Violence Act 2018 introduced the offence of coercive control into Irish law for the first time, based on section 76 of the Serious Crime Act 2015 in England and Wales.[80] Section 39.1 defines coercive control as occurring "where he or she knowingly and persistently engages in behaviour that (a) is controlling or coercive, (b) has a serious effect on a relevant person, and (c) a reasonable person would consider it likely to have a serious effect on a relevant person. The provision is gender neutral[81]and the test for serious effect is objective rather than subjective.[82] A person's behaviour is defined as having a serious effect by section 39(2) if "it causes the relevant person to (a) fear that violence will be used against him or her or (b) serious alarm or distress that has a substantial adverse impact on his or her usual day-to-day activities". The Act envisages that coercive control can be prosecuted both as a summary offence and as an indictable offence. Summary conviction attracts a class A fine and/or a term of imprisonment not exceeding 12 months and an indictable conviction attracts a fine or imprisonment for a term not exceeding 5 years or both. Importantly, coercive control under section 39 of the 2018 Act can only be perpetrated against a 'relevant person' and section 39(4) defines "relevant person" as a spouse or civil partner or someone who is or was in an intimate relationship with the perpetrator. It thus excludes family relationships from the definition of relevant person so if a person is coercing or controlling towards their siblings, parents, grandparents and/or children this is not currently an offence in Ireland. The behaviour can be either coercive or controlling but must be related to intimate partner or ex-partner abuse to be covered under section 39.[83] The first successful prosecution of a section 39 offence was in Letterkenny Circuit Court on February 11th 2020 where Judge John Alymer

[79] Women's Aid, *Unheard and Uncounted: Women, Domestic Abuse and the Irish Criminal Justice System 2019*. Available at: https://www.womensaid.ie/app/uploads/2023/07/unheard_and_uncounted_-_women_domestic_abuse_and_the_irish_criminal_justice_system_full_report.pdf

[80] Eithne Reid O'Doherty and Sean Gillane (2022) 27(5) 'Coercive Control and Stalking' *Bar review,* 130. The coercive control provision was also the result of intensive lobbying by Domestic Violence Organisations, championed by Inchicore Domestic Violence Centre in Country Dublin that spearheaded a campaign focused on highlighting the fact that domestic abuse comes in many forms including verbal, emotional, psychological, financial and physical. See Stephanie Thompson, David M. Doyle, Muiread Murphy and Rosemary Mangan 'A welcome change…but early days': Irish Service Provider Perspectives on Domestic Abuse and the Domestic Abuse Act 2018*, Criminology & Criminal Justice*, 1-19, 2. http://dx.doi.org/10.21428/cb6ab371.142e1ca7

[81] Brian Dempsey, Gender Neutral Law and Heterocentric Policies: "Domestic Abuse as Gender-Based Abuse" and Same Sex Couples, *The Edinburgh Law Review* 15.3 (2011) 381-405.Gender neutral domestic violence laws have been critiqued on the basis that they fail to acknowledge the gendered nature of domestic abuse and coercive control. However, others argue that legal definitions of domestic abuse should be gender neutral but that State polices to address and reduce domestic abuse should be gendered, meaning responsive to how different genders experience domestic abuse.

[82] Ibid (note 81) 132.

[83] Ibid (note 81) 132.

imposed a sentence of two and a half years with the final nine months suspended. The defendant made 5,757 unwanted phone calls to the complainant between March and June 2019.[84] In November of the same year the first conviction by a jury resulted in a sentence of ten and a half years imposed for coercive control and assault offences.[85]Interestingly, the new standalone offences of stalking and non-fatal strangulation in the Criminal Justice (Miscellaneous Provisions) Act 2023[86] dispenses with the 'relevant person' requirement which means that victims no longer need to know the perpetrator.[87] However, these offences were not included in this study.

Although coercive control may be prosecuted in both the District and Circuit Criminal Courts since its introduction very few cases appear to have been dealt with by the District Court. In contrast, a number of recent high profile prosecutions of coercive control in the Circuit Court have been taken since the commencement of the 2018 Act in January 2019.[88] Cronin writes that it is not unusual for a prosecution of coercive control to involve prosecution of other offences including assault and harassment and that while the offence applies to harm other than physical harm its limited application to 'relevant persons' means that certain categories of people remain unprotected including parents of adult children, and vulnerable adults residing with family members.[89] At the time of this study there are no known or reported prosecutions of coercive control in the District Court in Ireland. This is not surprising as the prosecution of coercive control presents specific challenges in that it is not a single incident based offence which is typically the remit of the criminal law. Instead, victims of coercive control can be subjected to campaigns of control and dominance that can take place over months and/or years that taken together resemble patterns of control but separately might not amount to an offence.[90] Some of the problems inherent in prosecuting the offence are evidential difficulties, the reliance on victim testimony[91] which may not only be re-traumatising but may also focus attention on the victim's complicity in their own abuse.[92] Another challenge common to the policing, prosecution and criminal adjudication of coercive control is the lack of training of front line staff in terms of identifying, understanding and

[84] Ibid (note 82) 133.

[85] Ibid (note 82) 133.

[86] Criminal Justice (Miscellaneous Provisions) Act 2023.

[87] Ibid (note 82) 132.

[88] Michelle Cronin, 'Michelle Cronin: Coercive control-the first convictions in Ireland', Irish Legal News (14th March 2022) Michelle Cronin: Coercive control – the first convictions in Ireland | Irish Legal News

[89] Ibid (n86)

[90] Evan Stark, Coercive Control: How Men Entrap Women in Personal Life. (Oxford University Press, 2007).

[91] Stephanie Thompson, David M. Doyle, Muiread Murphy and Rosemary Mangan 'A welcome change…but early days': Irish Service Provider Perspectives on Domestic Abuse and the Domestic Abuse Act 2018, *Criminology & Criminal Justice*, 1-19, 5. http://dx.doi.org/10.21428/cb6ab371.142e1ca7

[92] Cheryl Hanna, The paradox of progress translating Evan Stark's coercive control into legal doctrine for abused women. (2009) 15(2) *Violence Against Women* 1458–1476.

responding to coercive control.[93] A recent recommendation of the OECD report on judicial resources highlights the need for the Department of Justice to conduct a court resources audit on the introduction of new legislative provisions that are likely to have an impact on court and judicial workload.[94] The Irish government's Third National Strategy on Domestic, Sexual and Gender Based Violence 2022-2026[95] makes a commitment to ensure all criminal justice workers who come into contact with victims/survivors of domestic abuse will receive appropriate training to ensure that they do not contribute to their re-victimisation.

Alongside section 33 and section 39 prosecutions, domestic violence is also prosecuted under a range of offences including assault, murder, sexual offences, property offences and breach of domestic violence protective orders. The 2018 Act provides that the relationship between the defendant and the victim is an aggravating factor when the court is determining the sentencing for certain offences. A "relevant person" under this section is the spouse or civil partner or a person who was in an intimate relationship with the defendant, s 40 (6)(a)(b). A "relevant offence" is an offence listed in section 40 (5 (a)-(g); including an offence under sections 2 to 15 of the Non-Fatal Offences against the Person Act 1997, rape, rape under section 4 of the Act of 1990 and sexual assault within the meaning of section 2 of the Act of 1990. The court must impose a sentence that is greater than that which would otherwise have been imposed if the person against whom the crime was committed was not a relevant person, s 40 (2), unless there are exceptional circumstances justifying the court not applying that section.

An important objective of this study was to investigate judicial perspectives about the challenges and concerns they experience when sentencing a person convicted of the offence of breaching a protection order under section 33, section 39 and section 40 of the 2018 Act.

What challenges do judges face when sentencing a person convicted of a section 33 offence? Is prior involvement with the civil order helpful or unhelpful? Do judges approach the sentencing of section 33 offences differently to other criminal offences?

Have District Court judges presided over a section 39 trial?

Do District Court judges have an awareness and understanding of section 40 of the 2018 Act?

Other relevant provisions of the 2018 Act include the following:

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[93] Charlotte Barlow , Kelly Johnson , Sandra Walklate and Les Humphreys, Putting coercive control into practice: Problems and possibilities. (2020) 60 *British Journal of Criminology*, 160–179.

[94] OECD, Modernising Staffing and Court Management Practices in Ireland: Towards a More Responsive and Resilient Justice System, (OECD Publishing, 2023) Available at: https://doi.org/10.1787/8a5c52d0-en.

[95]Department of Justice, Zero Tolerance: Third National Strategy on Domestic, Sexual and Gender Based Violence 2022-2026, [2.4.1] 25. Available at: file:///C:/Users/Niamh/Downloads/228481_69e48889-49ea-49d6-8143-982f6cc28bac.pdf (Accessed 21 February 2023)

- Section 6.2(c) 2018 Act provides for the first time a prohibition on communication (including by electronic means) with the applicant or dependent person. This expansion in prohibited activities applies to Barring/Safety/Protective Orders.
- Section 26 of the 2018 Act provides for the right of a support worker to attend court but judges may refuse to allow an applicant to be accompanied if they believe it is in the interests of justice and must give reasons for the refusal.
- Under section 29 (1) a court may make a recommendation for engagement by the respondent with a programme for perpetrators of domestic violence, an addiction service, a counselling or psychotherapy service or a financial planning service. The court may take into account the engagement of the respondent with any such service or programme when hearing an application for a variation or appeal from a protective order, or when hearing an application for a further protective order. It may also take into account the applicant's view of the respondent's engagement.

Questions arising:

How familiar are judges with the various sections outlined above including section 6 (2) c which prohibits communication between the applicant and the respondent?

When sentencing section 33 cases do judges use or refer to section 29 (1) which allows them to recommend a respondent to engage with a programme for perpetrators?

How familiar are judges with section 26 of the Act which allows applicants to be accompanied into court?

Defining domestic violence and understanding victims' experiences

There is no legal definition of domestic violence in Ireland and no specific offence of domestic violence either. When the 2018 Domestic Violence Act was being debated in the Seanad, Senator Collette Kelleher, at Committee stage proposed an amendment to the Bill to include a definition of domestic violence.[96] She noted that the Bill referred to domestic violence 36 times and yet no attempt had been made to define it which implied that there was agreement and clarity around what constituted domestic violence. Senator Kelleher further noted that the aim of the Bill should be to reduce and provide protections against domestic violence in all its forms, not just the customary physical abuse which is the most commonly accepted form of domestic abuse. In support, Senator Kelleher noted that the National Women's Council, Safe Ireland, the Committee on the UN Convention on the Elimination of All Forms of Discrimination Against Women, and in 2014 the Joint Committee on Justice, Defence and Equality had all called upon government to provide a clear definition of domestic abuse.

[96] Domestic Violence Bill 2017: Committee Stage-Seanad Eireann (25th Seanad)-Wednesday, May 31, 2017 Available at: Domestic Violence Bill 2017: Committee Stage – Seanad Éireann (25th Seanad) – Wednesday, 31 May 2017 – Houses of the Oireachtas.

Article 3 of the Istanbul Convention defines domestic violence as acts of physical, sexual, psychological or economic violence that take place in the family or domestic unit or between current or former spouses or partners regardless of whether the parties had cohabitated or not. The definition in the convention also includes threats against women of any of the acts listed above. Regardless of the consensus that Irish law should have a clear definition of what constitutes domestic violence—the amendment was defeated and Irish law still does not have a statutory definition of domestic violence. We should not underestimate the importance of how we define domestic violence. Historically, the defining of domestic violence as merely a "domestic dispute"[97] and as "private"[98] served to justify the non-interventionist approach on the part of the law and legal institutions including the police, judges as well as communities friends and neighbours. Indeed, as we see later there is some evidence that judges sentence domestic violence offences more leniently than similar non-domestic violence offences.

As noted above, current Irish laws on domestic abuse do not specifically clarify what behaviours constitute domestic abuse. The offence of coercive control does not refer to psychological abuse, which is contrary to the definition of domestic abuse in the Istanbul Convention and to those adopted by Scottish and Northern Irish laws. Research on coercive control also suggests that psychological abuse is a central feature of coercive control and that this type of abuse is often overlooked or wrongly seen as having a less harmful effect than physical violence. The reluctance to introduce a legal definition of domestic abuse reflects and further confirms the widespread lack of awareness and understanding of the various forms of domestic violence and abuse amongst justice professionals working in the Irish criminal justice system. This lack of understanding and awareness of the various forms that domestic violence takes and the impacts on victims/survivors of domestic violence serves to re-victimise and re-traumatise victims/survivors.

A number of recent Irish research studies on the experiences of victims/survivors of domestic violence in the Irish legal system have concluded that as it currently stands the system does re-traumatise and re-victimise victims/survivors due to a number of serious challenges including:

- A system wide lack of understanding of the impact of domestic and sexual violence on victims/survivors;[99]
- Delays in the legal processes;[100]

[97] Shazia Choudhry and Jonathon Herring, Righting Domestic Violence' (2006) 20(1*) International Journal of Law, Policy and the Family* 95, 96.

[98] Elizabeth. M. Schneider, The Violence of Privacy' (1991) 23(4) *Connecticut Law Review* 973, 998

[99] Nuala Egan and Ellen O'Malley Dunlop, *A Report on the Intersection of the Criminal Justice, Private Family Law and Public Law Child Care Processes in Relation to Domestic and Sexual Violence*. (Dublin: Department of Justice/National Women's Council, March 2023). Available at: https://www.nwci.ie/images/uploads/NWC_DSV_Justice_Report.pdf. Accessed on the 17th of August 2023.p.6

[100] Ibid (note 91) p.6

- Lack of comprehensive court and out of court supports for victims/survivors of domestic and sexual violence;[101]
- Legal conceptualisation of domestic violence as 'incidental' rather than based on underlying patterns of control or course of conduct profoundly limits justice for victims;[102]
- Court processes are prolonged, stressful and lack support for victims before, during and after trials:[103]
- Responses from Gardaí to domestic violence calls can be inconsistent;[104]
- The disconnection between the criminal and family law systems means that important information about the safety and welfare of victims/survivors and their dependent children can get lost in the gaps between these systems;[105]
- Experiences of victims with court staff and facilities varied according to geographic location with some courts having excellent facilities and others having very poor facilities increasing the distress experienced by victims/survivors.[106]

The negative impact of court experiences on victims of domestic abuse has been referred to as 'legal system abuse' whereby victims attending court experience it as an extension of the original abuse,[107] and in which court processes can sometimes be 'weaponised' by the perpetrator by for example, repeated applications to court to appeal and change access orders.[108] The phenomenon of abusing procedural mechanisms to control a victim has been termed 'paper abuse' which involves legitimate legal means being used to intimidate and exercise power over victims.[109]

Several recent legal instruments have significantly enhanced the statutory rights of victims of domestic violence. The Criminal Justice (Victims of Crime) Act 2017 incorporated the EU

[101] Ibid (note 91) p.6

[102] Women's Aid and Monic Mazzone, *Unheard and Uncounted-Women, Domestic Abuse and the Irish Criminal Justice System.* Available at: https://www.womensaid.ie/app/uploads/2023/07/unheard_and_uncounted_-_women_domestic_abuse_and_the_irish_criminal_justice_system_full_report.pdf. P.10

[103] Ibid (note 102) 9.

[104] Ibid (note 102) 9.

[105] Ibid (note 102)10.

[106] ibid (note 91) 9. See also: Sara Burns, 'Current family law court facilities archaic, says campaign group'. Irish Times, December 10th 2019. Available at: Current family law court facilities 'archaic', says campaign group – The Irish Times; Dunphy L (2020) Webinar hears Irish legal system 'not fit for purpose' in dealing with violence against women. Irish Examiner, 11 June. Available at: Webinar hears Irish legal system 'not fit for purpose' in dealing with violence against women (irishexaminer.com)

[107] Heather Douglas, Legal systems abuse and coercive control. (2018) 18(1) *Criminology & Criminal Justice*, 84–99.

[108]Ibid (note 91) 9, "I have one woman and she has been in court seventy-four times over access and he just keeps pulling her back, he keeps appealing access orders, he keeps wanting to change the access order. (Interviewee 21)".

[109] Susan L. Miller and Nicole L. Smolter (2011) 'Paper abuse' when all else fails, batterers use procedural stalking. 17 (5) *Violence Against Women*, 637–650.

Victims of Crime Directive into Irish law which provides new statutory rights for victims at all stages of the criminal process including a new 24-hour helpline for domestic violence victims, new domestic violence risk assessment tools for the police and video links to give evidence in court. Provisions contained in section 25(1) of the Domestic Violence Act 2018 specifically allow evidence to be given via video link in civil proceedings for persons under 18 years and in any case with the leave of court. Research suggests that while service providers reported very positive views on the potential of video link to relieve much of the anguish victims experience in attending court and giving evidence, they also reported a perception of reluctance amongst judges to use these facilities.[110] Section 26(1) of the 2018 Act provides applicants for protection orders with the right to be accompanied in court by an individual of their choice. Section 26(2) provides the court with the right to refuse such accompaniment if the court considers it to be in the interests of justice with one interviewee expressing the view that this needs to be further developed in practice in order to support domestic abuse services to support victims attending court.[111]

Questions arising:

How do judges define domestic violence? Do they regard psychological violence as seriously as physical violence?

How aware are judges of the need to protect victims form re-victimisation through their experiences in criminal courts when giving evidence or attending a section 33 prosecution?

Physical 'incident' model versus 'pattern' of abuse model

Recent research on domestic violence has highlighted the gap between current policy, legal and criminal justice responses to domestic abuse and the actual experiences of victim survivors. Reflecting on practices in the USA in 2012, Stark highlights that the 'violent incident model' dominates current approaches and tends to equate domestic abuse with discrete abuse events usually involving physical violence whereas recent research suggests that a pattern of coercive control is typical of most abusive relationships experienced by battered women.[112] Stark argues that domestic violence research and intervention that is premised on the violent incident model is harmful because it ignores the many non-physical forms of domestic violence, leading to a failure to understand the harm that victims/survivors are experiencing and failure to understand the level of risk posed by perpetrators.[113]

[110] Ibid (note 91)10.

[111] Ibid (note 91), 11.

[112] Ibid (note 90)

[113] Evan Stark, Rethinking custody evaluation in cases involving domestic violence. (2009) 6 *Journal of Child Custody,* 287–321.

Similarly, Katz[114] contrasts the previously dominant 'physical incident model' of domestic violence with the more recently developed concept of coercive control which is a course of conduct crime that takes place over a number of months or years. She highlights that each behaviour by itself may not look that serious or particularly harmful but when all the behaviours are combined together they may result in adults and/or children being imprisoned in their own lives, with no autonomy and no control over their everyday decisions. The one off incidents that achieve this do not look significant when you see them separately but when you put them together you can appreciate the pattern of abusive behaviour involved.

Coercive control can be distinguished from 'situational couples' violence' where control is not central and where violence is prompted by situational factors.[115] Coercive control is considered to be a particularly harmful form of domestic violence involving a range of different tactics aimed at intimidating, degrading, exploiting, isolating and controlling the victim.[116] Katz, drawing on the research literature, lists the tactics typically used in coercive control as including: 'verbal, emotional, and psychological abuse, control of time, space and movement, continual monitoring, stalking, physical violence, intimidation and threats of violence against the victim/survivor, their loved ones and property, rape, sexual coerciveness and control of pregnancy, financial abuse and the denial of resources, and isolation from sources of support'.[117]

While physical violence can be an important part of coercive control some perpetrators do not use it at all and instead use psychological abuse and control to gain dominance over their victim.[118] The key difference then between the 'physical incident model' and the control based domestic violence is that victims/survivors experience coercive control as 'ongoing and cumulative rather than episodic'.[119] Katz et al's study of the impact of coercive control on children found that children are harmed from but also find ways of resisting, coercive control-based domestic violence even when they do not directly witness physically violent incidents.[120] Women and children living within a context of coercive control-based domestic violence often experience a reduction in agency and voice and a narrowing of their space for action which leads to a sense of disempowerment, loss of confidence and agency which can have long term effects.[121] It is well documented that while women who escape coercive control may experience a temporary expansion of their 'space for action' this often contracts

[114] Emma Katz, Beyond the physical incident model: How children living with domestic violence are harmed by and resist regimes of coercive control. (2016) 25(1) *Child Abuse Review*, 46–59.

[115] Michael P. Johnson, Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence, (2006) 12(11) *Violence Against Women*, 1003-1018.

[116] Ibid

[117] Ibid (note 114)

[118] Nicole Westmarland, Liz Kelly. Why extending measurements of 'success' in domestic violence perpetrator programmes matters for social work. (2013) 42 *British Journal of Social Work*, 1092–1110.

[119] Ibid (notes 114, 90, 113)

[120] Katz (note 114)

[121] Ibid, 57.

shortly afterwards with over 90 per cent of women experiencing post-separation abuse.[122] Research has demonstrated that the characteristics and consequences of coercive control without violence are similar to those of coercive control with violence[123] and that damage to long term mental health typically associated with physical violence are similar to those associated with psychological violence.

Questions arising:

Do judges sentencing domestic violence offences adhere to an incident model of domestic violence or a course of conduct or pattern of abuse model more which accurately captures the reality of domestic violence for many victims/survivors?

Do judges perceive domestic violence that involves physical violence as less harmful than domestic violence that involves psychological violence?

Do judges appreciate the negative impact that domestic violence in all its forms can have on children who witness it?

2.6 Sentencing of Domestic Violence in Ireland

We know very little about the sentencing of domestic violence offences in Ireland. There are no previous studies and we have no data on prosecutions, convictions and sentencing outcomes in these types of cases. Women's Aid study in 2019 examined a sample of 65 domestic violence cases reported in the news media over the period of one year between 1st May 2018 and 30th of April 2019.[124] Of these cases, 50 were reported to have received a sentence with 45 receiving a prison sentence and 32 of these prison sentences being suspended in whole or in part.[125] Only 11 of the 65 cases involved breaches of domestic violence orders under the 2018 Act.

Crowley suggests that Ireland's predominant approach to the sentencing of perpetrators of domestic abuse is retributive rather than rehabilitative.[126] The Irish government Third National Strategy on Domestic, Sexual and Gender Based Violence 2022-2026 commits to increasing the prison sentences for certain domestic violence offences but also acknowledges that rehabilitation of perpetrators through the development of evidence based perpetrator

[122] Nicole Sharp-Jeffs, Liz Kelly, Renate Klein. Long journeys toward freedom: The relationship between coercive control and space for action: Measurement and emerging evidence. (2018) 24 *Violence Against Women*, 163-185; Evan Stark and Marianne Hester, Coercive Control: Update and Review, (2019) 25(1) *Violence Against Women*, 81-104.

[123] Kimberly A. Crossman, Jennifer L. Hardesty, and Marcela Raffaelli. "He could scare me without laying a hand on me": Mothers' experiences of nonviolent coercive control during marriage and after separation. (2016) 22 *Violence Against Women*, 454-473.

[124] Ibid (note 145) 24.

[125] Ibid (note 145) 8.

[126] Louise Crowley, 'Domestic Violence Perpetrator Programmes in Ireland-Intervention Required! (2017) 31 *International Journal of Law, Policy and The Family*, 291-310. Doi:10.1093/lawfam/ebx010

programmes could be included within a commitment to ensure a victim/survivor centred wraparound service[127] and should be included to hold offenders to account and to prevent re-victimisation. [128] Priority is also given under the Prosecution Pillar 3 to developing and delivering DSGBV informed education, training and awareness for all in the criminal justice system who come into contact with victims to ensure that victims/survivors have access to safety, support and advocacy they need from public service agencies accountable for protection of victims/survivors.[129]

A number of recent cases have highlighted how sentencing judges should take into consideration the issues involving domestic abuse when sentencing. In X v Y[130] the High Court issued a strong message that domestic violence is never acceptable in any form for any reason. Mr Justice Barrett also gave guidance to how lawyers should raise issues around information related to a person's sexuality.[131] The case involved an appeal of an interim barring order granted by the Circuit Court under the Domestic Violence Act 2018. Mr Justice Barrett rejected the appeal and upheld an interim barring order noting domestic violence is never permissible and always unacceptable:

"There is no context in an intimate relationship in which domestic violence is permissible. … A party to an intimate relationship should never have to live in the fear and/or with the actuality of domestic violence being perpetrated upon that party. There are no 'ifs' or 'buts' in this regard, no exceptions, and no mitigating circumstances. Domestic violence and/or the threat of domestic violence (even where no actual violence ensues) is always unacceptable."132

This warning was again repeated in another High Court case presided over by Mr Justice Barrett where he noted the severe impact of domestic abuse against the female ex-partner of the respondent on their two children, one of which had developed a dissociative disorder as a result of the trauma.[133]

The importance of taking account of a context of domestic abuse was emphasised by Charleton J in the Supreme Court in *People v FE*.[134] The court in that case set out various bands for a range of circumstances when rape could occur ranging from 7 years to a life sentence and determined that the Court of Appeal had been incorrect when it reduced the accused

[127] Department of Justice, Zero Tolerance: Third National Strategy on Domestic, Sexual and Gender Based Violence 2022-2026. Available at: file:///C:/Users/Niamh/Downloads/228481_69e48889-49ea-49d6-8143-982f6cc28bac.pdf (Accessed 21 February 2023). Para. [2.4.1] 25.

[128] Ibid 31.

[129] Ibid 44.

[130] *X v. Y* [2020] IEHC 525

[131] Andrew McKeown 'High Court: Domestic violence 'never permissible' guidance to lawyers on raising sexuality'. Irish Legal News. Available at: https://www.irishlegal.com/articles/high-court-domestic-violence-never-permissible-guidance-to-lawyers-on-raising-sexuality-in-court

[132] *X v. Y* [2020] IEHC 525, [47].

[133] A v B [2020] IEHC 610

[134] The People (DPP) v FE, judgments delivered by Charleton J, 26 February 2020 at Kilkenny. Supreme Court appeal number: S:AP:IE:2018:000067 [2020] IESC

man's sentence, as it had taken the rape by a man of his wife as separate from other incidents of domestic abuse. The Supreme Court restored the original sentence imposed by Judge Kennedy in the High Court.

In the absence of comprehensive data on how domestic violence offences, both those prosecuted under sections 33 and 39 of the 2018 Act and those prosecuted across a range of other serious offences, are sentenced, it is impossible to assess how the Irish criminal justice system responds to perpetrators of domestic violence. One key question that arises is: are domestic violence crimes punished more leniently than similar offences committed within a context of non-domestic violence? Arguably treating domestic violence more leniently than non-domestic violence will fail to give the message that domestic violence is a serious crime and should not be tolerated. Research comparing the sentencing of domestic violence and non-domestic violence offences is relatively rare. However, a recent Australian study that used a population of cases sentenced in New South Wales between January 2009 and June 2012 found that domestic violence offenders were less likely than offenders convicted of crimes outside of domestic contexts to be sentenced to prison and received shorter prison terms.[135]

The authors posit that the tendency to sentence domestic violence offenders more leniently than non-domestic violence offences may be related to judicial stereotypical assumptions of domestic violence offending which may cause them to regard domestic violence offenders as less blameworthy, less risky and less harmful than those who inflict violence on strangers. Judges may also see the harsh punishment of domestic violence offences as having more social costs (impacts on family's economic circumstances and child-parent relationships).[136] Another Australian study that examined the prosecution and sentencing of breaches of domestic violence orders in Queensland found that defendants charged with these sentences were less likely to plead guilty, more likely to be legally represented and that domestic violence prosecutions take longer to finalise than other criminal cases.[137] This study found that sentences were often low involving fines and that violence experienced by victims/survivors were minimised and trivialised by perpetrators, police, prosecutors and magistrates and often add to the violence already experienced by victims at the hands of their partners.

There is also some evidence that suggests that what victims want from the justice system is not necessarily captured by typical justice system measures of success. Westmarland and Kelly highlighted the need to distinguish between 'justice goals' prioritised by victims of domestic abuse and the 'system goals' which measure how successful the criminal justice

[135] Christine E.W. Bond and Samantha Jeffries, Similar Punishment? Comparing Sentencing Outcomes in Domestic and Non-Domestic Violence Cases. (2014) 5 *British Journal of Criminology*, 849-872.
[136] Ibid, 867.
[137] Heather Douglas, The Criminal Law's Response to Domestic Violence: What's Going on? (2008) 30(3) *Sydney Law Review*, 439-469.

system response to domestic abuse is in terms of charges, prosecutions and convictions.[138] Victims' justice goals typically involve an immediate end to a violent event but also more long-term goals of securing a safer environment.

Questions arising:

Do judges sentence domestic violence cases similarly to ordinary criminal offences or do they treat them differently for example by prioritising victims' justice goals over traditional justice goals including convictions and sentences?

Do judges desire more information and training in terms of understanding the dynamics of family violence?

Do judges desire more sentencing guidance on how to approach the sentencing of relationship violence offences?

Recent Trends in Applications for Domestic Violence Orders in Ireland

The Courts Service publishes data on an annual basis on trends in the number of civil law applications for protective orders under sections 6-10 of the Domestic Violence Act 2018. Protective orders under the 2018 Act are an important form of protection for people experiencing domestic violence, who are sometimes sent directly by Gardaí who are called to a home.[139] Table 1 below shows trends in domestic violence applications in the District Court between 2013 and 2021.[140] Applications for domestic violence protective orders are clearly trending upwards. For example, applications for protection orders have almost doubled between 2014 and 2021 but as Table 1 shows, the gap between the number of protection order applications made and the number of protection order applications granted has increased. The gap between the number of safety order applications and those granted is definitely the largest with barely one third being granted on average. It is not immediately clear from the Courts Services Annual Reports why this gap is so large, but research based on observations of domestic violence applications in the District Court found that many applicants for protective orders do not return to court after the first hearing to pursue the order so this might provide an explanation.[141]

[138] Nicole Westmarland and Liz Kelly. 'Why extending measurements of "success" in Domestic Violence Perpetrator Programmes matters for social work', (2013) 43 British Journal of Social Work, 1092–110.

[139] Sinead Conneely, Shane Dempsey and Roisin O'Shea "Domestic Violence in the District Court" [2019] *Irish Journal of Family Law* 22(4) 79.

[140] Courts Service, *Annual Reports* 2013-2021. Available at: https://www.courts.ie/annual-report (Accessed 20 August 2023).

[141] Ibid

Table 1 District Court Trends in Domestic Violence Applications 2013-2021[142]

Domestic Violence: District Court Trends 2013-2021									
	2021	2020	2019	2018	2017	2016	2015	2014	2013
BOA	2,987	3,577	3,323	3,343	2,613	2,658	2,638	2,671	2,738
BOG	810	1,159	1,137	946	822	1,329	859	877	1,167
POA	8,269	7,649	7,049	6,390	5,869	5,365	5,108	4,406	4,529
POG	6,917	6,592	5,864	5,515	5,006	5,365	5,108	4,406	4,529
SOA	8,918	8,887	8,061	7,280	6,368	6,069	5,626	5,499	5,334
SOG	2,461	2,467	2,688	2,327	2,225	3,316	1,917	2,029	2,381
IBOA	1,917	1,918	1,643	1,270	917	880	731	699	674
IBOG	1,141	1,251	1,209	982	693	676	563	569	522
Other	505	915	418	289	195	255	271	12	-
OG	291	376	184	147	151	107	263	0	-
Total	34,216	34,791	31,576	28,489	24,859	26,020			

* Figures do not include applications struck out or withdrawn.

**Some interim barring orders were granted on foot of applications for protection orders. Likewise some protection orders were granted on foot of interim orders.

Sources: Courts Service *Annual Reports* 2018-2021

However, the figures in Table 1 on applications made do not include those struck out or withdrawn so potentially those who did not return to pursue the order at the next sitting are incorporated in the struck out or withdrawn category.

Previous research on domestic violence applications in the Irish Courts

Conneely et al[143]carried out empirical research in the District Courts by attending 360 family law cases between 2017 and 2019 with Ministerial consent. Private family law cases are heard in camera and involve the jurisdiction of the civil, rather than the criminal court system. The researchers attended family law cases in Dolphin House in Dublin as well as the District Courts in the South East Region and observed 17 randomly selected full case lists in five District Courts, involving 11 judges over a period of 14 days. Domestic violence allegations presented in almost 25 per cent of all private family law cases observed. The majority of applications, 74.4%, were brought by a wife or female partner against their husband or male partner and there was a high level of applications, 15% of cases, where the applicant parents were seeking the protection of the courts against an adult child. All but one of those cases involved physical abuse and in two of these cases serious physical assaults had taken place and the applicants were told by the Gardaí that they should make an application under the 2018 Act. Conneely et al[144] found that physical abuse was alleged in almost 50 per cent of all domestic violence cases and emotional abuse was alleged in 75.6 per cent of all cases. In cases that involved

[142] Trends examined include Barring Order Applications (BOA), Barring Orders Granted (BOG), Protection Order Applications (POA), Protection Orders Granted (POG), Safety Order Applications (SOA) and Safety Orders Granted (SOG), Interim Barring Order Applications (IOBA) and Interim Barring Order Applications Granted (IBOA).

[143] Ibid (note 139) 79-86.

[144] Ibid (note 139) 79-86.

spouses or current/former intimate partners, emotional abuse was alleged in the majority of cases and was the sole allegation in just over 50 per cent of cases. Conneely et al observed no applications on behalf of a child or applications alleging coercive control and only one case alleged controlling behaviour in terms of financial abuse. They also observed no allegations of sexual abuse in any of the cases observed before the court. More than half of the cases observed involved applicants and respondents who were still living together. Almost all of the applications for a protection order were granted; half of the safety orders were granted and less than half of barring orders were granted. Interim barring orders were rare but more successful. Conneely et al report that conflict between parents in relation to child access arrangements was prevalent, they recorded it as the main reason for a domestic violence application in almost one quarter of the cases and raised as a conflict flashpoint in almost three quarters of the cases.

Data Deficits in understanding how offences involving domestic violence are sentenced

The Courts Service does not publish information on breaches of orders under the Domestic Violence Act 2018. As Women's Aid[145] has highlighted two important data sources are missing in terms of the analysis of how the criminal justice system and the courts respond to domestic violence:

- There is no official data on sentencing for domestic violence crimes which hampers evaluation of how the criminal justice system is handling domestic violence against women.
- There is no official data on how often separate charges from breach of protective orders are brought against perpetrators of domestic violence and therefore how relevant this provision will be and of any plans to inform judges about it.

District Court statistics on the sentencing of section 33 breaches

Although the Courts Service do not currently publish any statistics on section 33 breaches and how they were sentenced, this study accessed Court Service data that was previously supplied to another party for the purposes of an article published in the Irish Times.[146] Data on sentencing outcomes in section 33 prosecutions was provided for the Dublin Metropolitan District (DMD) for a limited period of the years 2019, 2020 and January to February of 2021. It is acknowledged that these were somewhat exceptional years due to their overlap with the

[145] Women's Aid report by Monica Mazzone (2019) *Unheard and Uncounted***:** Women, Domestic Abuse and the Irish Criminal Justice System. Available from: https://www.womensaid.ie/about/policy/publications/unheard-and-uncounted-full-report/ [Accessed 15 November 2022].

[146] Mary Carolan, 'Less than 20% conviction rate in domestic violence cases before Dublin Courts' in *The Irish Times*, January 20th 2022. Available from: https://www.irishtimes.com/news/crime-and-law/less-than-20-conviction-rate-in-domestic-violence-cases-before-dublin-courts-1.4780719 [Accessed January 20th 2022].

Covid-19 Pandemic. Table 2 shows the number of offences and persons prosecuted for section 33 breaches in the DMD and Table 3 shows the outcomes for those section 33 breaches prosecuted in the Dublin Metropolitan District Court in 2019, 2020 and from January to February of 2021.

Table 2 Number of offences and the number of persons where offences have been disposed between January – Dec 2019, 2020 & January – February 2021.

Year	Offences	Persons
Jan - Dec 2019	428	296
Jan - Dec 2020	968	644
Jan - 28 Feb 2021	256	189

Table 3 Outcomes for section 33 prosecutions in the Dublin Metropolitan District 2019-2021***

Court Orders	2019 No Orders	2020 No of Orders	Jan – Feb 2021 No of Orders
Dismiss	55	143	34
Dismiss Probation	16	23	7
Fine	10	11	9
Imprisonment	32	46	23
Imprisonment Part Suspended	2	2	1
Imprisonment Suspended	19	66	27
No Order	22	20	1
Peace Bond	1	6	1
Poor Box	4	3	2
Probation	4	10	1
Sent Forward for Trial	0	1	0
Strike Out	203	522	122
Strike out not served	3	15	5
Taken Into consideration	23	24	6
Withdrawn	36	81	17
Total	430	973	256

* Section 33 Domestic Violence Act 2018 commenced on the 1st January 2019 so therefore we would not have statistics for 2018. **

In 2019, statistics from the Courts Service for the Dublin Metropolitan District indicate that there were 430 outcomes for 428 cases[147] prosecuted under section 33 of the Domestic Violence Act 2018 for breaches of orders under that Act. Of those, it appears as if almost 80% did not proceed to sentencing. Almost one half were struck out, although it is not clear whether this was due to a technical flaw or if the strike out happened after the facts were proven. A total of 55 were dismissed which means that the case was not proven against the defendant and 23 were taken into consideration which means the court passed a total sentence that reflected all of the behaviour. Prosecution withdrew 36 cases and there was no

[147] Courts Service provides data based on the submission of offence codes by prosecutors and it should be noted that an offence may receive more than one order.

order in 22 cases. No reasons are given for the withdrawal of cases and 'no order' could mean a deferral of sentencing. A little over 50% of prosecutions then did not proceed to sentencing.[148] On this analysis in 2020, there were 973 outcomes for 968 cases which were prosecuted for section 33 breaches, of which just over 60% did not proceed to sentencing.[149] In January and February 2021, there were 256 outcomes for 256 cases that were prosecuted under section 33, of which just over 50% did not proceed to sentencing.[150] Overall for the period of January 2019 to February 2021 between 50 % and 60 % all offences prosecuted for section 33 breaches did not proceed to sentencing. We have no information that might explain why this is the case. However, we know that the majority of section 33 prosecutions that do not proceed to sentencing are struck out. Given the serious nature of domestic violence prosecutions it is unlikely that they are struck out after the facts are proven. It is therefore possible to speculate that the majority of cases that are struck out do so due to technical flaws in the prosecution, such as the failure to prove that the original domestic violence order was served on the defendant as required in *DPP v RK*. [151]

Table 3 gives some insight into the sentencing outcomes of section 33 prosecutions which did proceed to sentence. Custodial sentences were issued in 32 (7.5%) cases in 2019, 46 (almost 5%) in 2020 and 23 (almost 9%) in the first two months of 2021. Orders for imprisonment part suspended were low with 2 in 2019, 2 in 2020 and 1 in the first 2 months of 2021. Orders for imprisonment suspended were given in 19 (just over 4%) of cases in 2019, 66 (almost 7%) in 2020 and 23 (10.5%) in the first two months of 2021. Fines were issued in 32 cases in 2019, 46 in 2020 and 23 in the first two months of 2021. The issuing of a peace bond was rare; 1 in 2019, 6 in 2020 and 1 in the first period of 2021. Orders for the poor box were also uncommon; 4 in 2019, 6 in 2020 and 1 in 2021. Probation orders were made in 4 cases in 2019, 10 cases in 2020 and 1 case in early 2021.

Questions arising

What might account for the relatively large proportion of section 33 prosecutions that are struck out on an annual basis in the DMD?

2.7 Questions Arising for this Study

Sentencing in the District Court

Do prosecutors assist judges with the provision of sentencing precedents in the District Court? To what extent, if any, have the views of District Court judges changed in relation to consistency and sentencing guidelines? What sources of sentencing guidance do judges in the

[148] Including those struck out and withdrawn by the prosecution.

[149] Including those struck out and withdraw by the prosecution.

[150] Including those struck out and withdraw by the prosecution.

[151] [2019] IEHC 852

District Court rely on? Do judges adopt an instinctual synthesis or a structured approach to sentencing? What sources of guidance would District Court judges find most useful?

Trends in the use of custodial and community sanctions in Ireland

Do District Court judges agree with the principle that prison should be used as a last resort and if so, do they still have difficulties adhering to this principle in their sentencing practices?

Do District Court judges view community service orders and other sanctions as not suitable for persons with mental health problems and addictions? What are District Court judges' views of probation reports and community sanctions including probation orders, supervision during deferment of sentence and community service orders?

Judicial perspectives on prosecutions under section 33 and 39 of the 2018 Act and their awareness and understanding of the purpose of section 40

An important objective of this study was to investigate judicial perspectives about the challenges and concerns they experience when sentencing a person convicted of the offence of breaching a protection order under section 33, section 39 and section 40 of the 2018 Act.

What challenges do judges face when sentencing a person convicted of a section 33 offence? Is prior involvement with the civil order helpful or unhelpful? Do judges approach the sentencing of section 33 offences differently to other criminal offences?

Have District Court judges presided over a section 39 trial?

Do District Court judges have an awareness and understanding of section 40 of the 2018 Act?

Other sections of 2018 Act

How familiar are judges with the various sections outlined above including section 6 (2) c which prohibits communication between the applicant and the respondent?

When sentencing section 33 cases do judges use or refer to section 29 (1) which allows them to recommend a respondent to engage with a programme for perpetrators?

How familiar are judges with section 26 of the Act which allows applicants to be accompanied into court?

Defining domestic violence and victim's needs

How do judges define domestic violence? Do they regard psychological violence as seriously as physical violence?

How aware are judges of the need to protect victims form re-victimisation through their experiences in criminal courts when giving evidence or attending a section 33 prosecution?

Models of domestic violence

Do judges sentencing domestic violence offences adhere to an incident model of domestic violence or a course of conduct or pattern of abuse model more which accurately captures the reality of domestic violence for many victims/survivors?

Do judges perceive domestic violence that involves physical violence as less harmful than domestic violence that involves psychological violence?

Do judges appreciate the negative impact that domestic violence in all its forms can have on children who witness it?

Sentencing of domestic violence in Ireland

Do judges sentence domestic violence cases similarly to ordinary criminal offences or do they treat them differently for example by prioritising victims' justice goals over traditional justice goals including convictions and sentences?

Do judges desire more information and training in terms of understanding the dynamics of family violence?

Do judges desire more sentencing guidance on how to approach the sentencing of relationship violence offences?

Statistics on section 33 breaches in DMD

What might account for the relatively large proportion of section 33 prosecutions that are struck out on an annual basis in the DMD?

3. Sentencing: challenges, approaches, guidelines

3.1 Introduction

In this chapter we present the findings from the questions relating to challenges faced by District Court judges when determining sentences in the Criminal District Court, the approach they take to sentencing and we examine judicial views on the introduction of sentencing guidelines. Recommendations are listed throughout the chapter beside the findings that they flow from. The chapter concludes by highlighting the main issues emerging.

3.2 Challenges of sentencing in the District Court

Time pressures and large caseloads

The biggest challenge facing judges of the District Court today is undoubtedly the pressure to dispose of large volumes of cases very quickly so that they can get through the long case lists. The pressure to get through the lists means that sentencing in the District Court happens at a fast pace leaving little room for further investigation, analysis or reflection. The following quotations are representative of how most judges described the pressure of trying to dispose of large caseloads in short periods of time.

> But the challenge is speed, and having to deal with it in that way. J07

> The sentencing is done at a generally rapid pace because you have…you have a major number of cases coming through and you have to move on quickly and you don't have time to reflect and you don't have time to investigate and analyse and that is one of the major problems. J02

Most judges mentioned the pressure to get through the lists, as a standalone item but also as linked to other decisions, they might make including whether to request a pre-sanction report (PSR) or a same-day community service order suitability report. If there were likely to be a significant delay in getting either report then judges would have to balance against the person's right to an expeditious trial and to a speedy resolution of the sentencing decision. The background and all pervasive pressure to 'get through the lists' coupled with other delays in the system, might well result in the removal of certain sentencing options off the menu altogether.

> I suppose it's on a wider issue, is effectively because the size of the lists, because of the amount of delays…there's a feeling that you need to just get the case finished. J05

> Well, for example if I needed a probation report, I would have to balance the accused's entitlement to have the thing dealt with expeditiously versus the amount of time that it would take for a probation report to be available. And there seems to be a significant delay…. And as a result, you would be inclined to try and dispose of the case without the report. J08

Judges identified temporal pressures coupled with the large volumes of cases as key challenges in District Court sentencing throughout the interviews. Concerns related to 'getting through the lists' were pervasive in that they affected sentencing decision-making in a number of different ways but most notably in relation to the pressure to avoid further delay. Decisions that might prolong a case getting through the system are less attractive and therefore require greater justification. Examples include imposing a suspended sentence instead of a CSO because a same day report is not available; not adjourning for restorative justice because the process takes too long; opting for a compensation order and requesting the monies be paid before the matter is finalised to encourage the speedy disposal of the case from the system.

As well as the multiple impacts and knock on effects of the high-speed sentencing environment, time pressures associated with large caseloads in the District Court also mitigate against any formal deliberation on sentencing principles:

> The big problem with the District Court is the volume of cases we're dealing with, and the timespan to deal with them. So, in effect, there is very little time allotted to consider sentencing principles in a very formal sort of way. And that to me is the biggest problem. J11

This also extends to a lack of opportunity to look up the law in unusual cases, cases that are relatively rare. As noted in the literature review, time pressures and large caseloads are characteristic of lower criminal courts in many countries. Reducing time pressures and caseloads might require a range of changes such as increasing the number of judges currently appointed to the District Court, the introduction of a case management system, the provision of training for new and experienced judges on craft of managing court lists[152] to assist with the proactive management of time pressures created by long and difficult to predict case lists.

Recommendations

- Provide training and guidance on case management as part of an induction programme for newly appointed judges of the District Court.

Accurate and timely Information and guidance

As a court of summary jurisdiction, sentencing hearings in the District Court are usually summary affairs in which the traditional rules of evidence are relaxed.[153] Nevertheless, judges

[152] Kathy Mack and Sharyn Roach Anleu. `Getting Through the List': Judgecraft and Legitimacy in the Lower Courts. (2007) 16(3) *Social & Legal Studies*, 341–361.

[153] Christopher Hughes and Stephen Hughes*, Criminal Procedure in the District Court Law and Practice,* (Clarus Press, Dublin 2015). See also Sean Smith 'Somebody Save Me' in The Law Society Gazette, 9th March 2022. Available at: https://www.lawsociety.ie/gazette/in-depth/pleas-in-mitigation

sentencing in the District Court require timely and accurate information about the circumstances of the person being sentenced, the circumstances of the crime the person is being sentenced for and about the impact on the victim, if there is a victim involved. The following provides a summary of the key pieces of information that sentencing judges require in order to arrive at an appropriate sentence.

- Circumstances of the person being sentenced including:
    - Background, history, previous convictions, any other relevant factors depending on the case.
- Circumstances of the crime the person is being sentenced for including:
    - Facts and circumstances surrounding the commission of the offence.
- Impact of the crime on the victim, if applicable.
    - Impact of offence(s) on victim—victim impact statement if available.
- All relevant sentencing authority and legislation that may assist in determining an appropriate sentence.

A significant challenge highlighted by many judges was the difficulty of getting accurate and timely case information relevant to passing sentence. The information deficit, explained respondents, is higher when there is a guilty plea. Judges associated contested cases with more information on the offence, the defendant's background, and previous convictions. Many judges highlighted that the need for more information is particularly acute in uncontested cases. In uncontested cases, when there is a plea of guilty, the sentencing hearing takes centre stage and yet it is in relation to these cases that judges noted that the data deficit is often most acute and judges are most dependent on the information provided by the defence and the State:

> Sometimes you'll certainly have more information if you did a hearing of a contested case because you'll have heard more of the facts from background and all of the circumstances. You're very much dependent, if there's a plea of guilty from the information given to you by the State and also, what may be given by the defence then in response and mitigation information on the defendant's background and previous convictions as well as information on applicable penalties and ranges and prior sentences imposed. J03

The prosecutor's role in uncontested cases is particularly relevant to this research and the guidelines state that. The prosecutor must provide a comprehensive factual basis for charges

the defendant pleads guilty to, the defendant's previous convictions and sentences, as well as providing the judge with any relevant sentencing authority or legislation.

Judges require information on the facts constituting the offence(s) so that they can determine the relevance of aggravating and mitigating factors. Yet, several judges identified ensuring sufficient information is before the court upon which to pass sentence as a key challenge:

> First of all… having the requisite information from the Prosecution, and in a District Court case, that would in fact be exclusively the Guards. J05

The Office of the Director of Public Prosecutions[154] has highlighted the comprehensive nature of the prosecutor's role in the sentencing process:

> …the accused's circumstances, background, history, and previous convictions, if any, as well as any available evidence relevant to the circumstances in which the offence was committed which is likely to assist the court in determining the appropriate sentence.[155]

However, judges in this research noted that prosecutions in the District Court are mostly presented by members of An Garda Síochána,[156] who do not usually provide assistance in relation to applicable penalties or relevant authorities:

> Not at District Court level. It's never done. I mean you might have a young rookie Guard as well, who's not conversant with the system as well, too. So, no. No. And even experienced Gardaí don't bother. They decide [let] the judge, it's all up to the judge and that's it. J13

Several judges noted that prosecutors at times provide insufficient information on the defendant, particularly in relation to previous convictions and applicable sentences. Although most prosecutions in the District Court are brought in the name of the DPP, in practice the majority of them are presented by members of An Garda Síochána with little input from the Office of the DPP.[157]

> I think myself that the prosecution should be more involved in … whilst I accept that [the] traditional theory behind prosecutions is and was that the prosecutor simply brings sufficient evidence to the court in order to convict the defendant of the charge...there should be an onus on the prosecution to bring the maximum amount of information. J03

Furthermore, some judges remarked that they rarely rely upon the prosecution or defence to provide assistance regarding relevant and applicable sentencing laws, as they run the risk that

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[154] Office of the Director of Public Prosecutions, Guidelines for Prosecutors (4th edn, 2016), 30. Available at https://www.dppireland.ie/app/uploads/2023/01/Guidelines-for-Prosecutors-4th-Edition-October-2016.pdf Accessed on 9/2/23.

[155] Ibid, 30.

[156] Court presenters are members of An Garda Síochána who prosecute cases on behalf of the DPP under section 8(2) of the Garda Síochána Act 2005, as amended by the Garda Siochana (Amendment) Act 2022. They present evidence of arrest, charge and caution in first appearances in court, and in remand and bail applications. Where a guilty plea is entered they present a summary of the evidence before the court.

[157] Ibid (note 154) 8.

it might not be accurate and might render their decision open to review. In 2018 the Commission on the Future of Policing in Ireland recommended in its *Report*[158] that all prosecution decisions should be taken away from the police and that the practice of police prosecuting cases in court should cease-precisely due to the fact that police are not trained in a comparable way to defence and prosecution lawyers.

The plea in mitigation is an opportunity for defence solicitors to argue for a reduction in severity of sentence on behalf of their clients. A broad range of factors might potentially mitigate the severity of an offence including an early guilty plea, previous good character/lack of previous convictions, cooperation on arrest, efforts at rehabilitation and payment of compensation to the victim. Several judges in this study noted that some solicitors do not take full advantage of the plea in mitigation as an opportunity to present their clients in the best possible light. Several judges indicated that solicitors do not always present their client in the most advantageous way—giving details of their background, education, work experience, or reasons for the offence. Sometimes, judges noted that defence lawyers may provide information but without any documentary evidence to back it up. Recent Court of Appeal rulings suggest that documentary evidence must be shown in the Circuit Court to support claims made in the plea of mitigation.[159] Several judges in this study noted that they would usually require some form of documentary evidence to back up claims made in the plea of mitigation.

Others contrasted the information they receive about the defendant during the plea in mitigation with that received from a full probation report:

> I find with defence lawyers, a lot of them are not really clued in and prepared for proper mitigation and for setting out clearly the position of the defendant. And when you listen to what the defence tell you in court and then when you read a probation report, it's an extraordinary position to me because you'd have got basic information in the course of the case and then you get the probation report which opens up a whole new vista for you and gives you much more information about the accused and helps you come to the proper decision to my mind. J02

Comparison of the plea in mitigation with pre-sentence reports must be approached with caution as both have very different functions, resource requirements and time frames. Pre-sentence reports provide in-depth information on the defendant's personal circumstances, their background (education, health, work and family), an analysis of the offence(s), pattern of offending, level of insight into harm caused to the victim, their attitude to the offence,

[158] Commission on the Future of Policing in Ireland, The Future of Policing in Ireland Report, 2930. Available at: https://policereform.ie/en/polref/pages/pb18000006

[159] See also Sean Smith 'Somebody Save Me' in The Law Society Gazette, 9th March 2022. Available at: https://www.lawsociety.ie/gazette/in-depth/pleas-in-mitigation

amongst other things.[160] They are prepared by the Probation Service on the request of a judge in advance of sentencing. These reports usually include an assessment of risk of reoffending and a sentencing recommendation. They typically take several weeks and sometimes months to produce and their estimated cost to the Probation Service in 2001 was €800-€900.[161] The plea in mitigation, while crucial to defendants facing sentence, is usually based on one or two brief meetings with the defendant and defence solicitors typically get €50.39 to represent a defendant on legal aid for one stand-alone sentencing hearing.[162]

Some judges acknowledged that the high-speed environment of the District Court placed pressure on other legal actors, particularly defence lawyers, who sometimes rush through their plea in mitigation and do not provide as much information about the defendant as judges feel they need to for sentencing. A question for further research is the extent to which the desire for more information underpins judicial requests for PSRs which usually provide a fuller insight into the personal circumstances, reasons for offending and risk of reoffending. However, pre-sanction reports are requested in only a tiny proportion of all cases heard in the District Court[163] so the plea in mitigation continues to play a central role in assisting judges in sentencing and yet we know very little about how defence lawyers perform this aspect of their defence role.

Furthermore, while many judges identified PSRs as providing an important source of information to sentencers several noted that since the Covid Pandemic, requesting a PSR often involves long adjournments and that despite the assistance it would provide, they had to balance this delay against the rights of the defendant to have their sentence decided expeditiously.

> And so, when the Probation Service are stretched and they're asking me for a further 18 weeks to do a report or something like that, that can cause challenges, certainly to me J04

> There's a lot of anxiety associated with what the penalty is going to be and if there's no sign of a probation report coming. And I know if I order the report, I just won't get it for weeks on end. J08

Others mentioned the lack of availability of Community Service Order (CSO) same day reports and the impact that has on their choice of sentencing options. Several respondents noted the lack of reference to sentencing options overseen by the Probation Service in judicial sentencing bench books which typically focus on outlining the maximum sentences only for a variety of the most common offences. Many judges noted that they would welcome more information on the types of supervisory sanctions overseen by the Probation Service.

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[160] Niamh Maguire and Nicola Carr, *Individualising Justice: Pre-Sentence Reports in the Irish Criminal Justice System*, Probation Service Research Report. (The Probation Service, 2017).

[161] Comptroller and Auditor General, *Report on Value For Money Examination in The Probation and Welfare* Service, (Department of Justice, Dublin, 2004) 9.

[162] Ibid (note 159). As Smith points out defence solicitors get €50.39 to represent a defendant on legal aid for one stand-alone sentencing hearing.

[163] Ibid (note 37).

Although judges may adjourn to consider sentence or defer sentence, in the majority of cases District Court judges decide the verdict and sentence sequentially without any pause in the proceedings. Given the high caseloads and rapid pace that characterises the District Court, there is considerable pressure not to adjourn cases to get more information because this will ultimately elongate and not reduce the list. As one respondent pointed out: *'if every case had to go back, just the whole system might grind to a halt'. J03*

It is in this context that the judicial emphasis on the importance of timely and accurate information should be understood. Judicial dependence on other professionals for the provision of information foregrounds the fact that sentencing is not a solitary act but is instead a performative[164] and implicitly collaborative activity between legal professionals.

Recommendations

- Training for new and experienced judges on the nature and purpose of pre-sentence reports. This training might emphasise the difference between the level and type of information produced by Probation Service reports and that produced by solicitors during a plea in mitigation.
- Training for new and experienced judges on the types of sentencing disposals that the Probation Service oversees and the types of circumstances in which these options might be suitable.
- Update Sentencing Bench Book to include information on the full range of sanctions judges may choose from when sentencing in the District Court including supervisory sanctions overseen by the Probation Service.
- Guidance for judges on the circumstances in which it is appropriate to request a probation report from the Probation Service.
- Guidance on the types of cases in which supervisory sanctions might be most appropriate for.
- Guidance for judges on the circumstances in which documentary evidence should be required to corroborate sentencing information provided by either the defence or the prosecution.

Finding the appropriate punishment

Several judges mentioned that finding the appropriate punishment was the biggest challenge for them in terms of passing sentence in the District Court. For some the challenge lies in balancing all the different factors, whereas for others it lies in finding the right or fairest punishment appropriate to the circumstances of the individual before them as well as the circumstances of the crime committed. Some identified the challenge as trying to

[164] Cyrus Tata, Sentencing: A Social Process, Re-thinking Research and Policy (Palgrave Macmillan, 2020)7-8.

individualise the sentence without going over or under, which would make their sentences more likely to be appealed. Certain scenarios presented difficulties in this regard. For example, one judge explained that trying to find alternatives to sending someone to prison can be quite challenging. In contrast to this, another judge explained that the prison authorities' tendency to release prisoners well before they complete their sentence caused them to consider other approaches. Several judges mentioned the challenge of how to approach longstanding recidivists without sentencing them to prison, which they regarded as futile.

> The challenges are that in a sense you have to find the appropriate response under the criminal justice system to behaviour which is deemed criminal and has been found to be criminal. J01

For some judges the challenge in finding the appropriate sentence was increased by the lack of clear cut guidance or sentencing principles to follow and the isolation of sitting alone on the bench and having no way of knowing what anyone else is doing in similar situations. These challenges are compounded by a lack of basic information on the types of sentencing disposals overseen by the Probation Service and by the fact that, even if a judge has knowledge about these disposals, choosing one is not always possible given the perceived shortage of pre-sentence reports and community service suitability.

Recommendations

- Develop sentencing guidelines specific to the District Court based on the general sentencing jurisprudence of the superior courts. Guidelines might incorporate ranges of offences based on the full range of financial, supervisory and custodial sanctions available to District Court judges as well as those only specifically available in the District Court.
- SGIC to liaise with the Probation Service to provide information and training to District Court judges on the range of supervisory disposals that it oversees.
- SGIC to liaise with the Probation Service to ensure that pre-sanction reports and same day community service order suitability reports are available to courts where most needed.

Court Context, Emotional Labour and Safety

Some judges identified certain court contexts as being particularly challenging, or more challenging emotionally than other court contexts. For example, one judge compared two different courts they had worked in over their judicial career describing one as a nice country court and the other, due to the level of criminality, poverty and deprivation as quite distressing to work in.

> I suppose the recidivism, the level of criminality, the level of deprivation, the level of just it's really quite distressing some days…but maybe that's because I live in a middle class bubble. You know. J09

Another judge described a remand District Court as the hardest court by far to work in and the most depressing due to the fact that most people appearing before it are on remand for serious offences and will most likely serve relatively long sentences (within the context of the District Court).

The issue of personal safety was also raised by one judge as a challenging part of the job and given the variety of contexts in which judges' work it was somewhat surprising that this was not raised more often.

Many judges interviewed for this study noted that the majority of people coming before them often come from disadvantaged backgrounds and that many have mental health problems and addictions. Some judges made the link between mental health problems/addictions and experiences of childhood trauma or other trauma. Previous research on the prevalence of mental illness in Irish prisoners found high levels of drug and alcohol dependence and harmful use along with higher than (the national) average rates of mental illness in both male and female populations.[165] Recognition in the international literature of the high prevalence of adverse childhood events[166] (ACEs) and trauma in justice-involved populations[167] has led to calls for trauma informed practice[168]for all service providers including justice professionals.[169] Guidance for establishing trauma informed courtrooms and judicial practices already exists[170] and research examining the psychological impact of judicial work suggests that levels of vicarious trauma are highest for judges working in the lowest, busiest courts.[171]

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[165] Ibid (note 54)

[166] Vincent J. Felitti, Robert F. Anda, Dale Nordenberg, David F. Williamson, Alison M. Spitz, Valerie Edwards, and Mary P. Koss. 'The relationship of adult health status to childhood abuse and household dysfunction', (1998) 14 *American Journal of Preventative Medicine*, 245-58.

[167] Mark A. Bellis, Helen Lowey, Nicola Leckenby, Karen Elizabeth Hughes, Dominic Harrison. 'Adverse childhood experiences: Retrospective study to determine their impact on adult health behaviours and health outcomes in a UK population'. (2014) 36(1) *Journal of Public Health. 2014*, 81-90.

[168]Mazine Harris, and Roger D. Fallot. *Using Trauma Theory to Design Service Systems,* (San Francisco, Jossey-Bass, 2001).

[169] Annie McAnallen, and Emma McGinnis, Trauma-Informed Practice and the Criminal Justice System: A Systematic Narrative Review. (2021) 18 *Irish Probation Journal*. 109 -128.

[170] Judicial Commission of New South Wales, Trauma-informed courts: guidance for trauma informed judicial practices. (Judicial Commission of New South Wales, Sydney, 2022). Available at: https://www.judcom.nsw.gov.au/wp-content/uploads/2022/11/Trauma-informed_courts.pdf

[171] K. O'Sullivan, J. Hunter, RI Kemp and P. Vines. 'Judicial Work and Traumatic Stress: Vilification, Threats, and Secondary Trauma on the Bench', *Psychology, Public Policy, and Law*, Vol. 28, 2022 pp. 532 – 545; J. Hunter, R, Kemp, K, O'Sullivan and P. Vines. 'A Fragile Bastion: UNSW Judicial Stress Trauma Study', *Judicial Officers' Bulletin*, 33,2021 pp. 1 - 7

Recommendations

- Trauma informed training should be provided to all judges on induction and access to trauma informed training should be made available to all judges of the District Court throughout their tenure by way of Continued Professional Development.

Approaches to sentencing

A small majority of District Court judges who took part in the research explained that they approach sentencing by first considering the seriousness of the offence, then deciding on the penalty, and finally applying any relevant mitigation based on the personal circumstances. Several judges referred to superior court judgments outlining a two or three stage process and used the same or similar language as those judgments to describe their process:

> You should choose the option that best suits the circumstances of both the crime in effect and the defendant. So, in actual fact, Chief Justice Denham in a case, she pointed out the importance of not only analysing the crime, the behaviour, but also analysing the position of the defendant and that's crucial to the sentencing policy of the Court of Appeal. J02

Others described their approach to sentencing or their process as being much more fluid than structured, but still identifiable as broadly following a structured approach:

> I suppose first and foremost I kind of look at how serious the offence is, [ ]and by way of example, if you're dealing with a drugs charge, is it cocaine or is it cannabis? …Then I'll look at more the individual factors then, the aggravating factors. Has the person got previous convictions? … And then mitigating factors. For example, did they plead guilty early? At what stage did they plead guilty? Because that's important. Have they shown remorse? Is there compensation in court? Is there any insight shown? Have they… If there's addiction issues, have they taken any steps to address them? J04

Several judges discussed the structured approach set out by the Court of Criminal Appeal and the Court of Appeal in various cases. Some expressed the view that it was only suitable for crimes sentenced in higher courts, others felt that—as the quotation above illustrates—the structured approach works across the board for all offences regardless of which court they are sentenced in, whereas others identified their approach as being closer to instinctual synthesis.

> We're more in the pure instinctive analyses area of sentencing. We work on the basis of our experience and our understanding of the circumstances. But effectively, the challenge is to come to an appropriate response that's fair and just and balances the various aspects that have to be balanced. J02

When outlining their approach many judges mentioned the importance of acquiring sufficient information on the defendant and their circumstances before passing sentence. The probation report (otherwise known as the pre-sanction report), previous convictions and the plea in mitigation were mentioned most frequently when judges described their approaches to sentencing.

Most respondents noted particular approaches to specific types of offences. For example, many noted that on repeat no insurance they would impose imprisonment whereas others noted they would consider avoiding a custodial sentence if compensation were paid to the victim of an assault case. The empirical sentencing literature shows that rules of thumb[172] are common features of sentencing culture in lower criminal courts with high caseloads. Previous research shows that developing rules of thumb and sentencing patterns is how sentencing discretion in lower criminal courts is practiced.[173]However common this approach might be in lower criminal courts, at its core it amounts to the adoption of specific sentencing policies towards certain offenders and/or offences which itself does not respond to the unique circumstances of individual cases. The development of sentencing guidelines for District Court judges that address specific offences and/or circumstances will be an important tool in reducing the impact of 'rules of thumb'.

Recommendations:

- Develop sentencing guidance/guidelines for District Court judges on how they should approach sentencing. Guidance/guidelines developed for the District Court should be based on sentencing guidance from superior courts but specifically adapted to the types of cases and circumstances that typically occur in the District Court. Areas to focus on initially might include:
    - Guidance on the adoption of a structured approach to sentencing, and the various steps involved in this with specific examples based on typical cases tried and sentenced in the District Court;
    - Guidance on the role of previous convictions in sentencing in the context of the District Court;
    - Sentencing guidelines on repeat road traffic offences, particularly no insurance, and on possession of drugs for personal use.

[172] Hogarth (1971) coined the term 'rules of thumb' as certain shortcuts judges make in terms of their sentencing policies in response to the overwhelming speed and sheer volume of cases they had to sentence. The ubiquity of patterned sentencing or 'rules of thumb' suggests that this may be the only way to make sense of very broad sentencing discretion in the absence of sentencing guidelines which coordinate all judges regardless of the type of court they practice in.

[173] Hunter et al (2016) found that this was a common feature of magistrates in Australia. Maguire (2010) found that District Court judges adopted specific policies for individual crimes.

- Provide training to new and experienced judges on how to apply sentencing guidance and guidelines while exercising their discretion in individual cases.

Court Specialisation and Court Context

Another consideration that influences judges' approaches to sentencing in the District Court is the high degrees of court specialisation. Several judges mentioned the different types of courts they sentence in and that different or more specialised courts may necessitate a different or adapted approach from their usual sentencing approach. In the District Criminal Court, specialised courts usually refer to particular days set aside for lists of specific categories of cases. For instance, the road traffic courts refers to a court list made up entirely of road traffic offences but might be referred to as a road traffic court informally. In provincial courts, court specialisation might be more infrequent but not unheard of. Other types of specific lists heard in court on a dedicated day include, fines, remand, domestic violence (usually, but not exclusively, section 33 breach charges), drugs etc. The Drug Treatment Court is also a specialised court with very different procedures and practices from ordinary criminal law sittings of the District Court. Similarly, certain courts in large multiple court districts have specialised domestic abuse lists which deal primarily with the prosecution and sentencing of section 33 breaches of protective orders. Court specialisation means that a judge's sentencing repertoire might differ considerably depending on which specialised court they usually sentence in.

> Different courts dictate different things – a road traffic court would be very different, because road traffic is very straightforward and it usually involves a fine, and/or a period of disqualification from driving. So, your approach to sentencing in a road traffic court would be very different. J07

Several judges, when asked about their approach to sentencing, explained that there were 'soft' sentencers or 'not tough' sentencers. By this, they meant that did not resort to prison much unless they really had a very serious offence and/or they avoid long prison sentences. When they described themselves as soft sentencers, they also meant that other court users and/or their colleagues perceived them as soft because they did not use prison that often or didn't impose long sentences. As the respondent in the following extract illustrates rehabilitation is sometimes perceived as a soft option, they view it as a better option in terms of the long term protection of society:

> And then, I'm very much into rehabilitation, because I do feel that best… people say you're soft, but my reason behind it is, the best safety and security for the public is that if somebody has committed offences, can be moved out of that offending behaviour, that is the best protection for society. So, that's where I would be coming from. J11

A common theme amongst these judges was the belief that imprisonment only does more damage and therefore, where possible is best avoided. Despite this, most judges tended to see imprisonment as unavoidable, a part of the job and something that had its uses as a deterrent. It was apparent from the tone of voice of judges who referred to themselves as

'soft' sentencers that they were not necessarily giving themselves a compliment, that perhaps there was a pejorative element to them being perceived as soft, rather than 'tough' on sentencing.

The approach of moveable judges to sentencing is somewhat different to judges who have been assigned to a specific district. Moveable judges move between different courts in different districts often at short notice. As a result certain sentencing options are less accessible to moveable judges due to feasibility issues. For example, while a moveable judge could theoretically defer the imposition of sentence for a period of time, because they move from court to court from week to week it would be very difficult to keep seisin of cases in various courts. Hearing the update on a particular case within a reasonable period of time may not be possible. Certain disposals are therefore more difficult for moveable judges to use on a regular basis.

Conversely, moveable judges are privy to the widest possible overview of District Court sentencing practices and court contexts and so are likely to be exposed to a breath of different approaches and practices. One interesting question which arises is to what extent do moveable judges feel they should change their sentencing approach depending on the court context—if they are standing in for a judge who usually imposes prison sentence for certain repeat driving offences, should they continue this approach or adopt their own approach? It is not inconceivable for a judge to spend their entire sentencing career as a moveable judge, which means they may find it more challenging to pass sentence when moving from district to district, and between different court contexts.

Recommendations

- Provision of information and training to new and experienced judges on existence of different types of courts and different skills needed for these courts. Ideally this training might be included in induction and before a judge is assigned to a specialised court.
- Develop sentencing guidance for judges sentencing in specific specialised courts such as the Road Traffic Court, Fines Enforcement Court, and Domestic Violence Court.
- Guidance on the sentencing options available to moveable judges and identification of the obstacles preventing use of certain sanctions and guidance specific to how moveable judges might tackle certain obstacles presented as a result of their moveable position.

3.3 Guidance currently available and required

Judges were asked what guidance they currently have available to them and what guidance they would ideally like to have when sentencing.

Guidance currently available

Judges interviewed in this study mentioned the following sources of guidance currently available to them:

- Sentencing Bench Books.
- CPD training including seminars and judicial conferences.
- Court of Appeal sentencing judgments.

The most commonly mentioned sources of guidance currently available were sentencing bench books and continued professional development (CPD) opportunities. Regarding bench books, it was interesting that not all judges mentioned these, especially considering their potential as an aid to sentencing. Some mentioned that they had not been updated for some time whereas others noted that they are especially useful for new judges, particularly those who come to the bench with no prior criminal law experience. One respondent explained that they can access several relevant bench books on a computer/iPad and therefore they have quick and easy access to the offences index, maximum sentence and right of election while sitting on the bench. However, one respondent noted that many judges do not possess the requisite IT skills that would allow them to enjoy a similar level of access which is something that can be addressed through targeted training and support.

Several judges mentioned that they found seminars, conferences and other forms of CPD to be particularly helpful in staying abreast of recent developments in the law, in the Court of Appeal and in practice. However, it was also noted that CPD opportunities were not available during Covid and had not returned to their pre-COVID levels of availability. Some District Court judges referred to the guidance provided by judgments of the Court of Appeal whereas others doubted its applicability to the types of case before the District Court. One perspective was that the Court of Appeal's two step approach provides an excellent structure with which to approach any sentencing decision although the exact ranges the court has indicated for particular crimes would not be applicable in the District Court due to the fact that it hears minor offences. Another perspective was that the Court of Appeal guidance was just not applicable at all to the context, crimes or time allotted to judges in the District Court.

Several judges mentioned that they rely upon probation reports as a form of guidance but many judges noted that they are simply not available due to resourcing issues.

Guidance judges would like to have available

When asked about what type of guidance they would ideally like to have as an aide to sentencing judges mentioned a broad spectrum of different types of guidance with no one approach being dominant. The guidance sought included:

- Appellate feedback from appeals of their sentence.
- Sentencing guidelines.
- Annual updates to bench books.

- Training, talks, seminars, podcasts.
- Robust system of induction for new judges.
- More opportunities to meet with other judges.

A number of judges mentioned the lack of any appellate feedback from appeals of their sentences to the Circuit Criminal Court. Due to the de novo nature of the appeal to the Circuit Court, some felt that even if there were feedback it might not be relevant given that the case presented before the Circuit Criminal Court may have been quite different on the facts than the one that was heard in the District Court. A number of judges, who stated that they would welcome appellate feedback, raised the value of having an appeal on sentence that was transcript based, along with a new process to gather a summary of the main insights from the appeals.

Several mentioned sentencing guidelines, particularly for new judges, and more training along with a proper induction programme. Annual updates to sentencing bench books, talks, seminars, podcasts, and more appellate guidance were all mentioned as desirable forms of guidance. Several mentioned that they met up with other judges to discuss sentencing approaches at the weekend and others had set up a WhatsApp group for this purpose. The need to introduce a more fitting system of induction and training for new judges was mentioned by several respondents. The current system involves sitting with an experienced District Court judge for a short period of time to observe. Several noted that while bench books exist they are not necessarily brought to the attention of new judges when they start out on the bench. It appears that new judges really are expected to know how to judge from the moment they step into court. This interpretation was aptly described by one judge who outlined not only this expectation but also the potential reproduction of negative or less desirable aspects of the sentencing practice and culture of the District Court:

> I suppose, there's a certain expectation on us, that we've been in court all of our lives, before we become judges – and we have a certain idea how to do it. The negative of that approach is that we may have been trained in our own respective court areas by judges who might not have received training themselves. And it can be self-perpetuating! Bad sentencing can be self-perpetuating, or you'd see a judge do something and go, oh I like that, that's not a bad idea, and I'll do that. Or there'll be little sentencing tips and tricks that I picked up in my career, where I would do… perpetuate bad habits, basically, that's the problem. J07

Whilst judges appointed to the District Court generally have had a long and successful career as a solicitor or barrister, and would have observed court practice in their own court area and judicial practice in that area and perhaps others, it is reasonable to surmise that this in itself may not be enough to equip them for the job. Particularly if in their previous practice, they did not specialise in criminal law. In the context of a fast moving court with little time to deliberate on sentence, and in the absence of specifically formulated sentencing training or guidance, and given the very broad discretion exercised by judges in the District Court, it seems unreasonable to expect anything other than widespread variation in practices and between courts and different court areas. This is not to mention the stress that might be

experienced by new judges, given the expectation that they know what they are doing on their first day in court.

While bench books and guidelines and guidance from higher courts were mentioned somewhat generally by most respondents, several were more specific and highlighted the gaps in information in these forms of guidance. Bench books were mentioned as being helpful but only giving the maximum sentences and not giving any examples of the types of cases in which certain disposals might be useful. For example, one judge noted that they'd never heard of adjourned supervision, but that deferral of sentence is something that they had used on occasion. The Probation Service statistics for deferral of sentence with supervision (adjourned supervision) show that this disposal has been used more commonly than either the probation order or the community service order.[174] It was also intended to introduce this adjourned supervision as a statutory disposal by the 2014 Criminal Justice Community Sanctions Bill. In this context, while judges understand it from the purely legal side of the coin - deferral of sentence - more context and more information about this and other disposals would equip judges with a full understanding of all the available disposals, what they entail and examples of circumstances that it might be acceptable to use them in. Indeed, a number of judges specifically noted more information on how to encourage people towards rehabilitation would be useful while another wanted to know more about the range of alternative options available locally. Another potential disadvantage of only listing maximum penalties, typically a term of imprisonment and a fine, is that this may unconsciously suggest that these penalties are the two most important or salient. A short chapter within a sentencing bench book on the types of disposals outside of the maximum with references to further reading or information on these might therefore be useful. Annual updates to the sentencing bench book might also serve as a systematic way of updating judges on changes in the law. Annual updates would also be helpful for updating judges on new laws, new offences and changes in sentencing ranges for certain offences. Judges cannot be expected to keep abreast of all the changes that occur on a monthly or annual basis in the law or indeed in procedure themselves. Moreover, judges without a criminal law practice might need more briefing but all judges need consistent support in terms of updated sentencing handbooks, worked examples, and a summary of relevant case law for different types of cases.

Overall, the very varied accounts given by judges of their experiences in terms of the information and guidance they rely upon and require, suggests that the current system is ad hoc, relies upon individual due diligence and is not fit for purpose. A uniform approach to induction, training and continued professional development has been absent since the foundation of the state.

[174] The Probation Service, *Annual Reports*, 2000-2020.

Recommendations

- Introduction of a robust and comprehensive system of induction and training for new judges on sentencing which would begin with an audit of the particular requirements of each judge, so that training and induction could be tailored to reflect variation in the background and strengths each judge brings to the bench.
- Annual updates to sentencing bench books with a chapter on the full range of sentencing disposals available to judges sentencing in the District Court, outside of the maximum terms of imprisonment and fines applicable to each offence. Particular emphasis to be placed on community sanctions overseen by the Probation Service to enhance judicial knowledge and awareness of these sanctions.
- Training for all judges on the various IT platforms and software necessary for accessing electronic resources and participating in virtual hearings. Training should be ascertained in advance by assessment of digital competencies.
- Regular updates on Court of Appeal sentencing judgments but with emphasis on those particularly relevant to sentencing in the District Court and reported with specific discussion of their relevance in the context of the District Court.
- Regular provision of feedback of outcomes of District Court sentencing appeal decisions.

3.4 Sentencing guidelines

District Court judges were asked about their views on the introduction of sentencing guidelines and whether or not they had any concerns about their introduction. Most District Court judges welcomed the idea of the sentencing guidelines, with only a minority feeling that they were unnecessary and/or would not work. This was linked to an understanding amongst many judges that there is a lot of variation in sentencing practices in the District Court, largely due to the lack of any clear guidance, and that sentencing guidelines in that context would be very welcome.

> I think they're long overdue. And without them the obvious danger is inconsistency. Where we are 65 district judges, each singing from our own hymn sheet and that is a recipe for inconsistency and if you have prolonged inconsistency, it may give rise to dissatisfaction. So, I'm … I'd be very much looking forward to setting guidelines. J01

Most judges identified the utility of sentencing guidelines as being to avoid inconsistency and the dissatisfaction that it might lead to, as well as to introduce a level of uniformity, universality and consistency in how they approach sentencing. Some were more qualified in their support, noting that their enthusiasm was conditional on the ability to depart from the guidelines and they would be most relevant to new judges. Several judges described how they thought sentencing guidelines could be most useful. Guidelines could set out starting points for different offences or even identify sentence ranges in a similar fashion to the Court of Appeal, provided these were not too descriptive and could be departed from.

> But I don't think they can be too prescriptive because then there's really no point in having an individual judge. […]I think they can give you ranges…In the same way that the Court of Appeal manages to achieve that in giving ranges and what you take into consideration, then it's left to the judge to assess that. J04

Judges voiced a number of concerns related to the introduction of guidelines. Unsurprisingly, the most common concern they expressed was that any guidelines introduced would not interfere with their sentencing discretion. Several judges tempered their concern around loss of discretion by noting that guidelines can be departed from once reasons are given to justify the departure. One judge referred to the personal injury guidelines already developed in Ireland as an example of how sentencing guidelines might turn out: *'It's a bit like the new personal injuries guidelines – same thing, you can depart from them, provided you give reasons, and the same thing will apply'* J04. Some cautioned against guidelines being so voluminous that they become oppressive and gave the example of the Magistrates' court in England and Wales, noting that sentencing guidelines had gone too far:

> In the British judicial system, they seem to have gone over the top altogether and the handbooks that are issued and the sentencing guidelines for the lower courts in England are voluminous and oppressive and… they seem to have overdone it entirely. J01

Others noted that if guidelines were too intrusive or restrictive there would be no need for an individual judge and sentences could be computer generated by algorithm. Judicial concerns centred on the potential loss of discretion and the ability to use instinct to craft sentences that were responsive to the exigencies of individual cases. Judges linked these tools to the unique nature of the District Court, the fact that many people who appear before it commit crimes more because of their circumstances than anything else, and to the fact that judges generally have more opportunity to help people change direction in the District Court than in other courts:

> The District Court I do think has an opportunity to make… You could turn somebody's direction. You could… Offending might be[…] stopped if certain community sanctions are brought in or community supports.[…] …by the time people come before the other courts that moment has passed. J04

Other concerns raised were that the guidelines should be judge-made and accompanied by systematic judicial training so that all judges understood and were trained in how to apply the guidelines in practice. Some expressed the concern that guidelines might be embraced by new judges starting out on their judging career but ignored by more experienced judges. Certainly, the response of individual judges was highlighted as a variable in the success or otherwise of any sentencing guidelines that might be introduced. Yet the general feeling was that, provided they were designed in consultation with judges, made by judges, offered clear guidance while respecting discretion, guidelines were welcome.

Several judges identified specific areas of the law as being most in need of sentencing guidelines including offences under the Misuse of Drugs Acts, sexual offences cases

particularly those involving pornographic images being shared on phones by minors[175] and decisions involving jurisdiction. How to respond to drugs and questions surrounding jurisdiction were the two most commonly noted by judges as areas in which they need more guidance. The possession of cannabis was raised as an important and yet complicated issue. While the possession of cannabis for personal use is not necessarily culturally regarded as truly criminal and can be dealt with by a caution, and while there has been and continues to be debate around decriminalising this offence, a question arises over how judges should sentence a person convicted of this offence.

> Because there's a disparate and varying approach to offences nationwide. And I'm not sure that I get it right and I'm not convinced that I am right. And I would be very glad of the guidance. Perhaps I'm too severe. Maybe I'm out of step. J01

The connection between addiction and involvement in the criminal justice system emerged as an important theme that will be fully developed further in this report. It is one example of where the executive branch of government arguably has an important role to play in formulating policy. Where an offence remains on the statute book but cultural attitudes towards it are in flux and where the executive has identified a potential change of direction, the issue of legitimacy of the courts is raised. If judges impose sentences that are perceived by the public to out of sync with the public mood and even perhaps the public interest, then this may undermine public confidence in the judiciary and could support the view that judges are out of touch with reality. While changing mores can sometimes unavoidably lead this scenario, in an individualised system there can often be glaring incompatibilities in terms of how certain offences are sentenced. For example, a first time offender convicted of possession of a pornographic image of a child on their phone might receive a suspended sentence or a community service order, whereas a person convicted for possession of cannabis or even theft, if there are previous convictions, might attract a prison sentence.

Recommendations

- Develop sentencing guidelines, in consultation with District Court judges, which offer clear guidance, but also allow for departures once clear justification is given.
- Guidelines should be accompanied by training for judges to ensure all judges understand how to apply guidelines in practice. Guidelines should also be monitored to understand implementation issues and their impact on judicial sentencing practices.
- From the perspective of judges who participated in this research immediate priorities in terms of the development of sentencing guidelines were as follows:
    - Guidelines that identify sentence ranges in a similar fashion to how the Court of Appeal identifies sentencing ranges for the following offences: offences relating to sharing of intimate images online under section 2, 3 and 4 of the

[175] These types of cases may fall under the Child Trafficking and Pornography Act 1998 and the Harassment and Harmful Communications Act 2020.

Harassment and Harmful Communications Act 2020 and possession of child pornography under the Child Trafficking and Pornography Act 1998;

- Guidelines in relation to the decision to accept or decline jurisdiction in the District Court.
- Guidelines on sentencing offences related to the possession of cannabis for personal use under the Misuse of Drugs Acts, taking into account the shift in public attitudes and the potential de-criminalisation of this offence.

3.5 Summary and Conclusions

- District Court judges are chosen from the ranks of long practicing and successful solicitors and barristers who have a proven ability to successfully master and navigate the complicated and fast moving pace of the lowest, and yet busiest, criminal court in Ireland. Yet, it appears that when they are appointed as a judge they are expected to continue to navigate this system by themselves, without a uniform, systematic induction and training programme, or a well-designed continued professional development approach that provides support throughout their judicial career. This undermines their ability to stay up to date with emerging new laws, processes and legal procedures. Given the breadth of criminal cases that can be heard in the District Court, judges in this court are most in need of support. The introduction of a bespoke system of support that caters specifically for the needs of District Court judges would significantly enhance their ability to overcome many of the challenges they currently face when sentencing in the busiest and most diverse court in the Irish legal system.
- The provision of bench books is hugely important but from judicial accounts it appears that they are not systematically updated on an annual basis. Judicial accounts also suggest that bench books are not routinely provided to new judges as part of their induction. Judges would welcome more information in bench books about available sanctions beyond the maximum fines and prison sentences up to and including all penalties available in the District Court, particularly community sanctions. As District Court judges may be appointed with different practice backgrounds they have different training requirements. An audit of training needs should be conducted annually with individual follow up and thought given to the various ways that Continued Professional Development can be flexibly delivered to take account of busy court schedules that most District Court judges are faced with. More attention to assessing and supporting digital competency skills amongst District Court judges along with the provision of digital bench books would enhance accessibility to bench books and other sources of guidance.
- The lack of a systematic form of appellate review of District Court decisions means judges do not receive the same sentencing guidance from higher courts that judges of Circuit, Central and Special Criminal Courts receive. Due to the minor nature of the

offences dealt with in the District Court, the range of applicable sentencing disposals are potentially much broader than in other courts where the seriousness of the offence mandates some level of custodial sentence. This means that the potential for inconsistency in sentencing is much greater in the District Court than in any other court. Thus, while District Court judges currently have less sentencing guidance than the higher criminal courts, they actually need sentencing guidance more but any guidance needs to be bespoke to the specific types of cases, circumstances and defendants that appear in the District Court.

- Additionally, the pressure to progress the list in the context of persistently long court lists and backlogs has almost become an independent variable in terms of how judges go about sentencing in that judges feel compelled to factor the potential for delays into their sentencing decision. The case in point being whether or not to order a Probation Report and the need to balance that against the defendant's rights to a fair trial which entails a speedy determination of the sentence. As Probation Reports must be obtained before imposing a supervisory sentence, pressure to progress cases through the system can sometimes mean that judges avoid supervisory penalties due to delays involved with obtaining reports.
- Judicial accounts of sentencing in the District Court in Ireland echo those of judges in other common law jurisdictions regarding the need to make decisions at speed but with limited information. Not all of this missing information is legal or law related. As in other jurisdictions, justice in the lower criminal courts often resembles adjudication of social as well as legal problems. In this regard, the role of the Probation Service as a key strategic partner for the District Court cannot be understated and indeed judicial accounts consistently highlighted the importance of information produced by the service. However, judges almost unanimously noted the reduced availability of reports and this significantly impacts their sentencing decisions by removing many community sentencing options from their list of available sentencing options.
- Judicial accounts emphasised the need for greater sentencing guidance and support in the District Court. In the absence of these key structural and contextual supports it is not surprising that variation exists between how judges approach sentencing between districts. However, this research found that District Court judges are much more aware of the principle of proportionality and the need for consistency in sentencing than they were in the past. Judges are also more open to guidance in the form of sentencing guidelines than previous research found, provided they do not interfere with their sentencing discretion and that reasoned departure from guidance is permitted.

4. Judicial perspectives on sentencing disposals in the District Court

4.1 Introduction

This chapter presents the findings from the questions relating to challenges faced by District Court judges when determining sentences in the Criminal District Court. It focuses on the challenges judges experience in relation to the specific sentencing disposals and begins with an exploration of judicial views on the relationship between decisions to accept or decline jurisdiction in the District Court and their relevance to determining sentence. It then explores judicial views on diversionary programmes, the decision to convict or not, financial sanctions, community sanctions and finally custodial sanctions. Recommendations are listed throughout the chapter beside the findings that they flow from. The chapter concludes by highlighting the main issues emerging.

4.2 Jurisdiction and sentencing powers

The jurisdiction of the District Court is limited to the trial of minor offences. Although a court of summary jurisdiction, the District Court, as a matter of law, has a very wide jurisdiction to hear a broad range of indictable offences that can be dealt with by the Circuit court and research suggests that in practice it exercises this jurisdiction extensively.[176]There are two ways in which indictable offences, so long as they are minor in nature, may be heard in the District Court. First, when charged with an indictable offence triable summarily an accused has the right to elect for trial in the Circuit Court although research suggests that this right is rarely exercised.[177] Second, in relation to hybrid or 'either way' offences the DPP has the right to direct that certain indictable offences are tried summarily, even against the wishes of the accused. However, in both cases the District Court judge hearing the case has the ultimate power to refuse jurisdiction if he or she believes that the offence in question is not minor in nature. While case law sets out guidance on what can be considered a minor offence in law, it is not entirely clear how this relates to what happens in practice. Particularly the extent to which there is agreement between different judges, different prosecutors and indeed judges and prosecutors regarding what constitutes a minor offence. Variation in the rates of certain

[176] John Jackson and Sean Doran, A Study of the Jurisdiction of the Criminal Courts in Ireland: report to the Working Group on the Jurisdiction of the Courts, (Courts Service, Stationery Office, Dublin, 2003) 42.
[177] Ibid 54.

offences being sent forward for trial in the Circuit and higher criminal courts has been documented across Ireland.[178]

A District Court judge has the power to decline jurisdiction at any stage of the hearing of the offence right up until its determination. However, once the case has been determined jurisdiction may no longer be refused. This was confirmed by the High Court in *State (O'Hagan) v Delap*[179], and O'Hanlon J clarified the circumstances in which this power may be exercised, stating:

> I am of the opinion that when a District Court judge has elected to try a case summarily, and has embarked on the trial, circumstances may arise which entitle him, or may even make it necessary for him, to reverse his previous decision and allow the case to go forward to the Circuit Court where a higher range of sentences might be imposed.[180]

Research carried out over two decades ago on the interface between the District and Circuit Criminal Courts found that 'a considerable number of offences that are heard in the Circuit Court in accordance with the rules of allocation result in a sentence that is within the lower court's sentencing range'.[181] The same research found that 60 % of those surveyed (including District Court judges, DPP, prosecuting and defence counsel, Gardaí) were satisfied with the current system of allocation of cases between the District Court and Circuit Court.[182]

A key requirement of the terms of reference of this study was to ascertain judicial perspectives on the importance of the decision to accept or decline jurisdiction and how it relates to the sentencing jurisdiction in the District Court which is limited to a maximum of 12 months imprisonment and/or a fine not exceeding €5000 for a single offence. To ascertain this, judges were asked how important the initial decision to accept or refuse jurisdiction is in relation to the determination of sentence in that case.

Most judges expressed the view that jurisdictional decisions are important to and clearly linked to the sentencing decisions and sentencing powers exercised by District Court judges. Several judges indicated that they rarely refused jurisdiction, some stating that they automatically accept jurisdiction. More than half indicated that they would refuse jurisdiction if they considered the offence to be more serious than a minor offence. Most explained that the key consideration when deciding on whether to accept or decline jurisdiction was to examine the facts to ascertain the seriousness of the case and determine whether the sentencing powers available to them in the District Court were sufficient to respond to the seriousness of the offence.

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[178] RTE Investigations Unit, 'District Court V Circuit Court', (March, 2018). Available at: https://www.rte.ie/news/investigations-unit/2018/0321/949117-district-court-v-circuit-court/

[179] [1982] IR 281

[180] Ibid (note 176) 217.

[181] Ibid (note 176) 61.

[182] Ibid (note 176) 62.

> But ultimately, I suppose what you're assessing is if this matter comes before me, worst case scenario, is 12 months in custody going to meet, you know, a strict enough sentence? J04

Several judges alluded to the fact that for many indictable offences tried in the District Court, the maximum sentence is one year whereas very few mentioned that this goes to two years if the accused is convicted of more than one offence or indeed the power to impose consecutive sentences when the offence is committed whilst on bail.

Two offences in particular were most commonly mentioned as an offence in relation to which jurisdictional issues might arise. Assault causing harm under section 3 of the Non-Fatal Offences against the Person Act 2001 (NFOAPA 2001) and possession of drugs for sale or supply contrary to section 15 of the Misuse of Drugs Act 1977 (as amended by section 9 of the Misuse of Drugs Act 1984). Section 3 assault causing harm is a hybrid offence triable either summarily or on indictment at the direction of the DPP and section 15 of the Misuse of Drugs Act can be tried both summarily and on indictment with each attracting different maximum sentences. Several judges explained that an assault case will typically give rise to jurisdiction issues if there is a broken limb or an injury that will result in significant scarring because of Court of Appeal jurisprudence which indicates that these types of injuries would generally attract in excess of one year. One example was given of an assault case where the DPP accepted jurisdiction and initially the judge did too only to decline jurisdiction when the full facts were heard because the case was too serious for the District Court:

> The DPP had accepted jurisdiction, and in my experience, they do that in a lot of cases. And, you know, in a lot of cases like the scenario I'm giving you. Then when the case came on for hearing, the injured party gave evidence that he was punched in the mouth, that he required a significant amount of dental treatment, and in those circumstances, the hearing had started, I heard his evidence. And I determined there and then, this is not an appropriate case for the District Court because in my view, his injuries were so significant and so serious, and very, very… can you say life changing? J05

Several judges explained that in relation to s.15 possession of drugs cases, the question of jurisdiction arises when the value of the drugs exceeds €7000 or €8000. Other offences mentioned by judges as giving rise to jurisdiction issues include offences involving violence, violent disorder, knives, coercive control, and threats to kill under section 5 of the NFOAPA 2001.

The exercise of assessing the seriousness of the offence by reference to the facts of the case is not as straight forward and uncomplicated as it might seem. Several judges explained that it can be challenging to elicit enough relevant and accurate information from the prosecution about the offence at the early stages of the hearing. Some explained that they usually request access to the medical report in assault cases before they accept jurisdiction and, when not available, they may initially accept jurisdiction only to refuse it once the full extent of the impact of the offence on the injured party transpires either from the medical report and/or the victim impact assessment. Getting accurate information at the time of making a decision

to accept or decline jurisdiction is necessary for the judge to make a fully informed decision. Some acknowledged that they can change their decision about acceptance of jurisdiction at a later point in the proceedings if and when more details emerge about the nature of the offence. However, several judges expressed the view that once the hearing has started it is not open to them to reject jurisdiction. Some judges were unclear if they could reject jurisdiction after a guilty plea was entered.

Judges highlighted that assessing the seriousness of the offence is complicated by the fact that a guilty plea, mitigating factors and previous convictions need to be taken into account in order to assess whether sentencing powers are sufficient. It was noted that previous convictions cannot be taken into account as this would introduce bad character evidence and potentially offend against the presumption of innocence. The difficulty getting the right information at the right time, particularly given the speed at which the District Court moves, and the complexity of incorporating all the relevant factors, some of which will remain unknown, most likely explain why many judges accept jurisdiction in most cases in a somewhat automatic fashion. Several judges mentioned that the DPP usually gets it right in terms of its directions on jurisdiction, although some noted that resource issues invariably play a role in decision-making.

> Most of them that come before you are considered, the DPP has actually looked at them. And they are reasonable enough to accept jurisdiction on. They won't let the bigger ones through. But sometimes the net has a hole. J07

Cases in the District Court are heard much more quickly and are much less expensive than in the Circuit Court, and the informality can be less traumatising than a hearing before a judge and jury. On the other hand, one judge noted that the Circuit Court has a stronger deterrence factor in so far as the case is heard by judge and jury and the sentencing powers are much more substantial. Several judges gave examples of cases in which they believe the offence was so serious that the accused would be better served by a trial by judge and jury.

Many judges highlighted the need for more information and guidance on all aspects of jurisdiction. Court of Appeal case law is used by some judges as a guide to the types of cases that would surpass their sentencing powers, but not consistently across all judges interviewed. Almost half expressed the view that guidance would be welcome to ensure consistency, acknowledging that there is inevitably variation amongst judges in terms of differing perceptions of the seriousness of offences.

> What is abhorrent to you might not be abhorrent to me. So, that's the thing. And particularly in relation to sort of like, I think an awful lot of the sexual offences and also in relation to an awful lot of that online stuff as well. People take different views of that in particular. J06

> I think there also would be an argument to say guidance with regard to accepting or refusing jurisdiction might be of assistance to judges to try to ensure that there's a level of consistency… [Otherwise it may] become a bit of a lottery which I don't think you know, is great from the point of view of the integrity of the entire system. J03

As the decision to accept or decline jurisdiction has an enormous bearing on the outcome in individual cases and on the overall system, guidance on the point in the process beyond which judges may no longer decline jurisdiction, as well as guidelines on the factors judges may appropriately decision-making would enhance consistency in judicial decision making around jurisdiction in the District Court. Other suggestions made by judges included the need for feedback on the sentence actually imposed in the higher court in cases where the District Court judges refuses jurisdiction. The key point of the feedback would be to inform judges about whether or not the case they refused was sentenced within the ranges available to them or not.

Recommendations:

- Develop guidance on the exact point in the process at which judges may decline jurisdiction in the District Court and on the various factors that may appropriately be considered when reaching this decision.
- Develop a mechanism for providing judges with feedback on how cases they declined jurisdiction for in the District Court were sentenced in the Circuit Court.

4.3 Diversionary programmes

Judicial views around the use of diversion programmes were also explored during interviews. Judges were asked about their views on diversion programmes, such as restorative justice and whether or not they had ever used them before. A majority of judges expressed the view that diversion programmes can be beneficial with many explaining that they had heard of restorative justice but didn't use it often. Many felt there was a need for more education and for more availability of opportunities for diversion in the District Court. A small number were not enthusiastic towards diversion programmes, particularly restorative justice, largely down to the extra time involved in referring a case to a Restorative Justice Programme but also due to the lack of availability of any such programmes in their District. Typical reasons for not using Restorative Justice included: delays associated with probation reports to assess suitability; the perception that such programmes are only relevant to minor offences; only relevant to persons with very few or no previous convictions; only relevant in cases in which the victim wants to explore this option. Several judges noted that there are a number of very well established Restorative Justice Programmes in certain parts of the country, including Nenagh and Tallaght, but outside of these areas they are generally not available. Whether or not a judge is assigned to a district was also identified as a factor that would make it more difficult to use diversion programmes.

Nevertheless, many judges noted positive aspects of Restorative Justice, most commonly the closure it gives to victims and the insights it helps to develop in offenders. Yet, even amongst

those who were enthusiastic about Restorative Justice, several expressed the view that such programmes have limited application as they are only suitable for minor offences, for offenders with few or no previous convictions and for middle class offenders who are more likely to understand the point of the process.

> That can be very good in instances where you have, we'll say, a first-time offender who is from a middle-class background that absolutely understands what they've done and it's a moment of madness or something like that. But it's not available nationally, you know? J06

Others thought such programmes were too difficult to facilitate in the context of huge court lists and delays in getting probation reports:

> I get the sense that the way things are going in the District Court, and the way the court services have organised, or failed to organise things, is that there is a huge pressure on the judge, get them in, get them out. And yes, of course these adjourning for probation reports, adjourning for the restorative justice programme, and for all the reasons you might adjourn as well, it means that, yes, they're coming back in, and therefore the list may be getting a little bit bigger because of that. But I am a firm believe that my job is not to run a smooth, efficient organisation – my job is to adjudicate on people, and adjudicate on crime. J11

A small minority expressed the view that what was needed was more education and more diversion programmes. A few judges referred to the Drug Court as a form of diversion that they supported and that they would like to see its applicability widened. One judge identified the need for more guidance and different forms of diversion available in the District Court.

Recommendation:

- Incorporate information on all available diversion programmes in Ireland into Induction Training for new District Court judges and into ongoing CPD training offered to all judges to raise awareness and knowledge of judges on diversion programmes.

4.4 Dismissal, discharge and strike out.

When making a decision to leave the defendant without a conviction, even though the facts against her have been proven, judges are generally motivated by a desire to give a young person a chance to avoid the stigma and life restrictions that result from a conviction.

> The decision not to record a conviction is one where one doesn't or the court might not want to brand a young person or any person with a criminal conviction because of the implications and the restrictions that it might create in terms of travel or employment or whatever. J01

Many judges noted the severe restrictions that a conviction imposes on persons wishing to travel to USA, Australia or Canada, on future job prospects and even on future parenthood through adoption. The consensus was that any activity that requires Garda Vetting will be

impacted by a conviction. Other reasons for leaving a person without a conviction included: if the probation report was good, if they complied with all conditions, were unlikely to reoffend or if it were a once-off or out of character offence. The majority of judges saw this option as applying mainly to a young or first offender, although many noted they may be persuaded to apply this option for older offenders where the offence is a once off or very minor. Some would apply this option to those in university training for a professional occupation or for persons intellectually challenged. Judges identified a range of offences that they might avoid a conviction in relation to but most agreed that the offence in question would have to be minor, once off or a first offence. Offences mentioned included s.3 possession of drugs, minor public order offences, minor road traffic offences, assaults if out of character, and offences that should never have been prosecuted. One example of an offence that probably should never have been prosecuted was a case in which a woman hit a kerb whilst driving her car, no one else was involved and when she went home she called Gardaí to tell them. She was prosecuted for leaving the scene of the crime and the judge explained that the justice of the case required the case to be struck out.

A dismissal under Section 1.1 (i) of the Probation of Offenders Act 1907 provides judges in the District Court with a very broad range of factors they can take into account when considering whether it might be expedient not to impose a conviction. Most judges identified the dismissal as one possible way of leaving a person without a conviction. Judges also noted that whilst a dismissal is not a conviction, the Gardaí keep dismissals on record and inform the court when it asks are there any previous convictions. Two judges expressed a view that this was not appropriate and that this practice should be challenged. However, a majority welcomed this approach as they felt it was important to have an official note of the fact that the person already received the indulgence of the court to avoid abuse of section 1.1 (i) and provided examples of situations where defendants had received several dismissals for similar charges in different courts.

> My preference would be the Probation Act because there's a record of it in so far as there's a court record if the person comes before and you know, well, listen, this is not their first rodeo. They've got the indulgence of the court before. So, my preference would be the Probation Act. J04

Several judges described the dismissal as a half-way house between a strike out and a conviction while a majority were uncertain as to whether a dismissal shows up in police vetting or not with majority believing that it does or being uncertain as to whether it does or not. While the majority of those interviewed prefer using a dismissal over a strike out because of the record that is left, confusion over whether the dismissal appears in Garda vetting or not which may later prevent a person getting a job, adopting a child or becoming a coach made the strike out an attractive option if a judge wanted to be sure of leaving no trace. One judge explained the difference between a dismissal and strike out in terms of Garda Vetting:

> If it comes back before the court again, Section 1.1 can be mentioned. The big issue that arises with it is that the Gardaí are recording. They're not recording strikeouts on their system but they are recording Section 1.1. and they shouldn't be doing that…..Because it's actually a dismissal which is

> a stronger order than a strikeout. It means that it was dismissed and it shouldn't be recorded at all on the vetting system, but it is. And I feel sorry for somebody where two people are going for a job and one has a clean record and the other has dismissed under the Probation Act drugs. I know as an employer which person I'd pick. But they shouldn't be recording that. I can't make a decision – I can't make an order that's not the correct order just because the Gardaí are recording it in a particular way. J08

In comparison to the dismissal, the conditional discharge was only mentioned by one judge who perceived it as a step-up provision to the dismissal in that conditions can be attached that must be complied with and yet it still leaves the person without a conviction, although they can be called back to court for up to a period of 3 years. The Court's power under section 1 (3) of the Probation of Offenders Act 1907 to order the offender to pay damages for injury or compensation for loss was not mentioned. Notwithstanding this many judges indicated that they would consider combining the dismissal with a payment to the poor box and/or a compensation order if appropriate.

Judicial perspectives on the strike out after facts are proven were much more circumspect. At least one third of those interviewed do not use the strike out after facts proven at all or on a regular basis. Strike out seems to be used more in relation situations like deferred sentencing where a person has been given time to prove themselves in terms of rehabilitation or not coming to notice of police—seems as something that is earned, and relatively rarely imposed although some judges seem to use it less sparingly than others. Some indicated that they use it for once-off, exceptional cases, where they don't want there to be any record of it at all. The big advantage of the strike out is that it leaves the person with a clean slate and is not generally recorded by the police nor can it be re-entered. However, two judges noted that the prosecuting Garda would normally indicate to the court whether or not a strike out would be appropriate for a particular case. Some judges noted that a strike out will still appear on the Garda Pulse system and that sometimes prosecuting Gardaí will advise a judge that a particular person has already benefited from one.

Recommendation:

- Develop guidelines on the circumstances in which it is appropriate to use a dismissal, a conditional discharge, and a strike out after facts proven.
- The inclusion of information in the Sentencing Bench Book on the impact that a dismissal, conditional discharge and a strike out after facts proven has on Garda Vetting.

4.5 Financial sanctions: Fines, poor box and compensation

Fines

The fine is typically considered the standard form of punishment for summary offences, and may also be imposed for most indictable offences.[183] The Fines Payment and Recovery Act 2014 was commenced in 2016 and introduced a new regime for the payment of court imposed fines. Prior to the introduction of the 2014 Act, levels of imprisonment in default of payment of fine had reached unacceptably high levels and the purpose behind this Act was to address this by introducing alternative payment and enforcement options to prevent the largescale, automatic imprisonment of those in default of fines seen in previous years. The key change was that fines were to be set at a level that takes into account the person's financial circumstances and that all fines over €100 could be paid by instalments over the course of a year rather than in one lump sum.

If the fine is not paid, there are a number of options for enforcement. First, the person can be brought back before the court that imposed the fine and the judge can order an attachment of earnings. However, an attachment to social protection payments cannot be made. For unpaid fines above €500 the court may also make a recovery order or a community service order where all or part of a fine remains unpaid. Where an attachment or recovery is made and the fine is still not recovered the court may make a community service order. Imprisonment is thus reserved for situations where it is not appropriate to make an attachment, recovery or community service order or where a person has failed to comply with the CSO.

In this study District Court judges were asked about their experiences with the new regime introduced under the 2014 Act. The sentiments expressed by judges were overwhelmingly negative towards the new Act.

Most judges interviewed reported negative experiences of the new regime and a consensus emerged in judicial accounts about the types of problems experienced in practice. Only one judge reported positive experiences of the new regime including the fact that far less people are now imprisoned in default of payment of fine and that judicial discretion to prioritise payment of certain fines and strike out the rest has been maintained.

Judges highlighted a range of problems associated with the system of enforcement of fines including backlogs in issuing and processing enforcement notices, several design faults in the process around enforcing fines, widespread failure to appear on foot of fines enforcement notices, and issues with the affordability of fines for many people appearing before the

[183] Andrew Ashworth, *Sentencing and Criminal Justice*, (6th edn, Cambridge University Press, 2015) 345-346. Over 80 per cent of all summary cases in magistrates' courts result in a fine and during the 1970s around 60 per cent adult males convicted of indictable offences in magistrates and crown court were fined although this proportion has declined in recent years replaced by community penalties.

District Court. Several judges mentioned the considerable backlog (estimated in one court to be circa 6000 cases, and 7/8000 cases in another court) in enforcement of fines that currently exists and that the Courts Service is currently processing fines enforcement notices imposed as far back as 2016, 2017 and 2018. Some questioned whether imposing a fine in the context of huge backlogs of enforcement notices even made any sense given the fact that they are unlikely to be enforced in a timely manner. As fines are one of the most commonly imposed sanctions this is quite concerning. If the problems associated with the enforcement of fines deter judges from imposing them then it means many defendants may potentially receive a more severe disposal instead of a fine.

Many judges identified the main problems as being the payment of fines by instalment and the inherent weaknesses in the processes around enforcement of fines that the 2014 Act was supposed to remedy. The Act allows for fines over €100 to be paid by instalment and in practice this means that once a person pays 10 per cent of the fine up front they have one year within which to pay the remaining amount by instalment. Many judges expressed the view that most fines remained unpaid and this gave rise to a feeling amongst them that the court's sanctions were being undermined. Some judges noted that many people simply do not have the money to pay the fines and that fines are being set too high. Others highlighted that some people find navigating the instalment system difficult as they cannot read. Judges gave similar accounts of the problems with the process of enforcing fines and the following account is representative of these accounts:

> We fine somebody €200, it's not paid…then time passes and an enforcement notice goes out to the person to come in… they don't come into court on the enforcement notice. The first notice is they're told to pay the money and eventually they're told come into court when they don't pay the money. They're asked a couple of times to pay and when they don't pay, they're brought back into court on an enforcement note. Nobody's in court to deal with the enforcement note. The enforcement note issued by the court staff, there's nobody representing the state in the court when that comes in. So, the person who is fined arrives in court, well very unusual, I'd say in any of the cases I had, I'd say if two people turned up out of 100 that was the height of it. And then if they genuinely wanted to deal with the matter, there's nobody on the state side to deal with it. There's no person. The District Court guard can't get involved…we don't have the means and the mechanisms. So, it's all hit and miss and… J02

The process of getting someone into court appears to be very elongated with many notices being issued and few people turning up in court. This was confirmed by several other judges with experience of presiding over a fines list. One judge confirmed that it can take a considerable period of time before anything happens. Then when enforcement notices are sent out several noted that very few people turn up to court on foot of the notice for their enforcement hearing:

> It just seems to be on the never, never. You get a list of fines. You could have 300 on your list and you could have it done in 15 minutes because nobody literally shows up for them. Out of a full list, you might get a handful of people….Nobody shows up for them. J10

As a result the next step is to issue a bench warrant to bring the person who hasn't paid their fine up before court. But when the person eventually arrives in court, there is no State official to deal with the enforcement hearing and no one to make arrangements for the person to pay the fine or part of it and this means that the court will not usually have the details to hand regarding how much is owed, so the person gets given another date to appear before the court:

> In practice, sometimes when they're brought in, they're usually given another date to come back the next fines list because you don't have the information. The guards will just arrive in with the person and the bench warrant and you don't have the summons for the fine. You don't know what they paid, what the amount is, or you don't have the information in front of you at the time, so it gets put back into the next fines list. And then the whole cycle starts again. J10

One judge summarised the impact of the 2014 Act by saying that whilst it reduced the imprisonment of fine defaulters, fines don't actually get paid for up to 3 years after they are imposed. Another noted that the in the old system that imprisonment was a way to extinguish fines whereas now they keep going around and around the system. Several viewed the lack of finality involved as undermining the credibility of the criminal justice system and removing the deterrent effect of fines.

Many noted that the inefficiency of the system must cost much more than the fines collected generate, as well as overloading the police with bench warrants and the courts with endless lists that take years to be resolved. Several judges raised the issue of the affordability of the fines for the persons they are imposed on. The 2014 Act provides that fines must be set at a level that takes into account the person's financial circumstances and that only fines above €100 can be paid by instalment. In order to be convertible to a community service order the fine must be at least €500. In the context of a maximum fine of €2500, a €500 fine may not seem very high but in the context of a person whose only income is their social protection payment and who perhaps has dependents, paying a fine of €500 might be out of their reach. This point was made by a judge in the following extract who explained that it is usually larger fines that go unpaid rather than the smaller ones and that this can sometimes indicate that the fine itself was the wrong fine:

> Firstly the ones that aren't paid are the very big fines. So you'll see the diesel ones, the marked gas oil ones, coming back, because they're usually €2,500. You'll see somebody has been fined €1,000 for no insurance. They just simply can't afford to pay the fine in the first instance. That was the wrong fine imposed in my view. The original sentence was wrong. Then you'll see a lot of parking tickets here where they'll be €323, which is €200 for parking in the wrong place and €123 costs for the local authority. They won't be paid. J07

The size of fines and their relationship to the means and ability of the person to pay were both issues raised by a small handful of judges. Two noted that since dealing with long enforcement lists they have reflected on the level of the fines they impose and have significantly reduced their fines to reflect the reality of what it is people living on social welfare can pay.

> So, I've reduced my fines substantially on the basis that if they're small, they'll probably pay them. Plus the fact I have had a good look at life and most people are on €180 social welfare, maybe total, and even if they're working, they're getting €300 or €400. You are fining them €300 or €400 when they're on €400 or €500 a week and they have a family, like that's bankrupting them. You know, if they … how can they afford to pay that if they have children to feed? They can't. So, my fines now are all €50 or €100 or €200 and €300 if I really think you've been bold. J09

Contrastingly, a small number of judges mentioned the need to apply the attachment to earnings mechanism to fine defaulters on social protection and/or disability payments at a rate of €10 per week whereas others noted that it is the fines that are too high and that not all judges actually carry out a proper assessment of means. The issue of the size of fines imposed as penalties appears to be a hugely significant one with judges expressing strong but contrasting views. There appears to be chasm between the size of fine that realistically represents a punishment from a judicial perspective and the size that is realistically payable by convicted persons on low incomes.

Many judges interviewed seemed genuinely exasperated by what they perceive to be the non-enforcement of fines and many questioned the waste of resources it involved.

> If it worked I would be quite happy. It is not working, and it must be … I would love to know what it's costing the government to send all those letters by registered post and execute all those bench warrants, and haven't the Gardaí enough to be doing, arresting people for failing to appear for criminal events, rather than this madness. God help them. J09

Most adapted their sentencing practices in response. Many of the adaptations are practical workarounds but some might be considered as circumventions of the 2014 Act. These approaches included plea bargaining, but only accepting a lesser plea if the fine is paid before the matter is settled; asking if the person can pay a fine and if not, offering a CSO instead of a fine; attaching a section 8 endorsement to a bench warrant to allow station bail to be paid and then converting that into the payment of a fine in court; reducing the size of fines to suit the income of the offender; using discretion to prioritise the payment of some fines and striking out the rest; if already serving time, adding a number of days in lieu to get the fine off the list. Some judges prepared for enforcement lists by ringing in advance to ensure that a Probation Officer was present so that a same day suitability for CSO can be carried out, giving that judge options in how to deal with the matter outside of adjourning it to give the person more time to pay.

Clearly, judicial experiences of the new fines regime brought in by the 2014 Act are not satisfactory. Many expressed the view that the overall inefficiency and irrationality of the fines system casts serious doubt over the whole criminal justice system in Ireland. If fines are perceived as less workable penalty from the perspective of judges it could seriously disrupt its place as a longstanding low tariff penalty. Potentially this could result in judges resorting to higher tariff penalties earlier in when sentencing recidivists are putting pressure on an already overcrowded probation and prison system.

Recommendations

- Training for all judges of the District Court on assessment of financial means when imposing a fine. Training should include material that provides a holistic and dynamic understanding of the lives and daily experiences of people experiencing poverty. Partnering with an NGO such as All Together in Dignity-Ireland (ATD) which already runs a successful training module in association with Trinity College Dublin.[184]
- Guidance on arriving at the appropriate fine taking into account all the relevant circumstances including income.

The Poor Box

Judges were asked about their views on the use of charitable donations in sentencing, whether or not they typically used this approach in their practice and if so, why in their view this approach might be better than imposing a fine. All judges interviewed, except one, indicated that they typically use charitable donations in their sentencing practice. A number of terms were used to describe this practice including discretionary fund, the court poor box and charitable donations. Most judges see this common law disposal as a way of dealing with a minor offence, particularly for first time offenders and once off offences, in order to do justice in the case. Most judges typically combine a contribution to charity with either a dismissal under section 1.1 (i) of the POA or a strike out, although dismissal was mentioned most often.

The most commonly mentioned cases were public order, misuse of drugs possession of cannabis for personal use and out of character offences. The key benefit of this approach appears to be leaving the person without a conviction but still marking the offence, so that they don't get off scot free. Most judges expect never to see the person before them again and suggested that leaving them without a conviction was intended to preserve their potential to get a job in the future. Other key benefits identified were that the local community directly benefits through the contributions to charity.

The actual size of the contribution ranged from €50 to €500 and judges indicated that the aim was to 'hit them in the pocket' whilst giving them a chance. Some noted that the poor box was not appropriate to serious offences or road traffic offences and several judges noted the need to dispel the notion that justice can be bought:

> I have a bit of a concern, obviously a bit of a concern that if you adopt the policy – and I may not be right about this – but if you adopt the policy of if you pay X thousand or X hundred into the court poor box, then you'll avoid a prison sentence or whatever and I just have this little worry that does that read as you can buy yourself out of trouble and then if somebody hasn't got the funds to do it, that they're disadvantaged. So, because I have that concern, I tend to use it sparingly enough. J11

[184] https://www.atdireland.ie/wp/poverty-awareness/

However, the most commonly noted circumstances in which it might be applied was in relation to the possession of cannabis where a young person had attended a music festival. In these circumstances, judges wanted to teach the person a lesson by imposing a monetary cost on their behaviour but also preserve their ability to get a job or professional qualification in the future. A number of judges noted that they would adjust the level of the contribution for someone with less funds or give more time to pay:

> One has to be careful that it isn't seen that just because somebody has loads of money that they can buy off their conviction so to speak. So, I think there needs to be some level of consistency and very often I would say listen, someone on social welfare, I look for €150 or €200 as a charitable donation, give them maybe two or three months to pay. And then agree that if they make that payment, the case will be struck out or I'll dismiss under the Probation of Offenders Act. J03

In relation to reform, a number of judges noted that the poor box or court discretionary fund plays an important role in supporting the work of local charities and communities and that decentralising the fund and taking it out of the hands of judges who are very familiar with the local communities would be a retrograde step.

> But you see…, it can kind of become almost like the second National Lottery, that it goes in to be dispersed by the politicians at the end of the… if it goes into a national fund. There is a benefit in seeing it go to communities. So, sometimes there's a benefit in me saying to a defendant, listen, this €300 is going to go to the ….to an organisation that deals with the drug issue for young people. So, there's seen to be some merit out of it. So, they feel it's just not gone into this bottomless. J03

Recommendations

- Sentencing guidance for judges in relation on the types of circumstances in which a contribution to charity should be considered instead of or in addition to a fine.

Compensation Orders

Most judges have used or sometimes use compensation orders with a small number indicating that they have never imposed one or only rarely. Some noted that they do not use the statutory order but instead use their power under the Probation of Offenders Act 1907 to order compensation for the injured party. Most indicated that they would impose a compensation order as a standalone penalty with only a few indicating that they would combine it with another penalty. Judges interviewed saw compensation as an opportunity to make amends directly to the victim particularly if the victim is out of pocket or injured.

Assault and theft were the most commonly mentioned by judges as offences in relation to which a compensation order might be appropriate. In relation to assault, many judges indicated that the defendant would usually make an offer of compensation to the victim as a show of remorse and that this can be treated as a form of mitigation. When asked whether people with little means would be able to obtain this type of mitigation, several judges explained that they would lower the compensation amounts for people on social welfare and/or give more time. Others noted that in some cases where a person has no means to pay

compensation the issue of payment of compensation would not arise. Some judges indicated that compensation would also be appropriate in low level theft cases and if the compensation is paid, they might consider leaving the person without a conviction. Several mentioned that if compensation were paid they would not impose a prison sentence.

> I would say to them 'Look, I will give you three months to get €4,000 together and to come back in here with the €4,000 and if you don't, you can come with your toothbrush', is my expression, and they know exactly what I mean by that. J06

Rather than framing this as a buyout of trouble, several judges referred to it as a show of remorse that mitigates the severity of the penalty and thus the payment of compensation would be justifiable reason for not imposing a custodial penalty.

> I normally view compensation as a show of remorse rather than a buyout of trouble, and [I set out] what the penalty will be if the compensation is not paid. And then the person knows exactly what they're dealing with if they don't pay the compensation. And then they come back in on the next day and see if they're paid or not and either this happens or that happens, but they know in advance. J08

> but it's rare that the person before you would have the means to comply with the compensation order, very, very rare and in cases where they do have money to pay, that will usually form part of the mitigation, it will already have been done before it even gets to you, that's my experience of it….. J12

Most judges who regularly use compensation explained that they like the compensation to be paid before the matter is finalised thus avoiding many of the issues around outstanding monies experienced in relation to fines. And most also indicated what the penalty will be if the compensation is paid and sometimes if it is not paid, so there is no ambiguity.

> […] I know for the compensation to be paid, I would finalise the case. I just feel it puts the obligation on the person to make that compensation. They know I'm going to take that into account if it's paid, but it's just to ensure that the money is paid to the individuals out of pocket and make the person responsible to pay it back. J11

Recommendations

- Guidance on the circumstances in which it is appropriate to impose a compensation order, either as a standalone penalty or in addition to another penalty.
- Guidance as to how a voluntary payment of compensation by the defendant to the victim can be treated in sentencing. Specifically, whether guidance on when it is appropriate for compensation to be treated as a factor that mitigates the severity of the sentence, and whether it is appropriate that such mitigation might make the difference between a custodial and a non-custodial penalty. Guidance should specifically tackle the issue of equity and fairness involved in the fact that defendants without financial means will not be able to avail of this form of mitigation.

4.6 Deferment of sentence and adjourned supervision

It quickly emerged from interviews with District Court judges that Adjourned Supervision is not the only terminology used to describe the practice of delaying imposition of sentence with supervision by the probation service. Most judges did not immediately understand or recognise the term 'adjourned supervision' and many denied having used it or come across it until I explained what the practice looked like, and even then some still did not recognise until much later in the interview. At times it was difficult to decipher whether or not this was a simple case of a split nomenclature or the failure of nomenclature—the failure to choose or devise of a term to describe a practice or was it more that there were different types of practices and therefore different terms applied or both.

Both issues of nomenclature and diversity of practice appear to be evident in judicial accounts of 'adjourned supervision'. Some had never heard of the term 'adjourned supervision' whereas others recognised the practice but did not call it adjourned supervision. Instead, they referred to it as supervision during deferment of sentence and noted that there were different types of supervision—under the scrutiny of the court, the police (bail conditions do not come to the adverse attention of the police), or the probation service. The common component across the different types of supervision was the imposition of conditions that must be complied with during the deferral.

Several judges recognised the term deferral of sentence and explained that they might defer sentence for six, nine or twelve months and see how the person behaves. If reports returned news of good behaviour (no further offending, compliance with bail conditions, engagement with probation service) several judges indicated that they would consider not imposing a conviction, striking out the case (with facts proven) and/or imposing a more lenient sentence than might have been warranted. If reports back to court showed that the person had not complied with conditions then a custodial sentence would most likely be imposed. This description of 'adjourned supervision' is fairly standard and accords with descriptions in previous research. Other descriptions emerged which included convict first, then adjourn for a probation report and then allow some time to pass before imposing sentence.

Most judges that used one of these approaches were motivated to steer the person towards rehabilitation—the carrot being the lesser sentence and potentially the strike out, although some noted that they would dismiss the case rather than strike out, and the stick being the potential to impose a less lenient sentence up to and including a custodial sanction if the reports were not positive or if conditions were breached. Length of time of deferral/adjournment ranged from six months to two years with quarterly reviews.

Several judges explained that they use it regularly while others noted they had never heard of it and did not recognise the practice even after it was described. One judge noted that it was not in the Sentencing Bench Book and another noted that it wasn't possible to use it at the moment due to length of time it takes to get a pre-sanction report. Moveable judges generally tend not to use supervision during deferment of penalty as they are not assigned to

one particular court and so reviewing progress during deferment would be very complicated unless they elected to retain seisin of the case which can create other complications.

Judges who use this disposal regularly find it most useful for young offenders who have few convictions, those for whom the offence might have been a once off or out of character and those who are disadvantaged in some way—such as those who have an addiction or a mental health problem. Over half of judges would use it for a young offender, someone with few convictions and a low risk of reoffending whereas several judges would use it for offenders suffering from addictions or mental health issues, as a way to motivate them and keep them on their toes. As the Expert Group's Report[185] noted, use of supervision during deferment in relation to people with addictions or mental health issues might be underpinned by doubts about their ability or capacity to engage in a community based programme without engaging in further offending. Some judges clearly see supervision during deferment as a way to keep the offender on their toes, to engage them immediately and directly, rather than serving an actual time limited probation order or community service order. Some believe it can be a window through which to reach a person before they go down the road of substantial criminal offending.

For young people the possibility that they might avoid a conviction if they comply with the conditions is accepted by judges as the best case scenario. If they behave they will get a lesser penalty and might also get a strike out. In a way, it reinforces to the person involved that the court is watching their behaviour and their compliance and will respond accordingly.

> But in my mind I sometimes think, yes, this offender needs to be kept on a leash for a little while until we see how he or she is turning out. […] I'd adjourn and frequently would tell the offender, 'You can expect to be under the scrutiny of the court for two years'. J01
>
> And if anyone has told you you're going to get the probation act and walk out the door and not bother, they might find it a bit of a surprise to say, 'No, we're not done here,' and I would tell them frequently from the bench, 'You can expect to be under the supervision of the court.' And he'll probably walk out the door and say, 'What did that mean?'…
>
> And the solicitor's going to say, 'You're not done here; he's going to keep an eye on you'. J01

Judicial accounts above suggest that some judges see a probation order as the person getting to walk away from the crime whereas a supervision order with conditions is very similar to the supervision during deferment of sentence order. One important difference is the need to record a conviction in relation to section 2 of the Probation of Offenders Act whereas because no sentence is actually imposed until the matter is finalised, deferment of sentence can ultimately result in the application of section 1.1 (i) of the Probation Act, which is a powerful carrot or incentive for the person to comply with conditions.

[185] Expert Group Report

Recommendations

- Guidance on the circumstances in which supervision during deferment of sentence should be imposed including types of cases, circumstances of the offenders, and circumstances of the crime and victim impact statements. Guidance should include indication of maximum time period for deferment of sentence and appropriate review intervals.

4.7 Community Sanctions

District court judges were asked about the types of cases they thought community sanctions are most suitable for and to give any recent examples that might come to their minds. It emerged early on in the interviews that most judges interpreted this question as being about community service orders rather than a broader range of sentencing disposals that have supervision in the community in common. The question was thus amended and a definition of community sanctions was given whereby it was explained that they included community service orders, probation orders and adjourned supervision/supervision during deferment of sentence. Conflating community sanctions with community service orders suggests a low level of awareness amongst judges in the District Court about the nature and range of community sanctions. Considering that community sanctions are most likely to be used in the District Court as it deals with minor offences, this lacuna in the knowledge banks of judges serving in that court is fairly serious and yet can be easily rectified by training and strong collaboration between the Probation Service and the Judicial Council.

Notwithstanding the amendment to the wording of the question that incorporated a definition of community sanction, most judges focused on community service orders in their responses to that question. A consensus exists among District Court judges that the main purpose or aim of community service orders is to give back to the community and this was particularly relevant where a person may not have the financial means to pay back. It may represent the first time a person gets to engage in a structured programme of work so is particularly beneficial to unemployed people who come before the work and several judges opined that CSO makes more financial sense to the state than short prison sentences:

> Also, it financially makes sense for the state. The person does it, they clear it, they don't have it hanging over them. And sometimes it can be the accused. I suppose sometimes we… You know, a lot of the people we would deal with would be underprivileged. It might be the first time they've ever worked and, you know, that can be a good experience too. But, no, community service is something I'd use quite a bit. J04

A range of other views were expressed about the CSO including that it should be developed more and used more, it gives people something to do and gets them out of the system (whereas imposing a fine does the opposite—clogs up the system). Several noted that it is particularly suitable for people who are willing to rehabilitate themselves.

> And I find that community service works better for people who are willing to rehabilitate themselves. And ironically, for people who haven't worked before. And it tends to provide a structure to their day and it tends to socialise them with other people who are doing the work and in some instances it actually causes them to interact with people and end up maybe in a job or something like that, and that provides structure to their day immediately and moves them out of hanging about a negative area. And sometimes it has that effect. I really see it as almost purely rehabilitative as opposed to punitive. I don't see it as punitive at all really. If I thought punishment was what was required, I probably wouldn't use it. J08

Judges mentioned other sentencing aims it served including deterrence and punishment and several noted that in some ways a CSO was more punitive than a sentence of imprisonment because it requires the person to turn up and engage and can last up to a year, whereas if they are sentenced to a short prison sentence they could be out in weeks:

> Because if I give you a jail term, you'll go down and you'll be out in half an hour. CSO at least they have to turn up, they have to do something and it's inconvenient, and they might remember. And you're basically, it's the time that they have to contribute to dealing with their offence that you think, you hope will prevent them from committing further crimes in that bracket. J09

Judges were asked about the types of cases that community sanctions were most suitable for. All judges interpreted this question as being about the types of offences most suitable for CSOs. Several judges mentioned public order offences, theft, drugs (section 3 possession), and assaults while others explained that they wouldn't use CSOs for some of these offences and explained why. One noted that addictions are usually behind thefts so for that reason CSO would not be suitable for theft. Another noted that they wouldn't use CSOs for any type of violent offence. Road traffic offences were also mentioned as well as repeat offending that has met the custody threshold. One judge noted that they would impose a CSO as a step up if fines were not working and another judge noted that a prison sentence must be warranted before a CSO can be considered.

However, a number of judges specifically mentioned that it wasn't the type of case as such but the type of offender that dictated whether or not they would impose a CSO. This was about both the suitability of people (which is a requirement under the legislation) for CSO and also their responsiveness to it:

> And I actually think those types of remedies are better associated with the offender than the offence because certain people will respond to that. There are certain people that attend court and the very fact of them having to attend court is enough of a source of anxiety and trauma that they never want to put themselves through it again. There's other people that it's just water off a duck's back to them. In fact, they attend court in case they're in court even when they're not in court. So, you have people at both ends of the spectrum and then you have all the people in the middle. J08

Technically a judge must order a CSO suitability report before sentencing someone to a CSO although a recent suitability report might suffice. A common theme in judicial accounts was

the lack of availability of same day suitability reports but more highlighted the fact that so few people who come before them are deemed suitable for CSO as a reason for its under-use by the courts. A consensus emerged around certain characteristics of people coming before the courts that would render them unsuitable for CSO. Typically those with addictions and/or mental health issues were deemed to be unsuitable for CSO due to their inability to turn up and engage with the programme. From a judicial perspective, people with these vulnerabilities are not suitable for CSO and imposing a CSO on them would be setting them up to fail. Judges acknowledged that the majority of people who come before them suffer from one or both of these particular vulnerabilities and that this, from their perspective, significantly reduces the applicability of CSO. In the following quotation a judge explains that a CSO wouldn't be suitable for a person with a drug addiction and the best that they could do is take that person out of circulation for a while by giving them a short prison sentence.

> I couldn't give her community service because she was a drug addict and basically – this sounds terrible – you were just taking her out of circulation for a while. J09

Additionally, several judges gave anecdotes about cases in which the person before the court did not want to engage in a CSO and their lawyer offered the conclusion that if a report were ordered it would find the person unsuitable. Some judges explained defendant reluctance to engage in CSOs by reference to the greater degree of 'work' required compared to a prison sentence. Nonetheless, these anecdotes raise the question as to who is responsible for defining the suitability requirement in relation to CSO—judges, probation officers or defence lawyers acting on their clients' instructions. As the following quotation illustrates this narrowing of the suitability requirements for CSO might be attributable to all three:

> You request a report from the Probation Service and nine times out of ten, people come back as unsuitable for that or their solicitors would volunteer that they're going to be unsuitable for that whether it's because of an injury they have or mental health issues. So, I find that the community service as an option is almost ruled out very quickly and therefore it's not one that I think is used as often as maybe it could be. There seems to be a very narrow approach to it in terms of what they can accept and there's probably insurance reasons and risks reasons and all of that. But as an effective option or a useful option, it seems to be getting narrower and narrower from what I can see of it anyway. J10

So the use of community service orders in the District Court are narrowly confined to cohorts of people who do not have addictions and are mentally robust and this represents a small minority of people being sentenced before the courts. During the course of this research most judges noted that the majority of people who come before them have suffered multiple deprivations and traumas in their childhood and most have either an addiction or a mental health illness which keeps them in a cycle of offending and reoffending. Viewed from this perspective, it becomes easier to understand why judges decry the limited range of sentencing options they have at their disposal.

Some respondents identified the types of offenders that might be suitable for CSO. This included young people, people who are too delicate for prison and people who cannot afford to pay fines. One judge explained that whether a person pleaded guilty or was convicted after a trial could be the difference between a custodial and a non-custodial offence. Two judges had completely opposed views on the role reoffending might play in making a person suitable or unsuitable for CSO. The first, explained that lots of previous convictions for the same crime (no insurance) had led to multiple prison sentences so they decided to impose a CSO, thinking that a shovel and pick might make the person stop and reflect on their behaviour.

> That's why I… because the prison sentence didn't stop him, that's why I reverted, because I was hoping that the shovel and the pick sort of approach might. I mean, I would be hoping that he'd be cleaning weeds on a pathway somewhere, and would actually focus his mind into this. J07

This was an unusual position as the consensus amongst those interviewed was that a prison sentence was a foregone conclusion for persistent offending. The following quotation illustrates this point, where the judge explains that persistent offending would rule a CSO out:

> But it very often will depend on the previous offences and if you find that there were community service orders imposed in the past and in circumstances where there's similar type of offending again, you then may move to the greater sanction of either a suspended sentence or just impose a prison sentence as it is. J03

The consensus on community service orders is that they are not widely applicable due to the types of offenders who come before the courts and their inability or unwillingness to engage with the requirements of such a sentence. It is worth remembering the person being sentenced must consent to a CSO under Irish law.

A variety of other critiques of the CSO were also expressed. Several judges noted that although there is a legal obligation to consider CSO when considering a prison sentence of less than 12 months, the lack of availability of same day reports makes it counter-productive. Some noted that 240 hours maximum should be increased to 300 or 400 hours. Others noted that the CSO itself needs further development and that judges should have to give reasons for why they do not use it. As mentioned earlier, it was surprising that so few chose to talk about probation orders, and the few that did, were not particularly enamoured with them and tended to see them as mostly for young persons. A key question for further research would be to ascertain is this a lack of confidence in or a lack of familiarity with the probation order and what steps can be taken to rectify this.

Judges often talked about sentencing a person in order to stop them reoffending and yet they were unaware that community sanctions such as probation have lower rates of reoffending than prison, which has the highest rate both in Ireland and internationally. Similarly, most judges 'step-up' the level of severity of penalty if they perceive that a particular penalty is 'not working' (meaning that the person has reoffended again) and this betrays a lack of knowledge

and insight into what motivates people to change or desist from crime. If judges are motivated to stop people reoffending—through deterrence or rehabilitation—then they should be equipped with evidence-based insight and knowledge about how this happens so their decisions can be consistent with their aims and not lead to unintended consequences. When decades of research shows what works, what helps and what definitely doesn't help, it seems pointless and wasteful to proceed with what you think might work whilst disregarding this evidence. Judges do not want to be social workers and they are constrained by information and resources but they can and should within this context be enabled to make the best decision for the person but also for the public interest.

In the absence of this work, as one judge put it, we are sending people to prison merely because the law provides for it.

Recommendations:

- The provision of information for the District Court on the various community sanctions overseen by the Probation Service to inform judges about the range of different supervisory sanctions, what they involve as well as the relative success of the different sanctions in helping people desist from crime. Particular attention might be paid to raising judicial awareness and understanding of the Probation Order. Information might usefully provide judges with insights from research on desistance on what works in terms of reducing reoffending.

4.8 Custodial sanctions: suspended sentence and immediate custody

Suspended Sentences

The suspended sentence is seen as a very useful sentencing option by the vast majority of the judges interviewed for this study. Most see it as a very effective warning to the defendant that the next stop is prison—a Damocles Sword hanging over their head for a defined period of time.

> I'm bringing that person to within a whisker of an actual custodial sentence. And that's the function. That's why I use it. Because it's a threat that if you don't change, things are going to go in a different way and the consequences are potentially dire for you. So, I use them… J08

Most judges interviewed see the suspended sentence as a form of specific deterrence that can be very useful in providing an incentive to the offender to comply with the law and not reoffend. Several related its usefulness to its flexibility in that it can be used in circumstances where a person is recovering from an addiction to link them up with the Probation Service or it can be combined with a compensation order where there is a victim who has suffered loss. This flexibility though is reduced by the recognition that judges will not impose a suspended sentence on a person they believe has little hope of complying with the conditions of the order:

> So that is a very useful instrument for certain people, and if you've a fair idea that they're not going to reoffend, because the probation report tells you that they're at a low risk or a moderate risk of reoffending, well then imposing a suspended is very useful, because they'd be terrified that they'd go to prison. J07

In other words, judges make calculations about which offenders are more or less likely to reoffend and the suspended sentence is a useful option for those without significant previous convictions or who are already on the path to rehabilitation. The suspended sentence was described as a useful alternative to prison, particularly for someone who had already received the benefit of other non-custodial sanctions and had continued to reoffend. Some judges expressed the view that suspended sentences are very effective in preventing reoffending, but this may also be a reflection of the fact that they are unlikely to impose it on people who are at a high risk of reoffending.

The usefulness of the suspended sentence is undermined by difficulties related to their administration and gaps in the activation process. A number of judges highlighted that when a person comes before them for an offence who is already on a suspended sentence, the court presenter does not usually have any information on the offence for which the s.99 sentence was imposed. This creates difficulties for the judge who has to decide whether or not to activate the suspended sentence:

> So, let's say somebody gets a two-year suspended sentence a year ago, for a burglary and a violent robbery and they then commit a no insurance a year later and it goes back before the District Court, the usual thing is that there'll be absolutely no, on a section 99 there'll be no information about the suspended sentence that they got, like what was the suspended sentence for, what was the nature of the crime, what was the impact on the victims, what kind of chance, what was the mitigation at that time, what was said to the court by the defence, you know that kind of that level of detail that you would have on a circuit court section 99. J12

Without this level of information the case may need to be adjourned and re-entered but this may then run into difficulties with the time limits for activation of the suspended sentence under section 99. Other practical difficulties associated with the suspended sentence is the lack of consistency, particularly in larger districts with multiple courts, in ensuring the suspended sentence is brought back to the court in which it was imposed. Several judges indicated that they would not automatically activate the suspended sentence on reconviction unless the new offence was of the same level of offending as the offence for which the suspended sentence was imposed. Despite the practical difficulties associated with the activation of the suspended sentence judges appeared significantly more knowledgeable and enthusiastic towards this than they were towards the probation order for example. However, most are not prepared to take chances with a suspended sentence and usually reserve this penalty for a defendant who is unlikely to reappear before the courts.

Recommendations:

- Guidelines for judges in the District Court on the types of cases that suspended sentences are most appropriate for with specific reference to the types of cases typically heard in the District Court.

Immediate Custody

Judges were asked about the types of cases that custodial sanctions were generally reserved for and the overwhelming majority agreed that they are generally reserved for persons with many previous convictions or longstanding or persistent offenders, and relatively serious minor offences such as assault, burglary and robbery and section 15A of the Drugs Acts. Relatively minor offences, if repeated would also attract a custodial sentence in the District Court. Typical examples of non-violent minor offences that many judges listed as attracting a custodial sentence, if repeated, were driving offences particularly driving whilst disqualified and driving with no insurance, theft, and public order offences. There is a clear consensus on the impact of previous convictions on sentencing amongst judges in the District Court interviewed in this study. Previous convictions are regarded as aggravating the seriousness of the offence thus warranting a prison sentence, even if the precipitating offence is relatively minor. A number of judges noted that this approach, widespread in the District Court, might fall foul of the principle of proportionality, especially if a relatively long prison sentence were imposed in relation to a relatively minor offence. One respondent gave an example of a person with 100 previous convictions who steals a breakfast roll and observed that, while it would be contrary to proportionality to give them a long sentence as the offence is so minor some judges might throw the book at them for it due to the very substantial previous record.

> I think the difficulty that can arise is where you have somebody with a large number of previous convictions that you might lose sight of the fact, of the offence that they are now being sentenced for and there has to be some degree of proportionality in relation to that. J03

Several judges specifically mentioned that this is what Irish sentencing law provides for the imprisonment of persistent offenders who commit minor offences and what both society and the victim expect to happen.

> But from a society point of view, I suppose and also from a victim's point of view, they likely will want to see that the person who offended against or impinged on their rights is suddenly going to end up getting some class of a sentence. That where the State, through the judiciary, are sending out a message that they find that this type of behaviour is objectionable and that a strong message should go out. J03

Several judges were cognisant of the problems this approach presents—both in terms of the impact on the individual repeatedly sentenced to prison and the impact of their treatment of persistent offenders on the Irish prison population:

> Yeah, sure we're filling it up. I would say that it's one of the big faults in your system where … see, we haven't thought out sentencing policy in any which way. We've no philosophy of sentencing.

> We don't know why. Of course we do know why we're sending, because the law provides for it. And … but we really haven't worked out. And it's not only have we not worked out a philosophy of sentencing, we really don't know what we have prisons for either. And you can't look at one without looking at the other. J02

On whether prison is really a deterrent for longstanding recidivists, some judges stated that they were aware that prison is not necessarily a deterrent and won't prevent reoffending but that it was the only option appropriate given the volume of offending.

> But some are such level of recidivist offending that to send them into prison for another six or nine months doesn't, they don't bat an eyelid, they just go in and do it but then they're out and a few months later they're back offending again. It's just hard to follow through on how successful or otherwise… anecdotally, we're told that prison sentencing doesn't really have the deterrent effect for people and in fact, can operate against them that maybe if there had been more appropriate interventions certainly for young people. J03

Some were sanguine about the ability of a prison sentence to alter the behaviour or reduce reoffending, several doubted that a prison sentence really represented a punishment with one referring to it as 'six months of three meals a day and Netflix' and others were convinced, by long service on the bench and watching the same cycles repeat themselves, that prison is a waste of time and resources. Several judges expressed the latter view and had purposely enquired about the willingness to engage in a rehabilitative sentence to avoid a prison sentence. However, for the majority, a prison sentence was seen as the natural progression once the 'path was worn' meaning that the offender had already travelled from fines, to probation, suspended sentences all the way through the various sentencing options and the time now was right for a sentence of immediate custody.

As well as the consensus that persistent offending and serious offences warranted a spell in prison, a majority of judges interviewed referred to the need to deter offending behaviour, to make it stop and that if a series of non-custodial sanctions had not worked to date, then a prison sentence would surely work. Many judges expressed the view that a prison sentence was a legitimate response to persistent offending which requires a continual stepping up in the severity of punishment through the various sentencing options. A common thread throughout judicial accounts was a concern to deter future offending. When a particular sentencing option, for example a fine or a probation order, does not work—then the punishment needed to be stepped up a notch. Most judges seemed to expect that something will 'work' to stop people offending and this results in the severity of penalty being 'stepped up' ultimately to imprisonment which even if it doesn't 'work' to stop reoffending it might at least provide a dose of reality. Some respondents acknowledged that for a small cohort, who were relatively used to prison, prison really was not a deterrent.

> But I think for some young fellas who we meet on the street out there, it's not a deterrent, because they've been there, or their dad has been there, or their… and it's just, it's just a piece of time they have to complete. I don't think it'll actually stop them from reoffending – that's the problem. J07

The search for the elusive penalty that 'works' to stop reoffending illustrates that judges would benefit from training to increase their knowledge and awareness of the process of desistance and the relative success rates of different sanctions in terms of reducing recidivism. It might be argued that judges are not social workers or probation officers and they therefore do not require such information or understanding. However, the fallacy of this position becomes clear once we remember most judges interviewed referenced deterrence as the sentencing aim they prioritise when imposing custodial sanctions. Determining which sentence might deter a particular person requires knowledge of desistance and of the comparative potential of various penalties to reduce recidivism. For the most part, judges in the District Court have traditionally relied upon pre-sanction reports to access this information. As reported in the previous chapter judicial perceptions of these supports is that their availability has declined since the Covid-19 pandemic.

Several judges explained that they no longer view short sentences as providing a deterrent. For some this was because nothing could be achieved during such a short period of time but several referred to the high chance that a person imprisoned for three or even six months would invariably be released early and this would undermine the deterrent effect. Judges attributed this as being down to the prison overcrowding and to prison authorities not being keen on short prison sentences but noted that this can be a cause of embarrassment for judges to see the person they have sentenced to prison released so soon.

> I believe that sending people to jail for things that I won't say are not serious but are not extremely serious is a waste of time. And anyway, they'll go down and the governor will say, 'Ah, we're full, here's the bus ticket, here's your tea, off you go home,' which makes a total mockery of you spending minutes or time or up in bed at night thinking about something, what you will do. If they go down to the jail and they're sent off home again. J09

Judges did not make reference to and therefore may not be familiar with the Community Return Scheme which is a form of early release into the community whereby prisoners serving between one and eight years may be released once they have served half of their sentence but must consent to completing a certain amount of community service order once released. It is possible that a person could be released on the Community Return Scheme without the knowledge of the judge who sentenced them thus causing unnecessary embarrassment.

Recommendations

- Sentencing Guidance for District Court judges on the role that previous convictions play in Irish sentencing law. In particular, guidance on the extent to which previous convictions can legitimately increase the seriousness of the offence, particularly when the offence is relatively minor, while remaining compatible with the principle of proportionality.

4.9 Prison: A last resort?

The principle that prison should be a last resort has been affirmed many times in sentencing jurisprudence and yet compared with our European neighbours, Ireland resorts to imprisonment very frequently, particularly for short custodial sentences. Judges were asked whether or not they agreed with the principle that a sentence of imprisonment should be a last resort and how they would define 'last resort'. Unsurprisingly, most judges agreed with the principle but for many this agreement was qualified by reference to the serious recidivism and serious offences. Many qualifications presented were based on the idea that sometimes there is no option, no choice but imprisonment, due to the serious nature of the offence or the substantial criminal record of the person before them, or because they have previously served prison sentences, or if they failed to engage with a CSO, or if they had an addiction, options were limited and prison would at least take them out of circulation for a while.

Generally, most judges felt they pursued all other available options before they reached for the custodial sentence:

> "Generally, it would be a last resort for me. And as I said earlier, I would have explored community service, suspended sentences, and then ultimately there comes a time then where…J04"

Aside from this, where offenders presented with many previous convictions or if they were repeat offenders in one particular offence such as assault, no insurance, burglary, dangerous driving, or where they were convicted of a very serious violent offence, the consensus was that prison was not a last resort in these instances. Some justified prison on the basis that there really was no other option in some cases, particularly in relation to addicted persons. Prison could be a useful option for persons with addictions because it at least takes them out of circulation and at best provides them with a structure, counselling and treatment frequently not available in the community:

> Sometimes you have no option is in front of you beforehand? I mean I would sooner send an awful lot of these people to XXXX or one these kind of treatment facilities if I could, but I can't. So, that's sometimes then… and I say that 'I'm sending you to prison because at least there's a structure there and there's some form of counselling and treatment there and it's better than nothing.' So, I mean you're often using really as a facility to provide services that are just not out there. J06

Others were less optimistic about the potential for rehabilitation in prison:

> The problem with the prison is they don't rehabilitate them, because they can't rehabilitate them, because the services aren't in the prison. So that's the problem – they don't get rehabilitation in prison. J07

The limited availability of services in the community for persons suffering with drug addictions and/or mental health illnesses is well documented. Homelessness is also unacceptably high in Irish society at the current time. Several judges mentioned during the course of the interviews that it was not uncommon for defendants to actually ask for a prison sentence

rather than a non-custodial sentence so that they could have a break from homelessness. Ireland has unacceptably low levels of detox and rehabilitation facilities and judges cannot sentence a person to a period of time in a detox or rehabilitation centre although they may defer sentence to allow for such treatment. When defendants present with these serious underlying issues and are unable or unwilling to address them, prison at the very least takes them off the street and out of circulation for a period of time, giving society a break from their lawlessness.

Judicial accounts repeatedly emphasised that prison acts as a step-up measure when offenders have not responded to the deferent effects of other sentence types. Failing to learn the lesson, change course or desist from crime are reasons given as to why a prison sentence is warranted. Few mentioned retribution explicitly but this and a limited form of incapacitation appear to be the only reasonable sentencing aims left that support a sentence of imprisonment. Part of the underlying reason for frequent use of prison appears to be the idea that judges feel they have to draw a line between behaviour that is acceptable and unacceptable to protect society and to punish those who are unwilling or unable to comply with laws.

In summary, it appears that District Court judges agree with the principle that imprisonment should be a last resort but do not feel that they can adhere to it in their sentencing practices. Furthermore, there is a lack of clarity around the definition of this principle particularly when translated in the context of the District Court. Judicial accounts also support the idea that there are limited sentencing options available to the District Court and this, in part, explains why prison cannot be a last resort. The limited alternatives argument is not simply a numerical lack of alternatives (although this too plays a part) but is a combination of the characteristics and circumstances of the people regularly appearing before the courts (persistent offenders with addictions and mental health issues from multiply deprived backgrounds) as well as the impact of sentencing principles that allow people to be repeatedly and cumulatively punished for each time they notch up another conviction. While the following quotation aptly summarises the need for guidance on this principle, the issue of what to do with people who repeatedly offend because they find themselves homeless, in poverty, in addiction and with mental and physical ailments is not only an issue that requires sentencing guidance but that urgently requires executive as well as societal attention:

> I agree with the principle. How you define it is… I suppose that's one area we would like guidance on is to when ultimately you do. It's costly to the state for a start. It's very disruptive to whether or not people… Their housing, their children. How effective it is, you know? Particularly short-term custodial sentences. It's very much now, you know… There's a debate as to whether they're effective at all. So, a guidance on that would be welcome. J04

Recommendations:

- Guidance on the application of the principle that prison should be used as a last resort and how judges in the District Court should apply this principle when sentencing persistent offenders who are experiencing chaotic living circumstances including homelessness, poverty, addiction as well as physical and mental ailments.

4.10 Summary and Conclusions

- All judges interviewed understood the relevance of the relationship between their decisions on jurisdiction and their sentencing powers. However, most judges generally accepted jurisdiction on the basis of trust in the DPP. A large minority actively consider the appropriateness of jurisdiction although most decline rarely. Most judges would welcome more guidance around making decisions on accepting or declining jurisdiction.
- District Court judges are acutely aware of the consequences that imposing a conviction can have on persons with no previous convictions and they displayed very consistent views on the circumstances in which it might be appropriate to attempt to leave a person without a conviction. Variation exists amongst judges in terms of how best to leave a person without a conviction with some opting for a dismissal over a strike out because it leaves a record whereas a strike out does not. Others expressed concern that dismissals may appear in relation to Garda Vetting applications and so preferred to use the strike out.
- Diversion programmes were in theory welcomed but it appears that their actual use depends on availability of programmes which differs geographically and the availability of probation reports which most judges perceive to be a scare resource involving inexpedient delays.
- District Court judges almost unanimously expressed negative views in terms of their experiences of how the Fines (Payment and Recovery) Act 2014 works in practice. Dissatisfaction varied according to whether judges had the experience of dealing with summons list for the enforcement of fines or not. Most judges located the main problem as being with the enforcement process, bureaucratic delays in sending enforcement notices, no identified state party to lead the enforcement process and the failure of persons to appear in court when requested to do so. However, some identified a failure to properly examine the defendant's financial means before deciding the amount of the fine as a concern. The consensus amongst judges was that most fines go unpaid. These experiences have resulted in judges imposing fines less often, imposing lower fines that they think can be paid more easily and/or in adapting procedures to ensure payment of fine before finalising matters.

- In the context of hugely problematic experiences with the enforcement of fines, most judges continue to use the poor box/contribution to charity/the court discretionary fund as a sentencing option. The flexibility of this approach particularly that it can be combined with a strike out or dismissal, is very attractive to judges and is used most commonly in the context of minor offences where the likelihood of reoffending is small.
- Compensation orders are used predominantly for assault and theft cases, often as standalone penalties. Judges prefer that victims receive compensation before the matter is finalised and compensation is seen as a form of reparation to the victim. If compensation is forthcoming it is generally seen as a mitigating factor and results in a more lenient sentence being imposed.
- When questioned about whether or not judges would impose fines, the poor box and compensation orders on offenders with limited means some acknowledged that the matter would not arise, others said that they would reduce the amounts to make that disposal appropriate, and others that they would give extra time to pay. Important questions about equity and equality arise in relation to defendants who do not have the financial means to compensate the victim.
- Many judges indicated that they use deferment of sentences regularly and that this often involves an element of supervision by the probation service. Most used it for young offenders to steer them towards a path of rehabilitation. Some indicated that they would use this approach for persons with addictions and mental health problems. The benefit of this approach for some was that it could be adopted without the need to record a conviction and provided an opportunity to test the offender's compliance with conditions before resolving the case. Several judges indicated that they never used this approach and were not familiar with it.
- A majority of judges interpreted the phrase community sanctions as referring to the Community Service Order which shows low awareness amongst judges of the range of community sanctions available to them. The Probation Order was barely mentioned which suggests a lack of awareness of what this disposal can offer. In contrast, judges were highly aware of and enthusiastic towards the suspended sentence. Judges expressed the view that applicability of CSOs was limited by the suitability of offenders, the availability of projects and same day probation suitability reports. Overall considerable work needs to be done to inform and assist judges to make full use of community sanctions and to remove the obstacles that currently exist in relation to their use. The loss of Probation Officers in every courtroom in the country might also account for the low take up of the sanctions supervised by the Probation Service. A major re-investment in resourcing the Probation Service to provide the reports and the community projects in every part of the country is needed. Judicial Sentencing Bench Books should include details on community sanctions and indeed all non-custodial sanctions and judicial training should include modules on non-custodial and community sanctions.

- District Court judges were overwhelmingly positive about the usefulness of suspended sentences seeing it as a way to achieve specific deterrence but most explained that they would only impose it in circumstances where the person had a chance of complying with the conditions—where there was a low risk of reoffending. Suspended sentences can be the last warning before a prison sentence is imposed and a good alternative if the person is not suitable for a community service order.
- Judges in the District Court use prison for serious offences, persistent offenders and when they determine that no other penalty is appropriate. Previous convictions are seen as a key determinant of a prison sentence and several judges noted that sentencing law provides that previous convictions aggravate the seriousness of the offence and thus the severity of the penalty. Many judges opined that prison is the only suitable penalty for people with many convictions.
- Most agreed with the principle of last resort but also agreed that if the case is serious or the offender has many previous convictions prison might be a first option. Mixed views exist in relation to the effectiveness of short prison sentences and many judges do not have basic background knowledge on the processes of desistance from crime despite wanting to pursue deterrence as a sentencing aim. Many noted that alternatives to prison are not feasible for most people who appear before them because they have addictions and serious mental health difficulties. Most judges feel they have no other option but to draw a line on behaviour that is unacceptable and that prison is the only option open to them when all others have failed to deter the person from reoffending. Given the problems judges have experienced with the enforcement of fines, their low awareness of the range of supervisory sanctions available and the need for a probation report to access these sanctions—it is not surprising that judges in the District Court might find themselves resorting to prison as a first rather than a last resort.

5. Judicial Perspectives on the sentencing of relationship violence in the context of section 33 prosecutions in the District Court

5.1 Introduction

This chapter sets out the findings that emerged from the general questions judges were asked about the sentencing of offences involving relationship violence in the context of section 33 prosecutions for breach of a protective order under the Domestic Violence Act 2018. It reports judges' views on the impact of prior involvement in the application for the civil protective order on their sentencing of the section 33 breach of that offence and whether or not they approach the sentencing of relationship violence cases differently to other criminal offences. Section 39 of the Domestic Violence Act 2018 created the offence of coercive control for the first time in Irish law. District Court judges in this study were asked had they heard any prosecutions under the section 39 coercive control offence, and if so, whether they approached it differently to section 33 prosecutions and about their experience, if any, of having used section 40 of the Domestic Violence Act 2018. The final areas explored in the interview were judicial views on the sentencing of domestic violence offences involving adult children, on the role of probation officers and other professionals in assisting judges in the sentencing of relationship violence cases, the benefits of training to better understand the dynamics of relationship violence and the role of the Sentencing Guidelines and Information Committee of the Judicial Council in the provision of more information on sentencing practice in this area.

5.2 Prior involvement in the Civil Order application

District Court judges were asked about whether or not they usually hear the application for the civil order under the Domestic Violence Act 2018 before hearing the criminal trial for a breach of the order granted. They were also asked whether they thought prior involvement in the civil order was helpful or unhelpful in terms of arriving at the sentencing decision in a section 33 case.

Views of judges with prior involvement

Just under one half of judges interviewed noted that they normally deal with the application for the civil order prior to hearing the criminal prosecution for breaching the order. Judges in this group were mostly assigned to courts outside of Dublin and explained that it would be normal practice in their districts for judges to deal with both the civil and the criminal aspect of domestic violence cases.

> […]… country judges like myself, we're the presiding judge eleven months of the year, so you will generally have given the order or made the order. J01

These judges held mixed views about whether hearing both the civil and criminal aspects of the case was helpful. Only one judge thought it was helpful to hear both aspects, two judges viewed it as unhelpful and three were of the view that it made no difference at all to their decision making. The judge who thought it was helpful explained that having an insight into where the couple were coming from was helpful for understanding the motivation behind the prosecution:

> It is. It gives you a background, for good or for bad. You could have situations where the breach is not that grave and you may know that these are a warring couple and that the complaint which gave rise to the prosecution for the breach maybe if not malicious, it may be strategic, it may be deliberate or it's part of an ongoing conflict. Some couples are good at warring and there are some people who don't take much prompting to report things to the Gardaí. J01

Judges who viewed prior involvement with the civil order as unhelpful believed that there may be an element of unfairness involved because they know so much about the case from the civil law application that it would be hard to keep that knowledge separate when you are dealing with the criminal law aspect.

> It's probably unhelpful. It's probably unfair, because you know so much. J07

The second judge explained that counsel for the prosecution and defence usually ask them to deal with the civil aspect first and then the criminal aspect, particularly if the civil order was granted ex parte. Otherwise they may end up dealing with the criminal prosecution of an order granted on an ex parte basis without having heard the other side at all.

Three judges were of the view that prior involvement made no difference to their decision making because their sole focus in a criminal prosecution for a breach of the civil order under section 33 was to establish whether or not there had been a breach and information about the civil order application was irrelevant to this:

> […] the breach has to be seen, you know, whatever threshold they pass to get the protection order or the safety order, that's that. But the breach is a breach of that order, so you've to look at the circumstances attached to that before coming anywhere. J09

One of these judges commented that they could be open to a claim of being prejudice for having heard the civil order application before the criminal prosecution. However, they countered this point by explaining that judges regularly have to park things in their head and disregard previous information and that this was a normal part of judging in the District Court.

Views of judges with no prior involvement

Just over one half of judges interviewed explained that they would rarely have any prior involvement in the civil order application either because they were moveable judges or because they were based in the Dublin Metropolitan District (DMD). The moveable judges explained that they would rarely be in the same district long enough to here both the civil and the criminal aspects of a particular domestic violence case. Judges in the DMD explained that

civil orders are usually heard in Dolphin House and criminal prosecutions of section 33 breaches of civil orders are usually heard in courts with dedicated domestic violence lists and vulnerable witness protections.

> But it would be unusual in Dublin because the orders are issued in the family court in Dolphin House and then the breaches are dealt with down in the CCJ. But outside of Dublin, it would be the norm that the same judge would have issued the order and deal with any breaches. J10

Prior involvement in the civil order application is something only provincial assigned judges experience on a regular basis. It is clear from judicial accounts that there are de facto two different approaches to the hearing of section 33 prosecutions in Ireland: one which involves the hearing of section 33 prosecutions in courts that will not have granted the civil protection order (typically the larger urban District Courts) and a second where the same judge grants the civil protection order and hears the prosecution of the breach of that order (typically provincial District Courts with assigned judges).

Judges' views about the helpfulness of prior involvement appear to be motivated by the extent to which they believe that a judge can disregard information they have access to as a result of that prior involvement. Judges in this study were almost equally split between those who felt it would be unhelpful to have heard the civil order application due to the potential for bias, conscious or unconscious, and those who felt confident that judges can and often do 'park' different types of information they are privy to.

Almost one third of judges felt that prior involvement would make no difference to their decision-making. They highlighted that breach prosecutions can only examine the alleged breach and cannot take into account previous patterns of behaviour or any behaviour outside of that directly linked to the alleged breach. While this is completely accurate from a legal perspective—this approach to the proof of domestic violence has been critiqued as ignoring or failing to understand that domestic violence usually occurs as a pattern of violence over a period of time and it cannot easily be atomised into individual incidents.

A number of judges expressed the view in the context of the prior involvement question that ideally you would have two different judges hearing the civil and the criminal aspects of a particular domestic violence case. One judge referred to the new dedicated family court in Hammond Lane and suggested that perhaps criminal prosecutions could be kept within the family law court in a special criminal law sitting. However, this judge had mixed views and questioned whether hearing prosecutions within the criminal courts would better communicate the seriousness of the behaviour to the perpetrator:

> My initial view of it was, yes, that you'd keep everything in the Family Court. Well, I've mixed views on it really. It is ultimately a family dispute and, you know, even for the alleged victim, they may not want to be down in the criminal courts…However, then you worry about is there a perception then that, oh, this is just the Family Court. Are you better off down in the Criminal Court so that it's

> treated or the alleged perpetrator sees that it's a serious matter and that it's now in the criminal realm? We've moved out of the family realm. It's now a criminal matter. And by going to the criminal courts, are you doing that? Now, maybe we could do that by having a dedicated criminal court for breaches in Hammond Lane. And that way you probably will end up with two different judges that would hear it, so if there was a judge that was dealing with the breaches, albeit in the Family Law Court, it wouldn't necessarily be the same judge that would have granted the orders. So, you'd have a dedicated court for breaches. J10

The same question was raised and answered by a second judge at the end of their interview. This judge was of the view that criminal offences with penal sanctions should be heard in criminal courts and not in family law courts, as to do so might potentially risk downgrading the seriousness of the behaviour:

> Because what you're saying is it's not really… my view is it's a criminal offence and you belong where the criminal offences take place. That is my view. Even though… and what you do is you adapt that. So, in other words, you have vulnerable witness days, you have victim… that's the other thing we haven't even touched on as well, victim support suites, you know, all of that kind of thing, in a criminal court. But I don't know that it's a good idea to sort of… because that sends it back to… you don't use the term but we're all guilty of using the term 'domestic violence', you know what I mean? It's violence. And when you put domestic violence on it, then you're just… it somehow makes it apart and different. J05

As the preceding analysis shows judicial views regarding prior involvement are mixed with almost equal numbers believing that it makes no difference, it helps and does not help. However, judges who hear both the civil and criminal aspects of a domestic violence case would most likely benefit from guidance and/or training regarding approaching the prosecution of section 33 offences with and without prior involvement in the civil order application.

An important point not examined in this study is the extent to which victims of domestic abuse are impacted by the differences in court contexts highlighted here. The experiences of victims of domestic abuse navigating three separate legal processes—the criminal justice process, the private family law process and the public law childcare process—was the subject of a report in 2023 commissioned jointly by the National Women's Council and the Department of Justice.[186] It highlights that information often gets lost between these three different legal processes and that victims of domestic abuse often suffer the consequences which include a systematic lack of understanding of the impact of domestic violence on victims, a lack of safety and re-traumatization in the court day experience, blame for not protecting their children from abuse, delayed legal processes and multiple applications

[186] Nuala Egan and Ellen O'Malley Dunlop. *A Report on the Intersection of the Criminal Justice, Private Family Law and Public Law Child Care Processes in Relation to Domestic and/or Sexual Violence*, prepared for the National Women's Council and the Department of Justice, March 2023. Available at: https://www.nwci.ie/images/uploads/NWC_DSV_Justice_Report.pdf

continuing for years resulting in many victims withdrawing from all legal processes.[187] The report makes recommendations about the development of collaborative evidence gathering and court processes which will mitigate the difficulties encountered by victims navigating the three separate systems. Guidance for District Court judges on the best practice approaches for hearing and sentencing section 33 offences should incorporate an understanding of the experiences of victims navigating these systems.

Recommendation

Sentencing guidance for District Court judges regarding best practice approaches in sentencing section 33 offences that incorporates an understanding of the difficulties encountered by victims of domestic abuse when navigating the three different legal processes including the criminal justice, private family law and public childcare law processes.

5.3 Different to ordinary crime?

Judges were asked whether they perceived section 33 cases involving relationship violence as being different to other criminal cases and the majority of the District Court judges interviewed indicated that they do perceive them as being different whereas a minority of judges held the view that section 33 cases should be treated the same as other criminal offences. Key reasons for seeing section 33 cases involving relationship violence as being different to ordinary criminal cases was the nature of the relationship between the parties, the sensitivities involved and the vulnerabilities of the parties.

Three judges took the view that section 33 breaches should be treated differently to other criminal cases, as the existence of a relationship was an aggravating factor. This approach is illustrated in the following quotation:

> "…a man assaulting a woman as opposed to a man assaulting a woman who's the mother of his children, they're completely different to me. The second one is a much more egregious offence because of just everything that's going on, their personal circumstances, the fact that they have children in common…there's just a breach of trust there…" J08

Two judges indicated that they approached relationship violence cases differently to other criminal cases based on the nature of the relationship between the parties, with one of those judges also noting a distinction in the legislative provisions which treated relationship

[187] Ibid p.3

violence cases differently from other criminal cases, through the application of the *in camera* rule.[188]

> "I suppose they are different in that, and in some respects, they're more complex I think because of the relationship between the parties and the fact they're all living together." J04

> "I think you have to because you have to be more sensitive in dealing with the whole thing because it's not just, it is not, it is a criminal offence alright but it is, you have to be sort of, I suppose, more aware of the sensitivities for everyone because they're in camera and they're usually then, or can be, evidence in relation to very personal…relationship in relation to both sides. So you do…have to approach it in a different way because it is one of those only criminal cases that are, other than obviously sexual offences, that are dealt with in camera". J05

However, the latter judge indicated that although they would treat a section 33 breach differently based on the sensitivities of the parties involved, they would still approach the sentencing of a section 33 offence in a similar fashion to an ordinary criminal offence.

Another judge spoke of treating the prosecution of section 33 cases differently to other criminal cases by affording them priority, based on an awareness of murder statistics:

> "Absolutely. I give them more priority anyway to start with. A DVA has to be given priority because someone could be killed. The murder statistics are shocking, if you look at them, that 50% of them are domestic, I think…if I came in here and I was told there were ten more protection orders and that was a quarter to six, or six o' clock as it is now, I will sit until they're all gone, because, I have to. Because I can't let those go home. They could be, one of those women could be killed tonight. It's rarely a man." J07

Three judges interviewed expressed the view that section 33 breaches should not be treated differently to other criminal cases.

> "No, I don't. Every case has its proofs and if it's a domestic violence case, it has to meet the same proofs or has to be a physical act, the intention of the party, there has to be technical proofs. Whatever the proofs are, I don't approach domestic violence cases any differently to any other criminal case." J12

The response of a fourth judge was more ambivalent. This judge explained that when a section 33 involves a serious physical assault that they would distinguish that from the section 33 that might involve the sending of a text message and noted that people should not be criminalised unless the circumstances are clear:

> But I'm conscious that people shouldn't be criminalised unless the circumstances are clear, obviously, unless the threshold is met. In family law situations where people possibly aren't acting rationally and wouldn't be involved with the criminal law but for this. Now, having said that, if it gets to a situation where there's any physical assault involved, that is a serious matter. […] J13

[188] Section 34 of the Domestic Violence Act 2018 addresses restrictions on those present in courtroom in proceedings under section 33

While a majority of judges view section 33 cases as different to ordinary crime, as the extracts above illustrate there are a variety of different reasons for this although many related this to the nature of the relationships involved and the sensitivities and vulnerabilities that this gives rise to. While an awareness of the sensitivities and vulnerabilities of the parties is hugely important for obvious reasons, section 33 is a criminal offence and it is important that judges are supported to approach the sentencing of section 33 cases in a similar manner to the sentencing of other offences, albeit with appropriate level of awareness and understanding of the context in which these offences are committed.

Recommendation

- Sentencing guidance for District Court judges on how to approach the sentencing of section 33 cases that sets out the various considerations that judges should be aware of when assessing the harm caused by the breach of the protective order, the various levels of culpability of the convicted person, and the range of aggravating and mitigating factors should be considered when assessing the overall level of seriousness of the offence. The guideline should also offer clarity on the range of personal factors and circumstances that might legitimately be considered in terms of mitigation of headline sentence.

5.4 Section 33 Adult children and their parents

All of the judges interviewed were keenly aware of how difficult it was for parents to seek protection from their adult child who resided with them in their home. While previous domestic violence research indicates that at least 15% of domestic violence cases involved these cases[189], some judges who participated in this study expressed the view that parents and adult children relationship violence cases are more common than this, with one judge believing that these types of cases represented a much higher percentage of relationship violence cases. Currently the Courts Service do not publish statistics on the circumstances in which protective orders are sought and we do not have statistical information on the proportion of protective orders granted in parent and adult relationship violence cases.

Priority given to the needs of the parents

A number of judges who participated in this study acknowledged that the parents in these types of cases were typically worn out, that they found it hard to seek help and these types of cases are more complex because of the relationship between the parties and the fact that they are all living together. Several judges took a victim-centred approach:

[189] Ibid (note 137)

> "…where you have a parent seeking the protection of the court, you'd have to give their needs a much greater priority, because as you can imagine, it does take an enormous amount of courage for a parent to seek the protection of the court against a violent son or daughter". J01

One judge noted the circumstances to be considered as including the relationship of the parent and child, their prior interactions and the fact that a parent may want to maintain a relationship.

> "…you have to look at the circumstances because very often it's a parent has a safety order against a child, wants to maintain a relationship of sorts with that child and that's where the lines can become a little blurred or muddied on occasions…" J03

One judge estimated that in about 10 % of cases involving a parent seeking protection against an adult child, the parents do not come back to court for a safety order hearing. According to this judge, in these cases parents are typically trying to give a message to their child, but they did not pursue the case further because they did not want their child to have a criminal record.

Homelessness, Addictions and mental health

As to whether the potential homelessness of the adult child would be a factor to be considered by the Court when sentencing a section 33 parent/child case, the consensus amongst judges was that priority must be given to the parents experiencing the alleged abuse.

> "I mean at the end of the day you cannot have a situation where parents are being physically and psychologically abused by a son or a daughter…I certainly think that the homeless aspect of it wouldn't weigh as much as others." J02

The majority of the judges interviewed indicated that drug or alcohol addiction is a common feature in the parent/adult child relationship violence cases. Several judges indicated that an adult child with mental illness is an important problem in the courts and indicated that this was a common reason for an order under the Domestic Violence Act 2018 in the first place.

> "Mental health is a huge problem…an extraordinary problem in the courts…It's hard to know how you deal with it because we don't have the resources or we don't use the resources. I mean we're continually coming across the issue in the District Court." J02

One judge described the lives of the parents who have to manage the addiction and/or mental health issues of their child, who is probably not working and is living off the parents. As the following extract illustrates, some judges mentioned the possibility of elder abuse, where the adult child who may have a mental illness and/or an addiction is living off the parents financially and then also physically abusing them:

> "…you're also taking into account that the parents are managing that mental health, and no work, no money, mental health issues and addiction possibly. They're not working, they've no money. They're tapping their father, or stealing money from their father for drugs, or gambling, or drinking and they're coming back home and beating them up." J07

In relation to the approach to sentencing in these kinds of cases where there is a breach of a Safety Order or a Barring Order, one judge set out their view that the adult child has to take on a level of responsibility for their own life.

Dependent adult child

An important issue was raised by two judges in relation to parents of adult children who come within the definition of a dependent person. They noted that parents of violent adult children who fall within the category of a dependent person cannot apply for a protection order under the Domestic Violence Act 2018.

> […] If an adult child isn't capable of living independently because of some mental or physical disability, the parent actually can't get a domestic violence order against them. So, they could be the most violent person in the word but because they come with this, the parents, they don't have any *locus standi* to get the order. Which in my view is a big problem. You are exposing the parent in those circumstances. Now, I understand the basis for it but the reality of it is that those parents may be more at risk almost. J10

This means that there is currently a gap in the provision for parents of dependent, violent adults who cannot live independently. Parents of adult violent dependent persons may thus be at significant risk of harm and fall outside the protections offered by the provisions of the Domestic Violence Act 2018.

5.5 Role of the Probation Service in section 33 prosecutions

Judges expressed mixed views about the role of the Probation Service in assisting the court in a relationship violence case. As the following extracts illustrate, some judges saw the role of the Probation Service as potentially providing the court with insight into the perpetrators risk of reoffending, their insight into the impact of their behaviour on the victims, and any other underlying issues such as addiction, anger management issues and mental illness.

> When it comes to the criminal prosecution, yes. I would refer on occasion for a probation report. Because one of the things is they do their process of assessing whether the person is low risk, medium risk, or high risk in relation to it. … At least the probation report can give you some sense of the overall picture in relation to the accused. You also of course would get a victim personal statement from the victim in terms of these proceedings as well. J11

> Well, I could refer for the purposes of anger management…That's about all, you know. They don't really … you don't really involve them that much in it. J09

Three judges felt a probation report would be appropriate if they were considering a custodial sentence and several others felt the Probation Service has a role in helping the convicted person address their offending behaviour.

> It may be of assistance if there is an issue of whether there's a likelihood of reoffending or not. It may be a situation where the court is considering a custodial sentence on the base of the facts, but maybe wants to explore to some extent is there something more underlying that wasn't possible

> to bring out in the hearing and that maybe the person has underlying difficulties such as anger management or there were other… you know, that there were other challenges or other pressures in place that led to this but that you want to see this to be independently verified. J03

> So that the accused person, not the accused but the person convicted of the breach would be assisted so that they would understand what they're doing is wrong, that they would maybe get some victim empathy, that they would address the underlying issues be it alcoholism, drug addiction, everything that they can possibly do to organise courses and assistance for the person who has committed the act of domestic violence. J12

Two judges noted that they would not rely on a probation report for cases involving relationship violence because of the significant delay involved in waiting for one:

> "There is a big backlog. I think they are short of staff and it is quite frustrating that you put the case back say six or eight weeks and then they come along and say they need more time because they weren't able to allocate a probation officer to the case because of shortages of staff." J03

As one judge explained, they were not inclined to use a Probation Officer for these cases as expedition is the most important thing, since domestic violence cases need to be resolved urgently and reports can take 12 weeks.

> Because I can't send that couple back into that environment and wait 12 weeks for a probation report. I just… I can't do that. So, I would… And if there was information that I needed, generally the solicitor or solicitors would be able to get it for me. J08

The judge quoted in the extract above indicated that they relied on solicitors to get the information to them and the case is solution driven, due to the family context. A small number of judges explained that they had never had the assistance of a Probation Officer in a relationship violence case.

While many judges could see the potential usefulness of the Probation Service in relationship violence cases in terms of the potential to refer defendants to programmes for anger management and/or parenting courses, only two judge mentioned offender rehabilitation programmes aimed specifically at perpetrators of domestic abuse.

> There is that organisation MOVE, I think it is Men Overcoming Violence, Environment. It's MOVE and I think they're still around and they do good work and the important thing is although it's called Men Overcoming Violence, I'm sure it would apply to everybody male and female. So, the probation office, the probation service both by using the likes of MOVE and with their own programmes, they may have a role to play. J01

Two judges mentioned the role of other professionals, some thought that psychologists and social workers involved with the family could be of assistance, and others thought that domestic violence support workers and sometimes other support services would be of benefit.

> In terms of other professionals, we often get people from Women's Aid coming in as support workers, and I've no difficulty with that. I'd ask the other side if they have a difficulty and hear any

objections they might have. Usually they don't. They're happy to do that…. So, there are certainly times when people will need supports from various organisations for those applications. J10

Recommendations

- The provision of sentencing information for judges on the range of rehabilitative programmes available and best practice approaches to reducing the reoffending of perpetrators of domestic violence.
- The provision of sentencing information for judges regarding the range of other professionals that may provide the court with assistance in sentencing section 33 cases.

5.6 Involvement in prosecutions for section 39 of the DVA 2018 and use of section 40 of the DVA 2018

When asked about whether or not they had dealt with a section 39 prosecution for coercive control yet only one judge said yes and the vast majority of judges answered that they had not. The judge that had dealt with a section 39 prosecution described the circumstances of the case in which the defendant was convicted and sentenced to 9 months:

> Well, it involved a situation whereby there was an assault and there was also coercive control of this lady. She was involved… she essentially was trafficked to Ireland and she was trafficked here, essentially for prostitution. And he controlled everything in terms of bank accounts, all their money went into a bank account. They did have a child together alright and he was charged then with coercive control as well. J06

Many judges expressed the view that section 39 prosecutions are too serious for the District Court, and that this might explain why most prosecutions to date have been sent forward for trial to the Circuit Court. Judges in the following quotations noted that section 39 prosecutions are on their way but that they are very grave and that jurisdiction may be declined:

> No…. But they're on the way….[…] because they're grave. I'm not even sure they could or should be dealt with in the District Court. You know, coercive control sounds like a serious matter and I would have thought that it would be borderline. You might be sending it on because, you know, it's not a charge that's made lightly. It's not a prosecution that's brought lightly. J01

> They're usually very… I suspect they're serious and I suspect… Like, a Section 33 is summary only, so I suspect that they're generally… You're into the jurisdiction issue. But they… Even the nature of it, I suspect most of those may go forward. J04

One judge acknowledged that it would depend on the circumstances of the case and that some may be suitable to be dealt with in the District Court.

> No, it will depend on the circumstances of it. I suppose in a lot of cases its sustained control over a number of years in most cases would be my sense of it, and if that's the case, you know, it may be that… And there's almost a bit of underhandedness about it I suppose and it's subtle over a long

period of time. And that it was done consciously. And I suppose that might increase the seriousness of it. But it would completely depend on the circumstances that were put to you. J10

Almost one third of judges noted that they regularly observe coercive control and controlling behaviour when hearing domestic violence applications for protective orders under the DVA 2018.

I deal with coercive control every day in domestic violence. Every domestic violence case you hear now is coercive control, because the people now, thankfully, understand what it is…I'm talking about giving out domestic violence orders, protection orders and safety orders. Coercive control certainly has become a buzzword, but thankfully due to agencies that assist men and women seeking help from the courts for domestic violence, people are more educated as to what it is now. J07

One third of judges highlighted what they perceived to be the difficulties associated with proving the existence of coercive control both in the context of domestic violence applications but also in the criminal context of a section 39 prosecution.

No, coercive control is something that's very difficult to prove of course. It's a very difficult matter to bring home. But it does exist. I think it can be proven with proper investigation, gathering of evidence, you can prove it in court. I think it's a very serious matter. J03

In the following extract one judge explains the various difficulties involved in section 39 cases highlighting that the concept of coercive control can be difficult even for a judge to understand, and that it requires familiarity with the research literature. They then highlight the difficulties that complainants have in recognising that they have been subject to coercive control and the difficulties they might have in giving evidence in court and that they may even be cross-examined by the alleged perpetrator.

Section 39 is very, very difficult. Coercive control, it's even hard to make a decision. Well I suppose depending on what they say, coercive control is really difficult for a judge to define…. Like I really don't understand why… I do understand why women don't stand up for themselves, but as to my nature, and my perception of well, if you give me a puck, I'd hit you back. You know? It's very difficult to understand why women allow this to happen to themselves, but then again you have to understand it and you have to understand the literature…. Because it often sounds exaggerated by the woman and yet you have to see it as being a crime, a crime. And I suppose you have to… this will all go down to body language, to credibility. Who do you believe? It's also very, very difficult for women to express it sufficiently well when they're in the box. Because some of them just disintegrate. They're not able to say what is wrong with them. And of course a lot of them are subjected to cross-examination by the other half. A lot of these will be without legal representation. J09

Other difficulties judges highlighted included trying to establish if coercive control has occurred in a domestic violence application particularly which evidence can be relied upon and which evidence you cannot rely upon:

> But you can have situations where a woman might come in and give evidence and you can see actually; she has downplayed the situation. You know? And you can see it in her, that actually the impact must have been greater than she actually is saying. Then you have other women who come in and the first thing they say to you, I'm subject to coercive control, as if they'd been sort of trained to say coercive control. You get into it; the coercive control doesn't exist in their evidence. So, it is human nature you're dealing with and there is a gamut of it. J11

The credibility of witnesses plays a major role for some judges in deciding on the existence of coercive control to support an application for a protective order in the Family Law court:

> Again, it depends on the credibility of the applicant and their demeanour. Let's say if it's for a safety application and then obviously the credibility and demeanour of the respondent. And certainly, there are grounds for… I've no hesitation in finding in favour of an applicant where the application is solely on the basis of coercive behaviour, if I'm satisfied he or she is telling the truth, and it reached the threshold… J13

Another judge explained that coercive control prosecutions are starting to come through the courts but that they have never had to sit down and consider the proofs necessary to support a charge of section 39 coercive control. Judges highlighted the types of behaviour that they would regularly see in court that would fall into the category of coercive control, at least within the context of a domestic violence application. In the following extract the judge gives an example of financial control:

> I mean there is a shocking amount of control of money out there that people will tell you. There are women in particular who have no access to funds, and they'll tell you 'I go to the supermarket on a Thursday with my husband, because he keeps the card.'

Another judge explained that they would equate a physical assault with an extreme case of coercive control in terms of a comparison of seriousness:

> Like I am conscious to at a certain level coercive behaviour and its impact, you know, psychological, possibly physical too, emotionally on a person may equate to a physical assault and a serious physical assault. So, I am conscious of that. But definitely I would still have a distinction between, let's say, any assault, any use of physical force on the injured party together with – and I'll put in the same category extreme coercive behaviour if I could put it like that, serious substantial coercive behaviour which has impacted the injured party in a substantial way. J13

In contrast, the judge in the following quotation highlights that domestic violence occurs even where physical violence is not present and that judges need to be attuned to the dynamics between the parties to understand what is really going on behind closed doors:

> So, I've had women for example come in and they think that because they're not being physically beaten that it doesn't really amount to domestic violence. Or because they're only being beaten a small amount and there's no weapons being used, it's not really domestic violence. Whereas anyone else, their jaw would be on the floor if they were to hear what was taking place. So, it's really important when you're assessing what the complainant is saying. And I'm using 'she' because it's typically women. What the complainant is saying, you have to have regard to the fact that a low level of violence may have… Or even a medium level of violence may have already become

> normalised for her and sometimes they'll minimise what's after happening and they'll only talk about the really serious incidents and not all of the other things that happened in the middle. J08

Another noted that the presence of certain behaviours in the evidence of the applicant can indicate that coercive control is present. So for example needing permission to leave the house, or to use the car. The general demeanour of the applicant giving evidence can also be indicative:

> Well, first of all we'll say it's the woman is the one that's under coercive control and she's the applicant. In terms of the evidence she gives, for example, it would be that she can't leave the house without his permission. He has the car keys. He won't give the car to her except when it suits him. When she cooks a dinner for him that he came home and he threw it on the floor saying it was a no-good dinner. Things like that. Day to day conduct within the home. I can't think of other ones but those sort of things where you wouldn't accept it yourself. That's ridiculous. He'll try to control everything I'm doing. So, you get it from the facts of what actually is happening. And from those facts then you can garner there is coercive control here. Or appears to be coercive control. You'd also note it from the demeanour of the woman. Her demeanour. You can almost see her beaten down. You can see it's almost a depression. You can see. And the manner in which she gives her evidence, you can see it. J11

Judicial accounts suggest that while some District Court judges have a good sense of the types of behaviour that must be proven to convict a person of section 39 criminal offence, that all judges would benefit from the provision of greater clarity around the proofs involved in a section 39 case and around the distinction between coercive control and controlling behaviour that might not meet the threshold set out in section 39. While many judges mentioned that they observed patterns of coercive control in domestic violence applications and noted the need to remain attuned to the dynamics between the parties, a small minority appear to wrongly regard physical violence as having a more detrimental impact on victims than psychological and emotional abuse which is central to the offence of coercive control. Training that focuses on increasing judicial awareness of the harmfulness of the various forms of domestic violence including emotional, psychological, financial and physical would increase judicial clarity and awareness in this area. As noted previously, while physical violence can be an important component of coercive control, in some cases it may not be relevant particularly in cases where the use of psychological abuse and control are the main forms of abuse used by the perpetrator to gain dominance over the victim.[190]

Such training is directly relevant to sentencing judges due to the requirement for sentencing judges to recognise and appreciate the impact of a particular form of abuse so that they can correctly assess the nature of the harm involved in the domestic abuse and thus the seriousness of the offence which is a key component of how Irish judges are required to apply the principle of proportionality in Irish sentencing law. Training should be accompanied by bespoke sentencing guidance on how District Court judges should approach the sentencing

[190] Ibid (note 123)

of persons convicted of coercive control under section 39 that highlights the need for the assessment of the harm to be informed by a wider consideration of the overall behaviour involved rather than focusing only on the harm caused by the individual acts.[191]

Recommendations

- Sentencing information and training for District Court judges on how to identify different forms of abuse and their respective impacts on victims/survivors and their children. Information and training on recognising the various forms that domestic abuse can take and their respective harms is directly relevant to sentencing judges to enable them to correctly assess the nature of the harm involved in the domestic abuse and thus the seriousness of the offence.
- Sentencing information and training for District Court judges on the various ways in which victims/survivors of domestic violence can experience re-victimisation as a result of participating in and trying to navigate their way through three interlinked but unconnected processes—the private family law process, the criminal process and the public childcare process. This training should be trauma informed and should include training in trauma informed court practices.
- Information for District Court judges on the various proofs necessary to ground a conviction in section 39 coercive control cases.
- Sentencing guidance to assist District Court judges in the sentencing of section 39 cases that highlights the need for the assessment of the harm caused by an offence under section 39 to be informed by a wider consideration of the overall behaviour involved rather than simply focusing only on the harm caused by the individual acts.

5.7 Experience of applying section 40 of the DVA 2018?

Section 40 (1) of the DVA 2018 provides that where a relationship existed between the defendant and the victim, that it is an aggravating factor for relevant offences, as listed in section 40 (5). While some judges were very familiar with that section of the DVA 2018, few had experience of applying section 40 when sentencing a case involving relationship violence. This is unsurprising given section 40 is not relevant to section 33 prosecutions and that outside of these prosecutions, we have no data on the numbers and types of cases in which relationship violence is prosecuted in the District Criminal Court.

[191] See People *(DPP) v Kane* [2023] IECA 86 in which Ms Justice Isobel Kennedy quoted with approval from the judgment of Hayden J in the English case of *F v M* [2021] EWFC 4 in which the comparable section 76 of the Serious Crime Act 2015 was under consideration: 'Key to assessing abuse in the context of coercive control is recognising that the significance of individual acts may only be understood properly within the wider behaviour'.

Recommendation

- Sentencing guidance on the application of section 40 in practice focusing on how much weight should be given to the existence of the relationship between the perpetrator and victim as an aggravating factor when passing sentence in domestic violence cases.

- Sentencing information on section 40 of the DVA 2018 and the types of cases that it might arise for consideration in.

5.8 Training on the dynamics of family violence

Judges were specifically asked if they thought they would benefit from training to better understand the dynamics of family violence as part of the interview on the challenges of sentencing cases involving relationship violence. All but one of the judges interviewed indicated that they would benefit from training to better understand the dynamics of family or relationship violence. One judge compared the training required by judges in the Magistrates' Court with that required of District Court judges noting that all justice professionals involved in domestic violence cases should have specific training before they can work on those cases:

> And if you're a judge that's hearing say family and you want to do crime, you've got to do courses before you can get your ticket. And in Ireland, we're brilliant because all the judges, we can do anything. You can put me into any court in any place at any time and I'm deemed to have the ability to deal with anything which isn't true of course. I mean it can't be true. So, we need to have a system. The judicial education needs to be nuanced and has to have an element of you know, continuing education. In fact, I don't think even solicitors should be let into courts without being trained or barristers in say childcare, in family law. I think they should have to get a ticket as well as us so that you would have a cohort of people involved in these courts who are ticketed and trained to do the work. J02

Another judge explained that training in the dynamics of family violence would be welcome because many people do not fully understand how victims/survivors are impacted by domestic violence and do not understand the reasons why they stay in domestically violent relationships. This judge also felt that ongoing training would assist with understanding the dynamics of relationship violence and would potentially prevent judges becoming "immune" when dealing with the large volume of domestic violence cases currently coming before the District Court. Another judge with a lot of experience sentencing section 33 breaches stated that they had not received any training for that specific job but would very much welcome it.

This judge further noted that most judges would not necessarily be aware of the research on the impact of domestic abuse on children other than from seeing and hearing the impact during the course of their work as a judge passing sentence in criminal cases. When sentencing theft and drugs offences, details from probation reports revealed that some

people charged with these offences had witnessed domestic abuse at home when they were children.

This was echoed by another judge who wanted more information on the impact and consequences of domestic violence on victims/survivors:

> But I suppose the other side I'd like to see is the consequences. Again, I'm only surmising, but clearly the consequences of criminal acts in relation to injured parties who are involved in a relationship or were involved in a relationship and share houses, responsibility and children with somebody, you know, it would be interesting to hear what you say, the dynamics too and the consequences of being part of the dynamics. And that's an area I'd always be open to learn more about. J13

Most judges welcomed the idea of training noting that they invariably learn something new. Another judge pointed out that even though they did not believe there was anything wrong with their current practice they would welcome the opportunity to learn how to do things better.

A request for balance in the training provided on domestic violence was made by a judge who noted that while domestic violence in the past was undermined and underestimated there is much more awareness now but that in their view the scale is tipping in the other direction now:

> I'm all for increasing our awareness and our learning on things and certainly in all areas of law…So I'm all open for that, but I would like balance on what is being produced here, because I come back to the thing that in relation to domestic violence, it was totally undermined and underestimated for years, and thankfully there is an awareness now in relation to it, but I also think there has to be a balance struck, and I do feel with that zero policy, that the scale is going, tilting the other way, and I would just be concerned about that. J11

In particular, this judge noted that they had experience of female applicants for protective orders lying under oath and that some seek a protective order because they are about to start judicial divorce proceedings and they want this as part of their armour.

Another judge noted that the training they had already undertaken had taught them something important about the distinction between anger management issues and domestic violence:

> Well, listen, every training you do, you benefit from if you get something out of it. You know? So, I'm completely open to any training. And I was on a family law conference there about a year ago… But one thing that stuck with me from that is that, you know, they were giving out about judges making orders. When they make a domestic violence order, you can direct that the perpetrator would go on a particular course and it can be taken into consideration then if there's any future orders. But they were giving out about judges sending people on anger management courses on the basis that that's completely different to domestic violence. That it's somebody who can't manage their anger. It is somebody who's out to commit domestic violence, for want of a better expression. So, I suppose there's a lot of things like that that you wouldn't necessarily understand unless you're doing it or you have training on it. So, I think yes, absolutely there should be training for judges on that. J10

Another judge wanted training to understand more about why some applicants apply for protective orders when the information they disclose to support the application seems relatively benign:

> Yes, I do – I do, because there's a huge explosion in domestic violence applications, and prosecutions. And I do think that as much training as we can possibly get in relation to that. And understanding too why people… there's just a huge increase, I think, in the application. So, understanding why people might make an application for something that might seem benign on its face, on the information, seems like a really… a huge ordeal for the applicant when they come in. […] as much training as possible on domestic violence issues, I think. J12

Recommendations

- Information and training for District Court judges on the various forms of domestic violence including psychological, physical, emotional and financial abuse; how to recognise each form of abuse and the respective impacts that each type of domestic abuse can have on victims/survivors and their children. Training and information will directly impact judges' assessment of harm when sentencing by expanding their awareness of the various types of harm that can arise from domestic abuse in all its forms.
- Training and information should be trauma informed and focus specifically on:
    - familiarising judges with the research literature on the impact of domestic violence, particularly coercive control, on victims/survivors and their children;
    - the reasons why women experiencing domestic violence stay in relationships;
    - the impact of psychological and emotional forms of abuse;
    - the various ways in which victims/survivors of domestic violence can experience re-victimisation and re-traumatisation as a result of participating in and trying to navigate their way through the family law and criminal courts.

5.9 Information on sentencing practice in the area of domestic violence from the SGIC

When asked if they would welcome further information on sentencing practice in this area from the Sentencing Guidelines and Information Committee (SGIC), most judges indicated that they would welcome more information on sentencing practice in this area from SGIC. Overall, District Court judges were very enthusiastic about receiving information on sentencing practice from the SGIC in the area of domestic violence and a small number noted

the need for both training and guidance in dealing with applications for protective orders in the family law courts.

Two judges were not convinced of the need for guidelines in this area. One felt that there was already enough sentencing guidance available but that perhaps all that was needed was codification. The same judge did not welcome any fettering of judicial discretion and expressed the view that the District Court is the only court in which sometimes human rather than legal solutions are more appropriate for what are essentially human problems. A second judge felt that perhaps guidance would be more relevant to the granting of orders rather than the decision-making around breaches of protection orders. However, most judges would welcome more information and guidance on sentencing practice without reservation.

Recommendations

- Sentencing guidance for District Court judges on how to assess the harm caused by the breach of the protective order and/or involved in cases involving domestic abuse. The sentencing guidance might focus on helping judges to recognise and assess the impact of the various harms that are evidenced in a particular case including psychological, emotional, financial, and physical harms. The assessment of harm caused by the offence goes directly to the question of the seriousness of the case which along with culpability is a major component of arriving at the headline sentence in accordance with the principle for proportionality in Irish sentencing law.
- The provision of a dedicated Sentencing Domestic Abuse Bench Book for District Court judges which will provide a one stop shop for all the sentencing information and guidance they need when sentencing section 33 offences and other criminal offences involving domestic abuse.

This chapter has outlined specific areas that training and sentencing guidance are most needed for District Court judges in relation to the sentencing of relationship violence. The next chapter explores additional areas where sentencing guidance on domestic violence might be needed. Chapter 7 provides a summary of the specific recommendations for training and sentencing guidance in relation to the sentencing of relationship violence cases in the District Court.

5.10 Conclusions

The majority of judges interviewed expressed the view that relationship violence cases are different to other criminal cases due to the relationship between the parties and the sensitivities and complexities that this gives rise to. By default, more than design, it appears that there are two systems in place in Ireland for the hearing of section 33 prosecutions. One

in which judges have full access to the original civil application for the protective order and another in which they have no previous knowledge of the family law file.

Judges expressed mixed views about the helpfulness of hearing the prior civil application with some believing it was unhelpful as it potentially introduces an element of bias or prejudice, others believing it was helpful to have knowledge of the broader family context and a third group who felt it made no difference to them either way.

In relation to protective orders in the context of adult children and parents, most judges generally recognised how difficult it was for parents to seek protection from their adult child and, although they noted complicating factors such as mental health issues and addiction, most prioritised the needs of the parents over those of the adult child.

Most judges interviewed would generally welcome input from the Probation Service in section 33 cases but many were not inclined to use the services of the Probation Service due to the delay it would cause in dealing with the case. Judicial awareness of how other professionals may be of assistance to the court in the sentencing of a section 33 offence and their awareness of the various domestic violence perpetrator programs funded by the Probation Service could be significantly enhanced with greater provision of information by the SGIC to judges.

Only one of the judges interviewed had dealt with a section 39 coercive control case, the general view of the majority of the judges being that section 39 cases are too serious for the District Court and are therefore normally dealt with in a Circuit Court.

The majority of judges would welcome training, information and sentencing guidance from the SGIC in relation to sentencing of domestic abuse cases in the courts and see the absence of such training as a gap in provision that should be filled.

6. Passing sentence in section 33 Offences: Analysis of the hypothetical sentencing vignettes

6.1 Introduction

This chapter presents the analysis of the sentencing vignettes that judges were asked to respond to. It proceeds by providing an analysis of the types of sentences judges indicated they would impose in response to the facts of each scenario and then discusses the main aggravating and mitigating factors they highlighted as relevant to their decision-making. The key themes emerging from the questions asked in relation to the vignettes are then explored. This is followed by a section that explores some additional findings that emerged when information from the interviews and sentencing vignettes were analysed together. Recommendations are listed immediately following the findings they relate to and the final section concludes by highlighting some of the most important findings from the analysis of judicial responses to the sentencing vignettes.

6.2 Vignette 1: Breach of a Safety Order Living Together

Adi and Mary are married with 4 children between the ages of 6 and 15, they reside together in the family home in Wexford purchased from the County Council. The marriage has been in difficulty for some time and there are frequent rows between the parties. In January 2022 Mary secured a Protection Order and was subsequently granted a Safety Order for a period of two years. On May 26th Mary called the Gardaí just before midnight. She alleged that Adi had breached the Safety Order and wanted him arrested and taken from the house. He had been drinking and kicked her bedroom door open, calling her a nutjob and a psycho and pushed her down on the bed as she rang the Gardaí. He struggled with her, grabbed her phone and threw it out the door and their eldest son intervened. Adi was arrested for a breach of the Safety Order and taken to the local Garda station. The breach, a section 33 Offence of the DVA Act 2018 is before the court for sentencing, Adi has a previous conviction for being in charge of a mechanically propelled vehicle while under the influence of an intoxicant, section 5 (1) of the Road Traffic Act 2010.

The appropriate sentence

The most common sentence that judges indicated they would adopt in response to Vignette 1 was a suspended sentence. There were three ranges of sentencing apparent based on leniency/severity. The most lenient sentence was a deferral without supervision for six months ending in a dismissal if all conditions followed. The judge imposing this sentence mentioned a guilty plea, and no previous breaches. A second group of judges indicated that their sentences would potentially involve non-custodial or suspended sentences depending

on further information regarding mitigating and aggravating factors. These judges indicated that if there were a guilty plea and proposals to leave the home, their sentence might involve engaging with the Probation Service in a programme involving anger management and alcohol awareness, a probation order or other non-custodial sanction. The absence of these mitigating factors and/or the presence of aggravating factors, emerging from the victim impact statement, might nudge this group of judges away from non-custodial towards a suspended sentence. A third group of judges indicated that their preferred sentencing disposal for this scenario would be suspended sentence. Several outlined the headline sentence, and then reduced sentence based on the presence of mitigating factors. The longest suspended sentence headline sentence was 10 months, reduced to 6 months and this would be accompanied by probation supervision. The shortest was 30 days to mark the gravity of the offence. Several judges in this category indicated that an immediate prison sentence was not outside the bounds of possibility, again depending on confirmation of mitigation and/or aggravating factors.

Mitigating Factors

When responding to this scenario half of judges asked whether or not there was a guilty plea and indicated that this mattered because a guilty plea would show acceptance of responsibility and perhaps remorse, both important mitigating factors. A guilty plea in this context would also prevent the victim from having to give evidence, which can be re-traumatizing. For some judges the presence of a plea might be the difference between a custodial and a non-custodial sentence. A show of remorse and of a resolve to change (by addressing addiction, anger management or engaging with the Probation Service) were mentioned by several judges. Other mitigating factors identified by judges were the absence of previous section 33 convictions, ability to comply with bail conditions, length of time in compliance with protection order. Just over half mentioned the living arrangements of the couple, with many indicating that proposals to move out might considerably alter the type of sentence imposed.

In summary, the two most important mitigating factors from a judicial sentencing perspective were **a guilty plea** and **a proposal to leave the family home**. Judges independently mentioned the living arrangements of the parties as part of their sentencing considerations but they were also asked directly about theirs views on the parties' living arrangements which will be explored below under key themes.

Aggravating Factors

The aggravating factors mentioned by judges responding to Vignette 1 included the physical contact involved—the fact that the perpetrator grabbed the victim, with several judges noting that the physical contact was more serious than the verbal abuse such as shouting. Some judges considered the fact that alcohol was taken on the night in question as an aggravating factor, others considered the short period of time between the granting of the order and its breach to be an aggravating factor. A majority of judges noted that the presence of the child

was an aggravating factor, many noting that the psychological harm of witnessing domestic abuse as a child can have lifelong repercussions.

Further Information

A majority of judges indicated that they would request a pre-sentence report, specifically to find out more information about the family background and to understand the various factors impacting on the defendant's behaviour. Judges wanted to know more information about the perpetrator, the complainant, where the marriage was headed, and whether or not social workers were involved. One half of judges would request a victim impact statement to understand the impact of the breach on the victim and what her wishes were in terms of the court's response.

6.3 Key Themes Vignette 1

Some of the key themes emerging from the analysis of judicial responses to Vignette 1 will now be explored in greater detail including: living arrangements/end of a marriage; impact on children of witnessing domestic abuse; type of abuse; avoiding a conviction in a relationship violence case; physical violence more aggravating than psychological violence; and bail/suspended sentence conditions.

End of marriage and living arrangements

Vignette 1 described the parties as still living together despite there being a safety order against the husband. Judges were asked whether the preservation of the marriage or the fact that the parties were married was an important factor in their sentencing consideration. Judges had mixed views on this—some saw the fact that their marriage was in trouble as not being a relevant consideration in a criminal context. Others felt it would have an impact on their decision either because it was an aggravating factor that the parties were in an intimate relationship or because of the potential risk if they continued to live together. Indeed, although there were mixed responses when asked directly about the importance of the end of the marriage in their sentencing, many judges when passing sentence assumed or expected that the husband would be moving out.

For some judges continuing to live in the house represented a higher level of danger or risk that there would be a re-occurrence of the behaviour that led to the breach of the safety order. Others explained that they would consider imposing a more lenient penalty if the husband moved out or offered to move out, while several noted that sometimes requirements to move out might be placed in conditions attached to bail or suspended sentences.

However, several judges noted that while their preferred option would be for the husband in this scenario to move out, that the housing crisis created difficulties for couples separating and that sometimes the only option might be living together in danger:

> […] So many people end up in that situation, that they can't afford to move elsewhere. The clue there, the relevance of the Council House there is that they can't afford another house, so they will end up living together, in danger. J07

Judges who participated in this study clearly consider factors such as whether or not the parties are married and living together or whether or not they continue to live together as important factors to consider when passing sentence for a breach of a protective order. This adds weight to the view that some judges approach sentencing of cases involving relationship violence somewhat differently to ordinary crime. A key question is whether this difference in perception corresponds to or is informed by a tendency to view domestic violence as less serious than other crimes because of the fact that it happens in the context of a familial or intimate relationship.

Based on judicial accounts in this study, one of the main reasons for focusing on living arrangements appears to be to prevent the reoccurrence of the breach and to provide greater protection to victims. Imposing restrictions on persons convicted of criminal offences on their personal movements such as staying out of specific areas, or away from named persons, are commonly observed features of sentencing. It could be argued therefore that requiring the accused person to move out of the family home as a condition before imposing a particular sentence might be considered to fall into the same category as restriction orders. At least some judges considered an offer by the husband in Vignette 1 to move out of the family home as a form of mitigation that might reduce the severity of the sentence. Furthermore, requiring perpetrators to move out of the family home could be justified if judges were motivated by the sentencing aim of specific deterrence and victim protection.

However, notwithstanding these potential justifications it is also possible that imposing conditions relating to living arrangements may not necessarily increase victim safety or reduce reoffending. Domestic violence research shows that the most dangerous time for a victim/survivor of domestic violence is the break-up of a relationship,[192] although some research suggests women who apply for protective orders typically experience less violence post separation than those who do not.[193] Even if the perpetrator of the domestic violence moves out of the shared home this may not necessarily reduce the risk of reoffending and treating offers to withdraw from the family home as mitigating the severity of the sentence may therefore not necessarily be appropriate and may unjustifiably lead to more lenient sentences than is warranted in the public interest.

[192] Lorraine Davies, Marilyn Ford-Gilboe and Joanne Hammerton, 'Gender Inequality and Patterns of Abuse Post Leaving'. (2009) 24 *Journal of Family Violence*, 27-29. DOI 10.1007/s10896-008-9204-5

[193] Judith McFarlane et al. "Risk of behaviors associated with lethal violence and functional outcomes for abused women who do and do not return to the abuser following a community-based intervention." (2015) 24(4) *Journal of Women's Health,* 272-80. doi:10.1089/jwh.2014.5064

Recommendations

- Sentencing guidance for District Court judges on the appropriateness of imposing conditions around the living arrangements of defendants in section 33 cases and other cases involving domestic abuse, as conditions of sentences or as a factor that mitigates the severity of the sentence. Guidance should be informed by research on domestic violence, particularly domestic violence research on levels of post-separation violence.
- Sentencing guidance for District Court judges on the range of mitigating factors can appropriately be considered in the context of the sentencing of cases involving domestic abuse. Particular care is needed to avoid unforeseen or unintended consequences.

Impact on children of witnessing domestic abuse on sentencing decisions

Judges were asked whether or not the fact that the children had witnessed the domestic violence would impact their sentencing decision. A majority responded that it would have an impact as an aggravating factor because of the psychological trauma it would cause to children and the lifelong effects that this would have on them.

Some judges also noted that domestic abuse occurring in front of a child would be an aggravating factor not only due to the trauma this causes to the child but additionally due to the extra trauma caused to the parent who worries about the abuse negatively impacting their children.

Two judges said that children witnessing the domestic abuse would not impact their sentencing decision. Rather than referring to the children in Vignette 1 witnessing the domestic abuse as an aggravating or serious matter they referred to it as part and parcel of the background circumstances of the case—it was inevitable that if they were present they would witness the abuse. One noted that it would be an aggravating factor if the child was physically attacked but merely witnessing shouting and roaring in the house would not of itself impact the sentence. Although the scenario in Vignette 1 described at least one child (who intervened, they had four children) witnessing both physical and emotional or psychological abuse, two judges did not see this as impacting their sentencing decision.

Judicial perspectives described here suggests that while most judges interviewed are aware of the psychological impacts on children of witnessing domestic violence some may not be and that training and guidance on the impacts of domestic abuse on all parties is needed.

Recommendation

- Training for all judges on the long-term psychological impacts of domestic violence on adults and on children.

- Sentencing guidance on how District Court judges should take into account the impact of domestic abuse, in all its forms, on all parties effected and particularly on children, when passing sentencing in section 33 breaches and in other cases involving domestic abuse.

Avoiding a conviction in a relationship violence case

When asked whether they would attempt to avoid a conviction in a section 33 case a majority of judges stated that they would not take this approach because of the criminal context of the case. One third of judges noted that they might exceptionally take this approach after consulting with the victim about the imposition of a conviction—sometimes a spouse or parent will request that the defendant be left without a conviction. A minority of judges indicated that they would routinely consider not imposing a conviction in a section 33 case.

Many judges indicated that the main reason they might consider not imposing a conviction was if this were requested by the victim. While the priority given to victim wishes is admirable from the perspective of responsivity to the victim's wishes, it could potentially be perceived as adopting a more lenient approach towards the sanctioning of domestic violence in comparison to non-domestic violence, and could unwittingly reinforce public misconceptions that 'domestic' abuse is not really violence.[194]

Recommendation

- Sentencing guidance on the circumstances, if any, in which it might be appropriate to not impose a conviction for a breach of a domestic violence protective order under the Domestic Violence Act 2018.
- Sentencing guidance on the weight that judges should give to victims' requests regarding the sanctioning of a person convicted of a section 33 offence.

Physical violence more aggravating than psychological violence

While discussing the seriousness of the breach in Vignette 1 many judges noted that the presence of actual physical violence, as opposed to emotional or psychological violence, was an aggravating factor. Some mentioned it as the most serious or aggravating element of the breach:

> The most serious aspect that I see in that vignette is the fact that he… there was physical contact. If it had been all shouting and roaring and what he said potentially, but it's the physical contact and then followed by the throwing of the phone out is clearly evidence of a person who potentially

[194] Carissa Byren Hessick (2007), 'Violence Between Lovers, Strangers and Friends', Washington Law Review, 85: 344–402. See also Jennifer L Hartman and Joanne Belknap. 'Beyond the Gatekeepers: Court Professionals' Self Reported Attitudes About and Experiences with Misdemeanor Domestic Violence Cases', (2003) 30 *Criminal Justice and Behavior*, 349–73.

> could engage in much more serious contact/assault/assault causing harm or something more serious. J03

Indeed, some judges did not specifically acknowledge the presence of emotional or psychological violence and omitted any reference to the name calling or the attempts to control by taking the phone from the victim.

Others noted that physical violence was present and described the name calling not as violence but as 'putting her in fear' which is the key requirement for the breach:

> Well, the only question you have to ask yourself is was there violence and was there a threat of violence. And there was. And even, okay, kicking in the door is violence, pushing her on the bed is violence. Like I would often define it down like, you know, through … calling her names would put her in fear. So, you have all the essential ingredients and then what do I do? Okay, he's convicted. J09

One judge specifically mentioned that when there is a physical element to the breach, as opposed to an emotional element, in their view it increases the seriousness of the risks associated with the breach:

> As I say, the fact that he physically… now and I know these orders can be granted on the basis of emotional abuse, but when there's a physical element to it, that to me brings it up to a higher scale in terms of concerns about safety and in terms of the approach I would take to the matter. J11

Judicial perspectives described here suggests that while most judges interviewed are aware that the psychological impacts of domestic abuse can be as damaging as the physical impacts some may not be and that training on the impacts of all forms of domestic abuse is needed. Psychological and emotional forms of domestic abuse are often more associated with coercive control but can be present in all cases involving domestic abuse. Greater awareness amongst judges of the prevalence of controlling behaviours in criminal cases involving domestic abuse would have a significant impact on their sentencing of section 33 cases and on their sentencing of all cases involving domestic abuse. Sentencing guidance on the harm associated with psychological and emotional abuse, particularly when it is used as a method to control and gain dominance over a victim, would have a significant impact on how judges sentence section 33 cases and all cases involving domestic abuse.

Recommendation

- Sentencing guidance for District Court judges on how to approach the assessment of harm associated with psychological and emotional abuse, particularly when it is used as a method of control to gain dominance over a victim, and the circumstances in which the attempt to control the victim may be considered as an aggravating factor, when sentencing section 33 cases and all criminal cases involving domestic abuse.

- The sentencing guidance should highlight the need for the assessment of the harm to be informed by an understanding that domestic abuse can be understood as a course

of conduct crime which prioritises a wider consideration of the overall behaviour involved rather than simply focusing only on the harm caused by the individual acts.

Bail/Suspended sentence conditions

This research did not directly ask judges about the use of conditions attached to bail or suspended sentences. However, a small number of judges described how they used stringent 'no contact with the victim' conditions to provide an extra 'layer' of protection for victims and their children. In the following account, the judge explains that the key reason for adding strict conditions to suspended sentences is welfare related and arises from victims' requests, not for punishment, but to be left alone. Another judge explained how they would request that the alleged perpetrator move out of the family home as a condition of receiving a suspended sentence and explained that when the matter first appears in the District Court the bail conditions usually require the alleged perpetrator to move out of the house. The same judge then adopted this approach to Vignette 1 where the parties were living together.

Recommendation

- Sentencing guidance on the types of conditions attached to suspended sentences imposed in criminal cases involving domestic abuse typically aimed at preventing alleged perpetrators of domestic violence engaging, communicating or living with alleged victims.

6.4 Vignette 2 Breach of a safety order living apart.

John and Yvette are in their 20s, are unmarried parents, and have a three year old child. Both are working and the paternal grandparents assist with looking after the child. They lived together but broke up and John moved back to his parents' house. John told his parents that Yvette had a quick temper, always seemed to be angry at him, and would frequently hit him. John applied for access and guardianship and both were granted. Yvette subsequently breached the access Orders on multiple occasions until the Court threatened to change custody. John had access every second weekend from Friday afternoon until Saturday afternoon, the drop offs and collections took place in the carpark of the local church. Yvette sent hundreds of abusive texts to John, posted nasty comments about him on the Facebook pages of mutual friends and would call him names in public in the local bar and the nightclub in town. One night she drove her car at him, he was terrified and jumped into the hedge. He was granted a Protection Order and subsequently a Safety Order. A week later, after John put the child in the car, Yvette became angry and pushed him so hard that he fell over and injured his head, requiring 4 stitches. Yvette was arrested and the matter is before the court for sentencing as a section 33 Offence under the DVA 2018. Yvette has no prior convictions. John

has told the prosecuting Garda that he has decided not to cooperate as he thinks it will only make things worse and he just wants to see his child.

Appropriate sentence and factors relevant to this

Judges adopted one of three different approaches when asked to pass sentence in Vignette 2. One group of judges, just under half of those interviewed, indicated the type of penalty they would impose if the section 33 breach was proven against Yvette. The majority of this group indicated that Yvette was at risk of imprisonment. Two judges would defer the imposition of penalty and adopt a wait and see approach. One reason for this was to investigate Yvette's possible mental health issues. One indicated that she was at risk of imprisonment and another noted that they would require her to undergo anger management and parenting courses. Another judge would refer to the probation service for a probation report and also noted that Yvette was at risk of imprisonment. Two judges indicated prison sentences of 6 and 9 months respectively although they noted the potential to suspend if there was a guilty plea. One judge in this group would impose a fine of €500 to be paid within 6 months. The approach of this group was distinctive because they focused on sentencing and not on the family law aspects presented by the case. They also considered the breach to be very serious and their sentences were meant to reflect this although even within this group there was a spectrum of severity. Those who indicated prison sentences noted that they would suspend if there was a plea of guilty, as this would reduce hardship for the complainant in terms of giving evidence.

A second group of judges, just under one third, adopted what could be defined as a family law approach to the case. Instead of indicating the type of penalty they would impose and the factors relevant to that, they focused explicitly on the family law aspects of the case. For example, one judge stated that they would ask if an application for sole custody had been made and indicated they would not deal with the matter if such an application had been made. Two other judges would ask for a probation report to examine child welfare issues and anger management issues noting that this case should really be solved in the family law courts.

A third group of three judges adopted a hybrid of the first two approaches. This involved referral to the probation service for a probation report to examine anger management issues, child welfare issues, with two indicating they would refer to their concerns around child welfare to TUSLA, but all indicating that either a custodial sentence or a deferral of sentence would be likely.

Across all of these groups four judges viewed Yvette's behaviour as potentially due to anger management issues and three judges raised concerns about her mental health. One judge questioned whether her behaviour was caused by anger management issues or by a campaign of harassment and decided that the latter was more likely. The three judges who viewed the cause of Yvette's behaviour as potentially emanating from anger management problems did not indicate an actual sentence but instead were likely to refer to the probation service for a

pre-sanction report, adjourn for a period of time and require her to do anger management and parenting courses. Interestingly mental health and anger management issues were raised less often as issues to be examined in relation to the alleged perpetrator of domestic violence in Vignette 1. Nevertheless, it is notable that some judges perceive that an anger management programme would be an appropriate intervention for persons convicted of domestic violence related offences.

Aggravating factors

The aggravating factors most commonly identified by judges when setting out their approach to sentencing Vignette 2 were the injuries suffered by John, the injured party, the abusive texts Yvette sent and the impact on the child of witnessing the behaviour involved in the breach. A number of judges mentioned that a lack of remorse and/or a lack of a guilty plea would be aggravating because it means the injured party would have to give evidence and potentially be re-traumatised. Most judges did not believe that multiple prior breaches of access orders should be taken into account as an aggravating factor.

Factors mitigating sentence

The most commonly mentioned mitigating factor was the guilty plea, with two judges noting that a guilty plea would be the difference between a custodial and a non-custodial sentence. Previous convictions—the absence of, were noted by two judges as important factors that would mitigate the severity of the penalty, reducing a potential custodial sentence to a non-custodial one. The fact that the defendant is a primary carer was noted by one judge who opined that while it has to be taken into account, it wouldn't stop them imposing a custodial sentence, in particular because in this case other family members could care for the child.

6.5 Key Themes Vignette 2

Some of the key themes emerging from the analysis of Vignette 2 will now be explored in greater detail including: the impact of multiple prior breaches of access orders on sentencing; the withdrawal of cooperation of the complainant on section 33 prosecutions; the bringing of other charges alongside section 33 prosecutions; child welfare concerns raised by judges; and evidential difficulties in section 33 prosecutions.

Multiple prior breaches of access orders on sentencing

In Vignette 2 we are told that Yvette breached access orders on multiple occasions. Judges were asked would they consider this to be an aggravating factor when considering their sentence in relation to breach of section 33. A clear majority, two thirds of judges, expressed the view that multiple breaches of access orders should not be an aggravating factor when sentencing a conviction under section 33 of the DVA 2018. The main reason given was that a breach of a civil order should not be taken into account in a criminal context.

However, even for judges who did not consider breaches of access orders to be relevant aggravating factors in the context of a section 33 offence, they noted that multiple breaches

might raise questions about the perpetrator's conduct and ability to comply with court orders. Some considered it as forming part of a pattern of hostility towards the complainant which would make it a relevant sentencing consideration and others saw it as part of the background context of the section 33 prosecution but not directly relevant to it.

A small number of judges responded by noting their concern for the child in the vignette. Two of them would refer the case to TUSLA to investigate the welfare of the child with the prospect of a change of custody in favour of the complainant. A third judge noted that quite often a breach of access order means the person does not fully understand the importance of complying with court orders. Another judge noted that they would need more information on the circumstances in which the breaches occurred and that that would not be available during a hearing for a section 33 breach.

A different interpretation was arrived at by one judge who felt that multiple breaches of access orders pointed towards an intentional interference with the children's rights to see their other parent:

> […] The children have a right to see their parent and if there's multiple breaches, you'd have to say ah no, that's … you'd nearly have to use the two words – parental alienation, question mark. J01

Most judges who responded to Vignette 2 noted the negative impacts of domestic abuse on children who witness it or who are directly subjected to it. Many observed that children are often caught in the cross-fire between warring parents. Only one participant in this study mentioned parental alienation. The concept of parental alienation is the subject of intense academic and policy debate and the most recent Irish research on it has critiqued the concept as not being supported by robust, methodologically rigorous scientific research.[195] The Department of Justice *Parental Alienation Policy Paper*[196] concluded that because so many aspects of parental alienation were so contested—including "its existence, its relationship with allegations of DSGBV, its prevalence, and significance in the family justice system and how the system should deal with it,"[197] that any policy initiative or legislation risked being applied inconsistently. Similar concerns were highlighted in *A Report on the Intersection of the Criminal Justice, Private Family Law and Public Law Child Care Processes in Relation to Domestic and/or Sexual Violence* [198] in which the increase in the use of the parental alienation

[195] See Research Matters Ltd, *Parental Alienation: Review of Understandings, Assessment and Interventions*, Department of Justice, (Dublin, 2023). Available at: https://www.gov.ie/pdf/?file=https://assets.gov.ie/258414/f72c1cbe-06bc-4595-8021-f6c64126c0bf.pdf#page=null. The authors note the absence of an agreed definition of PA in the scientific and legal literature and that Irish judges do not appear to have an agreed definition even though incidences of consideration of parental alienation in Irish family law cases are increasing. P122

[196]Department of Justice, *Parental Alienation Policy Paper*. Available at: https://www.gov.ie/pdf/258416/?page=null

[197] Ibid,.40.

[198] Nuala Egan and Ellen O'Malley Dunlop. *A Report on the Intersection of the Criminal Justice, Private Family Law and Public Law Child Care Processes in Relation to Domestic and/or Sexual Violence*, prepared for the

model by lawyers in Irish courts acting on behalf of alleged perpetrators was perceived by victims of domestic abuse as a way of silencing or cancelling out allegations of domestic abuse in the context of access and custody applications and was linked to a decreased willingness on their part to raise domestic violence allegations in the first place. Furthermore, the Council of Europe's Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) in its *Baseline Evaluation Report on Ireland*[199] in 2023 described the use of the term 'parental alienation syndrome' by some experts in Irish courts as problematic due to the tendency for it to be used in association with the minimisation and/or ignoring of claims of domestic abuse.

While most judges who participated in this study were aware of the negative consequences for children of witnessing domestic abuse, a sentencing guideline on the impact of domestic abuse on children would ensure that the best interests of the child are kept at the forefront of sentencing in cases involving domestic abuse and child victims. Similarly, whilst most judges would not consider multiple breaches of access orders as an aggravating factor when sentencing a person for violating a domestic violence protection order—clear guidance on the types of behaviours that can rightfully be considered to be aggravating would be welcome.

Recommendation

- Sentencing guideline for District Court judges to assist them to recognise and take into account that being exposed to all forms of violence against a mother endangers the best interests of the child and renders that child a victim in his or her own right.
- Sentencing guideline for District Court judges on the types of behaviours that can rightfully be considered as aggravating factors when passing sentence on a person who has breached a domestic violence protection order.

Withdrawal of cooperation

Vignette 2 asked judges what might happen if the complainant decided to withdraw his cooperation before the hearing of the section 33 case. All except two judges were unequivocal about the fact that the prosecution could not go ahead if the complainant withdrew his cooperation. Various reasons were given for this but most revolved around the sheer lack of evidence to support a conviction if the complainant withdraws.

A number of judges pointed out that the District Court does not have a hostile witness procedure whereby the sworn statement of the complainant can be admitted even if they

National Women's Council and the Department of Justice, March 2023, p. 46. Available at: https://www.nwci.ie/images/uploads/NWC_DSV_Justice_Report.pdf

[199] GREVIO (Group of Experts on Action against Violence against Women and Domestic Violence) Baseline Evaluation Report Ireland 2023, at p.7. Available at: https://rm.coe.int/grevio-s-baseline-evaluation-report-on-legislative-and-other-measures-/1680ad3feb

withdraw their cooperation. Such a provision applies in the Circuit Court whereby a statement can be admitted into evidence under section 16 of the Criminal Justice Act 2006 in circumstances where the witness withdraws cooperation with the prosecution. The judge in the following quotation explains this procedural difference but stops short of recommending its introduction in the District Court for domestic violence prosecutions:

> But in a huge majority of cases, when the case is called in for hearing – and a person may be on strict bail conditions and all that kind of stuff – the person won't co-operate, they won't give the evidence, they won't swear up against their former partner or that kind of thing. Now, in the Circuit Court if that happened, you'd have a hostile witness application. You could say that the witness is not co-operating or you could seek to admit their statement that they made as evidence of the fact within under Section 16. There's no equivalent of that available in the District Court and I'm not sure whether I'm advocating that there should be or not, but I'm just saying once the person doesn't swear up in the District Court, that's the end of it. So, you could have a really vulnerable person who, on the other side of things, who's just afraid to give evidence and you could put in measures for them, video link evidence, you can put in all of the special measures that victims would ordinarily get but ultimately if they don't want to co-operate, there's nothing you can do, whereas in the Circuit Court and higher there's always the potential that the prosecutor could consider if they felt it was an appropriate case to do so. J12

While most judges believe that a case cannot proceed if the complainant withdraws cooperation, three judges expressed the view that a prosecution is still technically possible if the prosecution has enough evidence to ground a conviction:

> It is. You'd hear that the injured party doesn't want to make a statement or give evidence. Now, that came up once. It was a long time ago but the defence solicitor said something like, the state can't go ahead without it. And I felt it wasn't really for me to say whether they could go ahead without it or not. I said, well it's up to them to decide whether they can prove the case without that evidence or not. And some guy from the DPP did stand up and said that there is case law to say that it can in certain circumstances be proven without the victim. So, you know, obviously it's very, very difficult. A huge amount of your evidence is taken out if they're not going to give evidence. But it depends on what other evidence they have, if it's CCTV evidence, if they had other evidence that they could… that they had enough that they felt they could go ahead on. It's not for me to make that decision without having seen the evidence. But certainly it's a big gap in their case. J10

While there were mixed views on whether a prosecution could go ahead or not if the complainant withdraws their cooperation, almost all judges noted that a major reason for the withdrawal of section 33 prosecutions is the withdrawal of cooperation of the complainant. One judge noted that there are no statistics collected on the reasons for withdrawal of section 33 prosecutions in Ireland.

Other criminal charges

The factual scenario described in Vignette 2 involved an assault on John by his former partner Yvette. Judges were asked whether they thought assault charges should be brought against Yvette as well as the prosecution for breach of the Safety Order under section 33 of the DVA 2018.

A majority of judges expressed the view that it would be appropriate for other charges such as section 2 and/or section 3 assault, harassment or criminal damage to be brought alongside the section 33 prosecution. Most of them stated that they would normally see these charges alongside section 33 prosecutions.

> […] I've seen cases where there's a Section 33 domestic violence and there might be Section 2 criminal damage and there might be an assault, Section 2 or Section 3 assault and they'd all be prosecuted with regard to the one incident. J03

A minority said they don't often see other charges with section 33 prosecutions. This may indicate some variation in charging practices between districts.[200]

> Sometimes I am surprised that they're not accompanied by a Section 3 assault or Section 2 assault charge. In that one, I would expect that it would because you're dealing with a very limited sentencing range as well and a Section 3 assault is a hybrid. J04

Several stressed that it is up to the DPP and/or prosecutor to make the decision and one noted that when the DPP gets involved they normally will prosecute the other charges as well whereas local prosecutors will just opt for the section 33.

> If there's an assault with a Section 33, there are two different events. It's the same factual matrix but there are two different offences. One is breaching a court order and the other is assaulting a person. And so, if there is an assault or an assault causing harm, that should absolutely be charged also, and I don't understand why it's not been done. And it tends to be that it can be adjudicated on by the local superintendent or inspector rather than the file going to the DPP. And the DPP typically, the files that go to them, they do direct assaults. So, it seems to be when the directions are given at a local level that you don't see the Section 2 or Section 3 assault coming in. J08

Some noted that the section 33 had greater sentencing powers attached than summary assault offences (although as assault is hybrid the DPP has discretion to charge as an indictable offence). Similarly, judges expressed mixed views about whether section 33 or other charges would be easier to prove.

> … I'd suspect it's because the Gardaí think it's an easier case to prove because… This is a court order. And all they have to do is establish that it was breached. And communicating in some instances will be enough. If, once they establish they communicated, when they weren't supposed to, that's enough. But the problem is they forget about the furnished, the document proof. And then the case collapses and then there's no assault charge there at all and then the whole case is thrown out. J08

> The Section 33 does have technical proofs where the assault requires just the absence of consent and harm which is defined very loosely, so it would be an easier case to prove. J12

One judge noted that a good reason for prosecuting assault charges alongside section 33 offences is that it is harder for the defendant to use emotional/relationship related defence arguments:

[200]Ibid (note 178) Differences in the proportion of cases being sent forward from the District Court to the Circuit Court across Ireland were highlighted by the RTE's Investigation Unit in March 2018.

> It just probably means that when the directions are obtained, they figure that they're better to prosecute on everything. Now the effect that it sometimes has is that you know, the person might be more inclined if they're the defendant, if they're placed in a difficult situation, is that they're meeting three different prosecutions and it makes it more difficult for them to try to put in the emotional aspect of she… whatever she… she was really the author of her own misfortune. She caused me to do this. It's hard because you can only really… more limited defences on assaults, so I can hardly argue self-defence unless there was something that would be self-defence aspect. But if it's a breach of a domestic violence order, you could start saying oh, well she invited me over, oh we were you know, we were getting on very well, oh we slept together last night, but yes, an argument arose the following day. And all those types of various issues then seem to come into play with regard to the incident which makes it much harder. J03

This is an explicit recognition that other relationship factors come into play when the offending behaviour is prosecuted under section 33 instead of under sections 2/3 of the NFOAPA. Similarly, a number of judges noted that bringing additional charges (such as assault or criminal damage) can bring more censure to the behaviour as sometimes domestic violence is not seen as truly criminal behaviour in the same way as an assault or criminal damage:

> Well, you see that's a matter for the Gardaí and the prosecutor, but I don't think it would be a bad idea because I think it would make the perpetrator, whether it's man or woman, aware of the fact that they're in breach of the criminal law. People have this attitude I gave him a puck. I gave him an elbow. Sure he's just my husband. Or my child. They don't seem to appreciate that violence is violence. And Section 3 DVA, Domestic Violence Act, you know, that's just people being difficult within their marriage whereas if you bring a straightforward criminal charge, I just think it's much more effective at making people aware of their conduct. And it is a Section 2 or a Section 3. J09

Additional charges to section 33 present certain advantages and disadvantages. One disadvantage noted was that additional charges may delay the prosecution of the section 33 offence due to waiting on directions from the DPP's Office:

> The problem with bringing Section 3 assault cases as well and all of that kind of thing is again, another agency who is stretched, the DPP's office, can take eight or nine weeks to come back to you and say whether or not there's a Section… there's further charges here. Do you see what I mean? …
>
> …But what delays matters in my court is the… it can delay matters, and it's completely understandable, is the DPP still, you know, the Guards will come in and say 'I still don't have the DPP's directions on the further charges yet.' And there's further adjournments. J05

On the other hand, if the prosecution of the section 33 case falls through for any reason, additional charges can be something to fall back on:

> This is a court order. And all they have to do is establish that it was breached. And communicating in some instances will be enough. If once they establish they communicated when they weren't, that's enough. But the problem is they forget about the furnished, the document proof. And then the case collapses and then there's no assault charge there at all and then the whole case is thrown out. J08

Only one judge who participated thought it would not be helpful to bring additional charges alongside the section 33. This judge emphasised the need to sort out the custody and access issues before taking any further steps in the criminal prosecution.

> Well, they probably should, but at the end of the day, you're trying to look at, like, the situation, what is a conviction for assault going to do there? It's not going to do an awful lot in terms of the access because if he brings a prosecution there for an assault, the likely outcome there is that she will take it into her own hands to be obstructive in relation to the access. So, I would deal with the access first. The access is the key flashpoint. J06

The factual scenario in Vignette 2 described acts of physical violence against John (hitting, pushing and driving car at John) as well as psychological violence including name calling, abusive texts, and failure to comply with access orders. In response to this four judges commented on the presence of physical and psychological harm in section 33 prosecutions. Commenting on the facts in Vignette 2 one judge was of the view that it would be appropriate to refer the case back to the police for further investigation of coercive control and harassment charges:

> If she's violent, abusive and harassing like that of the man who's the father of the children you'd say good God, what about the parenting. So, I'd be referring that to TUSLA. I would also be referring it to An Garda Síochána for further investigation as to whether there might indeed be coercive control or the offense of harassment. J01

A second judge noted that most section 33 cases that came before their court involved shouting abuse and abusive texts rather than physical assaults.

> But most of what I would see coming through in the bail, say, without ever getting to the meat of them, would be verbal and putting the person in fear and texts. There's a lot of that. I haven't seen an awful lot that are assaulted or caused harm and where they do, they generally are accompanied by a Section 2 or a Section 3. J04

A third judge opined that at least 20 to 25 percent of section 33 prosecutions in their court involved physical violence and that nearly all of them involve controlling behaviour:

> …[T]hat would be most of them. But there's probably… And I'm guessing here, but it's kind of an educated guess. I would say 20% to 25% of them involve actual physical violence. And I would say a lot of them involve… Nearly all of them involve that couple – involve controlling behaviour. Just, you know, really controlling behaviours. And then either coupled with violence or not coupled with violence – physical violence. Like, controlling behaviour is emotional… is psychological violence. I'm not sure that… Again, the head injury here, I don't know the extent of it, and the fact that it's been dealt with under Section 33 and there isn't an accompanying assault causing harm suggests that the injury may not be a big deal. J08

A fourth judge also noted that they would regularly see controlling behaviour in section 33 prosecutions:

> Controlling behaviour definitely, yes. Definitely. I haven't really got my… I haven't really had an opportunity to… So, I think it features in a huge amount of cases that come before the courts. I do. I have seen it. I have seen it a lot. J12

When asked about why such behaviour was not being prosecuted under the new coercive control provision in section 39 of the DVA 2018 one judge noted that there appeared to be a perception that such cases were too serious for the District Court:

> I don't know. I don't actually understand that. It's as if they think it's new and it's too serious for the District Court. And the only coercive control cases I've heard have been in the Circuit Court and they've attracted really big sentences straight away. And I'm not saying they're not justified but that coercive control can also go on, on a summary level in the sense of being dealt with in the District Court. J08

This judge also noted that one of the reasons for few summary prosecutions of coercive control might be the mentality of the police, in that they downplay the seriousness of the offending behaviour because they perceive that "it's only a domestic".

> Once the guards have a Section 33, there seems to be a mentality in the guards that it's a domestic. And the answer to a domestic is Section 33 and… Whereas my view is completely the opposite. The fact that it is happening in a domestic setting is a significant aggravating factor and all of the other charges that are available should be brought to bear, but they're just not being. And I'm not sure that the Gardaí have gotten out of the mentality that it's a domestic yet. It's only a domestic. And it's not unusual for me to hear that there was a significant domestic argument resolved by the Gardaí arriving and taking a drunken husband out of the house and bringing him to his mother's house to let him sleep it off, only to have the situation revived again the very next morning. And that really old-fashioned method of policing domestic violence is still going on and it shows a lack of understanding of domestic violence on so many levels that we could talk about it all day. J08

Another judge put the low rate of prosecution of coercive control cases in the District Court down to a lack of familiarity with the legislation and the evidential proofs needed to establish coercive control.

Child welfare concerns

The issue of child protection was raised by just over one half of judges in response to the facts of Vignette 2. When judges brought up the issue of child welfare they were probed about their views on dealing with this concern in the context of a section 33 prosecution. The main concern raised by judges was whether or not it was in the best interests of the child to remain in the custody of a parent who had allegedly been violent on a number of occasions towards the other parent. Three judges indicated that they would refer the matter to TUSLA to investigate whether there is a need for a supervision or a care order:

> Clearly there's more to it and I think the court would have to refer that further, first of all to Tulsa, to see if there's a child protection issue. If she's violent, abusive and harassing like that of the man

who's the father of the children you'd say good God, what about the parenting. So, I'd be referring that to TUSLA. J01

… I would have certain concerns about the children here and I think you'd be looking at maybe Tulsa or a supervision order or something because that's quite aggressive behaviour and erratic behaviour on her part and the child is in her custody, so that's something that you'd be mindful of. J04

So, you'll either request a report from The Child and Family… Tulsa, and they'll do a… a Social Worker will go in and do a report and they'll assess her and they'll assess him, and they'll make sure for us that she's a suitable parent and whether or not a supervision order is necessary, or whether custody should be with Dad, or whether the child should be taken into care. J07

However, a fourth judge noted that judges are not mandated persons under the Children First Act 2015, although no mention was made of the Children First Guidelines which provide that every adult is a mandated person for child welfare concerns. When asked about whether a parent being violent to another parent, in front of a child, would represent a threat for the child the same judge agreed that it would but that it would be up to the police to refer the matter to TUSLA and that child welfare in this context would be peripheral to the prosecution of the section 33 offence:

]…[I]t would but it's up to the Gardaí to refer that. They're mandated persons. I'm not mandated persons, and it's up to the father to refer it if he wants. But I'm … you end up like in the criminal court with a very net issue. Is the prosecution going to proceed or is it not? All those things are like important but they're not, they're almost peripheral to your decision as a judge in dealing with a conviction for domestic violence. And he wants to withdraw. J09

However, when asked whether it would be safe to leave the child with a parent who had been violent, like in Vignette 2, the same judge said they would refer to TUSLA if there was violence against the child.

The thing is, he would have to … she would have to slap the children, if she was slapping the children or being violent, then that's an entirely different matter. That's referred to the child and family agency and they do a criminal investigation. And can I tell you, if you slap your child, its Section 2 assault. J09

Two judges preferred to get a probation report or other expert report to investigate the child welfare issue:

But the worry would be then, is in relation to the welfare of the child, and in terms of her… and whether that level of anger is something that she could direct to the child at some stage, so that's why I would want a very detailed probation report on her. J11

I mean again, that… it's the impact of all of this on the child has to be concerned. And again, I would try and get as much information as I could vis-à-vis you know, the background, if there was any independent experts, try and see what could be used to assist the court. J02

This judge felt that it would be the duty of the police to refer the matter to TUSLA.

> I could be wrong now, but I think in instances like that, where the Gardaí are aware, I think the Gardaí refer it over to Tulsa to say 'There may be a child welfare issue here.' Where you could deal with it is obviously the access proceedings are probably before the Court, or the chances are that there might be further brought by John because of the circumstances, and in the course of that you could refer it. J11

While judges are not a mandated persons under the Children First Act 2015 they may have a duty to report child welfare issues that come to their attention under the Children First Guidance whereby all persons who become aware of a child protection issue must report.

> So, there would be ways of engineering to try and get the children's welfare considered… or child's welfare considered in that situation – maybe not through the domestic violence prosecution, but usually these things go hand-in-hand. Because of the issues that arose in relation to the… what happened on the access, the chances are that will come back into court in relation to the arrangements of collection and return of the child. Now that might need to be changed, or it could be that John could decide at that stage he wants to go for full custody, so you'd have probably other proceedings whereby it could divert towards looking… enquiring into the welfare of the child. J11

Recommendation

- Guidelines for District Court judges on what action, if any, is appropriate for District Court judges to take when child welfare concerns arise during a criminal prosecution for domestic abuse such as in a prosecution of and/or sentencing for a section 33 offence. The guidance should set out specifically where judges stand vis-à-vis the requirements of all adults to report child welfare concerns under the Children First National Guidance 2017.[201]

6.6 Other Noteworthy Findings

Several noteworthy findings emerged when data from across interviews and vignettes were analysed together. This section briefly outlines these findings.

Defining Domestic Violence

In Ireland there is no statutory definition of domestic violence and judges who participated in the study were not asked to define what they believed domestic violence included. However, discussions with judges around various aspects of hearing section 33 breaches of protection orders and sentencing these cases gave some insight into how judges define and categorise the various behaviours that they see in section 33 cases. Judges generally mentioned a wide range of behaviours that fall within domestic violence, requiring the protection of the law and

[201] See Children First National Guidance Available at: https://www.tusla.ie/uploads/content/Children_First_National_Guidance_2017.pdf

of the court. These included physical violence, choking, criminal damage (including damage to windows and doors), watching/stalking, verbal, emotional and psychological abuse, controlling behaviour, financial control, and coercive control, abuse of trust, and harassment (texting and emailing in circumstances where protection order prohibits communication). Not all judges mentioned all behaviours and the most commonly mentioned behaviours were physical assault and unwanted and harassing communications. There was a clear tendency amongst some judges to see physical assaults as more serious than other types of domestic abuse and this was illustrated to an extent by the distinction some judges made between technical and serious breaches of protective orders under section 33. But this was not widespread and indeed some judges were well aware that the impact of psychological abuse can be as harmful as physical abuse.

Judges generally noted that protective orders are put in place for legitimate reasons and many noted that they would not look behind an order and generally deal with the allegations of breach before them. However, a small minority of judges mentioned that sometimes protective orders can be abused and used as a weapon against a partner or former partner. When asked about mitigating factors in section 33 cases the same judge noted that a complainant's behaviour can sometimes be a mitigating factor because they might send out mixed messages, inviting a person over to the house even though there is an order in place and then when an argument escalates into threats it turns into a section 33 prosecution. Some judges felt that there can sometimes be a strategic motivation behind a section 33 prosecution to score points in an upcoming custody hearing. While this was a minority view expressed by only a small number of judges, all judges in the District Court would benefit from training on the dynamics of domestic abuse that is trauma informed.

A clear distinction between technical and serious breaches of section 33 cases emerged in judicial accounts. In general, technical breaches were considered to include instances of texting, emailing or phoning a person in circumstances where communication was prohibited by the protective order. Other instances of more technical breaches included watching or being in the same place as a person. Examples of severe breaches given by judges tended to involve physical violence, choking, assaults or coercive or controlling behaviour. A number of judges gave examples of what they considered technical versus serious.

One judge gave the example of a case in which a woman was seated in a car in a street and claimed her ex-partner looked at her in an aggressive manner. The judge explained that they did not impose a conviction in that case because objectively they felt it would be totally unfair to convict a person who was just going about his business:

> But realistically speaking, how do you try to police a situation where somebody who is legitimately entitled to walk down a street, who unfortunately walks down the street at the wrong time that his former partner is there necessarily means that his behaviour was such that would put a person in fear. Now if he went up and raised his fists that would be something that could. And that's the type of situation that you've a person who believes they were put in fear but in respect of which from

> an objective point of view we say listen, it would be totally unfair to convict and impose criminal sanction on somebody for something like that. J03

In the quotation above the judge contrasts the situation of being looked at in an aggressive manner with the perpetrator raising his fists and notes that if fists were raised this would be a more substantial threat and potentially might ground a conviction. In a second example, the judge contrasts a text sent at 4 am in circumstances where the order prohibits communication, with a showdown at access handover. In a third example, a judge contrasts a technical breach of sending an email when the order prohibits communication with a physical assault and noted that minor infractions like these would not attract a conviction.

There was some variation between judges on what types of breaches they considered to be technical and those they perceived as being serious. Some judges regarded the sending of text messages when the order prohibited communication as not warranting a conviction whereas other judges recognised that this can be a form of psychological abuse. Similarly, some thought mere watching from a distance could be accidental whereas others recognised that watching could form part of a pattern of other frightening behaviour aimed at 'tormenting' the victim. The following quotation shows that watching, texting and criminal damage may all form part of the same pattern of abuse:

> They'll send her a text and torment her, or they arrive at the door and break it down, or they'll break windows, or they'll sit outside and they'll watch her going back and forth from the kitchen, despite the order that I've made and explained to them in great detail, and that's a contempt for the court. J07

Many judges mentioned the importance of looking at the context of the case and the history between the parties before making decisions and several noted that it can be difficult to figure out exactly what is going on in some cases.

There appears to be a lack of clarity about whether the element of 'putting in fear' which must be proven for a section 33 prosecution to be successful is an objective or a subjective test and guidance on this would be very helpful for judges hearing section 33 prosecutions in the District Court. Whether the requirement is subjective or objective may influence not only the adjudication on whether a crime has been committed but also the adjudication around the level of harm caused, which directly impacts assessment of the appropriate sentence to be imposed.

Similarly, when assessing the alleged harm caused, both in terms of reaching a judgment about whether an offence was committed and assessment of the harm caused when sentencing, guidance that emphasises the need to be informed by a consideration of the overall behaviour involved rather than assessing harm as being caused by individual acts would be very useful so that instances of seemingly minor breaches that form part of a wider pattern of abuse are not missed.

Recommendation

- Sentencing guidance on how the harm caused by the alleged breach of section 33 is to be assessed—whether an objective or a subjective test should be employed by judges when assessing the extent to which the victim was put in fear by the perpetrator.
- Sentencing guidance on the need, when assessing the harm caused by an offence under section 33, to be informed by a wider consideration of the overall behaviour involved rather than focusing only on the harm caused by the individual acts.

A criminal offence and/or contempt of court?

Section 33.2 of the 2018 Act provides that section 33.1 is without prejudice to the law relating to contempt of court or any other liability, whether civil or criminal, that may be incurred by the respondent. Three judges spoke of a double effect, the breaching a civil court order and committing a section 33 offence.

> "…there is an unusual aspect in relation to somebody up on a charge of say a section 33…That there's a kind of double effect aspect to it. Not only is it a breach of statute but it's also a breach of a court order because they are charged with a breach, the charge is that you breached a court order and that's a criminal offence. It's a double effect. It's quite unusual. A breach in court orders in themselves are contempt of court and a law". J02

> "There has to be a marking of the gravity of the offence. It's domestic violence in breach of a court order. So, there's a double no-no there…" J01

Several judges mentioned that a breach of section 33 represented both a criminal offence and a breach of the civil order which is also contempt of court. This view is expressed by the judge in this quotation:

> "I think section 33 and its breach may be more looked at in the point of view of almost like a contempt of court, that it's a breach of a court order and sometimes can be looked at in that context that there's a contempt aspect with regard to not obeying court orders that are made, and sometimes that can be seen also as an aggravating factor, in that if people aren't obeying court orders, what will they obey?" J03

Judges in this study were not asked directly about their understanding of the contempt of court aspect of section 33. While some judges are clearly aware of the dual possibilities under the section great clarity for all judges could be provided through information and guidance on the types of circumstances in which treating a breach as a contempt of court might be an appropriate approach to adopt.

Recommendation

- Sentencing information for District Court judges on the dual powers available to them under section 33 of the 2018 DVA and circumstances in which it may be appropriate to rely on contempt of court powers where a breach of a court order is proven.

The role of victim advocates

Judges were not asked directly about the role of victim advocates in domestic violence court hearings. However, a number of judges recounted their experiences and views of the role played by victim advocates. Two judges expressed negative views towards victim advocates accompanying victims in court which may be related to a lack understanding of the role of victim advocates. As the following extract illustrates, a third judge expressed very positive views about the role played by victim advocates crediting them with helping victims to appear in court and helping to raise awareness around the concept of coercive control:

> Coercive control certainly has become a buzzword, but thankfully due to agencies that assist men and women seeking help from the courts for domestic violence, people are more educated as to what it is now. J07

Evidential difficulties in section 33 prosecutions

A number of judges highlighted that Section 33 cases are more difficult to prove than ordinary criminal offences because the evidence is so technical. First you have to prove the court order was served, then you have to prove it was breached and that the breach put the person in fear without hearing prejudicial evidence. In the following quote the judge explains why section 33 prosecutions can be so difficult to prove:

> …[T]hey are. They're not as technical as drunk driving but they're more technical than, in my view, than theft. Because you have to have… because there's all of the different processes involved. Because there has to be an order from another court, or from another sitting of a court. There has to be… that order needs to be produced as evidence, it's a vital piece of evidence and it doesn't happen as much now but there was a surprising amount of cases where the Guards would forget to hand it in. There has to be evidence of how it was served. In terms of the evidence of the breach, where, you know, in terms of the evidence that can be given, avoiding going into previous breaches and previous scenarios. So, if somebody is charged, as you gave the scenario, say if your phone is snatched and somebody throws it and pushes you down on the ground, you're going to be giving evidence, if you're giving evidence and that happened you, you're not going to be giving evidence of 'This guy did this to me last week.' Whereas in domestic violence cases, the tendency to stray into 'But sure of course I'm afraid of him, I'm always afraid of him, he's always doing this.' And then the defence stands up and objects and says 'You can't hear that'. So, that kind of thing. So there's an evidential basis and then the matters in relation to proof of service. So, it is different. J05

The difficulties involved in ensuring that the 'technical evidence' is proven were noted by a number of judges:

> […] Section 33 does have technical proofs where the assault requires just the absence of consent and harm which is defined very loosely, so it would be an easier case to prove. J12

The technical evidence can be particularly challenging for prosecutors who may not have legal training and may not be aware of the full extent of the proofs needed which may result in the collapse of a section 33 prosecution:

> […]I'd suspect it's because the Gardaí think it's an easier case to prove because this is a court order. And all they have to do is establish that it was breached. And communicating in some instances will be enough. If once they establish they communicated when they weren't, that's enough. But the problem is they forget about the furnished, the documentary proof. And then the case collapses and then there's no assault charge there at all and then the whole case is thrown out. J08

In some cases, the only evidence of service of the order on the defendant may be the complainant's evidence that the defendant was present in court when the order was served on the defendant. If the complainant withdraws cooperation, this vital evidentiary proof is removed and the case cannot proceed. Responding to Vignette 2 this judge noted that if the complainant were to withdraw his cooperation this may lead to the collapse of the prosecution:

> But given, you know, domestic violence cases can be very hard to prove anyway. You know, there's the technical evidence in terms of the service of the order. And say for instance the only evidence of service of the order was his evidence that she was present in court on the day the order was made, on the day the safety order was made, okay? If he's not there to give that evidence, then there's no proof of service of the order. J05

This judge also highlighted that since the recent decision in *DPP v R.K.* [202], when a Garda serves a domestic violence order he or she must be present in court to establish proof of service, and in many cases if the Garda who actually served the order is not present (for illness, long-term leave, holidays), the prosecution's case cannot proceed. When this happens the case

[202] [2019] IEHC 852. Procedural requirements for the lawful notification of protection orders were clarified by the High Court in 2019 in the *DPP v R.K.* This case arose by way of a case stated from the District Court to the High Court and emerged from a prosecution for a breach of a barring order granted under the Domestic Violence Act, 1996 (DVA, 1996). The central question revolved around whether or not the accused had been property notified of the barring order in accordance with section 10 of the 1996 Act. Justice Simmons clarified that notification in accordance with the provisions of the 1996 DVA is an essential proof as it is a pre-requisite to the barring order coming into effect. The Act provides for three types of notification: notification by prepaid post whereby the Court Service sends a copy of the court order; oral notification whereby the respondent is informed orally and is given a copy of the order; and deemed notification whereby the respondent is deemed to be aware of the terms of order by his or her presence in court when the order is imposed. In the District Court case, the prosecution adduced evidence of oral communication by the applicant for the order, but there was no evidence that the respondent had been furnished with a copy of the barring order. As such, Justice Simmons concluded that the prosecutor had not adduced any evidence that the accused received a copy of the order and that a conviction in these circumstances would not be safe.

will be adjourned which causes untold difficulties for the victims who may face repeated adjournments and court visits, spanning months and even years, before their case is concluded. The *R.K*. decision essentially adds another layer of technical proof to the prosecution of the breach of a domestic violence order under section 33. At least two judges highlighted that the absence of this essential proof as one reason for the high attrition rates in section 33 prosecutions.

More guidance is needed on the substantive proofs required for a successful prosecution of section 33. In particular, on whether putting someone in fear is objective or subjective:

> And as I say, there is very little by way of guidance in terms of the actual putting somebody in fear, whether that is objective or subjective. And they're all considerations that it would be helpful if there was some guidance on. J05

Another issue highlighted by some judges was the different evidentiary standards between criminal courts and family law courts. Whereas in the family law court, proof that one person is ringing another person excessively or sending excessive and abuse texts can be achieved by handing the phone to the judge, a section 33 prosecution requires a much higher level of evidentiary proof that the text messages emanated from the defendant's phone: required reference to Supreme Court precedent and much legal argument about the appropriate methods in the criminal law context whereas in the family law context the burden is much lower.

> Sorry, just on that. We wouldn't require the same… We wouldn't have the same evidential burden on proving the text messages. You know? If you're in a criminal trial you might say, oh, I didn't send those messages. Can you prove they came from me? Or you'd need the metadata on the phone nearly sometimes depending on the defence lawyer. We wouldn't look for the same level of proof of text message. And it's rarely raised but you wouldn't… You'd accept the phone or you'd accept the printout of the thing without need for further proof usually in the Family Court. J10

6.5 Summary and Conclusion

This chapter presented findings from judicial responses to the two vignettes judges were asked to sentence. In relation to Vignette 1, judges' hypothetical sentences represented a spectrum of severity with the most common approach being a suspended sentence. The spectrum of severity ranged from custodial sentences to non-custodial sanctions overseen by the Probation Service with many judges indicating they would request a PSR to increase insight into family circumstances. While findings from the interviews suggested that judges did not see a big role for the Probation Service in assisting the court when sentencing section 33 offences, many judges noted they would request a PSR to gain more insight into the circumstances of the parties. The aggravating factors mentioned most often by judges in Vignette 1 were the physical contact involved in the breach and the presence of child as a witness to domestic violence. The most commonly noted mitigating factors were no previous convictions, a guilty plea and proposals to move out of home. The priority judges give to living

arrangements is related to reducing the risk of reoffending and echoes a theme that emerged from interviews that judges approach section 33 offences somewhat differently to ordinary criminal offences because of the unique sensitivities involved. Treating offers to move out of the family home as a factor that mitigates sentence severity appears to be a common practice amongst the judges interviewed but may have unintended consequences and priority should be given to sentencing guidance for judges on this matter. The tendency of some judges to adopt a family law solution approach rather than one based on ordinary sentencing principles also highlights the need for sentencing guidance for District Court judges on the relevant factors that should be considered when sentencing and what, if anything, judges should do about child protection concerns.

While some judges consider physical abuse as more aggravating than psychosocial or emotional abuse, there was strong evidence that judges were motivated to adopt approaches that they believed would protect victims. For the most part judges were not in favour of avoiding a conviction in a section 33 prosecution although some noted that in exceptional cases this may be appropriate—particularly if requested by the victim. Judges' motivation to protect victims was evident from the fact that over half mentioned that they would request a victim impact statement and others noted that they would inquire into what the victim wanted to see happen before making their determination. Furthermore, some judges noted that they routinely use conditions of bail or suspended sentences to secure compliance of the respondent with the terms of the protective order.

The difference between judges who adopted a sentencing approach and those who adopted a family law approach was more distinct in relation to Vignette 2. Those who sentenced the vignette viewed the defendant as potentially at risk of imprisonment and viewed the offence seriously but would potentially suspend if a guilty plea was forthcoming. A second group took a family law approach focusing on custody and child welfare and a third group took a combination of a sentencing and family law solution approach. Some judges indicated that they would enquire into the mental health issues of the alleged perpetrator whereas others would refer to the Probation Service for anger management. Aggravating factors mentioned most often included the injuries the victim suffered, abusive texts, and a lack of remorse as indicated by the absence of a guilty plea. Most commonly mentioned mitigating factors included a guilty plea and no previous convictions. Most judges would not generally take multiple breaches of access orders into account as an aggravating factor but some would take them into account as evidence of an inability to comply with court orders or as part of a pattern of hostility towards the victim. Most judges indicated that section 33 prosecutions will usually fail if the complainant withdraws cooperation, unlike the Circuit Court in which there is a hostile witness provision. A majority of judges agreed that assault and criminal damage charges should be brought alongside section 33 charges. Some judges noted that bringing additional charges can be beneficial because it highlights the criminal nature of the behaviour and makes it more difficult for the defendant to raise emotional/relationship type defences.

While many judges noted that controlling behaviour was a common feature of section 33 cases in the District Court a majority appeared to believe that the reason very few section 39 prosecutions were taken in the District Court was because the offence of coercive control was too serious to be heard in that court. Just over one half of judges raised child welfare concerns in relation to vignette 2 and some were unclear of their precise role in terms of acting on or reporting their concerns. Judges raised a number of serious difficulties around how technical proofs related to section 33 offences often result in a substantial number of prosecutions collapsing on their first or second outing in court. Most important of these is the duty to show that the original order was furnished on the respondent and the necessity since *DPP v RK* for the Garda who served the order to be present in court to give evidence of proof of service.

7. Conclusions and Summary of recommendations

7.1 Introduction

This research study had three main objectives:

- To ascertain District Court Judges' views on the issues of concern and challenges in approaches to and arriving at sentencing in criminal matters in the District Court.
- To ascertain concerns and challenges in (the same) judges' approaches to arriving at decisions in specific cases of Relationship Violence and Abuse.
- To ascertain (the same) judges' views on how sentencing in the District Court might be better supported, including their views regarding the work of the SGIC in relation to sentencing guidelines and sentencing information.

This chapter provides a summary of the main findings and recommendations of the study relative to each of the three main objectives. It begins by providing a summary of the findings relevant to objective III of this study on how the sentencing in the District Court might be better supported by the work of the SGIC. This section is very succinct and essentially provides that District Court judges welcome and require the provision of sentencing information, sentencing guidance and sentencing training by the SGIC on a range of issues related to their experience of sentencing in the District Court. The remaining two sections of this chapter set out in much greater detail the content of the sentencing information, guidance and training that would support District Court judges in how they approach sentencing of criminal matters in the District Court and in how they approach the sentencing of criminal cases involving relationship violence, respectively. Each of these sections is prefaced by a summary of the main findings in order to contextualise the recommendations.

7.2 District Court Judges' views on how sentencing in the District Court might be better supported, including their views regarding the work of the SGIC in relation to sentencing guidelines and sentencing information.

Summary of main findings

- Overall judicial attitudes in the District Court showed a marked change from previous research. Most appeared to adopt a structured approach to sentencing with a minority following an instinctual synthesis approach and most valued consistency in sentencing.
- Most judges welcome guidance on a variety of issues although they are concerned that sentencing guidelines will interfere with their sentencing discretion.
- Most judges welcome the provision of more information on a range of sentencing related areas that are fully explored in the recommendations below.

- Most judges requested more CPD training delivered via innovative teaching and learning methods be employed to address the challenges presented by court sitting times.

7.3 District Court Judges' views on the issues of concern and challenges in approaches to and arriving at sentencing in criminal matters in the District Court

Summary of main findings

- District Court Judges face many of the same challenges and concerns in approaches to sentencing faced by judges who sit in lower criminal courts in other jurisdictions. Large caseloads and long court lists reduce the time and flexibility judges might otherwise have to explore in greater detail the various aspects of a case before imposing sentence. The need to progress cases and the pressure to avoid delays in a system already over-burdened was a constant theme throughout judicial accounts.
- District Court judges perceive themselves to be operating under considerable pressure, with the need to dispose of cases and get through the list a constant refrain raised by judges. This pressure is common to lower level criminal courts in other common law countries. It results in judges adopting a routinized approach to sentencing to get through the list. The need to adopt rules of thumb is exacerbated by the limited sentencing guidance and supports available to District Court judges.
- Most judges learned how to approach sentencing from their prior legal practice and did not receive training in sentencing when they were appointed to the bench. This accounts for the variation in practices between different judges with some long standing judges and relatively new judges having never encountered certain practices such as deferral of sentence. Some judges rely heavily on sentencing bench books whereas others had not been introduced to them. Bench books mainly reference maximum sentences and judges would welcome the provision of more information on the range of available sentencing options in bench books.
- Judges generally perceived sentencing options involving the Probation Service as not available without a considerable delay although most regarded the Probation Service highly. Ireland is unique in that previous research suggests that Irish judges welcome sentencing recommendations and assistance via pre-sanction reports from probation officers. This is not universally the case in other jurisdictions. The relationship between the judiciary and the Probation Service is of the utmost importance particularly for the District Court which predominantly uses probation supervision in the form of probation orders, supervision during deferment and community service orders. The removal of Probation Officers in attendance in courtrooms may have seemed like a cost effective proposal at the time but may have had unintended consequences of reducing the availability of probation reports thus indirectly influencing sentencing

practices. Judges would welcome the provision of more information and guidance on the supervisory sentencing options available to them.

- Judges sometimes vary their sentencing styles depending on the court they preside over. Moveable judges often expressed the view that they cannot use certain sanctions that rely on probation reports because they do not know when they will be back in that court. Judges sitting in specialised courts adopt different sentencing approaches that cater for the types of cases that appear before different courts. Judges would welcome the provision of more information and guidance on the specific challenges involved in approaching sentencing in specialised courts.
- Judicial approaches to the use of prison appear to mirror those discerned in previous research. Judges feel prison is appropriate for persistent offenders, serious offences and where no other penalty is appropriate. Judges identified various problems with community sanctions and alternatives to prison that prevented their use. The key one appeared to be that these sanctions are not suitable for the majority of offenders coming before the courts who are invariably unemployed, of limited means, suffering with addictions and mental health issues and generally living chaotic lives.
- Most District Court judges appreciated the stigma and life changing impacts of a criminal conviction and strive to avoid imposing a conviction where they feel there is a low risk of reoffending.
- Judges appeared to be less inclined to impose fines and an overwhelming consensus exists amongst participants that the enforcement of fines is unsatisfactory and likely to bring the sentencing system into disrepute. Fines are the mainstay of most criminal justice systems and so it would seem wise to review the problems highlighted here with the process of enforcement. However, some judges opined that judges in general do not conduct analyses of offenders' means and more guidance on this might prove useful in resolving difficulties. Sentencing guidance on the factors to consider when calculating the level of fines would be helpful.
- Judges are generally in favour of keeping the poor box and most would not welcome proposed changes involving the creation of a national reparation fund. At the moment, according to judicial accounts gathered in this research, it may be filling a gap in place of fines which are perceived as unlikely to be paid.
- While these challenges outlined above are not unusual in lower criminal courts throughout the world, in the Irish District Court they are compounded by a lack of a bespoke programme of judicial induction, training and continued professional development in the area of sentencing. They are also compounded by systemic problems including the absence of an appellate review system for the District Court, the under-resourcing of prosecutors whose duty it is to assist judges in information on sentencing, the lack of consistent availability of probation officers and probation reports, problems with the enforcement of fines, and a low level of awareness of the range and diversity of sentencing options available. All of these systematic issues

exacerbate the challenges District Court judges face in arriving at an appropriate and fair sentence.

- Further challenges include the requirement under sentencing law to treat previous convictions as aggravating the seriousness of the offence regardless of how minor the offence in question is. This, coupled with the fact that most sentencing disposals available to District Court judges are not suitable for the types of defendants being sentenced there—many of whom are homeless with addiction issues, whose lives are often chaotic with little structure, and who are survivors of inter-generational family trauma associated with poverty, addiction, institutional abuse and adverse childhood events—makes arriving at an appropriate sentence in the District Court a very challenging enterprise. In many respects, the criminal justice system is not the place to address what are essentially social, cultural, economic and political issues. Yet this is precisely what we ask judges to do when they sentence people who come up before the District Court on criminal offences. However, many sentencing disposals available to judges are often not fit for purpose given the types of characteristics and life circumstances of defendants who appear before them.
- Whilst this points to the need for policy solutions to provide judges with the tools for the job at hand, there is a careful balancing act involved between the executive and the judiciary in terms of policy development. Clearly government policy must address the lack of suitable and available sentencing disposals in the District Court as well as much of the content of sentencing law and policy. The judiciary has a duty to ensure that the best resources currently available including training and guidance are made available to District Court judges determining sentence. The SGIC can begin the work of the provision of more information and guidance, complemented by training, in the area of sentencing by adopting the following recommendations to address the challenges District Court judges face when sentencing.

Recommendations relevant to how the SGIC can support sentencing judges in the District Court in terms of sentencing information, guidance and training.

The Provision of Sentencing Information

- Annual updates to sentencing bench books with a chapter on the full range of sentencing disposals available to judges sentencing in the District Court, outside of the maximum terms of imprisonment and fines applicable to each offence. Particular emphasis to be placed on the provision of sentencing information on the types of sentencing disposals that the Probation Service oversees and the types of circumstances in which these options might be suitable. Information on all available diversion programmes in Ireland should also be incorporated into a Sentencing Bench Book for new District Court judges.

- The provision of information for the District Court on the various community sanctions overseen by the Probation Service to inform judges about the range of different supervisory sanctions, what they involve as well as the relative success of the different sanctions in helping people desist from crime. Particular attention might be paid to raising judicial awareness and understanding of the Probation Order. Information might usefully provide judges with insights from research on desistance on what works in terms of reducing reoffending.

- Regular updates on Court of Appeal sentencing judgments but with emphasis on those particularly relevant to sentencing in the District Court and reported with specific discussion of their relevance in the context of the District Court.

- Provision of information to new and experienced judges on existence of different types of courts and different skills needed for these courts. Ideally information should be made available on induction and at the latest before a judge is assigned to a specialised court.

- Regular provision of feedback to District Court judges on the outcomes of all District Court sentencing appeal decisions.

The Provision of Sentencing Guidance

- Develop sentencing guidelines, in consultation with District Court judges, which offer clear guidance, but also allow for departures once clear justification is given.

- Guidelines should be accompanied by training for judges to ensure all judges understand how to apply guidelines in practice. Guidelines should also be monitored to understand implementation issues and their impact on judicial sentencing practices.

- Develop sentencing guidelines specific to the District Court based on the general sentencing jurisprudence of the superior courts. Guidelines should be specifically adapted to the types of cases and circumstances typically heard in the District Court and the following areas should be prioritised:

    - the adoption of a structured approach to sentencing, and the various steps involved in this with specific examples based on typical cases tried and sentenced in the District Court;

- the different points on the scale of severity for the more serious offences heard in the District Court and appropriate penalties incorporating the full range of financial, supervisory and custodial sanctions available to the District Court;.

- role of previous convictions in sentencing in the context of the District Court with particular emphasis on cases with large volumes of previous convictions where the offence itself is relatively minor;

- Sentencing guidance on the application of the principle that prison should be used as a last resort and how judges in the District Court should apply this principle when sentencing persistent offenders who are experiencing chaotic living circumstances including homelessness, poverty, addiction as well as physical and mental ailments.

- Sentencing guidance on repeat road traffic offences, particularly no insurance, and on possession of drugs for personal use.

- Sentencing guidance for judges on the circumstances in which it is appropriate to request a pre-sanction report from the Probation Service.

- Sentencing guidance on the types of cases in which supervisory sanctions might be most appropriate for.

- Sentencing guidance for judges on the circumstances in which documentary evidence should be required to corroborate sentencing information provided by either the defence or the prosecution.

- Sentencing guidance for judges sentencing in specific specialised courts such as the Road Traffic Court, Fines Enforcement Court, and Domestic Violence Court.

- Sentencing guidance on the sentencing options available to moveable judges and identification of the obstacles preventing use of certain sanctions and guidance specific to how moveable judges might tackle certain obstacles presented as a result of their moveable position.

- Sentencing guidance on the exact point in the process at which judges may decline jurisdiction in the District Court and on the various factors that may appropriately be considered when reaching this decision.

- Develop a mechanism for providing judges with feedback on how cases they declined jurisdiction for in the District Court were sentenced in the Circuit Court.

- Develop guidelines on the circumstances in which it is appropriate to use a dismissal, a conditional discharge, and a strike out after facts proven.

- Guidance on arriving at the appropriate fine taking into account all the relevant circumstances including income.

- Sentencing guidance for judges in relation on the types of circumstances in which a contribution to charity should be considered instead of or in addition to a fine.

- Guidance on the circumstances in which it is appropriate to impose a compensation order, either as a standalone penalty or in addition to another penalty.

- Guidance as to how a voluntary payment of compensation by the defendant to the victim can be treated in sentencing. Specifically, whether guidance on when it is appropriate for compensation to be treated as a factor that mitigates the severity of the sentence, and whether it is appropriate that such mitigation might make the difference between a custodial and a non-custodial penalty. Guidance should specifically tackle the issue of equity and fairness involved in the fact that defendants without financial means will not be able to avail of this form of mitigation.

- Guidance on the circumstances in which supervision during deferment of sentence should be imposed including types of cases, circumstances of the offenders, and circumstances of the crime and victim impact statements. Guidance should include indication of maximum time period for deferment of sentence and appropriate review intervals.

The Provision of Sentencing Training to Complement Sentencing Guidance

- Introduction of a new sentencing information training programme bespoke to judges of the District Court, which should begin with an audit of their information training and needs and will utilise the concept of continued professional development.

- Training for all judges on the various IT platforms and software necessary to access electronic resources and participate in virtual hearings.

- Training for new and experienced judges on the nature and purpose of pre-sentence reports. This training might emphasise the difference between the level and type of information produced by Probation Service reports and that produced by solicitors during a plea in mitigation.

- Trauma informed training should be provided to all judges on induction and access to trauma informed training should be made available to all judges of the District Court throughout their tenure by way of Continued Professional Development.

- Provision of training to new and experienced judges on existence of different types of courts and different skills needed for these courts. Ideally this training might be included in induction and before a judge is assigned to a specialised court.

- Training for all judges of the District Court on assessment of financial means when imposing a fine. Training should include material that provides a holistic and dynamic understanding of the lives and daily experiences of people experiencing poverty. Partnering with an NGO such as All Together in Dignity-Ireland (ATD) which already runs a successful training module in association with Trinity College Dublin.[203]

7.4 Concerns and challenges in District Court Judges' approaches to arriving at decisions in specific cases of Relationship Violence and Abuse.

Summary of main findings

- Ireland does not have a specifically designated or specialist domestic violence court. By default more than design, there are at least two different approaches to prosecuting breaches of domestic violence orders in the Irish District Court. In most provincial districts domestic violence breaches will be heard by the presiding judge who will have heard and granted the application for the protective order in a separate family law sitting. In provincial districts with an assigned judge the same judge will deal with the criminal, family and civil matters relating to a family, including breaches of domestic violence orders. In contrast to this, in the Dublin Metropolitan District (DMD), and certain other large urban districts, domestic violence prosecutions are heard by a judge who had no involvement with the application for the protective order. This is because family law applications are centralised in some of the larger districts, so different judges will hear the application for the protective order to those who hear prosecution of breaches of the protective orders. A number of courts in the DMD have a dedicated domestic violence list and at least one of these is designated as a vulnerable witness court which means that they have facilities to cater for vulnerable witnesses. Prosecutions of section 33 are always heard in camera regardless of which judge presides over them.
- Despite the fact that some districts have a dedicated court list for domestic violence prosecutions judges in these courts do not have specialist training to deal with the dynamics of family violence or specialist court professionals who have training on

[203] https://www.atdireland.ie/wp/poverty-awareness/

managing the dynamics of domestic violence in courtroom contexts. In districts with a dedicated domestic violence list there is no sharing of information or coordination between concurrent criminal and family law proceedings dealing with the same parents and children. Despite this separation between the civil and criminal matters, judges who only heard and sentence the criminal aspect of a case indicated their awareness that the circumstances may involve ongoing access issues, the parties may be in an ongoing relationship, may be continuing to reside together through necessity, or there may be separation/divorce proceedings underway, which many of the judges interviewed considered to be circumstances that needed to be factored into sentencing of section 33 offences.

- Conversely, judges in provincial districts that hear both the civil and criminal proceedings in relation to the same family, other than moveable judges, often have the family law file in front of them, will generally have heard or be dealing with the civil aspect of the case in terms of custody, access and maintenance, and will generally have heard the domestic violence *ex parte* application and have granted Safety or Barring Orders in any subsequent hearing. While many judges interviewed put aside any knowledge they had of this family, concerns around an inference of bias or a difficulty with the presumption of innocence were expressed by some, given the first-hand knowledge a judge may have. Other judges expressed a view that this knowledge of the family helped them to take a holistic solution orientated approach, particularly where the breach was at the lower end of the scale. A third group of judges felt that having knowledge of the civil law aspects of a domestic violence prosecution makes no difference to them as they are solely focused on the adjudicating on whether or not there has been a breach of the order and on sentencing that offence.
- The majority of judges interviewed expressed the view that relationship violence cases are different to other criminal cases due to the relationship between the parties and the sensitivities and complexities that this gives rise to. Most showed an awareness of the ongoing nature of the family law proceedings and of the tensions that this can give rise to in terms of custody, access, maintenance and property division on judicial separation or divorce and that these proceedings can give rise to continuing conflict and ongoing litigation. Judicial responses to the vignettes showed that some judges responded to the breaches by adopting a sentencing approach whereas others adopted a family law approach more akin to problem solving. In Vignette 1 most judges enquired about the living arrangements of the parties and indicated that they regard the defendant moving out of the family home as a strong mitigating factor, mainly for victim protection purposes. In Vignette 2 the differences between the sentencing approach and family law approach were more noticeable with a large minority of judges indicating that they would not deal with the matter until the family law issues had been resolved in relation to custody, access and child welfare concerns. In contrast, judges that adopted a sentencing approach viewed the breach in Vignette 2 as very serious and indicated that a prison sentence was a strong possibility. A third

group of judges combined the two approaches indicating that they would apply sentencing principles but also prioritise probation involvement and child welfare enquiries.

- This study therefore found a divergence of approach amongst District Court judges in terms of how they approach the sentencing of breaches of domestic violence orders which was principally related to the different court contexts in which they operate. Differences in approach to the sentencing of domestic violence offences under section 33 of the Domestic Violence Act 2018 have emerged organically rather than by design. The SGIC can support the adoption of a more coherent and uniform approach to the sentencing of domestic violence offences under section 33 by the provision of a bespoke programme of sentencing information, sentencing guidance and sentencing training relevant to the section 33 types of cases that typically appear in the District Court.
- Most judges take a serious view of the impact on children who witness domestic violence and most treated this as an aggravating factor in Vignette 2. A majority of judges raised concerns about child welfare in both vignettes and judges would welcome greater clarity about how to deal appropriately with these concerns.
- There was strong evidence from judicial responses to the vignettes that judges are highly motivated in their approaches to sentencing to protect victims of domestic abuse. About half specifically mentioned that they would normally request a victim impact statement and many others noted that they would inquire into what the victim wanted to see happen before making their determination. Some judges routinely use conditions of bail or suspended sentences to secure compliance of the respondent with the terms of the protective order.
- Most judges had no involvement in a section 39 prosecution and all judges would welcome the provision of more guidance around the use of section 40 of the DVA 2018. Many judges noted that they would welcome more information around the proofs necessary for a section 39 conviction and most believed that the lack of section 39 prosecutions in the District Court was due to the serious nature of such offences. Despite this many noted that controlling behavior is commonly observed in section 33 prosecutions.

Recommendations on how the SGIC can support judges in the sentencing of cases involving relationship violence in the District Court in terms of sentencing information, guidance and training.

The Provision of Sentencing Information

- The provision of sentencing information for District Court judges on the different forms of domestic abuse and their respective impacts on victims/survivors and their children. Provision of reliable and accurate literature on the various forms of

domestic abuse and their respective harms is essential in order to enable sentencing judges to correctly assess the nature of the harm involved in domestic abuse cases and thus the seriousness of the offence.

- The provision of sentencing information for District Court judges on the various ways in which victims/survivors of domestic violence can experience re-victimisation as they navigate their way through three interlinked but unconnected processes—the private family law process, the criminal process and the public childcare process. Ideally information provided will be trauma informed and include literature on trauma informed court practices.

- The provision of sentencing information for District Court judges on the dual powers available to them under section 33 of the 2018 DVA and circumstances in which it may be appropriate to rely on contempt of court powers where a breach of a court order is proven.

- The provision of sentencing information for judges on the range of rehabilitative programmes available and best practice approaches to reducing the reoffending of perpetrators of domestic violence.

- The provision of information for District Court judges on the various proofs necessary to ground a conviction in section 39 coercive control cases.

- Sentencing information on section 40 of the DVA 2018 and the types of cases that it might arise for consideration in.

- The provision of sentencing information for judges regarding the range of other professionals that may provide the court with assistance in sentencing section 33 cases.

- The provision of a dedicated Sentencing Domestic Abuse Bench Book for District Court judges which will provide a one stop shop for all the sentencing information and guidance they need when sentencing section 33 offences and of other criminal offences involving domestic abuse.

The Provision of Sentencing Guidance

- Sentencing guidance for District Court judges regarding best practice approaches in sentencing section 33 offences that incorporates an understanding of the difficulties encountered by victims of domestic abuse when navigating the three different legal processes including the criminal justice, private family law and public childcare law processes.

- Sentencing guidance for District Court judges on how to approach the sentencing of section 33 cases that sets out the various considerations that judges should be aware

of when assessing the harm caused by the breach of the protective order, the various levels of culpability of the convicted person, and the range of aggravating and mitigating factors that should be considered when assessing the overall level of seriousness of the offence. The guideline should also offer clarity on the range of personal factors and circumstances that might legitimately be considered in terms of mitigation of headline sentence.

- Sentencing guidance for District Court judges on how to assess the harm caused by the breach of the protective order and/or involved in cases involving domestic abuse should focus on helping judges to recognise and assess the impact of the various harms that are evidenced in a particular case including psychological, emotional, financial, and physical harms. The assessment of harm caused by the offence goes directly to the question of the seriousness of the case which along with culpability is a major component of arriving at the headline sentence in accordance with the principle for proportionality in Irish sentencing law.

- Sentencing guidance on how the harm caused by the alleged breach of section 33 is to be assessed—whether an objective or a subjective test should be employed by judges when assessing the extent to which the victim was put in fear by the perpetrator.

- Sentencing guidance for District Court judges on the range of mitigating factors that can appropriately be considered in the context of the sentencing of cases involving domestic abuse. Particular care is needed to avoid unforeseen or unintended consequences.

- Sentencing guidance for District Court judges on the appropriateness of imposing conditions around the living arrangements of defendants in section 33 cases and other cases involving domestic abuse, as conditions of sentences or as a factor that mitigates the severity of the sentence. Guidance should be informed by research on domestic violence, particularly domestic violence research on levels of post-separation violence.

- Sentencing guidance on the application of section 40 in practice focusing on how much weight should be given to the existence of the relationship between the perpetrator and victim as an aggravating factor when passing sentence in domestic violence cases.

- Sentencing guidance on how District Court judges should take into account the impact of domestic abuse, in all its forms, on all parties affected and particularly on children, when passing sentence in section 33 breaches and in other cases involving domestic abuse. Sentencing guidance should take into account that being exposed to all forms of violence against a mother endangers the best interests of the child and renders that child a victim in his or her own right.
- Sentencing guidance on the circumstances, if any, in which it might be appropriate to not impose a conviction for a breach of a domestic violence protective order under the Domestic Violence Act 2018.

- Sentencing guidance on the weight that judges should give to victims' requests regarding the sanctioning of a person convicted of a section 33 offence.

- Sentencing guidance to assist District Court judges in the sentencing of section 39 cases that highlights the need for the assessment of the harm caused by an offence under section 39 to be informed by a wider consideration of the overall behaviour involved rather than focusing only on the harm caused by the individual acts.

- Sentencing guidance for District Court judges on how to approach the assessment of harm associated with psychological and emotional abuse, particularly when it is used as a method of control to gain dominance over a victim, and the circumstances in which the attempt to control the victim may be considered as an aggravating factor, when sentencing section 33 cases and all criminal cases involving domestic abuse.

- Sentencing guidance on the types of conditions attached to suspended sentences imposed in criminal cases involving domestic abuse typically aimed at preventing alleged perpetrators of domestic violence from engaging, communicating or living with alleged victims. Particular attention should be paid to the literature on domestic abuse and victim protection and research on unintended consequences.

- Sentencing guideline for District Court judges on the types of behaviours and circumstances that can be considered as aggravating factors when passing sentence on a person who has breached a domestic violence protection order.

- Sentencing guideline for District Court judges on what action, if any, is appropriate for District Court judges to take when child welfare concerns arise during a criminal prosecution for domestic abuse such as in a prosecution of and/or sentencing for a section 33 offence. The guidance should set out specifically where judges stand vis-à-vis the requirements of all adults to report child welfare concerns under the Children First National Guidance 2017.

The Provision of Sentencing Training to Complement Sentencing Guidance

- Sentencing training for District Court judges on how to identify different forms of abuse and their respective impacts on victims/survivors and their children. Training on recognising the various forms that domestic abuse can take and their respective harms is directly relevant to sentencing judges to enable them to correctly assess the nature of the harm involved in the domestic abuse and thus the seriousness of the offence.

- Training for District Court judges on the various forms of domestic violence should include psychological, physical, emotional and financial abuse; how to recognise each form of abuse and the respective impacts that each type of domestic abuse can have on victims/survivors and their children. Training and information will directly impact judges' assessment of harm when sentencing by expanding their awareness of the various types of harm that can arise from domestic abuse in all its forms.

- Training should be trauma informed and should focus specifically on:
    - familiarising judges with the research literature on the impact of domestic violence, particularly coercive control, on victims/survivors and their children;
    - the reasons why women experiencing domestic violence stay in relationships;
    - the impact of psychological and emotional forms of abuse;
    - the various ways in which victims/survivors of domestic violence can experience re-victimisation and re-traumatisation as a result of participating in and trying to navigate their way through the family law and criminal courts.

- Training for all judges on the long-term psychological impacts of domestic violence on adults and on children.

- Sentencing training for District Court judges on the various ways in which victims/survivors of domestic violence can experience re-victimisation as a result of participating in and trying to navigate their way through three interlinked but unconnected processes—the private family law process, the criminal process and the public childcare process. This training should be trauma informed and should include training in trauma informed court practices.

Appendix I:

Study of District Court Judges Views on Sentencing & Relationship Violence

Judges Interview Schedule

Preamble: This interview has two parts. Part I focuses on judicial views of sentencing, how judges approach the sentencing decision and their views on sentencing guidelines. Part II focuses on judicial views on the sentencing of cases involving relationship violence.

Part I Sentencing

To begin, I would like to ask you a few general questions about your views on sentencing…

What **challenges does passing sentencing in criminal cases present** in your view?

Could you describe your own approach to sentencing? What factors are the most important and do you follow a set process or how do you go about determining the sentence?

What **guidance or sources of information** would you like to have available?

What are your **views on the introduction of sentencing guidelines**? In your view, would sentencing guidelines assist judges in their sentencing decisions?

What **concerns,** if any, would you have around the introduction of **sentencing guidelines** in relation to District Court sentencing?

The next few questions focus on your views about the different **methods of disposal** of cases that are available to judges in the District Court including different sentencing options….

How important in your view does the **initial decision to accept or refuse jurisdiction in relation to the determining the sentencing decision**?

What factors typically inform your decision in relation to the decision to accept or refuse jurisdiction?

Is **adjourned supervision** a useful sentencing tool in your opinion, if so why?

Have you ever adjourned a sentencing decision with supervision for a period? If so, in what types of circumstances would you typically adjourn or defer a sentencing decision?

What is your view of the **decision to record or not record a conviction**? In what circumstances might you not record a conviction?

In what types of cases or circumstances might you **strike out a case** after the facts have been proven?

What are you views on **diversion programmes such as restorative justice**? Are you generally supportive of diversion programmes? Could you give an example in which you have used them?

What types of cases are **community sanctions** (CSOs, POs and AS) generally most suitable for? Could you give an example of a recent case you sentenced to a community sanction?

What **types of cases are custodial sanctions generally reserved** for? Do you believe in the principle that sentence of imprisonment should be a last resort? If so, how would you define 'last resort'? If you do not agree with this principle can you explain why?

What are your views on the **usefulness of suspended sentences**? Could you give an example of a recent case in which you imposed a suspended sentence?

The Fines (Payment and Recovery) Act 2014 introduced payment of fines by instalment and the use of CSOs instead of imprisonment as a means of enforcement. What has your experience been with this new regime?

In what **types of cases do you impose compensation orders**? Do you generally impose them as standalone orders, instead of another penalty or in addition to another penalty? Can you give an example of a recent case in which you imposed a compensation order?

What are your views on the use of **charitable donations** in sentencing decisions? Do you typically use charitable donations/donations to the poor box for particular types of cases? If so, how is this approach better than imposing a fine or a compensation order or both?

Should **Victim Impact Assessments** be available in relation to all offences as an aide to determining sentence?

Part II Sentencing Relationship Violence

I would like to ask you a few general questions about your views on cases involving relationship violence; i.e. offences under sections 33 and 39 of the Domestic Violence Act 2018.

Is it normal for you to hear breach prosecutions in cases where you made the original civil order? If so, is that helpful or unhelpful (and why)? What impact, if any, does this have when sentencing the Accused?

Do you approach Relationship Violence cases differently to other criminal cases?

What kind of mitigating factors that a court will consider in a case involving an offence under section 33 or 39 of the DV Act 2018?

What is your understanding of the role of a probation officer in assisting the court in a relationship violence case? Do other professionals have a role in assisting the court with these cases?

Previous research has indicated that approximately 15% of DV cases involve parents seeking protection from their adult children.

When considering this type of case what weight is given to the following facts: mental health problems, drug and alcohol abuse and the potential for homelessness?

Have you dealt with a prosecution for the offence of coercive control, section 39 of the DV Act 2018? If yes, did you approach it differently to a section 33 breach?

Have you come across section 40 of the DV Act 2018 and are you aware of its provisions?

Do you think you would benefit from training to better understand the dynamics of family violence?

Would you welcome more information on sentencing practice in this area from the Sentencing Guidelines and Information Committee of the Judicial Council?

Sentencing Vignettes: Relationship Violence

In the next section, I would like you to read two brief hypothetical sentencing vignettes and talk me through how you would approach each case.

Breach of a Safety Order, living together

Adi and Mary are married with 4 children between the ages of 6 and 15, they reside together in the family home in Wexford purchased from the County Council. The marriage has been in difficulty for some time and there are frequent rows between the parties. In January 2022 Mary secured a Protection Order and was subsequently granted a Safety Order for a period of two years. On May 26th Mary called the Gardaí just before midnight. She alleged that Adi had breached the Safety Order and wanted him arrested and taken from the house. He had been drinking and kicked her bedroom door open, calling her a nutjob and a psycho and pushed her down on the bed as she rang the Gardaí. He struggled with her, grabbed her phone and threw it out the door and their eldest son intervened. Adi was arrested for a breach of the Safety Order and taken to the local Garda station. The breach, a section 33 offence of the DVA Act 2018 is before the court for sentencing. Adi has a previous conviction for being in charge of a mechanically propelled vehicle while under the influence of an intoxicant, section 5 (1) of the Road Traffic Act 2010.

Q1: What do you think would be an appropriate sentence and what factors would you consider in making that determination? Would your answer be different if there was a barring order in place?

Q3: Does the fact that this is the end of a marriage have a bearing on how you would approach sentencing; is it an important factor that the parties are spouses or cohabitants and living together?

Q4: Would the presence of children have an impact on sentencing?

Q5: What are the mitigating or aggravating factors that would be considered?

Q6: Are you mindful of trying to defuse matters where the parties live together or have children and are you more inclined to avoid a criminal conviction in a relationship case?

Vignette 2. Breach of a Safety Order, living apart

John and Yvette are in their 20s, are unmarried parents, and have a three year old child. Both are working and the paternal grandparents assist with looking after the child. They lived together but broke up and John moved back to his parents' house. John told his parents that Yvette had a quick temper, always seemed to be angry at him, and would frequently hit him. John applied for access and guardianship and both were granted. Yvette subsequently breached the access orders on multiple occasions until the court threatened to change custody. John had access every second weekend from Friday afternoon until Saturday afternoon, the drop offs and collections took place in the carpark of the local church. Yvette sent hundreds of abusive texts to John, posted nasty comments about him on the Facebook pages of mutual friends and would call him names in public in the local bar and the nightclub in town. One night she drove her car at him, he was terrified and jumped into the hedge. He was granted a Protection Order and subsequently a Safety Order. A week later, after John put the child in the car, Yvette became angry and pushed him so hard that he fell over and injured his head, requiring 4 stitches. Yvette was arrested and the matter is before the court for sentencing as a section 33 offence under the DVA Act 2018. Yvette has no prior convictions. John has told the prosecuting Garda that he has decided not to cooperate as he thinks it will only make things worse and he just wants to see his child.

Q1: What do you think would be an appropriate sentence and what factors would you consider in making that determination?

Q2: Are multiple prior breaches of court orders for access by the mother considered an aggravating factor when determining the appropriate sentence in this case?

Q3: In your experience how difficult is it for a case to be successfully prosecuted where the complainant withdraws co-operation?

Q4: Do you think it would be better for charges to be brought under section 33 of the DVA Act 2018, or under section 2 or 3 of the Non-Fatal Offences Against the Person Act 1997, and why? Does the existence of section 40 of the DV Act 2018 make a difference here?

Appendix II:

Additional Recommendations Not Directly Relevant to the Work of the Sentencing Guidelines and Information Committee

Chapter 3

- Implement recommendations of OECD Report[204] and the Report of the Judicial Working Group[205] particularly those relating to increasing the judicial positions at the District Court level and the introduction of a case management system.
- Training for solicitors and barristers on their obligations to provide the court with sentencing information to assist the court in passing sentence. Training should highlight the obligations of defence lawyers in relation to the plea in mitigation and prosecutors' duties to comply with their obligations as outlined by the Director of Public Prosecutions Guidelines for Prosecutors.
- Mapping of different types of court context and specialised courts—information on this does not appear to exist anywhere, at least anywhere open to the public to access.
- Reform of the current de novo appellate system to include a transcript based appeal system in which judges of the District Court receive feedback from appeals of their sentencing decisions to inform their practice. Any new system should incorporate a means of providing annual feedback of all District Court sentencing appeal decisions.
- Training for all judges on the full range of different sentencing disposals currently available to judges of the District Court with particular emphasis on disposals overseen by the Probation Service including probation orders, deferment of sentence, community service orders and supervision of part suspended sentences.

Chapter 4

- The DPP in conjunction with the Department of Justice should consider developing guidance for prosecutors on whether disposals such as dismissal, conditional discharge and strike out after facts proven should remain on the PULSE system as a record and whether prosecutors should routinely inform the court that the defendant has had the benefit of such disposals in the past.
- Review and develop existing diversion programmes with a view to streamlining the processes involved and providing a dedicated support system through collaboration between the Judiciary and the Probation Service.
- Research to explore the experiences of people interacting with the current fines system to establish whether or not the new system does prevent imprisonment of fine defaulters, to examine the reasons for failure to pay fines and for failure to attend court and to explore alternative approaches to fine payment and recovery.
- Change to Court Services procedures to allow payment by instalments for fines under €100.

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[204] OECD, Modernising Staffing and Court Management Practices in Ireland: Towards a More Responsive and Resilient Justice System, (OECD Publishing, 2023). Available at: https://doi.org/10.1787/8a5c52d0-en.

[205] Department of Justice, *Report of the Judicial Planning Working Group*, December 2022. Available at: 1894d424-7e23-4dc0-b6c6-3e40babe4016.pdf (www.gov.ie)

- Collaboration between the Judicial Council, the Courts Service, the Director of Public Prosecutions and the Department of Justice to examine the problems currently impacting the system of fine payment and recovery including in particular:
    - Delays in issuing notices to pay and to attend court.
    - No State representative present in court when fine defaulter does attend court and wants to pay.
    - Review the size of the fines required to be convertible to a community service order–currently stands at €500 or more.
- Research to explore the similarities and differences in how fines and contributions to charity are used by the courts, as well as the merits and de-merits of centralising the poor box into a national reparation fund.
- The introduction of a legislative basis for supervision during deferment of sentence as a standalone community penalty. Any such legislation should be introduced in consultation with the Judicial Council and the Probation Service.
- Policy solution to increase resources available to the Probation Service to ensure the timely provision of pre-sanction reports and supervisor sanctions in the District Court. The loss of Probation Officers in every courtroom in the country might account for the low take up of the sanctions supervised by the Probation Service. A major re-investment in resourcing the Probation Service to provide the reports and the community projects in every part of the country is needed. Judicial Sentencing Bench Book should include details on community sanctions and indeed all non-custodial sanctions and judicial training should include modules on non-custodial and community sanctions.
- Enhance inter-agency collaboration between the Probation Service and the Judicial Council with a view to enhancing mutual understanding, trust and communication.
- Further research and policy development needed to address the issue of the suitability requirement for community service orders. Who makes the decision regarding suitability—judges, probation officers, or defence lawyers? What is the criteria for suitability? Does suitability differ across districts or is it related to the specific programmes available in specific districts? Judicial accounts suggest that suitability for community service in the District Court appears to be narrowly confined to cohorts of people who do not have addictions and who are mentally robust. This represents a small minority of people being sentenced before the courts. If this is to change, community service projects that cater specifically for these cohorts need to be developed. One might ask whether the question about suitability should be completely reframed towards the suitability of the community service projects for the clients coming before the court rather than vice versa.
- Policy solution required to address the practical difficulties associated with the suspended sentence which largely revolve around whose responsibility it is to seek the activation of the sentence once a breach has been committed.
- Further research needed to explore the level of risk of those typically given suspended sentences by the courts and the rate of compliance with these sentences. Judicial accounts suggest that levels of compliance are high but there is no data collected on this to confirm or contradict this perception.
- Policy solutions required to specifically address the limited range of sentencing options available to judges sentencing persistent petty offenders in the District Court.
- Policy development and legislative action required to review the current role of previous convictions in Irish sentencing law.

- Policy and legislative solutions to provide additional sanctions and measures suitable to the circumstances and characteristics of the most vulnerable persons who persistently offend and appear for sentencing in the District Court.
- Policy review of the impact of sentencing principles that allow people to be repeatedly and cumulatively punished for each additional conviction.

Chapter 5

- That the Courts Service collect and publish information on the gender of and relationship between the applicants and respondents in applications for protective orders under the Domestic Violence Act 2018.
- Policy solution required to address gap in legislative provision and service provision in situations where parents of violent adult children who are deemed dependent cannot apply for a protective order under the Domestic Violence Act 2018.
- Policy solutions urgently required to reduce reoffending amongst perpetrators of domestic abuse.
- Training for District Court judges on new offences introduced into Irish law on an annual basis. This is related to two recommendations made by the OECD Report[206] including:
    - Training needs of judges—gaps identified including specific training in IT use and alternatives to custody options in criminal cases. Consider in-depth detailed study to ascertain training needs and opportunities of judiciary and its support staff.[207]
    - Regulatory Impact Assessment of legislative proposals impacting on court operations, the additional court resources needed and the impact on court operations and court users if no such resources are available.[208]

Chapter 6

- There is an urgent need to collect accurate statistics on section 33 prosecutions, the attrition rate and reasons for non-continuance of prosecution. Further research is needed to thoroughly explore the reasons for withdrawal of cooperation in order to identify, what steps, if any, can be taken to support victims/survivors of domestic violence throughout the prosecution of section 33 offences.
- A review of evidential proofs required for a successful prosecution of a section 33 breach of a domestic violence protective order under the Domestic Violence Act 2018. The review should focus on identifying the impact of the technical proofs on the collapse of section 33 prosecutions and on what changes are needed to reduce the number of prosecutions that fail as a result of difficulties of adducing evidence for the various technical proofs required to successfully prosecute a section 33 offence.
- Courts Service to collect and publish information on the gender of and relationship between the applicants and respondents in applications for protective orders under the Domestic Violence Act 2018.

[206] Ibid (note 204) 16.

[207] Ibid (note 204)17.

[208] Ibid (note 205) 13.

- Collect and publish statistics on the reasons for the non-continuance of section 33 prosecutions in the District Court.
- Conduct research to establish definitively the challenges involved in successfully prosecuting section 33 breaches of protective orders. This research should be geographically diverse and encompass the perspectives of all the stakeholders involved.
- Further research to establish the extent to which conditional measures and sanctions (such as conditions related to bail, to suspended sentences, probation orders, deferral of sentence) incorporate requirements aimed at preventing alleged perpetrators of domestic violence engaging, communicating or living with alleged victims.
- There is an urgent need to collect accurate statistics on section 33 prosecutions, the attrition rate and reasons for non-continuance of prosecution. Further research is needed to thoroughly explore the reasons for withdrawal of cooperation in order to identify, what steps, if any, can be taken to support victims/survivors of domestic violence throughout the prosecution of section 33 offences.
- Collect and publish statistics on the reasons for the non-continuance of section 33 prosecutions in the District Court.
- Conduct research to establish definitively the challenges involved in successfully prosecuting section 33 breaches of protective orders. This research should be geographically diverse and encompass the perspectives of all the stakeholders involved.
- Introduce legislative amendment that states that there is a presumption that a protective order has been served on the respondent to address the need for actual proof on the part of prosecutor that the order has been served.
- Establish guidelines for the prosecution of section 33 breaches of protective orders that must be adhered to by all prosecutors. Guidelines should address the circumstances in which additional charges should be taken alongside section 33 prosecutions as well as the necessary proofs that are required to discharge the prosecutor's burden of proof.
- The formulation of a specific District Court policy on the prosecution of section 33 breaches, section 39 coercive control cases, the circumstances in which it is appropriate to bring one or both of these charges, or indeed additional charges such as assault, harassment, criminal damage and endangerment.
- Training for prosecutors, defence lawyers and judges on the Domestic Violence Legislation, particularly the various evidentiary proofs necessary for successful prosecution of each offence and the various protections for victims particularly those aimed at preventing re-victimisation.
- Policy solutions arising from research findings;
    - Reform of current de novo appellate system and introduction of a transcript based system of review of sentencing decisions with annual feedback to DCJs;
    - Resourcing the Probation Service sufficiently to ensure pre-sanction reports and same day community service order reports are available to courts;
    - Review and reform of the fines system to include provision of state party to deal with enforcement of fines in court.
    - Review of role of previous convictions in the sentencing law.
    - Development of specific probation programmes/sanctions suitable for persons suffering from mental health difficulties and addiction. Potentially adjust existing supervisory sanctions to make them specifically suitable for these cohorts.