



What's Wrong with the Criminal Justice Bill 2007?

ICCL Fact Sheet

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About the Irish Council for Civil Liberties (ICCL)

The Irish Council for Civil Liberties (ICCL) is Ireland's leading independent human rights watchdog, which monitors, educates and campaigns in order to secure full enjoyment of human rights for everyone.

Founded in 1976, the ICCL has played a leading role in some of the most successful human rights campaigns in Ireland. These have included establishing an independent Garda Síochána Ombudsman Commission, legalising the right to divorce, securing more effective protection of children's rights, decriminalising homosexuality and the introduction of multi-ground equality legislation.

We believe in a society which protects and promotes human rights, justice and equality.

What we do:

- Advocate for positive changes in the area of human rights;
- Monitor government policy to make sure that it complies with international standards;
- Conduct original research and publish reports on issues as diverse as equal rights for all families, the right to privacy, police accountability and judicial accountability;
- Run campaigns to raise public and political awareness of human rights, justice and equality issues;
- Work closely with other key stakeholders in the human rights, justice and equality sectors.

For further information contact:

Irish Council for Civil Liberties
9-13 Blackhall Place
Dublin 7

Telephone: +353 1 799 4504

Fax: +353 1 799 4512

E-mail: info@iccl.ie

Web: www.iccl.ie

1. Grounds for Concern about the Criminal Justice Bill 2007

The Government published the Criminal Justice Bill 2007 on 15 March 2007 (i.e. one week ago).

Although this Bill proposes significant changes to our criminal justice system, there has been little or no consultation about its content. At the only public consultation (organised by the ICCL, on the basis of a previous draft of the Bill),¹ national and international experts expressed the view that the draft measures proposed would do nothing to tackle gangland crime.² Subsequently, eminent barristers (including nine senior counsel)³ and the Law Society⁴ have called for the adoption of the Bill to be postponed until it can be fully debated.

Nonetheless, the 2007 Bill retains measures that have been criticised by academic experts and legal practitioners, and adds new measures which have not been the subject of any consultation.

The Bill has been referred to the Irish Human Rights Commission; however, the Commission has not been given sufficient time to prepare and communicate its observations before the Bill is debated in the Dáil (on 22 and 23 March 2007).

The ICCL has produced this Fact Sheet in order to raise awareness about the Bill's shortcomings amongst legislators, the legal profession, victims' rights organisations, the general public and the media. However, awareness raising is no substitute for a considered debate that takes account of the views of those stakeholders in our criminal justice system.

Given these substantial grounds for concern about the lack of consultation on the content of the Criminal Justice Bill 2007, **the ICCL recommends that the adoption of the Bill be postponed in order to allow for proper democratic debate of the merits of its provisions.**

¹ This event; "Re-balancing Rights? Contemporary Issues in Human Rights and Criminal Justice" was held in the President's Hall of the Law Society of Ireland on 17 February 2007.

² For example, Professor Robert Gordon, an international expert on criminology and restorative justice said he was "really puzzled by the suggestion that the rights of victims can in some way be enhanced by diminishing the rights of people accused of crimes. Quite simply, this flies in the face of the facts."

³ Letter to the Irish Times of 21 February 2007 signed by Pauline Walley SC, Ivana Bacik BL, Brendan Grehan SC, Paddy McCarthy SC, Anthony Sammon SC, Gerry O'Brien SC, Conor Devally SC, Michael O'Higgins SC, Niall Durnin SC, Aileen Donnelly SC, Sean Gillane BL, Dominic McGinn BL, Caroline Biggs BL, Vincent Heneghan BL, Garret Baker BL and Siobhán Ní Chulacháin BL, Law Library, Four Courts, Dublin 7.

⁴ "Law Society's deep concern at Government's intention to rush through far-reaching changes in criminal law", press release issued 27 February 2007.

2. “Crime Prevention Orders”

Section 25 of the 2007 Bill provides for the introduction of post-release “crime prevention orders”.

These new orders would enable the courts to impose additional conditions (e.g. staying away from particular places / persons) on people who have already served their sentences. Breaching these conditions would be an offence. In other words, conduct that is not, in itself, a crime would be criminalised.

The introduction of crime prevention orders has not been the subject of any form of debate or consultation. At first sight, they appear to have something in common with the “serious crime prevention orders” proposed in draft legislation (the Serious Crimes Bill 2007) in the United Kingdom. However, by contrast with the current situation in Ireland, serious crime prevention orders are the subject of intensive and informed debate, both within, and outside, the British Parliament.

Moreover, it remains unclear how the “crime prevention orders” proposed in the 2007 Bill would mesh (if at all) with the “restriction on movement orders” introduced by the Criminal Justice Bill 2006.

In the absence of any reasonable justification for the introduction of “crime prevention orders” without consultation or debate, **the ICCL strongly urges that section 25 of the Criminal Justice Bill 2007 be deleted.**

3. Seven Day Garda Custody

The 2007 Bill proposes to broaden the categories of offences in relation to which people may be held in Garda custody for up to seven days, despite the fact that an existing seven-day detention power⁵ is rarely, if ever, used. This substantial expansion of Garda detention powers is being proposed in the absence of any concrete evidence that it will have an impact on gangland crime.

When reviewing the existing seven-day detention powers in relation to drug trafficking offences, the Council of Europe's Committee for the Prevention of Torture (CPT) said that: "seven days in police custody without charge is a long period of time". The CPT added that "prolonged periods of detention of criminal suspects on police premises can lead to high-risk situations".⁶

The ICCL has drawn the Council of Europe's attention to this proposed further extension of periods of Garda custody. It fully anticipates that the CPT's confidential report on its 2006 visit to Ireland – which has just been adopted by the Committee in Strasbourg – will be critical of seven day detention by the Garda. Having regard to Ireland's international human rights obligations, **the ICCL recommends that the seven day Garda detention provisions be removed from the Criminal Justice Bill 2007.**

⁵ Set out in the Criminal Justice (Drug Trafficking) Act, 1996 made provision for additional powers of detention by the Garda Síochána of suspected drug traffickers following arrest, made provision for the issuance of search warrants by certain members of the Garda Síochána in the case of suspected drug trafficking offences and for the attendance of officers of customs and excise at, and the participation of such officers in, the questioning of certain arrested persons by the Garda Síochána and to provide for related matters.

⁶ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Report to the Irish Government on the visit to Ireland carried out by the CPT from 31 August to 9 September 1998. www.coe.int

4. Right to Silence - Inferences to be Drawn in Certain Circumstances

Part 4 of the 2007 Bill amends existing provisions relating to the right to silence and clarifies the circumstances in which inferences may be drawn if an accused person fails to answer certain questions when questioned by the Gardaí. This new provision is modeled on two existing sections: Section 5 of the Offences Against the State (Amendment) Act 1998 and Section 7 of the Criminal Justice (Drug Trafficking) Act 1996.

According to the Tánaiste and Minister for Justice, Equality and Law Reform, this proposed change is in line with a recommendation made by the Balance in the Criminal Law Review Group in an interim report on the right to silence.⁷ However, that Group, which is chaired by Senior Counsel Dr Gerard Hogan, has made clear that its interim report only sets out its tentative findings. If the Group's final report has been completed (it was due to be delivered to the Tánaiste on 1 March 2007), it has not been shared with members of the Houses of the Oireachtas.

The ICCL recommends that any changes to the right to silence be deferred until there has been an adequate opportunity to consider and debate the final report of the Balance in the Criminal Law Review Group.

⁷ Balance in the Criminal Law Review Group, *Interim Report: Right to Silence*, 31st January 2007, at p. 46.

5. Sentencing

Part 3 of the 2007 Bill provides for new sentencing arrangements for particular categories of offences. According to Section 24, a court must impose a sentence that is at least three quarters of the maximum sentence under the law, taking account of certain circumstances. Part 5 of the Bill also amends the Misuse of Drugs Act to restrict the courts from considering the personal circumstances of the offender where an individual has already been convicted of a first offence under Section 15A or 15B⁸ or where the drugs in question are of a value of €500,000 or more.

The ICCL is concerned that these new rules on sentencing may impinge upon the constitutional duty of judges to ensure that sentences are proportionate to both the gravity of the crime and the personal circumstances of the offender.

Speaking about this judicial function recently, retired High Court judge Mr Fergus Flood commented that: “Mandatory sentencing, *per se*, is an infringement of their judicial function, which not only requires observing the law, but being fair and just to the individual concerned”.⁹

Indeed, in the context of a discussion on the Criminal Justice Bill 2004, the Minister for Justice, Equality and Law Reform himself explained to a Dáil Select Committee that sentencing guidance for judges could not be too prescriptive, lest it be deemed unconstitutional.¹⁰

Consequently, **the ICCL recommends that the constitutionality of these proposals be tested in an appropriate fashion** – for example, by Presidential Referral of the Bill to the Supreme Court under Article 26 of the Constitution – **before they are included in legislation.**

⁸ These offences relate to possession of drugs with intent to supply.

⁹ Speaking on the Newstalk 106 radio show, “Lunchtime with Eamon Keane”, on 13 March 2007, as reported in the Irish Independent on 14 March 2007 (“Ex judge knocks new drug laws” by Dearbhail McDonald).

¹⁰ Select Committee on Justice, Equality, Defence and Women’s Rights, Wed 26, April 2006, Vol. No. 75.

6. Conditions for Granting Bail

a) Opinion evidence at the bail hearing

Part 2 of the 2007 Bill makes a series of changes to the procedure and conditions for granting bail. For example, additional information is to be made available to the court, and the opinion of a Garda Síochána Chief Superintendent will be admissible in evidence at bail hearings.

Only anecdotal evidence has been produced to suggest that the current bail laws are ineffective. The existing law on bail has the authority of a 1996 constitutional referendum, as translated into law by the Bail Act 1997. This already allows the courts to refuse bail on the grounds that the accused might commit an offence.

The ICCL recommends that the operation in practice of the current bail laws be independently reviewed before action is taken further to restrict the right to bail.

b) Electronic monitoring

As a new condition of bail, the courts are to have the option of imposing electronic monitoring on certain persons. Given that persons on bail are legally innocent, this is a questionable restriction on their liberty.

Section 11 of the Bill provides that the courts can only impose electronic tagging on persons accused of a serious offence or appealing against a sentence handed down by the District Court. However, in a response to a Dáil question on electronic tagging in 2003, the Minister for Justice, Equality and Law Reform explained that:

Studies on the use of electronic systems to monitor offenders in other jurisdictions suggest that tagging is effective only over a three to six month period and suitable only for low risk offenders whereas our court requirements may well be for the most serious offences and longer periods.¹¹

Given these – well-founded – Ministerial reservations, his rationale for proposing the introduction of tagging in relation to bail for serious offences remains unclear.

¹¹ Response from the Minister for Justice, Equality and Law Reform to a Parliamentary Question on Electronic Tagging Scheme from Mr Dennehy TD, on 11 March 2003.

Finance is another important consideration and, to date, no figures have been produced to show the likely cost of introducing this untested measure.

In the light of these considerations, **the ICCL recommends that the Department of Justice, Equality and Law Reform conduct a full cost benefit analysis of the benefits of electronic monitoring in relation to bail, and consider setting up a pilot of electronic monitoring before investing in this technology.**