Irish Council for
Civil Liberties

Combating Organised Crime and Respecting the Rule of Law:

Human Rights Based Alternatives to the Criminal Justice (Amendment) Bill 2009

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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 by Mary Robinson and others, the ICCL has played a leading role in some of the most successful human rights campaigns in Ireland. These have included campaigns resulting in the establishment of an independent Garda Síochána Ombudsman Commission, the legalisation of the right to divorce, more effective protection of children's rights, the decriminalisation of homosexuality and introduction of enhanced 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 and legislation 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 reform 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.

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1. Introduction

In recent months, a flurry of criminal justice legislative proposals have been presented by the Government:

- On 17 April 2009, the Criminal Justice (Surveillance) Bill 2009 which will provide a statutory basis for carrying out of covert surveillance was introduced.[1]
- On 11 May 2009, the Criminal Justice (Miscellaneous Provisions) Bill 2009 which amends the current regulatory scheme for firearms was presented to the Oireachtas.
- On 21 May 2009, the Criminal Procedure Bill 2009 was introduced, purportedly as a victims' rights measure; however, the Bill contains only one victim-orientated provision, namely enhanced use of victim impact statements.

It would appear that media attention given to organised crime killings and the subsequent public outcry has now prompted the Government to introduce the Criminal Justice (Amendment) Bill 2009. This submission examines the human rights problems created by the Criminal Justice (Amendment) Bill 2009. Organised crime is not a phenomenon unique to Ireland and the paper also outlines best practice alternatives that would allow the State to combat organised crime while respecting human rights.

[1] See the Observations of the Irish Human Rights Commission on the Bill at http://www.ihrc.ie/documents/documents.asp?NCID=6&L=1 [accessed 29 June 2009].

2. Human Rights Problems with the Criminal Justice (Amendment) Bill 2009

2.1 Expanding the use of the Special Criminal Court

Section 8 of the Bill declares that the ordinary courts are "inadequate to secure the effective administration of justice".[2] No evidence has been presented to demonstrate why the current operation of the courts is inadequate. This provision amends the Offences against the State Act 1939 to allow certain offences to be tried at the non-jury Special Criminal Court including the offence of directing a criminal organisation, participation or contribution to certain activities and the commission of an offence for a criminal organisation.[3]

The protection of jury members and witnesses has been mooted as the reason why the remit of the Special Criminal Court should be extended. However, as recently as last month, speaking at the Annual Prosecutors' Conference 2009, the Director of Public Prosecutions (DPP) raised an important point in relation to the participation of the ordinary citizen in the criminal justice system through service on juries. This, he said, "imports a degree of democratic legitimacy into the system".[4]

Furthermore, the issue of witness intimidation will not be solved by the use of the Special Criminal Court as witnesses will still have to give evidence in court. Rather, the protection of witnesses should be tackled by putting in place measures designed to protect their identities; if necessary, in addition to Garda protection operations. For more details on witness protection see section 3 of this paper.

The UN Human Rights Committee has consistently called on the Government to renounce the use of Special Criminal Court, which denies a defendant the safeguard of a trial by jury normally available to accused persons.[5] One of the main issues indentified by the Human Rights Committee in relation to this non-jury court is the discretion afforded to the DPP, whose decisions are not made public, in assigning cases to the Court. Discretion remains with the DPP in this Bill (albeit that there is now to be a presumption in favour of the use of the Special Criminal Court) and no clear referral grounds are stipulated in the legislation. In line with the recommendations of the UN Human Rights Committee, the ICCL considers that the jurisdiction of the Special Criminal Court should be reduced rather than extended and that all criminal procedures ought to be aligned with Article 9 (right to liberty) and Article 14 (right to equality before the law) of the International Covenant on Civil and Political Rights (ICCPR).

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[2] Section 8(1). See para 2.7 and 2.8 below for more information on these proposed offences.

[3] Section 8 (1).

[4] Hamilton, J., (23 May 2009), "Opening Address" at the 10th Annual National Prosecutors' Conference, Dublin Castle Conference Centre, at p. 2.

[5] Concluding Comments of the UN Human Rights Committee: Ireland, 24 July 2000, UN Doc A/55/40, at para 15 and Concluding Observations of the Human Rights Committee: Ireland, 30 July 2008, UN Doc CCPR/C/IRL/CO/3, at para 20. See also, Communication No 819/1998: Ireland 26 April 2001, *Kavanagh v. Ireland*, UN Doc: CCPR/C/71/D/819/1998.

The Hederman Report,[6] which considered the *Kavanagh* case[7] as part of its deliberations, recommended the review of cases before they are transferred to the Special Criminal Court against "reasonable and objective" criteria, as recommended by the UN Human Rights Committee.[8]

ICCL recommendations:

- **Section 8 of the Bill should be withdrawn;**
- **Appropriate measures be put in place for the protection of witnesses and jurors.**

2.2 Loosening Safeguards around Opinion Evidence

Under s. 7 of the Bill, the opinion of ***any*** Garda "who appears to the Court to possess the appropriate expertise" will be admissible as evidence of the existence of a criminal organisation. Under this section, "expertise" means experience, specialised knowledge or qualifications. The opinion of the Garda can be informed by the existence of previous convictions of the accused person. The Supreme Court has considered the use of belief evidence and its compatibility with Article 38 of the Constitution and Article 6 (right to fair trial) of the European Convention on Human Rights (ECHR). While holding that a Garda may claim privilege (as to his or her sources) when being cross-examined about belief evidence, the Court is clear that conviction cannot take place without supportive or corroborative evidence in recognition of the "disadvantage which flows from and accrues to the defence in a trial".[9] Moreover, in relation to the rank of Garda who is entitled to provide belief evidence, the Court has stated that the relevant provision in the Offences against the State Act 1939, was "carefully crafted ensuring that the belief evidence must come from an officer of an Garda Síochána not below the rank of Chief Superintendent". This, the Supreme Court said, was "with a view to establishing trust and credibility as far as possible".[10] This safeguard is absent from the Bill.

ICCL Recommendations:

- **Section 7 of the Bill should be withdrawn;**
- **Without prejudice, should the Bill be enacted, opinion evidence should be restricted to Gardaí not below the rank of Chief Superintendent;**
- **The Bill should include an express provision that a person cannot be convicted on opinion evidence alone.**

[6] Report of the Committee to review the Offences against the State Acts 1939-1998 and related matters.
[7] *Op cit*, decided by the UN Human Rights Committee.
[8] Paras 9.76 and 9.77.
[9] *DPP v. Binead*, unreported, Court of Criminal Appeal, 28 November 2006, Mrs Justice Macken, Mr Justice Budd, Mr Justice De Valera, at p. 12. See also, *DPP v. Kelly*, unreported, Supreme Court, 4 April 2006, Mr Justice Murray, Mrs Justice Denham, Mr Justice Geoghegan, Mr Justice Fennelly, Mr Justice Kearns.
[10] *DPP v. Kelly, ibid,* at p. 3.

2.3 Secret Detention Hearings

Under Part 4 of the Bill,[11] procedures of District Court detention hearings for the purposes of extending the detention of the person under the Offences against the State Act 1939[12] are altered.[13] Contrary to the principles of fair trial, the Bill allows for the hearing to take place in private if the judge considers that there may be a risk of prejudice. In justifying this, it is claimed that members of organised criminal gangs are attending the detention hearings and deciphering the direction of the investigation from the evidence that was given in court.

However, this provision fundamentally alters the nature of criminal justice in Ireland. It allows for the judge to hear evidence of a Garda ***of any rank***, in private, and without legal representation, in order to justify the continuing detention of a person. This includes answers to questions under cross-examination without either the defendant or his or her legal representative or the prosecutor present.[14] In essence what this means is that a person can be held without knowledge of the grounds on which the judge is justifying their continued detention. This detention can be justified by the secret information from any member of the Garda Síochána, regardless of his or her expertise or experience.

Fundamental to the detention of any person prior to conviction, is the abrogation of the person's right to liberty under Article 40.4.1 of the Constitution, Article 5 (right to liberty) of the ECHR and Article 9 (right to liberty) of the ICCPR.[15] Fair procedures under Article 38.1 of the Constitution dictate that a person should have the opportunity to defend themselves.[16] This includes the right to test those making the charge or complaint; or, substantiating a complaint by cross-examination.[17]

Under Article 40.4.1 of the Constitution, no one can be deprived of his or her liberty except according to the law. Where a person has been detained on the basis of secret evidence given by any member of the Gardaí without the opportunity to question that evidence, the mandating provision could be in breach of Article 40.4.1.[18] This is because it is possible that the provision allowing the detention is not lawful as it does not follow fair procedures (such as cross-examination) as set out above. Under Article 5 of the ECHR, a person's detention must be lawful and it must be in conformity to the general principles of Article 5, including the right of a person to review the lawfulness of his or her detention.[19]

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[11] Sections 20 – 23.
[12] As amended by the Offences against the State (Amendment) Act 1998.
[13] Section 20.
[14] If the judge considers that there is nothing material in the evidence, the tendering of the evidence will be heard again in open court.
[15] In 2000, the UN Human Rights Committee expressed concern at the extension of detention periods under the Offences against the State Act 1939 (as amended by the Offences against the State (Amendment) Act 1998). See Concluding Comments of the UN Human Rights Committee: Ireland, 24 July 2000, UN Doc A/55/40, at paras 422 – 451.
[16] *O'Mahony v. Ballagh* [2002] 2 IR 410.
[17] *Re Haughey* [1971] IR 217 and *Leonard v. Garavan* (30 April 2002), High Court.
[18] For example, *McSorley v. Governor of Mountjoy Prison* [1997] 2 IR 258.
[19] *E v. Norway* (1990) 17 EHRR 30.

ICCL Recommendations:

- **Sections 20 – 23 of the Bill should be withdrawn;**
- **Without prejudice, should the Bill be enacted, the Court should determine whether the opinion evidence of the Garda is sensitive or not by means of a hearing which includes legal representatives of both parties.**

2.4 Uncorroborated Evidence

Under s. 21 of the Bill, only the Garda who is making an application for the extension of detention is required to give evidence. If the evidence of another Garda is required, he or she does not have to take the stand but the Garda who is making the application can "testify" to this information "notwithstanding that it is not within the personal knowledge of the officer" (however, the court can direct, if it considers that it is in the interests of justice to do so, that the "other officer" tender the evidence).

The use of opinion evidence in Irish courts allows for the introduction of hearsay evidence (contrary to the normal rules of evidence) in order to protect informers and others whose lives may be at risk. However, it is questionable why a Garda member cannot take to the stand to tender evidence justifying a person's continued detention. At the very least, this provision should set out a test to determine whether the reasons why a Garda cannot take to the stand are justified. In relation to liberty issues attaching to bail hearings, the Supreme Court has held that an applicant was entitled to expect that evidence, upon which a court was going to rely, would be given orally under oath and tested by cross-examination given the "implications for the liberty of an individual who is presumed innocent".[20]

ICCL Recommendation:

- **Without prejudice to the recommendations under para. 2.3, section 21 should be amended to provide that a Garda should testify as to his or her own evidence only and not the evidence of any other Garda.**

2.5 Post-Release Orders

At sentencing, the judge may impose a "post-release order" on a convicted person.[21] This will make it possible to impose restrictions and conditions post release in relation to, movements, actions, activities, association with others and conditions subject to which the person may engage in an activity. Consideration can be given to the person's previous criminal convictions and other circumstances relating to him or her. Although a loose "public interest" test must be passed before an order can be imposed, a post-release order can extend up to 7 years and failure to comply with a post-release order is a criminal offence.

[20] People *(DPP) v. McGinley* [1998] 2 ILRM 233. See Walsh, D., (2002), *Criminal Procedure*, at p. 535 and Hogan, G.W. and Whyte, G.F., (2003), *JM Kelly: The Irish Constitution*, at p. 1589.
[21] Section 14.

The person can apply to have the order revoked by the court if matters or circumstances have changed since the making of the order.

The Bill does not indicate the extent of the restrictions or conditions which can be imposed on a person post-release and details of the framework are required in order to assess its compliance with Article 40.4.1 of the Constitution and Article 5 (right to liberty) of the ECHR. In the United Kingdom (UK), control orders were introduced under the Prevention of Terrorism Act 2005; however, the scope of these orders has since been scaled back by the House of Lords. The Court examined the use of these orders against Article 5 of the ECHR, considering the jurisprudence of the European Court of Human Rights which states that a whole range of factors should be taken into account in assessing liberty constraints, such as duration; nature; effects and manner of the order.[22] It concluded that a "deprivation of liberty" prohibited by Article 5 might take a variety of forms other than the classic detention of a person and in considering the entire regime imposed on the person by the conditions or restrictions, an order could amount to a deprivation of liberty under Article 5 of the ECHR.[23] Furthermore, post-release orders could raise serious concerns in relation to the right to private and family life under Article 8 of the ECHR, if a person was prevented from engaging in certain private or family activities. It is also likely that the potential length of a post-release order of 7 years may not pass the proportionality test under the ECHR.[24]

ICCL Recommendations:

- **Section 14 should be withdrawn;**
- **Without prejudice, should the Bill be enacted, specified restrictions and conditions should be provided in the Bill and not left to the discretion of the Minister for Justice, Equality and Law Reform.**

2.6 Inferences from Silence

The Bill restricts the defendant's right to silence and allows inferences to be drawn from his or her silence.[25] The right to silence enjoys constitutional protection, as part of a series of rights encompassing the right to fair trial, under Article 38.1 of the Constitution and Article 6 of the ECHR. The right to silence plays several vital roles in a democracy, including the protection of human dignity and privacy. However, it also serves to circumvent any abuse of power by the organs of the State and discourages false confessions by intimidated persons in the face of pressure. In terms of the trial process, the right to silence is an integral part of our adversarial system of justice and serves to protect the quality of evidence tendered to the court. The case law of the European Court of Human Rights provides that inference-drawing provisions will only be permitted where something in the nature of a *prima facie* case has been established which demands an explanation from the person detained.[26]

[22] *Engel v. The Netherlands* (No 1) (1976) 1 EHRR 647, at para. 59.
[23] *Secretary of State for the Home Department v. JJ and Others* [2007] UKHL 45.
[24] *Handyside v. UK* (1979-1980) 1EHRR 38, at para 49.
[25] Section 9.
[26] *Heaney and McGuinness v. Ireland*, (2001) 33 EHRR 12 and *Condron v. UK*, (2001) EHRR 31.

In the context of inference-drawing, the "cautions" given by the Gardaí must also be carefully examined. Furthermore, although inference-drawing provisions were introduced under the Criminal Justice Act 2007, in relation to all offences,[27] the Minister for Justice, Equality and Law Reform has yet to amend the Garda caution to take account of the changes to the law.

In situations where a person's silence can be used against them at trial, it is essential that he or she have access to legal advice. Detained persons should be entitled to have a legal representative present at all times during police questioning and no inference should be drawn from any period of silence which takes place prior to consultation with a legal representative.

ICCL Recommendations:

- **Section 9 of the Bill should be withdrawn;**
- **Access to legal advice should be available to people throughout the detention process.**

2.7 New Offences

It will be an offence to direct an activity of a criminal organisation, at any level.[28] The maximum sentence that this offence carries is life imprisonment. The direction of an activity could include, control, supervision, ordering, instructing, guiding or requesting and these activities may be carried out inside or outside of the State. Moreover, the activities themselves do not need to constitute a criminal offence. The fact that a person was directing the activities of a criminal organisation can be inferred from any oral or written statement, or conduct; and, evidence will be admissible of a "pattern of behaviour". The offence of participating or contributing to certain activities (organised crime) is also introduced with a penalty of up to 15 years imprisonment.[29]

It is unclear how or why these new offences are required given that the current criminal law contains measures which allow the conviction of people on conspiracy charges and for the offence of acting in concert. The vagueness and loose definition of these new offences could cause the net to be swept wider than envisaged to catch young people or low level operatives, who could face very lengthy sentences. However, the general aim of the criminal law is to create a standard of behaviour which the State will not tolerate.

ICCL Recommendation:

- **Section 5 of the Bill should be withdrawn;**
- **Section 6 of the Bill should be withdrawn.**

[27] Part 4 of the Criminal Justice Act 2007.
[28] Section 5.
[29] Section 6.

2.8 Definition of a Criminal Organisation

Section 3 introduces a new definition of "criminal organisation". However, this definition is substantially the same as the definition that is currently contained in section 70 of the Criminal Justice Act 2006 which was never brought into force. Therefore, even though at present, the Irish criminal law contains a definition of "criminal organisation" (one which is practically identical), it has never been deemed practicable to bring this into effect. It is questionable why the Minister for Justice, Equality and Law Reform considers that this definition will be the answer to organised criminal activity now, when such a provision has been ready and waiting for 3 years. This definition is vague and loosely defined; and, it will be difficult to secure convictions using it.

ICCL Recommendation:

- **Section 3 of the Bill should be withdrawn.**

3. The Alternative – Combating Organised Crime and Respecting the Rule of Law

3.1 Protection of witnesses and victims

In certain areas of criminality such as organised crime, there is an increased risk that witnesses will be subject to intimidation and measures should be developed to strengthen specific protections.[30] The Government has a duty to protect witnesses against intimidation by providing them "with specific protection measures aimed at effectively ensuring their safety".[31] The right to life under Article 2 of the ECHR places a positive obligation on the State to protect witnesses and victims. Although this does not create a general obligation to protect people from harmful criminal activities,[32] courts in the United Kingdom (UK) have found that the State is obliged to take particular steps to protect certain vulnerable categories of people such as witnesses.[33] There is no obligation on the State to prevent every possibility of violence; however, where individuals are exposed to threats to their lives, the State will in certain circumstances come under a positive obligation to provide police protection.[34] Moreover, witnesses and victims have the right to protection from harm for themselves and their families under Article 8 (right to private and family life) of the ECHR. In order to fulfill these obligations, the State should ensure that effective measures are taken "to thwart attempts to trace witnesses and collaborators of justice, in particular by criminal organisations".[35]

Any procedural rules which are enacted to protect the rights of witnesses must be formulated taking into account the need to safeguard the criminal trial process and the rights of the defendant.[36] Ultimately if this relationship is not managed correctly and according to the rule of law, miscarriages of justice could occur which would lead to further breakdown in societal control around organised crime.

Measures which could be made available to assist witnesses include anonymity before, during and after a criminal trial. However, this should be an exceptional measure and should be set down in law so that procedures are available for the defence to challenge the need for the anonymity (verification procedure).[37] While ensuring that the defence has adequate opportunity to challenge the evidence given by a witness, the use of screens, disguising the face or distorting voices could also be considered. However, conviction should not be based solely or to a decisive extent on the testimony of the witnesses in such circumstances.

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[30] Rec(2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice.

[31] Rec(2005)9 of the Committee of Ministers, *ibid*.

[32] *Ivison v. UK*, (2002) 35 EHRR.

[33] *R. v. Lord Saville of Newdigate Ex p. A* [2000] 1W.L.R. 1855; *R (A). v. Lord Saville of Newdigate* [2002] 1 W.L.R. 1249; and, *R. (A and B) v. HM Coroner for the Inner District of Greater London*, The Times, 12 July 2004.

[34] *Osman v. UK* (1998) 29 E.H.R.R. 245. See also, Emmerson, B. (2007), *Human Rights Practice*, Thomson Sweet & Maxwell, at paras. 2.022 – 2.023.

[35] Rec(2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice.

[36] Including the right of the defence to examine the witness and hear all the evidence against him or her.

[37] See Rec(1997)13 of the Committee of Ministers, *op cit*, at para 10.

Other possibilities include the audiovisual recording by means of statements made by witnesses during pre-trial examination; revealing the identity of witnesses at the latest possible stage of the proceedings and/or releasing only selected details; excluding the media and/or the public from all or part of the trial.[38]

Delay is a huge issue which affects the safety of witnesses and victims and the current operation of the criminal courts is not succeeding in managing its workload effectively. Moreover, "common sense" protection measures such as safe entry and exit to courthouses, the presence of Gardaí in the court; separate waiting areas for victims and witnesses and Garda protection have yet to yet to be routinely applied throughout the Irish courts.

ICCL Recommendation:

- **The ICCL considers that positive steps should be taken by the Government to protect witnesses and victims prior to focusing on draconian measures such as the removal of the right to a jury trial, which if it is to comply with the principle of proportionality under the ECHR, should only ever be used as a last resort.**

3.2 Intelligence-led Policing and Community Policing

Intelligence-led policing has its origins in the UK where two influential government reports identified many of the problems associated with traditional policing.[39] Since the implementation of intelligence-led policing in the UK, its use has spread to a number of other countries such as Canada, New Zealand, Australia and the US.[40]

Intelligence-led policing is an information-organising process that allows police agencies to "better understand their crime problems and take a measure of the resources available to be able to decide on an enforcement tactic or prevention strategy best designed to control crime".[41] Intelligence is developed through the analysis of items of information, usually from a number of different sources.[42] In a 1997 report, the Police Inspectorate in England and Wales stated that good quality intelligence was the life blood of the modern police service. According to the report, intelligence allows for a clear understanding of crime and criminality, identifies which criminals are active, which crimes are linked and where problems are likely to occur.

[38] Rec(1997)13 of the Committee of Ministers, *op cit*, at para 9. See also *Doorson v. Netherlands*, (1996) 22 E.H.R.R., 330, where the European Court of Human Rights has mandated the use of anonymity in certain cases.

[39] Ratcliffe, J. H., and Guidetti, R., (2008), "State Police Investigative Structure and the Adoption of Intelligence-Led Policing", *Policing: An International Journal of Police Strategies & Management*, Vol. 31, No. 1, 109, at p111.

[40] Ratcliffe, J. H., and Guidetti, R., (2008), *ibid*, at p. 112.

[41] Ratcliffe, J. H., and Guidetti, R., (2008), *op cit*, at p. 111.

[42] Maguire, M., and John, T., (1995), "Intelligence, Surveillance and Informants: Integrated Approaches", *Police Research Group, Crime Detection and Prevention Series*, Paper 64, at p. 16. See also Fuentes, J., R., (September 2006), "Practical Guide to Intelligence-Led Policing", *New Jersey State Police*, at p. 3.

It enables valuable resources to be targeted effectively against current challenges and emerging trends, ensuring the best opportunities for positive intervention and maximum value for money".[43]

Factors which the Inspectorate identified as crucial in promoting a "proactive, intelligence driven approach to policing" were:

- enthusiastic and energetic leadership and commitment to criminal intelligence
- published strategy
- integrated intelligence structure
- training of all staff
- performance measurement in respect of crime intelligence functions, including the costing and evaluation of completed operations
- effective partnerships with voluntary and statutory bodies at local and national level

Community policing is an important component in problem-solving policing and the gathering of intelligence. The Report of the Independent Commission on Policing for Northern Ireland (Patten Report), widely considered one of the most comprehensive studies of policing needs and which provided for one of the "most robust and farsighted structures for police governance anywhere in the world,"[44] recommends that policing "with the community should be the core function of the police service and the core function of every police station".[45] The Report further states the belief "that neighbourhood policing should be at the core of police work, and that the structure of the police service, the staffing arrangements and the deployment of resources should be organised accordingly".[46] In submissions received by the Commission, emphasis was put on the importance of having "local police officers who knew the area and were known, by name, to the residents".[47] Ultimately, Patten concluded that a "police service that is not engaged with the community in a continuous way will find it hard to act effectively against crime or disorder in that community, because it will find it hard to know the community and get cooperation from it".[48]

Adopting a problem-solving and consultative approach, the Northern Ireland model also allows communities to work with police and set local objectives for policing activities. In contrast to community policing arrangements in Northern Ireland, the Garda Síochána Act 2005 contains no provisions requiring the inclusion of independent community representatives on the new joint policing committees.

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[43] HM Inspectorate of Constabulary, (1997), "Policing with Intelligence", at p. 1.
[44] Topping, J. R. (2008) "Community Policing in Northern Ireland: a Resistance Narrative", *Policing and Society*, 18:4, 377 – 396, at p. 391.
[45] A New Beginning: Policing in Northern Ireland, *The Report of the Independent Commission on Policing for Northern Ireland*, September 1999, recommendation 44, at p. 111.
[46] *Ibid*, at para 7.8, p. 42.
[47] *Ibid*, at para 7.10, p. 44.
[48] *Ibid,* at para 7.6, p. 43.

In 2003, the National Crime Council (now disbanded) declared that the "importance of building support and trust in communities between An Garda Síochána and local residents cannot be overstated". In this respect, the ICCL considers that a "visible, accessible and responsive style of policing is crucial in terms of making communities safer and making them feel safer also."[49]

ICCL Recommendations:

- **Intelligence-led policing should be concretely pursued by an Garda Síochána (including by the publication of a strategy) before the introduction of any special measures such as retraction of the right to trial by jury.**

- **Community policing arrangements in the Garda Síochána Act 2005 should be reviewed with a view to expanding the remit of joint policing committees to ensure that independent community representatives are formally included and that communities set local policing objectives for policing activities.**

3.3 International Best Practice

Many organised crime groups, across the world, use violence and intimidation either as part of their planned operations or in spontaneous acts of aggression.[50] The Council of Europe advises the following in terms of developing "coherent and rational crime policy directed towards the prevention of organised crime":

- Situational prevention (for example, measures to introduce the opportunities and means of committing offences);
- Provision of assistance to victims;
- Individualisation of criminal reactions;
- Promotion of alternatives to custodial sentences;
- Social reintegration of offenders;
- Social prevention (for example, social and economic policy, education, information).[51]

Concrete measures to operationalise these measures include the coordination of crime policy with other relevant policies; and, taking advice and actively cooperating with individuals and experts who are concerned with the implementation of this policy.

[49] Innes, M., (2006), "Introduction Reassurance and the "New" Community Policing", *Policing and Society*, 16:2, at p. 97.
[50] Criminal intelligence Service Canada, (2008), *Report on Organized Crime*, available at www.cisc.gc.ca [accessed 10 June 2009].
[51] Rec(1996)8 of the Committee of Ministers to member states on crime policy in Europe in a time of change.

In its Organised Crime Situation Report of 2002 (in to which Ireland contributed information), the Committee of Ministers, in examining measures concerning the intimidation of witnesses and the rights of the defence in the context of organised crime, stated:

> When designing a framework of measures to combat organised crime, specific rules of procedure should be adopted to cope with intimidation. These measures may also be applicable to other serious offences. Such rules shall ensure the necessary balance in a democratic society between the prevention of disorder or crime and the safeguarding of the right of the accused to a fair trial.[52]

In addition, European Union (EU) documents dealing with organised crime generally refer to the need for information gathering and analysis (for example, the Hague Programme and the Communication from the Commission on "*Developing a strategic concept on tackling organised crime*").[53] The latter refers to special investigation techniques, obtaining of evidence across borders, reliance on witnesses or collaborators of justice and improvement to and strengthening of existing bodies (among others). Similarly, the Organisation for Security and Cooperation in Europe (OSCE) refers to like-minded measures and underscores the principle that organised crime can best be fought through democratic institutions that respect human rights and the rule of law, and are accountable to citizens and civil society.[54] The OSCE recommends that national plans should be adopted to address security-related issues and "to apply an integrated approach, mindful of the fact that every element of the criminal justice system impacts on the other elements".[55] It further recommends that data collection and analysis should be improved as part of policy planning in preventing and fighting organised crime.[56] Regarding the building of trust within communities affected by organised crime, the OSCE states that efforts should be made at outreach to the population, including cooperation between law enforcement authorities and civil society organisations.[57]

In general, international practice is revising the notion that traditional 'repressive' law enforcement bodies (police, prosecutors, courts) should have a monopoly on reactions to organised crime "because it is clear that alone, they are unlikely to have sufficient impact on levels of criminality".[58]

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[52] Rec(1997)13 of the Committee of Ministers to member states concerning intimidation of witnesses and the rights of the defence, at para 8.

[53] As approved by the European Parliament in the *Proposal for a Recommendation to the Council*, 19 January 2006.

[54] Preamble to Organisation for Security and Co-operation in Europe Ministerial Council, "Decision No. 5/06 Organised Crime", MC.DEC/5/06.

[55] Organisation for Security and Co-operation in Europe Ministerial Council, *ibid*, at para 2.

[56] Organisation for Security and Co-operation in Europe Ministerial Council, *ibid*, at para 5.

[57] Organisation for Security and Co-operation in Europe Ministerial Council, *ibid* at para 10.

[58] Council of Europe, Preventative Legal Measures against Organised Crime: Organised Crime – Best Practice Survey No 9, PC-S-CO (2003) 3 E, Strasbourg, June 2003, at p. 3. Some preventative legal measures identified by the Council of Europe are prevention from entering market place; company registration laws; criminal record database; trade laws; licenses and permits; supervision of natural and legal persons.

To a much higher degree than in other contexts, the fight against organised crime has been a major theme in justice and home affairs policy-making in Europe since the 1990s[59] and now, the emphasis is much more on intelligence gathering and targeted operations.

ICCL Recommendation:
The ICCL considers that we should take the time to learn from best practice internationally and formulate a robust framework of measures to combat organised crime, rather than rushing to amend our criminal law.

[59] Paoli, L., (2008), "Organized Crime: New Label, New Phenomenon or Policy Expedient?", available at https://lirias.kuleuven.be/bitstream/123456789/217845/1/Paoli_OC_Annales_2008_proofs.pdf, accessed on 23 June 2009, at p. 49.

4. Conclusion

There is no doubt that that the State must formulate an effective and coherent response to the threat of organised criminals who are terrorizing certain neighbourhoods in the country. However, in doing so, it is worth remembering how these criminals emerged in the first place. Generally, they come from areas that were spectacularly deprived and where relations with the Gardaí were poor. Even as the Government tries to respond to the immediate crisis of Limerick (or organised crime elsewhere), they also have to consider the next generation: what relationship will the children growing up in these areas have with the Gardaí when they are adults? What form of policing would be most appropriate to minimise the risk that such organised criminal activity will not dominate particular communities in 20 years time? To this end, the ICCL considers that there is a need to tackle the underlying causes of crime as well as the symptoms.

This climate is all too familiar to that which preceded the introduction of measures to deal with organised criminal activity in the Criminal Justice Act 2006. However, it is questionable whether a similar response, such as that which is being proposed by the Government, will in fact, have any significant effect in reducing organised criminal activity.

The use of special powers to deal with organised criminal activity tends to lead to the normalisation of these measures and emergency powers remain available (and used) even after a stated emergency has ended. Gradually they distort the tone and ethos of the criminal justice system by extending state powers. On the use of special measures, in May 2009, the DPP stated that the use of extraordinary measures "ought not to lead us to neglect necessary reforms within the ordinary criminal justice system nor ought the extraordinary become the norm".[60] Here, the DPP was specifically referring to trial by jury which is the "constitutionally mandated method of trial in this country".[61] He also stated that "we must also take such steps as we can to ensure that as far as possible the ordinary courts are adequate to ensure that justice is done".

In essence, what all the proposals have in common is a declared intent to protect "ordinary people" and witnesses/victims from intimidation and violence. The ICCL considers that the most appropriate response to extreme cases of violence is to place the victim and his/her family at the centre of the issue. The ICCL believes that the right to life and the right to protection from harm of victims, witnesses and their families will be protected by positive action by the Government rather than the introduction of special powers, propagation of crime control policies or the further diminishment of fair procedures.

The ICCL believes that measures must be taken to avert the threat of organised criminal activity; however, this should be done by focusing on the victims and witnesses at the centre of

[60] Hamilton, J., (23 May 2009), "Opening Address" at the 10th Annual National Prosecutors' Conference, Dublin Castle Conference Centre, at p. 1.
[61] Hamilton, J., (23 May 2009), *ibid*, at p. 1.

the threat. In particular, the right to life of victims and witnesses should be the paramount consideration and the State has a positive obligation to ensure that these rights are protected. The Council of Europe points out that the "legal obligation for witnesses to give testimony in a criminal trial is only fair if they do not have to fear for their life when they comply with this obligation".[62] This can be achieved by building protective relationships between the Gardaí and those affected, including the use of community policing; adequate resourcing of An Garda Síochána to facilitate the strategic roll-out of intelligence policing; the reduction of delays in the criminal courts and, competent security arrangements for witnesses and victims attending court. On the other hand, it is likely that special measures and increased sentences will do little or nothing to deter organised criminals from their lucrative crimes. Even if some success is achieved, the communities within which these organised criminals operate will remain fearful of the perpetrators and distrustful of the citizens in uniform who are charged with protecting them.

The Criminal Justice (Amendment) Bill 2009 is an ill-conceived and hastily-assembled response to these complex social and legal problems which will do little or nothing to address the problems that the Government claims it will solve. The ICCL calls upon responsible legislators to ensure that it does not become law in its current form.

[62] Council of Europe, (August 2004), *Combating Organised Crime: Best Practice Surveys of the Council of Europe*, at p. 41.