



**Submission on the human rights compliance of the  
Criminal Justice (Defence and the Dwelling) Bill 2010**

**26 October 2010**

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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.

For further information contact:

Irish Council for Civil Liberties (ICCL)

9-13 Blackhall Place

Dublin 7

Tel: +353 1 799 4504

Email: [info@iccl.ie](mailto:info@iccl.ie)

Website: [www.iccl.ie](http://www.iccl.ie)

## 1. Introduction

The Irish Council for Civil Liberties (ICCL) welcomes the introduction of the Criminal Justice (Defence and the Dwelling) Bill 2010,<sup>1</sup> and is hopeful that, following its Oireachtas passage and amendment, it will provide clarification for the public around the law on the use of force by householders.

As stated in the ICCL's submission to the Joint Oireachtas Committee on Justice, Equality, Women's Rights and Defence<sup>2</sup> in October 2009, Irish law in its current form provides a wholly adequate framework for dealing with circumstances where an intruder is injured – fatally or non-fatally – by a householder. In this respect, the ICCL welcomes those aspects of the Bill that codify the law as it now stands. For example, the Bill sets out clearly what the Court of Criminal Appeal has stated is the current law on the duty to retreat: namely a person in their home is not expected to retreat before using reasonable force to protect him or herself.<sup>3</sup>

However, some of the proposals seek to extend the reach of the current law in a manner which raises human rights concerns. More particularly, the ICCL considers that the description given of the range of circumstances in which force, including lethal force, could be used and the tests for assessing whether the use of force is justified, potentially raise issues under Article 2 (right to life) of the European Convention on Human Rights (ECHR)<sup>4</sup>. Accordingly, this short submission focuses on these two main issues:

- proportionality and the use of force;
- the use of potentially-fatal force in defence of property.

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<sup>1</sup> Hereinafter the Bill.

<sup>2</sup> Hereinafter the Oireachtas Committee.

<sup>3</sup> Section 2 (5).

<sup>4</sup> The ECHR was given further effect in Irish law under the European Convention on Human Rights Act 2003.

## 2. Proportionality and the Use of Force

Under the Bill, where a householder considers that a person has entered a dwelling or its curtilage<sup>5</sup> for the purpose of carrying out an offence, he or she may use force against the intruder in the following circumstances:

- to protect him or herself or another person from injury, including death or imprisonment;
- to protect his or her property or the property of another from theft or damage;
- to prevent a crime; or,
- to assist in making a lawful arrest.<sup>6</sup>

In deciding whether the householder is justified in using the force, a two-pronged test, comprising subjective and objective elements is provided:

1. *Subjective test*: the householder must believe that the intruder entered for the purpose of committing a criminal offence. The householder must also believe that the force used is reasonable in the circumstances as he or she sees them.<sup>7</sup> In this respect, it does not matter whether the use of force can be justified or not, if the person honestly believed that it was reasonable in the circumstances.<sup>8</sup>
2. *Objective test*: in deciding whether the person honestly believed that the force used was reasonable, a jury should consider the presence or absence of reasonable grounds for the belief and *all other relevant circumstances*.<sup>9</sup> So, for example, if a householder claims that he or she honestly believed there was a need to stab someone in order to prevent a personal injury or damage to property, a jury would be directed to look at circumstances such as the behavior of the intruder, whether he or she was carrying a weapon, the exact circumstances of the stabbing, what was said, where it took place etc.

The ICCL agrees that the use of a twofold subjective and objective test is the correct way in which to address the contentious area of assessing the conduct of a defendant. Crucially, however, these proposals also allow the defence of justifiable use of force which results in death.<sup>10</sup> In this respect, it is imperative that the balance between the subjective and objective tests is struck correctly as it can never be appropriate for a defendant to claim that he or she honestly believed he or she had to stab, shoot or otherwise fatally injure someone without reference to common standards of reasonableness.

Under Article 2 (right to life) of the ECHR, proportionality and - in the case of fatalities - absolute necessity are the guiding benchmarks to determine whether actions can be justified.<sup>11</sup>

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<sup>5</sup> Under section 1, curtilage is defined as an area which immediately surrounds or is adjacent to a dwelling and is used in conjunction with the dwelling, other than any part of the area that is a public place.

<sup>6</sup> Section 2 of the Bill; however, the householder may not use force against a Garda carrying out his or her duty or a person assisting the Garda in doing so; or, a person carrying out a function under law.

<sup>7</sup> Section 2(1) (a) and (b).

<sup>8</sup> Section 2(4).

<sup>9</sup> Section 2(4).

<sup>10</sup> Section 2(7).

<sup>11</sup> *McCann v. UK* (1996) 21 EHRR 97; *Kelly v UK*, Application No. 17579/90, 3 April 2001; *Nachova v Bulgaria*, Application No. 43577/98, Feb 26 2004.

However, the Bill makes no reference to proportionality or necessity, utilising instead the weaker formulation of “reasonable grounds” and “all relevant circumstances”. As such, the ICCL considers that the objective test as set down in the Bill is not sufficiently robust to protect the right to life in a manner that complies with Article 2 of the European Convention on Human Rights. Consequently, a jury may have difficulty convicting where disproportionate force is used as the Bill places greater weight on the subjective component of reasonable force.

In its 2009 report, the Law Reform Commission refers to the English lawyer and scholar, Professor Ashworth, who has queried whether English law complies with Article 2 (right to life) of the ECHR in relation to the use of lawful force. His questioning was prompted by the English legal test of “reasonableness” or whether is “reasonable and necessary” rather than the terms “absolutely necessary” and “strictly proportionate” adopted by Article 2 (right to life) of the ECHR.<sup>12</sup> In its own conclusions, the Law Reform Commission decided that the test of “reasonableness” is “too vague and unstructured”.<sup>13</sup> Instead, the Commission recommended that “substantive requirements traditionally embedded in the defence” should form part of any new law on legitimate defence in an effort to achieve certainty. These requirements are minimum threshold, imminence, necessity and proportionality. According to the Commission:

Placing these requirements on a specific statutory footing will help guide the courts and ultimately juries; it is the opinion of the Commission that juries should be provided with direction with regard to these elements rather than simply being asked to base their decision on a test of reasonableness.<sup>14</sup>

Under Article 2 (right to life) of the ECHR, the State is obliged to take “appropriate measures” to safeguard human life. This places a positive obligation on the State to provide a legal regime that effectively protects the life of all persons “present on the territory” of Ireland. The State must prohibit unlawful killing and punish it by criminal sanctions.<sup>15</sup> The substantive law, the formal mechanisms for its enforcement and their application in practice are all factors which determine whether life has been protected by law. In other words, the State must have in place an adequate legal regime to avoid people being exposed to unnecessary risks to their lives. In order to ensure compliance with the ECHR, the ICCL considers that the objective component should be strengthened by reference to proportionality with regards to all force used and by absolute necessity with respect to lethal force and potentially-lethal force.

Moreover, as the Law Reform Commission has stressed, the importance of maintaining a proportionality component on the right to use force in the defence of home reasonably limits the right to use force and “in doing so safeguards both the right to life of the defender and the attacker”.<sup>16</sup>

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<sup>12</sup> Law Reform Commission, *Report on Defences in Criminal Law*, LRC 95-2009, para 2.15, p. 28.

<sup>13</sup> Law Reform Commission, *Report on Defences in Criminal Law*, LRC 95-2009, para 2.25, p. 31.

<sup>14</sup> Law Reform Commission, *Report on Defences in Criminal Law*, LRC 95-2009, para 2.26, p. 31.

<sup>15</sup> Simor and Emmerson, (2007), *Human Rights Practice*, Thomson, Sweet and Maxwell, para. 2.003.

<sup>16</sup> Law Reform Commission, *Report on Defences in Criminal Law*, LRC 95-2009, para 2.193, p. 70.

**The ICCL recommends that:**

- **An explicit reference to a test of proportionality and/or reference to the four requirements as set out by the Law Reform Commission in their 2009 *Report on Defences in Criminal Law*: (minimum threshold, imminence, necessity and proportionality) should be included in the Bill;**
- **Section 2(7) of the Bill should be deleted and replaced with a test of “absolute necessity” in relation to the use of fatal force or potentially-fatal force, in order to render the Bill compliant with the requirements of Article 2 (right to life) of the European Convention on Human Rights.**

### 3. Defence of Property

As mentioned in section 2 of this submission, the Bill permits the use of force, including fatal force, by a householder to protect his or her property or the property of another from theft or damage.<sup>17</sup> The Law Reform Commission has pointed out that “killing to protect property may risk contravening the Convention [the ECHR]”. As mentioned, Article 2 (right to life) of the ECHR permits the use of force which is no more than is absolutely necessary, in *specific* and *clearly-defined* circumstances, namely:

- defending any person from violence;
- to arrest someone or prevent the escape of someone who is detained;
- to quell a riot or insurrection.

The Commission notes that a number of submissions were made during the consultation phase which recommended that an “upper limit” be placed on the use of force permissible to defend property i.e. that killing a person in defence of property may not be justifiable. The Commission rejected these points on the basis that the other requirements of legitimate defence (imminence, necessity and proportionality) would also have to be satisfied before the killing could be justified and that therefore, the test was sufficiently strong. However, it is clear from Article 2 (right to life) of the ECHR that the use of lethal force to defend property, as opposed to life, is not justifiable, a point to which the Commission does not refer in its final recommendation. In the case of *DPP v Barnes*, the Court of Criminal Appeal, followed similar thinking, albeit by reference to Article 40.3.1 and 40.3.2 of the Constitution:

It seems an elementary proposition, in the light of such provisions, that a person cannot lawfully lose his life simply because he trespasses in the dwellinghouse of another with intent to steal. In as much as the State itself will not exact the forfeiture of his life for doing so, *it is ridiculous to suggest that a private citizen, however outraged, may deliberately kill him simply for being a burglar* [emphasis added].<sup>18</sup>

While a householder is not under a duty to retreat under Irish law, as Mr Justice Hardiman stated in *DPP v. Barnes*,<sup>19</sup> there may well be circumstances where the person would be well advised to do so. Legal provisions which encourage people to use force to defend their property as opposed to a threat to their person show scant regard for the right to life: in essence such legislation would allow the right to life to be trumped by the right to property. Under Article 2 (right to life) of the ECHR, lethal force can only be used when absolutely necessary and any force used must be strictly proportionate, that is, it must be the *minimum* amount of force necessary in pursuit of a legitimate aim.<sup>20</sup> The defence of property is not such a legitimate aim.

Any change in the law which seeks to encourage householders to use whatever degree of force they might deem appropriate risks placing the right to enjoy property above the right to life of an intruder.<sup>21</sup> This would almost certainly be at variance with the requirements of the European Convention on Human Rights. Accordingly, **the ICCL recommends that the Bill be amended to exclude the defence of justifiable use of fatal force with respect to defence of property.**

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<sup>17</sup> Section 2(1) (b) (ii).

<sup>18</sup> Court of Criminal Appeal, Hardiman J., 21 December 2006, p. 15.

<sup>19</sup> Court of Criminal Appeal, Hardiman J., 21 December 2006, p. 18.

<sup>20</sup> See for example, *McCann v. United Kingdom*, (1996) 21 EHRR 97.

<sup>21</sup> Leverick, F., “Defending Self-Defence” *OJLS* 2007 27 (563), p. 571.



## **5. Concluding remarks**

It is important to remember that the use of force within the home environment can have unforeseen fatal consequences at any time and the fact that *all* force has the potential to be lethal. Of course, householders are entitled to defend themselves and others when faced with aggression.

In the *Barnes* case, the Court of Criminal Appeal stated the current law is as follows: householders cannot kill a burglar simply for being a burglar; however, a householder is entitled to defend her or his home and is not obliged to retreat. The use of force to defend the property must be proportionate and whether or not it is proportionate is to be determined by using both objective and subjective criteria. The ICCL considers that this is an appropriate legal framework around the use of force in defending one's household.

However, the proposals in this Bill go further that the Court of Criminal Appeal's guidance and, in the view of the ICCL, exceed the boundaries of what is permissible under Article 40.3.1 and 40.3.2 of the Constitution and Article 2 (right to life) of the ECHR.

**In this respect, the ICCL recommends that the Bill be amended as follows:**

- **include a stronger objective test, by reference to proportionality, in a similar vein to what was proposed by the Law Reform Commission in its 2009 *Report on Defences in Criminal Law*;**
- **include a test of absolute necessity before fatal force can be justified in line with Article 2 (right to life) of the ECHR, and,**
- **remove the defence of property as a legitimate reason for the use of fatal force.**

**Given the extensive media coverage around these legislative proposals and those preceding it, the ICCL also urges the Minister for Justice and Law Reform and/or the Director of Public Prosecutions to draw up simple guidance for members of the public when the Bill has completed its Oireachtas passage and has been enacted. Such clarity could reassure people of their legal rights in defending their homes, without erroneously encouraging them to believe that the legislature has granted them a licence to kill.**