



**Preliminary Submission to the Joint Committee on Justice, Equality, Defence
and Women's Rights**

on

Home Defence and the Right to Life

30 October 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

The Irish Council for Civil Liberties (ICCL) welcomes the Joint Committee's consideration of issues relating to the use of force by householders and the ICCL is grateful for the opportunity to make this submission.

The ICCL considers that 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. The courts are already empowered to decide whether the force used in any particular situation was lawful, necessary and proportionate, in line with constitutional and other human rights standards. If legislative moves are considered necessary for clarity and foreseeability, the ICCL considers that the codification of the legal principles set down by Mr Justice Hardiman in *DPP v. Barnes*,¹ would provide robust and clear law.

Over the past three years, measures have been proposed on four occasions which, if enacted, would change the law around the use of force by householders.² This submission sets out the current state of the law in Ireland and considers its adequacy in relation to relevant legal standards on the lawful use of force, including the requirements of the European Convention on Human Rights (ECHR).

¹ Court of Criminal Appeal, Hardiman J., 21 December 2006.

² Defence of Life and Property Bill 2006, Senator Thomas Morrissey, May 2006; Criminal Law (Home Defence) Bill 2006, Deputy Jim O'Keefe, June 2006; Scheme of the Criminal Law (Defence of Life and Property) Bill 2007, former Minister for Justice, Equality and Law Reform, Michael McDowell; and, Criminal Law (Home Defence) Bill 2009, Deputies Charlie Flanagan and Michael Ring, June 2009.

2. Current Law in Ireland

The current law in Ireland already provides that a householder is entitled to defend her or his home. However, the use of force by a householder must be proportionate and householders cannot lawfully kill a person merely on the basis that he or she is a burglar. Two fairly recent cases, *DPP v Nally* and *DPP v Barnes* merit special consideration.

The Nally case

The case of *DPP v. Nally*³ concerns the killing of Mr John Ward by Mr Nally, who lives on a remote farm in Mayo. Mr Nally purportedly lived in fear of burglaries and when Mr Ward ventured onto his property, he was shot twice in the back by Mr Nally as well as beaten around the head with a piece of wood. At the Central Criminal Court, Mr Justice Carney directed that the jury return a verdict of murder or manslaughter as he considered that the force used by the defendant was so excessive it could not be held to be reasonable. Mr Justice Carney held that Mr Nally did not have a duty to retreat while he had been initially protecting the inviolability of his dwelling; however, once Mr Nally became the “aggressor” in the altercation, his legal obligations changed. As a result, Mr Nally was not permitted to advance the full defence of self defence by the jury instruction of murder or manslaughter. However, Mr Nally’s conviction for manslaughter was quashed by the Court of Criminal Appeal and a re-trial ordered on the grounds that Mr Justice Carney had only allowed the jury to consider a partial defence.⁴ In the second trial, Mr Nally was acquitted and found not guilty of manslaughter by a jury. Nally had made a plea of full self-defence which was accepted by the jury but later told journalists that he shot Mr Ward to protect his home, and expressed the view that he did not deserve to be acquitted.⁵

The Barnes case

The current law in Ireland with respect to the use of lethal force by a householder or intruder is set out clearly in the 2006 Court of Criminal Appeal case, *DPP v. Barnes*.⁶ In this case, Mr Anthony Barnes entered Mr Richard Forrestal’s house with intent to burgle and killed Mr Forrestal after he interrupted Barnes and an accomplice.

In delivering the judgment of the Court, Mr Justice Hardiman was clear that under Article 40.3.1 and Article 40.3.2 “a person cannot lawfully lose his life simply because he trespasses in the dwellinghouse of another with intent to steal”.⁷

³ Central Criminal Court, Mr Justice Carney, 11 November 2005.

⁴ [2006] IECCA 128.

⁵ RTE News (15.12.06) “Nally comments on his acquittal”, accessible at: <http://www.rte.ie/news/2006/1215/nallyp.html>

⁶ *DPP v. Barnes* [2006] IE CCA 165.

⁷ *Op cit*, p. 15.

The Court grounded its judgment in the Constitution: the personal rights (Article 40.3.1) and right to private property (Article 40.3.2) of the householder and the right to life (Article 40.3.2) of the intruder.⁸ The Court affirmed the common law rule that “a person in his dwellinghouse can never, in law, be under an obligation to leave it, to retreat from it or to abandon it to the burglar or other aggressor”.

It is, in our view, quite inconsistent with the constitutional doctrine of the inviolability of a dwellinghouse that a householder or other lawful occupant could ever be under a legal obligation to flee the dwellinghouse or, as it might be put in more contemporary language, to retreat from it. It follows from this, in turn, that such a person can never be in a worse position in point of law because he has decided to stand his ground in his house.⁹

Notwithstanding that, the Court pointed out that there may be many situations where the householders would be well advised to flee but he or she can never be under a legal obligation to do so.

In this case the defendant was present in the house with the intention to burgle. Central to the Court’s decision was the premise that the act of burglary is one of aggression and as such the householder will always be in a position to defend themselves and their family. However, the Court pointed out that a question remains over the degree of force that can be used. Mr Justice Hardiman stated:

[A]lthough he is not liable to be killed by the householder simply for being a burglar, he is an aggressor and may expect to be lawfully met with retaliatory force to drive him off or to immobilise or detain him and end the threat which he offers to the personal rights of the householder and his or her family or guests. And this is so whether the dwellinghouse which he enters is, or appears to be, occupied or unoccupied when he breaks into it.¹⁰

In relation to the degree of force that could be used by the householder, the Court rejected any formula which could calculate what constitutes a reasonable degree of force as well as the objective, ‘reasonable person’ standard. The latter was disregarded due to the varying circumstances of householders as well as shock, surprise and fear.¹¹ However, Mr Justice Hardiman was clear that some standard had to be laid down in respect of the amount of force that could be used:

Equally, however, it cannot be left to every person himself to lay down for himself how much force he or she is entitled to use. There must be both a subjective and an objective component in the assessment of the degree of force proper to be used by the victim of a burglar.¹²

⁸ See O’Sullivan, C., “*The Burglar and the Burglarised: Self-Defence, Home Defence and Barnes*”, (2007) 17 (4) ICLJ 10.

⁹ *Ibid*, p. 18.

¹⁰ *Ibid*, p. 16.

¹¹ *Ibid*, p. 19.

¹² *Ibid*, p. 19.

Although the common law dictates that the householder would have been entitled to kill the burglar, the Court overruled this position by reference to the Constitution. With regards to the respect for life expressed in Article 40.3.2 of the Constitution, the Court considered that there must be some allowance for self defence by a burglar. That scope is limited, however, to a defence against an attempt by the householder to kill the burglar simply for being a burglar. However, according to the Court, the killing of a householder by a burglar, during the course of the burglary, can never be less than manslaughter, because the initial action by a burglar – of burglary – is one of aggression.

Capital punishment was completely abolished in Ireland under the Criminal Justice Act, 1990¹³ and its non-applicability in this jurisdiction was augmented by the Twenty-First Amendment to the Constitution passed in 2002 which prevents the Oireachtas from enacting any law re-imposing the death penalty.¹⁴ In this respect, the State has abrogated any legal authority to kill a person for committing a criminal offence. Given that the State can no longer carry out executions, there is no question that it would be unlawful for the Oireachtas to attempt to introduce a “licence to kill” for householders confronted by burglars. In the *Barnes* case, this point was powerfully made by the Court of Criminal Appeal, 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].¹⁵

In essence, what the Court of Criminal Appeal has stated as 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. **In the view of the ICCL, this constitutes a perfectly adequate legal framework, and the law in this area does not require reform.**

¹³ S. 1.

¹⁴ Article 15.5.

¹⁵ *Op cit*, p. 15.

3. European Convention on Human Requirements

As the Joint Committee will be aware, the European Convention on Human Rights Act 2003 gives further effect in Ireland to the human rights protections set out in the ECHR.

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 sanctions¹⁶ Whether life has been protected by law involves consideration of the substantive law, the formal mechanisms for its enforcement and their application in practice. In other words, the State must have in place an adequate legal regime to avoid people being exposed to unnecessary risks to their lives.

Under Article 2, lethal force can only be used when absolutely necessary. This is an important consideration bearing in mind that the use of force within the home environment could have unintentional deadly consequences and the fact that *all* force has the potential to be fatal. In relation to the test of absolute necessity under Article 2, any force used must be strictly proportionate, that is, it must be the *minimum* amount of force necessary in pursuit of a legitimate aim.¹⁷

Article 8 (privacy) of the ECHR provides for the right to respect for private and family life, home and correspondence; however, this not an absolute right and can be curtailed in certain circumstances. This right can be lawfully restricted if a person’s life is in jeopardy. Although any interference with Article 8 will still require justification, in reality, lawful and necessary measures taken to protect the right to life are highly unlikely to infringe Article 8. By analogy, in the case of *Venables v. News Group Newspapers Ltd*,¹⁸ a global injunction against the reporting of the identity of whereabouts of the claimants was held not to breach Article 10 (right to freedom of expression) of the ECHR as such disclosure would put the respondents at serious risk of injury or death. Similarly, in *R. v. Lord Saville of Newdigate Ex p. A*,¹⁹ the preservation of anonymity of soldier witnesses in the Bloody Sunday Inquiry was held to be necessary to protect their lives (causing tension with fair trial rights under Article 6).

The purpose of the duty of retreat rule and the use of proportionate, necessary and reasonable force is to attempt to preserve the safety and lives of both the intruder and the householder. Any change in the law which sought to empower householders to use whatever degree of force they might deem appropriate would place the right to enjoy property above the right to life of an intruder.²⁰ This would almost certainly be at variance with the requirements of the ECHR.

The ICCL recommends that any proposed reform of the law in this area be thoroughly benchmarked against Ireland’s obligations under Article 2 of the ECHR.

¹⁶ Simor and Emmerson, (2007), *Human Rights Practice*, Thomson, Sweet and Maxwell, para. 2.003.

¹⁷ See for example, *McCann v. United Kingdom*, (1996) 21 EHRR 97.

¹⁸ [2001] Fam. 430.

¹⁹ [2000] 1 WLR 185.

²⁰ Leverick, F., “Defending Self-Defence” *OJLS* 2007 27 (563), p. 571.

4. Law Reform Commission Proposals

In its 2006 report *Legitimate Defence* (published prior to aforementioned judgment in the *Barnes* case), the Law Reform Commission considered the use of force for defence of a dwelling house, including the ‘castle doctrine’ which provides that householders are allowed to stand their ground when attacked in their homes.²¹ According to the Commission, the current view is that “lethal defensive force is permissible to repel only those intruders who pose a serious threat to the occupants”.²²

On balance, the Commission considered that lethal force may be justified on the basis that it safeguards an individual’s autonomy, and takes cognisance of the split-second decisions of the householders in the situation. However, tests of necessity and proportionality would have to be satisfied before the defence could be maintained. Consequently, the Commission suggested that it would be likely that a person would have to face threat of death or serious injury before fatal force could be used. However, the Commission went further by stating that even if the defence could not be justified on the grounds of physical safety, it could be justified “in recognition of the home’s importance to the defender’s dignity, privacy and honour”²³ and compared the defensive force used by a householder with that used in the protection of liberty or the prevention of sexual attack.

Two of the provisional conclusions of the Commission were:

- no upper limit should be placed on the force that may be used to defend one’s dwelling house;²⁴ and,
- householders should not be required to retreat from an attack in their dwelling home even if they could do so with complete safety”.²⁵

However, in 2006, the Law Reform Commission gave no consideration to the need to strike a balance with the constitutional right to life (Article 40.3.2) and the right to inviolability of the dwelling (Article 40.3.2). Furthermore, its analysis did not engage with Ireland’s legal obligations under Articles 2 and 8 of the ECHR. Any genuinely authoritative consideration of the need for law reform in this area must engage in such a balancing exercise, and **the ICCL trusts that the Law Reform Commission give due regard to these considerations in the context of the work that it is currently undertaking on this issue.**

²¹ See Spencer, K., “*Self Defence and Defence of Home*” (2007) 17 (2) ICLJ 17a.

²² Law Reform Commission, *ibid*, p. 194, para 5.80.

²³ Law Reform Commission, *ibid*, p. 37, para 2.93.

²⁴ Law Reform Commission, *ibid*, p. 37, para 2.94.

²⁵ Law Reform Commission, *ibid*, p. 208, para 5.133.