



Submission on the Criminal Procedure Bill 2009, as passed by Seanad Éireann

February 2010

Contents

About the Irish Council for Civil Liberties (ICCL)	2
1. Introduction	3
2. Victim Impact Statements	4
3. Double Jeopardy	6
4. “With Prejudice” Appeals	12
5. Character Evidence	14
6. Concluding Comments	16

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

Website: www.iccl.ie

1. Introduction

- 1.1 The provisions of the Criminal Procedure Bill 2009 (the “Bill”) are largely based on the recommendations of the Balance in the Criminal Law Review Group (the “Hogan Group”). In this respect, the Irish Council for Civil Liberties (ICCL) would like to draw attention to two companion reports that it published in 2008; *Taking Liberties: The Human Rights Implications of the Balance in the Criminal Law Review Group Report*,¹ which examined the recommendations of the Hogan report; and *A Better Deal: The Human Rights of Victims in the Criminal Justice System*² which suggested alternative measures to protect the human rights of crime victims. The ICCL has also produced a Charter on the Rights of Victims of Crime setting out the rights of crime victims which includes rights to information, protection from harm, privacy, support and recognition, participation and remedy.

- 1.2 The ICCL regrets that the Minister for Justice, Equality and Law Reform did not conduct a wider consultation on the Scheme of the Bill, as the ICCL would have been pleased to contribute its views to the framing of the proposed legislation. Furthermore, if, as the Minister has pointed out, “the system must be seen to be responsive to the needs of society generally but it must be especially aware of the trauma and distress of the victims of crime”³, the ICCL considers that the victims of crime and support organisations should have been fully involved in the development of any statutory framework which purportedly seeks to benefit them.

¹ Available on the ICCL website at www.iccl.ie.

² Available on the ICCL website at www.iccl.ie.

³ Department of Justice, Equality and Law Reform, “Government approves major legislative package that will meet the needs of victims of crime”, 28 December 2008, available at www.justice.ie [accessed 5 February 2010].

2. Victim Impact Statements

2.1 The reform of the statutory regime covering the use of victim impact statements is a positive initiative for the victims of crime. In relevant cases, victim impact statements provide assistance to the trial judge in sentencing and an opportunity for the victim (and in some case the family) to express their loss.

What are the proposals in the Bill?

2.2 The Bill amends s. 5 of the Criminal Justice Act, 1993 (the “1993 Act”), which deals with victim impact statements.⁴ The Bill limits the application of victim impact statements to the victims of sexual offences and those where violence is used or threatened (including associated offences such as those where an attempt is made to commit the offence).⁵

2.3 Under the proposals, the “person in respect of whom the offence was committed”, or victim, will have the opportunity to make a submission to the court.⁶ Victims may also apply to address the court in relation to the effect of the offence.⁷ In this regard, the definition of “person in respect of whom the offence was committed” has been expanded beyond the direct victim (as is currently the case under the 1993 Act) in certain circumstances. In relation to the standing of a person to make a submission or address to the court, this will be extended to include family members of a victim who has died, is ill or otherwise incapacitated.⁸ Furthermore, in relation to addressing the court, if the victim is a child and is unable to give evidence; a parent, guardian or person in *loco parentis* may do so on their behalf. A parent or guardian may also address the court on behalf of a victim who has a mental disorder and is unable to give evidence. However, this does not *exclude* a child victim or a victim who has a mental disorder from making an address. If a child victim or a victim who has a mental disorder wishes to address the court, the Bill allows evidence to be given by video link⁹ or with the use of an intermediary.¹⁰ The ICCL considers that this will provide a real and meaningful improvement for victims of crime and their families, and welcomes these proposals.

Publication or broadcast of victim impact statements

2.4 The Bill empowers the court to direct that the victim evidence is not broadcast or published.¹¹ This provision limits the court’s power to restrict broadcast or publication of the oral address to the court; and, the ICCL assumes that this will also cover any written submission that a victim or person affected by the offence is entitled to make to the court

⁴ Section 4 of the Bill inserting a new section 5 in the 1993 Act.

⁵ Section 4 of the Bill inserting a new section 5 (2)(a) in the 1993 Act.

⁶ Section 4 of the Bill inserting a new section 5(2)(a) in the 1993 Act.

⁷ Section 4 of the Bill inserting a new section 5(3)(a) in the 1993 Act. Notwithstanding this, the Bill stipulates that the fact that a victim does not make such an application does not give rise to an inference that the offence caused little harm, section 4 of the Bill inserting a new section 5(4) in the 1993 Act.

⁸ Section 4 of the Bill inserting a new section 5(2)(b) in the 1993 Act. If more than one family member wishes to address the court, subsections (d) and (e) dictate how this should happen.

⁹ Section 5 of the Bill (which inserts a new section 5A in the 1993 Act).

¹⁰ Section 6 of the Bill (which inserts a new section 5B in the 1993 Act).

¹¹ Section 4 inserting a new section 5(5) in the 1993 Act. Subsections (d) and (e) also provide for accountability and sanction where an offence has been committed by a body corporate.

(under the new section 5(2) (a)).¹² Limitations on broadcasting and publication of victim impact statements are desirable so as to ensure that the right to a good name and the presumption of innocence afforded to any person against whom unproven allegations have been made, is protected. However, such protective measures should apply across the board to oral and written submissions/statements.

Further developments

2.5 The proposals outlined do not consider fully the needs of the victim impact regime. For example, it is not apparent from the Bill who should take responsibility for guiding the victim through the process – the gardaí, the DPP or the judge? Such practical clarifications often make a big difference to the actual experience of crime victims and their families.

2.6 Moreover, while the measures outlined above are welcome, the proposed provisions could pre-empt the examination of victim impact statements which has been targeted by the Law Reform Commission in their current body of work.¹³ The ICCL suggests that the Minister undertake to give further consideration of victim impact statements in light of any future recommendations of the Law Reform Commission.

ICCL Recommendations

- Responsibility for liaison with a victim or family member in relation to the victim impact statement process should be clearly assigned.
- The Minister for Justice, Equality and Law Reform is invited to undertake to give further consideration to victim impact statements in the event of future recommendations by the Law Reform Commission.

¹² However, this is not clear on the face of the Bill. New section 5(5)(d) refers to “evidence”, section 5(2)(a) refers to “submissions and evidence” and section 5(3)(a) refers to “evidence”.

¹³ Law Reform Commission, (2007) *Report on the Third Programme of Law Reform 2008-2014*, at p. 13.

3. Double Jeopardy

3.1 The rule against double jeopardy means that a person acquitted of an offence cannot be tried again for the same offence. The rule seeks to provide certainty in the law and to allow those who have been acquitted of a crime to live at liberty without fear of further prosecution.

Human rights concerns

3.2 Article 4 of Protocol 7 of the European Convention on Human Rights (ECHR) provides that a person should not be tried again for an offence for which she or he has been “finally acquitted or convicted”, except where there is evidence of “new or newly-discovered facts” or if there has been a “fundamental defect” in the previous proceedings. Having regard to the European Convention on Human Rights Act 2003, there is a legal duty upon all organs of the State to act in accordance with the case law of the European Court of Human Rights and an obligation on judges to take note of relevant case law of the Court.¹⁴

What are the proposals in the Bill?

3.3 Under Part 3 of the Bill, the Director of Public Prosecutions (DPP) will be entitled to apply to the Court of Criminal Appeal (the “Court”, for the purposes of this section) for an order quashing a person’s acquittal and ordering a retrial. Different procedural arrangements apply depending on the scenarios around which a retrial is sought. The DPP may apply for a retrial in two circumstances:¹⁵

- where new and compelling evidence has become available;¹⁶
- where an acquittal is tainted.¹⁷

3.4 Under both procedural arrangements, the Court must be satisfied that quashing an acquittal and ordering a retrial is in the public interest. The Court must also consider whether it is in the interests of justice to do so. In determining this, the Court should take into account:

- the likelihood that the trial could be conducted fairly;
- the time which has passed;
- the interests of the victim of the alleged offence;
- any other matters that the court considers relevant.

¹⁴ European Convention on Human Rights Act, 2003, section 3. Furthermore, Article 14(7) (right to fair trial) of the International Covenant on Civil and Political Rights (ICCPR) stipulates that retrials for the same criminal offence should be proscribed in all circumstances; even in cases where there has been a tainted acquittal or where fresh and compelling evidence emerges. The ICCPR was signed by Ireland on 1 October 1973 and ratified on 8 December 1989.

¹⁵ However, the DPP may only make one such application in both instances – see sections 8(4) and 9(5).

¹⁶ Section 8(3).

¹⁷ Section 9(3).

Privacy of the proceedings

3.5 The Court may exclude the public from proceedings which take place under this Part of the Bill where it is satisfied that because of the nature or circumstances of the case, it is in the interests of justice to do so. This does not apply to *bona fide* members of the Press.¹⁸ However, the Court may also prohibit the publication or broadcast of information given in evidence on matters which would identify the accused or other person.¹⁹ Provision for reporting restrictions on such cases is a reflection of the intense media attention that they are likely to attract and the potential for such coverage to affect the fairness of a trial and the right to privacy of the parties.²⁰ However, any limitations should be imposed by the Court of Criminal Appeal only and be determined according to what is necessary in the interest of justice, including the defendant's right to a fair trial.

New forms of evidence allowed

3.6 It is interesting to note that for the purposes of this Part of the Bill, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.²¹ This allows a person to be retried under new laws of evidence if they have been amended since the original trial. For example, it may be possible that a person could be retried in the future where there is compelling evidence arising from the use of surveillance authorised under the Criminal Justice (Surveillance) Act 2009. Article 15.5.1 of the Constitution and Article 7 of the ECHR protect against retroactive punishment in criminal matters. There has been little jurisprudence on the matter but it is arguable that a change in the rules of evidence (for example in relation to admissibility) could be considered sufficiently close to a determination of guilt to fall within the realm of Article 7 of the ECHR.²²

Speedy retrials

3.7 The accused person may be released on bail, pending retrial²³ and the trial court will ensure that the retrial takes place as expeditiously as reasonably possible.²⁴ In this regard, Article 6 (right to a fair trial) of the ECHR, which requires that everyone is entitled to a hearing within a reasonable time, must be taken into account. This is especially pertinent in the situations as envisaged under the Bill, where an acquitted person who has already been through a trial process has to face another trial period.

¹⁸ Section 12 (2).

¹⁹ Section 12 (3). The publisher, editor, owner or broadcaster may be liable to a fine of maximum €50,000 or imprisonment for up to 3 years under section 12 (5).

²⁰ Under Articles 38 and 40 of the Constitution and Articles 6 and 8 of the European Convention on Human Rights (ECHR).

²¹ Section 10(5).

²² Article 7 provides, *inter alia*, "No one shall be held guilty of any criminal offence on account of an act or omission which did not constitute a criminal offence under national or international law at the time it was committed". See Harris, O'Boyle, Warbrick, (1995), *Law of the European Convention on Human Rights*, Butterworths, p. 275 and Simor, Emmerson, (2009), *Human Rights Practice*, para 7.004.

²³ Section 13.

²⁴ Section 10(6). Legal aid may be granted under section 11. Appeal to the Supreme Court on a point of law of public importance is available under section 14.

Cases where there is new and compelling evidence

3.8 Certain specified offences which are set out in the schedule to the Bill may be appealed to the Court where there is new or compelling evidence. Such a procedure could also be referred to as a “fresh evidence” appeal i.e. contrary to current practice where a jury decision cannot be overturned, the State could apply for the quashing of a jury acquittal and retrial before potentially a judge-only court.²⁵ This applies to offences which had been tried on indictment only and concerns the most serious offences such as rape, murder, torture, genocide and crimes against the state. However, the Criminal Procedure Bill 2009 also includes certain less serious offences such as damaging property. Given the extreme nature of this procedure – appealing an acquittal which has been granted by a jury of peers – the ICCL considers that this mechanism should remain restricted to the most serious indictable crimes.

New and compelling evidence

3.9 New and compelling evidence is evidence that was not adduced in the proceedings in which the person was acquitted (nor appeal proceedings), and could not have been adduced in those proceedings with the exercise of reasonable diligence. The evidence must be reliable, substantial and must implicate the acquitted person with a high degree of probability in the commission of the relevant offence.²⁶

Human rights concerns

3.10 As mentioned previously, Article 4 of Protocol 7 to the European Convention on Human Rights (ECHR),²⁷ provides that a person should not be tried again for an offence for which she or he has been “finally acquitted or convicted”, except where there is evidence of “new or newly-discovered facts” or if there has been a “fundamental defect” in the previous proceedings.²⁸ According to the European Court of Human Rights, fundamental defects could include “jurisdictional errors or serious breaches of court procedure, abuses of power, manifest errors in the application of substantive law or any other weighty reasons stemming from the interests of justice”.²⁹ However, an incomplete or one-sided investigation; or, one which led to an “erroneous” acquittal does not, in itself, indicate the presence of a

²⁵See Criminal Justice (Amendment) Act 2009 where the use of the Special Criminal Court to try cases has been extended.

²⁶ Section 7.

²⁷ Article 4 :

“1.No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.”

Ireland ratified the Protocol on the 1 November 2001.

²⁸ As reiterated in the case of *Nikitin v. Russia*, the aim of Article 4 of Protocol No. 7 is to prohibit “the repetition of criminal proceedings that have been concluded by a final decision”; *Nikitin v. Russia*, Application No. 50178/99, Judgment of 20 July 2004, at para. 35. See also *Franz Fischer v. Austria*, no. 37950/97, § 22, 29 May 2001, and *Gradinger v. Austria*, judgment of 23 October 1995, Series A no. 328-C, § 53 and *Sergey Zolotukhin v. Russia*, Application number 14939/03, Grand Chamber judgment 10 February 2009.

²⁹ *Radchikov v. Russia*, Application No. 65582/01, Judgment of 24 May 2007, at para. 48.

fundamental defect in the previous proceedings. As the European Court of Human Rights has stated:

Otherwise, the burden of the consequences of the investigative authorities' lack of diligence during the pre-trial investigation would be shifted entirely [...] and, more importantly, the mere allegation of a shortcoming or failure in the investigation, however minor and insignificant it might be, would create an unrestrained possibility for the prosecution to abuse process by requesting the reopening of finalised proceedings.³⁰

Article 4 of Protocol 7 has non-derogable status under the Convention and therefore, may not be departed from, even in time of war or other public emergency.

³⁰ *Radchikov v. Russia, ibid*, at para. 48.

Cases where the acquittal is tainted

3.11 According to Section 9 of the Bill, if a person has been acquitted of an indictable offence and that person, or another person, has been convicted of an offence against the administration of justice relating to the trial which resulted in the acquittal, an appeal may be taken against the acquittal (“tainted acquittal”).³¹ An offence against the administration of justice in this case means:

- an offence under s. 41 of the Criminal Justice Act 1999 (intimidation etc. of witnesses, jurors and others);
- bribery, corruption, interference with a juror, witness (potential witness), judge or court official
- attempting to pervert the course of justice;
- perjury;
- conspiring or inciting another person to commit any of the above offences.³²

When can a tainted acquittal be quashed?

3.12 The Court can make an order for a tainted acquittal to be quashed and the person to be retried where the Court is satisfied that:

- it is more likely than not that the commission of the administration of justice offence affected the result of the trial;
- no application or appeal in relation to the administration of justice offence is pending before any court;
- it is in the public interest.³³

Human rights concerns

3.13 In relation to offences against the administration of justice, it is essential in the first instance, that vulnerable and intimidated witnesses receive appropriate treatment in order to safeguard against the abuse of process. Witnesses may be intimidated in a wide variety of cases; however, the category of witnesses who require enrolment in full witness protection programmes is likely to be quite small. Rather, all witnesses should be afforded a minimum standard of treatment and witnesses who are identified as particularly vulnerable to intimidation or tampering, should receive the necessary protection from the outset. Indeed, the European Court of Human Rights has found that there is a duty on the Government to put in place a system which safeguards the life, liberty and security of witnesses; and there is an obligation on the Government to organise criminal justice proceedings in order to secure those interests.³⁴ There are a number of straightforward measures which can be put in place to protect vulnerable witnesses, including:

- clear protocols for witness liaison and support;
- dedicated witness support service, providing witnesses with a clear and accessible point of contact;

³¹ Section 9.

³² A complete definition is available in section 7 of the Bill.

³³ Section 9 (3) and (4).

³⁴ *Doorson v. Netherlands* (1996) 22 EHRR 330.

- provision of escort services to and from the court;
- allowing witnesses to be accompanied by support persons;
- adequate preparation of witnesses for trial;
- appropriate facilities for witnesses in the court building;
- giving of evidence by video/ television link.³⁵

ICCL Recommendations

The ICCL does not believe that the case has been made for amendment to the double jeopardy rule in this jurisdiction. Retrial of the same offence is a costly and time-consuming process. The necessity for retrials could be alleviated by improvements in the protections afforded to witnesses and victims in line with Articles 2 (right to life) and 8 (right to private life, home and correspondence) of the ECHR, as described in paragraph 3.13.³⁶

Without prejudice to its view that the law should not be amended to allow an acquitted person to be re-tried for the same offence, in the event that legislation on this matter is passed, the ICCL recommends that:

- The schedule to the Bill should be amended so that the new provisions apply to the most serious indictable crimes.
- More specific guidance be provided on what will be classified as “new and compelling evidence”.
- The standards set down by the European Court of Human Rights in relation to “fundamental defects” be met.
- It would be far more appropriate to put in place adequate mechanisms to protect victims of crime and witnesses from intimidation and harm, including:
 - video link facilities should be available in *every* court room;
 - procedures should be put in place to afford victims, witnesses and their families entry and exit from the courthouse in a private fashion;
 - a statutory Witness Protection Scheme should be established;
 - garda escort for any victim who has been intimidated or fears that they may be subject to intimidation.

³⁵ In regard, see ICCL, (June 2008), *A Better Deal: The Human Rights of Victims in the Criminal Justice System*.

³⁶ Consideration should also be given, in this respect, to Ireland’s obligations under Article 14 (right to fair trial) of the International Covenant on Civil and Political Rights (ICCPR).

4. “With prejudice” Appeals

4.1 At present, Irish law provides that a verdict of acquittal handed down by a jury cannot be appealed. Under the Bill, the DPP would be entitled to appeal an acquittal to the Supreme Court; however, this appeal would be on a question of law only.³⁷ These are referred to as “with prejudice” appeals. The Supreme Court may affirm the acquittal even if it is considered that a point raised in the appeal may have grounds but it is in the interests of justice to retain the acquittal verdict. Alternatively, the Supreme Court may quash the acquittal and order a retrial.³⁸ If a retrial is ordered, the Court may release the person on bail, and the trial court must ensure that the trial takes place as expeditiously as reasonably possible.³⁹ The latter is essential to ensure compliance with Article 6 (right to a fair trial) of the ECHR.

Procedural safeguards

4.2 The Bill includes some safeguards on the procedure around the operation of “with prejudice” appeals:

- right of appeal is on a question of law only and is made to the Supreme Court;
- the defendant may be represented;
- even if the defendant is represented, the Supreme Court may assign legal representation to argue in favour of the acquittal verdict, if the Court considers that it is in the public interest to do so;
- expeditious retrials;
- the hearing may take place in private if in the interests of justice (however, *bona fide* press representatives will not be excluded);
- prohibition on publication or reporting, if in the interests of justice;
- legal aid is available.⁴⁰

However, clarity is required regarding the extent to which the DPP may make a “with prejudice” appeal and it is further submitted that prior judicial approval should be sought before an appeal can be made to the Supreme Court.

Human rights concerns

4.3 This new procedure allows a judge-only court to overrule a jury decision and could be considered an unwarranted interference with Article 38.5 of the Constitution which states that: “no person shall be charged on any criminal charge without a jury”. It has been pointed out that Article 38.5 should be viewed as a “constitutional imperative” rather than a personal “right” and “this would seem to mean, for example, that it is not open to an accused charged with a non-minor offence to waive this right to jury trial”.⁴¹

³⁷ Section 23.

³⁸ Section 23(9).

³⁹ Section 23(10).

⁴⁰ Section 23.

⁴¹ Hogan, G.W., Whyte, G.F., (2003) *JM Kelly: The Irish Constitution*, 4th Ed., Dublin, Lexis Nexis Butterworths, at p. 1221.

Inherent in the constitutional right to jury trials, is the requirement that a person's guilt or innocence should be determined by a jury of peers and not by a judge. A natural progression from this is the assurance that a judge cannot overturn the decision of a jury at a later time.

- 4.4 In relation to “with prejudice” appeals and the amendments to the double jeopardy rule (as discussed in section 3 of this submission), the re-opening of cases by the State must be assessed in light of Article 6 (right to fair trial) of the ECHR. The European Court of Human Rights has held that the principle of legal certainty is one of the “fundamental aspects” of the rule of law and “where the courts have finally determined an issue, their ruling should not be called into question”⁴² unless it is justified by “circumstances of a substantial and compelling character”.⁴³ In the case of *Fadin v. Russia*, the Court stated that “the power to reopen criminal proceedings must be exercised by the authorities so as to strike, to the maximum extent possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice”.⁴⁴
- 4.5 It is also important to note that the Law Reform Commission, which is the statutory body charged with advising the Government on law reform, did not advocate the use of “with prejudice” appeals in its 2006 *Report on Prosecution Appeals and Pre-Trial Hearings*.⁴⁵ No convincing rationale has been produced by Minister for Justice, Equality and Law Reform to justify the introduction of a new mechanism.
- 4.6 According to the DPP's 2008 Annual Report, 97% of prosecutions heard in 2007 resulted in conviction.⁴⁶ The ICCL does not believe that the introduction of “with prejudice” appeals is required in this jurisdiction. It undermines the constitutional authority of jury decision-making and perpetuates an ongoing threat of a criminal prosecution even though the law should be clear, exact and foreseeable.

ICCL Recommendation

- The ICCL recommends that “with prejudice” appeals should not be introduced.

⁴² *Ryabykh v. Russia*, Application No. 52854/99, Judgment of 24 July 2003, at para. 51.

⁴³ *Ryabykh v. Russia*, *ibid*, at para. 52. See also *Radchikov v. Russia*, *op cit*, at para. 42 and *Brumarescu v. Romania*, Application No. 28342/95, Judgment of 28 October 1999, at para. 61.

⁴⁴ *Fadin v. Russia*, Application No. 58079/00, Judgment of 27 July 2006, at para. 33. Although a violation of neither Article 6 nor Article 4 of Protocol 7 was found in the particular circumstances of the case. See also *Savinskiy v. Ukraine*, Application No. 6965/02, Judgment of 28 February 2006, at para. 25.

⁴⁵ The Commission could not recommend the use of “with prejudice” appeals due to doubts over the constitutionality of the measures, para. 1.35.

⁴⁶ Office of the Director of Public Prosecutions, *Annual Report 2008*, p. 38. These are the latest available figures.

5. Character Evidence

5.1 An accused person can only be asked about previous convictions at trial in very strictly defined circumstances. When this happens, the defendant is said to lose or drop her/his “shield”. This tight control is necessitated by the highly prejudicial effect such evidence tends to have on juries. Indeed, once the evidence has been placed before a jury, the judge effectively loses control of its impact.

What are the proposals under the Bill?

5.2 Part 5 of the Bill expands the areas in which the shield can be dropped. For example, if the defendant makes allegations against a victim who is deceased and incapacitated, the shield may be lost.⁴⁷ However, the shield will not be lost in these circumstances, if:⁴⁸

- the defendant gives seven days notice to the court;
- the defendant is unable to give notice to the court but leave is granted by the court to the defendant to speak of his or her own good character; or, question the character of witnesses or the victim who is deceased or incapacitated.

5.3 The Bill further extends the circumstances in which a defendant can be asked about previous convictions. Under current Irish law, this can only happen when the defendant or lawyer makes allegations against the prosecutor or a prosecution witness. However, under proposals in the Bill, previous convictions can be heard in court, if any witness, including a defence witness, speaks ill of the prosecutor/prosecutor witnesses.

Human rights concerns

5.4 It is the view of the ICCL that there could be serious difficulties in controlling such a statement from defence witnesses, particularly where it is elicited under cross-examination.⁴⁹ There is a significant possibility that a witness could inadvertently speak of the defendant’s good character. Subsequently, this would have the disproportionate effect that any previous convictions of the defendant, whether relevant or otherwise, could be laid before the jury. This could result in highly prejudicial material being put in evidence as a consequence of witness evidence tendered, which is out of the control of the defendant, and to some extent his or her counsel.

5.5 In line with Articles 38.1 (trial in due course of law) and 40.3.2 (right to a good name) of the Constitution, Articles 6 (right to fair trial) and 14 (right to fair and equal treatment before the law) of the ECHR, it is a fundamental right of a defendant to be presumed innocent until the prosecution has proved otherwise. To this end, character evidence is at best relevant to assisting the prosecution proving the case. At its worst, the potential harm and severe prejudicial effect that such evidence may have on juries cannot be underestimated. The probative value of character evidence must be very high in order to counterbalance its detrimental effect.

⁴⁷ Section 34.

⁴⁸ Section 34 inserting a new section 1A in Criminal Justice (Evidence) Act 1924.

⁴⁹ Rule 5.18 of the *Code of Conduct for the Bar of Ireland* provides that barristers may not coach a witness in his or her evidence, adopted 13 March 2006, available at <http://www.lawlibrary.ie/viewdoc.asp?DocID=581&m=f>.

ICCL Recommendation

- The Bill should be amended so that the defendant's previous convictions will not be admissible in the event that a defence witness inadvertently speaks of the defendant's good character.

6. Concluding Comments

- 6.1 The ICCL does not consider that the proposed amendment of criminal procedure rules will result in any significant changes for the victims of crime. As is outlined in the ICCL's 2008 *Better Deal* document, the majority of crime victims do not see rules of evidence and criminal procedure as an effective means through which to vindicate their rights. Rather they wish to see real, practical changes in their treatment within the criminal justice system. Amendments to the regime surrounding the use of victim impact statements are a very welcome development. However, the victims of crime should be placed centre stage in any reform of the law and the Bill currently fails in this regard. For example, the Bill does not identify the personnel who will guide victims through the victim impact procedures.
- 6.2 Legislation on criminal evidence and procedure is not the appropriate means through which to further the rights of the victims of crime. In this respect, the ICCL points to the European Convention on Human Rights (Articles 2, 3, 6, 8) and the European Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings which both set out the rights of victims of crime applicable in this jurisdiction.⁵⁰
- 6.3 If the Government is genuinely dedicated to improving life for the victims of crime, all relevant provisions of the Framework Decision should be incorporated in to Irish law and policy, in line with the ICCL's proposals in the *Better Deal* document. Chipping away at the rights of defendants will do little to enhance the experiences of crime victims who seek security, privacy, safety, information and recognition. The ICCL is of the view that a fair and just criminal justice system is one which respects the rights of victims and defendants alike. The ICCL urges the Minister for Justice, Equality and Law Reform to re-consider and re-calibrate these proposals in a genuinely victim-centred manner.

⁵⁰ See also the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985 and Recommendation Rec(2006)8 of the Committee of Ministers to member states on the assistance to crime victims.