TAKING LIBERTIES:

The Human Rights Implications of the Balance in the Criminal Law Review Group Report

TAKING LIBERTIES: The Human Rights Implications of the Balance in the Criminal Law Review Group Report

Irish Council for
Civil Liberties

TAKING LIBERTIES:
The Human Rights Implications of the Balance in the Criminal Law Review Group Report

June 2008

ACKNOWLEDGEMENTS

The ICCL wishes to thank all those who provided information and feedback to the author of the report. Particular thanks are due to: Mr Michael Finucane, Solicitor, Senator Ivana Bacik and Ms Síobhán Ní Chúlacháin BL who read and commented upon an earlier draft. The responsibility for any errors or inaccuracies remains that of the ICCL alone.

CONTENTS


Irish
Council
for
Civil
Liberties
Irish Council for
Civil Liberties

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 the 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 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***

EXECUTIVE SUMMARY

Background

The notion of 'balance' in the criminal justice system is one which has come to the forefront of criminal justice discourse in recent years. This debate has fuelled a widespread misconception that limiting the rights of defendants can in some way enhance or bolster the rights of the victims. However, restrictions imposed on fundamental rights in the context of the criminal justice system affect *everyone* and, in fact, do little or nothing to vindicate the rights of victims. The issue is not one of 'balance' but, rather, the realisation of full legal protection for the fundamental rights of victims and defendants alike.

This report reviews the human rights implications of the work of the Balance in the Criminal Law Review Group, established by the then Tánaiste and Minister for Justice, Equality and Law Reform, Mr Michael McDowell T.D., on 1 November 2006, with a deadline to complete its work by 1 March 2007. The Review Group was tasked with the examination of issues including the right to silence, the admission of character evidence, the operation of the exclusionary rule and permitting prosecution appeals. It presented the Tánaiste with an Interim Report containing provisional recommendations on the right to silence on 5 February 2007. These recommendations were subsequently incorporated into the Criminal Justice Act 2007. The Group's Final Report was presented on 15 March 2007.

More than a year later, the full impact of the Group's recommendations has yet to be explored. The ICCL has produced this review in order to provide considered reflection of the compatibility of the Review Group's recommendations with domestic and international human rights standards. The ICCL's principal findings follow.

Right to Silence

Changes allowing inferences to be drawn from the silence of a person during Garda questioning were introduced by the Criminal Justice Act 2007; however, these have not been accompanied by safeguards to ensure that the right to a fair trial is protected. The Minister for Justice, Equality and Law Reform has yet to introduce regulations providing for a new form of Garda caution which would make the consequences of remaining silent crystal clear. Lawyers still cannot be present during Garda questioning and judges lack guidance on the proper instruction of juries against drawing improper inferences from silence. The ICCL recommends that these shortcomings be addressed.

Character Evidence

The potential harm and highly prejudicial effect of allowing "bad character" evidence to be led in court has not been underestimated by the Review Group. Only minor changes in the law are proposed in this area. Nonetheless, care will be required to ensure that any reform continues to strike an appropriate balance between the rights of an accused person and the interests of justice. The ICCL recommends that judicial permission be required to cross-examine on character in cases where a defendant casts imputations on the character of a person who is deceased or incapacitated. A defendant should not be exposed to cross-examination on character simply because a defence witness speaks to his/her good character.

Infringements of Constitutional Rights: the Exclusionary Rule

Evidence obtained as a result of a conscious and deliberate violation of a defendant's constitutional rights is not admissible in evidence, unless there are extraordinary excusing circumstances. Dr Hogan, the Chairman of the Review Group, acknowledged that the formulation of this rule is strict. He considered, however, that it has a beneficial and constructive effect in ensuring that proper investigative standards are respected by An Garda Síochána and others. Nevertheless, he found himself in the minority amongst members of the Review Group, many of whom considered that it would be unfair if "technical errors" were to lead to acquittals. The ICCL's report emphasises that the fundamental rights laid down in the Constitution (and in international human rights law) cannot be equated with "technical errors". It endorses Dr Hogan's opinion that, in recognition of the primacy of such rights, no amendment should be made to the existing exclusionary rule.

"With Prejudice" Appeals and Re-opening Acquittals Following New Evidence

The Review Group considered that no significant argument was advanced against the principle of "with prejudice" appeals (where an acquittal handed down by a jury may be reversed by a judicial decision following a successful DPP appeal) or "fresh evidence" appeals (re-opening acquittals following new evidence). However, the ICCL agrees with the Law Reform Commission's 2006 recommendation that neither "with prejudice" appeals nor "fresh evidence" appeals should be introduced. In the event that such appeals were to be constitutionally permitted, the ICCL calls for robust safeguards around their application; including a high threshold of new or newly-discovered facts and/or a requirement to show evidence of a fundamental defect in the previous proceedings.

Other Issues considered in the Report

Other issues addressed in the ICCL's report include the need for the defence to disclose expert reports/statements on which the defendant wishes to rely; permitting prosecutors to independently volunteer information to the trial judge about sentencing precedents; and the development of sentencing guidelines and "bench books" for judges. The ICCL also recommends that the rule against hearsay should be retained in its current form, and all witnesses who are required to identify a suspect should be permitted to make that identification from behind a one way screen. A companion volume to this report sets out the concrete ways in which the human rights of victims can be enhanced, while fully respecting the human rights of those convicted of crimes.

INTRODUCTION

The Balance in the Criminal Law Review Group was established by the then Tánaiste and Minister for Justice, Equality and Law Reform, Mr Michael McDowell T.D., on 1 November 2006, with a deadline to complete its work by 1 March 2007. The Review Group was tasked with the examination of certain specific issues[1] identified by the then Tánaiste in a speech of 20 October 2006 as well as any other proposals regarding criminal law, criminal evidence and criminal procedure that may have come to the attention of the Group in the course of the review.[2] The Review Group presented the Tánaiste with an Interim Report containing provisional recommendations on the right to silence on 5 February 2007. Its Final Report[3] was presented on 15 March 2007 and eight days later the Criminal Justice Bill 2007 was presented to the Oireachtas (Irish Parliament).

MEMBERSHIP OF THE BALANCE IN THE CRIMINAL LAW REVIEW GROUP

The members of the Review Group were:

- *Dr Gerard Hogan SC*, Law School, Trinity College, Dublin (Chairman);
- *Barry Donoghue*, Deputy Director of Public Prosecutions;
- *Professor David Gwynn Morgan*, Faculty of Law, University College Cork;
- *Dr Richard Humphreys*, Barrister-at-Law;
- *Tony McDermott*, Assistant Secretary, Criminal Law Reform and Human Rights Divisions, Department of Justice, Equality and Law Reform;
- *Caitlín Ní Fhlaitheartaigh*, Advisory Counsel, Office of the Attorney General;
- *Ken O'Leary*, Assistant Secretary, Crime, Mutual Assistance and Extradition Divisions, Department of Justice, Equality and Law Reform;
- *Nora Owen*, Former Minister for Justice, member of the Commission for the Victims of Crime.

In relation to the composition of the Review Group, Mr Justice Adrian Hardiman pointed out in a paper delivered on 29 June 2007 that there was a dearth of criminal practitioners amongst its members.[4] He added that the Review Group should have included prosecution and defence practitioners who are knowledgeable in how the law operates from both sides. Without wishing to criticise the professionalism or integrity of any member of the Review Group, the ICCL fully shares Mr Justice Hardiman's concerns in this regard.

---

[1] These are set out at Appendix 1.
[2] Other issues that came to the attention of the Group, which they considered warranted further attention, are listed at Appendix 2.
[3] Hereinafter referred to as the "Report".
[4] Mr Justice Hardiman, in a paper delivered to *Rebalancing Criminal Justice in Ireland: A Question of Rights*, Conference at the UCC Centre for Criminal Justice and Human Rights, 29 June 2007. Mr Justice Hardiman's remarks were widely reported (see for example, Roche, B. (2007) Judge says law review helping to erode rights, *Irish Times*, 30 June 2007).

THE QUESTION OF BALANCE

A widespread fallacy about criminal justice is that the prosecution of an offence by the Director of Public Prosecutions (DPP) involves a weighing up of the defendant's "case" against the victim's "case". As a result, there is a perception that restricting the rights of the defendant can in some way advance or bolster the "case" of the victim. This is a misconception. In our adversarial system, the State is charged with investigating the offence and taking prosecutions on behalf of the "People". The onus is on the State to prove beyond all reasonable doubt that the defendant is guilty of the offence in question in accordance with the law; thus the criminal case is "an exercise in determining whether the accused satisfies the legal requirements of guilt".[5] If the State fails to prove that the legal requirements are met, then the person is acquitted. Therefore, the core legal relationship is between the State and the defendant.

Victim participation takes place at certain key points in the process: at the beginning when the crime is reported; possibly during the trial when the victim is required as a witness; and at the end of the process when a victim, who is enabled to do so under legislation, may provide a victim impact statement, prior to the sentencing of a defendant who has been found guilty. However, as Mr Justice Hardiman has recently highlighted, only those prosecutions which result in a conviction are considered meaningful within the current criminal justice debate, while acquittals are characterised as a failure.[6] In the same context, he stated that there is a "crying need" to explain criminal justice issues to the public, as many people perceive that the rights of defendants are "criminals'" rights rather than rights to which everyone living in Ireland is entitled.[7] In reference to the Criminal Justice Act 2007 which was informed by some of the recommendations of the Review Group, Mr Michael O'Higgins SC stated, "the changes amount to a serious diminution of human rights but this is not the way they are perceived. The rights in question are seen not to be "our rights", but rather the rights which belong to criminals, or people suspected to be criminals, a distinction that is increasingly blurred".[8]

In this report, the ICCL recognises the contribution of the Review Group and endorses some of its findings. However, it expresses serious reservations about some aspects of the Group's proposed "rebalancing" of the criminal law. In the ICCL's view, the Review Group has failed to strike an appropriate balance between respecting due process and protecting the interests of justice. The ICCL believes that proposing to strip defendants of fundamental rights and diluting the constitutional protection of such rights will not serve to "rebalance" matters to the advantage of victims of crime. Victims have often been forgotten players in our criminal justice system, and their rights should be enhanced. However, this cannot be achieved by chipping away at the fundamental rights of people, rightly or wrongly, accused of crimes.

The forthcoming companion volume to this Report addresses the effective protection of victims' rights from a human rights perspective.

---

5 Walsh, D., (2002), *Criminal Procedure*, Dublin, Thomson Roundhall, at p. 1.
6 Mr Justice Hardiman, *op cit*.
7 Mr Justice Hardiman, *op cit*.
8 Michael O'Higgins SC, paper to the Irish Human Rights Commission and Law Society of Ireland 5th Annual Conference, *Human Rights and Criminal Justice*, 13 October 2007. Re-published in the Autumn 2007/Winter 2008 edition of *Rights News* (ICCL, Dublin, 2007).

ISSUE 1: THE RIGHT TO SILENCE

WHAT IS THE RIGHT TO SILENCE?

The right to silence means that a person who is suspected of committing an offence does not have to answer questions posed by the Gardaí and is not obliged to give evidence when court proceedings are taken against him or her. The Review Group states that the "right is regarded as a fundamental one with long historical antecedents in the common law world".[9] 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 European Convention on Human Rights (ECHR). According to the European Court of Human Rights (the "European Court") the right to silence contributes to the notion of a fair trial under Article 6 by "providing the accused with protection against improper compulsion by the authorities" and in turn "these immunities contribute to avoiding miscarriages of justice". Article 14(3) (g) of the International Covenant on Civil and Political Rights (ICCPR) states that no person should be required to "confess against himself or to confess guilt". [10]

WHEN DOES THE RIGHT APPLY?

A person's constitutional right to remain silent in the face of questioning by the organs of the State can arise in a number of ways. The Review Group set out the various categories as follows:

1. The defendant may not be asked at trial about the reasons he or she did not answer questions while in Garda custody;
2. While the trial judge may remind the jury of the fact that the defendant did not give evidence at the trial, the jury must be expressly instructed not to draw any inference from his or her failure to exercise that right;
3. The prosecution cannot comment on the failure of the defendant to give evidence (they are expressly forbidden from doing so under the Criminal Justice (Evidence) Act 1924, section 1).

Although the right to silence enjoys constitutional protection, the rule is not absolute and can be curtailed by legislation.[11] The Report sets out the limited number of statutory exceptions on the right of a defendant to remain silent which are permitted under Irish law.[12] 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.

WHY REMAIN SILENT?

Four reasons why a person would choose to remain silent rather than explain their position in the event of questioning (at the Garda station or at trial) were identified in the Report:

Shock. A person may become upset if arrested and questioned by the Gardaí;

Embarrassment. The Review Group considered that a person may wish to conceal something of which he or she is ashamed;

Lack of knowledge. The "precise accusation and its implications" may not always be clear to the defendant, who may wish to consult with a lawyer before facing the questions of a Garda;

Vulnerable people. The suspect may be inarticulate, have physical or mental difficulties or other vulnerablity under questioning (while in custody at a Garda station or while on the stand).

People may also be compelled or choose to be silent on other grounds including:

- Confusion;
- Desire to protect himself/herself or another person;
- Fear of reprisal;
- Dependency problems (drugs/alcohol);
- Lack of understanding of the caution administered by the police;
- Lack of awareness that there were certain facts that were likely to prove his or her innocence;
- Fear that he or she will perform badly, as unlike the experienced police officer or prosecutor, he or she is uninformed about the law.[13]

The European Court has declared that there may be many reasons why in a specific case an innocent person would not be prepared to answer police questions and, in particular, that "an innocent person may not wish to make a statement before he has had a chance to consult a lawyer".[14]

---

[9] Report, at p.18.

[10] Other international standards that deal with the right to silence include: Article 8(2)(g) of the American Convention on Human Rights, which provides that an accused person cannot be compelled to testify against himself and Article 8(3), which states that a confession shall only be valid if it is obtained without coercion of any kind. The right not to be compelled to incriminate oneself and to confess guilt is also contained in Article 55(1) (a) of the Statute of the International Criminal Court, in Article 20(4)(g) of the Statute of the International Criminal Tribunal for Rwanda and in Article 21(4)(g) of the International Criminal Tribunal for the Former Yugoslavia.

[11] The right to silence is widely regarded across common law jurisdictions as a right which may be qualified; however, this departure is tolerated only in exceptional cases set out in law where adequate safeguards are in place.

[12] Offences against the State (Amendment) Act 1988, section 2; Offences against the State (Amendment) Act 1998, section 5; Criminal Justice Act 1984, sections 18 and 19; Criminal Justice (Drug Trafficking) Act 1996, section 7.

[13] "A great many people questioned in Garda stations are poorly educated, come from deprived backgrounds and are often vulnerable due to addiction to drugs or alcohol. They are likely to be frightened and confused and may not remember where they were or who they were with on any given date and they may have no idea what facts may be relevant to their defence". Michael Farrell, *The Right to Silence and the Criminal Justice Bill*, a paper delivered to the School of Law, Trinity College Dublin, 9 May 2007, at p. 5.

[14] *Averill v. United Kingdom*, (2001) 31 EHRR at p. 14.

FINDINGS AND RECOMMENDATIONS OF THE CRIMINAL LAW REVIEW GROUP

The Review Group considers that legislation should be introduced which provides that inferences as to the credibility of the defence forwarded by the defendant could be drawn when a person relies on a fact in his or her defence that he or she failed to mention while in custody. The Review Group further recommends that the law should be changed so that inferences could be drawn from a failure, when questioned in custody, to explain suspicious circumstances. However, the Review Group concluded that neither the trial judge nor the prosecution should be permitted to comment on the failure of the defendant to give evidence at his or her trial.

The Judges' Rules,[15] established at common law, are a set of rules which deal with issuing cautions to and taking statements from suspects. These rules were intended solely for the guidance of police officers and do not enjoy the force of law; in the sense that a breach of the Rules will not automatically expose the Gardaí to civil liability or criminal action.[16] However, it is likely that evidence which was obtained in breach of these rules would not be admitted in court.[17] The Review Group recommends that the body of guidance known as the Judges' Rules, should be laid down by Ministerial Regulation and that the Judges' Rules should cease to have effect.

The Review Group further recommends that recorded interviews should not require a written note of the interview; however, this procedure should be subject to suitable safeguards. Where a detained person requests that a recording should not apply to the interview, then a written note would be required. Routine audio and videotaping of common areas such as corridors was also recommended. This would alleviate the potential for issues arising in relation to any actions or utterances made in these areas.

In relation to the supply of videotapes of Garda interviews, the Report recommends that the law regarding the supply of the tapes to suspects be changed so that the tapes are only required to be made available by way of disclosure by the prosecution (following charging of the suspect or order of the court). In addition to this amendment, the Review Group also proposes the creation of a new offence of the disclosing or showing a videotape without lawful excuse.

ICCL ANALYSIS

The ICCL welcomes some of the measures proposed by the Review Group namely those regarding the regulation of the conduct of interviews and the use of videotapes in recording interviews. However, the ICCL is concerned that the dilution of the right to silence which has been recommended by the Review Group could potentially erode the right to a fair trial.

Interviews

The ICCL endorses the recommendation by the Review Group that the Judges' Rules should be abolished and the conventions set out in the Rules should instead be set down by way of Ministerial Regulation. This would place the rules regarding the administration of cautions and the taking of statements from suspects on a statutory footing similar to other detention procedures which are set out in the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1984 (the "1987 Regulations").

Any revised statutory framework should make clear that a member of the Garda Síochána who breaches the Regulations will be liable to disciplinary proceedings. At present, a Garda member may be liable to disciplinary proceedings by virtue of section 7(4) of the Criminal Justice Act 1984 where there has been a breach of the 1987 Regulations. However, as Walsh points out, the formulation of section 7(4) does not automatically mean that disciplinary proceedings will be instituted; it merely provides grounds upon which such proceedings could lawfully be based.[18] The ICCL believes that Gardaí should be liable to disciplinary proceedings where a breach has occurred of the 1987 Regulations or any new regulatory or statutory mechanism which replaces the Judges' Rules.[19]

Regarding the videotaping of interviews in lieu of a written note by the Garda member, the ICCL welcomes this development.[20] The ICCL agrees with the Review Group that adequate safeguards should be put in place to ensure that the rights of the person in custody are protected, including the facilitation of a request to conduct any interview without video recording (thus necessitating the taking of a written note).[21]

The ICCL recommends that any new Ministerial Regulations comply with the standards of international human rights law in relation to the detention of accused persons, such as the *United Nations Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment*. [22] The ICCL also points to the recommendation of the

---

[15] As stated by Keane J. in the *People v Finnerty* [1999] 4 IR 365 at p. 390, these rules were set out in *R.V. Voisin* [1918] 1KB 531 at p.538. They are not rules of law but a breach "will not be lightly excused," McDermott, Paul Anthony in *Criminal Justice in Ireland* (2002) at pp. 65, 66.

[16] Walsh, D., *op cit*, at p. 287.

[17] As stated by O'Higgins CJ in the *People v. Farrell* [1978] IR 13, quoted in the Report, at p. 29.

[18] *Op cit*, at p. 258.

[19] In this regard, the ICCL refers to the new Discipline Regulations for An Garda Síochána which came into effect on 1 June 2007. Garda Síochána (Discipline) Regulations 2007 (SI No 214 of 2007). Breaches of the 1987 Regulations or any Ministerial Regulations introduced to replace the Judges' Rules should constitute an "act or conduct constituting breaches of discipline" under the schedule to the 2007 Regulations.

[20] Indeed, section 57 of the Criminal Justice Act 2007 provides for the admissibility as evidence of a recording of the defendant's statement to the Gardaí.

[21] The Minister has indicated that the "manual writing of statements by the Gardaí" will cease as soon as possible. He believes that the recording of interviews and statements by video or digital camera would increase the efficiency of the Gardaí and would also assist the court process. "According to the Department of Justice, almost every Garda station in the country is now fully kitted with video and audio equipment and many of the higher courts have the facilities to show the recordings, although some would need to be renovated." McGee H., (2007), Courts to screen garda Interviews, *Irish Examiner* 9 October.

[22] Available at http://www.unhchr.ch/html/menu3/b/h_comp36.htm.

European Committee for the Prevention of Torture (CPT) that the right of access to a lawyer should include the right to have a lawyer present during police interrogations. The CPT's view was that the audio-video recording of an interview was a welcome additional safeguard; however, any potential ill-treatment of suspects would be better served by the presence of a lawyer during police questioning.[23]

Right to Silence

The right to silence is enshrined in constitutional and international human rights law as a basic component of the fundamental civil and political right to a fair trial.[24] The European Convention on Human Rights also provides protection for the right to silence and the case law of the European Court of Human Rights supports this position.[25] The Court has consistently recognised the right to silence as lying at the heart of the notion of fair procedures under Article 6[26] and has warned that "particular caution was required before a domestic court could invoke an accused's silence against him".[27] What is clear from the case law of the European Court is 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.[28]

The ICCL agrees with the position of the European Court that in circumstances where adverse inferences may be drawn, the weight attached to them by National Courts in their assessment of the evidence and the degree of compulsion inherent in the situation are important factors in determining whether any adverse inferences should be drawn from a defendant's silence.[29]

The ICCL strongly believes that the right to silence in Irish law should not be tampered with and should retain its current constitutional status as a right which can only be abridged on a proportionate basis where the prejudicial effect of any inference evidence does not outweigh its probative effect. In other words, evidence of an inference from silence should only be admitted to the court where it is important in proving the case and it does not prejudice the defendant in the eyes of the judge or jury. The ICCL contends that there are a number of issues of concern if the right to silence is diluted further as proposed by the Review Group. One of the dangers is pointed out by Michael O'Higgins SC: the drawing of adverse inferences "will have the effect, in certain cases, of focusing the attention not on the strength of the prosecution case, but on how suspicious it is that the accused only made his defence at trial".[30]

Garda Síochána

In the context of inference drawing, the "cautions" given by the Gardaí must also be carefully examined. Particularly in the case of vulnerable people or those with dependency problems, it must be clear to the Garda in question that the person fully understands and is aware of the significance of the warning. There are a number of different statutory provisions which oblige a person to cooperate with the police in certain circumstances.[31] For the most part, these have been introduced to deal with very specific situations, such as subversive activities and drugs offences.[32]

The ICCL believes that the blanket erosion of the right to silence across a range of offences proposed by the Review Group would lead to confusion for members of the public who are arrested or detained for minor offences.

> A great many people questioned in Garda stations are poorly educated, come from deprived backgrounds and are often vulnerable due to addiction to drugs or alcohol. They are likely to be frightened and confused and may not remember where they were or who they were with on any given date and they may have no idea what facts may be relevant to their defence until they have had an opportunity to discuss the case in detail with their solicitor. And a solicitor may feel that the best advice s/he can give to certain clients is not to answer questions because in their confused or frightened state they may make mistakes or get themselves into deeper trouble, or even, like the unfortunate – and innocent – Dean Lyons, end up confessing to a murder they did not commit.[33]

Úna Ní Raifeartaigh states that "proper police training will be essential if such inferences will survive the fairness barriers to play a probative role in the trial".[34] Although inference drawing provisions were introduced in the Criminal Justice Act 2007 (see below),[35] the Minister for Justice, Equality and Law Reform has yet to make Regulations providing for the new caution which should be administered when it is intended to admit inference evidence to trial. This failure by the Executive to put in place effective procedures to implement legislative changes has created difficult working conditions for the Gardaí as well as exacerbating the risk of confusion and uncertainty among the public.

---

[23] Council of Europe, *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Strasbourg, 18 September 2003, available at http://www.cpt.coe.int/documents/irl/2003-36-inf-eng.htm.

[24] The Rules and Procedure of Evidence of both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda make express reference to the right to remain silent as does Article 55(2) (b) of the Statute of the International Criminal Court.

[25] In *Heaney and McGuinness v. Ireland*, (2001) 33 EHRR 12, at the European Court of Human Rights, the Court stated that the right to silence and the right not to incriminate oneself were "recognised international standards which lie at the heart of the notion of fair procedure under Article 6", (at para 40).

[26] *Heaney and McGuinness v. Ireland, op cit; Averill v. UK, op cit; Condron v. UK*, (2001) EHRR 31; *Quinn v. Ireland*, (2001) 33 EHRR 264; *Weh v. Austria*, (2005) 40 EHRR 37; *Shannon v. UK*, (2006) 42 EHRR 31.

[27] *Condron v. United Kingdom, op cit*, at p. 15.

[28] Hogan and Whyte, (2003) *J.M. Kelly The Irish Constitution*, 4th Ed. at p. 1093.

[29] *Condron v. UK, op cit*, at p. 15.

[30] Michael O'Higgins SC, *op cit*.

[31] Walsh, *op cit*, at p. 339.

[32] See footnote 11. Michael Farrell has stated that the provisions in the Criminal Justice (Drug Trafficking) Act 1996 and the Offences Against the State (Amendment) Act 1998 are "rarely, if ever, used". Michael Farrell, *The Challenge of the ECHR*, a paper delivered to *Re-balancing Criminal Justice in Ireland: A Question of Rights*, conference at the UCC Centre for Criminal Justice and Human Rights, 29 June 2007.

[33] Michael Farrell, *ibid*, 29 June 2007.

[34] Úna Ní Raifeartaigh, *The ECHRA 2003 – A Practitioner's Perspective*, a paper delivered to *Re-balancing Criminal Justice in Ireland: A Question of Rights*, Conference at the UCC Centre for Criminal Justice and Human Rights, 29 June 2007.

[35] Part IV of the Criminal Justice Act 2007 which deals with inference drawing provisions, was commenced on 1 July 2007 under Criminal Justice Act 2007 (Commencement) Order 2007 (S.I. No. 236 of 2007).

[36] *Weh v. Austria, op cit*.

In light of the ongoing reform of the Garda Síochána, the ICCL would urge caution in deviating from a robust right to silence in Irish law, a facet of which is the privilege against self-incrimination. In doing so the ICCL refers to the European Court of Human Rights case of *Weh v. Austria*[36] in which the Court stated that the:

> [...] right not to incriminate oneself in particular presupposes that the prosecution in a criminal case seek to prove their case against the defendant without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the defendant. In this sense the right in question is closely linked to the presumption of innocence contained in Article 6 § 2 of the Convention.[37]

The Court further stated that one of the underlying principles of Article 6 of the Convention is the protection of the defendant against "improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice".[38]

Presence of a legal representative

A number of cases have come before the European Court of Human Rights in relation to the availability and role of legal representatives. In *Murray v United Kingdom*[39] the Court was asked to consider whether the inference drawing provisions in the Criminal Evidence (Northern Ireland) Order 1988 were compatible with Article 6 of the Convention (right to fair trial). The Court accepted that there could be circumstances where it would be acceptable to take the silence of the defendant into account; however, these must be "common sense" inferences in light of the weight of the evidence against the defendant. In this case, the Court found that allowing adverse inferences to be drawn from silence in police custody without access to legal advice fell foul of Article 6. Crucially, the Court held that inference drawing provisions would only be compatible with the Convention if a *prima facie* case was established by the prosecution and the defendant had full access to legal representation.

In order to bring United Kingdom law into line with the judgment of the Court, the Youth Justice and Criminal Evidence Act 1999 was enacted, which prohibits the drawing of inferences from silence when a suspect is questioned at a police station while denied access to legal advice.[40] The changes introduced by the 1999 Act[41] amended the inference drawing provisions in the Criminal Justice and Public Order Act 1994 which allows "proper inferences" to be drawn from the silence of a suspect during interrogation[42] or of the defendant during trial.[43] In setting out his or her charge to the jury, the judge may comment on the silence and the jury can take the silence into consideration when deliberating.[44] Failure of the defendant to account for objects, substances or marks;[45] or the presence of the defendant at a particular place[46] will also allow the judge and jury to draw inferences. This legal framework is similar to that advocated by the Review Group. However, as Michael O'Higgins SC has noted, significant differences exist in the UK system; most importantly, the solicitor sits in on the Garda interview.[47]

Furthermore, the operation of these provisions has not been without difficulty and has been considered by the European Court of Human Rights in the case of *Condron v. United Kingdom*.[48]

In this case, the defendants were admitted heroin addicts who were arrested on suspicion of drugs offences. Their solicitor became aware that they were suffering from withdrawal symptoms and formed the opinion that they were unfit to be interviewed by the police as they were in some distress. She subsequently advised them to remain silent when questioned. At the trial, the judge directed the jury that they had discretion whether or not to draw an adverse inference from the silence of the defendants at the police station. The European Court held that the judge's omission to restrict (further) the jury's discretion must be seen as incompatible with the exercise by the applicants of their right to silence at the police station. The Court of Appeal had had regard to the weight of the evidence against the defendant; however, the European Court considered that it was not in a position to assess properly what weight had been given by the jury to the inference. According to the Court, the trial judge should have told the jury that they could only draw adverse inferences if satisfied that the applicants' silence during questioning could only be attributed to their having no answer that would stand up during cross-examination.[49]

As part of their defence, the applicants voluntarily chose to disclose the advice of their solicitor to explain why they remained silent and therefore the Court considered that the legislation in question did not "override the confidentiality of their discussions with their solicitor".[50] The ICCL believes that the client/ lawyer relationship is a

---

[37] *Ibid*, at p. 6. The link between the right to silence and the presumption of innocence was also set out in the cases *Heaney and McGuiness v. Ireland* and *Quinn v. Ireland*, *op cit*.
[38] *Ibid*, at p. 6.
[39] *Murray v. United Kingdom*, (1996) 22 EHRR 29.
[40] Youth Justice and Criminal Evidence Act 1999, section 58.
[41] Section 59 and Schedule 3 of the 1999 Act also provided for restrictions on the use of answers obtained under compulsion in light of the judgment of the European Court of Human Rights in *Saunders v. United Kingdom*, (1996) 23 EHRR 313.
[42] Criminal Justice and Public Order Act 1994, section 34.
[43] Criminal Justice and Public Order Act 1994, section 35.
[44] Criminal Justice and Public Order Act 1994, section 35.
[45] Criminal Justice and Public Order Act 1994, section 36.
[46] Criminal Justice and Public Order Act 1994, section 37.
[47] Michael O'Higgins SC, *op cit*.
[48] *Condron v. United Kingdom*, *op cit*.
[49] Kilkelly, U. ed., (2004) *ECHR and Irish Law*, Bristol, Jordan Publishing Limited, at p. 163.
[50] *Condron v. United Kingdom*, *op cit*, at p. 17.

consideration for the operation of any inference drawing provisions in this jurisdiction. The Irish Supreme Court also recognised such difficulties in *The People v. Finnerty* when it referred to the "usual practice" of solicitors to advise their clients not to say anything while in custody if they feel it would be detrimental to their client's interests. The Court considered that if such inference drawing provisions were applicable, it could lead to a situation where solicitors were advising clients to make a full statement to the Gardaí even though it might be unfavourable to their position "thereby eroding further the right of silence recognised at common law".[51]

Role of the Jury

The ICCL does not wish to criticise the system of jury trials; however, there are concerns about the weight which may be attached by jury members to inference evidence. No matter how strict or careful the wording given by a judge to a jury, there is no guarantee that the jury members will correctly understand the degree of weight that should be attributed to inference evidence. The ICCL is concerned that the degree of importance attached by a jury following an explicit reference to an adverse inference drawn from silence may be disproportionate to its actual probative value. In this regard, the ICCL considers that some members of a jury may look upon such an inference as corroborating evidence or indeed an indication of guilt. Therefore, it is vital that trial judges give clear warnings to juries which are appropriate to "all the circumstances of the case".[52]

In the aforementioned case of *Murray v. United Kingdom*,[53] it has been suggested that the Court was influenced in its decision by the fact that the trier of the fact in the domestic court was a judge and not a jury and that he gave a fully reasoned judgment detailing the nature of the inference drawn.[54] In the same case, Sir Nicholas Bratza (now a judge of the European Court of Human Rights), in his partly concurring opinion in the European Commission on Human Rights considered that a judge is better equipped to "draw such inferences as are justified by a defendant's silence". On the contrary, he felt, that the same safeguards against unfairness do not seem to exist in the event of a jury trial. The risk of unfairness is "substantially increased however carefully formulated a judge's direction to the jury might be".[55]

Criminal Justice Act 2007

This Act was rushed through the Oireachtas at the end of the last sitting of the 29th Dáil. Sections 28 to 32 of the 2007 Act set out provisions that allow inferences from silence to be drawn in certain circumstances. In the main, they follow the recommendations of the Review Group.

Under section 32, the Minister for Justice, Equality and Law Reform has the power to make Regulations providing for the type of caution that must be given to a person before the inference drawing provisions apply (as mentioned on page 15, the Regulations have yet to be made). However, if a Garda fails to comply with any of the Regulations; this will not affect the admissibility of anything said by the person being questioned or their silence.[56]

The Review Group stated clearly in its Report that the inference drawing provision regarding the failure to mention a defence later relied upon in court should not be considered corroboration by the judge or jury nor "should it permit a more general inference as to guilt to be drawn".[57] Under the Criminal Justice Act 2007, failure to mention any fact later relied on in defence may amount to "corroboration of any evidence in relation to which the failure is material".[58] The introduction of a "late defence" which may be considered under the Criminal Justice Act to be corroborative evidence could lead a jury more easily to equate the "late defence" with a finding of guilt.

In this connection, the ICCL agrees with the view of the Irish Human Rights Commission (IHRC) that the complexity of the recently stated inference drawing provisions in the 2007 Act warrant substantial safeguards, including the availability of pre-trial legal advice. The IHRC considers that the presence of a legal advisor is necessary throughout police interviews. In circumstances where the defendant exercises his or her right to remain silent on the advice of his or her legal representative, the IHRC believes that this should be taken into consideration by the court.[59]

ICCL RECOMMENDATIONS

- In relaying a warning when detaining or charging an individual, the ICCL believes that the consequence of their silence be made crystal clear to the individual concerned. To this end, the ICCL considers that precise guidelines should be given to members of an Garda Síochána regarding the appropriate warning to be issued.
- In accordance with international human rights standards, the ICCL recommends that detained persons be entitled to have a legal representative present at all times during police questioning and that no inference should be drawn from any period of silence which takes place prior to consultation with a legal representative.
- In relation to the drawing of adverse inferences by juries, the ICCL recommends that guidelines on the issuing of appropriate warnings from trial judges should be introduced. The jury must be clearly instructed as to the specific facts which are the subject of an application for them to draw inferences. Moreover, the jury must be instructed not to consider any inferences unless they are certain that the defendant has a clear case to answer independent of inferences.

---

[51] *Op cit*, at p. 17.
[52] *Condron v. United Kingdom*, *op cit*, at p. 16.
[53] *Op cit*.
[54] Starmer, K., (1999) *European Human Rights Law*, Great Britain, Legal Action Group, at p. 308.
[55] *Ibid*, quoted at p. 308.
[56] Criminal Justice Act 2007, section 32.
[57] *Op cit*, at p. 86.
[58] *Criminal Justice Act 2007*, section 30.
[59] Irish Human Rights Commission, *Observations on the Criminal Justice Bill 2007*, 20 March 2007, available at http://www.ihrc.ie/_fileupload/banners/ObservationsonCriminalJusticeBill20071.doc.

ISSUE 2 - CHARACTER EVIDENCE

Character evidence refers to information which is put before the court about any previous convictions of a defendant or any evidence of his or her bad character. Details of any previous convictions or charges relating to the defendant are, for the most part, not laid before the jury. If a defendant elects to give evidence at trial he or she is liable to cross-examination by the prosecution (and if applicable, by counsel for the co-defendant). Broadly speaking, the defendant may not be asked about previous convictions or bad character unless he or she:

(i) *claims to be of good character;*
(ii) *casts accusations or aspersions against the witnesses for the prosecution (or the prosecutor);*
(iii) *gives evidence against a co-defendant.*

How does the rule operate?

The protections afforded to the defendant when he or she takes to the stand are laid down at common law and under the Criminal Justice (Evidence) Act 1924. In line with the presumption of innocence and the privilege against self-incrimination, these safeguards serve to prevent the prosecution from attempting to incriminate the defendant by reference to his or her previous convictions or bad character, rather than the consideration of the charge before the jury. Consequently, the defendant cannot generally be cross-examined about his or her involvement in offences or incidents other than those covered by the indictment. The protection afforded to the defendant is commonly referred to as the "shield" and can only be lifted in certain well-defined circumstances.

When will the shield be lifted?

Under section 1(f) (1) of the 1924 Act the circumstances where the shield can be lifted are as follows:

(i) *Where proof that the defendant has committed or has been convicted of another offence is admissible evidence to show that he or she is guilty of the case at hand.*

Evidence may be admissible if there is sufficient similarity between previous offences and those charged.[60] For this to happen there must be a sufficient similarity between the nature or manner of commission of the alleged previous offences and the offence for which the defendant was charged.[61] This provision draws on the common law rules and is "largely referred to as the 'similar fact evidence' scenario".[62] These cases are very rare and the evidence will only be admitted where the probative value[63] is not outweighed by the prejudicial value.[64]

(ii) *Where the nature and the conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or where the defendant:*

- *has attempted to establish his or her own good character by asking questions of the witnesses for the prosecution (or via counsel);*
- *has given evidence of his or her good character.*

There are two ways in which a defendant can cause the shield to be lifted. The first is where the defendant or his/her counsel cast aspersions on the prosecution witnesses or the prosecutor. So, for example, the shield may be lost if a defence witness made allegations in evidence or allegations were put to prosecution witnesses in cross-examination. Secondly, the defendant may lose the benefit of the shield where he or she seeks to establish his or her own good character. This may be done by introducing evidence or by cross-examining a prosecution witness with a view to establishing evidence of the good character of the defendant.[65]

(iii) *Where the defendant has given evidence against another person charged with the same offence.*

If the defendant gives evidence against any other person charged with the same offence, the shield will be dropped. Counsel for the co-defendant may pursue a line of questioning about the bad character and previous criminal convictions of the defendant.[66] The judge has discretion to permit the prosecution to adopt a similar line of questioning.

CRIMINAL LAW REVIEW GROUP FINDINGS AND RECOMMENDATIONS

What constitutes an allegation on the character of a witness?

The courts have generally asked the question whether the challenge to the reputation of a witness was gratuitous and necessary to the proper conduct of the defence.[67] The leading case in this area is *The People v. McGrail*[68] where Mr Justice Hederman stated that a distinction must be drawn between "questions and suggestions which are reasonably necessary to establish the prosecution or defence case"[69] and an "imputation of bad character introduced by either side related to matters unconnected with the proofs of the instant case". The Review Group decided that the current judicial construct of an allegation on the character of a witness should remain unchanged. The Review Group considered that any changes to the meaning of an allegation on the character of a witness would

---

[60] *Criminal Justice (Evidence)* Act 1924, sect. 1(f) (1) (i).
[61] Walsh, D., *op cit*, at p. 921.
[62] Fennell, C., (2003), *The Law of Evidence in Ireland*, 2nd Ed., Lexis Nexis Butterworths, at p. 333.
[63] This is the degree to which the evidence tends to prove something.
[64] The Report gives details of a number of cases demonstrating this at pages 121 - 124. One of these concerns Mr Smith who was charged with the murder of his wife in a drowning incident in the bath (*R v. Smith* (1915) 11 Cr.App.R. at p. 229). Evidence of the deaths of two previous women, to whom he was married, was admitted. In each case, the dead woman was found drowned in the bath, the accused had informed a doctor that the woman suffered from epileptic fits and the victim's life was insured for the benefit of the accused. The degree of similarity between the facts in the deaths was so strong that evidence of the previous deaths was admissible in the case at hand.
[65] If evidence is admitted under this section, the judge should direct the jury that this should only be used to consider the credibility of the defendant only and not as a determination of guilt.
[66] Walsh points out that it is not clear whether the defendant and co-defendant(s) must be indicted on the same charge before the shield can be lifted or whether it would be sufficient that they are charged with offences arising out of the same set of circumstances. *Op cit*, at p.926.
[67] Report, at p. 116.
[68] *The People v. McGrail*, [1990] 2 IR 38.
[69] *Ibid*, at p. 50, quoted from p. 117 of the Report, *ibid.*

"increase the risk of miscarriages of justice" and that a "proper balance" had been struck in the law as it stood.

Allegations made on the character of the deceased or an incapacitated victim

The Review Group recommended that the Criminal Justice (Evidence) Act 1924 should be amended so that a defendant can be cross-examined as to his or her bad character where he or she makes an allegation on the character of the deceased or an incapacitated person. The prosecution should also be allowed to challenge any evidence tendered by the defendant in relation to the character of the deceased or incapacitated victim. This would be applicable in homicide or assault cases, for example.

It is unclear from the Report whether this extension of the law would apply only where a defendant has made an allegation; or whether it would also be applicable where a defence witness does the same.[70]

Defence witness gives evidence of the defendant's good character

The Review Group further recommended that the Criminal Justice (Evidence) Act 1924 should be amended so that a defendant can be cross-examined as to his or her bad character where a defence witness gives evidence about the defendant's good character.

Bad character evidence presented even where the defendant does not give evidence

The Review Group considered that, in certain circumstances, the prosecution should be entitled to adduce evidence of the defendant's bad character even where the defendant does not give evidence. It presented this proposal as "a natural progression"[71] from those recommendations outlined above. It considered that the prosecution should not be prevented from putting forward evidence of the bad character of the defendant, where defence witnesses have made imputations or introduced good character evidence, simply on the basis that the defendant had personally not given evidence.

ICCL ANALYSIS

Similar Fact Evidence

The Review Group decided against any recommendation to change the common law rules in respect of similar fact evidence.

The ICCL agrees with the assertion in the Report that, "the courts owe more than 'verbal respect' to the presumption of innocence" and that "the corollary of this is that a defendant should be tried and convicted *only* on the basis of the evidence that he committed that particular charge".[72]

The Report states that the principal reason for the rules is to prevent the admission of bad character evidence from having a prejudicial effect on the jury. It is a view that is traditionally held by the judiciary and the legal profession alike. Once the evidence has been placed before a jury, the judge effectively loses control of its impact.

The ICCL endorses the recommendation of the Review Group that the law relating to the meaning of an allegation on the character of a prosecution witness should not be amended. The ICCL agrees with the Review Group that an appropriate balance in the present law has been struck and that there would be a serious risk of miscarriage of justice in the event of any amendment. The ICCL further endorses the view of the Review Group that the possible risk of miscarriage of justice would appear to be increased by a relaxation of the common law rules on similar fact evidence.

The ICCL accepts the recommendations of the Review Group that the defendant can be cross-examined on bad character if he or she blackens the character of the deceased or an injured party otherwise unable to give evidence. The ICCL calls for clarification on whether the loss of the shield will only occur when the defendant makes allegations; or, whether this new rule will apply to allegations made by defence witness and counsel as well. In light of the seriously prejudicial information that could be made available to the jury as a result of such a cross-examination, the ICCL recommends that such a cross-examination should only be allowed on foot of a successful application to the trial judge, sitting without the jury.

The ICCL has doubts regarding the fairness of the recommendation by the Review Group that the defendant should be subject to cross-examination in the event of a defence witness speaking about the good character of the defendant. The ICCL has concerns that there could be serious difficulties in controlling such a statement from defence witnesses, particularly where it is elicited under cross-examination.[73] 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

---

[70] On page 118 of the Report, in the main section dealing with this matter, the Report refers to the *accused* casting imputations on the character of the deceased or incapacitated person. However, in drawing its conclusion on p. 144 and in summarising the proposals on p. 145, the Review Group refers to the *defence* attacking the character of a deceased or incapacitated party.

[71] Report, at p.139.

[72] Report, at p. 105.

[73] 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.

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 also to some extent, his or her counsel.

On the basis of the fundamental right of a defendant to be presumed innocent until the prosecution have proved otherwise, 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. As the Report states, "due to the highly prejudicial nature of bad character evidence, the courts tend to "lean against the reception of such evidence"".[74]

ICCL RECOMMENDATIONS

- In cases where a defendant casts imputations on the character of a person who is deceased or incapacitated, the Review Group recommends that the prosecution should be allowed to cross-examine the defendant as to his or her character. In order to combat the inclusion of highly prejudicial information, the ICCL recommends that such cross-examinations should require the specific permission of the trial judge.
- The ICCL considers that the Review Group's suggestion that the defendant should be subject to cross-examination in circumstances where a defence witness speaks of the good character of the defendant fails to strike an appropriate balance between the rights of the accused and the interests of justice. The ICCL recommends that this proposal should not be adopted.

[74] *Report*, at p. 106.

ISSUE 3 – INFRINGEMENTS OF CONSTITUTIONAL RIGHTS – THE EXCLUSIONARY RULE

The exclusionary rule provides that evidence which has been obtained in breach of constitutional rights should not be put before a judge or jury in a criminal trial. The rationale behind the rule is that constitutional rights are paramount and evidence which has been obtained in violation of the constitutional rights of the defendant should not be admitted in evidence. The Review Group itself has described the purpose of the rule as one which aims to "ensure that the fundamental rights of the citizen are vindicated, that the courts are not seen to be a party to any breaches of such rights and that the police and other state agencies respect such rights".[75]

The exclusionary rule was adopted in the Supreme Court case of *The People v. O'Brien*.[76] The test formulated by the Court was summarised in the Report as follows: **evidence obtained as a result of a conscious and deliberate violation of the defendant's constitutional rights is not admissible in evidence, unless there are extraordinary excusing circumstances.** The question of what is meant by "deliberate and conscious" has been considered by the Supreme Court in *The People v. Kenny*.[77] In this case, the Court found that the words "deliberate and conscious" related to the actions of (in this case) the Garda rather than to his state of mind. The absolute protection rule set out by the Supreme Court serves to provide a disincentive to those in authority against the invasion of the personal rights of the citizen, as well as providing positive encouragement to the authorities to vindicate those rights.[78] The Review Group considered that the definition of "conscious and deliberate" in this way by the Court effectively imposes a strict exclusionary rule.

CRIMINAL LAW REVIEW GROUP FINDINGS AND RECOMMENDATIONS

The majority of the Review Group recommends that the exclusionary rule should be amended. The aims of the exclusionary rule, according to the Review Group, are to ensure that the fundamental rights of the citizen are vindicated; that the courts are not seen to be a party to any breaches of such rights; and that the police and other state agencies respect such rights. The Review Group considered that the definition of "conscious and deliberate" adduced by the Supreme Court in the *Kenny* case, effectively imposed a strict exclusionary rule; however, it was considered that "these aims can be as satisfactorily achieved by a discretionary exclusionary rule as by a strict exclusionary rule". The majority expressed a wish to see the rule relaxed, which would result in an increased discretion for the courts in deciding whether the rule should apply or not.

The Review Group identified a number of options available for changing the rule:

- *Development of the law by the Supreme Court*. Section 21 of the Criminal Justice Act 2006 inserted a new section 34 into the Criminal Procedure Act 1967 which allows the Attorney General (or the Director of Public Prosecutions on his behalf) to bring a case in the Supreme Court on a point of law where a defendant had been acquitted.
- *Referendum*. Constitutional amendment providing for a discretionary exclusionary rule.
- *Statutory regulation*. The regulation would provide for a new exclusionary rule.
- *Primary legislation*. Statutory provision of a list of factors which a court may take into account in deciding whether or not to exclude evidence.

Overall, a majority of the Review Group considered that the preferable route to achieve a shift from a strict exclusionary rule to a discretionary rule would be a development of its jurisprudence by the Supreme Court by virtue of the new section 34 appeal under the Criminal Procedure Act 1967.

DISSENT BY THE CHAIRMAN OF THE REVIEW GROUP DR GERARD HOGAN

Dr Hogan writes that the development of the exclusionary rule was the logical consequence of a series of connected constitutional provisions:

- Article 34.5 which requires each judge to uphold the Constitution;
- Article 38.1 which guarantees that the trial of a criminal offence will be carried out "in due course of law";
- Article 40.3.1 which provides that the State shall by its laws defend and vindicate the personal rights of the citizen as far as practicable.

He acknowledges that the formulation of the rule is strict. He considers, however, that it has a beneficial and constructive effect in ensuring that proper standards are adhered to (e.g. by An Garda Síochána) and that this important objective could be compromised if the exclusionary rule were to be significantly relaxed.

Dr Hogan is in no doubt that a constitutional rule cannot be reversed by a mere Act of the Oireachtas (which is one of the options

[75] Report, at p. 159.
[76] *The People v. O'Brien* [1965] IR 142.
[77] *The People v. Kenny* [1990] 2 IR 110.
[78] *Ibid*, at p. 133.

outlined by a majority of the Review Group above). If the rule which was developed in the *Kenny* case is considered a constitutional rule, he argues that it can only be changed by constitutional amendment and referendum. In the case of *Kenny*, the Supreme Court itself acknowledged that the rule can produce strange results; Dr Hogan expresses his agreement with this but contends that this will always be the case with any exclusionary rule (even if so modified as proposed so as to exclude only evidence obtained by reason of deliberate misbehaviour).

In relation to the European Convention on Human Rights, the Chairman considers that the criminal justice system is not compromised by the exclusionary rule; nor is there any restriction imposed by the rule on the rights of the victims (e.g. right to make an effective complaint). Indeed, in the case of *Schenk v. Switzerland*,[79] the Court was clear that Article 6 guarantees the right to a fair trial but "it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law".[80]

ICCL ANALYSIS

The ICCL agrees with Dr Hogan that the exclusionary rule should not be significantly modified on the basis that anomalies may sometimes occur due to the "absolute protection rule" of constitutional rights in criminal cases.[81]

The majority of the Review Group report that a discretionary approach has been adopted by other common law jurisdictions including New Zealand where a "balanced test" has been adopted and the United States which operates a "good faith" exception. However, these regimes are not without their detractors and the ICCL considers that further research should be carried out into the operation in practice of such approaches before this jurisdiction follows a similar route.

As mentioned, the European Court of Human Rights has made it clear that any rules on the admissibility of evidence are primarily a matter for regulation under national law; however, the Court keeps a strict eye on the right to a fair hearing under Article 6 in this context.[82] The Court examines whether "the proceedings as a whole, *including the way in which the evidence was obtained* [emphasis added], were fair".[83]

In deciding whether the admission of evidence obtained in contravention of the rights of the defendant amounts to a breach of fair trial procedures, the Court will consider all the circumstances of the case, including, whether:

- The manner in which the evidence was obtained was in accordance with law (i.e. whether the procedures were in contravention of national law);
- The defendant was afforded an opportunity to challenge the authenticity of the evidence and of opposing its use;
- The evidence in question was the only or most substantial piece of evidence before the Court;[84]
- The quality of the evidence is such that doubts are not cast on its reliability or accuracy.

The majority of the cases that have come before the European Court which deal with this issue concern evidence which has been obtained by covert means and generally this has been held to be admissible. However, in the case of *Jalloh v. Germany*[85] the applicant succeeded in his claim that evidence which was secured through the use of emetics[86] should not have been admitted to trial. The Court held that the use of emetics constituted inhuman and degrading treatment which amounted to a breach of Article 3 of the Convention.[87] Therefore, the evidence used in the criminal proceedings against the defendant was obtained in direct contravention of one of the core rights under the Convention. In the Court's view:

> Incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of the victim's guilt, irrespective of its probative value.[88]

The general question of whether the use of evidence obtained by an act qualified as inhuman and degrading treatment automatically renders a trial unfair was left open by the Court.[89] Overall, it appears that the Court will consider all the circumstances of the case with particular reference to: the legality of the act committed to obtain the evidence; the weight and quality of the evidence; and the opportunities afforded to the defendant to challenge its authenticity and use at trial. If the evidence has been obtained in breach of one of the core rights in the Convention there is an increased chance that its admission to the trial would constitute a breach of the right to fair trial under Article 6 of the Convention.

The majority of the Review Group felt that it is unfair if a "technical error" secures the unjust acquittal of a defendant. The ICCL believes that the fundamental rights which are laid down in the Constitution (and in other international human rights instruments) cannot be equated with "technical errors". It is important to point out in this context that there is a vital distinction between evidence which has been obtained illegally and that which has been obtained in breach of a person's rights under the Constitution.[90]

---

[79] *Schenk v. Switzerland*, (1988) 13 EHRR 242.
[80] *Ibid*, at p. 26.
[81] As per Finlay CJ in *The People v. Kenny* [1990] 2 IR 110 at 134, quoted in the Report, at p. 287.
[82] *Khan v. United Kingdom*,(2001) 31 EHRR 45; *P.J. and J.H. v. United Kingdom*, Application No. 44787/98, 25 September 2001; *Allan v. United Kingdom*,(2003) 36 EHRR 143; *Harutyunyan v. Armenia*, Application No. 36549/03, 28 June 2007.
[83] *Jalloh v. Germany*, Application No. 54810/00, 11 July 2006, at p. 25.
[84] *Khan v. United Kingdom*, *op cit* at pp. 9, 10.
[85] *Op cit*.
[86] Emetics are substances which cause a person to vomit.
[87] Article 3 provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".
[88] *Jalloh v. Gremany*, *op cit*, at para 105.
[89] The *Jalloh* case has been cited as an authority on this issue as recent as June 2007 in *P.G and J. G. v. United Kingdom*, *op cit*.
[90] Evidence has been obtained *illegally* if the investigator acted without or beyond his lawful authority under statute or common law or if it was obtained by the commission of a crime, tort or breach of contract; Healy, J., (2004), *Irish Laws of Evidence*, Thomson Round Hall.

In his dissent, Dr Hogan states:

> In practice, the courts almost never exclude on the ground there has been a mere illegality (as distinct from unconstitutionality) and there is nearly always a reason why such evidence should be held to be admissible in the overall public interest.[91]

Every judge has taken an oath to uphold the provisions of the Constitution[92] and the ICCL believes that the exclusionary rule serves an important function in ensuring the provisions of the Constitution are protected. Any violation of the Constitution, no matter its degree, should be taken seriously and judges should not be required to consider evidence which they know has been obtained in breach of the Constitution. As the former Chief Justice O'Higgins explained, in countries governed by a written Constitution, "one may expect the judges, by their oath of office, to be bound to uphold the Constitution and its provisions and to do so on all occasions in the courts in which they preside".[93]

The majority of the Review Group asserts that the collection of unconstitutionally obtained evidence may not be the fault of the Gardaí (e.g. the warrant did not appear to be defective on the face of it). It further states that any contention that the rule is necessary to ensure that the police comply with relevant legal requirements has been superseded by radical changes to the nature of policing in recent years: the videotaping of interviews, the creation of the Garda Síochána Ombudsman Commission[94] and the regulation of the Garda Síochána by statute. Regarding these matters, the ICCL points out that the Garda Síochána Ombudsman Commission opened to the public on 9 May 2007 and its impact cannot yet be assessed. The ICCL further refers to the fact that the videotaping of interviews is not a mandatory procedure.[95] The ICCL also refers to the recent Reports of the Morris Tribunal[96] which have highlighted serious flaws in the operation the Garda Síochána and the fact that not all of the recommendations made by Mr Justice Morris have yet been implemented. Furthermore, Professor Ivana Bacik has spoken about the dip in public confidence in the Gardaí when miscarriages of justice take place (possibly as a result of Garda abuse of powers). She contends that this is a very worrying development for the victims of crime as it "can be very difficult for Gardaí to obtain evidence against gang bosses or others, or to get witness statements from individuals, where those individuals are living under threat in an atmosphere of intimidation or in a community hostile to State authority".[97]

The ICCL also considers that the exclusionary rule is important to the doctrine of the separation of powers on the basis that the judicial arm of the State should monitor any behaviour of agents of the executive arm (e.g. the Gardaí) in carrying out their role. The admission of unconstitutionally obtained evidence is not only a major injustice to the individuals on trial, it also serves to undermine the entire criminal process. Any acceptance by the Courts of evidence which has been obtained in breach of the Constitution creates the danger that such practices may become more prevalent.[98]

ICCL RECOMMENDATION

- The ICCL endorses the opinion of the Chairman of the Review Group, Dr Gerard Hogan that, in recognition of the primacy of the need to protect Constitutional rights, *no amendment* should be made to the exclusionary rule.

---

[91] Report, at p. 289.

[92] Article 34.5.1 of the Constitution provides that: Every person appointed a judge under this Constitution shall make and subscribe the following declaration: "In the presence of Almighty God I, do solemnly and sincerely promise and declare that I will duly and faithfully and to the best of my knowledge and power execute the office of Chief Justice (or as the case may be) without fear or favour, affection or ill-will towards any man, and that I will uphold the Constitution and the laws. May God direct and sustain me.

[93] *People (DPP) v. Lynch* [1982] IR 64 at 76, quoted in Walsh, D., *op cit* at p. 460.

[94] The Garda Síochána Ombudsman Commission is an independent body which reviews policing activities and deals with complaints by the public concerning Gardaí.

[95] Although its introduction has been consistently recommended by the European Committee on the Prevention of Torture. See the Report to the Government of Ireland on the Visit to Ireland carried out by the *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, from 2 to 13 October 2006, at para. 19; and Report to the Government of Ireland on the Visit to Ireland carried out by the *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, from 20 to 28 May 2002, at para. 22.

[96] www.morristribunal.ie. See also, ICCL, (2006) *Implementing Morris: Placing Human Rights at the Core of Policing in Ireland.*

[97] Bacik, I., *Rebalancing Rights?*, paper to the Irish Council for Civil Liberties International conference *Rebalancing Rights*, Law Society, 17 February 2007

[98] Walsh, D., *op cit*, at p. 459.

ISSUE 4 – REQUIRING A DEFENCE STATEMENT

ISSUE 5 – EXTENDING ALIBI EVIDENCE RULES

In the context of a criminal trial, there is a difference between the advance disclosure procedures required of the prosecution and those required of the defence. Disclosure involves the provision of material to the other party in advance of the trial. Generally, the defence is not required to furnish any information to the prosecution, with the exception of the names of witnesses who will be called to give alibi evidence, information on witnesses for certain offences and evidence relating to the mental condition of the defendant.[99] However, the prosecution are required to furnish a "book of evidence" on the defendant which includes details of the precise offences alleged, copies of exhibits and statements of witnesses that they intend to call and a list of any exhibits.

CRIMINAL LAW REVIEW GROUP FINDINGS AND RECOMMENDATIONS

The Review Group considered whether there should be a defence statement regime requiring the defendant to disclose his or her defence to the prosecution prior to the trial itself. However, in light of the difficulties posed by such a scheme, the Review Group did not recommend it; rather, it proposed that the defence should be required to disclose expert or technical reports or the witness statements of experts on which the defendant wishes to rely. The Review Group took the view that it should not be open to the prosecution to *require* the defence to put a witness on the stand where a report or witness statement has been furnished but the defence does not, in the event, wish to call the witness at the trial. In the event that the provision of an expert witness statement or expert report faces delays, the Review Group recommend that the defence should be permitted to give details of the efforts that were being made to obtain the statement or report if the statement or report itself was not available at the deadline for disclosure.

In light of their evaluation of defence disclosure requirements, the Review Group considered that there were no further issues pertaining to the extension of alibi evidence.

ICCL ANALYSIS

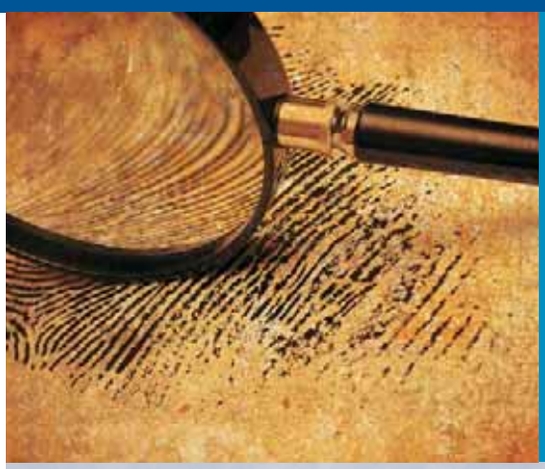
The ICCL endorses the recommendations of the Review Group in confining the disclosure requirements of the defence in this manner. As the Report states, there are a number of difficulties which the requirement of extensive pre-trial disclosure by the defence would entail. Extended obligations could be placed on the Gardaí and the Director of Public Prosecutions in relation to the service and detail of the indictment if broader disclosure was required of the defence. The ICCL would have serious concerns about the possibility of the Gardaí seeking to interview defence witnesses or asking questions of them should their names and addresses be disclosed. The ICCL would also have concerns about the significant delays in the court system that could arise as a result of an extensive disclosure framework and could lead to violations of the right of a defendant to be tried in a speedy manner; as well as the public interest in seeing trials prosecuted fairly and expeditiously.[100]

ICCL COMMENT

- The ICCL considers that, from a human rights standpoint, the current rules governing the provision of expert witness statements and reports are unproblematic and do not require amendment.

[99] The Report sets out the following limited exceptions at p. 167: alibi evidence under the Criminal Justice Act 1984, section 20; information regarding witnesses required by the Offences against the State (Amendment) Act 1998 or the intention to adduce evidence regarding the mental condition of the defendant under the Criminal Law (Insanity) Act 2006, section 19.

[100] European Convention on Human Rights, Article 6.



ISSUE 6 – "WITH PREJUDICE APPEALS"

ISSUE 7 – RE-OPENING ACQUITTALS FOLLOWING NEW EVIDENCE

ISSUE 8 – NULLIFYING ISSUES TAINTED BY TRIAL TAMPERING

A "with prejudice" appeal is one where a successful appeal by the prosecution means that the acquittal of the defendant can be reversed. At present such appeals do not exist in Irish law. The corollary to this is the "without prejudice" appeal where the acquittal which was granted to the defendant in the trial court cannot be overruled even if the appeal is successful.

A convicted person has the right of appeal and may be acquitted if successful in their appeal; however, the options for appeal which are open to the prosecution are more limited:

- Where a person is acquitted in the District Court there is no general right of appeal by the prosecution but some limited rights exist, for example in fisheries and excise cases;
- Where a person is tried on indictment (Circuit Court, Central Criminal Court and Special Criminal Court) and acquitted, the prosecution may refer a question of law which arose during the trial to the Supreme Court. This is done without prejudice to the verdict handed down in favour of the defendant;
- Where the Court of Criminal Appeal makes a decision in favour of the defendant, the prosecution may refer a point of law to the Supreme Court, but again this is on a without prejudice basis.

FINDINGS AND RECOMMENDATIONS OF THE CRIMINAL LAW REVIEW GROUP

A "with prejudice" right of appeal should be introduced

One of the primary issues that arise in this area is the constitutional status of the decision of a jury under Article 38.5 and whether a verdict of "not guilty" by the jury can be overturned. The Report refers to the case of *The People (DPP) v. O'Shea*[101] where a majority of the Supreme Court held that the DPP could appeal to the Supreme Court where the trial judge had instructed the jury to return a verdict of not guilty. The Court held that a trial cannot be said to be carried out in accordance with law where an error has been made by the trial judge in his or her direction to the jury. However, Mr Justice Finlay, in dissent, took the view that the constitutional right to a jury trial involved as an essential characteristic the proposition that a verdict of not guilty by a jury is not subject to an appeal to any other court. Agreeing with this opinion, Mr Justice Henchy, also dissenting, pointed out some logistical problems, including difficulties with a re-trial and very burdensome costs, which would arise in an appeal against an acquittal. The Review Group also examined the case of *Fitzgerald v. DPP*[102] which held that section 4 of the Summary Jurisdiction Act 1857 was constitutional, even though it confers more favourable treatment on the prosecution than on the defence. However, in reference to the limited interference that should be permitted in respect of an acquittal granted, Mr Justice Hardiman stated that "the status of near inviolability classically afforded to an acquittal, emphasises the need to construe the permitted scope of an attack on such acquittal strictly". He continued that the "scope of such challenge is strictly limited to a question of law".[103]

The Review Group were of the opinion that no significant argument was advanced against the principle of the "with prejudice" appeal. By contrast, "a very strong public interest" existed in ensuring that a person who has a case to answer does not benefit from a miscarriage of justice due to errors by a trial judge.

The prosecution should not have a more general right of appeal from acquittals in the District Court

At present, there is no prosecution right of appeal against an acquittal or an unduly lenient sentence in the District Court and the Review Group recommended that there should be no change in the procedures currently in place. Although attracted by the perceived benefits of providing a right of appeal, the Review Group cited lack of resources and the practical difficulties of operating such an appeal mechanism together with the fact that minor offences are dealt with in the District Court as reasons why no change was warranted at this time.

Statutory mechanism for the review of improperly obtained acquittals where there is evidence of jury or witness tampering

Where an acquittal has been achieved improperly, for example, by witness tampering, the Review Group considers that there are clear advantages to the creation of a statutory mechanism for review of improperly obtained acquittals.[104] The Review Group believes that the availability of a mechanism for review would:

- Correct any miscarriages of justice;
- Provide a significant deterrent to the improper behaviour of defendants;
- Enhance confidence in the courts system and ensure the integrity of trials as much as possible.

The Review Group is of the opinion that there is an overriding public interest in not preserving a jury verdict which has been "tainted by interference with the trial process"[105] and that there is no constitutional obstacle to revisiting jury acquittals which were influenced by interference. On this basis, the Review Group considers that a statutory provision should be introduced

---

[101] *The People (DPP) v. O'Shea* [1982] IR 384.
[102] *Fitzgerald v. DPP* [2003] 3 IR 247.
[103] Quoted in the Report at p. 188. The Review Group also considered Protocol 7 to the European Convention on Human Rights; Article 14(7) of the International Covenant on Civil and Political Rights; the Schengen Convention; and considered that the introduction of "with prejudice" appeals would not contravene these in any manner.
[104] Report, at p. 212.
[105] Report, at p 213.

accordingly. The Report briefly outlined various options including the circumstances under which a review should be permitted and the evidential standard of interference required to initiate the review. The Review Group concluded that the review of acquittals should be available in the event of interference with the trial process, whether in respect of jury tampering or otherwise. The Report recommends that the Supreme Court would have to be satisfied that there is sufficient evidence warranting the quashing of the acquittal.

Application to the Supreme Court to re-open old cases where there is compelling evidence of guilt

The Law Reform Commission considered this type of an appeal to be a form of "with prejudice" appeal;[106] the difference being that an acquittal is reconsidered after many years on the basis of newly discovered evidence (also known as "fresh evidence" appeals). At present, a defendant has the right to apply for review by the Court of Criminal Appeal of an alleged miscarriage of justice under section 2 of the Criminal Procedure Act 1993. The Review Group recommends that prosecution appeals of acquittals should be permitted in an analogous procedure. This provision allows the Court of Criminal Appeal to review alleged miscarriages of justice in cases where the Court has previously rejected an appeal or an application for leave to appeal in a particular case. Central to this process is the emergence of new evidence which suggests that there may have been a miscarriage of justice or that the sentence is excessive.[107] The new evidence must take the form of a new fact or a newly discovered fact. In its recommendation, the Review Group states that the prosecution should apply to the Supreme Court for an order quashing an acquittal in circumstances where it is alleged that a new or newly-discovered fact shows that there has been a miscarriage of justice.

ICCL ANALYSIS

The ICCL believes that neither "with prejudice" appeals nor "fresh evidence" appeals should be introduced in this jurisdiction. The ICCL is of the view that the introduction of a mechanism which would allow a judge-only court to overrule the jury as trier of fact is an unwarranted interference with Article 38.5 which states that "no person shall be charged on any criminal charge without a jury". It has been pointed out that Article 38.5 of the Constitution should be considered 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".[108] 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.

The Law Reform Commission did not advocate the use of "with prejudice" appeals in its 2006 *Report on Prosecution Appeals and Pre-Trial Hearings*[109] and the ICCL finds no substantive justification in the Report on which to base the introduction of such a radical new procedure. It is not apparent what additional examination by the Review Group has warranted a recommendation different to that of the Law Reform Commission, which is the statutory body charged with advising the government on law reform, in a detailed Report published only a year previously.

If the introduction of appeals by the State of jury acquittals were to occur (whether "with prejudice" or "fresh evidence" appeals) the ICCL calls for adequate safeguards to be included. The Report refers to a number of these:

- Right of appeal on a question of law only;
- Consent of the DPP to make an application;
- Right of appeal to the Supreme Court on a point of law;
- Clarity regarding the exact threshold of the obligation, such as compelling evidence;
- Advance judicial approval for the application;
- Setting aside of any acquittal in the State prior to the question of a re-trial arising.

The ICCL also points to the statement in the Report that an application by the prosecution for an order quashing an acquittal "would be in camera, and only a redacted version of the judgment would be published". The ICCL agrees that reporting restrictions on such cases would be necessary in light of the intense media attention that they are likely to attract. However, the ICCL contends that the restrictions 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.

In line with Article 4 of Protocol 7 to the European Convention on Human Rights,[110] the ICCL believes that a case should only be subject to an appeal by the State if there is evidence of "new or newly-discovered facts" or if there has been a "fundamental defect""in the previous proceedings.[111] According to the European Court of Human Rights, fundamental defects could include

---

[106] Law Reform Commission, (2006), *Report on Prosecution Appeals and Pre-Trial Hearings*, LRC 81 – 2006, at para. 5.

[107] Walsh, D., *op cit*, at p. 1214.

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

[109] *Op cit*, at para. 1.35. The Commission could not recommend the use of "with prejudice" appeals due to doubts over the constitutionality of the measures.

[110] 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 1st November 2001.

[111] 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 20th July 2004, at para. 35.

"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".[112]

However, an incomplete or one-sided investigation; or, one which led to an "erroneous" acquittal does not, in itself, indicate the presence of a fundamental defect in the previous proceedings. "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".[113] 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.

Furthermore, 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"[114] unless it is justified by "circumstances of a substantial and compelling character".[115] 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".[116]

Consequently, the ICCL considers that the introduction of any legislation permitting the DPP to appeal an acquittal must incorporate robust safeguards in order to ensure compliance with the European Convention on Human Rights. 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. Furthermore, Article 14(7) of the International Covenant on Civil and Political Rights (ICCPR) stipulates that re-trials 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.[117]

With regard to witness tampering, the ICCL believes that the proper treatment of vulnerable and intimidated witnesses within the criminal process is an important aspect of ensuring a fair criminal justice system. 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 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.[118]

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;
- 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.

ICCL RECOMMENDATIONS

- Following on from the recommendations of the Law Reform Commission in 2006, neither "with prejudice" appeals nor "fresh evidence" appeals should be introduced in this jurisdiction.
- In the event that such appellate mechanisms were constitutionally permitted, the ICCL calls for robust safeguards, including a high threshold of new or newly-discovered facts and/or the requirement to show evidence of the existence of a fundamental defect in the previous proceedings.

---

[112] *Radchikov v. Russia*, Application No. 65582/01, Judgment of 24th May 2007, at para. 48.
[113] *Radchikov v. Russia*, *ibid*, at para. 48.
[114] *Ryabykh v. Russia*, Application No. 52854/99, Judgment of 24th July 2003, at para. 51.
[115] *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, Judgement of 28th October 1999.
[116] *Fadin v. Russia*, Application No. 58079/00, Judgment of 27th 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 28th February 2006, at para. 25.
[117] See Coffey, G., (2007), *Evaluating the Common Law principle Against Retrials*, 14(1) DULJ 26, at pp. 11, 12.
[118] *Doorson v. Netherlands* (1996) 22 EHRR 330.

ISSUE 9 - PROSECUTION SUBMISSIONS ON SENTENCE

Prosecutors do not have a statutory right to make submissions at the sentencing stage of criminal proceedings. However, in *The People (DPP) v. Botha*, the Court of Appeal held that the prosecution is under a duty to assist the court with relevant information regarding sentencing precedents.[119]

Guidelines issued by the Director of Public Prosecutions[120] include a Code of Ethics for prosecutors which deals with the prosecutor's role in the sentencing process; however, this is not binding on prosecutors. The guidelines set out matters such as ensuring that the court has all the relevant information in relation to:

- Sentencing;
- The impact the crime has had on the victim;
- The defendant's circumstances, background, history and previous convictions;
- Evidence relevant to the circumstances in which the offence was committed.

The guidelines further require that the court has before it the "appropriate" submissions concerning:

- Victim impact;
- The sentencing options available to the court;
- Reference to any relevant authority or legislation;
- Assistance in avoiding any appealable error or any error of fact or law.

In relation to the advocacy of a particular sentence, the guidelines set out that the prosecutor must not seek to persuade the court to impose an improper sentence or a sentence of a particular magnitude but if the court requests, the prosecutor may draw the court's attention to any relevant precedent. The Guide to Professional Conduct of Solicitors in Ireland does not prohibit sentencing submissions by solicitors; however, the Code of Conduct for the Bar Council of Ireland provides that prosecuting barristers should not attempt by advocacy to influence the court in regard to sentence.[121]

CRIMINAL LAW REVIEW GROUP FINDINGS AND RECOMMENDATIONS

The Review Group found that the context for any change in this area is the availability of greater information regarding sentencing and expressed its desire to see more comprehensive sentencing information for the judiciary. To this end, the Review Group welcomed the Irish Sentencing Information System (ISIS) which will lead to developments in "collecting, updating and making readily available a well-organised system of precedents, as far as possible from the criminal courts".[122]

The Review Group was not aware of any significant demand for an extension to the role of prosecutor either on the part of the DPP or otherwise. As a result, the favoured option of the Review Group in developing practice in this area is to allow the prosecutor to volunteer information to the trial judge about sentencing precedents, *without* request. At present, the prosecutor can only pass on such information at the judge's request. The Review Group considers that a combination of the Director's guidelines and professional codes of conduct will be sufficient to avoid abuse of any new right to make submissions at the sentencing stage.

In relation to sentencing consistency, the Review Group believes that sentencing judges would benefit considerably if the Court of Criminal Appeal (or the Supreme Court) were to provide guideline judgments in relation to particular offences or categories of offences. Alternatively, a reference mechanism similar to that which is utilised in the courts of England and Wales could be introduced.

Some members of the Review Group were of the opinion that the prosecutor should be entitled to draw the judge's attention to aggravating factors. In addition to practical difficulties, the majority of the Review Group stated that it would "be uneasy" if the right of the prosecution to make a submission at the sentencing stage became a vehicle for the prosecution to "denounce" the accused.

---

[119] *The People (DPP) v. Botha* [2004] 2IR 375.
[120] *Guidelines for Prosecutors*, second edition 2006, available at http://www.dppireland.ie.
[121] The *Guide to Professional Conduct of Solicitors in Ireland* is available at http://www.lawsociety.ie/newsite/documents/Committees/conduct2.pdf and the *Code of Conduct for the Bar Council of Ireland* is available at http://www.lawlibrary.ie/viewdoc.asp?DocID=581&m=f.
[122] Report, at p 223.

ICCL ANALYSIS

The ICCL believes that the extension of the role of the prosecutor in relation to sentencing does not engage any human rights norms provided that the power of the prosecutor to volunteer sentencing precedent to the judge is subject to the Director's guidelines and the professional codes of conduct. However, any extended role of the prosecutor in advocating for particular sentences would be undesirable. Such a development could potentially usurp the role of the judiciary in administering an impartial process of criminal justice in accordance with fair procedures.

In order to deliver justice to victims, defendants and all those affected by criminal behaviour, consistent and appropriate sentencing is essential. To this end, the ICCL endorses the ongoing work of the Irish Sentencing Information System (ISIS) and agrees with the recommendation of the Law Reform Commission in its *Report on Sentencing*[123] that non-statutory sentencing guidelines should be introduced. These would identify aggravating and mitigating factors as well as offering guidance on the role of prior criminal records.[124] Any mechanism for direction on sentencing should remain flexible and strike the right balance between judicial independence and consistency of sentencing. Judges are in the best position to review all the relevant factors in relation to appropriate sentencing and apply the principle of proportionality to the cases which come before them. The ICCL considers that any sentencing framework which is developed should be informed and guided by the experience and knowledge of the judges themselves. The ICCL further believes that clear and transparent sentencing mechanisms are necessary to vindicate the constitutional proportionality of the sentencing process.

ICCL COMMENTS

- If conducted in accordance with the Director's guidelines and the professional codes of conduct, the ICCL considers that the proposed minor extension of the role of the prosecutor in relation to sentencing is unproblematic from a human rights perspective.
- The ICCL endorses the opinion of the Review Group that sentencing guidelines or a reference mechanism should be developed for judges. In this regard, the ICCL welcomes the work of the ISIS.

[123] LRC 53 – 1996, at p. 65.
[124] O'Malley, T., (2006) *Sentencing Law and Practice*, 2nd Ed., Dublin, Thomson Round Hall, at Appendix 1.

ISSUE 10 – HEARSAY EVIDENCE

The rule against hearsay means that a witness may not testify about the words spoken by another person who is not produced as a witness. There are a number of exceptions to the rule against hearsay.[125] The main reason for the rule against hearsay is that the words spoken by another cannot be tested under cross-examination and have not been uttered under oath. Therefore, there is no opportunity for the veracity, authenticity and reliability of the evidence to be tested or the credibility of the person tendering the evidence to be evaluated.

While the Review Group accepts that the fundamental principle of the rule is sound and should not generally be relaxed, it felt that there is a case for further examination of the need for legislative reform, particularly with regard to the clarification of the rule. Given that the right to cross-examine is a fundamental constitutional right, the Review Group pointed out that it doubted whether this jurisdiction could enact a provision similar to Part II of the UK Criminal Justice Act 2003 which makes all hearsay evidence admissible subject to an "interests of justice" test. Rather, the Review Group agreed that a preferred approach would be the identification of particular areas that warrant specific exceptions being permitted.

ICCL ANALYSIS

The ICCL endorses the recommendation of the Review Group that the rule against hearsay should remain as it is, though perhaps requiring some statutory reformulation in order to improve its clarity. Any relaxation of the rule could increase the possibility of unsound evidence being admitted to trial. The right of a defendant to cross-examine his or her accuser(s) has been consistently upheld since the Supreme Court acceptance of this right in the *Re Haughey* case.[126]

Article 6(3)(d) of the European Convention on Human Rights specifically provides that everyone charged with a criminal offence "shall be entitled to examine or have examined witnesses against him". The European Court has derived a number of general principles on the admission of hearsay evidence; if such evidence is admitted there must be counterbalancing factors which preserve the rights of the defence. These factors could include: whether the defence requested the attendance of the witnesses; the ability of the defence to question the evidence before the trial; and, the impact of the evidence.[127] Similarly, the right of a defendant to examine or have examined the witnesses against him or her is fundamental to the fairness of an international criminal trial. It was provided for in the Nuremberg and Tokyo Charters as well as the statutes of the current international criminal tribunals and the International Criminal Court.[128]

On this basis, the ICCL contends that any dilution of the rule against hearsay, without appropriate robust safeguards, would constitute a breach of fair procedures under the Constitution and Article 6 of the European Convention on Human Rights.

ICCL RECOMMENDATION

- The rule against hearsay should remain in its current form, as recommended by the Review Group.

[125] For example, in trials before the Special Criminal Court dealing with membership of an unlawful organisation. Under section 3 of the Offences against the State (Amendment) Act 1972, evidence of the "belief" of a Chief Superintendent is admissible and is regularly used. Sect. 16 of the Criminal Justice Act 2006 provides another exception to the rule in allowing the admission of statements made by a witness in any criminal proceedings relating to an arrestable offence (defined under section 2 of the Criminal Law Act 1997, as amended by section 8 of the Criminal Justice Act 2006, as "an offence for which a person of full capacity and not previously convicted may, under or by virtue of any enactment or the common law, be punished by imprisonment for a term of five years or by a more severe penalty and includes an attempt to commit any such offence").

[126] *Re Haughey* [1971] IR 217.

[127] Starmer, K., *op cit*, at p. 284.

[128] Judge May, R. and Wierda, M., (2002) *International Criminal Evidence*, Transnational Publishers at p. 284. Statute of the International Criminal Court, Statute of the International Criminal Tribunal for Rwanda and Statute of the International Criminal Tribunal for the Former Yugoslavia.

ISSUE 11 - OTHER PROPOSALS

IDENTITY PARADES

The Review Group recommends that an injured party should be permitted to identify the suspect through a one-way screen, as far as is practicable. However, the Review Group was unsure whether amendment to the law was required to achieve this.[129]

ICCL ANALYSIS

The ICCL agrees with this recommendation and further recommends that any witness who is required to give identification evidence should be accorded similar treatment. This process would have the advantage of preserving the anonymity of the victim or the witness and would assist in the prevention of witness tampering. Importantly it would also protect the injured party or witness from having to face the suspect, thereby reducing the potential for personal distress.

JUDGES' CHARGE

After the prosecution and the defence have made their closing statements to the jury, the judge normally sums up the case for the jury. This is referred to as "charging" the jury and may include guidance on evidential rules and directions on the law. The Review Group affirmed the proposal in the Law Reform Commission *Report on Prosecution Appeals and Pre-Trial Hearings*[130] on the prospect of the development of "Bench Books" by the proposed Judicial Council. This would bring "greater standardisation to the formulae used for certain aspects of judges' charges".

ICCL ANALYSIS

The ICCL endorses this recommendation and believes that this would bring greater clarity for all actors in a criminal trial. One of the most difficult tasks facing a trial judge is the direction he or she must give to the jury when it is retiring to determine the facts of the case and subsequent guilt or innocence of the defendant. Numerous appeals come before the Court of Criminal Appeal as a result of incorrect directions by trial judges. The ICCL believes that the uniformity of certain aspects of the judge's charge as developed in "Bench Books" would greatly assist trial judges as well as prosecution and defence lawyers; however, it is important that flexibility in the process is maintained. The considered development of standardised phraseology in dealing with matters such as the standard of proof, confession evidence and identification evidence would also provide much needed clarity to jury members.

VICTIM IMPACT STATEMENTS

The purpose of a victim impact statement is to assist the judge in sentencing by describing the impact on the victim of the offence of which the defendant was convicted. The introduction of victim impact reports in the sentencing process is governed by section 5 of the Criminal Justice Act 1993. It relates to sexual offences and offences involving violence or threat of violence to the person. The Review Group considered that the statutory provisions should be widened so that "persons who have been most directly affected by the offence" are permitted to give evidence at the sentencing stage. This should be subject to the Court's discretion, which should be flexible so as to adapt to the differing circumstances of the victims which come before it. Any new statutory provision should include a power vested in the Court to prevent the publication or broadcast of the report. The Review Group also found that the victim impact statements are relevant at the parole stage and should be provided to and considered by the Parole Board.

ICCL ANALYSIS

The ICCL cautiously agrees with the view taken by the Review Group. However, it has reservations regarding the manner and level to which the victim and others directly affected by the offence may contribute to the sentencing process. The ICCL has concerns that the increased use of some victim impact reports at the sentencing stage could present difficulties. Primarily, the aggravated impact of victim reports could lead to major inconsistencies in the sentencing of convicted persons. In all cases, the operation of the criminal justice system must be guided by the public interest in prosecuting crime to vindicate the rights of victims. With that role comes the responsibility to provide defendants with an unbiased trial in due process of law.

Likewise at parole stage, the over reliance on victim impact reports in some cases could lead to irregularities in the prison time served. On this basis the ICCL calls for a dedicated analysis and examination of the treatment and role of victims in the criminal process and punitive framework. In order to contribute to the debate on this issue, the ICCL will publish a companion volume to this Report, directly engaging with the protection of victims' human rights.

DEFENCE ACTS

The administration of military justice would also be affected should the recommendations of the Review Group be adopted. Therefore, the Review Group recommended that any necessary amendments should be made to the Defence Acts (1954 – 2006) to reflect the changes proposed.

ICCL RECOMMENDATIONS

- The ICCL recommends that any witness who is required to identify a suspect - and not just the "injured party" as recommended by the Review Group - should be able to make the identification from behind a one way screen.
- The ICCL endorses the recommendation of the Review Group that "Bench Books" should be developed by the proposed Judicial Council in order to bring a more standardised format to judges' charges.
- While expressing cautious agreement with the proposal by the Review Group that the ambit of victim impact reports should be widened so as to include those "directly affected by the crime", the ICCL points out that there are risks in widening the scope of victim participation in the sentencing process. The ICCL calls for a more thorough examination of the treatment of victims and their role in the criminal justice system, and will produce its own report regarding the protection of victims' human rights.

[129] Report, at p. 233.
[130] LRC 81-2006.


Rule 17.
Subpoena

CONCLUDING REMARKS

It is important to consider what is expected of a criminal justice system in a democratic society. The values and aims of a criminal justice system include the enforcement of the law, which sets out the norms of behaviour expected of every member of society. Everyone should be in a position to know whether his or her actions could constitute a criminal offence and the rules of criminal procedure must be sufficiently clear so that an average person can make an informed decision at any stage of a trial as to the best options available to him or her. An efficient and fair criminal justice system is one which is accessible, transparent and open to every member of society.

The plethora of legislative change to the criminal justice landscape in recent years has resulted in a system of criminal law which is often complex and muddled for criminal practitioners and their clients alike. Many of the measures introduced have far-reaching effects and serious implications for all individuals. Central to any criminal justice debate is the understanding that the restrictions imposed on the fundamental rights of defendants affect every citizen. Furthermore, the line between those accused of a crime and those convicted of a crime has become increasingly blurred. This has led to a perception that the criminal justice system is ineffective when defendants are acquitted.[131] This in turn has fed the misconception that there is a need to "re-balance" the process.

The ICCL believes that safeguards which protect the rights of defendants play an important role in the avoidance of miscarriages of justice. Ensuring that the right person is convicted is clearly in the interests of victims as well. There is also a necessity that the rights of victims, who are caught up in the system, be promoted and protected. To this end, the treatment of victims should be constantly reviewed and developed.

The ICCL contends that a fair and just trial must remain a core principle of any criminal justice reform. The ICCL believes that the concept of "balancing" is not helpful to criminal justice discourse. If we are to avoid creating future miscarriages of justice, we must rid ourselves of the notion that the advancement of one set of rights will be achieved by reducing the protections afforded to others. The ICCL believes that the rights of defendants and victims alike should be primary considerations in every criminal justice process.

[131] Mr Justice Hardiman, *op cit.*

SUMMARY OF RECOMMENDATIONS AND COMMENTS

Issue 1 – Right to Silence

- In relaying a warning when detaining or charging an individual, the consequences of remaining silent should be made crystal clear to that person. To this end, precise guidelines should be given to members of An Garda Síochána regarding the appropriate warning to be issued.
- In accordance with international human rights standards, a legal representative should be present with a detained person during police questioning and no inference should be drawn from any period of silence which takes place prior to consultation with a legal representative.
- In relation to the drawing of adverse inferences by juries, guidelines on the issuing of appropriate warnings from the trial judge should be introduced. The jury must be clearly instructed as to the specific facts which are subject to the inference-drawing rules.

Issue 2 – Character Evidence

- In cases where a defendant casts imputations on the character of a person who is deceased or incapacitated, the Review Group recommends that the prosecution be allowed to cross-examine the defendant as to his character. In order to combat the inclusion of highly prejudicial information, any such cross-examinations should require the authorisation of the judge.
- The Review Group's suggestion that the defendant should be subject to cross-examination in circumstances where a defence witness speaks of the good character of the defendant fails to strike an appropriate balance between the rights of the accused and the interest of justice. This proposal should *not* be adopted.

Issue 3 – Infringements of Constitutional Rights: the Exclusionary Rule

- In accordance with the opinion of the Chairman of the Review Group, Dr Gerard Hogan, *no amendment* should be made to the exclusionary rule.

Issue 4 – Requiring a Defence Statement
Issue 5 – Extending Alibi Evidence Rules

- From a human rights standpoint, the current rules governing the provision of expert witness statements and reports are unproblematic and do not require amendment.

Issue 6 – "With Prejudice" Appeals
Issue 7 – Re-opening Acquittals Following New Evidence
Issue 8 – Nullifying Issues Tainted by Trial Tampering

- Following on from the recommendations of the Law Reform Commission in 2006, neither "with prejudice" appeals nor "fresh evidence" appeals should be introduced in this jurisdiction.
- In the event that such appellate mechanisms were to be constitutionally permitted, they should be accompanied by robust safeguards; including a high threshold of new or newly-discovered facts and/or a requirement to show evidence of a fundamental defect in the previous proceedings.

Issue 9 – Prosecution Submissions on Sentence

- If conducted in accordance with the Director's guidelines and the professional codes of conduct, the proposed minor extension of the role of the prosecutor in relation to sentencing is unproblematic from a human rights perspective.
- In accordance with the opinion of the Review Group, sentencing guidelines or a reference mechanism should be developed for judges.

Issue 10 – Hearsay Evidence

- As recommended by the Review Group the rule against hearsay should remain in its current form.

Issue 11 – Other Proposals

- Any witness who is required to identify a suspect — and not just the injured party as recommended by the Review Group — should be permitted to make the identification from behind a one way screen.
- "Bench Books" should be developed by the proposed Judicial Council in order to bring a more standardised format to judges' charges.
- There should be a more thorough examination of the treatment of victims and their role in the criminal justice system.

APPENDIX 1

Terms of Reference of the Review Group

The Review Group's terms of reference were to consider and examine the following issues:

- The right to silence;
- Allowing character evidence of an accused;
- The exclusionary rule of evidence;
- Requiring the accused to outline the nature of his or her defence before or at the commencement of a trial;
- Re-opening new evidence;
- Nullifying an acquittal where there is evidence of jury or witness tampering;
- "With prejudice" appeals in the case of wrongful acquittal;
- Extending alibi evidence rules to other analogous situations;
- Allowing submissions by the prosecution before sentencing;
- Modifying the rule in relation to hearsay evidence;

and any other proposals regarding criminal law, criminal evidence and criminal procedure that may come to the attention of the Group in the course of the review.

APPENDIX 2

Other issues which came to the attention of the Review Group

In the Report, the Group stated that a large number of other proposals relating to criminal justice, had been put forward to them. They consider that many of these warrant further examination and study by the Department of Justice, Equality and Law Reform. The matters raised include the following:

- Issues regarding the playing of recordings of interviews in respect of a part-exculpatory statement;
- Detention periods, including events that would "stop the clock" for the purposes of calculating those periods;
- More general legislation on search warrants, including the question of by whom warrants should be issued and the manner of issue (e.g. electronically);
- Regulation of investigatory powers;
- Refinement of powers regarding photographs, samples, etc;
- Time periods for service of the book of evidence;
- Extension of anonymity provisions for victims and accused persons in certain circumstances;
- Reducing delays caused by judicial review;
- Ensuring that juries are selected on a more inclusive basis, and issues regarding peremptory challenges and electronic random selection;
- Regulating the cross-examination of injured parties by unrepresented defendants;
- Whether legal aid for victims ought to be channelled through the Legal Aid Board or private solicitors. Addressing the financial and other civil consequences of offending, including enjoining orders against an offender, and restraint on profiteering from an offence;
- Achieving greater permanence to the membership of the Court of Criminal Appeal.

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*

ISBN 978-0-9515425-8-3