

# TAKING LIBERTIES: The Main Issues

## Further Resources

Taking Liberties: The Human Rights Implications of the Balance in the Criminal Law Review Group Report:  
[www.iccl.ie](http://www.iccl.ie)

Report of the Balance in the Criminal Law Review Group:  
[www.justice.ie/en/JELR/Pages/Balance\\_in\\_criminal\\_law\\_report](http://www.justice.ie/en/JELR/Pages/Balance_in_criminal_law_report)

Department of Justice, Equality and Law Reform:  
[www.justice.ie](http://www.justice.ie)

Office of the Director of Public Prosecutions:  
<http://www.dppireland.ie>

Courts Services:  
[www.courts.ie](http://www.courts.ie)

Free Legal Aid Board:  
[www.legalaidboard.ie](http://www.legalaidboard.ie)

Free Legal Advice Centre:  
[www.flac.ie](http://www.flac.ie)

Law Society of Ireland:  
[www.lawsociety.ie](http://www.lawsociety.ie)

Bar Council of Ireland:  
<http://www.lawlibrary.ie>

## About the Irish Council for Civil Liberties

The Irish Council for Civil Liberties (ICCL) is an independent human rights watchdog, which monitors, educates and campaigns in order to secure full enjoyment of human rights for everyone. The ICCL is involved in advocacy for positive changes in the area of human rights as well as monitoring policy and legislation to make sure that it complies with international standards. The ICCL also publishes reports and runs campaigns to raise public and political awareness of human rights, justice and equality issues.

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These are the main issues raised in the ICCL's June 2008 report *Taking Liberties: The Human Rights Implications of the Balance in the Criminal Law Review Group Report*. Some changes to the right to silence have been introduced already by the Criminal Justice Act 2007. Other changes have been proposed which would diminish the rights of accused people, without improving life for victims of crime. This table shows the practical effect of the changes proposed by the Balance in the Criminal Law Review Group.

## 1. RIGHT TO SILENCE

### Before



Before 2007, when a new Criminal Justice Act was introduced, most people questioned by the Gardaí did not have to give an answer. In the vast majority of cases, the silence of an accused person could not be used in court to suggest that she or he might be guilty.

### After

Under changes introduced in the Criminal Justice Act 2007, the silence of any person questioned by the Gardaí can be used in court as a sign of her or his possible guilt.

The 2007 Act does contain some safeguards to protect people who are questioned by the Gardaí, but additional action is needed to make those safeguards more effective.

The Act states that Gardaí have to explain the consequences of remaining silent in ordinary language. However, the Minister for Justice has yet to issue guidance to the Gardaí on exactly how to explain to people what could happen if they do remain silent.

The Act also states that people should have a "reasonable" opportunity to speak with a solicitor before they decide to remain silent. However, people have no legal right to have their solicitor present when being questioned by the Gardaí. This means that it is very difficult for solicitors to give their clients sound advice about whether or not to remain silent, as they do not know in advance what their clients are likely to be asked.

Everyone should be in a position to know what could happen if they choose to stay silent when the Gardaí question them; however, at the moment, this is not the case.

## 3. THE EXCLUSIONARY RULE

### Before



The Irish Constitution protects a number of basic rights and, at the moment, if Gardaí gather evidence in a way that does not respect those rights, that evidence cannot normally be presented in Court. Only if there are extraordinary excusing circumstances will a jury be allowed to hear it.

For example, if Gardaí search a property using a search warrant that they know has not been issued properly, evidence that they find on that property will usually be excluded, because it has been gathered in a way that does not respect a person's constitutional right to peacefully enjoy their property. This is known as the "exclusionary rule".

### After?

A majority of the Balance in the Criminal Law Review Group proposed that the "exclusionary rule" should be relaxed to allow evidence to be put before a jury even if it had been collected in a way that does not respect an accused person's constitutional rights.

The Group justified this by saying that it would be unfair if "technical errors" were to lead to people being cleared by the courts. However, collecting evidence in an unconstitutional way is a serious issue, not just a technical error.

The Chairman of the Review Group, Dr Hogan, disagreed with his colleagues about the need to change this rule. He considered that excluding unconstitutionally collected evidence is an important way to encourage the Gardaí and others to carry out their investigations in a lawful and respectful way.

The ICCL considers that Dr Hogan is correct.

## 2. CHARACTER EVIDENCE

### Before



Generally, information about an accused person's "bad character" (e.g. previous convictions) is not given to a jury as it may encourage jury members to label the person as a "criminal", rather than focus only on the facts in front of them. Just because someone was charged with or convicted of an offence in the past does not mean that they have committed another crime with which they have been charged.

At the moment, a jury will only be allowed to hear "bad character" evidence about an accused person in strictly-limited circumstances. For example, this can happen if an accused person (or her/his lawyer):

- Claims to have a good character;
- Makes allegations against prosecution witnesses (or the prosecutor);
- Gives evidence against someone else who has been accused of the same offence.

### After?

The Balance in the Criminal Law Review Group has proposed that bad character evidence could be introduced if a defence witness tells the court that an accused person has a good character.

If this change was introduced, an accused person could be questioned about previous convictions (of no relevance) simply because a defence witness – over whose words the accused person has no control – speaks about his/her good character.

The ICCL considers that this change would not be in the interests of justice.

## 4. "WITH PREJUDICE" APPEALS AND "FRESH EVIDENCE" APPEALS

### Before



At present, the Director of Public Prosecutions (DPP) cannot appeal to the Court of Criminal Appeal if a person is found "not guilty", but he can appeal the sentence given to a convicted person if he considers that it is too light.

### After?

The Balance in the Criminal Law Review Group has suggested that new forms of appeal by the DPP could be introduced.

"With prejudice appeals" would allow the DPP to appeal a not guilty finding, and the judge would be able to change the jury's verdict and declare a person guilty. A "fresh evidence" appeal would allow the DPP to re-open a case in which a person had been found not guilty if there was new evidence.

If such appeals were introduced, the final say would be removed from the jury, even though the Constitution states that people have the right to have their guilt decided by a jury of their peers.

The ICCL considers that this change would not be in the interests of justice.