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A N G A R D A S Í O C H Á N A

# enblique

# COMMUNIQUE



## EDITORIAL

This edition of Communiqué presents the reader with articles on An Garda Síochána's response to road fatalities and serious injuries on Irish roads, the issue of drug testing police officers, a detailed analysis of the Criminal Justice (Amendment) Act, 2009 and Communiqué's first ever article (in Irish entitled) Stádas Dlíthiúil na Gaeilge.

Sergeant John Moore provides a detailed analysis of An Garda Síochána's response to road fatalities and serious injuries on Irish roads. The author explains the reasoning behind the establishment of a Forensic Collision Investigation capability in the organisation and outlines what exactly Forensic Collision Investigation entails. In conclusion the author notes the invaluable contribution of Forensic Collision Investigation to the Organisation's commitment to reduce the incidents of road deaths and serious injury on our Nations roads.

Garda John Griffin discusses the issue of drug testing police officers. The author provides an overview of what exactly drug testing is, the type of testing programmes commonly conducted and he provides statistics in relation to drug and alcohol use in Irish society. Police forces in the United Kingdom and the Irish Defence Forces already have drug testing programmes in place and the author examines these in detail. The article also looks at some of the legal and ethical issues surrounding the concept of drug testing.

Cuireann Sairsint Tomás Concannon staidéar cuimsitheach ar stádas dlíthiúil na teanga Gaeilge ar fáil agus lorgaíonn sé clocha míle stairiúla na teanga ó 1937 go dtí an lá inniu. Tugann an t-údar cuntas ar fhorbairtí reachtúla agus casdlí arna déanamh ag an teanga Gaeilge agus ar leasa a bheidh ag an bhforbairt seo do shaoránaigh sa tír seo.

Ms Marie-Claire Maney provides an in-dept analysis of the Criminal Justice (Amendment) Act, 2009 and outlines the arguments for and opposition to this much debated new piece of legislation. The author outlines the rational and intent of the Act, discusses the more contentious provisions of the Act and notes the implications of the Act for An Garda Síochána. The article concludes with a look to the future and how the Act has changed the legal landscape for the citizens of Ireland and for members of An Garda Síochána.



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A N G A R D A S Í O C H Á N A

# COMMUNITY



## NOTES ON THE CONTRIBUTORS

**SERGEANT JOHN MOORE** is a native of Kanturk, County Cork. He joined An Garda Síochána in 1986, and served at Donnybrook, Traffic Dept, D.M.R, and Carrigans, County Donegal. He joined Driver Training, Garda College in 1998, and was appointed Sergeant in charge in 2005. He is the holder of a Diploma in Safety, Health and Welfare at Work from University College Dublin. He is a qualified Forensic Collision Investigator, having successfully passed all components of the initial Forensic Collision Investigation course, delivered to the organisation. He is also the holder of the Scott Gold medal.

**GARDA JOHN GRIFFIN** is a native of Tramore, Co. Waterford and joined An Garda Síochána in 2001. Currently serving in the Policy & Planning Unit at Garda Headquarters he previously served on the District Drugs Unit in Dundrum Garda Station, Dublin, on the Crime Task Force at Blackrock Garda Station, Dublin and Stepside Garda Station, Dublin as a uniformed Garda.

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Garda Griffin holds a Bachelor of Arts Degree in Policing Studies (HETAC), a Bachelor of Arts Degree in Public Management (Administration of Justice) from the Institute of Public Administration, Dublin and a Masters degree in Public Administration - Inspector General Track with a specialisation in Investigations and Operational Inspection from the City University of New York – John Jay College of Criminal Justice.

John is also a member of the Association for Criminal Justice Research and Development which seeks to promote reform, development and effective operation of the criminal justice system.

Is as An Spidéal, Co. na Gaillimhe don Sáirsint **TOMÁS CONCANNON** ó dhúchas. Chuaigh sé isteach sa Gharda Síochána i 1996 agus bhí sé lonnaithe ag Stáisiún na nGardaí, Dún Laoghaire ar dtús. Ina dhiaidh sin, rinne sé seirbhís in Aonad Drugaí an Cheantair ag Dún Laoghaire agus ceapadh é in Aonad Bleachtairí an Cheantair i nDeilginis. Rinne sé seirbhís mar Bhleachttaire ag stáisiún chathracha eile freisin. I 2007, tugadh ardú céime dó agus sannadh chuig Stáisiún na nGardaí, An Caisleán Riabhach é agus i 2008, aistríodh é chuig Stáisiún na nGardaí, Carna. Faoi láthair tá sé i mbun staidéir don “Diplóma sa Ghaeilge” ag OÉ Gaillimh.

**MS. MARIE-CLAIRE MANEY** is the Head of Legal Affairs and Human Rights. She joined An Garda Síochána in November 2008. She manages all legal actions, corporate legal advice and human rights proofing. She recently was awarded a Masters Degree from Cambridge University in Applied Criminology and Police Management.

# Forensic Collision Investigation

Sergeant John Moore



Sergeant John Moore

An Garda Síochána, as the primary agency responsible for road traffic legislation enforcement, responded to spiralling road deaths with clearly defined and targeted strategies involving actions, resources and targets. One such initiative was the establishment of a forensic collision investigation capability in the organisation.

## INTRODUCTION

An Garda Síochána's Corporate Strategy 2005-2007 Strategic Goal 3 - Traffic, stated that the organisation would *"improve and enhance our traffic collision investigation capability"* by ensuring that *"a technical traffic collision investigative capability exists in every division"*. The Corporate Strategy stated that the organisation would *"develop and pilot a training course in the forensic analysis of traffic collisions"*.

Following on from this commitment, the first Forensic Collision Investigation course was held at the Garda College from July 18th to 12th August 2005. Further training courses were subsequently delivered in each of the following years, 2006, 2007, and 2008. These training courses were sourced from and delivered by a U.K based company, AiTS Ltd. The instructors delivering the courses are retired Police officers, who themselves have had many years of operational experience in the area of forensic collision investigation. The training courses delivered to the organisation were in line with City and Guilds criteria, and the final examination earns City and Guilds accreditation. City and Guilds are the U.K's leading vocational awarding organisation, and are a recognised global benchmark for workplace skills and professional development. Other members of An Garda Síochána had by this time, pursued another avenue and had obtained equivalent qualifications through the De Montford University, in Leicester in the U.K. This option involved completing the programme by distance learning, with tutor support. The learning process is spread over a longer duration, with regular examinations, mentoring and feedback. A one week residential module for practical purposes is also included. Both City and Guilds and De Montford University qualified investigators are now accepted and utilised by the Garda organisation.

## WHAT IS FORENSIC COLLISION INVESTIGATION?

Historically, forensic collision investigation and reconstruction was largely an American development, having been pioneered in the 1960's and 1970's. During the mid 70's, it was adopted and further developed by the majority of U.K. Police Forces, and the U.K. forces have since become recognised authorities in this expertise. The concept of forensic collision investigation revolves around the application of scientific formulae and principles, to relevant physical evidence gathered at a collision scene. It ensures that an impartial and thorough investigation can be carried out and that accurate information or evidence, based on physical evidence, can be provided to any subsequent court case or coroner's inquest. Where possible, it now provides the ability to piece together pre- impact vehicle movement and driver behaviour as well as post impact. It is a valuable independent tool in the investigation process, and will either corroborate, or at times contradict, any available witness evidence.

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### COURSE STRUCTURE

The City and Guilds course, as chosen by the organisation, is delivered over two modules. The first module is of four weeks duration, during which candidates initially gain an in-depth knowledge and understanding of everyday terms such as friction, gravity, forces, energy, and momentum. This understanding and theory is then applied to the dynamics of vehicle movement and handling, particularly in a collision scenario. This requires a certain proficiency with mathematics as the theoretical approach is formula and equation based. This proficiency is enhanced by regular exams during the module, culminating in a final examination based around collision investigation theory. There are also practical components during which candidates learn how to measure scenes using baseline and offset measurements, and from which scale plans of collision scenes can be hand drawn. The other practical aspect concentrates on performing skid tests from which the coefficient of friction (or, available road surface grip in layman's terms) can be established, and interpreting various marks left by a vehicle's tyres on the road surface. On successful completion of module one of the course candidates are qualified to attend traffic collision scenes, to gather and interpret the available evidence and to prepare a report into the circumstances of the incident.

The final module of the FCI course, usually takes place twelve months after module one. It is two weeks long, and is reinforced by the practical operational experiences gained in the interim. It explores the theory of elements delivered on Part 1, in more depth. It also focuses on preparation for the final examination, concentrating on examination techniques, and the structuring and presentation of answers. By this stage the candidates will also have completed two investigation files relating to the forensic investigation of two collision scenes. Successfully sitting the final examination gains City and Guilds certification and accreditation. This final examination is set by City and Guilds and takes place globally in October each year. In 2009, candidates from An Garda Síochána gained first and second place globally (Garda Portal, 23/02/10).

### ORGANISATIONAL POLICY

Chapter 10 of An Garda Síochána's Traffic Collision Investigation Policy now states that *"Detailed investigation of the circumstances surrounding fatal and serious injury collisions on the roads of Ireland is a fundamental part of the Garda policing function."* The same chapter states that *"In the investigation of fatal and life changing traffic collisions, the public is entitled to the highest possible standard of service and professionalism from An Garda Síochána."* In this regard, a Forensic Collision Investigator will now attend the scene of all fatal and life threatening/changing traffic collisions, and assist in the overall investigation by carrying out a detailed, professional and impartial examination of the scene.

### THE INVESTIGATION PROCESS

All traffic collisions will result in some degree of physical evidence. This will vary from a minor dent or broken headlamp to the almost total destruction of a vehicle. The more serious the impact, the more damage is caused and therefore the more evidence found at the scene. The role of the collision investigator is to locate, record, gather, evaluate and interpret any relevant physical or forensic

evidence, that arises from a collision. This evidence can be varied and includes “gouges” or other marks on the road surface, marks left by vehicle tyres, establishing a point or area of impact, the rest positions of vehicles in relation to this point of impact, projectiles (including parts of, or entire vehicles, pedestrians or riders thrown from motorcycles), and damage caused to vehicles.

In line with the training delivered, much of the investigative and reconstruction theory is based on mathematics and physics. It originates from, and revolves around formulae in relation to Newton’s laws of motion, rules of friction, force, etc. Specific terms are now used in reports. For example, what was previously referred to as “the speed of the vehicle” is now classed as the “velocity”. The collision investigator now has to consider such matters as calculating speed from skid marks while at the same time taking into account whether full or partial braking had taken place, road gradients, changes in road surface, vehicle dynamics and handling characteristics, circular motion of vehicles including critical speed, swerves and lane changes, momentum, pedestrian impacts, projectile equations, driver reaction times and maximum safe speeds in limited visibility situations.

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#### EVIDENTIAL COMPARISON

Evidential comparison can be applied to the evidence which, since the first recorded “automobile fatality”, is nearly always to be found at collision scenes. Physical evidence such as skid marks, (particularly in the pre-A.B.S era), post impact movement of vehicles, the projected distance travelled by vehicle parts or parts of a vehicle’s load, the distance over which a pedestrian was thrown following an impact, and the crush damage profile caused to a vehicle involved in an impact, would almost certainly have been present in the majority of scenes. However, as was the case with fingerprints, hair and body fluids, it is only in the recent past that police organisations have developed the training, knowledge and expertise to analyse and interpret this evidence and present our findings to the Courts.

The mindset of a collision investigator, who has been called to attend the scene of a fatal or serious injury collision is that he or she is going to the scene of an as yet unexplained or unlawful death, or incident of serious injury. They are, in essence, dealing with a crime scene, and it is imperative that the scene is treated as such. It is vital, after the other emergency services have carried out their life saving roles, that the scene is then left as undisturbed as possible. Good scene preservation is the key to a thorough forensic investigation and reconstruction of the circumstances both surrounding and leading up to the collision.

An acute sense of forensic evidence awareness now exists throughout all of the emergency services, following the introduction of a module on forensic collision investigation to Garda, Fire Service and Ambulance Service training courses by An Garda Síochána.

Forensic Collision Investigators now have the benefit of state of the art surveying equipment, enabling them to carry out an electronic survey of the entire scene. From this survey, they can produce a detailed computerised scale plan of the

scene. This has almost entirely eliminated the need to draw collision scene plans by hand. Training has also been delivered on the procedures and criteria regarding the specialised measurement the crush damage caused to the vehicle(s) and from these measurements (again subject to certain criteria being met), it may be possible to calculate the change in velocity or approximate closing speeds, where impacts with objects such as trees or walls are involved.

In the weeks following the completion of the forensic investigation of a collision scene, a detailed report, including the scale plan, crush damage analysis if applicable and any calculations carried out, is then forwarded to the investigating member, as part of the overall investigation file.

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Some very significant convictions have already been secured in this jurisdiction largely due to the evidence of Garda Forensic Collision Investigators. Their evidence has also been instrumental in securing guilty pleas in many other cases which, in the absence of this evidence, may well have been contested. Both the qualifications of, and evidence given by, the Forensic Collision Investigators now results in them being recognised as expert witnesses by the Courts.

#### CONCLUSION

The role of the forensic collision investigator is not solely confined to the scenes of fatal and serious injury road collisions. The training that they have received, coupled with the experience gained, means that they can also assist and advise in many other scenarios. These vary from incidents of a criminal nature where a vehicle was involved, to advising on matters of road safety. It is hoped that further training will continue to be sought and delivered, thereby broadening the knowledge base, expertise and professionalism of the forensic collision investigators. The introduction of a forensic collision capability in An Garda Síochána has resulted in answers now being available to questions which, for many years, remained unanswered. The introduction of FCI training has contributed to An Garda Síochána's ambition to reduce the incidents of road deaths and serious injury as much as possible.

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# 'Drug Testing the Police'

Garda John Griffin



Garda John Griffin

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A good police force is one that catches more criminals than it employs.  
(Robert Mark, Commissioner of the Metropolitan Police in the 1970's, *New Statesman* 18 January 1980 cited in Punch, 2009, p. 1)

## INTRODUCTION

Police officers hold a special place in society. It is the role of police officers to make arrests, detain individuals accused of criminal activity and, under certain circumstances, deprive individuals of their constitutionally guaranteed freedoms. As a result of their unique and powerful responsibilities, the behaviours of police officers are always held to a higher standard (Barker, 2002; Gates, 1987; Kappler, Sluder, & Alpert, 1998 cited in Lersch & Mieczkowski, 2005, p. 289). Police officers, in carrying out their duties, are almost invariably held to higher performance, ethical and moral standards. The employment behaviours or standards expected for a store clerk or a salesperson are less rigorous and demanding than the societal expectations of police officers (Barker, 2002 as cited in Kruger, Lersch & Mieczkowski, 2002). This principle – of a higher standard of conduct and expectations – is expected of a public servant.

## USE OF DRUGS AND ALCOHOL IN IRISH SOCIETY

The World Drug Report 2009 issued by the United Nations Office on Drugs and Crime (UNODC), report that Ireland, among a number of other countries continued to show increases in cocaine use. In Ireland, cocaine use increased from 1.1% in 2003 to 1.7% in 2007 among the population aged 15-64. This increasing trend reverses a previously recorded decrease of 1.3% in 1998 to 1.1% in 2001. The report also states that cannabis use has increased in Ireland in comparison to other countries where a decrease has been observed (United Nations Office on Drugs and Crime, World Drug Report, 2009). The Annual Report 2009 published by the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) report that the number of clients entering drug treatment for primary cocaine use has been increasing in Europe for several years, though the trend is strongly influenced by a few countries. Between 2002 and 2007, the largest proportional increases among new clients were reported by Spain, Ireland and Italy (European Monitoring Centre for Drugs and Drug Addiction, Annual Report 2009).

According to World Drink Trends 2004, Ireland is ranked third in the world alcohol consumption league. Luxembourg heads the rankings (NACD, 2007). The World Health Organisation states that Ireland's per capita litre consumption of alcohol has increased from 7.0 litres in 1970 to 14.5 litres in 2001 (World Health Organisation, 2004).

Alcohol related problems in the workplace carry a considerable cost in terms of absenteeism, job performance, accidents and productivity (Department of Health and Children [DOHC], 2004). The loss of output due to alcohol-related absences from work is estimated at €1,050 million, the healthcare costs of alcohol-related problems are €433 million and the cost of road accidents is €322 million (DOHC, 2004).

These statistics are certainly a worrying factor for Irish society.

### ALCOHOL AND DRUG TESTING DEFINED

Chemical testing for alcohol, drugs or their metabolites in biological tissues and fluids is part of a broader category of drug detection strategies designed to establish the presence of drugs, alcohol and/or related impairment among employees and other individuals. Besides drug and alcohol testing, drug detection procedures include, but are not limited to, direct observation of drug use, observation of intoxication, direct observation of impaired behaviour, reports from informants, self-reports, neurological testing and behavioural (i.e. performance) testing (Hanson, 1993).

In this article, workplace drug testing or drug screening<sup>1</sup> is defined as “the process of obtaining samples of body fluids or tissues (e.g. urine, blood, hair, breath) from job applicants and employees and conducting laboratory analyses to detect the presence of certain drugs, including alcohol, and their metabolites”. The most widespread forms of drug testing are breath testing for alcohol and urine testing for other drugs. Although accepted standards for impairment have been established for alcohol, in most cases impairment is inferred from screening and testing results (Hanson, 1993).

### TYPES OF DRUG TESTING PROGRAMMES

There are many different types of drug testing programmes in use throughout various organisations, they include:

- Pre-employment testing
- Probable cause testing
- Reasonable suspicion testing
- Periodic testing
- Random testing
- Testing on return from treatment
- Testing related to transfer or promotion
- Voluntary testing (Mrland, 1993).

Pre-employment testing programmes, in which job applicants are tested, are the most popular type of drug testing programme, offering the least liability to the employer. It is the easiest type of test because there are no contractual issues unless the employee starts work before the result is known.

There are two categories of probable cause testing: one includes testing after accidents, near-misses and unsafe acts; the other includes testing when evidence of intoxication, impairment or other behavioural signs of problematic drug or alcohol use are witnessed.

Reasonable suspicion testing includes testing of employees who exhibit poor time-keeping or a high degree of absenteeism or other suspect behaviour. There is no clear distinction between this type of testing and probable cause testing. It might be said that the grounds for testing on the basis of reasonable suspicion are less rigorous than those for probable cause testing.

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<sup>1</sup> Drug testing refers to both drug testing and drug screening. Although the terms are used interchangeably, drug “screening” refers to a more non specific qualitative analysis of a tissue or fluid sample for the presence of a particular drug. “Testing” involves a quantitative analysis of the same sample to confirm the presence of the specific drug identified in the screening analysis.

Periodic testing is usually found in programmes where employees are tested for drugs or alcohol according to a predetermined timetable, usually during annual medical check-ups. Such programmes could also include testing upon return from lay-offs or lengthy illnesses.

Random testing involves testing employees without cause and notice. The employees are unaware of when testing will take place until the day of the test.

Testing on return from treatment is to ensure that an employee has not had a relapse during or after treatment. The rationale behind such testing programmes appears to be the high relapse frequency among drug and alcohol dependent persons.

Testing related to transfer or promotion may be considered similar to pre-employment testing. One reason for such testing is the transfer of an employee to a safety sensitive or environmentally sensitive position.

Voluntary testing is when an employee submits to testing although it is not a requirement. Such testing should provide employees with an opportunity to demonstrate their commitment to the goal of a drug free workplace in their work setting and to set an example for other employees (Mrland, 1993).

#### WORK PLACE DRUG TESTING IN IRELAND

Workplace drug testing is quite common in Ireland but mainly conducted within the private sector. It is estimated that about 20,000 workplace drug tests are performed in Ireland, of which 50% are pre-employment, 30% post-accident/suspicion and 20% random. Testing is done mainly on white-collar workers, those working in information technology, pharmaceuticals and call-centres (Verstraete and Pierce, 2001 cited in NACD, 2001).

While An Garda Síochána does not carry out workplace drug testing, the Irish Defence Forces, which also contributes to the security of the State, has been conducting Compulsory Random Drug Testing (CRDT) since 2002.

The primary objective of Compulsory Random Drug Testing within the Defence Forces is deterrence. In order to provide a credible deterrent, the testing programme is devised to maximise the possibility of selection for testing and thus detection for the presence of a controlled drug or other substances or for the metabolites thereof. All personnel randomly selected irrespective of rank are tested. The monitoring of Drugs Testing is maintained to provide statistics for development of Defence Forces Substance Abuse Policy (Mc Carthy, 2009).

The Defence Forces testing programme requires each subject to provide a urine sample under controlled conditions. No blood samples are required. The sample is divided into two containers, both of which are sent to an independent civilian laboratory. One sample will be tested and the second sample will be retained in the event of an appeal against the findings of the laboratory. All members of the Defence Forces, irrespective of rank, with the exception of the members of the Army Nursing Service and the Chaplaincy Service are liable to testing. The process of selection for testing will be entirely random. A draw will take place to

select a Brigade/Service, an installation of that Brigade/Service and, the surnames of personnel within that Installation who will be tested (CRDT Explanatory Booklet). No prior notification of a CRDT is given to the selected Installation or personnel.

The Defence Forces have approximately 10,500 permanent members and 8,000 reserve members, who are all subject to CRDT programme. They have a budget of €120,000 per annum and a target of 10% of members to be tested annually (approximately 2,000). Since 2003, 10,007 members have been tested. 0.41% of tests have been positive, i.e. 41 personnel. 25 of these were administratively discharged or retired, two were retained as a result of legal action, one was retained following representations to the General Officer Commanding, one is the subject of ongoing legal challenge, three are undergoing administrative action and nine are subject to Targeted Drugs Testing (TDT) which is instigated at the discretion of the General Officer Commanding and with the agreement of the individual concerned having failed a CRDT (McCarthy, 2009).

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**TABLE 1: NUMBERS OF CRDT CARRIED OUT FROM 2003 TO OCTOBER 2009 BY THE IRISH DEFENCE FORCES.**

Testing Periods	Numbers Tested	Positives	% of Persons Positive	Cannabis	Cocaine	Ecstasy	Barbituates
2003	1086	4	0.37%	2	2		
2004	1110	4	0.36%	1	3		
2005	1238	7	0.57%	4	2	1	
2006	1213	7	0.57%	4	1	2	
2007*	1905	7	0.37%	3		3	
2008	1908	6	0.31%	3	2		1
2009* (Up until Oct)	1650	6	0.32%	5			
<b>Total</b>	<b>10,007</b>	<b>41</b>	<b>0.41%</b>	<b>22</b>	<b>10</b>	<b>6</b>	<b>1</b>

\*Two Refusals Source: Irish Defence Forces

Semi state bodies such as Irish Rail and the Electricity Supply Board (ESB) also conduct workplace drug testing. The ESB carries out pre-employment drug testing and drug testing on those whose work involves risks such as those working with live wires, driving, handling machinery and other types of manual work (Health & Safety Officer, ESB cited in NACD, 2007, p.26).

The Railway Safety Act, 2005 makes drug testing mandatory for railway workers. It states that there is a “general duty of a person working in the course of the operation of a railway undertaking, while on duty, not to be under the influence of an intoxicant to such an extent as to expose a person (including himself or herself) to danger or risk of danger as a consequence of being under such influence” (Section 37(2) Railway Safety Act, 2005). The Act also allows an authorised person to require a safety critical worker to provide a sample of blood or urine, in accordance with sampling procedures of the railway undertaking concerned where that authorised person is of the opinion that a safety critical worker who is performing a safety critical task has a drug in his or her body to such an extent that he or she is in breach of his or her duty (Section 89 Railway



Safety Act, 2005). A safety critical task in this act is defined as a task that involves driving a train, or in any other way controlling or affecting the movement of a train; controlling, affecting or managing, the movement of persons on a train, on a platform, across a level crossing, or, the boarding of, or, alighting from, a train of persons, or; working in a maintenance capacity or as a supervisor of, or look-out for, persons working in such a capacity (Section 93 Railway Safety Act, 2005). A safety critical worker means a person who performs a safety critical task as defined above.

#### **CURRENT RELEVANT LEGISLATION**

There is no specific legislation that deals with workplace drug testing in Ireland however relevant Irish legislation which would concern drug testing is as follows;

The Misuse of Drugs Act, 1977 as amended, provides for the prevention of the misuse of certain dangerous or otherwise harmful drugs. It also included a schedule, which recites a list of “controlled drugs”. Section 3 of the act states that a person shall not have a controlled drug in his possession.

The Safety, Health and Welfare at Work Act, 2005 states at section 13(1) that an employee, while at work, shall, ensure that he or she is not under the influence of an intoxicant to the extent that he or she is in such a state as to endanger his or her own safety, health or welfare at work or that of any other person. ‘Intoxicant’ is defined in the act to include alcohol and drugs and any combination of drugs or of drugs and alcohol.

The Non-Fatal Offences Against the Person Act, 1997 outlines at section 12(1) that a person shall be guilty of an offence if, knowing that the other does not consent to what is being done, he or she intentionally or recklessly administers to or causes to be taken by another a substance which he or she knows to be capable of interfering substantially with other bodily functions.

The Railway Safety Act, 2005 as mentioned above also contributes to workplace drug testing, but solely for railway workers.

#### **OTHER POLICE ORGANISATIONS**

Following work with the Home Office to secure compulsory powers to test police officers for substance misuse, the Association of Chief Police Officers (ACPO) of England, Wales and Northern Ireland created and agreed a policy for substance misuse and testing and recommended to all Chief Constables that they introduce Compulsory Substance Misuse Testing at the earliest available opportunity (ACPO, 2007).

The author contacted various police organisations in the United Kingdom with regard to their drug testing policy. The agencies were selected at random and each provided the author with their force policy.

The organisations contacted were; The London Metropolitan Police Service (MPS), Greater Manchester Police (GMP), Police Service of Northern Ireland (PSNI), Thames Valley Police (TVP) and Strathclyde Police.



All police services in the United Kingdom use legislation such as the Police (Amendment) Regulations 2005 which give the power to test for controlled drugs. Protocols as set out in Home Office circular 45/2005 and guidance in the ACPO Substance Misuse and Testing Guidelines Document 2007 are also utilised.

The London Metropolitan Police Service has three strands of testing; With Cause Testing; Pre-employment Testing; Random Testing.

Table 2 shows statistics from the London Metropolitan Police for random substance misuse testing. It shows total screens and the subsequent confirmed positive results for the period February 2007 to October 2009.

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**TABLE 2: RANDOM SUBSTANCE MISUSE TESTING STATISTICS OF THE LONDON METROPOLITAN POLICE SERVICE FROM 1ST FEBRUARY 2007 TO 1ST OCTOBER 2009.**

Testing Periods	Numbers Tested	Positive Confirmed Screens
01/02/07 to 31/03/08 (14 months)	502	2
01/04/08 to 31/03/09 (12 months)	688	1
01/04/09 to 01/10/09 (6 months)	642	0
<b>Total</b>	<b>1,832</b>	<b>3</b>

Source: London Metropolitan Police

Note: The three officers, confirmed as positive tests, were found to have consumed cocaine, cannabis and heroin and subsequently all resigned.

The MPS conduct random testing of officers within their probationary period and officers holding a safety critical and specialist post. These posts are areas in which physical risk to individuals, colleagues or members of the public would be raised significantly should such post holders be involved in substance misuse. Examples are authorised firearms officers; firearms tactical advisors and those directly supervising such officers; members or supervisors of police search advisor teams; underwater search team divers; and police drivers. Staff working in other posts who are identified as being vulnerable because of a specific responsibility for dealing with drugs, are also liable to being randomly tested. These posts are; staff employed on any degree of undercover work; Test Purchase Officers; Covert Human Intelligence Source Handlers; and plain clothes staff with responsibility for drug offences.

The Greater Manchester Police (GMP) has a similar policy to the MPS and has the same three strands of testing. They have a target to carry out 600 drug tests per annum which equates to 50 per month. In 2009, up to the 12th October, no member of the GMP tested positive for illegal substances (Doherty, 2009).

The Thames Valley Police (TVP) also has a similar policy and carries out the same three strands of testing as the MPS. In a six month period in 2009 from April to October, the TVP randomly tested 32 officers and recruits, this was in

addition to one with cause test, which proved negative. New changes commenced in October 2009 whereby all recruits are tested rather than a random selection (Beveridge, 2009). Also in October 2009, a TVP anti-corruption meeting discussed the changing of policy/legislation to use hair samples rather than urine for probable cause testing. However, this is also being discussed at national level (Boddy, 2009).

#### IRISH LEGAL JUDGEMENTS

One Irish case involving workplace drug testing is that of Rawson -v- The Minister for Defence. The judgement was delivered in December 2008 by Mr. Justice Hedigan in the High Court.

The applicant sought an order of certiorari quashing the order of the respondent directing his discharge from the Army. He also sought a declaration that there was a breach of fair procedures insofar as his Commanding Officer failed to direct his mind as to whether there existed a reasonable doubt he had innocently or inadvertently inhaled cannabis and failed to assess the representations made by the applicant. The applicant also sought a declaration that the regulatory provisions governing his discharge are unfair and unreasonable and do not set appropriate criteria to exclude passive inhalation of an illegal substance.

The court refused the reliefs sought by the applicant in this case for various reasons including the fact that even though the applicant had admitted being in a car with other friends who were smoking cannabis, the view of the court was that it was reasonable and rational for the General Commanding Officer of the Army to decide that this did not amount to innocent or inadvertent ingestion or inhalation and that the applicant was made well aware of the adverse effects of drug taking and his explanation of being in a car with people who were smoking cannabis is unacceptable, as a soldier would be expected to remove himself from any such situation (Courts Service of Ireland, 2008).

Another such case is that of John White -v- Minister for Defence. This judgement was delivered on 22nd February 2008 in the High Court. Again it relates to a compulsory random drug test within the Defence Forces which was carried out on the applicant in October 2005 where the result was positive for cannabis. The applicant elected to have the second sample independently tested, which also tested positive for cannabis. The applicant was now facing discharge from the Defence Forces as a result of the positive test and he subsequently made representations, stating that while he was at a friend's house he had gone to the bathroom and on his return he consumed some pizza which had been scattered with cannabis powder without his knowledge.

The supervisor in charge of dealing with the applicant's case recommended that the applicant be discharged and that discharge proceedings be initiated. One of the main grounds in an application for Judicial Review by the applicant was that the rules failed to provide a mechanism and/or suitably qualified persons to consider and determine the matter of innocent or inadvertent consumption was unfair and unreasonable and failed to vindicate the Applicant's right to fair procedures. Part of the rules for drug testing within the Defence Forces is that a certain section is to operate as a safeguard in a situation, where there are

circumstances, which could involve innocent consumption, and it is an attempt to bring the law within fair procedures, however this was ignored by the applicant's supervisor.

The judgement stated that the recommendation of the supervisor to discharge the applicant was fatally flawed and within the confines of fair procedures was wholly inadequate. The application was allowed and the order discharging the applicant from the Defence Forces was quashed (McCarthy, 2010).

As a result of this case the Defence Forces has introduced new procedures.

#### CONCLUSION

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The whole area of workplace drug testing, regardless of whether it takes place in a police organisation or a private company has many ethical, technical and legal issue. The most serious challenges to testing are based on privacy and data-protection arguments (Caborn & Shahandeh, 2003). By whatever means these tests are conducted, issues of privacy raise a question mark against whether this is truly an area in which the interests of collective security should always override individual civil liberties (White, 2003).

Any organisation is duty bound to ensure that its staff are fit to carry out their duties safely and effectively. Any form of substance misuse places at risk the health and safety of users, colleagues and the public, it also comprises individual and organisational integrity. This is vital in any police organisation considering the nature of work that police engage in.

Drug testing of police officers shares many of the same concerns as general employee drug testing, however police officers differ from other citizens because they possess different standards and expectations associated with their work.

The basic logic, the author believes, is that the police officer position is a critical one and there is a public interest in making sure that officers are fit for duty – both in an immediate sense and with respect to longer term integrity issues arising from drug use.

A drug testing regime in a police organisation can reduce the risk of corruption, minimise the chances of individuals who misuse substances entering the police service, deter officers from substance misuse through the application of a policy that makes detection a real possibility, screen officers in safety critical areas, so as to minimise any risk of operations being prejudiced by impaired judgement, encourage those with a substance misuse problem to identify themselves, so that they may be supported in seeking treatment, and protect officers in roles in which they may be vulnerable to malicious allegations of substance misuse. Drug testing in a police organisation may initially accompany outrage from officers but inevitably they will come to accept it as a necessary evil to prevent corruption and protect the police reputation (Henry, 1990 cited in Prenzler, 2005, p.406).

The eradication and prevention of drug misuse amongst police officers is one of paramount importance to sustain public confidence and integrity of the organisation.



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# Stádas Dlíthiúil na Gaeilge

Sergeant Tomás Concannon



Sergeant Tomás Concannon

*“Languages, with their complex implications for identity, communication, social integration, education and development, are of strategic importance for people and the planet. Yet, due to globalization processes, they are increasingly under threat, or disappearing altogether. When languages fade, so does the world’s rich tapestry of cultural diversity. Opportunities, traditions, memory, unique modes of thinking and expression – valuable resources for ensuring a better future are also lost.” (1)*

Tá sé aitheanta anois ag an domhan mór an tábhacht agus an tairbhe a bhaineann le teanga i gcultúr ar bith. Ba fhadhbhreathnaitheach a bhí bunaitheoirí Shaorstát Éireann nuair a d’imchochlaigh siad cearta na Gaeilge sa Bhunreacht. Rinneadh an chéad tagairt don Ghaeilge in Airteagal 4 de Bhunreacht Saorstát Éireann 1922 nuair a fógraíodh gurb í an Ghaeilge príomhtheanga an Stáit. Nuair a rinneadh athchóiriú ar an mBunreacht sa bhliain 1937 is mar seo a leanas a tugadh aitheantas don teanga in Airteagal 8:

1. *Ós í an Ghaeige an teanga náisiúnta is í an phríomhtheanga oifigiúil í.*
2. *Glactar leis an Sacs-Bhéarla mar theanga oifigiúil eile.*
3. *Ach féadfadh socrú a dhéanamh le dlí d’fhonn ceachtar den dá theanga sin a bheith ina haonteanga le haghaidh aon ghnó nó gnóthai oifigiúla ar fud an Stáit ar fad nó in aon chuid de (2)*

Tá sé sofheicthe gurb í an Ghaeilge ‘príomhtheanga oifigiúil’ na tíre agus níl dabht ar bith ach gurb é an ráiteas gearr thuas an bunchloch ar cruthaíodh gach a tharla go hoifigiúil ó thaobh cearta na Gaeilge riamh ó shin.

Chun tábhacht Airteagal 8 de Bhunreacht na hÉireann 1937 a shoiléiriú ní mór roinnt garspriocanna a aimsíodh ar an mbóthar sa tréimhse ó 1937 a scrúdú. Cuirfidh mé i bhfianaise gur de bharr Airteagal 8 a saothraíodh an dul chun cinn a baineadh amach go dtí an lá atá inniu ann. De bharr iallacháí foclóra agus ama i scríobh na cáipéise seo, ní féidir faraoir ach plé a dhéanamh ar na garspriocanna is suntasáí.

Is í an cheist mhór ná cén fáth gur thóg sé cois le trí scór bliain (go dtí 2003) sular cinníodh cearta na teanga trí reachtaíocht *Acht na dTeangacha Oifigiúla 2003* agus ina theannta sin meas tú an bhfuil cearta na teanga bainte amach go hiomlán fós, nuair a fheictear cásanna ar nós cás Pheadair Uí Mhaicín atá á phlé os comhair an Cúirte Uachtaraí le gairid (25 agus 26 Feabhra 2010); ó thaobh cead a bheith ag duine cás cúirte a bheith cloiste os comhair giúiré atá cumasach sa Ghaeilge?

Le mionscrúdú a dhéanamh ar “An tábhacht a bhaineann le hAirteagal 8 de Bhunreacht na hÉireann 1937” caithfear breathnú i dtús báire ar ról na teanga féin i ndruchtú na Bunreachta mar cháipéis dlí. Is fiú súil a chaitheamh siar ar ráiteas Éamonn de Valera ar an 14 Meitheamh 1937 le linn díospóireacht Dála nuair a deir sé:

*“I want to tell those who suggest that the Irish was only an afterthought, a mere translation of the English, that the Irish drafting has gone on pari passu almost from the beginning, when the fundamental ideas that were accepted for the*

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*Constitution were being put in draft form. It is true that, as far as the literal drafting of the Constitution was concerned. . . . The Irish has gone side by side with that.* (3)

Léiríonn an méid thuas go raibh an Ghaeilge ag croílár an phróiseas dréachta sa Bhunreacht agus ní mar ábhar pléite amháin sa Bhunreacht féin. Ba fhorbairt suntasach a bhí ansin ar Bhunreacht 1922 nuair a haistríodh an cháipéis Ghaeilge ón bhfoirm Béarla; ceann de na cúiseanna go raibh an oiread mór de dhifriocht idir an fhoirm Ghaeilge agus Béarla. Tá an tuairim seo athdhaingnithe le hionsá san Airteagal 25.5.4 a dhearbhaíonn:

*I gcás gan na téacsanna d'aon chóip áirithe den Bhunreacht seo a bheidh curtha isteach ina hirís faoin alt seo a bheith de réir a chéile, is ag an téacs Gaeilge a bheidh an forlámhas' (4)*

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Tá an tuairim pléite ag Pádraig Ó Fiannachta agus Tomás Ó Néill i mBeathaisnéis Éamonn de Valera, gur aistriúchán den fhoirm Ghaeilge atá sa leagan Béarla de Bhunreacht 1937, rud a mhíneoidh an fáth go bhfuil tús báire tugtha don Ghaeilge:

*'it is claimed in the authorised Irish Biography of Éamon de Valera by Pádraig Ó Fiannachta and Tomás Ó Néill that to a certain extent the final English draft derived from the Irish' (5)*

Má scrúdaímid fo-phointe 2 d'Airteagal 8 de Bhunreacht 1937 is léir go ndéantar tagairt don Bhéarla mar theanga oifigiúil “eile”. I rith taighde don phaipéar seo fuair mé amach nach bhfuil mórán tíortha ar domhan ina bhfuil an Béarla luaite in éineacht le teanga dúchais oifigiúil na tíre, m.sh. An India, Éire, an An Nua Shéalainn, Ceanada, Na hOileáin Filipíneach agus an Bhreatain Bheag. Tá sé feicthe agam ó mo thaighde go bhfuil Éire ar cheann de na tíortha is eisceachtúla sa mhéid go dtugtar tús áite don teanga dúchais. Ó thaobh comparáide de, tá cás na hIndia spéisiúil mar cé gurb í an Hindi teanga dúchais na tíre, níl an stádas céanna tugtha don Hindi agus atá don Bhéarla mar gurb é an Béarla atá aitheanta sa dlí:

*'According to the Constitution of India, Hindi in the Devanagari script is the official language of the union and English the 'subsidiary official language'; however, English is mandated for the authoritative texts of all federal laws and Supreme Court decisions, and (along with Hindi) is one of the two languages of the Indian Parliament'. (6)*

I gcomparáid le sampla na hIndia, mar atá luaite thuas, má bhreathnaítear ar fho-alt 3 d'Airteagal 8 de Bhunreacht na hÉireann 1937, rinneadh foráil chun chaon teanga a úsáid mar aonteanga i ngnó oifigiúil Stáit faoi leith:

*'Ach féadfar socrú a dhéanamh le dlí d'fhonn ceachtar den dá theanga sin a bheith ina haonteanga le haghaidh aon ghnó nó gnóthai oifigiúla ar fud an Stáit ar fad nó in aon chuid de'. (7)*



Fachtas fiorthábhacht fo-Airtigil 8 sa rialú Ard Chúirte: An Stát (Mac Fhearraigh) v Mac Gamhna – 1983) (An Ard-Chúirt, 1 Iúil 1983):

*'It will be noted that Irish is accorded a higher level of recognition in the Constitution of Ireland than it had in the first Constitution, since it is referred to for the first time as 'the first official language'. At the same time greater scope is given to the Oireachtas to give priority to one language over the other in accordance with the law insofar as relates to official matters in any part of the country. Until the Oireachtas exercises the function conferred on it by the provisions of the Constitution, it must always be assumed that Irish is the first official language, and that the citizen is entitled to require that it be used when the State has official matters to administer.'* (8)

Rinneadh atreisiú ar an bpointe seo sa chás Ó Beoláin v D.J. Mary Fahy & ors.(2001) IESC 37, i gcás a tugadh nuair a dhiúltaigh an Breitheamh d'iaratas go gcuirfí iachall ar an Stiúrthóir Ionchúiseamh Poiblí cáipéisí a aistriú nuair a rialaigh an Breitheamh Hardiman:

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*'Is é mo thuairimse nach féidir an Ghaeilge arb í an teanga náisiúnta í agus, san am céanna arb í príomhtheanga oifigiúil an Stáit í, a eisiámb (ar a laghad in éagmuis dlí den chineál a shamhlaítear le hAirteagal 8.3) ó aon chuid de dhioscúrsa poiblí an náisiúin nó ó aon ghnó oifigiúil de chuid an Stáit ná de chuid aon cheann dá bhail. Ná ní féidir caitheamh léi sna comhthéacsanna seo ar shlí ar bith nach bhfuil chomh fabhrach leis an tslí a gcaitear leis an dara teanga oifigiúil. Ná ní féidir iad siúd atá inniúil agus ar mian leo í a úsáid chun iad féin a chur in iúl nó chun cumarsáide, a chosc nó a fhágáil faoi mhíbhuntáiste agus iad á dhéanamh sin in aon chomhthéacs náisiúnta nó oifigiúil.'* (9)

Ba í an rialú seo ba chúis leis an ngéarghá reachtaíocht a chur i bhfeidhm i bhfoirm *Acht na dTeangacha Oifigiúla 2003*, sa chaoi nach bhféadfaí an Ghaeilge a eisiámb ó aon chuid de ghnó oifigiúil an Stáit nó nach gcaithfí leis an teanga níos boichte ná leis an mBéarla. Dhearbhaigh sé seo nach bhféadfaí aon duine a bheadh ag úsáid na Gaeilge as seo amach a fhágáil faoi mhíbhuntáiste i gcomhthéacs oifigiúil nó dlíthiúil.

Agus an páipéar seo á réiteach agam is tráthúil go raibh athbhreithniú breithiúnach á éisteacht san Ardchúirt (25 agus 26 Feabhra 2010) ina raibh Peadar Ó Maicín as Ros Muc, Conamara ag tabhairt in aghaidh cinneadh a rinne An Chúirt Chuarda i nGaillimh gan giúiré dhá-theangach a chur ar fáil dá thriail choiriúil. Duirt an cainteoir dúchais seo a bhí cúisithe in ionsaí a dhéanamh ar fhear eile:

*"go mbeadh sé faoi míbhuntáiste dá n-éisteofaí an cás i mBéarla nó dá mbeadh aththeangaire ag déanamh áistriúchán sa chúirt".* (10)

Ba é an phríomhargóint a bhí ag Ó Maicín ná go mbeadh sé riachtanach dó é féin a chosaint sa teanga oifigiúil Gaeilge, a theanga dúchais:

*"gan bac, gan constaic, gan mí-bhuntáiste"* (11)

Rinne sé an argóint chomh maith go gcaithfí leis mar eachtrannach agus go mbeadh sé faoi mhíbhuntáiste dá n-éistófaí a chás i mBéarla nó go dá-theangach. Léirigh an Abhchóide Ó Tuathail é seo trí fhigiúirí daonáirimh agus cleachtais atá i bhfeidhm cheana féin i gCeanada agus sa Bhreatain Bheag a chur ós comhair na Cúirte.

Mar pháirt den bhreithiúnas a thug an breitheamh Roderick Murphy ar an 14ú lá de Mhí na Bealtaine, 2010 agus é ag diúltú don iarratas thuas dúirt sé:

*“A jury is selected from the electoral register of that jury district. The selection is made by random sampling. The selection cannot be restricted in any way, for example, by way of political affiliation, religious belief, cultural identity or otherwise. To do so would be to interpret the section beyond its simple meaning. It would follow that a selection by linguistic ability, albeit restricted to the official languages of the State, would not accord with the provisions of section 5 (Juries Act 1976). It would, as well as other discriminants, create a bias and would be unworkable” (12)*

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Níl sé soiléir fós an é seo críoch an scéil seo nó an mbeidh corr eile ann fós.

Is léir go bhfuil forbairtí déanta agus fós ag tarlú go dtí an lá atá inniu ann faoi scáth mhion-stiúradh Airteagal 8 de Bhunreacht 1937. Cé nach bhfuil b'fhéidir, an t-aitheantas bainte amach fós ag an nGaeilge a bhí mar fhís ag ceapadóirí Airteagal 8 de Bhunreacht 1937, is léir go mbainfear ceann scríbe amach go luath de bharr na gcéimeanna atá bainte amach agus atá fós á dtroid go dtí an lá atá inniu ann sna Cúirteanna.

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9. Cinneadh an Bhreithimh Hardiman sa chás Ó Beoláin v D.J. Mary Fahy & ors.
10. Ráiteas an abhchóide Séamus Ó Tuathail, SC i gcás Uí Mhaicín san Ard Chúirt. 25 & 26 /02/2010.
11. Ráiteas an abhchóide Séamus Ó Tuathail, SC i gCás Uí Mhaicín san Ard Chúirt. 25 & 26/02/2010.
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Ms Marie-Claire Maney

# An Overview of the Criminal Justice (Amendment) Act 2009

Ms Marie-Claire Maney

## INTRODUCTION

The Criminal Justice (Amendment) Act 2009, to which I refer as “the Act”, has been the subject of much debate and media scrutiny prior to its signing in to law by President McAleese on the 23 July 2009. Indeed 133 lawyers recently took the unusual step of writing a letter to the Irish Times Newspaper demanding that the Criminal Justice (Amendment) Bill be withdrawn. They claim that Ireland will be “shamed in the eyes of the international community”. The Act has also caused a stir amongst Civil Liberty and Human Rights groups who have also published their opposition to the Act, most notably through a full-page advertisement in the National print media.

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Recent years have witnessed an outcry from the public and media urging that the Government actively tackle gangland crime. The Government acknowledged that gangland crime is a huge threat to the State and consequently the Government considers that an increase in Garda powers is a proportionate response to combat this threat.

## THE RATIONAL AND INTENT OF THE ACT

The purpose of the Act is to provide additional measures with respect to combating organised crime and criminal organisations and providing for the prosecution of offences under the Act in the Special Criminal Court. It amends the law in relation to the detention of suspects and provides that hearings to consider the extension of a detainees’ custody will be heard *in camera* and in the absence of the detainee or the detainee’s legal representatives. The Act has introduced new offences of membership and directing a criminal organisation. “Criminal Organisation” is defined as a structured group, however organised, that has as its main purpose or activity the commission or facilitation of a serious offence. Directing a criminal organisation is defined as controlling or supervising the activities or giving an order, instruction or guidance, or making a request, with respect to the carrying on of the activities.

The Act however has been criticised as being unconstitutional and infringing upon Human Rights. This article will briefly examine three of the more contentious provisions of the Act, namely:

1. the admission of opinion evidence of any member of An Garda Síochána;
2. secret detention hearings and
3. the use of non-jury Special Criminal Court hearings.

This article outlines the arguments for and opposition to these three provisions.

## 1. GARDA OPINION

To prove the existence, control or membership of a criminal organisation, the Act provides that any member of An Garda Síochána may provide evidence in this regard. Many commentators have criticised this provision, contending that this evidence should be submitted to the court by members above a certain rank as is the case in the Offences against the State Act. It is misleading to promote the view that a member of An Garda Síochána can simply supply this proof based on

his own uncorroborated opinion. The Act categorically states that opinion evidence can only be given by a member of the Garda Síochána who appears to the court to possess the appropriate expertise, though the Act is not specific as to what constitutes “expertise” or how a member will prove such expertise to the court. It is the intention of the Act that such evidence will be admissible but with the safeguard that any such evidence will require corroboration before it will be accepted by the court.

## 2. DETENTION HEARINGS

The introduction of *in camera* detention hearings will allow a Judge of the District Court to hear evidence in private and without legal representation, where An Garda Síochána seeks to justify the continued detention of suspects. This practice should limit the capacity of criminals to gain insight into the progress of the investigation, and interrogation which otherwise would be aired in open court. The concern has been raised that this again will be in breach of human rights, in particular the right to a fair trial under Article 6 of the European Convention of Human Rights and also guaranteed under the Irish Constitution.

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A suspect may well argue that he is being denied his Constitutional entitlement to fair procedures by not being afforded the right to face and cross examine his accusers. It is also arguable that he will not be able to hear all evidence against him. The Supreme Court has enumerated the rights of a person appearing before a court or tribunal in *Re Haughey [1971]*. Here O’Dalaigh C.J. held that a person is entitled (i) to be furnished with all evidence against him, (ii) he is permitted to address his own defence, (iii) he is allowed to rebut any evidence given against him and (iv) a person is allowed to cross examine his accusers. There is a strong likelihood that *in camera* detention hearings will be challenged citing this precedent.

On the other hand, it is arguable that the purpose of extension hearings is to satisfy a Judge that the continued detention is necessary for the proper investigation of the offence. Once a Judge is satisfied that the initial arrest and detention is lawful then the Judge is perfectly entitled to extend detention. The constitutional right of an arrested person to bring a Habeas Corpus application before a High Court Judge remains in tact.

## 3. SPECIAL CRIMINAL COURT

The Director of Public Prosecution (“the DPP”) has the facility to refer matters to the Special Criminal Court where he feels that the ordinary courts are inadequate to deal with certain offences, so as to secure the effective administration of justice and the preservation of public peace and order as provided for at Article 38.3 of the Constitution. Article 38.3 was discussed in *Kavanagh v Ireland [1996]* and this provision was deemed **not** to be unconstitutional. The Act now provides that matters relating to Criminal Organisations will be heard before the Special Criminal Court without the necessity for the DPP to make application for that purpose.

It is the view of the legislature that the introduction of this provision will solve the issue of witness intimidation in the trials of gangland crime. Those who have

criticised the use of the Special Criminal Court from a human rights perspective do so on the basis of Article 14 of the European Convention of Human Rights. Article 14 states that all persons are equal before the law. Critics believe that a suspect's rights are likely to be infringed if they are referred to a non-jury court.

The Irish Council for Civil Liberties have voiced their disagreement with the discretion afforded to the DPP. They state that his decisions in assessing referrals to the Court are not made public. They are however subject to Judicial Review as was illustrated in *Kavanagh v Ireland* [1996]. While conceding that the discretion remains with the DPP in the Act, critics suggest that there is a shift toward making the Special Criminal Court the mandatory venue for trying those suspected of involvement in criminal organisations.

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In a letter written to the Irish Times on 8 July 2009 a group of 133 prominent lawyers stated that the right to trial by jury is enshrined in our Constitution at Article 38.5. This right can only be taken away where ordinary courts are deemed inadequate to secure the effective administration of justice. They make the point that the United Kingdom legislation provides for a two-stage process. This process provides for an initial hearing before the matter is referred to a non-jury court. It could be argued that this two stage process allows for greater transparency in the utilisation of non-jury courts.

Civil Liberty and Human Rights groups state that this provision is at variance with Article 38.1 of the Constitution which guarantees that every person shall be tried only in the due course of law. They also contend that Article 6 of the European Convention of Human Rights which guarantees the right to a fair trial will be breached by this section.

The question of whether the Act is a proportionate response and hence permissible under the European Convention and the Constitution will have to be tested. A test case will have to consider all the arguments, including that members of criminal organisations resort to many methods which can make it almost impossible to secure admissible and relevant evidence. Using the Special Criminal Court does obviate the necessity to use juries and eliminates the risk posed to jurors by gangland criminals, who will exhaust all avenues including intimidation to escape prosecution.

#### HUMAN RIGHTS IMPLICATIONS

As people charged with offences under the Act come before the courts it is inevitable that legal challenges will be pursued through the Courts. These challenges will no doubt focus on Constitutional issues in conjunction with Human Rights concerns. The Irish Council for Civil Liberties in a press release on 23 July 2009 stated:

*“this Act remains riddled with legal pitfalls. Any attempt to invoke some of its more contentious provisions, such as secret detentions hearings, or the use of uncorroborated Garda evidence to establish facts central to a prosecution, is bound to provoke further legal challenges to its constitutionality”.*



This sentiment is echoed by the letter from the 133 lawyers who contend that:

*“the constitution will surely not permit this, but even if it does, Ireland is likely to find itself shamed before the international community when the European Court of Human Rights or the United Nations Human Rights Committee are, inevitably, called upon to rule on the issue.”*

The provisions contained within the Act will have implications for the Human Rights of citizens. The right to a fair trial under article 6 ECHR will be called into question because of the absence of a jury and the *in camera* detention hearings. In a press release from the Irish Human Rights Commission dated 30 June it notes that Ireland has already been criticised for the ongoing use of the Special Criminal Court. It is highly likely that the UN Human Rights Committee will not approve of the extension of or the expanded use of the Special Criminal Court as is proposed by the Act.

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The Irish Human Rights Commission are unequivocal in their disapproval of the Special Criminal Court and are clearly opposed to its increased remit as provided for in the Act. They explore alternatives and suggest that the focus should instead be placed upon the jury members themselves. They suggest protection against intimidation by means of anonymous juries, screening the jury from public view with the use of video link.

These suggestions are refuted by those who believe that jury intimidation cannot be overcome by protection alone. The Chief State Solicitor for Limerick, Michael Murray, has confirmed that juries have been intimidated in Limerick [*Irish Times 4th July*]. He states that *“these gangs have sophisticated networks capable of identifying those they perceive as thwarting their activities”*. This sentiment was echoed by the then Minister for Defence O’Dea in the same article, who suggests that jury intimidation is now so widespread in Limerick that any attempt to hold a gangland trial in Limerick will prove futile as it will not be possible to form a jury.

#### IMPLICATIONS FOR AN GARDA SÍOCHÁNA

The introduction of the Act will expand the capacity of An Garda Síochána to deal with organised criminals. With increased powers and the provision of new offences designed to target criminal gangs it should make it easier for An Garda Síochána to gather evidence in a criminal investigation involving those who are heavily involved in organised crime. It is clear however that this process will be scrutinised by the legal profession who will undoubtedly refer their concerns to the Higher Courts for adjudication particularly in relation to *in camera* detention hearings, Garda opinion evidence and the use of the Special Criminal Court.

Garda members who find themselves in the position of providing evidence in relation to membership of criminal gangs will have their respective opinions intensively scrutinised by advocates and will be required to corroborate their opinions with regard to intelligence and surveillance matters. This is an area which may prove sensitive in the course of a trial where members of An Garda Síochána are required to provide corroboration of their opinion evidence.

### THE FUTURE

It is clear that contrary to fears regarding the admission of Garda opinion evidence, that such evidence will require corroboration and in this regard members of An Garda Síochána will indeed be subject to rigorous cross examination by the legal profession and will be required to prove their expertise, although this is not defined in the Act. The requirement for corroboration of opinion evidence is not a new concept; it is required in relation to suspect identification evidence, Offences Against the State Act and under Drug trafficking legislation. It has been challenged under these provisions and has been deemed constitutional.

Opponents will argue that the introduction of *in camera* detention hearings will offend principles of justice as contained in the European Convention of Human Rights and the Irish Constitution.

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The expansion of the Special Criminal Courts to cater for offences under the Act has received much criticism. The use of the Special Criminal Court has been challenged in many high profile cases over the years from the *DPP v Quilligan* to *DPP v Liam Campbell*, and has withstood Constitutional challenges.

There is no doubt that the Act will face turbulent times and will be challenged through the courts. The letter published by 133 eminent lawyers opposing the Act may be viewed as a statement of their intent to challenge the provisions of the Act. For the citizens of Ireland and An Garda Síochána, the Act has certainly changed the legal landscape.

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