



**AN ROINN DLÍ AGUS CIRT AGUS COMHIONANNAIS
DEPARTMENT OF JUSTICE AND EQUALITY**

WHITE PAPER ON CRIME CONSULTATION PROCESS

Discussion Document No. 3

Organised and White Collar Crime

Overview of Written Submissions Received

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Introduction

Background

Work to develop a White Paper on Crime commenced in January 2009. The White Paper will set out a policy framework for future strategies to combat and prevent crime.

A key element in the development of the White Paper is a consultation process which is structured around a series of discussion documents. In October 2010 the third and penultimate discussion document, *Organised and White Collar Crime*¹ was published. Aimed at the general reader, it considers white collar crime as well as organised crime and a range of other complex types of criminal activity.

The specific types of crime covered in detail are:

- white collar crime
- bribery and corruption
- regulatory crime
- fraud
- serious armed gang crime money laundering
- money laundering
- drug trafficking
- human smuggling and trafficking
- intellectual property crime
- cybercrime

The discussion document invited views on a series of questions relating to how best to combat these crimes.

An invitation for written submissions was advertised in national newspapers and the discussion document was posted on the Department's website and was also circulated electronically. In addition, hard copies of the document along with the press notice were sent to public libraries throughout the country.

The original closing date for written submissions by the end of December 2010 was extended in response to requests from interested parties.

¹ The first discussion document 'Crime Prevention and Community Safety' was published in July 2009 and an overview of submissions received in response to that document was published in February 2010. The second discussion document 'Criminal Sanctions' was published in February 2010 and an overview of submissions received on that document was published in August 2010.

Responses to the consultation

The Department received 29 submissions, 18 of which were from organisations while 11 were from private individuals (see Appendix). One person wished their submission to remain confidential.

Comments and proposals were made on all of the types of crime covered in the discussion document. However, submissions on white collar and regulatory crime were predominant and some of these contained considerable detail.

This document reflects the submissions made but does not purport to be an exhaustive catalogue of all of the points conveyed.

Finally, it should be noted that the contents of this document do not necessarily reflect the views of the Department.

Overview of Submissions Received

The submissions received generally welcomed the opportunity to contribute to a public consultation on organised and white collar crime as part of the overall White Paper on Crime process.

While a broad range of subjects was raised, the vast majority of submissions dealt with white collar and regulatory crime. Some of these were of a very detailed and technical nature.

As was the case in earlier consultation phases, many submissions drew attention to the need for further empirical research and better data on crime related matters. One correspondent argued that the final White Paper itself should deal with organised and white collar crime in separate sections for the purpose of clarity.

Submissions which dealt with **white collar and regulatory crime** explored a very wide spectrum of issues. There was general agreement on the complexity and diversity of these crimes, as well as on the extent of damage which they can inflict. Many correspondents noted the small number of prosecutions and convictions for white collar crime in Ireland and an apparent lack of parity of treatment by the criminal justice system between white collar and other criminals. The need for comprehensive protections for whistleblowers was voiced in many submissions. Some very detailed and technical proposals were submitted to address perceived difficulties in investigating and prosecuting white collar crimes, including in relation to corporate criminal liability, documentary evidence and witnesses. It was also submitted that there should be a more uniform range of investigative and prosecutorial powers across the various regulatory and enforcement bodies. The establishment of a white collar crime oversight body was also mooted, as was a collaborative response involving businesses, professionals and civil society.

A submission which dealt with **bribery and corruption** welcomed recent Irish legislation on the matter. It also noted, however, the failure to secure more prosecutions for incidents of corruption and cited research findings which pointed to a widely held public view that sentences for corruption offences are too light. Proposals to improve detection and prosecution included the introduction of an immunity programme for corruption related offences.

Many of the correspondents who dealt with the topic of **fraud** noted the absence of a composite statutory definition for this offence in Irish law. Legislative responses to fraud offences in other jurisdictions and for which there are no Irish equivalents were examined. Certain specific categories of fraud offences (e.g., fiscal fraud and bank card fraud) were the focus of some submissions which made proposals on a range of fraud prevention responses.

In addressing **serious armed gang crime** in Ireland, correspondents considered factors contributing to the emergence of organised crime as well as current legislative and organisational responses. Topics covered included sentencing, powers of detention, surveillance and the Criminal Assets Bureau. Some correspondents proposed that the proceeds of crime seized by the authorities should be used to fund

crime prevention measures in communities. Mandatory and presumptive sentencing were subject to some criticism, and a number of correspondents suggested that the impact of the current statutory framework be assessed before any further legislative responses to organised crime are developed.

Submissions which focused on **drug trafficking and supply** considered issues around sentencing, measures to control supply and demand, community action, and legalisation. A number of correspondents were critical of current legislative responses to drug crimes, and, in particular, the introduction of presumptive sentencing. They argued that this approach is costly and ineffective in reducing drug consumption. Approaches in other countries to drug related issues were the subject of a number of submissions.

Human smuggling and the trafficking of human beings was considered in a number of submissions. Initiatives taken by the Department of Justice and Law Reform were welcomed (e.g., enhanced international cooperation in combating trafficking, the examination of Swedish legislation to address demand for sexual services and ratification of the Council of Europe Convention on Action Against Trafficking in Human Beings). However, there was also criticism of legislative and other provisions for victims of human trafficking. Measures were proposed with a view to reducing demand for illicit goods and services involving smuggled and trafficked people for the purpose of sexual or labour exploitation.

A small number of submissions considered aspects of **Intellectual Property Crime** (copyright theft/infringement and counterfeiting), their impact and approaches to preventing and tackling such crime through detection and sanctions. Some proposals centred on the creation of specific structures, such as a formal partnership between stakeholders to develop strategies and systems to combat this crime, as well as the establishment of a specialist civil Intellectual Property court at Circuit Court level.

Finally, a number of submissions addressed **cybercrime** and the particular challenges which arise in the investigation of cybercrime and internet fraud. Solutions at international and national level were discussed, including the possibility of developing new national structures to respond to cybercrime.

White Collar Crime

Definition

A number of submissions considered what exactly is meant by white collar crime. One in particular cited a broad US definition which defines white collar crime as ‘those illegal acts which are characterised by deceit, concealment, or violation of trust and which are not dependent upon the application or threat of physical force or violence. Individuals and organisations commit these acts to obtain money, property, or services; to avoid the payment or loss of money or services; or to secure personal or business advantage’².

Many submissions considered that the range of appropriate criminal offences in Ireland is too narrow and cumbersome to deal effectively with some of the behaviours which society considers should be labelled as criminal, and therefore, punishable. It was argued that there is a need **to assess the adequacy of Ireland’s white collar crime laws** and to develop new offences which are more specifically tailored to these behaviours. One correspondent argued that the development of new white collar offences might also require regular revision and updating, a task which it was suggested could be undertaken by a dedicated oversight body for white collar crime.

More specifically, another correspondent noted that while there had been public comment in the last year or so about the failure to bring criminal charges against the management of Irish banks in respect of their ‘reckless trading’, ‘there is no general provision in Irish law which makes reckless trading a criminal offence’. He said that if society wants ‘to treat as ‘white-collar criminals’ those who engage in reckless trading, we would need to have an appropriate offence on our statute book’. (Section 184 of the Australian Corporations Act 2001 was referenced in that regard.) Other areas were additionally proposed included with respect to the misappropriation or inadequate stewardship of company assets as well as false statements in loan and credit applications, with the penalties being commensurate to the loss suffered by the entity and its shareholders. Aside from the financial area, one submission proposed that the mistreatment of migrant workers by employers should be classified as a white collar crime.

It was suggested that consideration be given to applying obligations which exist in one area of business more generally, or in other areas of business. By way of example, the correspondent asked, if it is a crime to fail to manage a bank or other credit institution in accordance with ‘sound administrative and accounting principles, or to not have in place ‘internal control and reporting arrangement’³, whether it should also be a crime when the failure occurs in an insurance company or on the part of a fund manager or a stockbroker. He also asked whether there is a case for applying this requirement to all large undertakings.

2 U.S. Department of Justice, Federal Bureau of Investigation (1989). White Collar Crime: A Report to the Public. Washington, D.C.: Government Printing Office.

3 Regulations 16 and 33 of the European Communities (Licensing and Supervision of Credit Institutions), Regulations 1992, S.I. 395 of 1992.

One of the difficulties in the prosecution of white collar crime cases which was considered is the **requirement to prove intent**, which arises due to the often complex and private nature of the acts in question. Accordingly, it was proposed that a lower 'recklessness' standard be applied in such cases.

Investigating and Prosecuting White Collar Crimes

Some submissions considered the challenging and time consuming nature of investigating many white collar crimes. Attention was drawn to the need for **adequate investment in training, expansion of specialised police units, and the need to build an indigenous knowledge base** so as not to have to rely on outside expertise. One submission noted the absence of white collar crime as a priority in An Garda Síochána policing strategy for 2011.

A number of submissions proposed that **periods for the investigation and prosecution of white collar crimes should be flexible and lengthy** due to the complexity of the investigations, and because various white collar crimes can be concealed for many years. These submissions considered that the law should provide for sufficient time to be given to investigators to put relevant documentation and questions to white collar suspects, while ensuring that the questioning is not seen to be oppressive both in terms of length of interview segments and number of interviews. One suggestion made was that if additional interviews are envisaged or required after already lengthy interviews some form of judicial oversight to grant more time might be useful.

It was also suggested that if white collar offences were defined, they might be listed as specified offences under the Criminal Justice Act 2007 (s.50). This would allow for a period of up to 7 days detention if such detention were considered necessary for the proper investigation of the offence concerned.

There was support for proposals to amend the existing law whereby a person may be detained for questioning by An Garda Síochána for a specified period to allow the period of detention to be broken into segments and the person released in the intervening periods⁴. Under the proposals, An Garda Síochána would be empowered to detain and question an individual for part of the period, release that person while further inquiries into what was said were made, and then require the individual to return to the Garda station at a later stage for the continuation of his or her detention.

Insofar as the **time limits for bringing prosecutions on summary matters** are concerned, it was argued that these are less of a problem where offences are, or can be upgraded to, indictable offences, because serious cases can be considered for prosecution on indictment, and summary proceedings after the expiry of the usual time limit might also be possible⁵.

It was suggested that in the case of those offences which it is thought appropriate to leave as summary only, all relevant investigators and prosecutors should have the

4 Proposed Criminal Justice Bill 2011.

5 s.7 of the Criminal Justice Act 1951, as amended by s.177 of the Criminal Justice Act 2006.

benefit of provisions similar to those in the Companies Acts⁶. These provisions were believed to be useful as they potentially allow for summary proceedings to be brought a long time after the date on which the underlying offence was committed, in cases where the evidence of such offence was not obvious or forthcoming in the years directly after the offence was committed. It was pointed out that provisions broadly similar to those in the Companies Acts, although not as flexible, are contained in other statutes⁷. It was submitted, that Irish law should deal with this issue in a single, consistent way, rather than by way of provisions which vary across different legislative codes.

One submission looked at means of alleviating **the impact on crime investigations of the withholding of documents from investigators on grounds of legal professional privilege (LPP)**. It was noted that the Oireachtas amended the Companies Acts in 2009 to put in place a better statutory framework for dealing with LPP issues⁸. It was believed, however, that difficulties remain around the management of electronic evidence, for example. It was suggested that the law could curtail the extent to which those who choose to operate their computer systems in such a way that their LPP data and non-LPP data become intermingled. It was considered that the law should expect those who wish to be able to assert LPP claims to organise themselves so that they keep their privileged material separately from their non-privileged material. It was suggested that urgent consideration needs to be given to creating generally applicable provisions for other investigatory bodies (e.g., the Competition Authority, the Revenue Commissioners, and An Garda Síochána) because the powers in the 2009 Act relating to LPP claims only apply to the Office of the Director of Corporate Enforcement (ODCE).

The **introduction of a requirement for the use of universal identifiers** was seen as a means of reducing obstacles to investigations. It was pointed out that difficulties can arise for investigators when they are trying to establish conclusively a person's identity. It was suggested that there could be a legal requirement that Personal Public Service Numbers, which are currently not widely used, should be supplied in certain contexts, such as when directors are notified to the Companies Registration Office, when property is purchased or leased, when loan agreements are signed, and when statements are provided to investigators. It was believed that such a requirement should be accompanied by legal safeguards relating to confidentiality.

It was suggested that, in order to combat white collar criminal behaviour, where appropriate, the **evidential burden** could be transferred to the defendant for certain

6 Section 240(5) of the Companies Act 1990 provides that:

'Notwithstanding section 10(4) of the Petty Sessions (Ireland) Act, 1851, summary proceedings in relation to an offence under the Companies Acts may be commenced—

(a) at any time within 3 years from the date on which the offence was committed, or

(b) if, at the expiry of that period, the person against whom the proceedings are to be brought is outside the State, within 6 months from the date on which he next enters the State, or

(c) at any time within 3 years from the date on which evidence that, in the opinion of the person by whom the proceedings are brought, is sufficient to justify the bringing of the proceedings comes to that person's knowledge, whichever is the later'.

7 e.g., Waste Management Act 1996, s.11; Electronic Commerce Act 2000, s.6; National Training Fund Act 2000, s.8; Dormant Accounts Act 2001, s.6; Competition Act 2002, s.50(6); Water Services Act 2007, s.9; Building Control Act 2007, s.67(2).

8 Companies (Amendment) Act 2009 (ss. 5 and 6).

elements in a criminal offence, where proof of those elements depends on factual knowledge that is particular to the defendant. The defendant would thereby be required to raise a *prima facie* case that the element in question did not apply or was not satisfied in his case. A failure to raise a *prima facie* case would be treated as evidence that the element was satisfied.

One submission expressed concern as to the potential **length and complexity of white collar crime trials** which may make the construction of a comprehensible narrative, necessary for a jury trial, very difficult. The fact that other jurisdictions have had a mixed experience with some very lengthy and complex trials was noted. Arguments were advanced for the introduction of specialist juries (or at least the need for a debate or research on the issue) and/or additional measures in respect of jury trials, including the provision of extra or ‘spare’ jurors to lessen the likelihood of losing a quorum (which would be much more likely in the context of a potentially lengthy trial) as well as special judicial panels with financial qualifications. Another submission supporting the introduction of **pre-trial hearings**, said that if the defence and prosecution were required to agree on non-contentious evidence, trials could be restricted to the core contentious evidence and their duration and costs reduced.

One submission considered the jury trial to be a core feature of Ireland’s criminal justice system which should exist for both organised and white collar crime. It argued that **non-jury trials** which were considered in the discussion document should only be introduced following a constitutional referendum, and subject to a well-founded case for such an approach.

Protections for Whistleblowers

There was **support for the introduction of comprehensive protections for whistleblowers in Ireland** on the basis that whistleblowers are important sources of information about corporate crime and unethical conduct. It was submitted that the current sectoral approach ‘is overly complex and only allows certain categories of persons to report very specific offences’ – an approach which was described as leaving ‘a lacuna in protective provisions for whistleblowers’.

One submission stated that the introduction of a ‘good faith reporting’ provision into Irish company law was not favoured by a majority of the 2007 Company Law Review Group, a position which it noted was accepted by the then Minister for Enterprise, Trade and Employment. It was submitted that the enactment of whistleblower protection legislation would be beneficial in assisting in the enforcement of company law and that the view of the ODCE on whistleblowing⁹ is a balanced one which would facilitate the exposure of hidden misconduct while minimising any possible adverse effects.

A number of correspondents cited **developments in other jurisdictions**. One noted developments in the UK to actively support and encourage whistleblowers in relation to wrongdoing in the financial sector. They reported that the Serious Fraud Office has

⁹ ODCE Discussion Paper C/2008/1 *Whistle-blowing and Irish Company Law – A Review of National and International Research on Whistle-blowing*, 17 June 2008. Dublin: Office of the Director of Corporate Enforcement.

established a hotline for whistleblowers and undertaken an advertising campaign to appeal for persons to come forward with information. Another correspondent reported that in the UK, the Public Interest Disclosure Act grants protection to UK workers for whistleblowing in almost every sector, while in the US those who blow the whistle on fraud and tax evasion can expect to gain financial rewards commensurate with the savings made by the State. Incentivising citizen involvement in divulging and investigating regulatory breaches also found favour with another correspondent.

Legislation

Documentary and electronic evidence

Many submissions addressed issues surrounding the admissibility of documentary evidence and the challenges the hearsay rule presents in the context of white collar prosecutions. In general, submissions favoured relaxing requirements relating to documentary evidence and the **rule of hearsay** for such prosecutions, although the view was also expressed that care would be needed to ensure that this would not become a pretext for relaxing those requirements in the ‘ordinary criminal process’. Particular reference was made by one contributor to a paper delivered at the 2010 Annual National Prosecutors’ Conference, which noted that ‘the hearsay rule probably represents the greatest single hurdle in the context of regulatory prosecutions’¹⁰.

Attention was drawn to the numerous and dispersed provisions relating to the admissibility of documentary evidence as evidence of the truth of its contents. One submission queried why a particular document might be acceptable as evidence of the truth of statements contained therein for the purposes of one type of prosecution but not another. By way of illustration, the submission referred to s.13 of the Competition Act 2002 which provides that a statement by a party to a competition law irregularity contained in a document, asserting that an act has been done, or was proposed to be done, by another person relating to the same irregularity, can be admissible in evidence that the act in question was actually done by that other person. The correspondent wondered why such a statement should be admissible only when the accused is being charged with a Competition Law offence and not be admissible for prosecutions under, for example, the Companies Acts or taxation law, where the competition law irregularity gave rise to a breach of those Acts.

The Company Law Enforcement Act 2001, in particular, s.110A(9) was also cited in this regard. The correspondent asked why if an accused person is being charged both with false accounting¹¹ and with fraudulent trading¹², the same document should be treated differently as regards the two charges, because the latter is an offence under the Companies Acts, but the former is not. In the latter case, the presumptions

10 Paper delivered by Mr. Remy Farrell BL.

11 Contrary to s.10 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

12 Contrary to s.297 of the Companies Act 1963, as amended.

available under s.110A(9) will operate¹³. However, those presumptions will not be available if the document is sought to be used to prove the false accounting charge, because no similar provision is contained in the Criminal Justice (Theft and Fraud Offences) Act 2001.

It was suggested that further research would probably identify other areas where reasonable presumptions could be made regarding the evidential value of documentary material and which could usefully be introduced into Irish law to assist in the investigation and prosecution of suspected white collar crime.

Another submission addressed questions around the provision of **certificates of evidence** under the Criminal Evidence Act 1992. This Act provides for the admissibility into evidence of documents/material in circumstances where this material is accompanied by a certificate. At present there is no obligation to complete and hand over such a certificate to An Garda Síochána when providing documents/material. It was submitted that such a provision would be beneficial to investigations.

Reference was also made to the Companies Act 1990 (s. 187(13)). That section deals with documentary evidence which can be served on the accused, and in respect of which the accused must indicate within 21 days if s/he intends to contest the evidence. It was thought that it would be useful in criminal investigations to build on this model, to allow certificate evidence, etc., to be served on suspects during investigations, rather than on persons who are the subject of a prosecution, which postpones the process until after criminal proceedings have been instituted.

A further suggestion recommended extending the application procedure under s.7A of the Bankers Book Evidence Act 1878 by a Superintendent to an Inspector or Sergeant.

Insofar as the **Best Evidence Rule** is concerned, several submissions referred to the provisional recommendations in the Law Reform Commission Consultation Paper *Documentary and Electronic Evidence* (LRC CP 57–2009) and supported proposals that this Rule be abolished and replaced with a rule that documentary evidence should, in general, be admissible in civil and criminal proceedings where the court is satisfied as to its relevance and necessity.

Finally, one submission argued that in Ireland investigators need to adopt what might be seen in other jurisdictions as a ‘belt and braces’ approach. It was held that this is because of the extent to which the outcome of many Irish criminal trials is determined by what some might see as peripheral aspects, or technicalities due to the **exclusionary rule of evidence**¹⁴.

13 S.110A(9) provides: ‘A document that purports to have been created by a person is presumed, in the absence of evidence to the contrary, to have been created by that person, and any statement contained in the document is presumed to have been made by that person unless the document expressly attributes its making to some other person.’

14 The submission referred to Peter Charleton, Paul Anthony McDermott and Marguerite Bolger (1999) in *Criminal Law*. Dublin: Butterworths.

‘Irish criminal law needs to develop further. What has stunted its growth has been, in essence, the exclusionary rule of evidence which requires that mere mistakes by agents of the State result, whether they are deliberate or not, in being classified as intentional infringements of the accused’s constitutional rights with the automatic exclusion of any evidence following

Witnesses

A number of submissions dealt with the difficulty in white collar crime investigations in securing the **voluntary co-operation of witnesses**, most of whom are under no legal obligation either to meet investigators or to make a statement.

Accordingly, it was suggested that it would be helpful if there were statutory provisions under which criminal investigators could make 'reasonable demands' of people that they co-operate with inquiries either out of court or through sworn depositions in court before a file was submitted to the DPP. It was believed that people would be more willing to attend for a voluntary interview if they knew that the alternative to attending voluntarily would be a summons to attend court to give evidence on deposition. In this regard there was support for a recent legislative proposal¹⁵ which would require witnesses to make a statement, and make it an offence to withhold information.

The powers available to the Director of the UK Serious Fraud Office under the Criminal Justice Act 1987 (s.2) were also cited. These provide that 'The Director may by notice in writing require the person whose affairs are to be investigated...or any other person whom he has reason to believe has relevant information to answer questions or otherwise furnish information with respect to any matter relevant to the investigation or any documents of a specified description which appear to him to so relate..'. Such powers were believed to be of particular relevance to witnesses such as accountants and other professional advisors.

As a further model, attention was drawn to provisions in the Competition Act 2002 whereby the Competition Authority can summon witnesses to attend before it to answer questions on oath and provide documents where necessary. The summons power is seen to be of use in compelling witnesses who are reluctant to assist an investigation or who are otherwise constrained from furnishing the private records of suspects, such as bank or telephone records. It was considered in the submission to be 'an invaluable tool' for the Competition Authority and one that would be of use to other agencies investigating white collar criminal offences.

Immunity and plea bargaining

On the question of **immunity**, it was proposed that the existing immunity programme for offences under the Competition Acts should be extended not only to corruption cases but also to other white collar cases, (e.g., in respect of tax offences or accounting irregularities).

therefrom. Criminal litigation in this country is therefore fixated on the notion of police powers and defence arguments on the identification of legal technicalities which, the accused hopes, will result in the exclusion of most, or a huge chunk, of the evidence prepared against him. How this is to be reconciled with the constitutional right and duty of a jury to try criminal charges is difficult to understand as, in the result, in many major criminal cases a mere mistake on behalf of the Executive results in the jury never getting to hear anything more than a portion of the case.'

¹⁵ Proposed Criminal Justice Bill 2011.

The question of **plea bargaining** was linked in some submissions to the provision of immunity. It was understood by one correspondent to be ‘one of the major drivers of what is perceived as the swifter and more effective aspects of the US criminal justice system’. A study of the subject by the Law Reform Commission and its potential to tackle white collar crime was proposed. It was believed that a plea bargaining procedure would need to be supported by a system which was proactive in pursuing white collar crime. It was understood that in the US even those people who may only have been at the margins of a white collar crime will be vigorously pursued by the authorities, that they will be put to huge expense in seeking to defend themselves, and that there is a likelihood that if they have not succeeded in making some sort of a plea bargain with the State, they face lengthy periods of imprisonment. The conclusion drawn was that unless the authorities have a credible form of leverage, a plea bargaining regime would probably not have a great impact.

One aspect of the US Plea Bargaining system - **Deferred Prosecution Agreements** (DPAs) was considered. These are binding agreements which, it was believed, US authorities commonly use in fraud or white collar cases and under which a suspect (often a company) agrees to pay substantial monetary settlements, make full disclosure of all relevant information, fully co-operate with ongoing investigations (sometimes against company insiders such as managers or directors who it is intended to prosecute separately) and undertake structural reforms (e.g., by putting in place a new compliance regime or internal governance, or monitoring by external bodies engaged to report periodically to the relevant US regulatory body). In return, the authorities agree to defer the further investigation and/or intended prosecution of the company for an agreed period, and to strike-out the prosecution at the end of that period if the company concerned has fulfilled its undertakings. In the event of any breach by the company of its undertakings, the DPA will allow the prosecution to proceed on the basis of a full admission by the company of its guilt recorded in the agreement. It was suggested that consideration be given as to whether DPAs would serve a useful purpose in the Irish context and, if so, what legislative changes would be needed for their introduction.

Limitations of summary offences for white collar crime

Specific reference was made to the limitations of summary offences in this field, both in terms of the extent of the penalties available and the time limits for bringing of prosecutions. Particular issues arise with respect to certain offences deriving from obligations under EU law and the manner in which these were given effect in Irish law.

By way of illustration, one contributor cited the offence of failing to manage the business of a credit institution authorised by the Central Bank in accordance with sound administrative and accounting principles¹⁶. However, the submission noted that this is a summary offence only, and cannot be prosecuted on indictment, thereby limiting the maximum penalty. In addition, the offence can be prosecuted only if the offence has been detected, and fully investigated, within the period of two years from

¹⁶ Regulations 16 and 33 of the European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992, S.I. 395 of 1992.

the date on which it was committed¹⁷. In light of the gravity and complexity of white collar crime and the fact that wrongdoing might go undetected for some time, the value of what might otherwise appear to be a useful and highly relevant legislative provision was believed to be limited as a consequence.

The restrictions in this instance arise because the offence in question derives from an obligation under EU law¹⁸ to which effect was given in Ireland by means of a statutory instrument made under the European Communities Act 1972. The 1972 Act provided that such statutory instruments could create summary offences only. Furthermore, the time-limit for the bringing of charges in respect of such offences is the two year period provided in s. 5 of the European Communities (Amendment) Act 1993. It was noted in the submission that as a result of amendments introduced by the European Communities Act 2007, it is now possible for statutory instruments made under the 1972 Act to create indictable offences punishable by fines of up to €500,000 or terms of imprisonment of up to 3 years. In that regard, it was submitted that it would be desirable that a re-examination of all statutory instruments made under the European Communities Act 1972 be undertaken, so as to identify those offences (white collar and non-white collar) which ought to be dealt with by way of trial on indictment, and consequently attract the higher levels of punishment on conviction associated with such trials.

It was acknowledged that, in some cases, it might be decided that fines of up to €500,000 and/or imprisonment for up to three years (available for breaches of statutory instruments made under the European Communities Acts) are sufficient - in which case, it was submitted, the necessary legislative changes could be achieved by further statutory instruments under the 1972 Act, as now amended, in order to give further and better effect to the requirements of the underlying EU obligation. It was also acknowledged that there might be other offences which deserve to be punished by fines in excess of €500,000 and/or imprisonment for periods in excess of 3 years, in which case, it was suggested, the relevant penalties could be provided for in primary legislation, as is the case with the Investment Funds, Companies and Miscellaneous Provisions Acts of 2005 and 2006¹⁹.

Corporate and company directors' liability for white collar crime

One submission considered the difficulty of **attributing criminal responsibility to a company** i.e., when/how a company can be held liable for any criminal offence that requires a mental element (offences other than strict liability offences). It noted that recent legislation has provided for corporate criminal liability, not only for strict liability or 'regulatory' crimes, but also for crimes requiring a mental element, for example, the Criminal Justice (Theft and Fraud) Offences Act 2001, the Competition

17 Section 5(4) of the European Communities (Amendment) Act 1993.

18 Article 13.2 of Council Directive 89/646/EEC of 15 December 1989; since repealed and substantially re-enacted in Article 17 of Directive 2000/12/EC of 20 March 2000.

19 These Acts provide that breaches of the obligations contained in statutory instruments containing Irish law on (i) prospectuses, (ii) market abuse and (iii) transparency obligations should be capable of being punished by penalties of (a) fines of €1m and/or imprisonment for up to 5 years, for breaches of the Prospectus Regulations 2005 or the Transparency Regulations 2007, and (ii) fines of €10m and/or imprisonment for up to 10 years, for breaches of the Market Abuse Regulations 2005.

Act 2002, and the Prevention of Corruption (Amendment) Act 2001. However, it referred to the Law Reform Commission observation that the precise form of the corporation's criminal liability has not been fully resolved in Irish law²⁰ and considered that the absence of certainty in this regard is likely to complicate white collar trials.

In particular, the submission argued that the provisions in Irish law governing **personal criminal liability for company directors are inadequate and insufficiently onerous.**

Reference was made to white collar crime cases which have been successfully prosecuted by the Competition Authority and the Office of the Director of Corporate Enforcement, for example. It was noted that many of these cases involved individuals who worked on their own account, or in comparatively small corporate contexts where the accused engaged personally and directly in the conduct which resulted in their conviction. It was thought that it would not be as easy to secure convictions against individuals who can point to a greater degree of distance between them and the underlying irregularities, or to an uncertainty of how much they personally knew about the instances of non-compliance or wrongdoing. These difficulties increase as company size increases. It was noted that in High Court disqualification proceedings, corporate managers who were party to the execution of criticised corporate conduct have avoided disqualification on the basis that they lacked influence to change corporate strategy.

The submission also cited s.202 of the Companies Act 1990 which is the main provision in Irish law dealing with the obligation of companies to keep proper accounting records. It was reported that the Act provides that a company director may be criminally liable if he 'has by his own wilful act been the cause of any default by the company' regarding its obligation to keep proper accounting records or if s/he 'fails to take all reasonable steps to secure compliance by the company' with its obligation to keep proper accounting records. In the latter case, however, a statutory defence is available to a director who can prove 'that s/he had reasonable grounds for believing and did believe that a competent and reliable person was charged with the duty of ensuring that [the company's requirement to keep proper accounting records] was complied with and was in a position to discharge that duty'. It was submitted that the availability of such a defence potentially enables a company director to delegate away his/her own potential criminal liability for defaults to someone (e.g., an internal or external accountant) who, in the event of non-compliance, will not be criminally liable. The submission asked whether (i) such a defence is appropriate if there is a wish to comprehensively tackle white collar crime, (ii) directors who wish to delegate their responsibilities should be required to periodically monitor the extent of their delegate's compliance with the responsibility which the delegate has agreed to

20 'By limiting the focus of the criminal law to the senior officers of the corporation, the doctrine fails to reflect the reality that corporate decision-making can occur at many levels within a sophisticated organisational structure. In consequence, corporations will not be held criminally liable for the majority of their corporate acts, and some may even structure their organisational system by devolving potentially criminal decisions to a lower level within the organisation. To date the identification doctrine has worked best in relation to smaller companies where everyday corporate affairs are conducted at a higher level; its requirements will rarely be satisfied in larger corporations having more diffuse structures.' Law Reform Commission Report on Corporate Killing (LRC 77-2005).

discharge on the delegator's behalf, and (iii) whether there should be derivative criminal responsibility on the part of the person to whom duties have been delegated, such as that contained in s.77(10) of the Safety, Health and Welfare at Work Act 2005²¹, and a requirement that directors can avail of the defence only where they can show that the delegate has been specifically informed that they may be criminally responsible for non-compliance, and has freely accepted the consequential responsibility.

The submission considered other provisions in the Companies Acts which provide that any 'officer in default' of requirements under those Acts is guilty of an offence²². This includes any officer who authorised or who, in breach of his or her duty as such officer, permitted the relevant default. An officer is presumed to have permitted a default by the company unless s/he can establish that s/he took all reasonable steps to prevent it or that, by reason of circumstances beyond his or her control, s/he was unable to do so. It was submitted that the '**officers in default**' formula which it was understood does not exist outside of the Companies Acts might be introduced into other legislative codes to apply to the legal obligations of company directors generally.

The '**directors' compliance statement**' provision in the Companies (Auditing and Accounting) Act 2003 (s.45) was also cited as requiring directors in large companies to give greater attention to important compliance issues. It was pointed out that this obligation was never brought into force and that it is planned to introduce an amended provision in legislation to consolidate and modernise the Companies Acts. It was submitted that a 'directors' compliance statement' provision stronger than that recommended to the Government by a majority of the Company Law Review Group (CLRG)²³, is required.

The correspondent also noted that companies and/or their directors accused of alleged white collar crimes may be able to **escape criminal liability on the basis of erroneous legal advice** that the behaviour in question was lawful. It was considered that the fact that an accused person acted on the basis of incorrect legal advice may not necessarily be a bar to their being convicted of a criminal offence. It was submitted that if it is possible to argue that ignorance of the law is no defence, then neither should a defence be available to those who have acquired a mistaken understanding of the law. However, if a defendant can show that he/she acted on foot of legal advice it seemed reasonable to suppose that this may be taken into account by a jury when deciding whether to convict an accused; and if they convict, that it will be a factor which the sentencing judge will be asked to treat as mitigating. The correspondent further submitted that there should be a legal provision which would act as a 'strong incentive' for lawyers to be extremely careful when giving advice on

²¹ These provide that where a person is charged with certain offences, s/he is entitled to have any other person whom s/he charges as the actual offender brought before the court (whether or not the other person is his/her employee or agent). If the commission of the offence is proved and the first person charged proves to the satisfaction of the court that s/he used all diligence to enforce the relevant statutory provisions and that the other person whom s/he charges as the actual offender committed the offence without his or her consent, connivance or wilful default, that other person can then be convicted and penalised.

²² s. 383 of the Companies Act (as inserted by s.100 of the Company Law Enforcement Act 2001).

²³ CLRG Report on Directors' Compliance Statement (2005).

the basis of which a client may be encouraged to embark on a transaction which may amount to a breach of the criminal law.

Sanctions for White Collar Crime

There was general consensus across submissions that the criminal justice system does not deal with white collar criminals in the same manner as other criminals, and correspondents wanted **parity of treatment** for all criminal suspects.

A number of submissions referred to the fact that, while white collar crime may often seem to be victimless, misconduct in the financial sector, in the workplace, in the political sphere and in environmental matters can **undermine the security and wellbeing of large numbers of people**. Some correspondents noted that the perpetrators of white collar crime are generally educated and privileged and in positions of power and trust, and that they appear to be beyond the reach of the law.

Some submissions believed that the nature of much white collar crime and the associated sanctions is such that many perpetrators will calculate that the **personal rewards hugely outweigh any potential costs or penalties**. This was believed to apply particularly, but not exclusively, to regulatory crime. It was argued that in order to be effective, fines should be proportionate to the wealth/income of the accused. One correspondent believed that if the gains from certain types of crime, such as insider trading, are disproportionately greater than the penalty likely to be paid, the rule of law breaks down. He said that ‘the opposite is also true: many low level street criminals are committed to prison instead of being given community service whereby the harm of imprisonment is grossly disproportionate to any profit or benefit they might have made or from any benefit the sentence might serve.’

One submission held that there is no reason why some forms of white collar crime would not qualify as organised crime if the definition of organised crime were to be focused more precisely on criminal activities, whatever their form, which pose a threat to the stability and integrity of government, business and civil society, where the appropriate culpability is present. It was also held that such offences should be subject to the criminal justice measures and civil confiscation measures (e.g. Criminal Assets Bureau and Proceeds of Crime Act) which currently apply to organised crime.

Correspondents wanted to see the use of a wide range of sanctions, custodial and non-custodial, against those who engage in white collar crime. It was submitted that a system of **administrative sanctions** should be introduced on a wider basis than currently exists for white collar offences. The perceived merits of a process of administrative sanctions were that it would: reduce the time, expense, and difficulty associated with the investigation and prosecution of criminal offences through the Courts; improve the incidence and visibility of public sanctions for white collar offences; and facilitate the decriminalisation of minor regulatory obligations and so, serve to limit criminal liability to the more serious forms of white collar misconduct.

Further suggested penalties included **forfeitures, disgorgement²⁴, restitution, house arrest²⁵, community confinement, paying the cost of the prosecution and supervised release**. One correspondent proposed that transferring property acquired as a result of illegal activity should be voidable by the enforcement authorities. While there was support for measures which target the financial gains from white collar crime, another submission was concerned that a person should not be able to avoid imprisonment simply as a result of having assets, as this would create an inequitable two-tier system of justice based on personal wealth.

It was submitted that any new legislation in this area should provide for sentences reflecting the seriousness of the crime. It was also submitted that sentencing guidelines which draw attention to the socio-economic impact of white collar crime would assist in ensuring consistency and fairness in sentencing. As white collar crime will frequently impact more heavily on the community than on individual identifiable victims, ‘community impact statements’ were proposed to assist with sentencing decisions.

One correspondent believed that penal moderation should guide policy on white collar crime as it should crime policy more generally. In response to the reference in the discussion document to the limited impact of **imprisonment as a deterrent in the domain of white collar crime**, it was submitted that the same point could be made about other types of crime as ‘prison has little deterrent value across the board’ and that many street criminals are as impervious to the threat of prison as are white collar criminals. Some correspondents considered different approaches by the courts in white collar crime cases. On the one hand, it is considered that a criminal sanction in such cases does not have a deterrent effect because the person is not likely to re-offend due to the loss of the position of authority or trust which enabled them to commit the offence in the first place. On the other hand, a sanction can be imposed, not because the offender is likely to commit a crime again, but in recognition of the wrong they had done and also to make an example of the offender in order to deter others from committing these crimes²⁶.

Structures

One submission believed that, given the distinct nature of white collar crime and the need to deploy a combination of criminal, regulatory and civil methods to tackle it effectively, there may be value in developing a **white collar crime oversight body** ‘to keep under review, offer advice on and report on the nature and extent of white collar crime in Ireland, the success of the methods being deployed to combat it and how these methods can be enhanced’.

24 Described in a submission as an equitable remedy ‘whereby financial wrong-doers would be stripped of their unlawful profits which would be redistributed outside the criminal justice system used in the USA to recover the proceeds of illegal activity and deter violations of federal securities law... not intended as tool to punish, but as a vehicle for preventing unjust enrichment’.

25 One correspondent could see no reason why consideration of non-prison sanctions such as house-arrest should be restricted to any single category of offenders.

26 Considerations which were highlighted in the judgement of Mr. Justice McKechnie, Director of Public Prosecutions v Patrick Duffy and Duffy Motors (Newbridge) Limited, 23 March 2009.

Another submission noted that the White Paper on Crime discussion document had highlighted the potential value of a collaborative approach to tackling white collar crime. It welcomed a collaborative approach involving business, professionals, public servants and civil society in building knowledge and capacity to effectively address white collar crime.

Bribery and Corruption

Corruption

One submission welcomed the introduction of the **Prevention of Corruption Act 2010** and described the ‘small increase in the number of cases of corruption both detected and prosecuted in the Irish courts since 2001’ as encouraging. However, it expressed disappointment that the fight against fraud, corruption and white collar crime are not listed as priorities in the An Garda Síochána policing strategy for 2011.

Reference was made to the finding that more than 80 per cent of Irish people believe that the government has not done enough to fight corruption and that 73 per cent believe that sentences for corruption offences are too light (Global Corruption Barometer 2010, Transparency International, 2010). It was also reported that only 32 per cent of Irish people believe that the prosecution rate is sufficient to deter people from engaging in corruption related offences (Attitudes of Europeans Towards Corruption, EC, 2009).

Attention was drawn to the need for proportionate responses to criminal behaviour in line with Article 30 of the **UN Convention against Corruption**. It was stated that this should involve ‘a multi-dimensional approach to punishing corrupt or fraudulent behaviour (including) custodial sentences proportionate to the impact of the crime, (and) a system of financial compensation for the victims of corruption related offences (consistent with Article 9 of the **Council of Europe Civil Law Convention on Corruption**)’. It was believed that such a system could be informed by the use of socio-economic victim (including community) impact statements and relevant expert analysis. It further noted that while the Irish Government has signed these Conventions, it has yet to ratify them, and that it was not clear whether existing Irish legislation adequately meets the obligations they give rise to.

Looking at an approach to tackling corruption, reference was made to successful inter-agency cooperation to tackle, *inter alia*, illegal smuggling, money laundering and foreign bribery, and it was suggested that an **anti-corruption inter-agency task force**, ‘with meaningful civil society participation’ would facilitate greater coordination of national anti-corruption efforts.

It was also suggested that **state bodies responsible for investigating corruption should have enhanced powers**. For illustrative purposes the correspondent referred to the Standards in Public Office Commission (SIPO) which it was believed currently needs to wait for a formal complaint to be lodged before conducting an investigation, resulting in investigations being conducted ‘in the full glare of publicity’. It was submitted that SIPO should be enabled to adopt less formal procedures in order to make initial inquiries into apparent breaches of the Electoral and Ethics Acts by office holders. It was considered that this would reduce the cost and time involved in launching a formal investigation; prevent unnecessary publicity surrounding an office holder; and help to safeguard the reputation of those subject to any inquiry.

The submission also proposed the introduction of an **immunity programme for corruption related offences** on the basis of the success of the Cartel Immunity Programme which offers immunity to witnesses involved in price fixing and bid rigging. Such a programme would be aimed at encouraging conspirators to ‘break ranks’ and improving rates of detection, and seen as complementing whistleblower legislation. It was submitted that applications for immunity or leniency under such a programme would still have to be made on the basis of full disclosure to the relevant enforcement agency before the submission of a file to the Director of Public Prosecutions.

Bribery

One submission welcomed the expansion in the definitions of an agent and the jurisdiction of the state with regards to bribery in the **Prevention of Corruption Amendment Act 2010** (s.2). However, the failure to bring any criminal prosecutions in certain categories was a cause for concern and in that regard it was noted that no cases have been pursued against Irish nationals or companies bribing foreign public officials.

One correspondent submitted that ‘comprehensive corporate liability is vital for the credibility of Ireland’s measures against bribery’, which, it was noted, have been criticised in international evaluations. It was noted that the **OECD Working Group on Bribery** has recommended that Ireland codify and clarify the liability of legal persons for bribery offences²⁷.

It was submitted that: **the prosecution of legal, as well as natural persons for corruption related offences** would serve as ‘a powerful deterrent against corporate complicity in bribery and corruption’; and that a provision of corporate liability for failing to prevent bribery by an agent of a company as provided for under the UK Bribery Act 2010 (s.7) would be welcome. It was believed that such a provision would prompt the introduction of corporate procedures aimed at preventing bribery, as a company would have to prove that it had adequate procedures in place to mitigate any sanction imposed by a court.

²⁷ Ireland: Follow-Up Report on the Implementation of the Phase 2 and 2 Bis Recommendations. OECD, March 2010

Regulatory Crime

Overview

Submissions which dealt with regulatory crime addressed a range of topics, many of which were also raised in relation to white collar crime in the broadest sense. These included questions relating to corporate liability in criminal matters, as well as differences between regulatory and other offences in terms of the likelihood of prosecution, penalties, and the enforcement resources available. It was proposed that a multi-agency compilation of data on levels of white collar/ regulatory crime should be undertaken in the same way as statistical data on ordinary crime is compiled. This would raise awareness of the nature and costs of such crime to society and support policy-making in responding to white collar/regulatory crime.

In the section that follows it is proposed to minimise the repetition of views already expressed in relation to white collar crime which are pertinent to regulatory crime and to focus on additional views proffered.

Definition

One correspondent suggested that ‘regulatory offences’ be **defined and codified** with precise benchmarks. The rationale was that, while there were believed to be more than five hundred regulatory measures or offences in Ireland, there is no discrete ‘regulatory offences’ category of criminal law. It was argued that these regulatory measures frequently impose general standards such as ‘reasonable care’ or ‘best practicable means’, leading to compliance and enforcement problems. It was suggested that regulatory codes should include a reference to harm caused, at least for sanctioning, and with appropriate procedural safeguards.

Role and Operations of Regulatory Bodies

The role and operations of regulatory bodies was considered by a number of correspondents. It was suggested that there is a requirement for strong regulatory leadership. This would make it clear that, while breaches should, where possible, be pre-empted, where they occur and are substantial they will be met with significant action against the companies and their directors. Some submissions were critical of what they termed the ‘so-called light touch approach’ and felt that this had suggested to financial institutions that the authorities would not take effective regulatory action where breaches occurred. A small number of correspondents addressed misconduct and crime within the legal professions and considered that they are subject to a weak regulatory regime. In this regard it was proposed that the Legal Service Ombudsman Act 2009 should be commenced.

One submission proposed that there ‘needs to be symmetry between those who are subject to enforcement and those who conduct the enforcement’ in areas for which

public policy has defined principles and standards (e.g., food safety, water quality, financial services, blood products, the built environment, and health care). The rationale for the proposal was that where firms are allowed to conduct their activities without adequate enforcement there are two offending parties: the regulatory body and the 'delinquent firm'. It was considered that the law should be able to hold both parties to account at the level of the Board of Directors, or equivalent, and at individual officer level. One correspondent thought that the Oireachtas should require meaningful reporting by state agencies with regulatory powers on the deployment of those powers.

It was noted in one submission that the UK Financial Services Authority carries out, on a risk basis, **interviews with persons nominated to assume key functions within financial institutions**. It was reported that these interviews cover not only technical competence but also integrity, and suggested that Ireland could 'usefully adopt this more pro-active approach to the recognition of the importance of ethical and behavioural factors'.

Co-operation in regulation was raised by a number of correspondents. One saw it as 'desirable that regulators in the financial sector work more effectively with professional advisers, including auditors'. They said that '(t)here needs to be an expectation that auditors pass on information where it is reasonable for them to expect the information to be of substantial regulatory interest. The circumstances in which reporting is required needs to be specified but should include providing prompt disclosure of threats to liquidity and going concern, as well as indications of criminal activity and regulatory breaches. They suggested that such a dialogue between auditors and regulators should also encompass information sharing with auditors on the part of the authorities' on the basis that 'if the regulator can help auditors do their jobs better the regulator will ultimately benefit'.

It was held by one correspondent that while legislation is necessary for the pursuit of policy objectives it is not sufficient in itself and needs to be augmented by **support from professions, trade associations and individuals** working in areas where transgressions arise. He believed that public policy should articulate the responsibilities and obligations of such parties, particularly where they are 'afforded privileged positions in Irish society'.

Resourcing of Regulatory Bodies

A number of submissions pointed to the need for regulatory bodies to have sufficient resources to enable them to do their job. One said that the 'financial crisis has demonstrated a clear link between the economic welfare of the State and the need to enforce well designed laws and regulation'. One correspondent thought that further investment in the enforcement of laws and regulations preventing economic crime is imperative. He believed that effective law enforcement would aid economic growth, and increase confidence in the ability of the State to police its business and financial sectors. It was suggested that fines or settlements arising from prosecutions of white collar criminals and corporations should be ring-fenced for future investigations and crime prevention measures and that there should be no restrictions on positions providing essential investigation services in agencies such as the Office of the

Director of Corporate Enforcement and Garda Bureau of Fraud Investigation. One submission suggested the establishment of a ‘discrete, expert corporate prosecution service, capable of taking references from all regulators, with powers to recommend fast-tracked legislative amendments’, in addition to the availability of sufficiently expert personnel.

Investigations

A number of submissions proposed strengthened powers for agencies responsible for investigating regulatory crime. It was submitted that the current approach is a piecemeal one, whereby each agency has different powers available to them when investigating crime. ‘Small discrepancies between the investigative powers available under various statutes leave open greater opportunities to attack, at trial, the enforcement powers used in the case at trial.’

It was submitted that the general powers to investigate crime provided to An Garda Síochána should also be available to officers of specialist agencies, such as the Competition Authority, the Office of the Director of Corporate Enforcement, the Health and Safety Authority, and the Environmental Protection Agency. Other related proposals included that:

- obstruction of authorised officers in the course of a search should be an arrestable offence;
- where an authorised officer is searching a premises on foot of a search warrant in relation to a specific alleged offence but finds evidence of a separate and previously unknown offence, that officer should be empowered to seize that evidence in much the same way as a member of An Garda Síochána or the defence forces can seize evidence; and
- the Criminal Law Act 1976 (s.9) be amended to allow such other authorised officers duly appointed by statute, to seize and retain any material that they believe to be evidence of any criminal offence.

It was submitted that consideration should be given to the enactment of **generic search powers** for officers from investigative agencies. Currently, each statute which creates a criminal offence also creates its own search powers which can vary from other similar, though not identical, search powers. This can result in variations in interpretation of their application, and delays at trial where the admissibility of evidence gathered during an investigation is challenged.

It was submitted that officers from specialist investigative agencies who are investigating offences be allowed to attend and assist in the **questioning of suspects** who have been arrested and detained for questioning. The rationale for this proposal was that if it is clear that in order to progress an investigation, it is necessary to arrest and detain a suspect for questioning, Gardaí who might not be as familiar with the investigation, or perhaps with the area of law relevant to the investigation, have to conduct the questioning of suspects. The correspondent recalled that this issue was addressed in respect of officers of the Criminal Assets Bureau (CAB) by the Criminal Justice Act 2007 (s.58) which permits a CAB officer, accompanied by a member of

An Garda Síochána who is also a CAB officer, to attend at, and participate in, the questioning of a person detained under the Criminal Justice Act, 1984 (s.4).

Co-operation between An Garda Síochána and regulatory bodies was a theme common to submissions dealing with the investigation of regulatory crime. It was considered desirable that there should be laws which ‘unequivocally authorise’ all agencies discharging any executive power of the State, or any powers vested in the agency by statute, to co-operate to the maximum possible extent with any other statutory body which is investigating the possible commission of a criminal offence.

It was suggested that the law should allow for the establishment of **joint investigation teams** between any two or more law enforcement bodies. In this regard, the secondment of members of An Garda Síochána to the Office of the Director of Corporate Enforcement and to the Competition Authority was cited as examples of effective alliances. It was recommended that crime investigation by specialist agencies be done with at least some assistance from An Garda Síochána, including assistance during searches on foot of warrants issued by the District Court to search business premises and private dwellings. It was considered that this would help ensure a consistent and professional approach to the investigation of white collar crime.

It was suggested that there should be a common legal basis permitting one regulatory body to take the lead role in investigating a set of events relevant to different legislative codes, in agreement and in co-operation with other regulatory bodies. It was believed that where there is a sectoral, compartmentalised approach to legislative codes, it is likely that the events of suspected illegality will give rise to breaches of several different legislative codes. For example, an instance of tax evasion may also involve company law offences, theft and fraud offences or, indeed, offences under pension law.

It was submitted that **regulatory agencies should be enabled to investigate and prosecute general offences** in addition to those created under their own specific legislative code. General offences included the offences of making a gain or causing a loss by deception, unlawful use of a computer, false accounting, forgery, unauthorised accessing of data, and conspiracy to defraud. It was envisaged that any such power to investigate and prosecute would be accompanied by safeguards, such as an obligation to notify the Garda Bureau of Fraud Investigation of an offence in the first instance, and to cede control of the investigation to them, if that were their preference, and to be able to commence proceedings for that offence only with the consent of the DPP, or in accordance with instructions by the DPP.

Finally, one correspondent proposed the introduction of a modern **Perjury Act** of general application to clarify the law and to help protect the integrity of investigations. It was submitted that perjury cases are very difficult to prosecute successfully and that, as a result, there have been very few such prosecutions under Irish law. It was proposed that an offence of perjury under the proposed legislation would carry, at least, a maximum sentence of 5 years on indictment, making the offence an arrestable offence and would help to deter persons from committing the offence.

Protections for Whistleblowers

As was the case in relation to white collar crime, many submissions favoured the introduction of **legislation to protect whistleblowers**. It was noted that the Competition Act 2002 (s.50) protects whistleblowers but does not contain sanctions for those who retaliate against whistleblowers. It was submitted that specific statutory prohibitions and penalties for reprisals against whistleblowers would enhance the willingness of those with information to come forward. Other views expressed on the subject are dealt with in the earlier section on white collar crime.

Legislation

A small number of correspondents proposed a periodic **review of the efficacy of legislation** and an ongoing examination of levels of regulatory compliance and prosecution. It was considered that in order to learn from the lessons on the public record and reflect them in legislation, the review process should take account of independent commentaries, such as those by the Consumer Consultative Panel which reviewed the performance of the Financial Regulator, the Comptroller and Auditor General, and ‘the Regling and Watson report’²⁸.

Specific issues identified for review included the area of corporate criminal liability (discussed earlier) and the use of strict liability offences in regulatory crime. It was also suggested in one submission that legislation should provide for criminal liability to be grounded on omissions and not solely on acts, especially where the accused has specific responsibilities under contract or company law.

It was contended that record keeping is an integral part of an implementation strategy, and weakness in such record keeping should be viewed as important evidence of a breach of responsibility in this regard. It was accordingly submitted that the law should provide that where boards of directors have reported to the Regulators that policies and practices which limit risk are in place, and it subsequently emerges that this is not the case, such failure should be a criminal offence by the boards and/or chief executives.

Another submission argued that protections of the European Convention on Human Rights apply to regulatory matters relating to administrative style ‘offences’, tax and customs penalisations, contempt proceedings, and professional disciplinary proceedings in criminal classifications. The correspondent accordingly questioned whether it is ‘such a stretch of the imagination to foresee a litigant successfully requiring the State to provide laws to protect them as a victim of regulatory breach’.

Sanctions

It was argued that any regulatory framework needs to provide substantial penalties to encourage and deter. It was furthermore argued that regulations need to be followed up by thorough supervisory action and the will to impose penalties where breaches

²⁸ Regling K. & Watson M. (2010) A Preliminary Report on the Sources of Ireland’s Banking Crisis.

have been identified and proven. One proposal suggested an escalation of penalties in response to failure to reform, but de-escalation with improved compliance. Sentencing guidelines were also proposed which would set out a fair, effective, and equitable approach to penalties, considered essential for the legitimacy of a regulatory system.

A number of correspondents dealt with the issue of **administrative fines** and their views have been summarised earlier in the document (see under ‘Sanctions for white collar crime’). One correspondent submitted a detailed analysis of the role for civil fines with particular reference to the Competition Act. The correspondent noted that breaches of sections 4 and 5 of the Competition Act (dealing, respectively, with anti-competitive agreements, decisions and concerted practices and, abuse of dominance) constitute offences under sections 6 and 7 of the Act. It was stated that while what are viewed as ‘hard-core’ breaches of competition law (e.g. price-fixing), are potentially criminal in nature, other anti-competitive behaviour breaches of competition law do not bear the classical characteristics of a criminal offence. However, because legislation provides that the power to impose fines for all of such breaches of the competition rules rests with the courts, a criminal fine is the only available penalty. The correspondence considered that the Courts will tend not to apply such a fine where the behaviour does not appear to the Court to be sufficiently blameworthy to be regarded as a crime.

The submission suggested that this ‘over-criminalisation undermines arguments that serious white collar criminal offences are truly criminal, and confuses criminal breaches of the law with what should otherwise be treated as civil breaches of the law.’ Alternatively, if there were provisions which allowed for civil fines in appropriate cases, sanctions would be available for those breaches of the law that are either not amenable to criminal prosecution because of their complexity or which simply do not bear the characteristics of a criminal offence.

One correspondent argued that enforcement agencies have too little autonomy in the application of sanctions for regulatory infractions and proposed that the autonomy of regulators regarding enforcement be reviewed.

A number of submissions considered the use of **licensing systems** as a regulatory technique. It was noted that in some areas of regulation, licences obtained by individuals or firms are subject to annual renewal and that it is open to the public or An Garda Síochána to object. This was seen as providing the Courts with an opportunity to impose limitations on the licence and to have compliance messages transmitted in a public forum to the licence holder. Licensing legislation may also provide for administrative fines or the loss of the licence in certain circumstances. It was concluded that the licensing mechanism makes the regulatory process more transparent and serves as a check on illegal behaviour.

The value of fines as a deterrent in certain circumstances was, however, questioned, including where the behaviour would warrant so large a fine as to put the business and employment at risk. It was argued that imprisonment should be an integral part of the regulatory enforcement ‘tool box’, particularly where damage is extensive. One correspondent proposed that where there is evidence of increasing non-compliance in areas of activity subject to administrative sanctions, the continuation of such sanctions should be justified ‘with evidence and with argument’. Another believed that where

sentences of imprisonment are imposed for regulatory crime, there 'seems to be a marked judicial preference to suspend such punishment' giving rise to a perception that such crime is not taken seriously.

Fraud

Definition

It was stated that there is no comprehensive statutory definition of fraud in Irish law. Instead it amounts to an umbrella term for offences such as theft, deception, forgery, false accounting, unlawful or unauthorised use of computers, and possession of certain articles. One correspondent reported that fraud related offences are covered by more than 34 different Acts with different sanctions prescribed for each separate offence.

Reference was made in a number of submissions to the UK Fraud Act 2006 which identifies three different ways in which a person may be guilty of fraud: ‘fraud by false representation’, ‘fraud by failing to disclose information’, or ‘fraud by abuse of position’. One submission said that it is claimed that the Act has enabled prosecutors to prosecute crimes which would have previously gone unpunished due to the lack of a clearly identifiable victim or the confusion in definitions and sanctions under the old legal regime. It said that while no major cases have arisen in relation to corporations within the UK, it was considered that ‘the fraud by abuse of position’ charge ‘could prove particularly useful to prosecutors in cases where there are allegations that senior executives have acted dishonestly and to the detriment of their company and its stakeholders’.

Fraud Offences in Other Jurisdictions

One submission identified offences within US law which constitute just one element of a larger white collar crime but which are easier to prosecute than other aspects of the crime. That submission proposed the introduction of a number of such offences into Irish law: **bank fraud**²⁹, **mail fraud**, **wire fraud**³⁰ and **the making of false statements in loan and credit applications**³¹.

The submission considered the approach taken in the US to such offences. For example, offences of **mail fraud** in the US Code³² are committed when an accused who has ‘devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of any false or fraudulent pretences, representations or promises’ makes any use of the US postal or telecommunications system ‘for the purpose of executing such scheme or artifice or attempting to do so’. Aside from the extent to which the use of the postal or telecommunications system allows for the offence to be investigated and prosecuted by the US authorities, it was understood that one of the attractions of these offences for US prosecutors is that it

29 Section 1344 of Title 18 of the US Code.

30 Section 1343 of the US Code.

31 It was thought that such actions are capable of being dealt with in Ireland by means of general offences, such as the deception related offences in ss. 6 and 7 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

³² Section 1341 of the US Code

can be easier to prove mail or wire fraud, than the entirety of the larger fraud within the context of which the postal or telecommunications services was used.

It was submitted that, except in certain specific areas, Ireland does not have a general offence equivalent to Section 1342 of the US Code which **prohibits someone using a false or misleading identity**. Again, it was understood that this is another offence which the US authorities can prosecute relatively more easily than the larger white-collar criminality of which it forms just one aspect.

The correspondent further understood that Ireland does not have a specific offence dealing with **false statements in loans and credit applications** similar to Section 1014 of Title 18 of the US Code which, it was reported, provides for fines of up to US\$1m and imprisonment for up to 30 years for persons convicted of making any false statement or report, or wilfully overvaluing any land, property or security, for the purpose of influencing in any way the actions of banks and other lending institutions. It was proposed that criminal liability in Ireland be extended to the **misuse of a false or misleading identity**.

The extension of the concept of **fraudulent trading** in Ireland was considered in the context of the UK Fraud Act 2006. That Act (s.9) extended the scope of fraudulent trading to businesses which are operated other than through companies established under the Companies Acts. As a result, UK law provides that a person may be guilty of an offence where they are party to the carrying on of fraudulent business by, for example, sole traders, partnerships, trusts, companies registered overseas, building societies and credit unions.

Bank Card Fraud

Bank card fraud was addressed in a small number of submissions. It was reported to cost Irish retail banks approximately €16.5m annually, and the card payments industry as a whole more than €1.5m, including the losses incurred by banks, shops and consumers. A number of submissions referred to the Irish Card Fraud Forum (CFF) which includes representatives of the retail banks in Ireland, An Garda Síochána, the Police Service of Northern Ireland, as well as representatives from international and national card schemes. Forum members share fraud data and collate industry fraud loss figures so that new fraud trends can be measured and the highest risk areas targeted. The Forum can also develop best practice guidelines and solutions for consumers and retailers to respond to specific fraud issues. It was reported that the CFF operates within existing data protection laws regarding the **sharing of fraud and payment crime data**. It was submitted that there is further information available within the reporting organisations regarding fraud and potential fraud which cannot be shared under current data protection legislation, but which if shared could help prevent losses, ‘not only to banks and retail but also to insurance, telephone companies (etc.) ... as it has been proven in the past that individuals arrested for payment card fraud are also involved in frauds perpetrated against these other industries’.

It was believed that an Irish fraud database would offer the potential of a significant reduction in credit fraud and stem the flow of funds to criminals who ‘currently see

Ireland as a 'soft touch' in this area'. It was argued that sharing known fraud information between relevant institutions and in conjunction with An Garda Síochána would not compromise the personal details of genuine customers. Attention was drawn to the provisions on exchange of data for the purpose of fraud prevention in the EU Payment Services Directive, which was transposed into Irish law in 2009. It was reported that shared fraud databases operate in other jurisdictions including France, Germany, UK, the Netherlands, Poland and Spain. Accordingly, it was proposed that consideration be given to amending data protection legislation with regard to the 'commission or alleged commission of any offences by data subjects', so as to facilitate the establishment of a fraud database in Ireland and enable financial institutions to share fraud data.

Fiscal Fraud

The subject of fiscal fraud was also considered. A small number of submissions addressed the **illegal tobacco trade** in Ireland which, it was said 'is taking place on a daily basis in markets, door-to-door and on the street nationwide'. Not only is the illegal trade of tobacco defrauding the State of revenues, it is also being conducted by organised crime gangs and, it was submitted, is still perceived as a victimless crime. Recommendations relating specifically to the involvement of organised criminals in tobacco smuggling included that: the issue should be prioritised as matter of urgency; the remit of law enforcement agencies, policies and strategies should be expanded to specifically include tobacco smuggling; and an interagency, national anti-smuggling strategy involving An Garda Síochána, the Revenue Commissioners and the Departments of Finance and Justice, should be developed and implemented.

One submission proposed that legislation be amended 'to ensure appropriate **sentences and penalties** are given to criminals engaging in the illicit tobacco trade in Ireland and....to criminals stealing the trade marks of legitimate brands (counterfeiting)'. It suggested amendments to the Casual Trading Act 2005 to prohibit the sale of any excisable product as it is a direct loss to the Exchequer, and to raise the penalties for selling an excisable product within the Casual Trading Act to the same level as the Finance Acts. It stated that illegal traders are often arrested and fined under the Casual Trading Act but it was considered that the fines handed down by the Courts 'are far too lenient'. As a result, it was held that many illegal sellers are before the Courts on successive occasions on similar charges under the Casual Trading Act and that they pay 'the small fine and resume activities'. It was argued that sanctions under the Casual Trading Act need to act as a deterrent to ensure that **appropriate sentences and penalties** are given to persons engaging in the illicit tobacco trade in Ireland and to those stealing the trade marks of legitimate brands (counterfeiting). Another submission proposed that 'stronger penalties', particularly for organised criminals, should be enforced for tobacco smuggling 'to act as a real deterrent to large-scale international smuggling gangs' and that penalties should be introduced for tobacco companies whose products are smuggled. In regard to the latter, reference was made to the UK Finance Act 2006 which provides that tobacco manufacturers who fail to take sufficient steps to prevent their products being smuggled into the UK face fines of up to £5m. The introduction of a similar penalty in this jurisdiction was proposed.

Fraud Prevention

One respondent believed that preventing fraud is better than tackling it once it has happened and that sharing data about fraud or suspected fraud is often the only practical way to prevent further fraudulent activity and to help identify those responsible. Another respondent proposed the development of **public awareness campaigns** to reduce consumers' willingness to purchase smuggled tobacco and to increase the public's awareness of the role played by organised criminals in such smuggling.

The introduction of a national **fraud prevention infrastructure** along the lines of the Road Safety Authority was proposed. It was envisaged that such a structure would be representative of organisations affected by fraudulent activity and would develop and promote prevention strategies and measures, and educate the public and raise awareness of the impact of fraud on the economy. These actions together with an effective enforcement and sanctions regime were seen as a catalyst for change over time.

Serious Armed Gang Crime in Ireland

Community Development and Organised Crime

A number of submissions commented on the apparent link between social exclusion and deprivation and the emergence of organised crime. Community development, education and vocational training were believed to have a positive effect in preventing and suppressing organised crime. It was argued that other factors which should be addressed include housing, family support, diversion from substance abuse, community policing, and the cross-generational impact of organised crime.

One submission emphasised the importance of projects such as Limerick Regeneration to the long-term prevention of organised crime. Another submission referred to the Scottish Government “CashBack for Community” initiative under which children and young people, particularly those in areas of high crime, can engage in a wide variety of activities such as sports and arts designed to enhance their opportunities and skills, which are funded from the proceeds of crime. Referring to rising levels of youth unemployment and job losses one person considered that there is a ‘significant risk of increasing numbers of young people being recruited by criminal gangs and paramilitary organisations’. They believed that the work of community and voluntary organisations which empower local communities and offer alternatives to young people is currently ‘under threat due to cuts in funding’ and needs to be protected. They argued that a breakdown in community structures in rural as well as urban areas can lead to increased criminal activity and act as a barrier to successful prosecutions as a growth in intimidation and fear makes it more difficult for witnesses to come forward. The submission concluded that there is a need for ‘joined-up thinking across Government departments’ to ensure that community development initiatives are protected.

The Criminal Assets Bureau

A number of submissions reflected on the **Criminal Assets Bureau (CAB)**. While it was acknowledged that CAB reports annually on its activities and successes, it was argued that there were shortcomings in its accountability mechanisms which are complicated by its multi-agency structure. Another submission saw the CAB as ‘an effective way of obtaining the proceeds of organised crime using a non-conviction based forfeiture approach’ and believed that **the proceeds of crime should help to tackle the causes of crime**.

Some submissions were critical of aspects of the **Proceeds of Crime Act (POCA)**, because they believe that there is little evidence of its use against ‘the more insidious activities of ‘white collar’ organised criminal suspects (although) they may ... pose a more substantial threat to the integrity and stability of government, business activities and civil society..’. In this regard they said that there may be a need for a multi-agency body such as OLAF (the European Anti-Fraud Office) in Ireland. They held that despite its place in the civil justice system, the POCA is used by An Garda Síochána, the Criminal Assets Bureau and the State as a primary tool in tackling

crime and is seen as a criminal process in many respects. They proposed that the lower standards of protection for the defendant in the civil process be strengthened to ensure that appropriate checks and balances of criminal procedures are in place where the property, person and reputation of the defendant are under threat.

Criticisms of the Current Approach to Organised Crime

Some submissions were critical of current legislative and organisational responses to organised and armed gang crime.

A number of submissions noted the absence of **empirical research** on the nature and extent of organised crime in Ireland relative to other countries, and relative to other life-threatening crimes. It was argued that crime data suggests that organised crime in Ireland remains at relatively low levels compared with other crimes, and with comparable jurisdictions.

With this in mind, caution in developing organised crime policy was advocated. A number of submissions noted the large volume of legislation which has been introduced since 1996 to address organised crime. One submission thought that the approach which has been taken in the last 15 years has been over-reactive and is 'potentially counter-productive'. A small number of submissions considered that any further legislative responses to organised crime should be preceded by an assessment of the impact of the current statutory framework.

Submissions critiqued a number of legislative provisions. One submission noted that very few Acts include the phrase 'organised crime' and instead target certain types of 'mainstream criminal offences, or offences which have netted a gain to the offender in excess of a specified amount' which, the submission said, 'reflects a...narrow view of organised crime...(associating) it almost exclusively with the activities of ...locally based...networks who specialise in robbery, extortion, drug-trafficking, prostitution and people trafficking, and who use violence and intimidation..'. It considered that the term 'organised crime' is being applied to another variant of 'street' crime and that networks with a focus on 'office' crimes, i.e. where profits are illegally made through, for example, corrupt business dealings which don't involve violence or intimidation are implicitly excluded. Another submission also underlined the link between organised crime and corruption.

One submission thought that the definition of organised crime in the Criminal Justice Act 2006 was framed in such broad terms that its impact will depend on how An Garda Síochána and the DPP will apply it. It stated that in other jurisdictions there is a clear distinction between organised and traditional crime, with organised crime distinguished by 'its capacity to undermine the security, stability or proper functioning of the administrative, business or civil order of the State... to an extent not normally associated with traditional crime where the impact is generally confined to the immediate victims and their families'. It was proposed that the adoption of a definition of organised crime along these lines would be an important step in developing an effective and proportionate legislative response to organised crime.

Reference was made in one submission to the provision which enables witness statements to An Garda Síochána to be admitted in evidence instead of direct

testimony where the witness's refusal to give evidence in person is believed to be the result of intimidation. They saw this as being inappropriate because where a police officer is under pressure to produce results it could undermine due process and generate miscarriages of justice. They thought that 'the safer option is an effective **witness protection programme**' and that there is a need to revisit the programme and develop it in a manner that satisfies the needs of witnesses who are at risk of intimidation, while at the same time respecting due process standards.

Other points made were that measures to combat organised crime must be evidence-based and that some measures can inflict damage on the traditional due process values which underpin the criminal justice system. This in turn has the potential to generate miscarriages of justice, generate fear of law enforcement agencies, and undermine confidence in, and respect for, the law.

Sentencing

Sentencing policy and practice was addressed with reference to the principle of using imprisonment as a last resort. It was suggested that in recent years there has been a shift to **presumptive and mandatory sentences** in response to organised and serious crime. It was argued that: presumptive and mandatory sentencing make imprisonment a sanction of first resort; they are blunt sentencing tools which disregard the individualisation of punishment and proportionality in sentencing; and it is desirable to safe-guard judicial independence in discharging the sentencing function, even when responding to organised crime and the illegal drugs trade. The repeal of existing laws providing for mandatory or presumptive minimum sentences was proposed.

Powers of Detention

One submission held that the 7 day power of detention is used only against those suspects associated with street or gang crime and 'generally not against the 'white collar' organised crime suspects whose activities often pose a much larger...threat to the integrity and stability of government and business' because their activities do not normally involve the use of firearms and violence. The repeal of the 7 day power of detention for investigation was proposed, to be replaced with the traditional norm for ordinary crime. It was also proposed that should the need for questioning organised crime suspects beyond this period arise, it could be facilitated by the introduction of a judicial questioning procedure – a feature of many civil law jurisdictions.

Proposals for Further Responses to Organised Crime

Referring to the specialist units within An Garda Síochána (e.g. National Drug Unit, the Organised Crime Unit and the Bureau of Fraud Investigation), one submission suggested that the Government might consider creating a single body with the task of combating transnational organised crime in order to streamline the law enforcement framework and facilitate a unified approach, (e.g., the Serious and Organised Crime Agency (UK) and the Federal Bureau of Investigation (USA)).

Some submissions argued that traditional law enforcement is not adequate for serious crimes such as organised crime and terrorism, and that law enforcement authorities need to be equipped with appropriate powers for more proactive, intelligence-led law enforcement. It was believed that the **Criminal Justice (Surveillance) Act 2009** could be amended to include provisions similar to those contained in the UK Regulation of Investigatory Powers Act 2000 (e.g. a broadened definition of surveillance, amended approval procedures for emergency situations and provisions relating to surveillance (directed and intrusive) and including the intercept of communications by the relevant authorities (not only the police)).

One person suggested that it should be a criminal offence to "groom" children and young people for participation in crime, in order to **protect children** who are often vulnerable and unprotected within their family life and who may be used by criminal gangs to carry out tasks such as couriering drugs, weapons and money, as well as carrying messages, threats, and in some cases carrying out violent acts.

A small number of submissions discussed so-called '**tiger kidnappings**'. It was stated that attacks on cash in transit, 'tiger kidnapping' and other forms of complex robbery entail high levels of organisation and considered that 'tiger kidnappings' etc. will become a more common occurrence. Accordingly, it was argued that the response to these crimes needs to be more proactive. Another submission proposed a focus on the 'getaway' aspect of the 'tiger kidnapping' and suggested tracking down the movements of the criminals (perhaps using satellite monitoring) after the robbery, rather than during the kidnapping as the victims are 'unwilling accomplices'.

The **cross-border nature of organised crime** and progress on European and globally coordinated responses was considered in one submission. It emphasised the importance of Ireland's involvement in such responses but noted that while Ireland 'engages enthusiastically in such cooperation, it shies away from the formalities associated with mechanisms such as joint investigation teams'. The submission said that Garda cooperation with the PSNI is conducted largely on the basis of memoranda or agreements, none of which is published or debated in draft form before adoption and few of which are published in full. It argued that this can result in the absence of a clear mechanism to seek a remedy where individuals or communities are adversely affected by cross-border police cooperation activities, and can also engender distrust between An Garda Síochána and the community.

Drug Trafficking and Supply

Submissions addressing drug trafficking and supply considered a range of issues relating to sentencing, supply and demand, legalisation and control of drugs, the provision of information to An Garda Síochána, and community action.

One submission looked at legislative responses to drug crimes and, in particular, to sentencing laws and the introduction of a presumptive sentence of 10 years for possession of drugs with an estimated street value of over €13,000³³. It was argued that such sentences disregard the need for individualisation of punishment (i.e. to focus not only on the offence, but also on the offender and his/her personal circumstances) and proportionality in sentencing. Further criticisms of the **Misuse of Drugs Act 1977** (as amended) were that:

- while it was intended to target organised crime ‘drug barons’ and the illegal drugs trade, more often than not the people who are apprehended and punished ‘are much lower down the organised crime food-chain ...vulnerable, drug-addicted couriers or those who temporarily hold “the product” for a small reward’;
- a prison sentence is imposed for many of those found in possession of drugs worth more than €13,000, an amount which was seen as arbitrary;
- the market value as established by a Garda or customs official of the drug being carried is the deciding factor, rather than the person’s role and involvement within the organised crime network;
- there is a lack of a distinction between different types of drugs ‘as certain hard drugs such as heroin are established as being more addictive and socially destructive than other drugs, such as cannabis’; and
- long sentences are being imposed on many people without previous convictions and exposing them to the detrimental effects of imprisonment.

It was submitted that current legislation should be reviewed as mandatory/presumptive sentences are costly and ineffective in reducing drug consumption. Reference was made to a study in the US³⁴ which looked at the success of mandatory minimum sentences relative to other control strategies in reducing drug consumption and drug-related crime. It found that mandatory minimums and conventional law enforcement reduce drug consumption less, per million dollars spent, than drug treatment programmes. Another study referred to estimated that every million dollars spent on California’s three-strike laws would prevent 60 serious crimes, whereas providing parent training and assistance for families with young children at risk would prevent 160 serious crimes, and giving cash incentives to encourage disadvantaged high school students to graduate would prevent 258 serious crimes.³⁵ In conclusion, it was submitted that resources should be shifted from longer sentences to a broader mix of enforcement measures, including treatment.

33 s. 27 Misuse of Drugs Act 1977, as inserted by s. 84 of the Criminal Justice Act 2006.

34 http://www.rand.org/pubs/research_briefs/RB6003/index1.html.

35 Greenwood, P., Model, K., Rydell, C. and Chiesa, J. “Diverting children from a life of crime: What are the costs and benefits?”, MR- 699-UCB/RC/IF, RAND Corporation, 1996.

One submission considered approaches adopted by different states to reduce demand for drugs. It reported that some impose heavy penalties for use of illicit drugs (e.g., Thailand and other Asian states), while others, for example, have decriminalised the personal use of less dangerous drugs. It was reported that Portugal has decriminalised the use and possession of some hard drugs such as cocaine and heroin, and instead of imprisonment, those arrested for drug use are required to appear before a panel of a psychologist, social worker, and a lawyer which determines appropriate treatment. It was understood that the use of illegal drugs has declined since the introduction of this policy.

One respondent thought that criminalising/banning activities forces ‘little people like drug users’ away from the protection of the State and the Gardaí, and makes them more prone to exploitation by organised criminals. He believed that the modest reductions in drug use which result from criminalisation are not justifiable when the resultant creation of criminal gangs is considered. He suggested the **legalisation** of drug use in a specific area so that the content and strength of the drugs for sale could be controlled, and anti-drugs campaigns, rehabilitation services and medical emergency services would have a specific area in which to focus their activities, and organised criminals would be deprived of their most reliable source of income. Another respondent said that there was a perception that more affluent people who used cocaine were not subject to the same levels of law enforcement as other drug users.

Proposals to curb the supply of drugs included more rigorous **border and customs controls**, encouraging landlords to report confidentially the involvement of tenants in ‘grow houses’, and the need for communities to provide information on illegal activities to the Gardaí. One submission referred to the effectiveness of community campaigns against ‘head shops’ which resulted in a legislative response and to their eventual closure. Another said that there was an ‘urgent need’ for a debate on the use of recreational drugs, psychoactive substances and alcohol, to resolve what was described as ‘arbitrary distinctions’ between them, both for social policy purposes and to bring coherence into the criminal law.

Finally, the absence of empirical research on the nature and extent of the drug trade in Ireland and the involvement of Irish organised crime gangs in the international drug trade was noted by a number of correspondents.

Human Smuggling and the Trafficking of Human Beings

It was argued that an effective **demand reduction** strategy is essential to prevent and suppress the demand for illicit goods and services which can involve smuggled and trafficked people for the purpose of sexual or labour exploitation. Such a strategy would include education, awareness raising and criminal sanctions. Reference was made to a focused advertising campaign in the UK to make men aware of human trafficking and sexual exploitation, and to the UK Immigration, Asylum and Nationality Act 2006 which imposes civil penalties for employing illegal migrants (up to £10,000 per worker) and also provides for an offence of knowingly employing illegal workers which incurs a maximum imprisonment of 2 years and/or unlimited fine.

One correspondent considered customs controls as a means of deterring trafficking and smuggling of human beings and suggested an increased level of inspection, and that private airports and landing strips should be subject to the same level of customs control as the main entry routes to the country to deter trafficking in human beings. Another submission said that 'it would appear that the regime for combating the counterfeiting of goods is more organised, developed and sophisticated than that for tackling trafficking in persons'. One correspondent welcomed initiatives taken by the Department of Justice and Law Reform to enhance international cooperation in combating trafficking, with a view to arresting and prosecuting those responsible. However, it was felt that little progress has been made in dismantling global trafficking networks and that those arrested have tended to be minor players and have received sentences of short duration. The need to dedicate sufficient resources and 'unflinching political will' to address the crime of human trafficking was emphasised.

One submission welcomed the Department's initiative to examine the **legislation introduced by Sweden** to address the issue of demand for sexual services. It was considered that the introduction of similar legislation in Ireland would make an important contribution to reducing the earnings from prostitution and ensuring that people are not abused in this way in Ireland. However, another correspondent believed that decriminalisation/legalisation in a particular district would be appropriate so that prostitution can take place in a safer environment and under the authority of an accountable body. This was seen as preferable to the current situation where criminals organise prostitution without any concern for creating a safe environment.

The progress made by Ireland on the issue of human trafficking was noted and specific reference was made to the ratification of the *Council of Europe Convention on Action Against Trafficking in Human Beings (2005)*.

One submission believed that the victims of human trafficking are 'too often' **re-victimised** by being treated as 'illegal immigrants' and argued that instead they should be treated as victims of organised crime and treated accordingly. That submission was critical of aspects of Irish legislation which, it said, is an obstacle to the participation of victims in criminal prosecutions. It said that victims of trafficking required specialised accommodation and financial support due to their very particular physical and psychological needs. It also concluded that a 60 day 'reflection' period

'is far from adequate'. It was submitted that all victims of trafficking should be given the option to remain in Ireland whether they wish to participate in criminal proceedings or not because currently, the law only provides for a possibility of temporary leave to be granted, and does not take account of the inability of many of these victims to return home, either because their families may be in danger or because they may be rejected by their families.

Money Laundering

Reference was made in one submission to the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 which replaced the Criminal Justice Act 1994. It was proposed that the provision relating to search warrants contained in the latter and absent from the former should be reintroduced into legislation.

Another submission noted the assertion in the White Paper discussion document that money laundering is broadly a concern in the context of terrorism and organised crime. It considered that 'it would also be worth acknowledging the likelihood that the proceeds of bribery, corruption and other forms of white collar crime (both domestic and foreign) are laundered in the Irish financial services and legitimate business sectors or overseas'.

Intellectual Property Crime

A small number of submissions considered aspects of Intellectual Property Crime (IP Crime), their impact and approaches to preventing and tackling such crime.

Impact and Extent of Intellectual Property Crime

One submission said that copyright theft posed both a criminal and commercial threat, involving a 'huge' loss of legitimate income, tax revenues and jobs. Another noted that counterfeiting has been assessed as one of the significant criminal activities involving organised crime and leading to other crimes such as money laundering.

A number of submissions noted that **copyright infringement is most prevalent on the internet** (e.g., copyright theft involving movies, music and games), and that the internet and digital technology have presented criminals with an efficient, high speed and anonymous way to conduct IP crime across borders. It was considered that the role of technology will continue to grow, helped by faster broadband speeds and that a reduction in the demand for copyright infringed goods and services was unlikely. One submission said that the illegal downloading of music and film, streaming sites, cyberlockers, linking sites, usenet and infringing DVD material purchased from illegal sales websites 'present a substantial issue for both industry and consumers'. Another submission noted the recent judgment by Mr. Justice Charleton in *EMI and Others v UPC* which, it said, 'pointed to the need for quick changes to Irish copyright legislation'.

Reference was also made to the widespread availability of illegal **counterfeit tobacco products** in Ireland which, it was stated, make up a significant proportion of Ireland's tobacco trade and which are being sold door-to-door and in markets. It was reported that a number of criminals have attempted to infiltrate legitimate stores, and that media speculation and seizures by Customs of raw loose tobacco being smuggled into the country suggest that there could be counterfeit manufacturing operations within Ireland.

Proposals for Legislative and Other Responses

It was proposed that IP crime could be better addressed by **formalising current partnerships** between An Garda Síochána, the Customs Service, the Department of Justice and Law Reform, Irish National Federation Against Copyright Theft, the Irish Recorded Music Association and business interests through the establishment of a forum which would meet regularly and devise strategy and systems to combat this activity. It was thought that the proposed forum could be along the lines of the Road Safety Authority. On the same theme, it was submitted that it would be beneficial if the Customs Service and the legal profession worked more closely to combat IP crime.

Particular reference was made to **EU Commission Report on the Application of Directive 2004/48/EC on the enforcement of intellectual property rights** (December 2010). The submission cited extracts from the report's consideration of the question of the right balance between the right of information and privacy law: 'The European legal framework on the protection of personal data on the one hand and enforcement of intellectual property rights on the other is neutral, in that there is no rule implying that the right to privacy should generally take precedence over the right to property or vice versa. National laws implementing the various directives must therefore be construed in a way that allows a balance to be struck...'

Proactive education of the public, through advertising campaigns on the detrimental effects of this activity on the economy was considered a central part of a strategy to tackle IP crime along with an effective enforcement and sanctions regime for any person or company involved in the activity.

A small number of correspondents made detailed legislative proposals aimed at ensuring the enforcement of intellectual property rights, reducing the risk of intellectual property crime, and pursuing and challenging 'large scale organised pirate activity and vast annual profits/resources currently being amassed by these criminals' It was held that the proposals submitted could be implemented within existing resources. In the context of the illicit tobacco trade in Ireland, amendments to the Trade Marks Act 1996 were proposed with the stated aim of ensuring appropriate sentences and penalties, and improving its powers as a deterrent and optimising its effectiveness.

Detection and Sanctions

A number of submissions addressed the issues of detection and sanctions. One correspondent understood that the emphasis of the Revenue Customs Service in combating IP crime is on seizures (detection) rather than prosecutions (sanctions). While the 'commendable results' of the Revenue were acknowledged it was noted from the Revenue Commissioners' Annual Report 2009 that 'only 8 out of 548 summary convictions are referable to pirated or counterfeit goods despite the Revenue Commissioners making 1019 seizures of counterfeit goods valued at an estimated €2.5 million'. It was also noted that the same report suggested that at the end of 2009 'none of the 123 ongoing serious prosecutions related to IP Crime'. It was contended that when there is no expectation of sanctions, perpetrators of IP crime will not be discouraged.

It was submitted that while many judges recognise the serious nature of film, music and other piracy, there is a perception among criminal elements that the worst that they can expect on conviction is a small fine. It was further submitted that the duty of the State under international treaties to provide effective sanctions is not satisfied only by providing for high maximum penalties and that in order to be effective such penalties must be applied in a 'recognisably even and significant manner'.

One submission believed that consideration should be given to establishing a **specialist civil IP court** at Circuit Court level to allow IP rights holders to pursue parties dealing in pirated/counterfeit goods in a less costly and more timely manner

than is currently the case. It was explained that a majority of civil proceedings regarding pirated/counterfeit goods are issued in the High Court so that cases can be heard by specialist judges familiar with intellectual property law. It was argued that many IP rights holders do not consider that they have effective redress in Ireland as often the infringement would not warrant the costs associated with High Court proceedings. This, it was believed, is contrary to the spirit of Article 5 of the EC Directive on the enforcement of intellectual property rights. It was proposed that consideration should also be given to the establishment of 'a more streamlined' High Court procedure of which IP rights holders could avail, such as that in place in the UK Patents County Court.

Cybercrime

A small number of submissions dealt with the logistics of cybercrime/internet fraud investigation and the difficulties which can be encountered by investigation teams. It was considered that the implementation of the **Council of Europe Cyber Crime Convention** would go some way towards improving cybercrime law in Ireland, although it only provides for freezing orders for data in relation to international cooperation and does not provide for quick access to data which is considered important in investigations, particularly those with an international dimension.

Cybercrime was described as typically involving three jurisdictions: where the victim is located; where the perpetrator is located; and where the funds which are the subject of the crime end up. It was further suggested that these issues probably need to be addressed by a European/International initiative. Suggestions were made for possible provisions in the new **Criminal Justice (Cybercrime) Bill** relating to international requests for critical computer data, similar to those contained in the Regulation of Investigative Powers Act in the UK.

One submission recalled that various industries in Ireland have been subjected to 'Denial of Service' and hacking attacks and noted the potential capacity for distributing malicious software and launching large-scale cyber terrorist attacks. The submission argued that in order to protect the public there is a growing demand for a structural response to some of the very serious crimes perpetrated *via* the internet. It held that there are measures which are available to reduce the susceptibility to threat of members of the public, industry, and State infrastructure, and that there is expertise within the country to assist in developing a structural response infrastructure. In this regard reference was made to the **Centre for Cybercrime Investigation**, UCD School of Computer Science and Informatics, which was described as one of two Centres of Excellence in Europe, and supported by both Europol and Interpol. Reference was also made to An Garda Síochána's Cyber Crime Unit whose members 'have gained international respect and reputation for the highest standards and leading expertise and thinking in this arena'. 'Multi-lateral engagement with stakeholders' was suggested as a means of developing a **national response infrastructure**.

One submission referred to the broad ramifications of cybercrime, including, for example, the spread of **racist and homophobic views and attitudes**. It argued that Irish legislation to address these issues 'is long overdue' and that there is a 'strong case' for adopting 'a more direct and intrusive approach to **child pornography**, including the blocking of sites'.

In relation to **developments in other jurisdictions** it was noted that in a number of EU member states there have been successful criminal prosecutions regarding the facilitation by websites of illegal downloads, and that in the US, Immigration and Customs Enforcement bring criminal actions for removal of websites offering illegal facilities and seize the proceeds of these activities held in bank accounts and elsewhere.