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

Department of Justice & Law Reform

White Paper on Crime

Report of Proceedings of

Consultation Seminar on

White Collar Crime

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1. Overview

The format of this consultation seminar was designed to facilitate a dialogue between panellists and audience members on topics that arise in the White Paper on Crime third discussion document *Organised and White Collar Crime*.

There were almost 100 participants present on the day, including representatives from community and voluntary organisations, Joint Policing Committees, public representatives, regulatory bodies, the legal profession and the criminal justice system.

Following opening remarks by the Minister for Justice and Law Reform, Mr. Dermot Ahern, T.D. (See Appendix A), presentations were made by Professor Sandeep Gopalan, Department of Law, NUI, Maynooth and Dr. Shane Kilcommins, Faculty of Law, University College Cork.

These presentations were followed by an open forum chaired by Dr. Barry Vaughan, NESC. Four panellists were invited to comment on a number of topics which were then opened to audience members for further comment.

The panellists were:

- Chief Superintendent Eugene Corcoran, Chief Bureau Officer, Criminal Assets Bureau,
- Chief Superintendent Martin McLaughlin, Garda Bureau of Fraud Investigation, and
- Dr. Elaine Byrne, Trinity College Dublin.

The topics which were considered were:

How to respond to white collar crime in terms of:

(1) Preventative measures: legislation, promoting compliance, and awareness- raising;
(2) Detection, investigation and prosecution; and
(3) Penalties and sentencing and their respective contribution in terms of prevention, retribution, and rehabilitation.

2. Guest Speakers

Participants heard presentations dealing with aspects white collar crime by Professor Sandeep Gopalan, Department of Law, NUI, Maynooth and Dr. Shane Kilcommins, Faculty of Law, University College Cork (See Presentations at Appendix B and C).

Summary of Presentation

Law and Economics of White Collar Crime

Professor Sandeep Gopalan, Head, Department of Law, NUI, Maynooth

This presentation dealt with white-collar crimes involving corporate fiduciaries (entities entrusted with the task of managing the financial assets of a given party) who make bad decisions at the expense of shareholders but who are likely to be acting in the belief that their conduct was legal (e.g., in cases involving the interpretation of complex accounting rules or risky business decisions), as opposed to those white collar crimes which involve clear intent, such as fraud.

Dr. Gopalan said that despite the long sentences that alleged wrongdoers (e.g., Jeff Skilling of Enron, Bernie Ebbers of Worldcom, and Joseph Nacchio of Qwest) have received, there is a popular perception in the US that white-collar criminals are not punished enough. As a result, there seems to be increasing criminalisation of conduct which was traditionally dealt with by other areas of the law.

Dr. Gopalan described the effects of such criminalisation: He suggested that it undermines the coercive power of the criminal law, dilutes its expressive power, over-deters otherwise desirable business activities, conflates blameworthiness with imprisonment, creates incentives for prosecutors to abuse their powers, fuels an appetite for enhancing prison terms, increases social costs and punishes people for actions that Dr. Gopalan held are not even civil wrongs, let alone undertaken with the taint of moral wrongfulness.

Dr. Gopalan proposed a model for responding to this type of white-collar offending. He argued that moral blame must be disentangled from punishment and that criminalisation should not automatically lead to imprisonment. Conviction itself, along with sanctions other than imprisonment are sufficient to satisfy the three main justifications for criminalisation: incapacitation, retribution, and deterrence. In appropriate cases, clawing back the offender's gains will also aid in the achievement of these objectives. Other consequential sanctions can include disqualification from positions of trust or loss of licence to practice.

This proposed model would generate significant savings by reducing prison costs, while allowing the state to take advantage of the disproportionate cost/burden of conviction on white-collar offenders. Owing to the offenders'

high earning potential, deterrence can be achieved at lower cost by conviction alone because the offender's capacity to generate income is affected even without going to jail. Dr. Gopalan argued that if the cost of imprisonment is the same for offenders with different earning capacities, imprisoning those with very high earning capacities is a waste of social capital, especially if the objectives of incarceration can be achieved through other means.

Summary of Presentation

What to do with white collar wrongdoing

Dr. Shane Kilcommins, Law Department, UCC

Dr. Kilcommins explored the various definitions of white collar crime and the categories of activities which might be described as white collar crime.

He referred to a widespread preoccupation with ordinary crime (homicides, violent assaults, organised crime, sexual offences) while white-collar offences which are often enforced by specialist agencies have tended to be ignored. He described it as a focus on 'crime in the streets' rather than 'crime in the suites'. This is reflected in an overrepresentation of individuals from the lowest socio-economic classes in the criminal courts and prisons.

Dr. Kilcommins noted a move towards criminalisation arising from the failure of compliance through negotiation and monitoring. He looked at the advantages of employing administrative sanctions/civil penalties which included: the criminal law would not be cluttered up with provisions which did not always carry the same moral stigma as convictions for the core criminal offences, and the level of criminal penalties, particularly fines, do not adequately reflect the benefit to the wrongdoer, and therefore do not adequately deter. On the other hand, the difficulty with employing administrative sanctions is the constitutional concern that the imposition of such penalties would properly be regarded as part of the administration of justice, and therefore a function of the courts.

Dr. Kilcommins whilst noting the benefits of compliance strategies that focus on persuasion and dialogue, said that there must also be a commitment to supporting strategies which signal to white collar criminals that their wrongdoing is treated seriously by society and will, if warranted, result in imprisonment as it does for street crime. Any other approach would be an endorsement of a two-tier system of justice which would undermine the notion of equality for all citizens before the law.

Dr Kilcommins recalled that of the 35,000 holders of non-resident accounts, no one went to prison and no bank official was prosecuted arising out of the non-payment of DIRT, and in several cases involving companies where conspiracy, bribery, false accounting and other crimes were discovered no one was prosecuted.

He referred to a recent judgment in the Central Criminal Court (*People (DPP) v Duffy [2009] IEHC 208*) in which Mr Justice McKechnie considered competition law abuses by an association of Citroen car dealers and noted:

'If previously our society did not frown upon this type of conduct, as it did in respect of more conventional crime, that forbearance or tolerance has eroded swiftly, as the benefits of competition law become clearer…Therefore it must be realised that serious breaches of the code have to attract serious punishment [which included imprisonment]'.

Dr. Kilcommins considered that this judgment may be an indication of an emerging new approach to white collar crime.

3. Panellists' comments

Chief Superintendent Corcoran addressed the two principal objectives of the Criminal Assets Bureau (CAB): the identification of assets, wherever situated, which have been acquired directly or indirectly from criminal conduct, and, following identification, the taking of appropriate legal action to deprive or deny those persons of the assets themselves or of the benefit of the assets. In the interest of accountability, CAB is required to submit an annual report to the Minister for Justice and Law Reform. All funding generated by CAB is paid directly to the Exchequer and in 2009 that amounted to €6.6m.

Chief Superintendent Corcoran noted the unique staffing arrangements of the Criminal Assets Bureau which is staffed by members of An Garda Síochána, the Chief State Solicitor's Office, the Revenue Commissioners and the Department of Social Protection, as well as by analysts, legal experts and technical and administrative support staff – a structure which provides a multi-disciplinary approach to investigations. He said that the primary function of the Bureau is to use all of the legal remedies available to the State in pursuance of serious criminals and serious crime assets. He reported that in 2008 the Bureau targeted 29 respondents under the proceeds of crime legislation where the sums involved amounted to €11.1m. The challenge facing the Bureau is the ever-changing means and speed at which criminals can disguise their assets and place them out of sight and which has given rise to increased dialogue with the authorities in other jurisdictions.

Chief Superintendent McLaughlin outlined the principle objectives of the Garda Bureau of Fraud Investigation which are to investigate Fraud related crime, and in particular to investigate serious and complex cases of commercial fraud, cheque payment, card fraud, counterfeit currency, money laundering and computer crime and breaches of the Companies Act (through secondment of Garda members to the Office of the Director of Corporate Enforcement) and to investigate breaches of the Competition Act (through secondment of members to the Competition Authority). The Bureau comprises a number of units: the Assessment Unit, the Commercial Fraud Investigation Unit, the Money Laundering Unit which includes the Financial Intelligence Unit, the Computer Crime Unit, and the Cheque and Payment Card Unit.

Chief Superintendent McLaughlin described the practical difficulties facing the Garda Bureau of Fraud Investigation. Given the volume of cases, the Bureau refers less serious cases to local Garda stations and before undertaking any investigation itself assesses a number of factors, including: that the suspected fraud is particularly serious or complex in nature, that the amount of money defrauded or at risk is significant, that there is a significant international dimension to the situation, or that the case requires the specialised knowledge which the Bureau has at its disposal.

Dr. Byrne was the final panellist to address the conference. She noted that since 1990, Ireland has been in a permanent process of institutional self-scrutiny with thirty-two public inquiries initiated to examine matters of ethical concern within every sector of Irish society. She considered that all of those inquiries have challenged authority and self-regulated authority and that they represent an overdue and positive development in Irish public life. Dr. Byrne noted that while there has been very little legislation dealing directly with corruption there have been encouraging developments such as the establishment of the Criminal Assets Bureau, the banning of foreign donations and the ceiling on political donations.

She considered that while the self-scrutiny of every source of authority in Ireland has shown a maturing of public life and resulted in dramatic change there is a perception that nothing has changed when this was not necessarily the case.

4. Open Forum Discussion

There was a wide range of participants present on the day including legal academics and practitioners as well as community workers and elected officials.

For the purposes of this report, the identities of participants, other than the guest speakers and panellists, have been omitted and the summary below represents an overview of the comments and suggestions made by speakers on the day.

Question 1 – Preventative Measures

1.1 Whistleblowing

Whistleblowing was addressed in a number of interventions. Speakers noted that in the absence of comprehensive legislation to protect whistleblowers, employees who whistleblow face victimisation in their jobs, in some cases dismissal, or may find themselves exposed to prosecution. One speaker said that even if companies discover an internal irregularity, they may not wish to disclose it for reputational reasons.

In addressing the first question in respect of preventative measures Dr. Byrne noted that the greatest challenge in respect of prevention is the prevailing cultural perception that highlighting concerns is itself a tainted act and the negative connotations associated with such informing are hugely significant for both detection and prevention of wrongdoing. She suggested that even the simple fact of referring to the process as ‘whistleblowing’ rather than ‘informing’ is an important factor in changing social perceptions.

Dr. Byrne noted that many whistleblowers in Ireland in the past have not been Irish or, if they have been, they have left the country. She noted the sectoral approach to whistleblowing legislation in Ireland and that because there are a lot of fields of employment not covered by whistleblower legislation there is a public perception that there is no such legislation or that there is an absence of commitment or will to protect whistleblowers. She considered that legislation alone is not the answer, that there has to be an acceptance that whistleblowing is positive, and that whistleblowers are not informers but are doing an act of citizenship.

Chief Superintendent Corcoran said that there are many types of whistleblower and that in the experience of law enforcement agencies it would be misleading to view persons in this category as a homogenous group. He believed in this regard that the person who ultimately becomes a witness is clearly the most valuable in the long term. The issue becomes more complex when the person has had some involvement in the wrongdoing being highlighted. He said that this can only be addressed in consultation between

the investigative agency and the prosecutor. In conclusion, Chief Superintendent Corcoran said that there are matters which can be addressed in this area which do not require legislation in order to function. An example of this may be encouraging an open culture of reporting within organisations.

One speaker emphasised the importance of meaningful whistleblower legislation to assist in the prosecution of what are complex, lengthy, and difficult jury trials, by providing a comprehensible narrative that the jury is able to follow.

Dr Gopalan referred to whistleblower legislation in the US and whistleblower hotlines in the US Securities and Exchange Commission and Department of Justice. He said that under US law, senior management is required in cases where there is a 'tip-off' from a lower level employee, to notify the fact to the regulators. Consequently, when senior management ignores such whistleblowing they make themselves complicit in the wrongdoing.

Following on from these comments, a number of speakers noted the stigmatisation of whistleblowers in corporate culture. The general consensus appeared to be that having meaningful protection to cover such persons would bring about compliance with corporate standards, whereas currently whistleblowers are open to victimisation if they raise concerns. Developing this point further, a number of participants commented on the reality of whistleblowing in circumstances where a person may themselves be personally exposed as a result of their passing on information. In such circumstances those persons have no incentive to come forward. Most speakers argued for the need for whistleblowing legislation.

1.2 Defining White Collar Crime

A number of contributors addressed the absence of any clear legal definition of white collar crime. It was suggested that the definition of white collar crime needs to be broad and that it should include, for example, company law breaches, governance failures, competition offences, health and safety breaches and environmental offences. One speaker noted that there is no clear branding of white collar offences: for example, there may be fifty offences in relation to the misappropriation of company assets but there should be a distinct crime of misappropriation of company assets so that people could understand it in the same way as they understand murder or manslaughter, or false accounting.

In response, Dr Gopalan referred to the offence of accounting fraud or accounting mis-statement. He considered the benefit of a provisions such as those contained in the US Sarbanes-Oxley Act (ss 301 & 302), which penalise a CEO or CFO who certifies an accounting statement as true when it later turns out that it is false in material respects. He believed that such a provision would remove all doubt when a mere statement based upon it being materially false will suffice in order to commence prosecution.

One speaker noted that an American writer has pointed out that government and the private sector keep on declaring war on white collar crime but keep failing to define what they are fighting. He pointed out that the White Paper on Crime Discussion Document noted the absence of a specific offence of fraud. In that regard, he referred to the introduction in UK law in 2006 of a definition of the offence of fraud into three parts, one of which is the concept of fraud by abuse of position.

A speaker referred to the Minister's opening remarks and its reference to the extent to which white collar offences are spread across different legislative codes. The speaker acknowledged the inevitability of that position given the form of 'compartmentalised government' in Ireland and suggested that changes to the legislative infrastructure or the way in which investigation, detection and prosecution are approached should reflect the fact that a single criminal act may involve breaches across several statutes and enable the relevant authorities to operate with fluidity.

A number of speakers referred to the need to consolidate numerous statutes, and, in that regard, one contributor pointed out that the Law Reform Commission has completed a restatement of the Prevention of Corruption Acts - a step on the way towards consolidation. Another contributor informed the meeting that the Minister for Justice and Law Reform had announced the preparation of a consolidation bill on the prevention of corruption following the passing of the Prevention of Corruption Amendment Bill[1].

1.3 Professional Standards and Conduct

A member of the audience addressed the liabilities of legal advisers and clients where there are doubts about the legality of certain actions, and the extent to which the accused can defend themselves on the basis of erroneous legal advice. It was pointed out that the new Money Laundering Act provides that lawyers can be prosecuted for 'tipping off' their clients in relation to their being investigated for money laundering offences. Another speaker said that a starting point should be that ignorance of the law is no defence, a principle which should apply in the white collar crime sphere as in others.

Dr Gopalan said that a lot of corporate law relies upon gatekeepers such as accountants and lawyers to do their jobs well, and that can only happen if the professional standards in each of these professions are strong enough and vigorously enforced. There was much debate on this topic, including by practitioners who emphasised the professional standards which guide their work practices.

One speaker believed that there is 'considerable asymmetry' between regulated entities and regulators. He said that officers in regulated entities are subject to considerable penalties if they fail to behave, whereas the officers in

[1] The Prevention of Corruption (Amendment) Act 2010 was signed into law on 15 December 2010.

regulatory bodies are not subject to similar penalties if they fail to discharge their responsibilities.

It was noted by a number of participants that while there are reports of incorrect audits or company statements in the media, the professional bodies and regulatory institutions which govern those practices seem to be unaffected. One speaker argued that if professional licensing bodies were more active in their internal regulation and investigation, it would go some way to solve the problem without involving State resources.

The consensus amongst the speakers who contributed to this part of the discussion was that there needs to be reciprocity between the regulated and the regulator and that responsibility for regulation falls as much on the firm as on the regulator.

Question 2 – Detection, Investigation & Prosecution

Many participants addressed the perceived absence of arrests and/or prosecutions relating to white collar offences, while acknowledging the challenges confronting investigators and prosecutors of such offences.

2.1 The Practical Reality of Prosecution and Conviction

Chief Superintendent Corcoran accepted that there was frustration at the length of time it takes to bring such cases to court but noted that before reaching prosecution stage, lengthy investigations which involve gathering evidence and obtaining legal advice are required. He said that delays inherent in the legal system are an unfortunate but necessary feature of prosecution of such crimes and that to rush an investigation simply to arrive at a prosecution would be a knee-jerk reaction to what is a complicated criminal process. He suggested that what was needed was meaningful infrastructural change and legislation to reflect the complexity of white collar crime.

Referring to the length and complexity of cases, one contributor wondered if would be possible to introduce an expedited process as had happened in the case of corporate matters with the establishment of the Commercial Court.

One speaker expressed concern that prosecutions should be brought simply because the public are angry, and said that such a context would make it difficult to reach a determination on whether someone is guilty or not. Dr. Kilcommins agreed with this speaker and said that penal populism has had a strong influence on the ordinary criminal justice area with nobody willing to be soft on ordinary crime. He believed that evidence-based policy should be applied to both white collar and so called ‘ordinary’ crime. However, he emphasised the expressive function of the criminal law and that there is value in demonstrating that all serious wrongdoings are punished, i.e. the DPP or Gardaí prosecute or investigate in the public interest.

2.2 Tribunals of Inquiry

One speaker noted that a bill to reform tribunals of inquiry, to make them more efficient and of a shorter duration has been on the Oireachtas legislative programme for a number of years. Another speaker wondered if the money spent on tribunals of inquiry would have been more effectively spent on the Garda Fraud Investigations Unit.

Question 3 – Penalties and Sentencing

A large number of audience members referred to the perception that white collar crime is more a matter for corporate governance and practice than for the criminal justice system. As noted above (at 1.2), the issue of the 'branding' of white collar crime was one that arose for discussion and, in particular, the extent to which various corporate activities would be considered criminal. Many speakers were of the view that justice needs to be seen to be done in relation to white collar offending and that failure to impose criminal sanctions would send out the wrong signal to both the public and potential corporate offenders.

3.1 Deterrent Effect

In considering the various means by which penalties would have deterrent effects, a number of participants spoke of the methods used by some State agencies such as the National Consumer Agency with its powers to use 'naming and shaming', in order to seek undertakings of compliance. Offering a socio-psychological perspective, one speaker commented that the reason people do not offend on a daily basis is not principally because of fear of prosecution and imprisonment, but rather because a whole range of social, reputational and market reasons are at play for that person. It was argued that imposing a criminal sanction in response to corporate crime 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.

An audience member spoke about different approaches by the courts in two white collar crime cases. He described the McKechnie judgement, which Dr. Kilcommins had earlier considered, as 'far-reaching' and said that the point of punishing people in that instance was not because they were likely to commit a crime again, but for the wrong they had done, and also to act as a general deterrent by making an example of the offender in order to deter others from committing these crimes or causing harm. The other case involved an individual who had operated outside the legal system for a long time, committing fraud and not paying taxes. That person received a short sentence which he successfully appealed on the basis that no one was harmed. The speaker believed that such a response makes the sanction of imprisonment meaningless. Another speaker suggested that seemingly inconsistent responses by the courts arise because sentencing not only reflects the

offence but also the offender. For example, generally a first time offender is entitled to mitigation. He reminded the meeting of the right of the DPP to appeal a sentence if he considers it to be unduly lenient.

A speaker considered that responses to white collar crime are a choice for society; if society wants to deal with banking irregularities in the same way as it deals with drug offences, mandatory sentences can be introduced. However, he cautioned against mandatory sentencing which can be a blunt instrument and one which can bring about an increase in the prison population.

Reflecting on comments made by both Dr. Kilcommins and Dr. Gopalan, one speaker suggested that responses to crime could be more effective through calibration. For example, there may be occasions when working to change behaviour is more appropriate than prosecution. In that regard, he said that he understood that in the case of 'hardcore' cartels, the Competition Authority focus on prosecution without giving any 'educational' advice on why cartelisation is wrong.

3.2 Responses to White Collar Crime

One member of the audience considered that the use of the term 'white collar crime' is problematic because it suggests that some people who carry out premeditated, calculated actions that cause social harm and breach the law should be treated differently. He said that if white collar crime can be committed with impunity it can have a wider effect on the actions of others in society and their tendency to break rules and the legitimacy of the legal system and the attitudes of citizens towards it. He noted that countries with high rates of general compliance with regulation have lower levels of low-level street crime. A speaker supporting the principle of imprisonment as a last resort said that he was not advocating the imprisonment of large numbers of white collar criminals but rather that there should be parity of treatment for all offenders. He supported the approach by Dr. Kilcommins of exploring the social harms of imprisonment.

3.3 Suggestions for Detection

In response to the call for meaningful processes to be established, two interesting suggestions were made. The first was that a confidential phone line along the lines of 'Dial to Stop Drug Dealing' the Garda confidential line, or local authority lines to report anti-social behaviour, be set up for breaches or suspected breaches of the law. A second suggestion aimed at preventing corporate cover ups, was the introduction of legislation regarding lawyers responsibilities and ensuring that where legal advice was sought simply to enable a party act under the cover of said legal advice, that advice giver could be held accountable. As was noted earlier there was much debate on this topic from the practitioners present who denied strongly that such practices existed or were widely used and who expressed support for accountability and

transparency in the prosecution and investigation of such white collar offences.

3.4 Prosecution

One participant suggested that because the criminal code is only geared for the prosecution of individuals, the prosecution of companies should be addressed.

Throughout the session the complexity, length and difficulty of investigations was acknowledged by all speakers. Particular reference was made to the difficulties which arise in building and presenting a case to a jury, due in part to evidence which can involve a very complex paper trail and forensic accounting. In addressing the practical impact of that complexity, the point was made that in a jury trial, lay members of society are asked to adjudicate complex, lengthy and very difficult matters which require in-depth consideration of issues often beyond the scope of their daily experience. In addressing this point, specialist jurors were suggested as a possible solution.

Time did not allow for detailed consideration of this issue. However, some speakers raised concerns about the constitutional inequality of a two-tier system where persons who commit corporate crimes would be tried by essentially corporate jurors unlike persons who commit ‘regular’ crimes.

Appendix A

Opening Remarks by the Minister for Justice and Law Reform, Mr. Dermot Ahern, T.D.

Lord Mayor, Ladies and Gentlemen,

Thank you for coming here today to this White Paper on Crime consultation seminar focusing on white collar crime. I would particularly like to thank guest speakers Professor Sandeep Gopalan and Dr. Shane Kilcommins as well as panellists Dr. Elaine Byrne, Chief Supt Eugene Corcoran and Det. Chief Supt Martin McLaughlin for their participation. Thanks also to Dr. Barry Vaughan and the IPA for their assistance and, finally, to the Courts Service for the use of this magnificent building.

The nature of white collar crime and how society responds to it have long been the subject of academic debate. That debate has increasingly moved into the public arena making today's consultation a very timely one.

It is painfully clear that the actions of persons in what I might call the white collar sector can have catastrophic consequences for society. Where those actions involve breaking the law there is a clear and overwhelming public interest that the persons involved face justice.

It would not be appropriate for me here to go into any details about a major and complex investigation that is going on at present relating to events at Anglo Irish Bank. I have at all times been careful not to say or do anything that would undermine or prejudice that investigation. Obviously neither I nor the Government seek to direct investigations or decide whether people should face charges. That is a cornerstone of our democratic system.

Of course, I share the deep frustration that investigations of this kind, of their nature, take a long time. But posturing does not ground prosecutions. Outrage - however understandable - cannot be included in a book of evidence. The best thing we can do is let the Gardaí and the Office of the Director of Corporate Enforcement get on with their work, and refrain from saying or doing anything which undermines that.

Some people have made fairly bizarre public comments about what the State should do in relation to people involved. In my view, enough damage has been done to the country by the events at Anglo Irish bank already, without people suggesting, in effect, that we abandon the fundamental principle of respect for the rule of law.

While the discussion document rightly asks what can be learned from other jurisdictions, people need to take a clear-headed look at how successful those jurisdictions are. While it may be cold comfort, the fact is that questions are

being asked in the United States as to why, so far, there have been no prosecutions of people for their roles in the collapse of firms like Lehman Brothers and Bear Sterns or the risky investments that led to bailouts of huge corporations like the American International Group, Fannie May and Freddie Mac. To the best of my knowledge no prosecutions have taken place in the U.K. or Germany either in relation to the banking crisis. So to suggest that investigations of this kind pose unique difficulties for Ireland does not seem to be well based.

Of course, it is right that we seek to learn what lessons we can from major investigations. That is why earlier this year I asked the Garda Commissioner for his views on what changes in the law might be desirable in the light of their experience of investigations. It is important to emphasise that there is no suggestion that the law is preventing progress in current investigations. But the Commissioner did raise a number of issues with me and I am pursuing those, including in consultation with the Ministers for Finance, the Minister for Enterprise, Trade and Innovation and the Attorney General.

That brings me to the more general point that much of the law governing the area of white collar crime is not, in fact, a matter for my Department. For example, company law is primarily a matter for the Minister for Trade, Enterprise and Innovation and banking law for the Minister for Finance. But we felt that it would be wrong to produce a white paper on crime that did not deal with the crucial area of white collar crime in all its aspects. I am sure my colleagues, Batt O'Keefe and Brian Lenihan will not be slow to take on board suggestions for change that are in the public interest.

The discussion document on organised and white collar crime which I published two weeks ago bears out the complex nature of white collar crime and the necessity for tailored responses to its many facets.

Today's consultation gives an opportunity to examine our responses to white collar crime in terms of prevention, detection, investigation, prosecution and penalties. The key-note speakers and panellists will give their own observations on the challenges faced in this respect, which I know will stimulate and enrich your discussion today. We have invited a wide range of participants to this seminar which I am sure will be reflected in a diverse and dynamic exchange of views.

The publication of the most recent White Paper on Crime discussion document is the start of the penultimate phase of the White Paper process. Since the launch of the process last year, I have been heartened by the level and quality of the response to our consultations. Indeed, I know that some of you here today have already made valuable contributions to the earlier phases of the consultation project.

This process is leading to a White Paper on Crime which will be published next year. It will, I believe, be a significant milestone in the ongoing development of crime policy in Ireland and will provide a framework for how we tackle crime into the future.

Your deliberations here today and any written submissions you wish to make on today's topic will inform the shape and content of the White Paper.

Thank you all again for giving us your valuable time and I wish you well in your work here today.

Appendix B
Presentation by Professor Sandeep Gopalan,
Head of Department of Law, NUI Maynooth.

Law & Economics of White Collar Crime

Prof. Sandeep Gopalan
Head, Dept. of Law,
National University of Ireland, Maynooth

View my blog at
http://irishlawforum.blogspot.com

- Popular opinion that the law is too lenient on white collar criminals
- Jeff Skilling of Enron- 26 years
- Bernie Ebbers of Worldcom - Convicted and sentenced to 25 years imprisonment
- Joseph Nacchio of Qwest - Convicted on nineteen counts of insider trading and sentenced to six years in prison and to pay $19 million in fines
- Creeping criminalization of conduct that was traditionally dealt with by other areas of the law
- Sarbanes-Oxley Act of 2002

- Creeping criminalization has serious ramifications:
- Undermines the coercive power of criminal law
- Dilutes its expressive power
- Over-deters otherwise desirable activities
- Conflates blameworthiness with imprisonment
- Incentives for prosecutors to abuse powers
- Fuels an appetite for enhancing prison terms
- Increases social costs

- Jail is costly: direct expenditures by federal, state, and local governments on corrections in 2006: $68.7 billion
- Combined criminal justice expenditures: $214.3 billion

- Analysis limited to agency offences
- Intersection of risky behaviour and morally wrongful behaviour
- Moral blame must be disentangled from punishment
- Criminalization does not automatically entail imprisonment
- Objectives of punishment achieved under deterrence, retribution, incapacitation, and restorative models

- sub-set of white-collar offenders – corporate fiduciaries abusing the principal-agent relationship
- inherently asymmetric
- Agents make up gaps in expertise, skill, and time that prevent principals from accomplishing the delegated tasks
- Company: collectivization of the principal creates incentives for free-riding and rational apathy

- Yield significant savings by reducing prison costs.
- Allows state to take advantage of the disproportionate cost/burden of conviction on agency offenders
- Deterrence can be achieved at lower cost by conviction alone
- If cost of incarceration is the same for offenders with different earning capacities, imprisoning those with very high earning capacities is a waste of social capital if objectives sought to be achieved by incarceration can be achieved via other means

- Cost of a conviction can be predicted with sufficient certainty in the case of white-collar criminals (earnings history)
- Contra common criminals, this loss ought to serve the deterrence function without the need for jail

- Criminalization of the principal-agent problem
- Justified?
- May be justified if conduct is morally blameworthy
- What if it is merely risky?
- Consensual harm? Caveat investor?
- Many regulatory offences may not involve moral blame

- Harm: suffered not only by the principal
- Economic harm from agency offences might be far greater than street crime
- Permissible to criminalize harmful white-collar conduct even if it is not morally wrongful
- Bodily harm and social harm
- Is imprisonment necessary to prevent harm in agency situations?

- Rational actor will trade off the expected value of committing the criminal act against two variables:
- 1. probability of being caught
- 2. punishment after conviction.
- If probability of being caught is low, criminal act might confer value even if the punishment is high.
- Same if punishment is low and probability is high.

- These 2 variables are a function of state resources
- Scholars in the economics tradition focused on disutility of punishment
- I focus on disutility of imprisonment
- Probability of conviction is *p*, the length of imprisonment is *l*, and the total disutility is *u*.

- Total disutility is made up of disutility of conviction *c* and disutility of imprisonment *i*.
- $u = p \times [(l \times i) + c]$.
- Individuals with a high value for *c* are reputation conscious and those with a low value for *c* are reputation-indifferent

- Probability of conviction is 10 percent, the disutility of conviction is 200, and the disutility of any sentence length is 5, and the sentence is 10yrs. Then total disutility is .1 x [(5x10) +200] = 25
- Increasing the sanction to 20 years will increase the total disutility to .1x [(5x20) +200] = 30
- If disutility of any sentence length is 0, then total disutility is .1x [(0x10) +200] = 20.
- Increasing the sentence length to 20 does not alter the total disutility at all (.1 x [(0x20) + 200] = 20.

- Probability of conviction is 10 percent, disutility of conviction is 0, disutility of any sentence length is 5 and the sentence is 10 years. Now total disutility is .1 x [(5x10) + 0] = 5.
- Increasing the sentence length to 20 years results in a total disutility of .1 x [(5x20) + 0] = 10

- State can achieve the same disutility for this individual as the offender with the disutility of conviction of 200 and no disutility of imprisonment only by imprisoning him for 40 years!
- Conversely, offender with disutility of 200 on conviction but no disutility on imprisonment can be deterred to the same extent even by saving money on prison costs for 40 years.

- Sending both kinds of offenders to jail for the same length is a waste of resources
- Disutility of conviction is hugely significant
- Destroys earning capacity, disqualifies from positions of trust…
- Sanctions can be combined to maximize disutility of conviction alone
- Information costs are low

- Offender is lawyer: lose his bar license
- SEC can suspend him from practicing before it
- CEO of a company: demit office (Martha Stewart)
- Sarbanes-Oxley: section 1105, SEC has the power without going to court to issue officer and director bars as part of a cease-and-desist proceeding
- Standard for a bar is unfitness

- Disgorgements
- Clawbacks: SEC v. Cavanagh, 445 F.3d 105, 117 (2d Cir. 2006)
- Section 304 Sarbanes-Oxley Act: accounting restatement due to material noncompliance: CEO & CFO to reimburse for--(1) any bonus or other incentive-based or equity-based compensation received by that person
- (2) profits realised by sale of shares

- *SEC v. Sands*, 142 F.3d 1186; 1998 U.S. App. LEXIS 8093: equitable powers to compel disgorgement
- Revoking registration
- Consequential sanctions
- Dismissal from boards
- Sum: variety of non-imprisonment sanctions available
- Can be more finely calibrated

Appendix C
Presentation by Dr. Shane Kilcommins,
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What to do with white collar wrongdoing

Dr Shane Kilcommins

UCC

The issue of definition

- Sutherland would define crime as follows
- **a crime** – this is an obvious element but it is often forgotten.
- **committed by persons of respectability** – someone with no convictions for non-white collar crime. But should it also not include corporations (Enron?)
- Of **high social status (**is this not a problem – are environmental offences committed in this manner?
- In **the course of his/her occupation** – overcharging, charging for unnecessary work, pilfering, misuse of computers, telephone, photocopier, false accounting, time fiddling, insider dealing etc – *but what about tax evasion*? Also when false claims are made against insurance companies, this is not made in the course of employment?

Definition

- Can we also include another one besides Sutherland's four: **a violation of trust**.
- Would it be better just to describe it as *economic crime* - but are health and safety offences economic, or environmental offences?
- Or could we say that it involves the following categorisations:
- Financial (from share dealing to bribery to tax evasion)
- Offences against consumers (price fixing, illegal sales, unfit goods,)
- Crimes against employees
- Crimes against the environment

1. Introduction

- Crime in the streets v crime in the suites
- Mala prohibita v mala in se
- Characteristics of regulatory strategies
- Compliance model v sanctioning model
- A proper balance

2. Not a recent phenomenon

- "[C]rime…is almost exclusively committed by a certain social class; that criminals, who were once to be met with in every social class, now emerged 'almost all from the bottom rank of the social order'…;that, this being the case, it would be hypocritical or naïve to believe that the law was made for all in the name of all; that it would be more prudent to recognise that it was made for the few and that it was brought to bear upon others; that in principle it applies to all citizens, but that it is addressed principally to the most numerous and least enlightened classes; that in the courts society as a whole does not judge one of its members, but that a social category with an interest in order judges another that is dedicated to disorder: 'Visit the places where people are judged, imprisoned or executed…One thing will strike you everywhere; everywhere you see two quite distinct classes of men, one of which always meets on the seats of accusers and judges, the other on the benches of the accused'…Law and justice do not hesitate to proclaim their necessary class dissymmetry."

  M Foucault, Discipline and Punish: the birth of the prison (Penguin: Harmondsworth, 1977), p. 276.

- Persons who violate laws regarding restraint of trade, advertising, pure food and drugs, and similar business practices are not arrested by uniformed policemen, are not tried in criminal courts, and are not committed to prisons; their illegal behaviour receives the attention of administrative commissions and of courts operating under civil or equitable jurisdiction…My thesis, stated positively, is that persons of the upper socio-economic class engage in much criminal behaviour, that this criminal behaviour differs from the criminal behaviour of the lower socio-economic class principally in administrative procedures which are used in dealing with the offenders; and that variations in administrative procedures are not significant from the point of view of causation of crime. The causes of tuberculosis were not different when it was treated by poultices and bloodletting than when treated by streptomycin. (Edwin Sutherland, White Collar Crime (New York: Dreyden Press).

- The law making process is the means through which the criminal label is distributed in society. As it operates in Ireland, the process of law making distributes this level in an uneven manner. It sanctions some kinds of socially harmful behaviour and ignores others. It is aided and abetted by an enforcement system that devotes more resources to the pursuit of some kinds of law-breaking than others…The end product of this system is a criminal population which contains a disproportionate number of those who are poor, uneducated and unskilled'

  C McCullagh, 'Getting the Criminals We Want: the social production of the criminal population' in P Clancy et al, eds, Irish Society: Sociological Perspectives (Dublin: IPA)

3. Examples

- (i) A Mayo farmer who pleaded guilty to seven counts of making incorrect tax returns between 1991 and 1998 and who failed to declare an investment of almost €20,000 in an offshore account received a suspended prison sentence. The offender owned land worth more than €3 million, despite having declared an annual income of just £400 over a ten year period in the 1980s and 1990s. He held a number of bogus non-resident accounts and accounts in the names of deceased persons. The week before his case came to court he paid €316,000 to the Revenue Commissioners. According to a newspaper report about the case, the criminal was described by his parish priest as a 'good, decent, honest to goodness' person who worked hard. The priest added that he had never seen the offender's wife without wellingtons on her when he called to the house. (S Kilcommins et al, Crime, Punishment and the Search for Order in Ireland (Dublin: IPA, 1994)

- (ii) The DIRT inquiry
- *(iii)* workplace deaths and homicides
- (iv) assaults and work related injuries
- (v) Whitaker Committee
- (vi) Aluminium Fabricators
- (vii) Re Contract Packaging Ltd
- *(*viii) Re Kelly's Carpetdrome Ltd
- (ix) Re Hunting Lodges
- (x) Patrick Gallagher

- "[t]he Fraud Squad usually sees its suspects by appointment rather than dawn raid and it may be that if he or she doesn't confess in remorse at this genteel confrontation which the suspect has prepared for, they have not got the resources to go further and build a case through documents. The capacity to build a case through documents without a suspect's co-operation should be a fraud squad's basic skill. The courts have not seen any evidence that such a skill exists in Ireland (P Carney, Irish Times, 31 August, 1990, p. 10)

- ‘Those who are tempted to make serious breaches of company law have little reason to fear detection and prosecution. As far as enforcement is concerned, the sound of the enforcer’s footsteps on the beat is simply never heard’. (Working Group on Company Law Compliance and Enforcement 1998, para 2.5)

- One only has to see – and you do not need to be in the Special Branch to come to this conclusion – the pattern of price movements on the Stock Exchange before sensitive information is released to conclude that those in possession of privileged information are dealing. It is happening all the time and it is just a historical fact on the Dublin Stock Exchange. (Shane Ross, Seanad Debates, 16th July 1987)

- Fianna Fail and the Progressive Democrats in government are committed to taking the tough measures needed to deal with the crime issue. We will adopt a zero tolerance policy towards crime, including white collar crime. This means effective law enforcement, while at the same time addressing the factors which contribute to crime – economic deprivation, educational disadvantage, and social exclusion. (Dept of Taoiseach, Action Programme for the Millennium (1998)

4. So why not imprison?

- "People can be deterred from crime by making the punishment system greater than the value of that activity to them. Where the violator has assets, employ a monetary penalty. Otherwise, use prison. But prisons are expensive: construction, maintenance and operation costs; the loss of the incarcerated person's legitimate production; the likely impairment of his legitimate productivity on release." Richard Posner, Economic Analysis of Law (2nd ed, 1977)

- "There does not seem to be any great enthusiasm for incarceration as a means of dealing with white collar criminals'…The possibility of imposing a more effective civil sanction which meets and regulates the behaviour at stake, instead of worrying about a less than effective criminal sanction following an expensive criminal trial is compelling'. I Lynch-Fannon, 'Controlling Risk Taking: whose job is it anyway' in Kilcommins and Kilkelly, eds, Regulatory Wrongdoing in Ireland (Dublin: First Law)

Advantages of Administrative/civil penalties

- Statute book not cluttered up with criminal law provisions; *de minimis* principle
- Due process provisions can be diluted –*mens rea*, reverse onus provisions; hearsay;
- This may be appropriate having regard to the wrongdoing
- Criminal fines are not always an adequate deterrent.
- The costs involved in the criminal process
- Non-stigmatisation
- Expert evidence and juries
- Problems – Constitution

5. But should we also criminalise and 'custodize'?

- **First,** our ordinary criminal justice system is founded on the notion that public protection and security are 'essential goods' that are necessary for our self-preservation, well-being, and happiness.
- **Secondly**, to suggest otherwise would be to endorse a two-tier system of justice, something which would make a mockery of the notion of equality for all citizens before the law
- **Thirdly**, imprisonment is often justified on the basis of its **deterrent effects**.
- **Finally,** we should not underestimate the powerful cathartic effects that the proper use of criminal can provide in society

- *'The financial loss from white collar crime, great as it is, is less important than the damage to social relations. White collar crime violate trust and therefore create distrust, and this lowers social morale and produces social disorganization on a large scale.'* Edwin Sutherland (op. cit)

- "*The need for vengeance is better directed than heretofore. The spirit of foresight which has been aroused no longer leaves the field free from the blind action of passion. It contains it within certain limits; it is opposed to absurd violence, to unreasonable ravaging. More clarified, it expends less on chance. One no longer sees it turn against the innocent to satisfy itself. But it nevertheless remains the* ***soul of penality*** (E Durkheim, The Division of Labour in Society (New York, 1933), p. 86.

Sentencing

- Punishment should fit the crime and *the individual circumstances of the offender*
- Traditional crime in the streets jurisprudence
- 'Remorse'
- 'Good character'
- Absence of 'previous'
- But, **aggravating factors**:
- 'breach of trust'
- 'grave threat to society'

6. Conclusion

- Mr Justice McKechnie, in an excellent judgment in the Central Criminal Court which considered competition law abuses by an association of Citroen car dealers noted: *People (DPP) v Duffy* [2009] IEHC 208:

> 'These [offences] stifle competition and discourage new entrants, damaging economic and commercial liberty…[T]hey remove price choice from the consumer, deter consumer interest in product purchase and discourage variety. They reduce incentives to compete and hamper invention…If previously our society did not frown upon this type of conduct, as it did in respect of more conventional crime, that forbearance or tolerance has eroded swiftly, as the benefits of competition law become clearer…Therefore it must be realised that serious breaches of the code have to attract serious punishment [which included imprisonment]'.

His reasons for imprisonment

- *→Firstly, such a sentence can operate as an **effective deterrent** in particular where if fines were to have the same effect they would have to be pitched at an impossibly high figure.*
- *→Secondly, fines on companies might not always guarantee an adequate i**ncentive** for individuals within those firms **to act responsibly***
- *→ Thirdly, knowledge within undertakings that courts will regularly make use of a custodial sentence may act as an **incentive to people to offer greater cooperation** in cartel investigations against, and quite frequently against their employers.*
- *→Fourthly, prison, in particular for those with unblemished pasts, for those who are respected within the community, and for those who are unlikely to re-offend can be **a very powerful deterrent***
- *→the imposition of the sentence for the type or category of persons above described can carry **a uniquely strong moral message***