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WHITE PAPER ON ORGANISED AND WHITE COLLAR CRIME

SUBMISSION BY THE ASSOCIATION FOR CRIMINAL JUSTICE RESEARCH AND DEVELOPMENT LTD. TO THE DEPARTMENT OF JUSTICE AND LAW REFORM

The Association for Criminal Justice Research & Development (ACJRD) is an independent organisation that exists to promote reform, development and effective operation of the criminal justice system.

1. Scope of this Submission

- 1.1. ACJRD welcomes the White Paper on Crime Document No. 3 on Organised and White Collar Crime published by the Department of Justice and Law Reform (DJLR).
- 1.2. ACJRD recommends its publications on www.acjrd.ie from its Research Working Groups and Conferences. In particular, it recommends in the context of Document No. 3, its Conference publications on *Minorities Crime & Justice*, *Perspectives on Sex Offending- The Victim and the Offender* and *Women in the Criminal Justice System* with regard to the aspects of White Paper that discuss Organised Crime in the context of Human Smuggling and Trafficking.
- 1.3. This paper proposes to focus on White Collar Crime.

2. An argument for two discrete discussions – one on White Collar Crime and one on Organised Crime

- 2.1. ACJRD respectfully urges DJLR to address White Collar Crime as a discrete area for discussion and to have a separate discrete section in the White Paper deliberations on Organised Crime. This rationale and process will support and enhance discussion in terms of:
 - 2.1.1. The importance of determining a clear definition that reflects a model of White Collar Crime that will be amenable to interpretation by each citizen
 - 2.1.2. The necessity to ensure that with currently implemented criminal investigation practices apply equally to White Collar Crime
 - 2.1.3. The application of principles of proportionality in the sanctions that are imposed in relation to White Collar Crime
 - 2.1.4. The necessity to enhance that citizen's perception of and engagement with the Administration of Justice in this area

3. The importance of determining a clear and robust definition of White Collar crime

- 3.1. Discussion document No. 3 (the document) distinguishes previous White Paper discussion on what are termed visible 'street crimes'
- 3.2. It connects the Organised Crime (otherwise referred to as Gangland Crime) and White Collar Crime insofar as they are both engaged in by *ad hoc* groups in circumstances of 'privacy' where the victim may be unaware of the actions of the alleged perpetrator and similarity in the *modus operandi* of these *ad hoc* groups as being complex and as having a high degree of organisation.
 - 3.2.1. It is respectfully submitted that such connections/similarities should not give rise to a situation whereby both topics are dealt with in the same section of the White Paper on Crime. To do so could in fact lead to a lack of certainty and clarity in the definition of what White Collar Crime is.
- 3.3. It is acknowledged at page 37 of the document that there is difficulty in defining, detecting and investigating White Collar Crime and this is proffered as a rationale for a lower rate of successful prosecution of these wrongs.
- 3.4. The acknowledgement that the definition of White Collar Crime is problematic, presents a unique opportunity through this White Paper on Crime process to clearly outline what definition will be the bedrock of tackling its prevention, detection and sanctioning in this Jurisdiction.
- 3.5. There is a danger that identified definitional difficulties may be compounded by simultaneously addressing White Collar Crime and Gangland Crime in the same discussion document.
- 3.6. It is however acknowledged, in deference to the rationale of the discussion document, that in the compilation of the final White Paper, the confluence of various types of offending should be compared and contrasted within the White Paper to indicate comparisons/interconnections and distinctions. Such analysis could prove very helpful in citizen awareness raising with possible consequences in a) dispelling some current perceptions that our Criminal Justice System unfairly supports a system whereby 'different rules apply' to the perpetrator of White Collar Crime and b) promote prevention and thereby facilitate compliance.

4. Engaging with past and current definitions of White Collar Crime

- 4.1. It is well known that the White Collar Crime categorisation of offending, originated from a 20th century criminologist, Edwin Sutherland, who produced data to show that corporations frequently broke the law. In addressing the American Sociological Association in 1939, he described

white-collar crime as “a crime committed by a person of respectability and high social status in the course of his occupation.”

- 4.1.1. One needs to interrogate the notion that it is necessary to have a distinction between ‘white collar crime’ and ‘ordinary crime’? Is it not the case that the intentional or reckless pollution of a drinking water supply is arguably as much a “criminal” act as an intentional or reckless assault? In both sets of circumstances, there is risk posed to the lives and/or health of others.
- 4.1.2. Some wrongs are strictly economic in nature and affect property rather than direct harm to the person. They often occur outside ‘the course of one’s occupation’ e.g. fraudulent claims made against insurance companies – thereby demonstrating the limitations of Sutherland’s definition.
- 4.2. Another distinction has been drawn between ‘ordinary crime’ and ‘regulatory offences’ – acts that are intrinsically wrong or evil with an identifiable victim versus those that have been deemed wrong through legislation where it is difficult to identify the victim.
 - 4.2.1. Such wrongs are tangential to economic activity and include revenue offences, competition offences, company law offences, environmental offences and health and safety offences.
 - 4.2.2. The Gardaí model of dealing with wrongdoing in an accusatory adversarial common law criminal justice system, is a deterrent methodology with sanctioning.
 - 4.2.3. Regulatory agencies, (health and safety authorities, health boards, local authorities, competition authorities, consumer protection bodies, revenue commissioners, social welfare agencies etc.) follow an Administrative Law model common in the inquisitorial mainland European systems of Criminal Justice¹ as they opt for compliance strategies that use all available means to ‘persuade’ the offender to comply with regulations with prosecution regarded as a measure of last resort.
 - 4.2.4. This different approach may send out a message that there is a policy acceptance of a two-tier system for wrongdoers, which favours Sutherland’s person of ‘respectability and high social status’.

5. Necessity to reflect parity with currently implemented criminal investigation practices

- 5.1. Ultimately all criminal wrongs against our citizens are connected and the type of perpetrator (individual or a group acting in consort) is just one element of the wrong committed against society. Creating distinctions of

¹ It might be useful, in the context of this discussion, to link into work at European level in which Ireland engages, regarding the Third Pillar of the Maastricht Treaty.

'blue collar' and 'white collar' crime have resulted in the citizen's perception of a structure of dealing with criminality based on class.

- 5.2. Fraud is not a specific criminal offence in itself. It is merely an umbrella term for such offences as theft, deception, false accounting, forgery, counterfeiting, unlawful or unauthorised use of computers, possession of certain articles, breach of company legislation and money laundering.
- 5.3. The categories of perpetrators of fraud include those working within their occupations i.e. Managers, Directors, Employees, Contractors, Suppliers, Customers, Consultants and also includes Opportunists.
- 5.4. Therefore these crimes of dishonesty occur across all strata of society and they democratically do not distinguish between Sutherland's 'person of respectability and high social status' and other members of society.
- 5.5.** It is necessary therefore to reflect the democracy of the umbrella that accommodates all of these offences, by ensuring that all citizens can rely on the certainty that the same focus and level of investigation applies to the alleged wrongdoer, regardless of perceived social status. The fact that the offence originates in either 'ordinary' criminal legislation or 'regulatory' legislation should not create any real or perceived distinction in the manner in which the alleged wrong is investigated.

6. The imposition of principles of proportionality in the sanctions that are imposed

- 6.1. ACJRD has had the benefit of reading a copy of submissions to the White Paper on Crime Discussion Document No. 3 submitted by Dr. Shane Kilcommins
 - 6.1.1. ACJRD concurs with the opinions expressed therein which recommend that no distinction should be afforded to the perpetrator of a white collar offence with regard to the range of sanctions currently available to the Criminal Justice System in its processing of 'ordinary crime' including imprisonment where that is the proportionate response.

7. Conclusion including responses to the 'Questions for Consideration' in the discussion document

- 7.1. Are there **legislative, procedural or other approaches in relation to white collar crime being applied in other jurisdictions** which would have value in Ireland?
 - 7.1.1. We may firstly need to **progress matters** at home that have **already been identified**:

- 7.1.1.1. The Recommendations of the **Law Reform Commission (2009) Consultation Paper** on Documentary and Electronic Evidence should become manifest in legislation
- 7.1.1.2. The Recommendations of the Government Advisory Committee on Fraud 1992 and the **Fennelly Committee's Report** on Jurisdiction regarding the introduction of **pre-trial hearings**. If the defence and prosecution were required to agree on non-contentious evidence, trials could be restricted to the core contentious evidence thus shortening their duration and associated costs.
- 7.1.2. **New Legislation** may be required:
 - 7.1.2.1. Introduce legislation to adapt to the nature of the necessary detention for questioning
 - 7.1.2.2. Progress the Prevention of Corruption (Amendment) Bill
 - 7.1.2.3. In Fraud cases some changes in the Law of Evidence would greatly assist: a) Where orders are served for the production of materials it would assist investigations if the recipient of the order was obliged to give a written statement explaining the documentation, accepting its origin and/or generation. b) It would also be helpful if the production of non-contentious evidence by way of certificate under the Criminal Justice (Miscellaneous Provisions) Act 1997 was reviewed. c) Consider extending the application procedure under S7A of the Bankers Book Evidence Act 1878 by a Superintendent, to an Inspector or Sergeant.
 - 7.1.2.4. Restructure Company Law
 - 7.1.3.1 Conclude the process that has being in existence for in excess of nine years now to create single Companies Act
 - 7.1.3.2 Restructure the law so that it will be easier to follow
 - 7.1.3.3 Refocus on small private companies rather than public limited companies
- 7.1.3 Research best practice**
 - 7.1.3.4 Explore through research the viability of introducing Non Jury Trials, or Professional Juries or Special Judicial Panels that have financial qualifications
 - 7.1.3.5 Consider the introduction of formal Plea Bargaining strategies
 - 7.1.3.6 Gather some empirical data on a) the extent of White Collar Crime and b) its cost to the state in terms of injured parties c) its cost in terms of non-compliance and subsequent prosecution.
- 7.2** In the context of regulatory crime, **how can an effective and robust regulatory system be best enforced?**

- 7.2.1 See point 6 above
- 7.3 In tackling white collar crime what specific criminal justice strategies might be effective?**
- 7.3.1 Apply the criminal justice procedures that are in place regarding 'ordinary crime'. The fact that the offence originates in either 'ordinary' criminal legislation or 'regulatory' legislation should not create any real or perceived distinction in the manner in which the alleged wrong is investigated (point 5.5 above).
- 7.4 How best can a response to organised and white collar crime be developed across the private sector and communities?
- 7.4.1 See para 2.1 above
- 7.5 How can **challenges in terms of investigation, prosecution and sentencing of white collar crime cases be overcome?**
- 7.5.1 Above responses have addressed this question
- 7.6 Is there sufficient awareness of the nature and costs of the crimes described in this document? If not, how might that awareness be increased?
- 7.6.1 A multi-agency collation of data regarding the instances of white collar crime and the cost to society.
- 7.6.1.1 One of the consequences of the distinction between ordinary crime and regulatory crime is that there is a facility to correlate cumulative statistical data on the former but there is no comparable cumulative statistical data across all aspects of White Collar Crime that can influence necessary criminal justice policy-making in the regulatory crime sphere.
- 7.7 Are there evolving aspects of these crimes which need to be anticipated and for which existing responses will not be adequate?
- 7.7.1 As a large proportion of our regulatory legislation emanates from or has comparators in the EU, there should be constant liaison with relevant institutions and a maximization of their associated resources.

ACJRD hopes that The Department of Justice and Law Reform finds the views herein expressed helpful in their White Paper on Crime deliberations.

Maura Butler, Chairperson

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