NATIONAL ARCHIVES

IRELAND

Reference Code:	2006/133/714
Title:	Memorandum for Government from the Department of Justice on proposed anti-terrorist legislation, including a note circulated by the Minister for Defence, Patrick Donegan, TD, titled “Powers of Search and Arrest”
Creation Date(s):	13 August 1976
Extent and medium:	13 pages
Creator(s):	Department of the Taoiseach
Access Conditions:	Open
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Oifig an Aire Dli agus Cirt

S. 20/76 13 August, 1976.

MEMORANDUM FOR THE GOVERNMENT

Proposed anti-terrorist legislation

1. The Minister for Justice wishes to refer to the discussion at the Government meeting on 10th August relating to the Provisional Draft of the Criminal Law Bill. It will be recalled that certain matters were raised at that meeting which the Minister undertook to have examined further. It appears to the Minister that the most satisfactory procedure, from the point of view of the Government, is that he should submit his comments on those matters now, so that the Government may reach final conclusions on them, rather than to submit the comments later with a revised version of the Bill which might not be fully acceptable to the Government.

Possibility of banning An Phoblacht, etc.

2. There is no power to ban (on grounds of sedition, etc) a publication printed in the State. Section 11 of the Offences against the State Act, 1939, gives power to the Minister for Justice to impose a three months ban on a newspaper or periodical publication printed outside the State but the powers relevant to material printed in the State are those set out in section 10 of the 1939 Act - though the section is not confined to material printed in the State - and the gist of that section is to make it a criminal offence to print, publish, distribute, or sell matter which is treasonable, seditious, or "incriminating". Section 10 expressly prohibits the publication in newspapers, etc. of any letter, article or communication which is sent or contributed or purports to be sent or contributed by or on behalf of an unlawful organisation (incidentally, it is section 10 which prohibits the use of the initials "IRA" because the 1939 Act defines "treasonable document" as including "a document in which words, abbreviations, or symbols referable to a military body are used in referring to an unlawful organisation").

3. It is generally believed, and may reasonably be taken as fact, that sometime in the late Sixties the then Taoiseach met newspaper editors (as a group) and appealed to them to exercise restraint in the matter of according status and even glamour to people commonly accepted as being IRA leaders and that, as a kind of quid pro quo, he agreed to a request which newspapers

had been making for some years, namely, that they could assume that no action would be taken against them merely for the use of the term "IRA" (Newspapers claimed that, when reporting a court case in which a woman had shouted "Up the IRA", they had to represent her as saying "Up an unlawful organisation"). On the other hand, there was no suggestion at any time that any similar "understanding" was even sought, much less entered into, in relation to the reporting by newspapers of statements purporting to come from the IRA. However the situation gradually developed, largely if not entirely as a consequence of the intensification of violence in Northern Ireland, where the reporting of claims and counter-claims (including statements directly attributed to the IRA) relating to shootings, bombings, etc. became virtually routine features of the newspapers and radio and television even though this involved, in very many cases, clear breaches of section 10 of the 1939 Act. The Media here tended to "insure" themselves against interference by periodic references to the "letter of the law" and how ridiculous it would be to invoke it having regard to the fact that the BBC, ITV, not to mention English (and Northern Ireland) newspapers had no inhibitions about publishing IRA statements.

4. Reverting to the question of An Phoblacht , it has already been mentioned that existing law makes no provision for a ban as distinct from a prosecution for the publication of material that is seditious, etc. Since the essence of a ban, as distinct from a prosecution, is that it is directed at <u>future</u> issues of a publication, that is to say, at material as yet even unwritten, it is clear that the difficulties in the way of legislation for this purpose would be grave if not quite insurmountable. Even if the obvious constitutional difficulties could be got over (as might be possible by, for instance, including a provision in a Bill to be enacted pursuant to the "emergency" resolution), it would be virtually impossible to apply it with any degree of apparent fairness and equally difficult to apply it effectively since it would be a simple matter for a publication to re-appear under a slightly different title but in circumstances where readership would readily recognise what it was.

5. An Phoblacht is not the only publication of its kind - for instance, the Republican News , which may be taken as the organ of the Belfast Provisionals, is freely sold in Dublin and, while emphasis varies from time to time, there are times when it can make An Phoblacht seem like a pacifist publication. However,

it is also to be noted that both An Phoblacht and Republican News - and other publications as well - are on open sale in Northern Ireland. It is also a fact that the great bulk of the material in An Phoblacht is such that there would be no possible way in which it (i.e. the material) could be made the subject of a prosecution. On the other hand, if particular items are singled out as the subject for a prosecution, the problem arises that, if the enforcement of the law is to have any appearance of impartiality, similar consideration would have to be given to the Dublin newspapers for publishing inflamatory speeches by IRA leaders who are either living in the North or going to the North from here to make speeches in the North. Examples of this have arisen even within the last week. Again, there is the obvious and well orchestrated campaign to undermine the morale of Prison Officers in Portlaoise and Limerick, a campaign which is aided and abetted by certain journalists well known to be sympathetic to the IRA and who apparently are given unfettered freedom even by newspapers that claim to be opposed to everything the IRA stands for. This publicity campaign calculated to damage the morale of Prison Officers presents a real security risk, all the more so when there is a parallel campaign by a group called the Prisoners Rights Organisation with contacts not only in newspapers but also in RTE.

6. Members of the Government will be aware that the daily newspapers here continue to carry IRA bulletins openly identified as such, frequently going as far as to include the standard "signature" ("P. O'Neill, Runai"). From observation it would seem that R.T.E. do not give the script of IRA statements, as such, confining themselves (in recent years) to reporting, as news, that such and such a thing was claimed or denied, as the case may be, by the Provisionals. In fact, R.T.E. are not bound by the terms of section 10, which relates only to the printed word.

7. Any question of introducing "new law" in this area would clearly raise immediately the question of the provisions of section 10, which have become largely or entirely a dead letter.

8. The Minister thinks it unnecessary to emphasise further the complexities that arise in this matter but at the same time he thinks it only realistic to recognise that the general situation could quickly deteriorate to a point

where there would be no alternative but to recognise the important and conceivably vital role of the communications media if the institutions of the State were in serious jeopardy or the future of this Island in the balance. If it became necessary to take action to ensure that the media were not being used to destroy the State, the Minister would think that the very first step that would be needed would be that Ministers and others should help the public to appreciate the fact that, whereas Northern Ireland is only a small part of the United Kingdom, and the British can afford to tolerate situations of very high risk in the North without placing Britian herself in jeopardy, the stakes for the people of this country are enormously higher, and that, in addition, our resources are so much more limited that a policy which the British could afford to underwrite would not be open to this State.

Possibility of proscribing Sinn Fein, and perhaps some other Organisations, and closing of offices

Closed 12 months + forfeiture

9. Section 25 of the Offences against the State Act, 1939, provides that an officer of the Garda Siochana of the rank of Chief Superintendent or higher may, in certain circumstances, close a building for up to three months and may extend that order for a further three months - any aggrieved person having a right of appeal to the High Court. The circumstances in which the Gardai may make such an order are that they are "satisfied that a building is being used or has been used in any way for the purposes, direct or indirect, of an unlawful organisation". There is no other power in the law to make such an order and while, as members of the Government are aware, the Sinn Fein offices in Kevin Street were closed, it was not on the basis that they were the offices of Sinn Fein as such.

10. The Garda Officer who signs the closing order is liable to be called (as he was on the last occasion) to defend his action in the High Court. Even a moderately competent Counsel would be in a position to do a great deal of damage in cross-examination. On the last occasion, the challenge in the High Court did not relate to the Sinn Fein offices but to another building - and the challenge failed. It could not be assumed that if the closing order were now made, an appeal would not be made in relation to the Sinn Fein offices or that, if it were, it would fail. There would be an internal propaganda bonus in successfully closing "Kevin Street" and undoubtedly a substantial external bonus too. However, if an appeal succeeded the resultant harm both internally and externally would be far greater than the possible gain. Internally Sinn Fein would have achieved a certain validation by being blessed, as it were, by the Courts. Externally it would be represented or misrepresented in a way analagous to what has happened in regard to the High Court decisions refusing extradition in "political" cases. In addition, it could severely damage Garda morale as the Force, represented by a senior officer, would be seen to have been beaten by Sinn Fein in the Courts. On balance, the Minister would recommend that the question of closing Sinn Fein premises be left in abeyance for the time being.

11. The proscription of Sinn Fein/itself would present much the same kind of very difficult problems as action against An Phoblacht. The making of a suppression order is (under section 19 of the 1939 Act) a matter for the Government and an appeal lies to the High Court under section 20. It appears to the Minister to be clear that, if the Government were to make such an order, they would have to do so on the basis that there was at least a strong risk that an appeal would be made and the consequences of that would need to be weighed. The question that is thereby raised is what evidence the Government would have in the High Court action. If the contention were to be that Sinn Fein is simply the I.R.A. under another name (which, on a practical level at least, is certainly not an unreasonable contention) the question arises why its members have not, on the basis of that same evidence, been prosecuted for membership of the I.R.A. In fact, the Minister considers that a very respectable argument could be adduced for the proposition that there can be no such thing as a lawful "political" wing of an organisation with a self-confessed military - and unarguably unlawful - wing, at all events when there is, to say the least, a high degree of common membership and common leadership. That argument would be on the lines that it is impossible for a person simultaneously to be an advocate of unlawful (military) means and not be an advocate of such means and that Sinn Fein's provably close links with (if not identification with) the I.R.A. make it impossible to deny that Sinn Fein is in fact a supporter of violent subversion, etc. - and therefore an illegal organisation.

12. If, on the other hand, it was thought that such an argument would be unsustainable, the Minister would find it difficult to be in any way sanguine about the prospects of successfully defending a proscription order in a High Court challenge. If Sinn Fein is not in fact the I.R.A. under another name or something so inextricably bound up with it as to be inescapably branded with its illegality (and in this connection it is relevant to note that the 1939 Act declares unlawful many types of organisation on the basis of their aims and activities as distinct from doing so by reference to them by name) it is

difficult to see how the supression order could be upheld. To put the point in a slightly different way, if Sinn Fein are engaged in activities of a character which brings them within the ambit of the 1939 Act, these are not activities separate or distinct from those of the I.R.A. and, if those activities can be effectively laid at the door of Sinn Fein, its members could successfully be prosecuted. It is, however, a question of "if".

13. The proscribing of organisations depends for its effectiveness on the willingness of people to adhere to a particular name. Both the I.R.A. and Sinn Fein (as distinct from, for instance, the I.R.S.P.) have the weakness (as well as the strength) that flows from the historic associations which these names have - that is to say, they cannot easily evade a prohibition order by resorting to the device of changing their name. This does not mean, however, that the activities now being carried on by Sinn Fein would have to cease. There is no difficulty in continuing to hand out the propaganda such as that contained in An Phoblacht without any reference to the name Sinn Fein - indeed the term 'Republican Movement" is already well established and of its nature is scarcely proscribable, Accordingly, in the Minister's view, a proscribing order directed at Sinn Fein would bring very little and perhaps nothing at all by way of practical advantage and would provide "The Republican Movement" with an opportunity to engage in a massive propaganda campaign based on the claim that the Government had now openly decided to make it impossible for "Republicans" to engage in political activity, that this made a mockery of Government challenges to the I.R.A. to test their support at the ballot box, etc, etc, Insofar as Sinn Fein leaders are engaging in I.R.A. activities, the present law is as adequate as the Minister thinks it could reasonably be to enable them to be convicted - that is, in broad general terms and without prejudice to the question of amendments here or there to improve the prospects of getting conviction. In this connection the Minister would here make a point which could equally well be made in relation to many other aspects of the problem of countering I.R.A. activity and that is that account must always be taken of the not insignificant sector of the public which tends to be ambivalent either directly in relation to the I.R.A. or indirectly in relation to "anti-British" activities. The Minister is very far from suggesting that people in this group must not be offended but, in what is in

part a battle for the "minds and hearts" of the public, he would suggest that any course of action that would lend itself to easy exploitation should not be embarked on unless it was fairly clear that there would be a real gain outweighing the propaganda loss.

Question of deleting those provisions of the law under which membership of the I.R.A. may be regarded as only a summary offence

14. The general feeling at the Government meeting was that there was something basically inappropriate in the idea that membership of the I.R.A. could be merely a summary offence. Moreover, as the Minister understood it, there was a definite feeling that if there were some very serious reason for retaining the present law under which such an offence can be regarded as a summary one, the proposal in the draft Bill to increase the maximum penalty on a summary charge from £50 to £300 should be changed so as to make the figure £500.

15. There are certain potentially serious issues here which the Minister requests the Government to consider and then to give a decision as to what should be done.

16. Although there are cases - and quite a few cases - were youngsters are inveigled into the I.R.A. by emotional appeals, by free drink and by monetary hand-outs which are a serious temptation to unemployed people and although this problem is compounded by the fact that some of the people who are thus inveigled into the organisation are, at best, immature even for their age and who, if they committed "ordinary" crime, would be treated sympathetically and put on probation, the Minister would nevertheless be disposed, if there were no other problem, to take the view that this may very well be a situation in which the broad public interest required that a very "hard" attitude be shown in relation to I.R.A. membership and that this might have to prevail over the interests of the people just mentioned. There is, however, another problem, and, as the Minister sees it, a very serious one. Despite all the "troubles" since 1939, it is a fact that the norm in this State has been a situation in which there is in being no Special Criminal Court though, obviously, there has been no time throughout that period in which there has been no "I.R.A.". The Minister would think that ordinary prudence makes it necessary to act on the basis that there will again come a time when there will be no Special Criminal Court - indeed, if there were some kind of

generally acceptable "settlement" in the North, even though there were formal acceptance of it by the I.R.A. etc., it is easy to envisage the possibility that the abolition of the Special Criminal Court here might become highly desirable as evidence of a general "de-escalation". Nevertheless, anti-I.R.A. legislation would, almost certainly, still be necessary. Going on past experience, the Minister would emphasise that convictions for membership of the I.R.A. can be expected (in the absence of a Special Criminal Court) only in the District Court - that is to say, where there is no jury. The Minister has adverted to the possibility that new legislation could be introduced when the Special Criminal Court ceases to exist, but what would be involved then would be the introduction of a provision saying that henceforth membership of the I.R.A. could be treated as a summary offence. The Minister would find it difficult to conceive of any circumstances in which the introduction of such legislation would be anything other than gravely damaging, all the more so since it would be impossible for the promoting Minister to admit that the offence was being "downgraded", not on the merits of the case, but simply because that was the only way to secure convictions.

17. The Minister is nevertheless fully in accord with the view expressed at the Government meeting that references in the new Bill to summary proceedings in the context of membership of the I.R.A. could be seen as taking from the normal seriousness of this offence and, while recognising that in one sense it is paradoxical, he suggests that perhaps the best solution would be to include nothing in the Bill about a summary offence (even though this means leaving the penalty at its present level of £50 maximum). In this way, the Bill itself would not raise the issue at all and if the issue were raised in debate, in the Oireachtas or otherwise, the Minister could take the line that since it was quite inconceivable in present circumstances that summary proceedings would be brought for such a serious offence unless the circumstances were such as to indicate beyond doubt that, because of youth or other circumstances, there was diminished responsibility, there was no need to alter the monetary penalty.

18. If, on the other hand, the concept of summary offence were to be excluded completely, the Minister would expect that the point would be raised that it would be impossible to justify bringing before the Special Criminal Court youngsters

of 15 or 16 and that the practical consequences of the change would be to make it impossible to prosecute such persons at all. There is, of course, provision in the law whereby in certain circumstances indictable offences may be prosecuted summarily but all the arguments against having it a summary offence would apply to that procedure and additional arguments besides.

Question of giving powers of arrest, etc. to members of the Defence Forces

19. As decided by the Government, discussions have taken place betweeen the Departments of Defence and Justice but, while the Minister for Justice is in favour of giving certain additional powers to members of the Defence Forces, he regrets to have to report that the difference of opinion is so great that there is no prospect whatsoever of an agreed recommendation emanating from inter-Departmental discussion and accordingly the Minister now seeks a Government direction.

20. The proposal of the Minister for Defence is understood to be that members of the Defence Forces, when engaged on patrol duties, etc, should have exactly the same powers as members of the Garda Siochana in relation to arrest and search of persons, vehicles, buildings, etc., this power to be given perhaps not by the proposed Criminal Law Bill but by the first ("Emergency") Bill so that the power would last for so long, but only for so long, as the "Emergency" continued. (As the Army act only "in aid of the civil power", these powers would, in a general sense, be exercisable only "at the request of the Gardai", but the intention, as understood, was that, once a general request had been made, this could be exercised in particular situations by Army personnel on their own initiative). Unfortunately, there has not been time to enable the Department of Defence to be invited to give written arguments in support of that proposal for incorporation in this Memorandum but the Minister feels that the argument in favour of the proposal can fairly be stated very briefly as being that this is considered to be the way to make available the maximum resources in countering I.R.A. activity.

21. Before commenting on the merits of that proposal, or mentioning his own ideas on the matter, the Minister thinks it necessary to say with all the emphasis at his command that all the indications are that such a proposal, or any proposal even approaching it, would be likely to be strongly and even bitterly resented throughout the entire Garda Force, in all areas and in all ranks. The Minister has not invited Garda comment on such a proposal, partly because he is in no doubt whatsoever what the response would be. His evaluation of the Garda reaction is not based on anything said by some small

group of Garda officers. Through meetings at Conciliation proceedings, at various Garda-sponsored functions and in other ways, there are numerous contacts between officers of the Department of Justice and members of the Garda Siochana of all ranks and the Minister himself has met members of various ranks. At the present moment relationships between the Garda Siochana and the Army are good and there is no reason to expect that this will not continue on the present basis. It would be unreal, however, to deny that throughout the Garda Siochana there is a watchfulness about any moves to involve the Army to any greater extent in what the Garda Siochana would see as a device to deprive them of jobs, of promotion, of overtime; and apart from those material considerations, it is an unquestionable fact that there is on the Garda Side a certain amount of professional jealousy. If this appears strange, it should perhaps be mentioned that it is not peculiar to this State - on the contrary, relationships between the two Forces here are far better than they are in the North.

22. The Minister would summarise the position about Garda attitudes by saying that he would find it difficult to think of any measure more calculated to do serious damage to Garda morale and provoke disaffection in the Force than a proposal that Army personnel should be given, even for a period of 12 months, "blanket" powers such as those proposed.

23. On the merits of the matter, there are serious practical difficulties. There are occasions, and enough of them to make a material difference, when the Garda Siochana for good and adequate reasons do not want a search made of a particular house, a particular area, or car or person, or when they do not want a particular person arrested or interrogated. Even with the unified command structure in the Garda Siochana, mistakes in this respect happen occasionally and lead to very serious complications. It would be very difficult to avoid more awkward situations if Army personnel were to act in matters of this kind on their own initiative or otherwise than with the specific knowledge and approval of the Gardai.

24. The wider the powers which the law is giving to members of the Garda Siochana, the greater the objections there would be to giving them to members of the Defence Forces. The Minister expects that it will be difficult

enough to secure general backing in Parliament and amongst the public for the measures now proposed even on the basis that they are in large measure confined to members of the Garda Siochana in so far as powers of arrest etc. are concerned.

25. The Minister considers that he may not have emphasised sufficiently, during the discussion on Tuesday last, that the Bill, as submitted, contains in section 7 a substantial widening of a power by a Garda officer to issue search warrants. At the moment that power is restricted to a power to search for documents but the new proposal is that it be extended, in effect, to evidence of any kind relating to the commission or intended commission of any of the offences relevant to I.R.A. activity. Part of that proposal is that the warrant may authorise the member of the Garda Siochana named in the warrant together with any other persons named therein to carry out a search. This was intended to cover (and indeed to relate primarily to) members of the Defence Forces but the matter can be made clearer by an express reference to the members of the Defence Forces, which would obviate the need to have particular members named in the warrant and the Minister proposes accordingly.

26. In addition, the Minister suggests for consideration a provision to the general effect that, where a Garda of Superintendent or higher rank requests the assistance of the Army for a specified purpose such as manning or mounting a road-block on a particular occasion, the powers of search of vehicles and persons in those vehicles which section 12 of the Bill, as submitted, would confer on the Gardai should also extend to members of the Army.

27. While the Minister has thought it right to emphasise in these comments the reaction to be expected from the Garda Siochana, which he regards as a matter of great importance in the context of successful maintenance of anti-I.R.A.

measures, he would also stress that he believes that there would be widespread public disquiet at the idea of allowing persons with no training of the kind given to the Garda Siochana to exercise rights of arrest, search, etc. in relation to ordinary citizens. Even though the Garda Siochana have special training, there is already a certain volume of complaint and a feeling of disquiet about the exercise of some police powers.

Question of Posters ("Join the I.R.A.") etc.

28. The Bill as submitted (section 6) is sufficient to enable persons who are found pasting-up or distributing such posters to be given long sentences (up to 10 years).

29. There are serious practical difficulties about any attempt to provide effective means to require owners to remove such posters.

30. Often, what is defaced is a temporary hoarding and ownership can be quite difficult to determine. It could be a Company (slow-moving) rather than a person and in either case the hoarding could be related to the site or to a building in progress and could be owned by a building contractor or sub-contractor. By the time ownership is ascertained weeks may have passed. Then, private owners and their workforce may be intimidated and many workers could be afraid to remove posters. Attempts at prosecution would be open to various exculpatory pleas (lack of knowledge, inability to make arrangements, etc.) and penalties would be unlikely to be serious.

31. While posters can be removed (not necessarily easily), no such action is open against the aerosol-sprayed "Join the IRA". In such cases, the owner is himself seriously aggrieved by what to him is malicious damage requiring complete and expensive repainting of an entire wall, etc.

32. All in all, the Minister believes that the law would be likely to be a dead letter, if indeed it would not provoke a campaign of "postering" as an easy means of "showing-up the authorities". At best, its enforcement would take up a great deal of police time.

New Item

Penalty changes in section

33. The Minister proposes to add to the Bill a new provision increasing the maximum penalty for participation in a "banned" meeting from £50 or 3 months or both to £500 or 12 months or both.

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Circulated by M/D at todays meeting 13/8

POWERS OF SEARCH AND ARREST

1. In the aftermath of a serious crime (kidnapping, murder, jail break, bank robbery) the numbers of Gardaí available for checkpoints and other urgent duties may not be capable of providing the immediate response in volume to successfully apprehend the criminals.

2. The present position is that Army personnel act only in Aid of the Civil Power for protective purposes, in the presence of a Garda at the place of action; or as a deterrent at jails, vital installations etc.,

3. What is desired is that troops, under the command of a Commissioned or Non-Commissioned Officer, would have the powers of search and arrest (e.g. at check-points, on patrols, at vital installations etc.) on the request for their services from a member of the Garda Siochana not lower than the rank of Superintendent.

NOTE:

Obvious merits are that it makes best use of both forces with the maximum speed. For instance, on a prison break-out, armed bank raid, or bombing, a Standing Operational Procedure could have been agreed by high ranking Officers of both forces to be put into immediate operation, producing a much more efficient and more sweeping reaction.

Each request for assistance in this context could, unless renewed, be limited to a period not exceeding twenty-four hours.

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