

**BALANCE IN THE CRIMINAL
LAW REVIEW GROUP**

FINAL REPORT

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15 MARCH 2007

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Letter from Chairman to Tánaiste

Michael McDowell, SC, TD,
Tánaiste and Minister for Justice, Equality and Law Reform,
St. Stephen's Green,
Dublin 2

March 15, 2007

Dear Tánaiste,

On behalf of the Balance in the Criminal Law Review Group, I have pleasure in enclosing the final report of the Group.

You will note that our Report makes certain recommendations regarding the reform of aspects of criminal law, criminal procedure and the law of evidence in criminal cases with a view to striking a fair balance between the rights of the community in general and those of victims of crime in particular on the one hand and the traditional rights of an accused as protected by the Constitution, the European Convention of Human Rights, statute and, indeed, the common law on the other.

Yet I cannot help thinking that society must not ignore the fact that the majority of prisoners are drawn from the more disadvantaged sections of the community and that any balanced response to the problems of crime must also have regard to this factor. A large number of prisoners are the product of dysfunctional families and have experienced significant educational, housing and other social disadvantages. Many of them have only ever encountered hardship, disadvantage and failure in their lives and they have often fallen prey to the evils of alcohol and drug addiction. While not for a moment excusing their crimes, the fact remains that some at least of the prison community can justly say that they too are also in one sense the victims of society. The principle that we must hate the sin, but love the sinner is at least two thousand years old, but yet I fear that as a society we have sometimes lost sight of this fact. Although these are matters which stray well beyond the boundaries of the work of the Review Group, these are factors which I nonetheless consider cannot be ignored in the wider public debate.

Kind regards,

Gerard Hogan

Chairman, Balance in the Criminal Law Review Group

Introduction

The Review Group on Balance in the Criminal Law was established by the Tánaiste and Minister for Justice, Equality and Law Reform on 1st November 2006, and was required to report by 1st March 2007.

The Review Group's terms of reference were to consider and examine the following issues:

- "the right to silence
- allowing character evidence of an accused
- the exclusionary rule of evidence
- requiring the accused to outline the nature of his defence before or at the commencement of a trial
- re-opening new evidence
- nullifying an acquittal where there is evidence of jury or witness tampering
- "with prejudice" appeals in the case of wrongful acquittal
- extending alibi evidence rules to other analogous situations
- allowing submissions by the prosecution before sentencing
- modifying the rule in relation to hearsay evidence

... and any other proposals regarding criminal law, criminal evidence and criminal procedure that may come to the attention of the Group in the course of the review”

On the 19th December 2006, the Tánaiste also requested the Review Group to consider the issue of admissibility of video evidence in circumstances where the accused person remains silent.

The members of the Review Group are as follows:

- Dr Gerard Hogan SC, Law School, Trinity College, Dublin (Chairman)
- Barry Donoghue, Deputy Director of Public Prosecutions
- Professor David Gwynn Morgan, Faculty of Law, University College, Cork
- Dr Richard Humphreys, Barrister-at-Law
- Tony McDermottroe, Assistant Secretary, Criminal Law Reform and Human Rights Divisions, Department of Justice, Equality and Law Reform
- Caitlín Ní Fhlaitheartaigh, Advisory Counsel, Office of the Attorney General
- Ken O’Leary, Assistant Secretary, Crime, Mutual Assistance and Extradition Divisions, Department of Justice, Equality and Law Reform
- Nora Owen, Former Minister for Justice (1994-1997), member Commission for the Victims of Crime.

The Review Group would first wish to express its heartfelt thanks to the three members of its Secretariat: Ann Barry, Assistant Principal, Caroline Davin-Power, Executive Officer and Peter Jones, Assistant Principal, of the Criminal Law Reform Division of the Department of Justice, Equality and Law Reform. All three responded promptly to our requests for documentation and research and organised the meetings of the Group which were invariably held at short notice and out of ordinary office hours. The Chairman, with the complete assent of the other members of the Review Group, would particularly wish to register special recognition of the exceptional contribution of Dr. Richard Humphreys.

The Review Group advertised for submissions and also had meetings with a number of interested parties including victims' groups, members of the judiciary, senior members of An Garda Síochána, the Director of Public Prosecutions and Chief Prosecution Solicitor, journalists, representatives of the Human Rights Commission and legal practitioners. We list in Appendix 1 the persons we met or from whom written submissions were received.

The Review Group also presented the Tánaiste on February 5, 2007 with an interim report containing provisional recommendations on the right to silence. Observations received on that interim report were taken into account in preparing this final report.

As stated above we should also emphasise that, given that the terms of reference of our review constrained us to report by 1st March 2007, we have taken the view that in certain cases, various issues drawn to our attention or considered by us warrant further study and we have sought to identify those issues later in this report.

The context of the Review Group's deliberations is the need to keep under review, in a changing society, legal rules that have developed over a long period of time. O'Higgins C.J. in *Re Criminal Law (Jurisdiction) Bill 1975*¹ speaking of the constitutional guarantee in Article 38.1 that no-one shall be tried save in due course of law, commented that the concept of due course of law requires:

“a fair and just balance between the exercise of individual freedoms and the requirements of an ordered society.”²

In considering this proposition it must be recalled that individual freedoms are not the monopoly of the defendant and that the State also has a primary responsibility to vindicate the rights of the victim. The criminal law is a significant mechanism for vindicating those rights. At the same time, the criminal trial cannot simply be regarded as the equivalent of a civil action between a plaintiff victim and a defendant accused where the rights of

¹ [1977] IR 129.

² [1977] IR 129 at 152

both parties are absolutely equal. Certainly in the case of non-minor offences, the State has long since claimed a monopoly to prosecute such offences, in the words of Article 30.3 of the Constitution, "in the name of the People." Moreover, given the profound implications for the liberty, reputation and livelihood of an accused charged with a serious offence, society has rightly ordained that an accused enjoy a series of special protections designed to ensure fairness and to guard against a possible miscarriage of justice. That, at any rate, is the theory of both the Constitution and the European Convention of Human Rights.

The Review Group takes the view that the fundamental principles of our criminal justice system are sound, including the adversarial nature of the trials, the general rule of trial with a jury, the requirement that the burden must rest with the prosecution and the requirement that guilt be proved beyond a reasonable doubt. The Review Group considers that these traditional fundamental features of the system are necessary and appropriate and would not wish to see these elements changed.

Indeed the very fact that the system of jury trial is fundamental to our ordinary criminal law explains to a large extent many of the complexities in our criminal law, evidence and procedure. Other countries which do not have the tradition of jury trials have, in many respects, radically different laws of evidence, but

these systems are not a necessarily reliable guide as to how Irish law should develop. The Group feels that the fundamental rules of the Irish criminal justice system are working satisfactorily and, in any event, radical change to those fundamental rules is outside our remit.

We also emphasise that a primary consideration in our deliberations has been to avoid miscarriages of justice and to ensure that the due process guarantees contained in Article 38 and Article 40 of the Constitution and Article 6 of the European Convention of Human Rights are guaranteed. Those considerations have been to the forefront in, for example, our recommendation against any general relaxation of the rules restricting evidence of previous bad character.

The fact that the onus rests on the prosecution, which must prove its case beyond reasonable doubt, illustrates that the concept of “balance” in the criminal justice system is not something that can be pursued in an absolutist way. As we have already pointed out, there is not and cannot be any absolute “equality of arms” as between the prosecution and the accused in a criminal proceeding. Nonetheless, the rules of the justice system must seek to achieve fairness. At the same time, we note that while the presumption of innocence means that the prosecution must prove the case beyond reasonable doubt, it does not follow from this that the presumption of innocence also requires the numerous auxiliary

advantages which (in law or in practice) the defence presently enjoys. There may be particular policy reasons for, by way of example, the exclusionary rule, the rule prohibiting prosecution appeals or the requirement that only the prosecution must give advance notice of its case. The short point, however, is that these principles are not mandated by the presumption of innocence and that it would be perfectly possible to have a fair system of criminal justice without these rules, at least in their present form.

We consider that some element of re-balancing of the existing rules is required to enable the courts to arrive at a just and fair result in criminal cases. Many legal rules were developed prior to the universal availability of legal aid in criminal cases for those unable to pay for legal representation out of their own means. In addition, some jurisprudence since the 1960s has had the effect of extending the protections available to defendants, including the development of an extensive exclusionary rule where evidence is generally excluded where the accused's constitutional rights have been infringed. Criminal defendants now also have the benefit of statutory human rights protection under the European Convention of Human Rights Act 2003.

Another related context is that the Review Group has been conscious of a sense that crime has gradually been becoming more violent and offenders more ruthless. While criminals have become more sophisticated and dangerous, at

the same time the activities of the Garda Síochána in combating crime have been subject to increased scrutiny in recent years, in itself a commendable development. The cumulative effect, however, of all of these developments may have been to gradually tilt the balance in favour of the criminal defendant.

In much traditional analysis, international human rights instruments are designed to benefit the defendant in a criminal case.³ But criminal law does not and cannot operate in a vacuum entirely separated from the victim's rights, and we emphasise the fundamental proposition that the prosecution of offenders through the criminal law is a legitimate and, indeed, essential mechanism for vindicating the human rights of victims.

The Review Group is conscious of a growing recognition of the need to protect the rights of the victim. Article 40.3.2 of the Constitution guarantees that the State shall protect from unjust attack, and in the case of injustice done, vindicate the life, person and property rights of every citizen. In the view of the Review Group, this provision must imply a right of victims of crimes affecting their life, person or property to the effective protection of the criminal law.⁴ There is growing judicial authority for this view. In *B. v. D.P.P.*⁵, Denham J. made clear that a defendant's right to reasonable expedition in the prosecution of an offence

³ See Trechsel, Stefan, *Human Rights in Criminal Proceedings* (Oxford, 2005) p. 90.

⁴ See James Hamilton "Does the Irish Legal System favour the Criminal?", opening address at the Law Society Debate, Letterkenny Institute of Technology, 3rd March 2005.

⁵ [1997] 3 I.R. 140.

alleged against him, had to be balanced with “the community’s right to have criminal offences prosecuted”⁶, a right also referred to by Hardiman J. in *Scully v. D.P.P.*⁷

Article 2 of the European Convention on Human Rights also entails an obligation on the State to secure the right to life, including a requirement to put in place effective criminal law provisions to deter the commission of offences against the person.⁸ The leading case of *X and Y v. Netherlands*⁹ establishes that the Convention does not merely prohibit the State from interference with rights but may impose positive obligations inherent in an effective respect for rights. In *Doorson v. Netherlands*¹⁰, the European Court of Human Rights held that the right of a defendant to a fair trial under Article 6 of the Convention must be balanced against the interests of witnesses in personal security and privacy, and the same point might be made about the rights of victims generally in the criminal process. In making these comments the Review Group is not asserting that current Irish law is contrary to the European Convention of Human Rights, but rather that the rights of the victim,¹¹ including the right to an effective investigation and, where the evidence and public interest so indicates, prosecution of alleged

⁶ [1997] 3 I.R. 140 at 196.

⁷ [2005] 1 I.R. 242.

⁸ See the decision of the European Commission of Human Rights in *Taylor Gibson and King*, application 23412/94, D and R 79-A (1993) page 127 (136), James Hamilton, *op. cit.*, p. 5; Paul Anthony McDermott, “Equality of Arms? Balancing the Rights of the Prosecution and the Defence”, speech to 7th Annual National Prosecutors’ Conference, Saturday, 13th May 2006.

⁹ (1986) 8 E.H.R.R. 235.

¹⁰ (1996) 23 E.H.R.R. 330 para. 70.

¹¹ See in particular article 53 of the Convention.

offences require a new and invigorated emphasis in the overall balancing of rights in the criminal justice field.

It would be wrong to look at the matter exclusively from the viewpoint of the victim. The offender too can benefit from being required to take responsibility for his or her offence – a point made forcibly to us in submissions from victims’ relatives. Responsibility can be the beginning of rebuilding the offender’s life. It is in that spirit that Frankl observed that “the criminal has the right to be punished.”

This is accordingly an appropriate juncture to emphasise both the value and the limitations of this Report. As noted, our terms of reference direct us to certain evidential and procedural rules of the criminal trial. But the trial itself is located within the criminal procedure system which includes, in addition to the trial, investigation by the Garda Síochána; prosecution through the medium of the Garda Síochána and the Director of Public Prosecutions; the provision of court premises and staff by the Courts Service; the independent judiciary and jury. If the accused is convicted, the sanctions which may be imposed draw in further bodies such as the Probation or Prison Services; as well as the Parole Board. Ranging even further we find that crime and the criminal procedure system each sit within and are influenced by our entire society. And there have been huge changes in this over the past generation. Relevant changes have

occurred in relation to: the family structure within which children are brought up; the closeness of neighbours; patterns of employment; and deference to the established order, including the Garda Síochána, the courts and the law. The Group is, inevitably, aware of the complex social factors which form the background against which crime takes place, but obviously these are wider matters which fall outside our limited remit. Clearly it is not within our terms of reference to address the question of tackling the causes of crime, or to say where the balance lies between ensuring that the offender takes responsibility for their crime on the one hand, and ensuring that society affords the offender rights as well as holding them to their responsibilities on the other.

It is therefore outside our terms of reference to discuss the proposition that large numbers of offenders are the product of dysfunctional families and have experienced significant educational, housing and other social disadvantages. The duties of society in this regard are matters which stray well beyond the boundaries of the work of the Review Group, but are factors which nonetheless cannot be ignored in the wider public debate.

We outline these elements in order to make the simple point that our own review is necessarily focused on one corner of a very wide field. It is certainly true to say that, even if our changes are implemented promptly and to the letter, they

would simply be one element in addressing what is known as ‘the Problem of Crime’.

With these considerations in mind, the Review Group believes that a number of features of the criminal justice system now warrant review and examination and has set out in this report the group’s analysis and conclusion in respect of the range of issues identified by the Tánaiste as well as other issues brought to the group’s attention in the course of the review.

Issue 1 - The Right to Silence

Introduction

As we have already noted, the Tánaiste asked the Review Group to produce an interim report on the right to silence by January 31, 2007.¹² The Interim Report was delivered to the Tánaiste on February 5, 2007.

There were certain issues left over to the Final Report in that Interim Report. In addition, the Review Group has taken the opportunity to take into account a number of suggestions which were made in respect of the Interim Report.

The right to silence

What is loosely termed the right to silence has various dimensions. Broadly speaking, the right to silence is held to mean that a suspect cannot be compelled to answer questions or to testify in a court

¹² It may be noted that the right to silence (or aspects of the right to silence) has been considered (directly or indirectly) in a series of other official reports over the last thirty years or so. These include: *Committee to Recommend Certain Safeguards for Persons in Custody and for Members of An Garda Síochána* (“the O’Briain Report”)(1978); *Report of Committee to Enquire into Certain Aspects of Criminal Procedure* (“the Martin Report”)(1990); *Report of the Expert Group Appointed to Consider Changes in the Criminal Law* (1998) (“the Leahy Report”) and *The Report of the Committee to Review the Offences against the State Acts 1939-1998 and related matters* (2002)(“the Hederman Report”).

proceedings where the resulting evidence would be admissible in proceedings against the person. The right is regarded as a fundamental one with long historical antecedents in the common law world. The right to silence is also regarded as part of the bundle of rights protected by the right to trial in due course of law by Article 38.1 of the Constitution and by Article 6 of the European Convention of Human Rights. It finds expressions in express guarantees in other constitutions, most notably the Fifth Amendment of the US Constitution and other international instruments.¹³ For reasons which will be explained below, the Review Group does not propose to recommend any change in this basic constitutional right as expressed at this level of generality.

The right to silence, has, however a number of specific dimensions which require more elaborate consideration. First, one aspect of the rule is that, generally speaking, the accused may not be cross-examined at his trial as to the reasons why he declined to answer questions in the course of Garda custody.¹⁴ One practical effect of this is that if a suspect either

¹³ Thus, Article 14(3)(g) of the United Nations International Covenant on Civil and Political Rights (1967)(which provides that an accused shall not “be compelled to testify against himself or to confess guilt” and the Fifth Amendment of the US Constitution provides that “no person shall be compelled in any criminal case to be a witness against himself.” Article 67(1)(g) of the Rome Statute of the International Criminal Court goes even further by providing that the suspect has the right:

“Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence.”

¹⁴ *People v. Finerty* [1999] 4 IR 364.

declines to answer Garda questions or, alternatively, omits to mention some matter which would tend to exculpate him, but keeps this back until his trial, “the court or jury may not infer that his evidence on this issue at the trial is untrue.”¹⁵ Second, while the trial judge may remind the jury of the fact that the accused has not exercised his right to give evidence at his trial, the jury must be “expressly instructed not to draw any inference from the exercise of that right.”¹⁶ Third, the prosecution are expressly forbidden by statute from commenting on the fact that the accused has exercised his right to remain silent.¹⁷

The rationale for the right to silence

While the right to silence has deep roots in the common law (and, as we shall presently see in more detail, nowadays enjoys both constitutional protection and protection under Article 6 of the European Convention of Human Rights), it is only fair to acknowledge that the rule has its sceptics. These anxieties were famously expressed by the leading English jurist, Jeremy Bentham, almost one hundred and seventy years ago:

¹⁵ *Report of the (UK) Criminal Law Revisions Committee, Eleventh Report, Evidence (General)* Cmnd. 4991 (1972)(“the UK Eleventh Report”) at para. 28.

¹⁶ *People v. Coddington*, Court of Criminal Appeal, May 31, 2001, per Murray J. This does not, however, mean that the trial judge is not entitled to tell the jury that a particular defence advanced by the accused has not been substantiated in evidence: *People v. Brazil*, Court of Criminal Appeal, March 22, 2002. In that case Keane CJ held that the trial judge was entitled to comment that the denial proffered by defence counsel was not evidence and that “if that is to be said, it must be said by the defendant from the witness box and an opportunity given to the prosecution to cross-examine [him].”

¹⁷ Criminal Justice (Evidence) Act 1924, s. 1.

“If all criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it. Innocence claims the right of speaking, as guilt invokes the privilege of silence.”¹⁸

While there is a good deal of force in Bentham’s comments, the Review Group does not consider that it represents the full picture. There are some occasions (not necessarily rare) where silence is perfectly consistent with innocence and some instances may now be given.

First, it may be that an accused is “shocked by the accusation and unable at first to remember some fact which would clear him.”¹⁹ This may be especially so if the person arrested has never previously been in this situation before. Even in ordinary life well away from the realms of criminal law many of us can recall examples in our life where, upon being challenged strongly by others as to our actions, we were so upset or distressed that we could not think clearly and recall or point to facts

¹⁸ *Treatise on Evidence* at 241.

¹⁹ *UK 11th Report* at page 21. This point was also made by the Leahy Committee (at page 32):

“Of course, it need not necessarily be the case that the accused has, in the period between questioning and trial, invented a story. There may be reasons for his or her silence during questioning or on being charged, for example, shock, or embarrassment at revealing the truth, which are consistent with innocence.”

which would have exculpated our conduct. As the *Report of Committee to Review the Offences against the State Acts 1939-1998*²⁰ observed on this very point:

“...it is possible that an accused, placed in unfamiliar and potentially hostile surroundings of Garda custody may be confused or tongue-tied or may simply forget important matters which, in a calmer environment and on fuller reflection, he may wish to rely on.”²¹

Second, there may be instances where to mention an exculpatory fact might reveal something embarrassing to the accused which he would otherwise wish to conceal. Thus, for example, the accused may not wish to reveal his precise whereabouts on a particular evening because this would inevitably disclose the existence of a long-standing extra-marital affair or where to mention an exculpatory fact would be to inculcate another member of his family whom the accused wishes to protect. Another example might be that the suspect would have to admit that, by reason of intoxication or drug-taking, he cannot recall what he was doing at the time of the events in question. In certain circumstances the disclosure of this

²⁰ May 2002.

²¹ At page 210.

(perfectly) truthful answer might have an unfairly prejudicial effect on the accused at a subsequent trial.

Third, the precise accusation and its implications may not be clear to the accused and the accused might prefer to consult with his lawyer before deciding how to respond. It is clear from the decision of the European Court of Human Rights in *Murray v. United Kingdom*²² that it would be contrary to the guarantee of a fair trial in Article 6(1) of the European Convention of Human Rights for inferences to be drawn from the suspect's failure to answer questions where the accused has not had the benefit of obtaining legal advice. Where the questioning has proceeded on different days - up to seventy two hours in the case of detention under section 30 of the Offences against the State Act 1939²³ - and in respect of different offences, it may be difficult to recall what questions precisely have been asked and what facts are or might later be regarded as "material" in such a context. The Bentham thesis regarding the right to silence proceeds on the straight forward case where there is a straight forward accusation which has been precisely stated and which calls for a direct answer from a lucid and clear-thinking suspect. In practice, things may not be that simple.

²² (1996) 23 EHRR 29.

²³ Provided, of course, that a District Judge has authorised the third day's detention.

Fourth, the suspect, although innocent, may be inarticulate or is vulnerable to suggestion. In the case of the criminal trial itself, such persons might be considered to be “bad witnesses and might convict themselves because of a bad performance in the witness box.”²⁴

These factors, taken together, ensure fairness for an accused, prohibit the State from coercing an accused to incriminate himself and generally reduce the risk of a miscarriage of justice. These are powerful considerations which would in themselves inhibit us in recommending any general relaxation of the right to silence, irrespective of constitutional constraints or the analogous constraints contained in Article 6(1) ECHR.

The detention process and the right to silence

It would have to be recognized that the right to silence cuts across an important dimension of police investigation, namely, the opportunity to subject the arrested person to questioning over a prolonged period. While the common law recognized that the Gardaí had a right to question suspects - the Judges’ Rules reflect this - there was often no legally proper opportunity to do this, since the purpose of the arrest was (at least in

²⁴ McGrath, *Evidence* (Dublin, 2005) at 628.

theory) for the sole purpose of charging the suspect and bringing him directly before a court and not for the purposes of questioning.²⁵

The practice was somewhat different, however, in that a system of legally irregular detention grew up where suspects were said “to be helping police with their inquiries”, but were in reality in an irregular form of de facto detention. In *The People v. Finnerty*²⁶ Keane J. helpfully explained the background to this practice and the subsequent necessity for the legislative changes effected by section 4 of the Criminal Justice Act 1984:

“The common law also proceeded on the basis that the police had no right to detain a person whom they suspected of having committed a crime for the purpose of questioning him. Their only right was to arrest him and bring him before the appropriate court, there to be charged, as soon as practicable. Since, however, many people were unaware of their rights in this context and were not normally reminded of them, the practice, euphemistically described as “assisting the police with their enquiries”, mutated into what was, in practice if not in theory, a form of unlawful detention....

²⁵ *The People v. Walsh* [1980] IR 294.

²⁶ [1999] 4 IR 364.

Prior to the [Criminal Justice Act 1984], one major abridgement of the citizen's rights in this regard had been effected in the form of the Offences Against the State Acts, 1939 - 1972. While the provisions of that legislation were intended to afford the Gardaí specific powers in cases where the security of the State was threatened, they were routinely applied in cases of what came to be described as "ordinary crime". Thus, a person who broke into a house and murdered the occupant could not be detained for questioning on the ground that he was suspected of having committed the murder; he could, however, be detained because he was suspected of having committed an act of malicious damage.

It was against this background that the 1984 Act was enacted. The policy of the legislation is clear: to end the dubious practice of bringing people to the station for the purpose of "assisting the Gardaí with their enquiries", or in purported reliance on the legislation directed primarily at subversive crime, and to substitute therefor an express statutory regime under which the Gardaí would have the right to detain a person in custody for a specified period of six hours which could be extended for a further six hours for the purpose of investigating specified crimes."²⁷

²⁷ [1999] 4 IR 364 at 377. It should be noted, however, that the Supreme Court had already decided in *The People v. Quilligan (No.1)* [1986] IR 497 that section 30 detention could be utilized for the investigation of non-subversive scheduled offences."

As Keane J. pointed out, by the 1980s, however, it was clear that this practice of “holding for questioning” could no longer continue, as the courts were ruling with increasing frequency that such suspects were in unlawful custody and that any evidence obtained as a result would have to be excluded on the ground that it violated the suspect’s constitutional right to liberty.²⁸ Even the practice of using the extended arrest powers contained in section 30 of the Offences against the State Act 1939 in a context other than that of tackling subversive crime was coming under increasing strain.²⁹ It was against that background, therefore, that, commencing with section 4 of the Criminal Justice Act 1984, the Oireachtas has prescribed the maximum periods under which the suspect can be detained by law.³⁰

Following the recent changes effected by the Criminal Justice Act 2006, the periods of detention which a suspect can be detained in respect of serious crime now vary from 24 hours³¹ to three days (in the case of arrests under section 30 of the 1939 Act) to seven days in the case of persons detained under the Criminal Justice (Drug Trafficking) Act 1996.

²⁸ *People v. McLoughlin* [1979] IR 85; *People v. Coffey* [1987] ILRM 727.

²⁹ See, e.g., *People v. Howley* [1989] ILRM 629.

³⁰ Offences against the State Act 1939, s. 30; Offences against the State (Amendment) Act 1998, s. 10; Criminal Justice Act 1984, s. 4 (as amended by section 9 of the Criminal Justice Act 2006) and Criminal Justice (Drug Trafficking) Act 1996, s. 7.

³¹ Or 32 hours if a rest period is availed of by the detained person.

Why are such detention periods necessary? While one reason is to give the Gardaí the opportunity to eliminate particular suspects and check out alibis etc., the principal reason is that the Gardaí hope that the suspect will feel compelled to speak fully about his involvement in the crime and to make a full confession.

Some of the submissions to the Review Group made the point that experienced criminals exploit the present system by “running down the clock” by having frequent consultations with solicitors³² or visits from family members. In an increasing number of cases involving the detention of non-nationals, it is also necessary for the Gardaí to secure the services of an interpreter. All of this serves to reduce the time available to the Gardaí for effective interrogation. In other cases experienced suspects can simply resort to standard anti-interrogation techniques by simply staring at a spot on the wall and refuse to say anything.³³

³² See, e.g., the comments of Carney J. in *Barry v. Waldron*, High Court, May 23, 1996. Here Carney J. refused to order the release of the applicant (who had been arrested under section 4 of the Criminal Justice Act 1984) when the Gardaí refused to permit his solicitor to be present during his interrogation. The applicant frankly acknowledged that he desired the presence of his solicitor for the duration of the twelve hour detention period so that he could:

“continue with his formula of saying that he wanted to assert his right to silence and refuse to answer any questions and he would be supportedand maintained in that position by [his solicitor] for the statutory period of detention. If he did not have the support of an independent person, he would probably not be able to maintain such a stance, which does require a considerable degree of strength against people who are trained in interrogation techniques. And let us not be frightened of the word ‘interrogation’ because that is what it is all about and that is what the statute provides for.”

³³ It may be noted, for example, that in *The People v. Binead* [2006] IECCA 147 during Garda interviews, numerous questions were put to the accused relating to their possible membership of an illegal

The Judges' Rules

By virtue of Rules 2, 3, 4 and 5 of the Judges' Rules³⁴ an accused who has been charged or who is under arrest must be formally cautioned that he is not obliged to answer any question before he is questioned. The purpose of the Rules are to ensure fairness to the accused³⁵ and to ensure in "the public interest that the law should be observed even in the

organization and section 2 of the Offences Against the State (Amendment) Act 1998 was invoked by the interviewing Gardaí. Macken J. observed:

"Each applicant was informed of the consequences to him of a failure to answer material questions. Neither answered any question and did not respond to questions such as "Are you a member of the I.R.A.?" The trial court stated, as regards these interviews and the failure to respond as follows:

"..., not only did each accused remain totally silent during the course of the interview, but each of them appeared to take no ostensible interest whatsoever in what was going on. They sat bolt upright showing remarkable self-control throughout, in that their only movement was an occasional blink of the eyes, but they made no effort to engage with their interviewers. In the view of the court, it was clear that each accused was deliberately, and indeed offensively, ignoring all that was being asked of them. On the other hand, the court is satisfied, not only that the provisions of section 2 of the Offences Against the State (Amendment) Act 1998 were invoked in the course of those interviews, and adequately explained to each accused, but that each accused was given every opportunity to protest in the event that he had not understood that explanation; an opportunity which was ignored.

Furthermore, the court does not doubt the materiality to the charge which has been preferred against each accused of many of the questions which were put to each of them during the course of those interviews; questions which were met with a stony silence."

³⁴ See generally, McGrath, *Evidence* (Dublin, 2005) at 411-423.

³⁵ *The People v. Buck* [2002] 2 IR 268 at 277, per Keane CJ This is especially true of Rule 9 (the writing requirement). As O'Higgins CJ explained in *The People v. Towson* [1978] ILRM 122 at 126 the object of this Rule is "to prevent a situation in which invented or planted oral statements are adduced in evidence by the stronger side to the detriment and harm and injury of a weak and oppressed defendant."

investigation of crime.”³⁶ The Judges’ Rules do not have the force of law and the court has a discretion to admit evidence obtained in breach of the Rules. As O’Higgins CJ put it in *The People v. Farrell*³⁷:

“The Judges’ Rules are not rules of law. They are rules for the guidance of persons taking statements. However, they have stood up to the test of time and will be departed from at peril. In very rare cases.....a statement taken in breach may be admitted in evidence but in very exceptional circumstances. Where.....there is a breach of the Judges’ Rules.....each of such breaches calls for adequate explanation. The breaches and the explanations (if any) together with the entire circumstances of the case are matters to be taken into consideration by the trial judge before exercising his judicial discretion as to whether or not he will admit such statement in evidence.”³⁸

While it may be that the test in *Farrell* has not always been followed in practice in every subsequent case³⁹, serious breaches of the Rules are regarded with judicial disfavour.

³⁶ *The People v. O’Brien* [1965] IR 142 at 160, per Kingsmill Moore J.

³⁷ [1978] IR 13.

³⁸ [1978] IR 13 at 21,

³⁹ See the comments of McGrath, *Evidence* at 413.

The origin of the Judges' Rules was explained by Walsh J. in *The People v. Cummins*⁴⁰:

“The Judges' Rules which are in force in this country.....are sometimes called the Judges' Rules of 1922 though they first appeared in 1912 when the judges in England, at the request of the Home Secretary, drew up four rules as a guide for police officers in respect of communications with prisoners or persons suspected of crime. The Rules were signed by Lord Chief Justice Alverstone and were then four in number; they were printed at the end of the report of *R. v. Voisin*.⁴¹ In the judgment of the Court of Criminal Appeal given in that case, the following statement appears at p. 539 of the report:— “These Rules have not the force of law; they are administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners, contrary to the spirit of these rules, may be rejected as evidence by the judge presiding at the trial...” By 1922 the rules mentioned in those cases had increased to a total of nine. These nine rules are the ones which have been followed in this State since that

⁴⁰ [1972] IR 312.

⁴¹ [1918] 1 KB 531.

date. The first four of them are the ones which were originally formulated in 1912 and they are mentioned in the cases decided in 1918.”⁴²

It may be somewhat anomalous that what amounts to the code of conduct for the questioning of suspects by members of the Gardaí should continue to rest on the what amounts to the extra-judicial views of a number of English judges in 1912 and 1922 following requests by the then British Home Secretary for guidance from the judiciary. In our present constitutional system it might be regarded as a breach of the separation of powers for the judicial branch to make formal or quasi formal rules of this kind regulating the conduct of persons (in this instance, members of An Garda Síochána) for whom the Minister for Justice, Equality and Law Reform had ultimate democratic responsibility under Article 28 of the Constitution. While the conduct of Gardaí in the treatment and interviewing of suspects must be regulated, this ought to be done by means of legislation enacted by the Oireachtas and not rest on extra-judicial rules made by English judges prior to independence. The Review Group suggests, therefore, that the Rules be repealed by new legislation which, within certain parameters, would give guidance in this area and would enable the Minister for Justice, Equality and Law Reform to make regulations prescribing matters such as the form of caution.

⁴² [1972] IR 312 at 323.

In any event, while it is true that the Rules contain a good deal of practical common sense which is worth preserving, an overhaul and re-examination of these Rules in the light of modern circumstances is overdue. As we note elsewhere with regard to, for example, the requirement in Rule 9 that statements are taken down in writing, this nowadays is often very difficult with longer detention periods than were envisaged when the Rules were first drawn up. The Rules likewise proceed on the premise that the decision to charge will be taken by the Gardaí, when in practice this decision nowadays rests in serious cases with the Director of Public Prosecutions. More critically, if it were thought desirable to permit inferences to be drawn from an accused's silence while under arrest or in Garda custody, it would be necessary to effect a significant revision of the Judges' Rules. At present, the effect of the caution required by the Judges' Rules may be regarded "as containing an implicit promise that the silence of a suspect will not be used in evidence against him or her."⁴³ If this is so, then as Cory J. said in *R. v. Chambers*⁴⁴:

"...it would be a snare and a delusion to caution the accused that he need not say anything in response to a police officer's question

⁴³ McGrath, *Evidence* at 656.

⁴⁴ [1990] 2 SCR 1293.

but nonetheless put in evidence that the accused clearly exercised his right and remained silent in the face of a question which suggested his guilt.”⁴⁵

This point was also tellingly made by the Supreme Court in *People v. Finnerty*⁴⁶ where Keane J. observed that drawing an inference from a suspect’s silence in Garda investigation would “render virtually meaningless the caution required to be given to him under the Judges’ Rules.”⁴⁷

This point was also recognized in 1972 in the UK *11th Report* where the warnings then contained in the Judges’ Rules in the United Kingdom were said to constitute “on the face of them a discouragement to the suspect to make a statement.”⁴⁸ The *11th Report* also identified other serious objections:

“It is of no help to an innocent person to caution him to the effect that he is not obliged to make a statement. Indeed, it might deter him from saying something which might serve to exculpate him. On the other hand, the caution often assists the guilty by providing an

⁴⁵ [1990] 2 SCR 1293 at 1316.

⁴⁶ [1999] 4 IR 364.

⁴⁷ [1999] 4 IR 364 at 379.

⁴⁸ Para. 43.

excuse for keeping back a false story until it becomes difficult to expose its falsity.”⁴⁹

It follows, accordingly, that if modifications are to be made by statute in respect of the inference drawing powers, it would be necessary (at least) to revise the Judges’ Rules and the existing forms of caution. Indeed, it is unsatisfactory that the existing Judges’ Rules have not been revised formally, at least, to take account of the special inference-drawing provisions contained in section 7 of the Criminal Law (Drug Trafficking) Act 1996⁵⁰ and section 2 and section 5 of the Offences against the State (Amendment) Act 1998.⁵¹

⁴⁹ Para. 43.

⁵⁰ These difficulties featured in *The People v. Bowes* [2004] 4 IR 223. Here quantities of heroin were found in the boot of the accused’s car. Following his arrest and detention, the accused was first given the standard caution and it was subsequently then put to him that:

“...certain inferences can be drawn by your failure to answer some questions in relation to the amount of heroin found in your car question.”

The Court of Criminal Appeal held that this warning was not sufficient to comply with the requirements of section 7(2) of the 1996 Act which requires that the consequences of a failure must be explained in “ordinary language.” In the words of Fennelly J. ([2004] 4 IR 223 at 239):

“the warning required by [section 7(2)] must draw the attention of the suspect to the danger of not mentioning any *fact* upon which he will or is likely to rely on his defence. The first version of the warning given, relating to ‘failure to answer some questions’ clearly does not satisfy the requirement. The second formulation mentioned ‘failure to mention any fact which you may rely on in your defence’ and is much closer to what is needed.”

⁵¹ The Irish Human Rights Commission drew attention to this in their submission to the Review Group. Dealing with the issue of a caution in the context of prosecutions to which section 2 and section 5 of the 1998 Act might apply, the Commission observed:

“This becomes much more difficult when it is necessary to explain that failure to answer a “material” question will lead to inferences being drawn and distinctions have to be made between “material” and “non-material” questions. This has led to extremely convoluted formulae being

The constitutional position

The right to silence is, of course, constitutionally protected. Legislation which curtailed or abridged this right which did not also respect the essence of the right and pass a proportionality test would almost certainly be found to be unconstitutional. These principles emerge from a series of important decisions of the High Court and Supreme Court over the last fifteen years.

In *Heaney v. Ireland*⁵² the plaintiffs had challenged the constitutionality of s.52 of the Offences against the State Act 1939 following their conviction and imprisonment for failure to give an account of their movements. This section required suspects arrested under section 30 of the 1939 Act to give an account of their movements. Failure to do so constituted an offence

used when questioning persons suspected of membership of unlawful organisations, which has arguably undermined the whole effect of the traditional caution.”

It may be noted that the *UK Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers* now provides (Code C at para. 10(4)):

“You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you say may be given in evidence.”

⁵² [1996] 1 IR 580.

carrying a penalty of six months imprisonment. The Supreme Court upheld the constitutionality of this sub-section with O'Flaherty J. reasoning that s 52 did not constitute a disproportionate interference with the right to free speech:

“On the one hand, constitutional rights must be construed in such a way as to give life and reality to what is being guaranteed. On the other hand, the interest of the State in maintaining public order must be respected and protected. We must, therefore, ask ourselves whether the restriction which section 52 places on the right to silence is any greater than necessary having regard to the disorder against which the State is attempting to protect the public...Of course, in this pursuit the constitutional rights of the citizen must be affected as little as possible. As already stated, the innocent person has nothing to fear from giving an account of his or her movements, even though on grounds of principle, or in the assertion of constitutional rights, such a person may wish to take a stand. However, the Court holds that the *prima facie* entitlement of citizens to take such a stand must yield to the right of the State to protect itself. *A fortiori*, the entitlement of those with something relevant to disclose concerning the commission of a crime to remain mute must be regarded as of a lesser order. The Court concludes that there is a proper

proportionality between any infringement in the citizen's rights with the entitlement of the State to protect itself."⁵³

The Court upheld the constitutionality of the sub-section without, however, deciding the fundamental question of whether statements obtained pursuant to section 52(1) were generally admissible in evidence. Moreover, the basic premise on which the Court proceeded ("...the innocent person has nothing to fear from giving an account of his or her movements..") has subsequently been questioned. If this premise were correct, one would have to question as to why the privilege enjoyed constitutional protection.⁵⁴

Heaney was subsequently applied by the Supreme Court in *Rock v. Ireland*⁵⁵, a case concerning the constitutionality of sections 18 and 19 of the Criminal Justice Act 1984. Section 18 permits a court of trial to draw

⁵³ [1996] 1 IR 580 at 589-590.

⁵⁴ Cf. the eloquent comments of McGuinness J. in *Gilligan v. Criminal Assets Bureau* [1998] 3 IR 185 at 230 on the implication of the curtailment of the right to silence by the Proceeds of Crime Act 1996:

"The defendants' argument here seem to me to tend towards a sophisticated version of the 'innocent have nothing to fear', which I would not accept as being sufficient in itself to offset a threat to the privilege against self incrimination. There have been sufficient miscarriages of justice in the history of crime in this and in other jurisdictions to indicate a belief that the 'innocent have nothing to fear' is not necessarily the whole answer."

Note also the comments of the *Report of the Committee to Review the Offences against the State Act 1939-1998* (Dublin, 2002)(at 184) which expressed concern that any erosion of the privilege:

"might present some risk to the innocent (especially the forgetful, the inarticulate and the socially vulnerable) so that these immunities 'contribute to avoiding miscarriages of justice': *Murray v. United Kingdom* (1996) 23 EHRR 29, para. 45."

⁵⁵ [1997] 3 IR 484.

inferences from an accused's failure to account for the presence of objects, substances or marks on his person or clothing which the Garda effecting the arrest reasonably believes "may be attributable to the participation of the person arrested in the commission of the offence." Section 19 is in similar terms and permits inferences to be drawn from an accused's failure to account for his presence at a particular place "at or about the time the offence in respect of which he was arrested is alleged to have been committed." Both sections provide that the court:

"...may draw such inferences from the failure or refusal as appear proper; and the failure or refusal may, on the basis of such inferences, be treated as, or as capable of amounting to corroboration of any evidence in relation to which the failure or refusal is material, but a person shall not be convicted of an offence solely on an inference drawn from such failure or refusal."

Having noted that the decision in *Heaney* did not "automatically dispose of the issues in the case", the Court nonetheless upheld the constitutionality of the provisions in question. Hamilton CJ drew attention to the limitations inherent in the inference-drawing power:

“In deciding what inferences may properly be drawn from the accused’s failure or refusal, the court is obliged to act in accordance with the principles of constitutional justice and having regard to an accused person’s entitlement to a fair trial must be regarded as being under a constitutional obligation to ensure no improper or unfair inferences are drawn or permitted to be drawn from such failure or refusal.....If inferences are properly drawn, such inferences amount to evidence only; they are not to be taken as proof. A person may not be convicted of an offence solely on the basis of inferences that may properly be drawn from his failure to account; such inferences may only be used as corroboration of any other evidence in relation to which the failure or refusal is material. The inferences drawn may be shaken in many ways, by cross-examination, by submission, by evidence or the circumstances of the case.”⁵⁶

The Chief Justice later observed that as only such inferences as “appear proper” could be drawn, this meant that a court “could refuse to allow an inference in circumstances where its prejudicial effect would wholly outweigh its probative value as evidence.”⁵⁷ Against this background the Court concluded that the legislation in question did not disproportionately interfere with the right to silence.

⁵⁶ [1997] 3 IR 484 at 497-498.

⁵⁷ [1997] 3 IR 484 at 501.

A few months after *Heaney* was decided, the European Court of Human Rights took an entirely different view of this issue in *Saunders v. United Kingdom*⁵⁸ where it held that the admission of evidence obtained pursuant to a statutory demand (in this case demands made by a companies inspector pursuant to the UK Companies Acts) in a subsequent criminal trial constituted a breach of Article 6(1) of the European Convention of Human Rights. While the Court held that the application of the guarantees of Article 6(1) to investigative procedures of this kind would “unduly hamper the effective regulation in the public interest of complex financial and commercial activities”⁵⁹, the issue as to whether such answers were admissible in evidence in a subsequent criminal prosecution was quite a separate matter. The Court held that the use of such statutorily-compelled answers constituted a denial of his rights under Article 6(1) ECHR:

“The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings...Moreover the fact that statements were made by the applicant prior to his being charged

⁵⁸ (1996) 23 EHRR 313.

⁵⁹ (1996) 23 EHRR 313 at 337

does not prevent their later use in criminal proceedings from constituting an infringement of his rights.”⁶⁰

Just as importantly, perhaps, a few months before *Saunders* that Court had also held in *Murray v. United Kingdom*⁶¹ that the drawing of inferences from an accused’s silence during the pre-trial detention constituted a breach of Article 6(1)(the right to a fair trial) read in conjunction with Article 6(3)(c) (the right to a lawyer). In that case, the applicant had been arrested under the (UK) Prevention of Terrorism (Temporary Provisions) Act 1989. Following his arrest he was cautioned under the Criminal Evidence (Northern Ireland) Order 1988 where he was informed that adverse inferences could be drawn at his trial if he elected to remain silent and not to answer police questions. He was also denied access to legal advice for the first 48 hours of his detention. In finding the accused guilty of the offences in question (aiding and abetting false imprisonment), the trial judge made it clear that he had drawn adverse inferences from the accused’s failure to answer police questions and from the fact that the accused had not given evidence at his trial.

⁶⁰ (1996) 23 EHRR 313 at 340. See to the same effect *Weh v. Austria* (2005) 40 EHRR 37; *Shannon v. United Kingdom* (2006) 42 EHRR 31.

⁶¹ (1996) 22 EHRR 29.

The European Court first explained the rationale behind the right to silence:

“Although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aim of Article 6.”⁶²

The Court then continued by saying that:

“On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused’s silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused’s silence, in situations which clearly call for an explanation from him, be taken into account in assessing the

⁶² (1996) 22 EHRR 29 at 60.

persuasiveness of the evidence adduced by the prosecution. Wherever the line between these two extremes is to be drawn, it follows from this understanding of the 'right to silence' that the question whether the right is absolute must be answered in the negative."⁶³

The Court concluded that the drawing of the adverse inferences by the trial judge was not in itself a breach of Articles 6(1) and 6(2), since appropriate warnings were given as to the effect of remaining silent; that there was no evidence that the accused had failed to understand the importance of such warnings and the inferences could only be drawn where a case calling for an explanation had been made out against the accused.⁶⁴ Nor were the inferences unfairly or unreasonably drawn:

"In the Court's view, having regard to the weight of the evidence against the applicant...the drawing of inferences from his refusal, at arrest, during police questioning and at trial, to provide an

⁶³ (1996) 22 EHRR 29 at 60-81.

⁶⁴ As the Court observed ((1996) 22 EHRR 29 at 62) the question in each case is whether the evidence adduced by the prosecution is sufficiently strong to require an answer:

"The national court cannot conclude that the accused is guilty merely because he chooses to remain silent. It is only if the evidence against the accused 'calls' for an explanation which the accused ought to be in a position to give that a failure to give that explanation 'may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty. Conversely, if the case presented by the prosecution had so little evidential value that it called for no answer, a failure to provide one could not justify an inference of guilt. In sum, it is only common sense inferences which the judge considers proper, in the light of the evidence against the accused, that can be drawn under the Order."

explanation for his presence in the house was a matter of common sense and cannot be regarded as unfair or unreasonable in the circumstances....[T]he courts in a considerable number of countries where evidence is freely assessed may have regard to all relevant circumstances, including the manner in which the accused has behaved or has conducted his defence, when evaluating the evidence in the case. It considers that, what distinguishes the drawing of inferences under the Order is that, in addition to the existence of specific safeguards mentioned above, it constitutes, as described by the Commission, 'a formalised system which aims at allowing common sense implications to play an open role in the assessment of evidence.' Nor can it be said, against this background, that the drawing of reasonable inferences from the applicant's behaviour had the effect of so shifting the burden of proof from the prosecution to the defence so as to infringe the principle of the presumption of innocence."⁶⁵

However, the Court continued by saying that the drawing of adverse inferences in circumstances where the accused had been denied access to a lawyer did violate the accused's rights under Article 6 of the Convention:

⁶⁵ (1996) 22 EHRR 29 at 60-81. Subsequent case-law makes it clear that legislative provisions permitting the drawing of inferences from the suspect's silence will only be compatible with the Convention where the prosecution have presented a case against an accused which calls for an explanation: see, e.g., *Condron v. United Kingdom* (2001) 31 EHRR 1; *Averill v. United Kingdom* (2001) 31 EHRR 839; *Beckles v. United Kingdom* (2003) 36 EHRR 162.

“The Court is of opinion that the scheme contained in the [1988] Order is such that it is of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation. It observes in this context that, under the Order, at the beginning of police interrogation, an accused is confronted with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him. Under such conditions the concept of fairness enshrined in Article 6 requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation. To deny access to a lawyer for the first 48 hours of police questioning in a situation where the rights of the defence may well be irretrievably prejudiced is - whatever the justification for such denial - incompatible with the rights of the accused under Article 6.”⁶⁶

The potential implications for this jurisdiction of this important decision are diminished somewhat by reason of the fact that reasonable access to a

⁶⁶ (1996) 22 EHRR 29 at 67. See also *Averill v. United Kingdom* (2001) 31 EHRR 839.

solicitor during police custody is constitutionally guaranteed⁶⁷ and this right is, in any event, protected by statute.⁶⁸ This notwithstanding, the decision is still of very considerable importance inasmuch as it places some (although, perhaps, somewhat imprecise) limitations on the entitlement of Contracting States to legislate for the drawing of adverse inferences from an accused's silence.

Subsequently, in *Re National Irish Bank Ltd.*⁶⁹ the Supreme Court - clearly influenced by the intervening judgment of the European Court in *Saunders* - took a distinctly more liberal line on the right to silence issue, by confirming that evidence obtained pursuant to a statutory demand could not constitutionally be admitted in a subsequent criminal trial. This case concerned section 18 of the Companies Act 1990 which provided that statements made by any officer or agent of a company to inspectors appointed by the High Court "may be used in evidence against him." The issue thus arose as to whether any statements made by such persons was admissible in any subsequent criminal prosecution. Delivering the judgment of the Supreme Court, Barrington J. held that the use of compelled answers in a criminal prosecution violated Article 38.1 of the Constitution:

⁶⁷ See, e.g., *The People (Director of Public Prosecutions) v. Healy* [1990] 2 IR 73.

⁶⁸ Criminal Justice Act 1984, s.5.

⁶⁹ [1999] 1 IR 145.

“It is proper, therefore, to make clear that what is objectionable under Article 38 of the Constitution is compelling a person to confess and then convicting him on the basis of his compelled confession.”⁷⁰

The Court concluded that it was possible to read section 18 in a constitutionally permissible fashion, i.e., that it simply required the person questioned to answer the questions in the knowledge that any such answers were inadmissible in a subsequent criminal prosecution, save where the judge was satisfied that such answers were given voluntarily and not in answer to any statutory demand. The principles were applied by Kearns J in *Dunne Stores Ireland Co. Ltd. v. Ryan*⁷¹ in holding section 19(6) of the Companies Act 1990 unconstitutional, precisely because he considered that the answers to a statutory demand under that section would be later admissible in evidence.

The Supreme Court’s judgment in *The People v. Finnerty*⁷² also points in this direction. The accused had been charged with rape. The complainant gave evidence that she had accompanied the accused as a passenger in a car where she was then brutally raped. The complainant was then cross-

⁷⁰ [1999] 1 IR 145 at 188, per Barrington J. In the light of this decision it is clear that both *McGowan* and other Court of Criminal Appeal decisions permitting the admission of statements made pursuant to a statutory demand (see, e.g., *The People (Director of Public Prosecutions) v. Madden* [1977] IR 336) would not now be followed.

⁷¹ [2002] 2 IR 60.

⁷² [1999] 4 IR 364.

examined by the accused's counsel who suggested that the entire allegations of rape were a fabrication and that the parties had had consensual sexual relations in the car. Beyond denying the allegation of rape and saying that the sexual relations had been consensual when first confronted with the charge, the accused had remained silent when detained by the Gardaí pursuant to section 4 of the Criminal Justice Act 1984. However, following this line of cross-examination of the complainant, the prosecution applied for, and were granted leave to, cross-examine the accused as to why he had not answered any questions during his time in Garda custody.

The Supreme Court quashed the conviction, holding that the accused could not constitutionally have been cross-examined as to the reasons he remained silent, at least in the absence of an express statutory abridgement of that right. As Keane J. put it, the right of the suspect in custody to remain silent:

“...is also a constitutional right and the provisions of the 1984 Act must be construed accordingly. Absent any express statutory provisions entitling a court or jury to draw inferences from such silence, the conclusion follows inevitably that the right is left

unaffected by the 1984 Act save in cases coming within ss. 18 and 19 [of that Act] and must be upheld by the courts.”⁷³

The decision in *Finnerty* was the subject of some comment in the submissions made to the Review Group. It would appear that the decision proceeds from the premise that should the Oireachtas wish to restrict or curtail the constitutional right to silence, it must do so in express terms. The decision in *Finnerty* would appear to leave open the possibility that the Oireachtas could validly enact (within certain parameters) new legislation providing for inferences to be drawn from the failure to answer Garda questions.

Doctrine of recent fabrication

One further consequence of *Finnerty* is that it would also in principle be open to the Oireachtas to enact legislation permitting the accused to be cross-examined as to credit as to the reasons why he only mentioned a new fact for the first time in the witness box. The credibility of witnesses - whether in civil actions or criminal proceedings - is frequently challenged in cross-examination on the ground that the version of events which they have just advanced in the witness box has never previously been

⁷³ [1999] 4 IR 364 at 380. In *The People v. McCowan* [2003] 4 IR 349 the Court of Criminal Appeal held that, in the light of *Finnerty*, evidence should not have been given at the accused's trial by members of the Gardaí to the effect that he had elected to remain silent during interview following arrest.

mentioned by them, despite the fact that they have had reasonable opportunity to do so. Indeed, where this occurs the law also recognises that, by way of exception to the rule against self-corroboration, if:

“...a witness’s testimony is challenged in cross-examination as being a recent fabrication, statements made by him to the same effect prior to the date of alleged fabrication may be adduced in order to show his or her consistency.”⁷⁴

One direct consequence of *Finnerty* is that it precludes the converse of this, namely, the cross-examination of the accused as to credit with a view to suggesting recent fabrication in the absence of prior consistent statements. It is interesting to note that although the Supreme Court reversed the decision of the Court of Criminal Appeal in that case, the judgment of Lynch J. for the latter Court proceeds on the premise that this was a permissible line of cross-examination as to credit:

“The applicant claims that that permission to give that evidence of his silence and to cross-examine him about the silence was in breach of his right to silence. Now his right to silence was emphasised by the learned trial judge and the only purpose of this evidence and cross-examination

⁷⁴ McGrath, *Evidence*, at 108.

by the prosecution of the applicant related to the reliability of the applicant's detailed statement of explanation. There were before the jury manifestly two contradictory versions of what had happened on this particular night. The issue was which of these versions was to be believed and it was quite proper and reasonable for the prosecution to ask the applicant why he had not given the full exculpatory account of the evening's events at an early stage instead of for the first time during the course of the trial.

This course of events does not trench in any way on the right to silence which, as I have said, was emphasised very strongly by the learned trial judge but this form of evidence of the applicant's silence in the Garda station and of cross-examination by the prosecution was highly relevant to the credibility of the applicant's lately proffered account of events. The evidence as to his silence and his cross-examination about the silence were permitted and adduced only for that purpose and that was made quite clear and in the circumstances of the case that course of proceedings was perfectly permissible and proper."⁷⁵

While the Supreme Court's decision is quite understandable inasmuch it held that, given that the right to silence was constitutionally protected, if it

⁷⁵ [1999] 4 IR 364 at 373-374.

were sought to restrict or trench upon that right, this would have to be done by statute, a number of submissions nonetheless made the point that this restriction places an unfair burden on the prosecution. It would appear that, prior to *Finnerty*, accused who had remained silent under caution, but who had advanced a positive defence in the witness box, were frequently cross-examined along these lines.

Legislation prescribing penalties for failure to answer

A distinction must also be made between legislation which provides that it is a criminal offence for the suspect not to answer the questions posed and legislation which goes further and allows for the *use* of such information against the accused in subsequent criminal proceedings. Sections 15(1) of the Criminal Justice Act 1984, provides that where a member of An Garda Síochána finds a person in possession of any firearm or ammunition, has reasonable grounds for believing that the possession is in contravention of the criminal law, and informs that person of that belief, then:

"he may require that person to give him any information which is in his possession, or which he can obtain by taking reasonable steps, as to how he came by the firearm or ammunition and as to any previous dealings with it, whether by himself or by any other person."

Section 15(3) provides that the person concerned must be told in ordinary language that his failure or refusal without reasonable cause to give such information, or the giving of misleading information, is an offence; though any information so given shall not be used in evidence against him in any other proceedings.⁷⁶ Section 16 is a similar provision.

Sections 15 and 16 merely require the person arrested to answer the questions asked but do not permit such answers to be used in evidence *against him or her*.⁷⁷ The statutory guarantee that the evidence so obtained will not be used against the witness in court ensures that by giving what is sometimes termed this form of transaction immunity, the essence of the right to silence is not violated.

Section 18 and section 19 are wider in their scope. Section 18(1) provides that where:

⁷⁶ In the light of the Supreme Court's decision in *National Irish Bank* this proviso would appear to shield s 15 from any successful constitutional challenge or, in the light of the European Court's decision in *Saunders*, a challenge based on Article 6 ECHR.

⁷⁷ It may be noted that the privilege against self-incrimination has been abridged by a variety of other legislation. Thus, for example, s 15 of the Road Traffic Act 1994 provides that a Garda may require an accused to give a blood or urine specimen in certain defined circumstances where he suspects that the defendant has consumed intoxicating liquor. In *Director of Public Prosecutions v. Elliot* [1997] 2 ILRM 156 at 159 McCracken J acknowledged that s 15 of the 1994 Act was a "clear violation" of the principle against self incrimination, but added that, in his view, this abridgment passed the proportionality test.

“(a) a person is arrested without warrant by a member of the Garda Síochána, and there is –

(i) on his person, or

(ii) in or on his clothing or footwear, or

(iii) otherwise in his possession, or

(iv) in any place in which he is at the time of his arrest

any object, substance or mark, or there is any mark on any such object, and the member reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of the offence in respect of which he was arrested, and

(b) the member informs the person arrested that he so believes, and requests him to account for the presence of the object, substance or mark, and

(c) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence, evidence of the said matters is given, the court, in determining whether to send forward the accused for trial or whether there is a case to answer and the court (or, subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence charged (or of any other offence of which he could lawfully be convicted on that charge) may draw such inferences from the failure or refusal as appear proper; and the failure or refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any other evidence in relation to which the failure or refusal is material, but a person shall not be convicted of an offence solely on an inference drawn from such failure or refusal."⁷⁸

Section 19 is a similar provision and it enables inferences to be drawn from the accused's failure to explain his presence in suspicious circumstances to the arresting member. Section 19(3) requires that the suspect be informed in "ordinary language" of the effect of such failure to answer.

⁷⁸ Section 18(3) provides that section 18(1)

"shall apply to the condition of clothing or footwear as it applies to a substance or mark thereon."

From the submissions made to the Review Group, it would appear that there is striking under-utilisation of both section 18 and section 19. One possible explanation is that the language of these sections is too restrictive in that, for example, it suggests that the inference can only be drawn after the arresting Garda puts the issue to the arrested person at the time of the arrest.

Inferences from silence

Section 2 of Offences against the State (Amendment) Act 1998 goes even further than sections 18 and 19 of the Criminal Justice Act 1984. Section 2 provides that where an accused has been charged under section 21 of the Offences against the State Act 1939 with membership of an illegal organization and evidence is given that he failed to answer a question posed by a member of the Garda Síochána, inferences may be drawn from such failure to answer. The proviso is that such inferences may be treated as corroborative evidence “but such a person shall not be convicted of an offence solely on an inference drawn from such failure.” This provision thus allows a defendant’s silence to be proved as part of the prosecution case, a mechanism which - in terms of onus of proof - is a radical departure from ordinary legal principles but perhaps one which has a certain logic in the special case of the offence of membership of an unlawful organization.

Section 5 is a much more limited provision and one which is much easier to reconcile with familiar legal principles. It provides that in any proceedings against a person

“for an offence to which this section applies evidence is given that the accused—

(a) at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, or

(b) when being charged with the offence or informed by a member of the Garda Síochána that he or she might be prosecuted for it,

failed to mention any fact relied on in his or her defence in those proceedings, being a fact which in the circumstances existing at the time he or she could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, then the court, in determining whether to send forward the accused for trial or whether there is a case to answer and the court (or, subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence

charged (or of any other offence of which he or she could lawfully be convicted on that charge) may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to which the failure is material, but a person shall not be convicted of an offence solely on an inference drawn from such a failure.”⁷⁹

Accordingly, the section does not “bite” unless the defendant puts forward a positive case by way of defence – in those circumstances the prosecution is entitled to introduce in evidence the fact that the defence was not raised when the person was questioned.

These provisions provide statutory authority for the line of cross-examination as to credit which was held in the absence of such authority in *Finnerty* to be an unauthorized interference with the right to silence. But in certain respects they go further.

⁷⁹ A virtually identical provision is contained in the Criminal Justice (Drug Trafficking) Act 1996, s 7.

In the case of section 2, the failure⁸⁰ to answer material questions⁸¹ can in and of itself be regarded as corroboration, although an accused shall not be convicted solely by reason of the failure to answer.⁸² In effect, therefore, the failure to answer a question can be regarded as providing evidence which actually *positively assists* the prosecution case, as opposed - as

⁸⁰ Which includes a false or misleading answer: see section 2(4)(b).

⁸¹ Which includes the failure to give a “full account of his or her own movements, actions, activities or associations during any specified period”: see section 2(4)(a).

⁸² Section 2(1). See generally *The People v. Binead* [2006] IECCA 147 where Macken J. noted that the trial court had drawn inferences from silence in certain circumstances:

“... the court is entitled to and does in fact, draw the inference from the failure of each accused to answer those questions, that each of them has a guilty conscience insofar as the allegations that they are members of an unlawful organisation was concerned, and that the court is satisfied that their silence amounted to corroboration of the belief evidence in that behalf given by Chief Superintendent Kelly.”

Macken J. then continued:

“The gravamen of the applicants’ complaint in this regard is the alleged unlawful commentary on the demeanour and behaviour of each of the applicants during interview. It is necessary to analyse the judgment with a view to seeing whether this complaint is justified. The trial court was considering, in this part of its judgment, the content of the interviews, and the materiality of the questions posed having regard to the charges, and was assessing whether it could draw the inferences which section 2 of the Act of 1998 states it can draw in certain circumstances. It is true that in the introductory passage of the judgment on this issue, the trial court commented on the general demeanour of each of the applicants during the interview, referring to them as reacting with “stony silence”, or pointing out that each appeared in the interviews to be simply ignoring what was going on, even, the court said, deliberately and offensively doing so. It is not suggested by the applicants that these comments were in any way inaccurate of the actual events occurring at the time or of the applicants’ demeanour, and no case is made by either applicant that they had, in fact, answered any question at all. This objection, against a background of a total failure to answer any question at all, is rather surreal. In dealing with the question of whether it could draw inferences from a failure to respond to material questions, the above extracts from the transcript make it clear that the trial court made a finding on just that, namely the failure to respond, and dealt with that precise question in a discrete manner. What the applicants suggest, arising from the foregoing, is that bias can in some way be implied against the trial court in the course of its assessment of the issue as to whether inferences could be drawn from the clear failure to respond, and that because of the comments made as to demeanour, the court’s inferences were invalidly drawn. The entitlement to draw inferences arises from the failure to respond to material questions. The evidence established clearly that there was a complete and utter failure on the part of either applicant to answer any question at all in the course of interview. In these circumstances, the inferences were correctly and validly drawn. The commentary as to demeanour in no way altered that, nor did it suggest that the right to silence did not apply.”

would have been the case in *Finnerty* - to negating a defence advanced by the accused.⁸³

Section 5 is not as far-reaching in that it only applies where the accused previously failed "to mention any fact relied on in his or defence in those proceedings", i.e., its initial effect is simply to allow cross-examination as to credit to negative the facts now relied on in a defence. But even here the section goes further than that which was necessary to deal with the issue of credibility of the accused and the doctrine of recent invention or fabrication (i.e., the *Finnerty* issues) and, again like section 2 and section 7 of the 1996 Act, permits the failure to answer to be treated as amounting to corroboration.

This interpretation is confirmed by the decision of the Court of Criminal Appeal in *The People v. Bowes*.⁸⁴ In this case quantities of heroin were found in the boot of the accused's car. In addition to the usual caution, Gardaí warned him that his failure to account for the presence of the drugs might lead to inferences being drawn from his silence. The Court of

⁸³ It may be noted that the *Offences against the State Acts Review Group* (2002) divided on the scope of the inference drawing powers contained in section 2 and section 5. The majority (at para. 8.63) considered that the inference-drawing power was a "limited one" and did not extend to cases where the court "was of opinion that the prejudicial effect of such an inference would outweigh its probative effect." The minority objected, however, to the retention of these sections on the ground (at para. 8.63) that these provisions "seem to permit adverse inferences to be drawn even where there was no prima facie or other set of circumstances which, as a matter of common sense, call for an explanation from the accused." See *Report of the Committee to Review the Offences against the State Acts 1939-1998* (Dublin, 2002) at 209-210.

⁸⁴ [2004] 4 IR 223.

Criminal Appeal quashed his conviction on a number of grounds, among them that the prosecution in opening had sought to lead evidence as to the accused's silence in response to the Garda questioning after his arrest, although the accused had not yet relied upon any facts in his defence. As Fennelly J. noted:

“The permitted inference relates to “any fact relied on in [the] defence..... being a fact which in the circumstances existing at the time he or she could reasonably have been expected to mention....” The section does not relate to silence generally. In particular, it does not relate to the fact that the accused, in response to Garda questioning, exercised his right to remain silent and declined to answer any questions. There must be an identifiable fact relied on by the defence at the trial which the applicant “could reasonably have been expected to mention when...questioned.” The prosecution case was never presented in those terms. Counsel commented, in opening, that the applicant, when shown the various items in Garda custody, “had no comment to make....” That was clearly inappropriate. The prosecution did not yet know what fact or facts would be relied on by the defence. The section did not justify any prosecution reliance on failure by an accused person to comment. The learned trial judge, as well as counsel on both sides, appears to have proceeded on the footing that the section permitted general silence to be

admitted in evidence, once a warning had been given. It does not. The applicant gave evidence of a number of matters in his defence. It is not appropriate for this court to express any view as to whether his failure to mention any of those matters brought the section into play. It does not arise on this appeal.”⁸⁵

The judgments of the European Court of Human Rights in *Heaney and Quinn*

It remains, therefore, to complete a complex picture and to note that the European Court of Human Rights concluded in *Heaney v. Ireland; Quinn v. Ireland*⁸⁶ that the use of section 52 of the 1939 Act *prior* to the decision in *National Irish Banks* in January 1999 contravened Article 6 ECHR. Given that prior to that decision of the Supreme Court there was - at the very least - an uncertainty as to whether statements obtained pursuant to a statutory demand were later admissible in evidence, the Court held that the invocation of section 52 in these circumstances destroyed the essence of the applicant’s right to silence. The applicants had been confronted with the dilemma of either refusing to answer the question (and committing an offence) or potentially incriminating themselves and finding such a statement being later used in evidence against them in subsequent proceedings. But

⁸⁵ [2004] 4 IR 223 at 238-239.

⁸⁶ (2001) 33 EHRR 334.

whether section 52 could be used in a manner compatible with Article 6 ECHR in the wake of *National Irish Banks* is itself a moot point⁸⁷, although the fact that the suspect would now enjoy the transaction immunity as a result of that decision (i.e., the answers which he is compelled to give cannot be used in evidence against him) strongly suggests that the use of the section under these changed circumstances would not now amount to a violation.

Comment by prosecutor and the trial judge

The prosecution are precluded by section 1(b) of the Criminal Justice (Evidence) Act 1924 from commenting on the accused's failure to give evidence during the course of a criminal trial. The 1924 Act does not expressly prohibit judicial comment on failure to give evidence in court⁸⁸ but does not expressly authorize or encourage such comment either, and in practice

⁸⁷ See *Report of the Committee to Review the Offences against the State Acts 1939-1998* (Dublin, 2002) at 203-204.

⁸⁸ The *UK 11th Report* noted (at para. 108) that at the time of the enactment of the Criminal Evidence Act 1898 (on which the 1924 Act was entirely based):

“One of the arguments advanced against the Bill for the Criminal Evidence Act 1898 which gave the accused the right in all cases to give evidence on oath, was that it was wrong that pressure should be put on him to do so. It was a concession to this view that section 1(b) prohibited the prosecution from commenting on the failure of the accused to give evidence. In fact the enactment of section 1(b) was the result of an amendment moved by a private Member of Parliament at the committee stage in the House of Commons. As at first moved the amendment would have forbidden comment by the judge as well. The Solicitor General (Sir R. Finlay) at first resisted the amendment altogether; but eventually he suggested that the prohibition should apply to the prosecution alone because there were exceptional cases ‘such as where the defence involved grievous reflections on the character of the prosecutor’, where it would be right for the judge to be able to comment. Sir R. Finlay thought that the limitation would show that it was only in ‘special circumstances’ that comment should be made.”

such comment is but rarely engaged in. In any event, one further effect of the Supreme Court's decision in *Finnerty* is to discourage such comment, save where the statutory inference provisions contained in the 1996 Act and 1998 Act apply. As Keane J. said in that case, a trial judge in his charge to the jury "should, in general, make no reference to the fact that the defendant refused to answer questions during the course of his detention."⁸⁹

Contemporary practice is illustrated by two subsequent decisions of the Court of Criminal Appeal, namely, *The People v. Coddington*⁹⁰ and *The People v. MK*.⁹¹ In *Coddington* the accused was charged with the possession of drugs for the purposes of supply and a considerable sum of money had been found in concealed locations in his house. In his charge to the jury the trial judge had said that the defence case was that:

".....there may be a totally innocent explanation as to why the cash was in the house. You are invited then to speculate as to what the perfectly innocent explanation may be. You have had no evidence from the accused

⁸⁹ *People v. Finnerty* [1999] 4 IR 364 at 381 per Keane J. In *People v. Quinn* [1955] IR 364 the accused was charged with unlawful carnal knowledge of an underage young girl contrary to s 2 of the Criminal Law (Amendment) Act 1935. Following his arrest by the Gardaí he was cautioned and said nothing. The Court of Criminal Appeal, per Maguire CJ., condemned as "utterly wrong" comments by the trial judge to the jury which strongly implied that an "honest decent man" would have volunteered an exculpatory explanation to the Gardaí if the accused was, in fact, innocent of the charge.

⁹⁰ Court of Criminal Appeal, May 31, 2001.

⁹¹ [2005] IECCA 93.

insofar as that is concerned. There is no contest about where he lived, there is no contest that it was his money, and yet you are invited to speculate as to what the explanation there might be for the money being there”.

The Court of Criminal Appeal held that the judge’s charge was erroneous in law in that it suggested that there was some onus on the accused to provide evidence of an innocent explanation for the presence of the money. Murray J. referred to the decision in *Finnerty* and continued:

“While the trial judge may remind the jury of the fact that the accused had, as is his right, not given evidence in the trial they must be expressly instructed not to draw any inference from the exercise of that right. In this case, the learned trial judge not only recalled that the accused had not given evidence but did so in the context of the failure of the defence to provide evidence of an innocent explanation for the presence of the money and without any direction that no inference was to be drawn from his failure to give evidence.”

The Court accordingly set aside the conviction on the basis that it would be unsafe to allow the verdict to stand and a re-trial was ordered.

As McGuinness J. put in her judgment for the Court of Criminal Appeal in *MK*, the trial judge in *Coddington* had erred in that he “had in a positive way invited the jury to draw an inference from the fact that the accused had not given evidence.” By contrast in *MK* the trial judge had charged the jury thus on the right to silence:

“You will have to have regard to what [the accused] said. He did speak, even though he didn’t leave the dock, he didn’t give evidence. He relied on the right to silence, which he is entitled to do. He is entitled to stay where he is in the court and adopt the attitude, I am not saying a word because I don’t have to say a word. That is known as the right to silence, which [the accused] has and he acted on that. He did not give evidence. You, ladies and gentlemen, will have regard to the fact that he didn’t give evidence as a right.”

Following a requisition on this charge to the jury, the trial judge then re-charged the jury on this point as follows:

“The first thing I want to deal with is the right to silence. The accused man has the right to silence. When I spoke of his right to silence, that is his silence in court. He has, of course, as I have told you and as you are aware, spoken to the Guards in the bedroom of his house the night the

Guard went to investigate, he spoke that night, he spoke later in the police station, the next day in the police station. So he did speak, and I emphasise that to you. That was when he spoke. But in court he did not speak, he decided and elected to rely on his right to silence which he has and nobody is to take any consequence from that. That was what I told you."

McGuinness J. rejected any comparison with *Coddington*:

"The jury was clearly informed that the accused man had a right to silence and that no one was to take any consequence from the fact that he did not give evidence at the trial."

The arguments for change

The following represent arguments that could be advanced for change.

Where defendants who plead not guilty exercise their right not to go into the witness box, the jury is thus denied the chance to hear the defendant's side of the case; so that it can be tested, by cross-examination against the prosecution case. Many lay-persons, approaching the legal system with a fresh mind would consider this a curious restriction which requires good reason to justify it.

Whilst the bar on comment on the defendant not giving evidence has recently been gathered in under the head of the right to silence, there is in fact a rather different historical explanation for it. It goes back to the fact that it was not until the Criminal Justice (Evidence) Act 1924 that the accused was permitted in all cases to give evidence on oath. And, significantly for a long time after 1924, the defendant was frequently not represented by experienced counsel. It seemed natural, therefore, not to allow comment on a strategic choice which would usually have been made by an uninformed lay person, on their own and without assistance.

One may take the classical view that victims and, beyond them, the community do not have any rights in regard to the criminal trial, although of course Article 30.3 of the Constitution provides that all prosecutions on indictment⁹² “shall be prosecuted in the name of the People.” But even so, it looks strange for counsel to the defence to be allowed to subject prosecution witnesses to vigorous cross-examination whilst the defendant remains placidly outside the witness box.

While the ‘right to silence’ is sometimes used as a very broad concept, it may (as indicated earlier) be divided into situations bearing on the defendant’s silence at

⁹² With the exception of prosecutions before the Special Criminal Court.

the Garda station or (as in the present section) the defendant's not testifying at the trial. What are the arguments which are usually advanced in favour of the right; which arguments seems to bear mainly on the question of comment on the silence in the Garda station?

First, in a "straightforward case of interrogation by the police ... the accused may be shocked by the accusation and unable at first to remember some facts which would clear him."⁹³ But this state of shock would hardly continue through the months leading up to the trial. The second reason sometimes adduced is that traditionally the accused may not have had access to legal advice at the Garda station. Again, the reverse will be the case at the trial.

Third, it might be embarrassing for the defendant to mention an exculpatory fact, which might reveal something which he would otherwise wish to conceal. The stock example here is where the defendant in giving evidence might be drawn into admitting that he or she were conducting an adulterous affair. This is, of course, a function of the fact that trials are held in public and it would be as true of all witnesses (defence or prosecution) as for the accused; yet the law makes it a contempt of court for other witnesses to refuse to give evidence. For instance, a defendant might subpoena a married woman as a witness whose evidence would be to say that she was carrying on an affair with him at the precise time

⁹³ *UK 11th Report*, para. 35.

of the robbery, or equally, the prosecution might subpoena a witness to say that, precisely because she was carrying on such an affair, she had a unique view of the scene of the crime. In each case this giving of such evidence will (presumably) have disastrous consequences for the witness' marriages. Yet the law has always taken the robust policy view that the witness must choose between being embarrassed or committing a contempt of court.

The final point is that an accused person might prove to be a 'bad witness' and give a bad performance in the witness box. This, too, is partly the result of general consideration of the importance of a public cross-examination. (What, for instance, if it is the defence's key witness, who happens to sound unconvincing: should that be a reason for him or her to give written testimony?) To cater for this difficulty, one possibility might be that any change in this area should (like the UK Criminal Justice and Public Order Act 1994, section 35), include a provision that any new rule in this area would not apply where it appears to the court that "the physical or mental condition of the accused makes it undesirable for him to give evidence."

On this view, all of these "practical" arguments against change depend upon adverse consequences which it is said would follow from disturbing the immunity. Therefore, it is of some relevance to note that in practice the law was

changed in England thirteen years ago, and, so far as the Review Group is aware, there has been no report of these anticipated dangers materialising.

On this view, it could be said that this immunity goes back to a historical era which is no longer with us; it is not part of the main channel of the right to silence, and it is one way in which the criminal trial is not 'balanced'.

The arguments against change

The following represent arguments that could be advanced against change.

It is a fundamental principle of our system that the onus of proof is on the prosecution. It would run contrary to this principle if the failure of a defendant to advance a positive defence were to be held against him or her. That is not to say that, as a matter of common sense, certain consequences might not flow from evidence which is not explained, such as, for example, the unexplained possession of proceeds of crime or an instrument used in committing the crime. In this sort of case, an accused is likely to be convicted in the absence of a credible explanation and it is unnecessary to make this sort of radical change to secure a conviction in such cases.

In any event, a failure to give evidence *per se* is not in the same category. It would be a radical change to the law to permit an adverse inference to be generally drawn from the accused's failure to give evidence, as would invariably be the case if either the prosecutor or (especially) the trial judge were to be permitted to make such a comment. That is not to say that the case of suspicious circumstances calling for an explanation is not in a separate category⁹⁴. As regards comment on a failure to give evidence, it is essential to stress that comment cannot exist in a vacuum – the comment must be made for some relevant purpose founded in the evidence. A judge or prosecutor could not say to the jury, for example, “you may find it remarkable that the defendant chose not to give evidence to explain the prosecution case, but, of course, you cannot draw any adverse inference from that.” If the principle of no adverse inferences from failure to give evidence is to be maintained, it would seem to follow that there can be no comment on such failure (except of course in the special case of comment by a co-accused).

It is true that the 1924 Act does not prohibit the judge from making a comment on the failure to give evidence, but any right to do so which might be implied by this provision is rarely exercised. In practice, such comment is not ordinarily made. If existing practice were to be changed and such comment were to be permitted, it might well compromise the integrity of the trial process in

⁹⁴ This matter is considered separately by the Review Group.

that (in practice) huge weight would be given to such comments by a jury. Judicial warnings notwithstanding, the temptation might be for the jury to draw an adverse inference as to guilt, *simply* because the accused elected not to give evidence.

Recording of interviews

Rule 9 of the Judges' Rules requires that:

“Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.”

Where the interview is recorded, Article 6(2) of the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997⁹⁵ further provides for an additional caution in the following terms:

"You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in

⁹⁵ SI No. 74 of 1997.

evidence. As you are aware this interview is being taped and the tape may be used in evidence"

Rule 9 obviously serves the very important purpose of ensuring that "invented or planted oral statements are [not] adduced in evidence."⁹⁶ Many of the submissions to the Review Group nevertheless made the point that this requirement was unduly burdensome on the Gardaí. The taking down of a lengthy statement is laborious and may well impede the natural flow of an interview. The Rule was, moreover, drafted with short statements and short detention periods in mind. If, however, the Gardaí are required to investigate a serious and complex crime where the suspect has been detained for up to anything up to seven hours, it is unrealistic to expect the Gardaí to take anything like a verbatim note. Quite apart from the considerations mentioned in *Towson*, this requirement in itself may give rise to subsequent disputes at the trial as to what was actually said, if the interview is, for some reason, not recorded. The Court of Criminal Appeal has recently emphasised the importance in the interests of both the Gardaí and the accused of the video recording of interviews.⁹⁷

⁹⁶ *The People v. Towson* [1978] ILRM 122 at 126 per O'Higgins CJ.

⁹⁷ *The People v. Connolly* [2003] 2 IR 1; *The People v. Michael Murphy* [2005] 4 IR 504.

Of course the recording of the interviewing of suspects has greatly improved matters. As Kearns J. said in *The People v. Michael Murphy* ⁹⁸:

“Indeed, the regular ‘trial within a trial’ as to the admissibility of confessions which presently arises in virtually every criminal trial might well become a far less frequent event if electronic recording of interviews becomes the invariable or normal practice in all garda stations where suspects are interviewed.”⁹⁹

In the vast majority of cases there is now a record of the interview that can be viewed later by the court and the legal teams to ascertain precisely the questions which were put to the suspect and the answers, if any, given in response. However, the current practice involves the Gardaí writing down the questions and answers during the interview, which is in any event being video recorded. Is this necessary? An argument can be made for the video-tape to be the primary record of the interview and for transcripts to be compiled later so that they can be provided to the court and to the prosecution and defence lawyers. The Review Group is, however, aware that the Steering Committee on the Audio and Video Recording of Garda Questioning of Detained Persons has examined this matter in its *Third Report*¹⁰⁰ in some depth.

⁹⁸ [2005] 4 IR 504.

⁹⁹ [2005] 4 IR 504 at 514.

¹⁰⁰ September 2004.

There are, of course, also arguments against abolishing Rule 9's requirement regarding Garda note-taking, as the present system facilitates the briefing of other interviewers and, indeed, the obtaining of directions from the Director of Public Prosecutions. The Review Group at this stage can do little more than note our preference in principle for transcripts rather than handwritten notes.¹⁰¹

One further potentially important aspect of the present recording system might be mentioned at this juncture. At present detained persons whose interviews have been video-taped are entitled to be given a copy of the tape on release if same is requested in writing. This procedure is governed by Article 16(2) of the Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations, 1997¹⁰² which provides that:

“A working copy [of the tape] shall be provided to the person interviewed or to his or her legal representative on receipt of a request in writing, from that person or his or her representative, to the

¹⁰¹ In *The People v. Michael Murphy* [2005] 4 IR 504 at 514 Kearns J. expressed the view that the present requirements add:

“greatly to the time required to complete an interview and a correspondingly lengthy period of time to play over the tape to a judge and jury in the trial itself.”

¹⁰² SI No. 74 of 1997.

Superintendent of the District in which the interview took place, unless that Superintendent believes, on reasonable grounds, that to do so would prejudice an ongoing investigation or endanger the safety, security and well being of another person.”

The present practice is nonetheless open to abuse in that suspects might be required to hand over their video-tapes to others. This could arise where the suspect was involved in a criminal organisation whose leaders wished to know what information, if any, was given by the suspect to the Gardaí. There is some – admittedly anecdotal – evidence to suggest that this sort of abuse may be widespread. The Review Group suggests that the Regulations be amended so that the video tapes are only made available as a matter of prosecution disclosure following the charging of the suspect. While this would not entirely eliminate the potential for abuse, it might help to curb it. These are matters which are further addressed towards the conclusion of this Chapter.

The right to silence in practice

It may be convenient, therefore, to sum up the present state of the law regarding the operation of the right to silence before proceeding to make our recommendations.

A. Silence during questioning

A detained person is entitled to maintain silence in general on the basis that such silence will not be admissible against him or her as part of the prosecution case. The exceptions here are section 2 of the Offences against the State (Amendment) Act 1998 and (to a more limited extent) section 18 and section 19 of the Criminal Justice Act 1984, section 7 of the Criminal Justice (Drug Trafficking) Act 1996 and section 5 of the Offences against the State (Amendment) Act 1998 which allow an inference to be drawn from such silence. In other circumstances a suspect may be required by statute to give an account in respect of relevant circumstances, but such answers are rendered constitutionally inadmissible in a criminal trial.

B. Not giving evidence in court

The defendant cannot be compelled to give evidence at the trial.¹⁰³ As regards failure to give evidence at the trial, the Criminal Justice (Evidence) Act 1924 provides that failure to give evidence shall not be the subject of comment by the

¹⁰³ Criminal Justice (Evidence) Act 1924, s. 1(a).

prosecution¹⁰⁴ but the Act does not expressly prohibit such comment by the judge or by a co-accused.

C. Comment by the prosecution on silence during questioning or failure to give evidence in court

The effect of the Supreme Court's decision in *Finnerty* is in general to preclude the prosecution cross-examining the accused as to why he remained silent during questioning while in Garda custody. Such cross-examination is naturally legitimate where the inference provisions apply.

As stated above, the prosecution are precluded by statute from commenting on the accused's failure to give evidence during the course of a criminal trial.¹⁰⁵

D. Comment by the trial judge on silence during questioning or failure to give evidence in court

As we have just seen, one further effect of *Finnerty* is that the trial judge is but rarely permitted to comment on the accused's failure to give evidence, save where the statutory inference provisions apply.

¹⁰⁴ See Walsh, *Criminal Procedure*, at 912.

¹⁰⁵ Criminal Justice (Evidence) Act 1924, s. 1(b).

The 1924 Act does not expressly prohibit judicial comment on failure to give evidence in court but does not expressly authorize or encourage such comment either, and in practice such comment is not engaged in. In any event, such comment might be thought to be questionable given the onus of proof on the prosecution.

Conclusions

The Review Group has considered a number of options for change and sets out below a summary of our analysis and recommendations.

Option 1 - No change

The Review Group has considered the possibility of recommending no change to the existing law. We recognise that one argument in favour of this option is that any change would need to be balanced with various safeguards and conditions and that, on one view, it would be preferable to refrain from making any provisional recommendation for change until all such safeguards are elaborated in the overall context of an analysis of the full range of criminal justice issues to be considered by the Group.

Having considered this option in detail, the Review Group nonetheless considers that, on balance, the present state of the law is not wholly satisfactory and we provisionally recommend against the option of no change.

Option 2 - Extended provision compelling detained persons to answer certain questions, with the safeguard that the answers will not be admissible in evidence against the accused.

As we have already noted, certain statutory provisions, particularly section 52 of the Offences against the State Act 1939, allow a detained person to be compelled to answer certain questions. In the light of the Supreme Court's decision in *National Irish Banks* it is absolutely plain that such a provision would be unconstitutional if it permitted such compelled evidence to be admissible in evidence against an accused.

We have considered the question as to whether this provision should be extended to cover other types of question apart from those referred to in section 52 of the 1939 Act. The main disadvantages of this approach are as follows: (a) such a provision would be a direct interference with the right to silence and might arguably run into constitutional difficulty on that basis, unless it were limited to specific issues which called for a response from the detained person (b) the offence of withholding the information would necessarily be a more minor

offence than the substantive wrongdoing being investigated and thus such a provision would be of limited value.

On balance there is no clear case for such a measure, and a considerable weight of argument against it. We therefore recommend against this option also.

Option 3 - A provision which permits (a) the prosecution to comment on the accused's failure to give evidence in court and (b) permits the trier of fact to draw an adverse inference from the accused's failure to give evidence at the trial or which expressly permits comment on such failure

A majority of the Review Group are of opinion that it would not be desirable that either the prosecution or the judge should be permitted to comment on the failure of the accused to give evidence. In practice, such comment would often be fatal to the accused, yet there might be sound reasons why an accused elected not to give evidence. The accused might, for example, be inarticulate or liable to be confused when giving evidence.

We think instead that the prosecutor or the trial judge should be permitted to intervene only if the defence make unfounded assertions as to the reason why the accused did not give evidence. As the Court of

Criminal Appeal pointed out in *The People v. Brazil*¹⁰⁶, it is perfectly proper for the trial judge to point out to the jury that assertions made by the defence to the effect that it was unnecessary for him to give evidence given that the jury had already seen his exculpatory accounts in a video recording were incorrect in law and that such accounts are not to be regarded as evidence unless he goes into the witness box and subjects himself to cross-examination.

Option 4 - Provision to allow the prosecution to rely on silence in general in the Garda interview as part of the prosecution case and as being corroborative of guilt

The Review Group sees - as the Leahy Committee previously saw - a fundamental distinction between a failure to explain suspicious circumstances and a general failure to answer questions. Failure to explain suspicious circumstances is a special case which we deal with below. But a general failure to answer questions, such as for example failing to account for movements which are not in themselves suspicious, could not be admissible without a major inroad into established principles. The Review Group considers that such a proposal would be a direct interference with the right to silence and would involve a

¹⁰⁶ Court of Criminal Appeal, 22 March 2002

fundamental shift in the onus of proof. This would be a radical change to existing law, apart from the special case of membership of an unlawful organisation under section 2 of the Offences against the State (Amendment) Act 1998. We do not think that the principles behind section 2 of the 1998 Act should be extended any further.

Quite apart from the important considerations of principle, some members of the Review Group consider that there are also important pragmatic considerations which would militate against such a change. They take the view that, if it were thought to be desirable that a court should be entitled to draw inferences from an accused's failure to answer material questions while being questioned by the Gardaí following arrest, it would be necessary, for example, to permit suspects to have legal advisers present at all stages during the interview process.

The onus of proof is a central feature of our criminal justice system and an important bulwark against miscarriages of justice. The Review Group, therefore, recommends against any change to allow silence to be introduced as part of the prosecution case or as providing corroborating evidence.

Option 5 - Provision to allow inference to be drawn from an accused's failure to mention a defence on which he or she subsequently relies.

The Review Group has considered this option in some depth.

This option would involve the extension of section 5 of the Offences against the State (Amendment) Act 1998 and section 7 of the Criminal Justice (Drug Trafficking) Act 1996 (“the existing provisions”) to cover other forms of crime.

The practical effect of this option would be to permit an accused who puts forward a defence for the first time in the witness box to be cross-examined as to when he or she first came up with the defence. It would further allow the prosecution and, indeed, the judge to comment on the lateness of the defendant’s mentioning the fact, but solely for the purpose of questioning the truthfulness of the alleged exculpatory account. This evidence would be introduced for the purpose of impeaching the defendant’s credibility in respect of this affirmative defence, but it would not be tendered for the purpose of bolstering the prosecution case as such. It would also be necessary for the trial judge to warn the jury that such evidence was being introduced for the *sole* purpose of undermining the positive defence advanced. Such a proposal would not, on the other hand, apply to an accused who chose either not to give evidence or to put forward any positive defence.

The Review Group sees a certain logic in permitting a defendant to be challenged on a defence which emerges very late in the day. To permit such a challenge would, of necessity, involve an exploration of whether the defence was mentioned in the Garda interview. While we have drawn on the existing statutory provisions as a model for such a proposal, we would nonetheless observe that our proposal does differ from the existing provisions.

First, the inference-drawing provision which we suggest under this heading is one limited to the question of recent invention of a defence, and the provision would not invite the trier of fact to hold that the false defence amounts to corroboration and nor would it permit a more general inference as to guilt to be drawn.

The existing provisions make reference to "corroboration", which suggests that the failure to mention the fact in the interview somehow supports the prosecution case. This can be seen as unsatisfactory (and possibly confusing in practice) in that it implies that the defendant would be bolstering the prosecution case by putting forward a defence where the inference is drawn. Any new provision should not refer to corroboration, but should rather allow an inference to be drawn from the failure to mention a fact as to the credibility of the fact which is now put forward in defence.

Second, a defence might quite legitimately be withheld in the interview in the Garda station but, was perhaps, volunteered shortly afterwards, where the detained person was in shock for example, or embarrassed, or incapable of applying his or her mind to the position.

By contrast with the existing provisions, our suggested proposal provides that in deciding whether to draw an inference from the failure to mention the fact in interview, the trier of fact would have regard to when the fact was first mentioned. This would distinguish between a case where the defence was volunteered early, although not necessarily in the interview, and where it emerges for the first time in the trial.

Since the publication of the Interim Report there have been some suggestions to the effect that our proposal ought to mirror the existing provisions and contain a clause to the effect that, just as with section 2(1) of the Offences against the State (Amendment) Act 1998, “a person shall not be convicted of the offences solely on an inference drawn from such a failure.” We think that, strictly speaking, this point is not well taken, because under our proposals, the inference will not amount to corroboration, but will rather permit the negating of newly advanced facts by way of defence. The inclusion of such a clause might, therefore, unwittingly extend the scope of the inference drawing provisions by

suggesting that the inference could (or might) amount to corroboration of the prosecution case when we have been careful to avoid this very suggestion.

With some hesitation, therefore, we suggest that such a clause be inserted. We consider, however, that the clause be prefaced by the words “for the avoidance of any doubt”, so that it will help to make clear that there is no suggestion that any inference drawn might otherwise amount to corroboration.

The Review Group has carefully considered the implications of such a change for the Judges’ Rules. It would appear to follow from such a change that the practice put in place by the Judges’ Rules would need to be altered so as to provide for an amended form of caution, along the lines that:

“You do not have to say anything. But it may harm the credibility of your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence.”¹⁰⁷

¹⁰⁷ This is a version of the ordinary caution given after arrest and after affording the defendant access to legal advice in the UK: see Police and Criminal Evidence Act 1984, Code of Practice C, para. 10.5. But we have used the words ‘the credibility of your defence’ advisedly, so as to ensure that the suspect is not placed under the impression that he is under a general obligation to answer questions, but rather that he is liable to be cross-examined as to credibility if he advances a defence at his trial which he has not previously mentioned. If it were thought that the words

To avoid any problems as to the precise legal status of the Judges' Rules it is suggested that a change in the caution should be made by statute and we provisionally recommend a power to prescribe forms of caution by regulations.

The Review Group has carefully considered whether the inference should apply to certain serious offences only or to arrestable offences generally as defined by section 2(1) of the Criminal Law Act 1997 (as amended by section 8 of the Criminal Justice Act 2006). On balance, there is no strong reason in principle not to apply the inference to all arrestable offences. In addition, to have two classes of arrestable offences would cause confusion in practice as two separate forms of caution would apply to each class, with attendant opportunity for inadvertent error.

The Review Group recommends that a statutory provision along the lines discussed above be introduced. However, we emphasise that the precise terms of this provision should be carefully considered as there is clearly a relationship between it and other issues including disclosure of the defence case, review of the Judges' Rules, the manner in which interviews are recorded, and access to videotapes of interviews.

“credibility of your defence” were liable to confuse suspects, then perhaps the words “But your defence may not be believed.....” might be used as an alternative.

We have considered possible safeguards for such a provision including that leave of the trial judge be necessary before a question or comment could be made, that the accused person be entitled to have a lawyer present during the interview, or that the interview be either recorded or that the detained person consent to the non-recording of the interview. We consider that while the first two safeguards are unduly restrictive on the prosecution and police respectively, the third safeguard would be a valuable one and should be included in any statute on this subject.

Our recommendation is broadly in line with that of the Leahy Committee although we offer a slightly different formula of words for the statutory provision concerned.¹⁰⁸

Option 6 - Permitting the prosecution to adduce video-tape evidence of Garda interviews with suspects

Another option is that the prosecution should be allowed to adduce video tape evidence of the accused's failure to answer questions while in Garda custody. The unspoken inference which the jury would be invited to draw if such a change were made is that the accused is guilty simply because

¹⁰⁸ See *Report of the Expert Group to Consider Changes in the Criminal Law*, Recommendation 6.

he refused to answer the questions posed. We think that such a proposal would undermine the substance of the right to silence and we therefore do not recommend it.

Option 7: Provision allowing an adverse inference to be drawn from the detained person's failure to account for suspicious circumstances.

Sections 18 and 19 of the Criminal Justice Act 1984 allow inferences to be drawn from the failure by an accused person to account for suspicious marks, objects etc, or his or her presence in a particular place, if required to do so by the arresting member.

The provisions are of limited use for a number of reasons, including because the person must be warned by the arresting member rather than any member. This problem could be addressed by changing the reference in a redrafted provision.

It would also be of assistance in terms of clarity to provide that both failure to explain the matters the subject of the requirement, and the giving of an explanation that is false and misleading, would give rise to the inference. The sections at present do not encompass the false or misleading explanation.

Because the sections have fallen into disuse we suggest that a fresh legislative provision is required to tie together the fundamental principles of the existing sections, namely that common sense dictates that an inference can be drawn from failure to explain something which is inherently suspicious, and which in the language of the European jurisprudence, calls for an answer from the detained person. Such circumstances would include, but could go beyond, the particular matters listed in the present sections 18 and 19. It would ultimately be a matter for the trier of fact to determine whether the matter in question did in fact call for an answer and if so, whether the failure to answer or the giving of a false answer is something which warrants the drawing of an inference. We would also seek to take the opportunity to make the application of the provisions easier technically, and the power we suggest for the Minister to regulate the giving and withdrawing of cautions would assist in the practical implementation of such a new provision.

The Review Group accordingly recommends these changes.

Other issues

We have also considered the issue, referred to us by the Tánaiste, as to whether the prosecution should be allowed to adduce video tape evidence of the

accused's failure to answer questions while in Garda custody. On balance it appears to us that such a proposal would run counter to the proposals made by us in the interim report. It would inevitably lead to a situation where the inference which the jury would be invited to draw if such a change were made would be that the accused is guilty simply because he refused to answer the questions posed.

We have further considered whether the question of re-examining the Judges' Rules be overhauled in the light of modern conditions. We have come to the view that the Judges' Rules ought to be replaced by appropriate statutorily-based regulations. The Judges' Rules, while having the benefit of flexibility, are something of an anomaly in terms of their origin and status. The Rules would, in any event, need to be amended in the event of the proposals in our interim report being enacted. We, therefore, favour legislation which would provide that the rules would cease to have effect and would be replaced by regulations, to be made by the Minister, regarding the conduct of interviews. The draft heads attached to our interim report reflect that approach to the extent that they provide for the form of caution to be so prescribed.

We should also add that the new caution would replace that prescribed by the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997, Art. 6(2)(a).

As stated in the interim report, the Group would wish to see a situation develop in which digitalised transcripts of the interviews were available to the Garda Síochána, prosecutors and the accused's legal team. This would dispense with the necessity for the existing Rule 9 of the Judges' Rules and would generally make for a more efficient system in the interests of all concerned, even bearing in mind that "general conversation" is not covered by rule 9.¹⁰⁹ It has been stated in *The People (D.P.P.) v. Towson*¹¹⁰ that the purpose of rule 9 is to avoid planted or invented statements – a purpose that can be achieved considerably more thoroughly by a digital transcript and audio and video tape. On balance, the benefits of such an approach probably outweigh the disadvantages. The downside of moving to transcripts would be the lack of an immediately available note of the interview for the purpose of briefing another team, or seeking directions from the Director, and the lack of an opportunity to the person to sign the note. The absence of a formal note of the interview would not preclude either the questioning members, or another member who is monitoring the interview, from making a note of the important passages of the interview for briefing purposes. We consider that subject to suitable safeguards, a recorded interview should not be required to be the subject of a written note. This would be in line with the practice in the U.K. under the codes of practice

¹⁰⁹ *The People (D.P.P.) v. McKeever* [1994] 1 I.L.R.M. 186.

¹¹⁰ [1978] I.L.R.M. 12.

under the Police and Criminal Evidence Act 1984, where if there is an audio or audio-visual recording there is no necessity for a written record.

Under our proposal, the requirement for a note would, however, apply to any admission made in an interview where the detained person requests that recording would not apply – but there would be no need to make a written note of any “off the record”-type discussion not consisting of admissions on which the prosecution would be in a position to rely.

This proposal would involve providing that rule 9 and Article 12(11) of the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987 (which is somewhat wider than rule 9 in that it does apply to “general chat”¹¹¹) would not apply to any interview which is electronically recorded.

We would also wish to see routine audio and video taping of common areas such as corridors etc to minimise the potential for issues arising concerning utterances or incidents in such common areas.

As stated in the interim report, and for the reasons there given, the Review Group recommends that the present practice regarding the supply of the

¹¹¹ *The People (D.P.P.) v. Murphy*, unreported, Court of Criminal Appeal, 12th July 2001.

videotapes of Garda interviews to suspects be changed so that the videotapes are only required to be made available by way of prosecution disclosure following the charging of the suspect or by order of a court. This recommendation would, of course, entail an amendment of the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997.

We also suggest a new offence of disclosing or showing an interview videotape without lawful excuse. This would give the Garda Síochána a further remedy in the event that, following disclosure by the prosecution, such videos were found to have been played to other suspects for purposes not connected with the lawful defence of criminal proceedings.

Since the interim report, we have received a proposal to increase the penalties for breach of sections 15 and 16 of the Criminal Justice Act 1984. We agree that these penalties are too low and suggest a fine of €5000 and imprisonment for a period of 12 months would be an appropriate summary penalty.

Our recommendations can be summarised as follows. We recommend that legislation provide for inferences as to the credibility of a defence to be drawn

from a failure to mention the fact relied on in the defence when in custody. We further recommend that inferences be drawn from a failure to explain suspicious circumstances in custody.

We favour legislation which would provide that the Judges' Rules would cease to have effect and would be replaced by regulations, to be made by the Minister, regarding the conduct of interviews.

Subject to suitable safeguards, a recorded interview should not be required to be the subject of a written note. The requirement for a note would, however, apply to any admission made in an interview where the detained person requests that recording would not apply. This would involve providing that rule 9 and Article 12(11) of the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987 would no longer apply. Provision of good quality recordings would also be important in practice.

We would also wish to see routine audio and video taping of common areas such as corridors etc to minimise the potential for issues arising concerning utterances or incidents in such common areas.

The Review Group recommends that the present practice regarding the

supply of the videotapes of Garda interviews to suspects be changed so that the videotapes are only required to be made available by way of prosecution disclosure following the charging of the suspect or by order of a court. This recommendation would entail an amendment of the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997.

We also suggest a new offence of disclosing or showing an interview videotape without lawful excuse.

We favour an increase in the penalties for breach of sections 15 and 16 of the Criminal Justice Act 1984 (which have already been increased to €2500 and €1500 respectively by the Criminal Justice Act 2006 s. 62 and the Criminal Justice (Theft and Fraud Offences) Act 2001 s. 19) to a fine of €5000 (the existing imprisonment for 12 months as an alternative would remain) .

A majority of the Group considers that neither the trial judge nor the prosecution should be permitted to comment on the failure of the accused to give evidence at his or her trial.

Issue 2 – Character Evidence

Introduction

That aspect of criminal evidence governing the admission of evidence of bad character of the accused is difficult and complex. Just as with the UK Criminal Law Revision Committee, the Review Group considers that this topic has proved “far the most difficult of all the topics we have discussed.”¹¹² A related topic - albeit not nearly as difficult - is the question of the extent to which an accused should be entitled to lead evidence of good character during the trial.¹¹³ While “evidence of character is, in general, not admissible”¹¹⁴, the law has always (understandably, perhaps) taken a somewhat more lenient view of the rules regarding the admission of good character.¹¹⁵

At the risk of a significant over-simplification, the present law as to bad character can be quickly summarised by saying that it precludes an accused being cross-examined as to bad character unless he has given evidence of good character or has made imputations against prosecution witnesses. In addition, the prosecution

¹¹² 11th Report *Evidence (General)* (Cmnd. 4991)(1972)(“UK 11th Report”).

¹¹³ We stress during the trial, i.e., prior to the jury verdict. The question of leading character evidence *following* conviction and *prior* to sentence is another matter altogether and is not governed by these rules.

¹¹⁴ *The People v. Ferris*, Court of Criminal Appeal, June 10, 2002, per Fennelly J.; *The People v. Murphy* [2005] 2 IR 125 at 151, per Kearns J.

¹¹⁵ This point was recognized by Cockburn CJ in *R v. Rowton* (1865) 10 Cox CC 29 at 30:

“Although, logically speaking, it is quite clear that an antecedent bad character would form quite as reasonable a grounds for the presumption and the probability of guilt as previous good character lays the foundation of innocence, yet you cannot, on the part of the prosecution [subject to certain specific statutory and common law exceptions] go into evidence of bad character.”

may not independently adduce evidence of bad character otherwise than by way of rebuttal unless it demonstrates “system or “similar facts” or rebuts a defence such as co-incidence.¹¹⁶ The principal reason for these rules is that it is generally considered that the admission of bad character evidence will have a disproportionately prejudicial effect on the jury.¹¹⁷

While this is a view which is traditionally held by the judiciary and the legal profession alike, it seems to be supported by such (limited) empirical research as there is. Lloyd-Bostock, drawing on the results of one such study, concluded that:

“The results clearly confirm that evidence of previous convictions can have a prejudicial effect, especially where there is a recent previous conviction for a similar offence. Significant effects were found even though no information about the previous conviction other than the offence was provided, and where there was only one previous conviction. It may well be that greater effects would be found for a longer criminal record, especially one including several similar previous convictions. The findings

¹¹⁶ See generally *Maxwell v. Director of Public Prosecutions* [1935] AC 309 at 319, per Lord Sankey. As for the “system” cases, see *Makin v. Attorney General for New South Wales* [1894] AC 57; *The People v. BK* [2000] 2 IR 199. The prosecution does not necessarily have to wait for the accused to advance the defence in question, as otherwise the accused might succeed unfairly in an application for a direction that the prosecution be dismissed on the ground of no case to answer where the prosecution might otherwise have availed of similar fact evidence: see *Harris v. Director of Public Prosecutions* [1952] AC 694 at 706-707, per Viscount Simon.

¹¹⁷ “....its prejudicial effect may be more powerful than its probative effect and thus endanger a fair trial because it undermines the integrity of the presumption of innocence and the burden of proof”: *R v. Boardman* [1975] AC 421 at 451, per Lord Hailsham. In *The People v. Murphy* [2005] 2 IR 125 at 150 Kearns J. warned that the introduction of bad character evidence where there were no grounds for doing so “can only be seen as a significant erosion of the presumption of innocence” and that in the case of a jury trial, “the risk of a prejudice would be glaringly obvious.”

concerning the effects of a previous conviction for indecent assault on a child in particular show the potential for such convictions to be highly prejudicial. It appears that, in addition to any effect of similarity to the current charge, the nature of the offence produces a more general negative evaluation, including a perceived propensity to commit a range of other offences.”¹¹⁸

Lloyd-Bostock went on to observe that:

“If we assume that, amongst defendants with similar previous convictions, some are innocent of the current offence, we have good grounds to infer that routinely revealing previous convictions would indeed increase the risk of convicting an innocent man.”¹¹⁹

It is, of course, quite true to say that other legal systems take a totally different approach to this question and do not generally endeavour to prevent the admission of such bad character evidence at the trial of an accused. Lawyers coming from the civil law tradition would, for example, find many of these complex evidential rules quite bewildering. This is because the principle of “free evaluation of the evidence” - a concept foreign to the common law - is central to the civilian tradition in both civil and criminal cases alike. There is also the further point

¹¹⁸ Lloyd-Bostock, “The Effects on Juries of Hearing about the Defendant’s Previous Criminal Record: A Simulation Study” [2000] *Crim.LR.* 734 at 753. This particular paper reported on an experimental study funded by the UK Home Office at the request of the UK Law Commission. The method used was ([2000] *Crim.LR* 734 at 739) “a controlled experiment in which samples of stimulated, or ‘mock’ jurors viewed videos of a condensed, reconstructed trial.”

¹¹⁹ [2000] *Crim LR* 734 at 754-755.

that even in those civil law countries with provision for trial by jury - as in France - the judge (unlike in common law countries) retires with the jury. As the civil law judge will assist the jury in sifting through that evidence and prevent them from giving undue weight to such evidence, it is considered, therefore, that there is no need for these highly complex rules in those jurisdictions.

It may be noted, however, that even in common law jurisdictions, like England and Wales and Canada, the law has recently been relaxed to allow the admission of bad character evidence in similar fact type cases in a wider range of circumstances than heretofore, a point to which we return to below.¹²⁰ For reasons that will become clear, the Review Group did not consider that it could recommend any general relaxation of the law in this area. We do, however, recommend that some changes be made to the Criminal Justice (Evidence) Act 1924 so as to permit an accused to be cross-examined as to his bad character where he makes an imputation on the character of the deceased or an incapacitated victim. We also consider that this should be possible where a defence witness (and not simply the defendant) gives evidence as to the accused's good character. In addition, we believe that in certain circumstances the prosecution should be entitled to adduce evidence of the accused's bad character where the accused does not give evidence.

¹²⁰ The English Court of Appeal has nonetheless warned that, even under the new legislation, "prosecution applications to adduce such evidence [should] not be made routinely simply because an accused has previous convictions" and that evidence of bad character "cannot be used simply to bolster a weak case or to prejudice the minds of a jury against a defendant": *R v. Hanson* [2005] 1 WLR 3169 at 3173, per Rose LJ.

But before proceeding to consider whether the law in this area should be changed in this jurisdiction it is necessary first to summarise certain key principles.

Bad character evidence: general principles

Perhaps the most fundamental principle of the law of evidence is that evidence is admissible only if it is relevant. In addition, the court of trial has a general discretion to exclude evidence if it is more prejudicial than probative of any particular fact. Taken together these two general principles inform the entire law in this area. A straightforward example may illustrate these principles. A., a middle aged male, is charged with the sexual assault of a young teenage boy. A. is generally of good character, but has one single conviction for a minor traffic offence. The fact that A. has such a conviction is plainly irrelevant to the charge before the court. Even if it could be said to be relevant, such evidence would be excluded on the ground that it is more prejudicial than probative. On either ground, therefore, the evidence would be inadmissible at the trial.

Things become more complex, however, if we change the facts given in the example. Suppose now that A. has a previous conviction for the rape of an adult female. Is that relevant to the charge of indecent assault of a young boy? Even if it is, is that evidence more prejudicial than probative of the facts alleged? What of the situation where A. has a previous conviction for the possession of child pornography? Change the facts again and suppose that A. has several previous convictions for the indecent assault of children. Should such evidence be

admissible at a trial where the accused has been charged with that very same offence?

The courts are frequently confronted with such problems and, frankly, have struggled consistently to apply these principles. Of course, the difficulties arise from the application of these basic principles to often complex sets of facts. What, then, is the state of the law in this area?

Bad character evidence: the present law

First, as the courts owe more than “verbal respect” to the presumption of innocence, the corollary of this is that an accused should be tried and convicted *only* on the basis of the evidence that he committed that particular charge.¹²¹ Thus, in *King v. Attorney General*¹²² the plaintiff successfully challenged the constitutionality of section 4 of the Vagrancy Act 1824. This section provided that where the accused was a “suspected person or a reputed thief”, it was sufficient to prove that he was frequenting or loitering in certain public places “with intent to commit a felony.” But the section allowed the proof of the intent to commit a felony to be inferred from his previous convictions. Henchy J., speaking for the Supreme Court, held that this section was, for several reasons, unconstitutional:

¹²¹ *King v. Attorney General* [1981] IR 233 at 242, quoting the words of O’Dalaigh CJ in *The People v. O’Callaghan* [1966] IR 501 at 509.

¹²² [1981] IR 233

“.....I shall confine myself to saying, without going into unnecessary detail, that the offence, both in its essential ingredients and in the mode of proof of its commission, violates the requirement in Article 38, s. 1, that no person shall be tried on any criminal charge save in due course of law; that it violates the guarantee in Article 40, s. 4, sub-s. 1, that no citizen shall be deprived of personal liberty save in accordance with law – which means without stooping to methods which ignore the fundamental norms of legal order postulated by the Constitution; that, in its arbitrariness and its unjustifiable discrimination, it fails to hold (as is required by Article 40, s. 1) all citizens to be equal before the law; and that it ignores the guarantees in Article 40, s. 3, that the personal rights of citizens shall be respected and, as far as practicable, defended and vindicated, and that the State shall by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.”¹²³

While there is no doubt but that the decision in *King* places certain constraints on the Oireachtas, it is important nonetheless to bear in mind that section 4 of the 1824 Act represented an extreme example of where the legislation proceeded from the premise that proof of intent to commit a felony could be inferred *simply* by reason of the accused’s previous convictions.

Second, as it is recognised that the admission of previous convictions is generally highly prejudicial, the courts lean against the reception of such evidence. As

¹²³ [1981] IR 233 at 257.

Black J. said in *The People v. Kirwan*¹²⁴, “bearing in mind the strong prejudice that would necessarily be created in the minds of the jury by evidence of this class.....the greatest care ought to be taken to reject such evidence unless it is plainly necessary to prove something which is really in issue.”¹²⁵ Section 1(f) of the Criminal Justice (Evidence) Act 1924 (“the 1924 Act”) takes great care to ensure that such evidence is not introduced into evidence *save* where the accused either gives evidence of good character or “drops his shield” by making imputations against a prosecution witness:

“(f) a person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as

¹²⁴ [1943] IR 279.

¹²⁵ [1943] IR 279 at 307, quoting in part the judgment of Kennedy J. in *R. v. Bond* [1906] 2 KB 389 at 398.

to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(iii) he has given evidence against any other person charged with the same offence.”

The substantive part of the section 1(f)(“shall not be asked...”) is “negative in form and, as such, is universal and is absolute unless the exceptions come into play.”¹²⁶ In other words, a trial judge has no discretion to permit the cross-examination of the accused as to bad character, unless the case comes within one of the statutory exceptions. But independently of the 1924 Act the prosecution could (and can) always tender rebuttal evidence of bad character.

The 1924 Act was more or less a direct copy of the Criminal Evidence Act 1898, which Act had not, for certain historical reasons, applied to Ireland. The 1924 Act - just like its 1898 Act counterpart in England and Wales - gave an accused the right for the first time to give evidence in court. This was a matter which had been the subject of much parliamentary discussion in the late 19th century in Westminster and previous Bills designed to achieve this result which had been introduced in the Houses of Parliament had oscillated between allowing

¹²⁶ *Maxwell v. Director of Public Prosecutions* [1935] AC 309 at 319, per Lord Sankey. This passage was expressly approved by Fennelly J. in *The People v. Ferris*, Court of Criminal Appeal, June 10, 2002.

full cross-examination of the accused as to previous convictions on the one hand while others had suggested full protection for the accused.¹²⁷

The 1898 Act was, accordingly, a compromise between these respective positions and this compromise is also reflected in the 1924 Act. Broadly speaking, the accused is protected from cross-examination as to previous misconduct unless (a) he claims to be of good character; (b) he makes imputations against the witnesses for the prosecution or (c) he gives evidence against a co-accused. As will be seen, the 1924 Act presents its own difficulties, including questions such as what constitutes an “imputation” for this purpose, along with the question in homicide cases as to whether the accused should be allowed to attack the character of the deceased with impunity.

Third, the prosecution is entitled at common law - and quite independently of the 1924 Act¹²⁸ - to lead evidence of bad character where this is relevant to rebut a defence raised by the accused. The cases falling within this special category - often known as “similar fact evidence cases” - are very rare indeed. But even in this type of case the prosecution may not lead such evidence “for the purpose of inviting the jury to infer that the accused was the type of person likely to have committed the offence with which he or she was charged.”¹²⁹ Moreover, any such evidence is only admissible provided that the trial judge is of opinion that:

¹²⁷ *UK 11th Report* at para. 115.

¹²⁸ The existence of the common law similar fact rules, is, however, tacitly acknowledged by section 1(f)(i) of the 1924 Act.

¹²⁹ McGrath, *Evidence* at 477.

“[its] probative value was not outweighed by their prejudicial potentiality and provided that he clearly directed the jury that they were to be used against the accused only in so far as they provided such a rebuttal.”¹³⁰

Difficulties arising under section 1(f) of the 1924 Act

What constitutes “good character” for the purposes of section 1(f)(ii)?

The whole object of section 1(f)(ii) is to ensure that the jury is not misled by the accused giving a false picture of his character. As Lord Reading said in *R. v. Wood*¹³¹ :

“.....if the defendant endeavours to show that he is of good character when he is in fact of bad character, he presents a false view of the case, and the prosecution are not only entitled but bound to do what they can to prove to the jury that he ought not to be placed upon the high pedestal which he desires to occupy.”¹³²

¹³⁰ *The People v. Mohangi* (1964) 1 *Frewen* 288 at 301, per Henchy J.

¹³¹ [1920] 2 KB 179.

¹³² [1920] 2 KB 179 at 182.

This, we think, is only fair because the trial would certainly be unbalanced if an accused could mislead the jury in this fashion. There are, however, some lingering problems with this sub-section.

First, what is “character” for this purpose? It seems clear from the judgment of Fennelly J. for the Court of Criminal Appeal in *The People v. Ferris*¹³³ that the word “character” in section 1(f)(ii) should be given its meaning at common law, namely, evidence of the accused’s general reputation and standing in the community, as distinct from evidence of disposition, namely, was he the kind of person who was likely to commit the crime of which he stands accused.

Second, what of the situation where the accused does not directly lead evidence of good character, but nonetheless impliedly asserts this by other evidence or even appearance and “tries to achieve the same effect indirectly by evidence suggesting that he is a respectable person”?¹³⁴ The *UK 11th Report* gave a striking example in this regard of a case which came before the Central Criminal Court in London in the early 1970s. Here an accused with a long criminal record who was charged with conspiracy to rob:

“went into the witness box wearing a dark suit and looking as if he were a respectable business man. When asked by his counsel when and where

¹³³ Court of Criminal Appeal, June 10, 2002.

¹³⁴ *UK 11th Report* at 86. Thus, for example, in *R. v. Coulman* (1927) 20 Cr.App.Rep. 106 at 108 Swift J. gave as an example of impliedly setting up character in this way that of asking an accused “whether he is a married man with a family, in regular work and has a wife and three children,”

he met his co-accused, he said: ‘About eighteen months ago at my golf club. I was looking for a game. The secretary introduced us.’¹³⁵

This issue is now addressed by section 105 of the UK Criminal Justice Act 2003, the marginal note of which is headed “Evidence to correct a false impression.”

The sub-section provides:

“(1) For the purposes of section 101(1)(f)-

(a) the defendant gives a false impression if he is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant;

(b) evidence to correct such an impression is evidence which has probative value in correcting it.

(2) A defendant is treated as being responsible for the making of an assertion if-

(a) the assertion is made by the defendant in the proceedings (whether or not in evidence given by him),

(b) the assertion was made by the defendant-

¹³⁵ *UK 11th Report* at 86.

(i) on being questioned under caution, before charge, about the offence with which he is charged, or

(ii) on being charged with the offence or officially informed that he might be prosecuted for it,

and evidence of the assertion is given in the proceedings,

(c) the assertion is made by a witness called by the defendant,

(d) the assertion is made by any witness in cross-examination in response to a question asked by the defendant that is intended to elicit it, or is likely to do so, or

(e) the assertion was made by any person out of court, and the defendant adduces evidence of it in the proceedings.

(3) A defendant who would otherwise be treated as responsible for the making of an assertion shall not be so treated if, or to the extent that, he withdraws it or disassociates himself from it.

(4) Where it appears to the court that a defendant, by means of his conduct (other than the giving of evidence) in the proceedings, is seeking to give the court or jury an impression about himself that is false or misleading, the court may if it appears just to do so treat the defendant as being responsible for the making of an assertion which is apt to give that impression.

(5) In subsection (4) "conduct" includes appearance or dress.

(6) Evidence is admissible under section 101(1)(f) only if it goes no further than is necessary to correct the false impression.

(7) Only prosecution evidence is admissible under section 101(1)(f).”

While the problem may not be a particularly serious one, the Review Group considers that a modest reform of section 1(f) of the 1924 Act to deal with this issue nonetheless has merit. In this regard, section 105 of the UK 2003 Act provides a good starting point, even if some of these provisions might be regarded as over-elaborate.¹³⁶

Third, what of the situation where the evidence of good character is given by a defence witness, albeit not by the accused? In this situation it is clear from the decision of Fennelly J. for the Court of Criminal Appeal in *The People v. Ferris*¹³⁷ that the accused has not “dropped his shield” under the sub-section in this situation in that he has not given evidence of good character and nor has he “personally or by his advocate asked questions of the witnesses for the prosecution with a view to establishing his own good character” within the meaning of section 1(f)(ii). It

¹³⁶ In particular, the provisions of section 105(5) defining “conduct” as including dress or appearance may seem too robust. Many defendants (whether they have previous criminal records or otherwise) think it appropriate to dress smartly for court appearances and it does not seem quite fair to the Review Group that in those circumstances alone a defendant might run the risk of dropping his shield.

¹³⁷ Court of Criminal Appeal, June 10, 2002.

is true that, as Fennelly J. noted in *Ferris*, the prosecution could always at common law lead evidence in rebuttal, but for reasons which will later elaborate upon, we still think that the law in this area merits clarification by statute.

It is, of course, eminently possible that witnesses led for the defence may genuinely think that the accused is of good character and may be unaware that he has a past criminal record. One could readily envisage a situation in which, for example, a close neighbour truthfully gave a glowing character reference for the accused. This would, of course, create a misleading impression for the jury, because they would assume therefore that the accused had no previous convictions. Unless, therefore, the accused took steps to disassociate himself from this assertion of good character by a defence witness¹³⁸, it does not seem unfair that the decision in *Ferris* be reversed by statute by allowing in those circumstances the cross-examination of the accused as to bad character.

What constitutes an “imputation” on the character of prosecution witnesses?

The issue as to what constitutes an “imputation” for this purpose has always been problematic. The courts have generally refrained from holding that a vigorous defence does amount to an imputation.¹³⁹ As Kennedy CJ said, in the very first appeal arising under the 1924 Act, *Attorney General v. Campbell*¹⁴⁰:

¹³⁸ Cf. section 105(3) of the (UK) Criminal Justice Act 2003 which contains a similar provision.

¹³⁹ See, e.g., *R. v. Rouse* [1904] 1 KB 184 (here the accused, having been asked whether a prosecution witness was inventing his story, stated that the witness was lying. Darling J. held that this was not an imputation in the statutory sense of the term, but rather a denial in emphatic

“Denial, however strong, is not an imputation of necessity upon the character of the witness for the prosecution.”¹⁴¹

Viscount Simon subsequently expressed similar sentiments in *Stirland v. Director of Public Prosecutions*¹⁴²:

“an accused is not to be regarded as depriving himself of the protection of the section because the proper conduct of the defence necessitates the making of injurious reflections on the prosecutor or his witnesses.”¹⁴³

The courts have instead tended to ask themselves whether the imputation was gratuitous and unnecessary to the proper conduct of the defence. Thus, for example, in *Campbell* Kennedy CJ stressed that the accused had lost his shield because the defendant “had cursorily and voluntarily launched forth” with direct charges against the prosecution witnesses in the course of replies to cross-examination. Likewise in *The People v. Coleman*¹⁴⁴ Sullivan CJ held that the accused (who had been charged with performing an illegal abortion) had lost his shield where he had alleged that a prosecution witness had also performed an illegal operation. As this was a charge which was not necessary to the proper

charges); *Attorney General v. O’Shea* [1931] IR 718 (a rigorous cross-examination of the prosecution witnesses does not amount to an imputation in this sense).

¹⁴⁰ (1928) 1 *Frewen* 1.

¹⁴¹ (1928) 1 *Frewen* 1 at 4.

¹⁴² [1944] AC 315.

¹⁴³ [1944] AC 315 at 317.

¹⁴⁴ [1945] IR 237.

conduct of the defence, the Court of Criminal Appeal held that the accused had been properly cross-examined as to his previous character.

The leading case is now the decision of the Court of Criminal Appeal in *The People v. McGrail*.¹⁴⁵ Here the accused was charged with certain firearms offences. The prosecution had contended that the accused had made certain admissions and had pointed out the location of where certain weapons had been hidden. The accused's defence was that no such voluntary statement had been made and that he had never identified the location of the weapons. Hederman J. held that these charges were not "imputations" in this statutory sense:

"A distinction must be made between questions and suggestions which are reasonably necessary to establish the prosecution or the defence case, even if they do involve suggesting a falsehood on the part of the witness of one or the other side, on the one hand and, on the other hand, an imputation of bad character introduced by either side relating to matters unconnected with the proofs of the instant case."¹⁴⁶

The Review Group received several submissions to the effect that this judicial gloss on the statute should be modified. But we think that the purposive construction which has been placed on the sub-section represents, on the whole, the correct approach. After all, if the accused were to lose his shield simply

¹⁴⁵ [1990] 2 IR 38.

¹⁴⁶ [1990] 2 IR 38 at 50.

because of an emphatic defence which of necessity required the making of imputations, this would in reality amount to little more than penalizing the accused for having advanced such a defence.

Attacks on the character of the deceased in homicide cases

A particular issue arises in homicide cases where, by definition, the deceased is not available to give evidence for the prosecution.¹⁴⁷ What, then, of the situation where the accused makes imputations on the character of the deceased? Had the deceased been alive he would, of course, been available to give evidence for the prosecution and the defence could not make “imputations” on his character (in the *McGrail* sense of that term) without being subject to cross-examination as to bad character. Why, then, should the situation be different simply because the victim is dead and no longer available to give evidence?

Many submissions made by victims’ groups drew attention to this issue. The Review Group considers that the failure on the part of the 1924 Act to make provision for the situation where the accused makes imputations (again in the *McGrail* sense of that term) on the character of the deceased (in homicide cases) or the incapacitated victim (in assault cases) is, frankly, anomalous. We propose, therefore, to make a specific recommendation in this regard. We are also recommending that advance notice be given to the prosecution of an intention to make an

¹⁴⁷ This problem also arises where the victim has been incapacitated and accordingly cannot give evidence as a result of an assault or other criminal act.

imputation against a deceased or incapacitated witness, subject always to the right of the trial judge to grant the defence leave to make such imputations where prior notice has not been given. We believe this is fair and appropriate. A prosecution witness against whom an imputation is being made is probably in a position to deal with the issue in the witness box, whereas an imputation against someone who is deceased or incapacitated may require some time to be investigated.

Difficulties arising with the common law rules regarding similar fact evidence

As we have seen, the prosecution can lead evidence of bad character independently of the 1924 Act in order to prove system or to rebut a defence.¹⁴⁸ The classic exposition of the principle of what is generally described as “similar fact” evidence is still to be found in the speech of Lord Herschell in *Makin v. Attorney-General for New South Wales*¹⁴⁹ where he stated:

“It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other

¹⁴⁸ This sort of application is very rare. While the Review Group is unaware of any empirical study in this jurisdiction, the number of instances recorded in the law reports of where such evidence was admitted at the court of trial is very low. One leading study in the United Kingdom (which took place before the reforms effected by the (UK) Criminal Justice Act 2003) found that, based on their sample study, similar fact evidence was admitted in less than 0.5% of trials on indictment: see Zander and Henderson, *Royal Commission on Criminal Justice Research Study No. 19: Crown Court Study* (1993) at paras. 4.6.6 and 4.6.7

¹⁴⁹ [1894] AC 57. This decision was expressly approved by the Supreme Court in *The People v. Kirwan* [1943] IR 279. It has also been subsequently applied in many of the leading Irish similar fact cases: see, e.g., *The People v. Dempsey* [1961] IR 288; *The People v. Mohangi* (1964) 1 *Frewen* 297; *The People v. Wallace* (1983) 2 *Frewen* 125; *B v DPP* [1997] 3 IR 140 and *The People v. BK* [2000] 2 IR 199.

than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.”¹⁵⁰

This passage in *Makin* forms the basis of the present law. The evidence is thus admissible not to prove that the accused had a propensity to commit the crime in question (the so-called “chain of forbidden reasoning”), but rather to rebut a defence which would otherwise be open to an accused. It is true that the law of evidence is replete with examples of instances where evidence is admissible for one purpose and not for another. Such differential admission of evidence is generally for the purpose of rebutting a defence¹⁵¹ or “going to the credibility of the accused” as distinct from advancing the prosecution’s case by “demonstrating the probability of his having committed the offence for which he was then being tried.”¹⁵² But experience has shown that this is a distinction which is exceptionally difficult to apply consistently in this particular area of the law of evidence.

¹⁵⁰ [1894] AC 57 at 65.

¹⁵¹ See, e.g., the comments of Henchy J. in *The People v. Mohangi* (1964) 1 *Frewen* 297 at 301.

¹⁵² See *The People v. Bond* [1966] IR 214 at 221, per Haugh J.

Makin was, in any event, a very special case. Here a couple were charged with the murder of a child. The prosecution proved that they had received a small sum of money from the natural mother to foster the child and that the skeleton of the child was found in the accuseds' back garden. These facts *in themselves* were not open only to an interpretation consistent with guilt: it was quite possible that the child had died from natural causes and had been buried irregularly. If no other evidence had been forthcoming, the prosecution for murder would almost certainly have collapsed. The prosecution were, however, allowed to prove that the skeletons of other children were found in the back garden of a previous residence of the accused and that other children who had similarly been entrusted to the care of the Makins for small sums had also disappeared. One could say that this evidence rebuts the defence of death by natural causes, since it was inherently unlikely that so many children would have died in this fashion. But it really goes much further than that, since it provided compelling evidence that the Makins were likely to have murdered the children, even though Lord Herschell expressly denied that the evidence would be admissible for this purpose

Other classic similar fact cases also demonstrate this problem. In *R. v. Smith*¹⁵³ the accused was charged with murdering his wife in her bath by drowning. There was no direct evidence of this other than opportunity. The prosecution were, however, permitted to lead evidence demonstrating that two other wives had drowned in the same way. In all three cases Smith had recently gone through a ceremony of marriage; persuaded each bride to make a will in his favour and had

¹⁵³ [1914-15] All ER Rep. 262.

also taken each of them to a doctor to suggest that she was suffering from an epileptic fit.

One could, of course, classify *Smith* as a case where the evidence was admissible merely to rebut the defence of accidental death. But it might equally be said that the evidence was admissible to show that Smith had a propensity to murder women in this fashion. Moreover, even if in theory this evidence is admissible only to rebut the defence case of accidental drowning, this distinction is a very fine one in the hands of a jury. One could well imagine that, if the similar fact evidence had not been given, a jury faced with the facts of a single charge only might have been inclined to acquit Smith on the basis of the defence of accidental drowning. In these circumstances, far from merely rebutting the defence of accident, the reality is that it was the similar fact evidence which clinched the case for the prosecution. No reasonable person could plausibly believe that Smith had been so unlucky as to have had a succession of three wives, each of whom had had an epileptic fit while in the bath and had then drowned.

Another example is provided by *R v. Ball*.¹⁵⁴ In this case a brother and sister were charged with incest, which conduct had first been criminalized in 1908. Prior to 1908 they had held themselves out as a married couple and had a child. They were subsequently charged with committing acts of incest at certain periods in 1910. The main prosecution evidence was that the couple shared a double bed; there were signs of occupation by two parties and they had been seen coming

¹⁵⁴ [1911] AC 47.

from the bedroom in a partially undressed state. The House of Lords, overruling the Court of Criminal Appeal, held that the prosecution were entitled to adduce evidence of the conduct of the Balls prior to 1908 and of the fact that they had had a child together. It is true that such evidence rebuts the defence of innocent association between siblings¹⁵⁵, but it also goes further and shows that the accused were guilty because, given the real nature of their relationship, they were the type of siblings who had a propensity to commit incest with each other.¹⁵⁶

This very point was squarely at issue in *The People v. Dempsey*¹⁵⁷. Here the accused was charged with unlawful carnal knowledge of a sixteen year old girl. The accused's defence was one of mere innocent courtship and flirtation, but the prosecution were allowed to prove that the couple had had consensual intercourse on dates and times other than those specified in the indictment and had subsequently had a child together. The Court of Criminal Appeal, following the decision in *Ball*, held that this evidence was admissible. Counsel for the accused

¹⁵⁵ Or, as Maguire CJ, commenting on the decision in *Ball* in *The People v. Dempsey* [1961] IR 288 at 293, put it:

“It would be natural for a brother and sister to occupy the same house, though occupation of the same room would be going somewhat far and occupation of the same bed further still.”

¹⁵⁶ This was indeed the basis on which the English Court of Criminal Appeal held that the evidence was inadmissible, for as Darling J. put it ([1911] AC 47 at 57):

“If without admission of the disputed evidence the fact of the two accused persons occupying the same bed on the date or dates charged was insufficient proof that intercourse took place between them on that date or those dates, then the fact that intercourse took place between them on former occasions could only be tendered to show that the *persons were persons likely to have intercourse on the particular dates - a ground on which evidence is not receivable.*” (emphasis supplied)

That, of course, is very probably a correct interpretation of what Lord Herschell had actually said in *Makin*. But it shows both how unrealistic the so-called forbidden chain of reasoning argument really is and how difficult in practice it is to apply.

¹⁵⁷ [1961] IR 288.

had argued that the present case was distinguishable from *Ball* on the basis that the relationship between the parties in that case was abnormal:

“[Counsel] contends that, while evidence showing a tendency towards an unnatural passion on the part of the accused may be admissible as tending to show a course of conduct on his part, evidence of failure to control a natural passion is not admissible as evidence tending to show the likelihood of a previous or subsequent similar failure. This Court does not see any ground for drawing such a distinction.”¹⁵⁸

But if no such distinction can be drawn, then one has to ask why the evidence was admitted in this case? It is hard to avoid the conclusion that it was primarily for the purpose of showing that the accused had a natural propensity to have sexual relations with his under-age girlfriend.

The position in the United Kingdom since the Criminal Justice Act 2003

The position in the United Kingdom with regard to similar fact evidence has been significantly changed since the enactment of the Criminal Justice Act 2003. Sections 99 to 105 of the 2003 Act repeal the common law similar fact rules and also repeals the Criminal Evidence Act 1898 (i.e., the legislation to which our 1924 Act is the counterpart). This legislation not only re-states the law in this area, but also effects significant changes.

¹⁵⁸ [1961] IR 288 at 293, per Maguire CJ.

While it is still too early to anticipate the full impact of the 2003 Act, a good illustration of the manner in which the 2003 Act has been applied to date in practice is provided by the decision of the English Court of Appeal in *R. v. Hanson*.¹⁵⁹ Here the accused was charged with the theft of a significant sum of cash from the private living quarters of a public house. There was significant circumstantial evidence linking the accused with the crime, but the prosecution was also allowed to call evidence as to accused's previous convictions for offences of dishonesty, specifically handling stolen goods aggravated vehicle taking and robbery.

Rose LJ first set out the principles governing the 2003 Act:

4. "The starting point should be for judges and practitioners to bear in mind that Parliament's purpose in the legislation, as we divine it from the terms of the Act, was to assist in the evidence based conviction of the guilty, without putting those who are not guilty at risk of conviction by prejudice. It is accordingly to be hoped that prosecution applications to adduce such evidence will not be made routinely, simply because a defendant has previous convictions, but will be based on the particular circumstances of each case.
5. Section 101(1) provides seven possible gateways through which evidence of a defendant's bad character is admissible. The ones likely to be most commonly

¹⁵⁹ [2005] 1 WLR 3169.

relied upon by the prosecution are (d), where the evidence is relevant to an important matter in issue between the defendant and the prosecution, (f), where the evidence is to correct a false impression given by the defendant and (g), where the defendant has made an attack on the character of another person who will often, though not always, be the victim of the alleged crime, whether alive or dead.

6. The present applications are concerned only with the Crown wishing to rely upon evidence of previous convictions rather than other evidence of bad character. By section 103(1) matters in issue for the purpose of section 101(1(d) include:

"(a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;

(d) the question whether the defendant has a propensity to be untruthful, except where it is not suggested the defendant's case is untruthful in any respect."

By section 103(2) a defendant's propensity to commit offences of the kind with which he is charged may be established (without prejudice to any other way of doing so), by evidence of conviction of an offence of the same description or category as the one with which he is charged, but by section 103(3), this does not apply if the Court is satisfied that this would be unjust "by reason of the length of time since the conviction or for any other reason". The Criminal Justice Act 2003 (Categories of Offences) Order 2004, Statutory Instrument 2004 No 3346,

prescribes offences in the categories of theft and sexual offences against persons under the age of 16.

7. Where propensity to commit the offence is relied upon there are thus essentially three questions to be considered:
 1. Does the history of conviction(s) establish a propensity to commit offences of the kind charged?
 2. Does that propensity make it more likely that the defendant committed the offence charged?
 3. Is it unjust to rely on the conviction(s) of the same description or category; and, in any event, will the proceedings be unfair if they are admitted?
8. In referring to offences of the same description or category, section 103(2) is not exhaustive of the types of conviction which might be relied upon to show evidence of propensity to commit offences of the kind charged. Nor, however, is it necessarily sufficient, in order to show such propensity, that a conviction should be of the same description or category as that charged.
9. There is no minimum number of events necessary to demonstrate such a propensity. The fewer the number of convictions the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category will often not show propensity. But it may do so where, for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged (compare *DPP v*

*P*¹⁶⁰). Child sexual abuse or fire setting are comparatively clear examples of such unusual behaviour but we attempt no exhaustive list. Circumstances demonstrating probative force are not confined to those sharing striking similarity. So, a single conviction for shoplifting, will not, without more, be admissible to show propensity to steal. But if the modus operandi has significant features shared by the offence charged it may show propensity.

10. In a conviction case, the decisions required of the trial judge under section 101(3) and section 103(3), though not identical, are closely related. It should be noted that wording of section 101(3) - "must not admit" - is stronger than the comparable provision in section 78 of the Police and Criminal Evidence Act 1984 - "may refuse to allow". When considering what is just under section 103(3), and the fairness of the proceedings under section 101(3), the judge may, among other factors, take into consideration the degree of similarity between the previous conviction and the offence charged, albeit they are both within the same description or prescribed category. For example, theft and assault occasioning actual bodily harm may each embrace a wide spectrum of conduct. This does not however mean that what used to be referred as striking similarity must be shown before convictions become admissible. The judge may also take into consideration the respective gravity of the past and present offences. He or she must always consider the strength of the prosecution case. If there is no or very little other evidence against a defendant, it is unlikely to be just to admit his previous convictions, whatever they are.

¹⁶⁰ [1991] 2 AC 447 at 460E to 461A.

11. In principle, if there is a substantial gap between the dates of commission of and conviction for the earlier offences, we would regard the date of commission as generally being of more significance than the date of conviction when assessing admissibility. Old convictions, with no special feature shared with the offence charged, are likely seriously to affect the fairness of proceedings adversely, unless, despite their age, it can properly be said that they show a continuing propensity.

12. It will often be necessary, before determining admissibility and even when considering offences of the same description or category, to examine each individual conviction rather than merely to look at the name of the offence or at the defendant's record as a whole. The sentence passed will not normally be probative or admissible at the behest of the Crown, though it may be at the behest of the defence. Where past events are disputed the judge must take care not to permit the trial unreasonably to be diverted into an investigation of matters not charged on the indictment.

As to propensity to untruthfulness, this, as it seems to us, is not the same as propensity to dishonesty. It is to be assumed, bearing in mind the frequency with which the words honest and dishonest appear in the criminal law, that Parliament deliberately chose the word "untruthful" to convey a different meaning, reflecting a defendant's account of his behaviour, or lies told when committing an offence. Previous convictions, whether for offences of dishonesty or otherwise, are therefore only likely to be capable of showing a propensity to be untruthful where, in the present case, truthfulness is an issue and, in the earlier case, either there was a plea of

not guilty and the defendant gave an account, on arrest, in interview, or in evidence, which the jury must have disbelieved, or the way in which the offence was committed shows a propensity for untruthfulness, for example, by the making of false representations. The observations made above in paragraph 9 as to the number of convictions apply equally here.”¹⁶¹

Rose LJ then went on to hold that as the defendant:

“had a considerable number of convictions for burglary and theft from a dwelling, which were plainly properly admissible to show propensity to commit an offence of the kind here charged,”¹⁶²

Rose LJ also indicated that:

“...convictions for handling and aggravated vehicle taking....do not, in our judgment, show, without more pertinent information, propensity to burgle as indicted or to steal.....”¹⁶³

As already indicated, it is too early to anticipate how far-reaching the effect of the 2003 Act will be. It is doubtful, for example, if the convictions for dishonesty in *Hanson* would have been admitted under the pre-existing law, although, of course, they might have been had there been a sufficient similar facts dimension to the previous convictions. What the 2003 Act makes clear, however, is that previous convictions are now admissible to show propensity and it is

¹⁶¹ [2005] 1 WLR 3171 at 3173-3174.

¹⁶² [2005] 1 WLR 3171 at 3177.

¹⁶³ [2005] 1 WLR 3171 at 3177.

possible that the law in the United Kingdom will move to the point where the admission of such evidence will become, if not quite routine, then at least reasonably common.

Good character evidence of the accused

The admission of good character evidence of an accused is of long standing and can be traced back to the days when it was allowed in capital cases “*in favorem vitae*.”¹⁶⁴ The whole object of this type of evidence goes not only to general credibility, but may also extend to the issue of propensity. In other words, by tendering such evidence the accused is asking the court to accept that it is more likely that he is truthful and also - depending on the circumstances - that it is inherently unlikely that a person of previous good character would actually commit the offence with which he has been charged. In the latter (but not the former) case the evidence of good character must be relevant to the offence charged. Thus, for example, if an accused is charged with a sexual offence, it would be scarcely relevant to tender evidence that he was a person who paid his bills regularly¹⁶⁵, although such evidence might be relevant if he had been charged with fraud.

The question then arises as to what is “good character” for this purpose? Does it mean general reputation among those who know the accused or does it mean

¹⁶⁴ *The People v. Ferris*, Court of Criminal Appeal, June 10, 2002.

¹⁶⁵ *R v. Hardy* (1794) 24 *State Trials* 1076.

evidence of disposition? In the classic passage from *R. v. Rowton*¹⁶⁶ Cockburn CJ answered this question as follows:

“I think it means evidence of reputation only. I quite agree that what you want to get at, as bearing materially on the probability or improbability of the prisoner’s guilt, is the tendency or disposition of his mind to commit the particular offence with which he stands charged; but no one ever heard of a question put deliberately to a witness called on behalf of a prisoner as to the prisoner’s disposition of mind. The way, and the only way the laws allows of your getting at the disposition and tendency of his mind is by evidence as general character founded upon the knowledge of those who know anything about him and of his general conduct.”¹⁶⁷

In *Rowton* the accused had been charged with indecent assault on a male. The defence called several witnesses as to the good character of the accused. The prosecution was then permitted to call evidence in rebuttal of a witness who said that while he knew nothing of the accused’s general reputation, he knew the accused while he was at school with him and that his opinion was that his character was that “of a man capable of the grossest indecency and the most flagrant immorality.” Cockburn CJ held that this was evidence of disposition only and not evidence of general reputation.¹⁶⁸

¹⁶⁶ (1865) 10 Cox CC 25.

¹⁶⁷ (1865) 10 Cox CC 25 at 29.

¹⁶⁸ This principle is not always the easiest to apply. In *The People v. Nevin* [2003] 3 IR 312 the accused was convicted of the murder of her husband. She gave “surprise” evidence to the effect that her husband had had close connections with an illegal organization and that his might have

This passage was approved recently by Fennelly J. in his judgment for the Court of Criminal Appeal in *The People v. Ferris*¹⁶⁹, an important case which draws together elements of the good character rules, the prosecution's right at common law to call character evidence to rebut the evidence of good character and the scope of section 1(f) of the 1924 Act. In *Ferris* the accused had been convicted of 32 counts of indecent assault of a child. The applicant was a friend of the parents of the child and the prosecution contended that these offences occurred when the accused took the child for a drive in his car. The defence called the child's aunts who testified that the accused had often been alone with their children and that no problems had ensued.

At this point the prosecution applied to cross-examine the accused under section 1(f) on the basis that the accused had elicited evidence of good character from his witnesses. The trial judge acceded to this application and the accused was cross-examined as to the extent of the pornographic and paedophile material which had been found in a search of his premises. The Court of Criminal Appeal held that the trial judge had erred in this respect. In the words of Fennelly J.:

“The situation said to be relevant to the present case is that which occurs when the accused ‘has given evidence of his good character.’ But,

accounted for death. The Court of Criminal Appeal held that the trial judge had been correct to permit the prosecution to lead evidence in rebuttal to the effect none of the deceased's family would ever have considered him to have had such connections. This rebuttal evidence probably fell into the category of evidence of general character, but is certainly a fine line between such evidence and evidence of disposition.

¹⁶⁹ Court of Criminal Appeal, June 10, 2002.

assuming the evidence of his aunts to speak to the character of the accused, it was not the accused who gave it. It is true that the situation envisaged earlier in the sub-paragraphs of section 1(f) engages the responsibility of the 'advocate' of the accused in the event that he seeks to establish his good character through cross-examination of the prosecution witnesses other than the accused. The reason is clear. There was no need for such a provision. The reforms effected by the Act of 1924 did not require any provision for the case where the defence called character witnesses other than the accused. The rights of the prosecution to call rebutting character evidence was already covered by the common law.

In the present case, however, the prosecution did not seek to rely on those common law provisions by calling rebutting evidence. It chose, instead, to introduce damaging matter by cross-examination of the accused. That was directly prohibited by section 1(f), unless one of the provisos applied. In fact, as already stated, none of the exceptions applied. Specifically, the accused had given no evidence of his own good character."

Fennelly J. went on to say that he doubted, in any event, whether the prosecution would have been permitted to call this evidence in rebuttal, quite irrespective of any issue under the 1924 Act. The trial judge had warned the jury that with regard to this evidence called by the prosecution:

“the fact that he was someone who was or had a disposition to employ pornographic or paedophilic material for his entertainment might well be something that would assist you in assessing his credit in regard to his testimony and very, very definitive denial of any wrongdoing in his part.”

But as Fennelly J. noted, the views of Cockburn CJ in *Rowton* had “prevailed as an accepted principle ever since” it was decided in 1865 and the trial judge’s charge clearly implied that “the predilections of the accused might assist in assessing the credibility of the denials by the accused that he had committed the offences.” While Fennelly J. was not required to decide the point, the clear implication here was that such rebuttal evidence fell into the forbidden category of evidence as to disposition as distinct from character and was, hence, inadmissible. We discuss below whether these rules should be reformed.

Options for change

The Review Group considered a wide range of options with regard to the reform of (i) section 1(f) of the 1924 Act; (ii) the common law “similar fact” evidence rules and (iii) the rules as to good character evidence. We propose to consider the possible reform of each of these rules separately.

Possible reform of section 1(f) of the 1924 Act

Option A: Changing the meaning of the word “imputation”

The most critical question with regard to the entire section is the meaning of the word “imputation” in section 1(f). The Review Group received some suggestions that this word (especially in the wake of the decision of the Court of Criminal Appeal in *McGrail*) was too liberally interpreted in favour of the accused and that we should instead recommend a change in the law to the effect that the accused must be deemed to have dropped his shield once any attack whatever was made on a prosecution witness.

The Review Group cannot agree. In nearly every criminal case the accused will perforce have to attack or cast an “imputation” upon the prosecution witnesses. As the case-law has demonstrated, many of these “imputations” are in reality no more than either an emphatic denial of the charge or are else essential to the proper conduct of the defence. As we have already indicated, we do not think that the accused should, in effect, be penalised by the admission of past bad conduct evidence if he has done no more than fairly and properly defend his case. If the law were otherwise, it would mean that an accused with a bad record would be faced with the unenviable choice of either passively defending the case or, alternatively, suffering the admission of highly prejudicial evidence.

As such a course of action would increase the risk of miscarriage of justice, we do not recommend it. We instead agree that the proper balance has been struck

by decisions such as *McGrail* and we see no reason why the present law should be changed.

Option B: Permitting the cross-examination of the accused where he has made “imputations” (in the McGrail sense of that term) against the deceased in a homicide case or an incapacitated victim of an assault

We now consider a range of options dealing with reform of the 1924 Act and the right of the prosecution to call evidence in rebuttal. Options B, C, D and E to a large extent overlap and complement each other.

Many submissions to the Review Group made the point that, at present, an accused with a bad record could more or less with impunity attack the good name of the deceased in a homicide case or that of an incapacitated person following an assault. By definition, neither could be witnesses for the prosecution within the meaning of section 1(f) as it presently stands, so that an accused could not then be cross-examined as to character. While it is true that in some instances¹⁷⁰ the prosecution can tender evidence in rebuttal, this is not always possible. We consider instead that the 1924 Act should be changed to allow the accused to be cross-examined as to his previous character where he has made imputations (in the *McGrail* sense) against the deceased or the incapacitated victim.

¹⁷⁰ As in, e.g., *The People v. Nevin* [2003] 3 IR 312.

Option C: Allowing evidence of bad character to be introduced in the circumstances described in Option B where a defence witness (other than the accused) has made McGrail imputations against the deceased in a homicide case or against an incapacitated witness in an assault case.

At present, where the defence leads evidence, the effect of which is to make *McGrail* imputations against the deceased (in a homicide case) or against an incapacitated person (in an assault case), then the prosecution is placed in something of a quandary. By reason of the decision in *Ferris*, the accused could not be cross-examined as to bad character, since it is not he who has given this evidence. Even if the 1924 Act were itself amended to deal with this issue, it might not in itself suffice given that the majority of accused persons do not give evidence. and it is not even clear that the prosecution could call evidence by way of rebuttal in those circumstances.

We therefore recommend that where the accused leads testimony from other witnesses the effect of which is to make *McGrail*-style imputations against either the deceased or an incapacitated witness, then the prosecution should be free to cross-examine the accused and, where appropriate, to lead evidence in rebuttal as to the character of the deceased and (as the case may be) the incapacitated victim.

Option D: Allowing the accused to be cross-examined as to bad character where a defence witness other than the accused has given evidence of good character

As the decision of the Court of Criminal Appeal in *Ferris* illustrates, there is something of a lacuna in the law where a defence witness (other than the accused) gives evidence of the accused's good character. It is true that this gap can to some extent be remedied on the part of the prosecution by the calling of rebuttal evidence.¹⁷¹ But given the limitations as to the extent and nature of the prosecution's capacity to lead such evidence, we think it desirable that the prosecution also be given an express power by statute to address the accused's character by cross-examining the accused in the manner contemplated by the 1924 Act.

Option E: Allowing evidence of bad character to be introduced where the accused does not personally give evidence but where the defence leads evidence of the accused's good character from other defence witnesses or where imputations are made through cross examination against a prosecution witness or a deceased or incapacitated injured party.

The Review Group considers that this is a natural progression from Options B, C and D. If our proposals with respect to Option D were to become law, then the accused could, of course, be cross-examined as to bad character where he gave evidence. But we do not think that the prosecution should be debarred from calling such evidence of bad character where the defence have led evidence of good character or made imputations of the type indicated above, simply because the

¹⁷¹ See, e.g., *R. v. Winfield* [1939] 4 All ER 164.

accused has not personally given evidence. In those particular circumstances, we recommend that the 1924 Act be amended so as to give the prosecution the express right to call evidence as to bad character in those circumstances.

Possible reform of the common law similar fact rules

The Review Group received several submissions to the effect that the similar fact evidence rules should be significantly relaxed, especially in cases involving sexual offences. Indeed, one submission went so far as to advocate the admission in certain circumstances of a previous *acquittal* in a previous prosecution for a sexual offence.¹⁷²

But while the Review Group is aware that these similar fact rules have been relaxed by section 101 of the Criminal Justice Act 2003 in the United Kingdom, it does not consider that any significant relaxation of these rules is warranted or justified. It is true that we do not *actually* know what effect bad character evidence has on juries, but such research as is available suggests that it is

¹⁷² This proposition is, perhaps, not quite as startling as it might seem at first blush. The argument advanced was that if an accused had been previously acquitted for rape on the ground, for example, that he had reasonable grounds for belief that the victim had consented, it is likely that he would be much more likely to be careful about his conduct in the future. It was said, therefore, that the fact that the accused had been so acquitted would be relevant to negative a positive defence of this kind in any subsequent prosecution for sexual offences.

But while the Review Group acknowledges that this argument has a certain internal logic, it could not recommend such a drastic change in the law. First, we cannot know the reason for the acquittal by the jury. For all we know, the jury might have believed that the victim had, in fact, consented to the act of intercourse. Second, even if one accepted for argument's sake that the acquittal was relevant, its probative effect is surely outweighed by its prejudicial effect. Third, the introduction of such evidence would be seen by many as seeking to go behind the actual verdict of acquittal by the jury.

regarded by them as prejudicial, perhaps disproportionately so. If this is correct, then the risk of possible miscarriage of justice would appear to be increased by any commensurate relaxation of the rules, especially when in many (but, of course, as the existing similar fact rules recognise, not all) cases, the probative value of the previous conviction would not be high.

It is, of course, true, for example, that persons with a previous conviction for assault have a greater propensity to commit crimes of violence than members of the public as a whole. But it is still a big jump to say that such evidence should be routinely admitted where the accused has been prosecuted for manslaughter. Indeed, it is probably not an exaggeration to say that any too radical change in the law in this area might affect the prospects for a fair trial in the case of an accused with a previous record.¹⁷³ This would be especially true if an accused had a prior conviction for either a sexual offence or a crime of violence.

It was for these reasons that the Review Group decided against making any recommendation to change the law in respect of similar fact evidence.

Possible reform of the common law good character rules

¹⁷³ Some members of the UK 11th Report also thought (at para. 89) that:

“it would undermine the confidence of the public in criminal trials and might be a discouragement to criminals to reform because of their sense of unfairness and the hopelessness of avoiding conviction, even when innocent, because of their record..”

The Review Group gave consideration to a recommendation which would have had the effect of altering the common law good character evidence rules. It is true that the distinction between “character” (in the wider, reputational sense of that term) and “disposition” (in the sense of propensity) is often not an easy one to apply in practice.¹⁷⁴ As we have seen, much good character evidence is led to bolster the general credibility of the accused’s defence and, where necessary, to demonstrate that it is inherently unlikely that he committed the offence with which he was charged. But if an accused were to be permitted to lead evidence to the effect that the witness did not believe that his disposition was such that he could have committed the crime, the prosecution would have to be afforded a similar facility to call the sort of rebuttal evidence as to bad disposition which was precluded by the long-standing decision in *Rowton*. The practical effect of this would be simply to lengthen criminal trials, probably to no great purpose.

In practice, history has been on the side of the decision in *Rowton*. It is true that a cogent theoretical case could be made to the effect that all such evidence should be admissible - which was, in effect, the position of the dissenters in *Rowton* - but if the law were otherwise, the way would be open for the prosecution to lead evidence of disposition which might not amount to much

¹⁷⁴ As Lord Pearce said in *Selvey v. Director of Public Prosecutions* [1970] AC 304 at 354 in the context of the meaning of the word “character” in section 1(f) of the (English) 1898 Act:

“....it might be justifiable to consider whether ‘character’ means in the context solely general reputation, if a re-assessment could lead to any clarification of the problem. But in my opinion it leads nowhere. For I cannot accept the proposition that to accuse a person of a particular knavery does not involve imputations on his general reputation.”

more than an expression of opinion by a witness, but which in practice would often be highly prejudicial to an accused. If such evidence were to be admitted, it would also have implications for the meaning of the word “character” in section 1(f) of the 1924 Act, for, as Fennelly J. pointed out in *Ferris*, this word must be taken to have the same meaning as that at common law.

If, however, our other recommendations for reform in this area are accepted, then the existing lacunae (such as they are) in both the common law rules as to rebuttal evidence and the 1924 Act as to leading evidence of bad character where evidence of good character is adduced by defence witnesses other than the accused will in practice disappear. Any wider reform of the rules as to good character could present practical problems for judges, prosecutors and defendants alike.

Conclusions

While the Review Group has recommended a specific range of reforming measures, for the reasons just set out, we do not consider that we could safely recommend any general relaxation of either the present statutory or common law rules as to bad character. Nor do we think that the present common law rules as to what constitutes good character need to be re-cast.

It is true that the preservation of these rules may serve to exclude certain types of evidence which would be relevant and probative in particular cases. The

existence of such rules might also contribute to the occasional unmeritorious acquittal of a particular defendant. But the Review Group is concerned that any wholesale abandonment of these principles might be unfair to the accused and increase the risk of miscarriages of justice.

We consider that, on balance, in a case where the injured party has died or has become incapacitated such that he or she is unable to give evidence, where the defence attacks the character of the injured party (in the *McGrail* sense of that term), the shield would be dropped and the accused would be liable to cross-examination as to his or her character without leave of the court. This would involve amendment of section 1(f)(ii) of the Criminal Justice (Evidence) Act 1924 to allow a further category of case in which such cross-examination is permitted (i.e., by adding reference to the injured party including a deceased or incapacitated injured party).

We also recommend that, where the accused has engaged in an attack¹⁷⁵ on the character of the prosecution witnesses or, the injured party who is deceased or unavailable to give evidence, or has adduced positive evidence of his good character, or asked a question designed to elicit such evidence from any witness, the prosecution would be entitled to adduce positive evidence regarding the defendant's character.

¹⁷⁵ Again, in the *McGrail* sense of that term.

We consider that, on balance, in a case where the injured party has died or has become incapacitated such that he or she is unable to give evidence, where the defence attacks the character of the injured party, the shield would be dropped and the accused would be liable to cross-examination as to his or her character without leave of the court. This would involve amendment of s. 1(f)(ii) of the Criminal Justice (Evidence) Act 1924 to allow a further category of case in which such cross-examination is permitted (i.e., by adding reference to the injured party including a deceased or incapacitated injured party).

We also consider that 10 days notice of an intention to make an imputation against a deceased or incapacitated victim should be given, and that in the absence of such notice, the leave of the court would be required by the defence to make the imputation.

Where the accused has engaged in an attack on the character of the prosecution witnesses or, under our proposal, the injured party who is deceased or unavailable to give evidence, or has adduced positive evidence of his own good character, or asked a question designed to elicit such evidence from any witness, the prosecution would be entitled to adduce evidence regarding the defendant's character.

There would appear to be merit in allowing an express power to call further prosecution evidence regarding the character of the deceased or an incapacitated victim where the victim's character has been put in issue.

Issue 3 – Infringements of Constitutional Rights – The Exclusionary Rule

Background

The exclusionary rule is the rule that defines the circumstances in which a court will exclude evidence on the grounds that it has been obtained in violation of the accused's constitutional rights. Traditionally the common law did not have an exclusionary rule and the courts allowed evidence to be admitted which had been obtained as a result of, for example, an illegal search, provided the evidence was otherwise admissible and relevant. At common law, however, the courts retained a discretion to exclude evidence which had been obtained as a result of an unfair procedure (for example by a trick). The Irish courts followed this common law approach until the mid 1960's when the exclusionary rule was adopted in the leading case of *The People v. O'Brien*¹⁷⁶. An exclusionary rule is now a feature of most common law countries, the United States being the classic case in point. But the exclusionary rule has also been developed by some continental Constitutional Courts, with the jurisprudence of the German Constitutional Court being, perhaps, the best known¹⁷⁷. The jurisprudence of the European Court in Human Rights is now moving towards the limited proposition that domestic law must permit an accused to litigate the

¹⁷⁶ [1965] IR. 142

¹⁷⁷ See, e.g.,

question as to whether evidence obtained as a result of a violation of his rights should be excluded¹⁷⁸. Argument therefore centres not so much as on whether there should be an exclusionary rule, but rather about the nature and extent of the rule.

In *O'Brien*, the two accused were convicted of offences under the Larceny Act, 1916. The principal evidence against them was stolen property which had been discovered on foot on search of their home at 118, Captain's Road, Crumlin, Dublin. The Garda Síochána sought a warrant from the District Court to search this premises but in error the warrant referred to the address as "118, Cashel Road, Crumlin". Both roads adjoin each other in the Crumlin area. Accordingly, the Garda had in fact no authority to enter the home of the accused. The issue for determination by the courts therefore was whether the evidence obtained in foot of the search was admissible.

The Court of Criminal Appeal decided to apply the traditional common law rule, namely, that evidence which is relevant and otherwise admissible should not be excluded because of some technical defect in the warrant to search. The decision in *Kuruma*¹⁷⁹ was cited with approval. In that case the accused was searched by

¹⁷⁸ See for example *Schenk v. Switzerland* (1991) 13 E.H.R.R. 175. However, the European Convention on Human Rights does not require that unlawfully obtained evidence must be excluded: *AG's Ref No 3 of 1999* [2001] AC 91.

¹⁷⁹ *Kuruma v. The Queen* [1955] A.C. 197

police officers in his native Kenya and found to be in possession of ammunition. This at the time was a capital offence. The search was illegal because the power of search was conferred on police officers of or above the rank of assistant inspector and neither officer was of the requisite rank. The Privy Council decided that the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. "If it is, it is admissible and the court is not concerned with how the evidence was obtained"¹⁸⁰.

The Court of Criminal Appeal in *O'Brien* accepted that this was a correct statement of the law. The matter was then referred to the Supreme Court on a point of law. In arguing the case before the Supreme Court counsel for the Attorney General submitted that evidence discovered as a result of the adoption of any means however illegal could be given in evidence. He went on to say however that the Attorney had given explicit instructions that he did not wish to argue that evidence obtained as a result of gross personal violence or methods which offend against the essential dignity of the human person could be received.¹⁸¹

In the event, the Supreme Court decided that the error in relation to the warrant was not such as to require the evidence in the case to be excluded. The test to be

¹⁸⁰ This somewhat simplifies the position, as not all relevant evidence is admissible. For example, highly relevant evidence can be excluded on the basis that it is hearsay evidence.

¹⁸¹ State Counsel (later McCarthy J.) stated that "to countenance the use of evidence extracted or discovered by gross personal violence would....involve the State in moral defilement" ([1965] IR 142 at 150).

applied following *O'Brien* can be summarised as follows: evidence obtained as a result of a conscious and deliberate violation of the accused's constitutional rights is not admissible in evidence, unless there are extraordinary excusing circumstances. This remains the essential test today. If unlawfully obtained evidence does not fall to be excluded under this test, the court will then have a discretion whether or not to allow the evidence to be admitted. Thus, if the accused's rights that were violated were not constitutional rights (if, for example, the property searched was a business premises and not a dwelling house) or if the violation was not conscious and deliberate or if there were extraordinary excusing circumstances, the trial judge would have a discretion to permit the evidence to be introduced.

The question of extraordinary excusing circumstances has not been an issue that has arisen frequently before the courts. Likewise, whether the right that had been infringed was a constitutional right or a common law right has not been a matter of great debate (although the extent of the constitutional right to privacy can be a matter of some dispute). The question as to what is meant by "conscious and deliberate" has, however, been hotly debated. The Supreme Court settled the issue in the case of *The People v. Kenny*¹⁸² in a manner which involves a significant extension of the exclusionary rule.

¹⁸² *People (D.P.P.) v. Kenny* [1990] 2 I.R. 110.

This issue had been examined by the Supreme Court prior to the actual decision in *Kenny* in a series of (not always consistent) decisions. Thus, in *The People v. Shaw*¹⁸³ the Supreme Court had to determine the consequences of the accused being detained by the Garda Síochána for a number of days while members of the Garda Síochána were investigating the disappearance of two women. It was accepted that there was no statutory basis for thus holding the accused. He made an admission to the rape and murder of one of the women while so detained by the Garda Síochána. In his judgment Walsh J. in summarising the law covering the arrest and detention of suspects and the consequences of any breach of the rights of the suspect stated:

“When the act complained of was undertaken or carried out consciously and deliberately, it is immaterial whether the person carrying out the act may or may not have been conscious that what he was doing was illegal or, even if he knew it was illegal, that it amounted to a breach of the constitutional rights of the accused. It is the doing of the act which is the essential matter, not the actor’s appreciation of the legal consequences or incidents of it.”¹⁸⁴

Madden’s case is cited as the authority for that proposition.

¹⁸³ *People (D.P.P.) v. Shaw* [1982] I.R. 1.

¹⁸⁴ [1982] IR 1 at 23. Walsh J. cited the decision of the Court of Criminal Appeal in *The People v. Madden* [1977] IR 336 as authority for this proposition.

In *Madden's* case¹⁸⁵ the accused had been detained for 48 hours under section 30 of the Offences against the State Act, 1939. His detention expired at 7.15 am. At that time he was in the course of making a statement and the members of the Garda Síochána continued to detain him without advertence to the legal basis for so doing. When it was put to him that the accused was in unlawful detention after 7.15 am the Garda replied: "That's not for me". He also stated that he did not think that the accused was unlawfully detained as "he was making a statement during that time". The trial court concluded that the breach of the accused's rights was not "conscious and deliberate" but the Court of Criminal Appeal disagreed. It ruled that the trial court was wrong in deciding the issue simply on the basis of lack of *mala fides* on the Garda's part. The Garda must have been aware of the lawful period of detention that applied in the case and he deliberately and consciously determined that the taking and completion of the statement was of more importance than according the defendant his right of liberty.

What the courts had to determine in these cases was whether the words "conscious and deliberate violation" could be used to give a Garda ignorant and indeed oblivious of the suspect's rights a "fool's pardon". The courts were clear that no such allowance should be made. As Walsh J. stated in *Shaw*: "To attempt to import any such interpretation ... would be to put a premium on ignorance of

¹⁸⁵ *The People v. Madden* [1977] I.R. 336

the law”.¹⁸⁶ However, the judges have differed as to how they should achieve this end. Walsh J. in particular emphasised that the words “conscious and deliberate” qualified the actions of the Garda, rather than his state of mind. In the majority judgment in *Shaw’s* case, however, Griffin J expressly dissented from this position. He stated: “In my opinion, it is the violation of the person’s constitutional rights, and not the particular act complained of, that has to be deliberate and conscious for the purpose of ruling out a statement.”¹⁸⁷

In *Kenny*¹⁸⁸ the accused was charged with possession of drugs found as a result of the search of his home. The warrant was bad because there was insufficient information placed before the peace commissioner to enable him to be satisfied that there were reasonable grounds to grant the warrant. The trial judge had decided that the warrant was valid. The Court of Criminal Appeal ruled that it was not valid and in a separate judgment that the evidence was nonetheless admissible on the basis that there was no conscious and deliberate violation of the accused’s constitutional rights. The matter was then referred to the Supreme Court on a point of law. A majority of the court (Finlay C.J., Walsh and Hederman JJ.) ruled that there was a conscious and deliberate violation of the

¹⁸⁶ [1980] IR 1 at 33.

¹⁸⁷ [1980] IR 1 at 56.

¹⁸⁸ *The People v Kenny* [1990] 2 IR. 110. The decision in *Kenny* was also anticipated by the Supreme Court’s decision some months earlier in *The People v. Healy* [1990] 2 IR 73 where the Court excluded on this ground a statement which had been made by an accused while in custody, but where his constitutional right of access to a solicitor were held to have been infringed.

accused's constitutional rights. There were two strong dissenting judgments (Griffin and Lynch JJ.).

In essence, the Supreme Court in *Kenny* decided that the words "conscious and deliberate" qualified the actions of the Garda rather than his state of mind in relation to the lawfulness of the search. The Garda clearly believed he had a valid warrant to search the premises. The warrant on the other hand was invalid. However, the search of the accused's home was conscious and deliberate and therefore the evidence must be excluded, as there were no extraordinary excusing circumstances.

By defining the words "conscious and deliberate" in this way the court has effectively imposed a strict exclusionary rule. This intention is clear from the majority judgment of Finlay C.J. Once the focus of the court is on whether the Garda consciously and deliberately searched the accused's home or arrested the accused in a manner which, objectively, constituted an infringement of the constitutional right) it is completely immaterial that the members of the Garda Síochána did not know or indeed *could not know* that the warrant was invalid.

Arguments for Change

One of the central problems of a strict exclusionary rule is that it does not allow the trial judge to weigh the public interest in ensuring that constitutional rights are protected by agents of the State as against the public interest in ensuring that crime is detected and punished and that the constitutional rights of victims are vindicated by the courts.

In *R v Shaheed*¹⁸⁹ the New Zealand Court of Appeal reviewed the exclusionary rule in most other common law jurisdictions, including Ireland. In concluding that a balancing test was the appropriate one to adopt it stated:

“A careful consideration of the experience of this country and other broadly comparable jurisdictions is persuasive in that the proper approach is to conduct a balancing exercise in which the fact that there has been a breach of the accused’s guaranteed right is a very important but not necessarily determinative factor. The breach of the right would be given considerable weight....But it might, in the end, be held to be outweighed by the accumulation of other factors. In such a case, the conscious

¹⁸⁹ [2002] 2 NZLR 377.

carrying out of the balancing exercise will at least demonstrate that the right has been taken seriously.”¹⁹⁰

In particular, a strict exclusionary rule does not allow the courts to have regard to whether the defect in the warrant is caused by factors outside the control of the Garda Síochána. The U.S. Supreme Court has developed a good faith exception to address that very issue.¹⁹¹ That Court has accepted that to exclude evidence obtained as a result of an error or lack of authority on the part of the authority which granted the search warrant does not assist in the aim of deterring police misconduct:

“The Fourth Amendment exclusionary rule should not be applied so as to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid.”¹⁹²

The following is an example of the operation of the strict exclusionary rule. Many District Court judges do not reside in their own districts. Accordingly, to obtain a search warrant from a District Court judge at night or at weekends it was not uncommon for the members of the Garda Síochána to travel to the

¹⁹⁰ [2002] 2 NZLR 377 at 419

¹⁹¹ *United States v. Leon* 468 US 897 (1984).

¹⁹² 468 US 897 at 925, per White J.

judge's home and to seek a warrant from the judge there. This was considered a perfectly normal and proper practice. However, in *Creaven v. Criminal Assets Bureau*¹⁹³ the Supreme Court decided that a District Court judge does not have authority to grant a warrant when not physically present in his or her own district. (This authority is now provided by section 32A of the Courts (Supplemental Provisions) Act, 1961, as inserted by section 180 of the Criminal Justice Act, 2006.) This is an example where the defect in the warrant would have nothing to do with the behaviour or actions of the Garda Síochána. Yet, where such defective warrants were acted by members of the Gardaí, it might well result, for example, in searches of private dwellings which were "not in accordance with law", contrary to Article 40.5 of the Constitution, so that any evidence obtained thereby would have to be excluded by reference to the *Kenny* doctrine.

The operations of the exclusionary rule can have far reaching implications. In *The People v. Laide & Ryan*¹⁹⁴ the Court of Criminal Appeal decided that where a member of the Garda Síochána arrested an accused at his home while present there on foot of an invalid search warrant issued by the District Court the arrest and subsequent detention were invalidated. As a consequence statements made by the accused were inadmissible.

¹⁹³ [2005] 2 I.L.R.M. 53

¹⁹⁴ [2005] 1 I.R. 209.

It is arguable that *Kenny* is not wholly consistent with the decision in *O'Brien*.¹⁹⁵ *Kenny* nonetheless does not purport to reverse *O'Brien* but the inconsistency between the two decisions can be demonstrated by the fact that when one applies to the facts in *O'Brien* the principles set out in *Kenny*, a different outcome would result. The members of the Garda Síochána in *O'Brien* “consciously and deliberately” searched the house of the accused and the fact that they were unaware that the warrant related to different premises was not something to which, on the basis of *Kenny*, the courts could have regard. On the possibility of the evidence being excluded in *O'Brien's* case Lavery J, who delivered a short judgment agreeing with the judgment of Kingsmill Moore J., had this to say:

“If a judge were to hold inadmissible the evidence in question in this case, or in any comparable case, his ruling would, in my opinion, be wrong to the point of absurdity and would bring the administration of law into well deserved contempt.”¹⁹⁶

The purpose of the exclusionary rule is to ensure that the fundamental rights of the citizen are vindicated, that the courts are not seen to be a party to any breaches of such rights and that police and other state agencies respect such

¹⁹⁵ In *The People (D.P.P.) v. Balfe* [1990] 4 IR 50 Murphy J. attempts to reconcile both judgments on the basis that *O'Brien* is concerned with patent defects and *Kenny* with latent defects in search warrants

¹⁹⁶ [1965] IR 142 at 148.

rights. These aims have been emphasised in various *dicta* in the courts here and elsewhere. It can be argued that these aims can be as satisfactorily achieved by a discretionary exclusionary rule as by a strict exclusionary rule.

Significantly, international experience would suggest that a relaxation of the exclusionary rule would not violate human rights norms. There is little jurisprudence from the European Court of Human Rights to suggest that improperly obtained evidence must be excluded at the trial, save in special circumstances.¹⁹⁷ A recent decision of a pre-trial chamber of the International Criminal Court emphasised that admissibility decisions are normally a matter for national jurisdictions – the court made this point while admitting, in the case before it, evidence obtained in violation of fundamental rights on the grounds that the admission would not “seriously damage the integrity of the proceedings”.¹⁹⁸

Furthermore it can be argued that any contention that the rule is necessary to ensure that the police comply with the relevant legal requirements has been superseded by radical changes to the nature of policing in recent years, the videotaping of interviews, the creation of the Police Ombudsman Commission

¹⁹⁷ See e.g., *Jalloh v. Germany*, Application 54810/00, European Court of Human Rights, 11th July 2006.

¹⁹⁸ *Prosecutor v. Lubango*, Pre-Trial Chamber I of the International Criminal Court, 29th January 2006, paras. 70-90.

and the regulation of the Garda Síochána by statute. The protection of the rights of victims is an essential part of this changed context as well.

Finally it might be contended that there is often a disproportion between the technicality of a breach of rights on the one hand as against the unjust acquittal of a defendant who is in fact guilty on the other hand.¹⁹⁹

Arguments against change

Traditionally the argument in favour of the exclusionary rule is that it provides a mechanism for vindicating the right of the defendant that has been infringed, whether by the actions of An Garda Síochána or otherwise. Any relaxation of the rule would encourage sloppy or substandard police practices, and, indeed, any new provision that evidence would not automatically be inadmissible if the contravention was “bona fide” would put a premium on ignorance. As McCarthy J. put it in *The People v. Healy*²⁰⁰ :

¹⁹⁹ It is, of course, a matter of debate in any particular case as to whether a mistake was technical or not, and such errors will fall on a spectrum from the minor to the fundamental. Thus, by way of example, the error in *Competition Authority v. Irish Dental Association* [2005] 3 IR 208 (where the material sought to be obtained under the search was inadvertently misdescribed) might not, on one view, be regarded as a merely technical breach. On the other hand, it might be contended that the facts of this case presented precisely the kind of inadvertent non-prejudicial error which ought not to have resulted in the exclusion of evidence.

²⁰⁰ [1990] 2 IR 110.

“A violation of constitutional rights is not be excused by the ignorance of the violator no more than ignorance of the law can ensure to the benefit of a person who.....is presumed to have intended the natural and probable consequences of his conduct. If it were otherwise, there would be a premium on ignorance.”²⁰¹

Moreover, the exclusionary rule ensures that any violation of the Constitution - which each judge, upon appointment, has taken a solemn declaration to uphold - is regarded with the appropriate degree of seriousness and that the courts are not obliged to act upon evidence which they know has been unconstitutionally obtained.

Options for Change

A majority of the Group is of the view that the current exclusionary rule is too strictly calibrated, and would wish to see a situation develop where the court would have a discretion to admit the evidence or not, having regard to the totality of the circumstances and in particular the rights of the victim.

Prior to the coming into force of section 21 of the Criminal Justice Act, 2006 the Director did not have any legal avenue to have the issue re-visited by the

²⁰¹ [1990] 2 IR 110 at 89.

Supreme Court. That section, which came into force on 1 August, 2006 and inserts a new section 34 of the Criminal Procedure Act, 1967, now provides such an avenue, as a decision of a trial judge to exclude evidence on the basis of the decision in *Kenny* may in the event of an acquittal be the subject of a reference to the Supreme Court. This mechanism may result in some reconsideration of the law.

The Group has considered a number of alternative approaches in the event that such reconsideration by the Supreme Court does not take place:

1. Constitutional amendment providing for a discretionary exclusionary rule;
2. Statutory regulation providing for a discretionary exclusionary rule;
3. Statutory provision of a list of factors which a court may take into account in deciding whether or not to exclude evidence.

The Group has considered these three options in detail. On balance, having regard to the existing jurisprudence, it would appear likely that a “full frontal” challenge to the existing law (Option 2 above) would be likely to be held to be unconstitutional. Indeed, the US Supreme Court in *Dickerson v. U.S.*²⁰² held unconstitutional a similar attempt by Congress to overrule the *Miranda*²⁰³ decision on the requirement for a warning to suspects in custody concerning

²⁰² 530 U.S. 428 (2000).

²⁰³ 384 U.S. 436 (1966).

the right to silence. Rehnquist C.J. summarised the constitutional position as follows:

“In *Miranda v. Arizona*, 384 U.S. 436 (1966), we held that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence. In the wake of that decision, Congress enacted 18 U. S. C. §3501, which in essence laid down a rule that the admissibility of such statements should turn only on whether or not they were voluntarily made. We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.”²⁰⁴

In dissent, Scalia J. regarded the legislation as valid and indeed stated that he intended to continue to apply it notwithstanding the Court's decision:

“Today's judgment converts *Miranda* from a milestone of judicial overreaching into the very Cheops' Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance. In imposing its Court-

²⁰⁴ 530 U.S. 428 (2000).

made code upon the States, the original opinion at least *asserted* that it was demanded by the Constitution. Today's decision does not pretend that it is--and yet *still* asserts the right to impose it against the will of the people's representatives in Congress. Far from believing that *stare decisis* compels this result, I believe we cannot allow to remain on the books even a celebrated decision--*especially* a celebrated decision--that has come to stand for the proposition that the Supreme Court has power to impose extra-constitutional constraints upon Congress and the States. This is not the system that was established by the Framers, or that would be established by any sane supporter of government by the people."²⁰⁵

A more limited legislative option would be that of providing – at least in the first instance – a greater flexibility for the court in terms of the factors to be taken into account in deciding whether to admit or exclude illegally or unconstitutionally obtained evidence.

This list could include factors such as whether the breach was intentional or not, and if not the level of negligence or want of care involved, if any, whether it was committed by the Garda or some other person or authority such as the District Court, whether the breach was a minor, technical or clerical one, whether the breach of rights involved significant prejudice to the accused in and of itself

²⁰⁵ 530 U.S. 428 (2000).

(independently of the nature of the evidence thereby obtained), and whether the offence is a technical or regulatory one or, on the other hand, involves the vindication of the personal rights of a victim.

The legislation might go on to provide that the primary matter to be considered by the Court would be whether having regard to all the circumstances, the admission of the evidence would bring the administration of justice into disrepute – the test set forth in Section 24(2) of the Canadian Charter of Rights and Freedoms.²⁰⁶

In practical terms, however, there are clearly some important constitutional issues with the legislative approach, even in the case of the more limited option of providing factors to be taken into account. There may be difficulties if the provision is enacted without having been referred to the Supreme Court under Article 26 of the Constitution.

On balance a majority of the Group considers that the most satisfactory approach would be to see whether the appeal provisions of the Criminal Justice Act 2006 would give the Supreme Court an opportunity, in the appropriate case, of revisiting its jurisprudence and of moving towards the discretionary approach. If this mechanism does not give rise to any change in the jurisprudence, a

²⁰⁶ See Sch. B to the Canada Act 1982.

majority of the Group considers that the other options would then have to be examined and considered. As stated above, these other options include various legislative models or possibly constitutional change. We note in passing that there should be no constitutional objection to legislation providing factors to be taken into account in determining the admissibility of illegally (as opposed to unconstitutionally) obtained evidence, but while we do not see any immediate need for such legislation, the matter should be kept under review.

The majority recommendation can be summarised as follows. We would wish to see a situation where the court would have a discretion to admit unconstitutionally obtained evidence or not, having regard to the totality of the circumstances and in particular the rights of the victim. In the first instance we suggest the approach of seeing whether a change in jurisprudence emerges following use of the appeal provisions of the Criminal Justice Act 2006. If not, the other options would then have to be examined and considered. As stated above, these other options include various legislative models or possibly constitutional change.

A separate dissent from the Chairman is attached to this Report.

Issue 4 - Requiring a Defence Statement

Advance disclosure of the defence case

A considerable disparity exists between the advance disclosure required of the prosecution and defence in criminal cases. The prosecution are required to set out details of the precise conclusions that they seek to prove (in the form of statement of and particulars of the offence in the indictment) and to furnish not only copies of exhibits and the statements of witnesses it is intended to call, but also any other material which may be useful to the defence. The defence by contrast - with limited exceptions such as alibi evidence under section 20 of the Criminal Justice Act 1984 and information regarding witnesses required by the Offences against the State (Amendment) Act 1998, or the intention to adduce evidence regarding the mental condition of the accused under section 19 of the Criminal Law (Insanity) Act 2006 - is not required to furnish any such information. There are, however, provisions for defence disclosure in quasi-criminal proceedings such as confiscation orders under the Criminal Justice Act 1994 or the Proceeds of Crime Act 1996.

This disparity cannot be explained purely by reference to the onus of proof. After all, assuming that the prosecution overcomes the burden of showing a case to answer, the defence case, if any, must be disclosed in full during the trial.

Last-minute disclosure of the defence case can cause major problems for the task of fairly determining the truth, in that such late disclosure can cause confusion as to the issue and leave little time to challenge or check out the version of facts put forward by the defence. One example might be an allegation of mistaken identity, but there could be many other examples where the prosecution is unfairly wrong-footed by a late disclosure. Another instance might be last minute scientific, expert or technical evidence where there is inadequate time for the prosecution experts to consider the position and respond.

We note also that the rules of procedure of international criminal tribunals also firmly establish that there is nothing fundamentally inappropriate about compelling the production of a statement of the nature of the defence – for example the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia require the defence to furnish a statement in general terms of the nature of the accused's defence, the matters with which the defence takes issue and why the accused takes issue with each such item.²⁰⁷ The Rules of Procedure and Evidence of the International Criminal Court require

²⁰⁷ Rule 65 *ter* (F) of the Rules.

disclosure of information regarding an alibi or a ground for excluding criminal responsibility,²⁰⁸ and the Regulations of the Court also allow the Court to direct the parties to define the issues they propose to raise during the trial.²⁰⁹

The Group after careful consideration is of the view that the current arrangements are imbalanced and unsatisfactory. We have considered a number of options as follows –

1. Require the defence to furnish a statement of the defence case, setting out what parts of the prosecution case the defence will challenge (whether on factual or legal grounds including admissibility) and what matters the defence positively intends to prove.
2. Require the defence to furnish only the names and addresses of witnesses.
3. Require the defence to furnish only statements of the proposed expert evidence which is proposed to be relied on.
4. Require the defence to meet obligations broadly comparable to the obligations on the prosecution, i.e., to furnish statements of evidence from all Defence witnesses.
5. Require full equality, including defence disclosure of material on which it is not proposed to rely.

²⁰⁸ Rule 79.1.

²⁰⁹ Regulation 54.

We have considered models based on the U.K. law, particularly section 5 and section 6A (inserted by section 3 of the Criminal Justice Act 2003) of the Criminal Procedure and Investigations Act 1996. The defence statement required by this provision includes:

- The nature of the defence
- Aspects of the prosecution case which the defendant takes issue with and why
- Any point of law including admissibility or abuse of process, and authorities relied on
- Alibi details and witnesses
- Any information of assistance in identifying such witnesses

A more full defence statement could afford the accused an opportunity to account for suspicious circumstances forming part of the prosecution case, in line with our recommendation regarding the putting of such circumstances during police questioning. Thus, if the defendant proposes to advance at the trial an innocent explanation for certain suspicious circumstances, he or she would be required to give advance notice of that intention. Such a provision would allow, for example, a more considered view to be taken of expert evidence. For example, if part of the prosecution case is forensic evidence linking the accused

to the crime, the defendant would be required to state the theory that allows an innocent explanation. This would allow considered interpretation by the expert witness rather than instant reaction while giving evidence.

If the option of furnishing the names and addresses of all witnesses was availed of, that would replace and subsume section 20 of the Criminal Justice Act 1984 and section 3 of the Offences against the State (Amendment) Act 1998.

Under such a proposal, the defence would be able to serve an amended statement with leave of the court, as with an amended indictment, and can serve notice of additional evidence in the same way that the prosecution can in respect of its case. The Leahy Committee recommended²¹⁰ that failure to list a witness would mean that the witness could be called only with leave of the court. But if the option of a defence statement were to be pursued, there would be merit in a more relaxed rule allowing the defence to serve a further statement of the new witness, although this could be the subject of comment, criticism or cross-examination.

Clearly one difference between the two sides of a criminal case is that while there is a ready remedy for the prosecution's failure to serve a book of evidence, there is no such easy remedy for a corresponding failure by the defence. Thus if the

²¹⁰ Recommendation 11.

option of a defence statement were availed of, and if the defence fails to meet the statutory deadline, the trial court could be permitted to order the defendant to deliver the statement within a specified period, failing which contempt of court remedies could apply. Furthermore there could be a power to reduce the legal aid payable or order costs against the defendant in the event of seeking to raise an issue at the trial that was not dealt with in the defence statement or the pre-trial admissibility hearing, as recommended by the Leahy Committee.²¹¹ One could also envisage that the court could have power to direct further particulars of either the defence or the prosecution case on the application of the other party. Clearly however any obligation to disclose the defence case or witness statements would not apply to the statement of the defendant himself or herself – to avoid any possible trespass into the area of compelling evidence from the defendant – and nor would it apply where the defendant pleads guilty on or before the date on which the defence statement is due.

There would, however, be some major practical problems with extensive pre-trial disclosure especially where combined with pre-trial hearings. One might end up in a situation where all cases were effectively run twice, first, on the points that occurred to the defence at the disclosure and pre-trial stage and, second, on the further points that occurred during or prior to the trial itself.

²¹¹ Leahy Committee recommendation 11.

Another disadvantage of disclosing, for example, the names and addresses of witnesses might be that, in certain circumstances, the Garda Síochána might seek to interview those witnesses or ask questions of them. Another difficulty is that the requirement for an extensive, pleading-style defence statement would give rise to a corresponding requirement for the indictment to be served well in advance, rather than on the morning of the trial (as it often is), and perhaps for the indictment to develop a more narrative format rather than laconic particulars of the offence.

On balance, and having regard to the difficulties of moving to a defence statement regime, we consider that, in the first instance, the obligation of additional disclosure should be limited to the expert or technical reports or witness statement of experts on which the defendant intends to rely. Provision should be made that, following such disclosure, the prosecution would not be entitled to call any witness making such a report without the consent of the defendant.

We likewise consider that it should not be open to the prosecution to require the defence to tender a witness where a report or witness statement has been furnished, but the defence does not, in the event, wish to call the witness at the

trial.

We recognise that, in many circumstances, the obtaining of expert evidence may take a longer period of time and, in such instances, the defence should be permitted to give details of the efforts being made to obtain a statement if the statement itself is not to hand at the time for disclosure. But, in any event, such reports should be disclosed well in advance of the trial.²¹²

Disposal of Admissibility Issues pre-trial

Following the service of any expert reports as recommended by the Group, the issue would arise as to when any admissibility issues that the defence wishes to raise would be determined. We consider that the present arrangement whereby a jury is sworn in before any admissibility issue is determined is illogical and inconvenient on a number of levels and only explicable by historical considerations which no longer apply. It involves the jury waiting in the jury room for long periods, or being sent away, and increases the chance of jurors becoming unavailable during a long trial.

²¹² Note also that the Review Group has elsewhere recommended that, in general, the defence should furnish 10 days advance notice of an intention to make an imputation on the character of the deceased (in a homicide case) or an incapacitated witness (in an assault case).

We consider that all admissibility issues on which issue has been joined by the defence statement should be determined prior to the swearing in of a jury. On balance – and particularly to avoid the danger of running the case twice – we suggest that this should be done on the first day or days of the trial.

A related issue is the need to encourage the defendant to come to terms with the issues at an early date in order to increase the overall efficiency of the system and, above all, to avoid the suffering of victims that can be caused by a long wait for the accused to decide how to plead. In this regard, we suggest that legislation would expressly state the existing principle that in any case where there is a plea of guilty, the sentencing judge shall consider the stage in proceedings at which the plea was tendered or at which it was indicated that the plea would be tendered.

We recommend that legislation provide that admissibility issues may be determined prior to the swearing in of a jury, on the first day or days of a trial.

We further recommend that the principle that consideration be given in sentencing to the stage at which a plea is tendered should be stated expressly in statute.

Issue 5 – Extending Alibi Evidence Rules

We consider that we have dealt with this issue sufficiently under the heading of defence disclosure, and that no separate issue arises for consideration in this report under this heading.

Issue 6 – “With Prejudice” Appeals

Introduction

The term “without prejudice” in relation to an appeal means that, if the appeal is successful, the point of law will have been clarified in favour of the prosecution but the court does not actually reverse the acquittal. The term “with prejudice” means that, if the appeal is successful, the acquittal can be reversed.

The current position can be summarised as follows:

1. Where a person tried on indictment is acquitted, the prosecution may, without prejudice to the verdict in favour of the accused, refer a question of law arising during the trial to the Supreme Court²¹³.
2. Where the Court of Criminal Appeal makes a decision in favour of the accused, the prosecution may appeal the decision to the Supreme Court on a without prejudice basis.²¹⁴

²¹³ Section 34 of the Criminal Procedure Act 1967 as substituted by section 21 of the Criminal Justice Act 2006.

²¹⁴ Section 29(3) of the Courts of Justice Act 1924 as substituted by section 22 of the Criminal Justice Act 2006.

3. There is no general right of appeal from the District Court by the prosecution, but such a right exists in limited cases such as fisheries and excise offences.

An acquittal by the courts may in certain circumstances be made amenable to judicial review at the suit of the Director, which may have the result that the matter is required to be reheard. In addition, acquittals in the District Court may be reversed where the prosecution appeals on a point of law as a result of a case stated under section 2 of the Summary Jurisdiction Act 1857.

The principal questions to be addressed by the Review Group therefore are:

- a. Whether provision for with prejudice appeals is constitutionally permissible.
- b. Whether the prosecution should have a with prejudice right of appeal in respect of acquittals on indictment.
- c. Whether the prosecution should have a more general right of appeal from acquittals in the District Court.

- d. Whether the prosecution should have a right of appeal in respect of acquittals where there is evidence of jury or witness tampering.
- e. Whether there should be a procedure for re-opening old cases where there is compelling evidence of guilt.

Constitutional considerations

The prosecution right of appeal has been the subject of recent detailed examination by the *Working Group on the Jurisdiction of the Courts*²¹⁵ and by the Law Reform Commission,²¹⁶ and has also been the subject of recent legislation in the form of the Criminal Justice Act 2006.

The Working Group made the general observation that appeals against unreasonable jury verdicts or even *de novo* reviews of the evidence would be:

“fundamentally incompatible with the status of jury trial under the law and the Constitution. It would conflict with the rule of double jeopardy.

There is no evidence of widespread discontent with jury verdicts.”²¹⁷

²¹⁵ *Report on the Criminal Jurisdiction of the Courts*, 2003.

²¹⁶ *Prosecution Appeals and Pre-Trial Hearings*, LRC81-2006.

²¹⁷ Paragraph 682.

We agree with these sentiments. There could be no question of appeals against a “perverse” jury finding on the merits. By “perverse” we mean a finding of not guilty which is against the weight of the evidence. However, the question of appeals in respect of points of law is a separate issue.

Any examination of this issue must begin with a recognition of the significant constitutional status of the decision of a jury under Article 38.5. The question of re-opening acquittals by juries on the basis of a with prejudice prosecution appeal was considered by the Supreme Court in *The People (D.P.P.) v. O’Shea*²¹⁸, a case where the Central Criminal Court (Gannon J.) had directed a jury to record a verdict of not guilty. The Director appealed to the Supreme Court under Article 34.4.3° of the Constitution, and the issue before the court was whether such an appeal lay.

It was contended by the respondent in that case that Article 38.5, which provides for trial with a jury on criminal charges, involves as an essential feature “that a verdict of “not guilty”, however achieved, once recorded by a jury can never be appealed.”²¹⁹

O’Higgins C.J. disposed of this argument by stating that, in the case of a directed verdict, “the reality is that such a verdict of “not guilty” was never pronounced

²¹⁸ [1982] IR 384.

²¹⁹ [1982] IR 384 at 400.

by the jury and resulted from the judge's decision and his alone".²²⁰ In any event, O'Higgins C.J. held that the general right of appeal to the Supreme Court had not been qualified in such a way as to create an exception for acquittal. Such a jurisdiction, however, would not be exercised so as to disturb an acquittal "duly recorded by a jury on a consideration of the evidence"²²¹.

O'Higgins C.J. also rejected the suggestion that such an appeal would impose an intolerable burden on those facing criminal charges in the Central Criminal Court by saying:

"We have advanced very far from the days when the lonely prisoner, with inadequate means, faced at his trial the full resources of the State which accused him. Today such a prisoner has access, at the expense of the State, not only to the finest professional assistance but also to all other scientific and technical aides required for his defence. The hardship which he faces is the charge and the trial."²²²

O'Higgins C.J. went on to outline the fundamental argument in favour of a with prejudice prosecution appeal:

²²⁰ [1982] IR 384 at 401.

²²¹ [1982] IR 384 at 405.

²²² [1982] IR 384 at 405.

“If, as a result of an error made by the trial judge, the jury is not permitted to consider the evidence or the charge brought against an accused or to pronounce on his guilt or innocence, can it be said that justice has been accorded to the State and to society? In my view, it cannot and, if this be so, a situation would exist which the Constitution prohibits.”²²³

Walsh J. concurring with O’Higgins C.J. said that the requirement that a criminal trial be conducted in accordance with law (do réir dlíghidh) “is not satisfied by trials where verdicts are based on error of law or have been procured by improper means”.²²⁴

Finlay P., dissenting, took the view that the constitutional guarantee of a right to trial with a jury involved as an essential characteristic the proposition that a jury’s verdict of not guilty is not subject to an appeal to any other court. In his view, this principle also included cases where the verdict was as a result of a direction from the trial judge.²²⁵

²²³ [1982] IR 384 at 405.

²²⁴ [1982] IR 384 at 420.

²²⁵ [1982] IR 384 at 414.

In dissent, Henchy J. outlined a number of reasons why, in his view, a with prejudice prosecution appeal from a decision of the Central Criminal Court did not lie. He referred in particular to the inequality that would exist as between defendants in the Central Criminal Court on the one hand and in the Circuit Court or Special Criminal Court on the other.²²⁶ It may be observed that such a disparity would not arise in the event of the enactment of a general statutory provision covering all acquittals on indictment.

Henchy J. also referred to the fact that there was no precedent for such an appeal,²²⁷ but this, in itself, of course, is not a reason for not considering a statutory provision for such an appeal at this stage. Henchy J. took the view that it was a quintessential feature of the jury trial required under Article 38.5 that when the trial takes place properly within jurisdiction and results in the jury's verdict of not guilty, whether directed by the judge or not, that verdict can never be questioned in any court.²²⁸ Henchy J. continued:

“after the acquitted person steps out of the courtroom and breathes afresh the air of freedom, even if it should emerge afterwards that there is fresh evidence of his guilt, even evidence provided by his own admission of

²²⁶ [1982] IR 384 at 421.

²²⁷ [1982] IR 384 at 421.

²²⁸ [1982] IR 384 at 431-432.

guilt, he cannot be put on trial again for the offence of which he has been found not guilty by the jury".²²⁹

It should be emphasised that Henchy J. was not dealing with a situation where a statutory provision would permit revisiting of an acquittal.

Henchy J. went on to say that the Oireachtas debate and records of arguments for and against the draft Constitution of 1937 did not contain the suggestion that a verdict of not guilty would be re-opened:

"Indeed, if such an opinion had been expressed by a reputable person or a body, it is to be arguably contended that the Constitution would never have been enacted by the people."²³⁰

The Review Group, however, considers that whether or not this view accurately reflected the state of public opinion in 1937, it probably does not reflect the state of public opinion today.

Henchy J. also dealt with a series of perceived logistical problems, including difficulties with a re-trial - such as the issue of very burdensome costs - which in his view would arise from an appeal against an acquittal. However, the Review Group considers that none of the practical objections are insuperable.

²²⁹ [1982] IR 384 at 432.

²³⁰ [1982] IR 384 at 433.

Following the decision in *O'Shea*, the Director successfully appealed against a directed acquittal in *The People v Quilligan (No. 1)*.²³¹ The issue then arose as to whether a retrial could be ordered, and in *The People v. Quilligan (No. 2)*²³² the Supreme Court split three ways with no clear majority emerging on that proposition.

Two other recent cases warrant reference. In *Considine v. Shannon Regional Fisheries Board*²³³ the Supreme Court held that section 310 of the Fisheries (Consolidation) Act 1959 was constitutional. That section provides for an appeal against acquittals from the District Court to the Circuit Court. The court considered that the right of appeal referred to in Article 34.3.4° of the Constitution was to be provided for, in general, in whatever manner the Oireachtas thought fit. It is noteworthy, however, that *Considine* follows the majority, rather than the minority, position in *O'Shea* as to whether an acquittal would ever constitutionally be appealed.

In *Fitzgerald v. D.P.P.*²³⁴ the Supreme Court held that section 4 of the Summary Jurisdiction Act 1857 was constitutional. That section allowed for a “with prejudice” appeal by case stated in which the legislation treated the prosecutor

²³¹ [1986] I.R. 495.

²³² [1989] I.R. 46.

²³³ [1997] 2 I.R. 404.

²³⁴ [2003] 3 I.R. 247.

more favourably than the defence – the court was required to state a case requested by the prosecution but could refuse a request by the defence if the request was frivolous. The Supreme Court did not see this as interfering with the determination of guilt or innocence by the courts, and, just as with *Considine*, the decision can be read as approving of the concept of the with prejudice appeal, at least in the summary context.

In that case, Hardiman J. emphasised²³⁵ the limited nature of any interference with a duly arrived at acquittal, even by way of case stated:

“In my view, the jurisdiction to entertain a case stated by way of appeal against acquittal requires to be strictly construed. In *The People (Director of Public Prosecutions) v. O’Shea* [1982] I.R. 384, Henchy J. and Finlay P. embarked on analysis of remarkable depth and thoroughness of the nature of an acquittal. The former said at p. 437:-

"So far as I can ascertain, the authoritative Irish decisions in both the pre-Constitution and post-Constitution eras show that a plea of previous acquittal will always prevail (save in a statutorily allowed appeal by Case Stated) to defeat any appeal or other proceeding in which it is sought to make a person liable for any offence in respect

²³⁵ At pp. 265-266.

of which he has already been acquitted within jurisdiction by a court of competent jurisdiction"

The reason for this, and its deep roots in fundamental principle, appear clearly from the cases analysed by the judges. In the leading (and very remarkable) case *The Queen v. Justices of Antrim* [1895] 2 I.R. 603, O'Brien J., in a passage cited and commented upon by Finlay P., said at p. 641:-

"But the matter does not rest merely upon the technical nature of *certiorari*, nor is the principle exhausted by the rule *nemo bis vexari debet*, because that is common to civil cases. Another element comes in - the ground of constitutional law, following the necessity of natural law. An acquittal by a tribunal of whatever degree is a judgment *in rem*, a judgment of personal *status*."

I agree with the passage cited and would therefore have difficulty in agreeing with the first respondent's submission that acceding to an application for a case stated, which will continue the suspension of the judgment of acquittal, and which can have the result of reversing it (see section 6 of the Act of 1857) is not to be regarded as a judicial act, but as "an administrative or a ministerial one only". But that is not the issue at present. The status of near inviolability classically afforded to an acquittal,

emphasises the need to construe the permitted scope of an attack on such acquittal strictly. I have no hesitation in finding that the scope of such challenge is strictly limited to a question of law.”²³⁶

On balance, and while recognising that any decision by the Government to progress legislation in this regard would be subject to the advice of the Attorney General, the Review Group considers that, while the provisions of Article 38.5 would be likely to preclude an appeal court from substituting a sentence of guilty for a sentence of not guilty arrived at by a jury, those provisions probably would not, in principle, displace the power of the Oireachtas to provide for a right of appeal.

The Review Group does not consider that any fundamental constitutional principle would be infringed by allowing erroneous rulings on law which result in an acquittal to be revisited (indeed, this mechanism already exists to the extent that District Court decisions may be amenable to with prejudice judicial review). Nor does any international legal principle appear to be infringed by an appeal against acquittal. Protocol 7 to the European Convention on Human Rights acknowledges the permissibility of such appeals.

²³⁶ [2003] 3 IR

Objection may also be taken to such a scheme on the grounds of international law. Article 4 of the 7th Protocol to the European Convention on Human Rights, which has been ratified by Ireland, protects against double jeopardy. The Article is, however, subject to a number of qualifications. It only applies where the person has been “finally” acquitted – thus making clear that appeals against acquittal are permissible. Secondly Article 4.2 allows the reopening of a case if

“there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case”.

We consider that these exceptions are clearly wide enough to embrace our proposals in the present report.

While the term “finally” also appears in Article 14(7) of the International Covenant on Civil and Political Rights, the other exceptions embodied in Article 4.2 of the 7th Protocol are not explicit, although the UN Human Rights Committee has made clear that such exceptions, which involve the resumption of a trial in exceptional circumstances, are implicitly embodied within the Covenant.²³⁷ The right to reopen a verdict in the light of new evidence is also

²³⁷ See General Comment 13/21 para. 19.

recognised in the Rome Statute of the International Criminal Court²³⁸ and the Statute of the International Criminal Tribunal for the former Yugoslavia.²³⁹ In short, we consider that the sort of exceptions to the *ne bis in idem* rule which we contemplate are well established internationally and would not be held to contravene international human rights norms.

The principles established in European law in respect of the Schengen Convention do not contradict this approach. The Court of Justice has held that *ne bis in idem* is a fundamental principle of Community law,²⁴⁰ and the principle is now enshrined in Article 54 of the 1990 Schengen Implementation Convention. That Article also contains the limitation that the person's trial has been "finally" disposed of in one member state, and provides that where this is so, he or she may not be prosecuted in another member state for the same acts. The Article does not by its terms prevent the original member state either from permitting appeals against acquittal (indeed by the use of "finally" this power is effectively acknowledged) or from permitting the re-opening of an acquittal in special circumstances.

The 2nd Protocol to the Treaty of Amsterdam provided that Ireland and the U.K. can take part in all or some of the Schengen arrangements subject to agreement,

²³⁸ Article 84.

²³⁹ Article 26.

²⁴⁰ Joined Cases C-238/99, C-244/99, C-245/99, C-247/99, C-250/99 to C-252/99 and C-254/99 *Limbrugse Vinyl Maaschapij and Others v. Commission* [2002] ECR I-8375 at para. 59.

and indeed Ireland has done so in so far as the double jeopardy rule (*ne bis in idem*) is concerned. Ireland has not, however, conceded jurisdiction to the European Court of Justice to rule on matters relating to police and judicial co-operation in the criminal law area, which embraces the double jeopardy issue.²⁴¹

The general approach is that, on account of the right to exercise freedom of movement, no one should be prosecuted on the same facts in several member states. This applies where the proceedings are administratively discontinued in one member state by way of resolution of the complaint²⁴² or where proceedings are dismissed as time-barred in one member state.²⁴³ By contrast a decision to discontinue proceedings because another member state is prosecuting the person on the same facts is not a bar to assisting that other prosecution.²⁴⁴ The rule prohibits prosecuting a person for the same acts in two member states – this depends on an assessment of the substance rather than the form of the circumstances before the court.²⁴⁵

Recent United Kingdom law allows the prosecution to appeal rulings of the trial judge, including interlocutory rulings that significantly weaken the prosecution

²⁴¹ I.e., Ireland has not made a declaration under Article 35 of the EU Treaty accepting the jurisdiction of the European Court of Justice in Title VI matters (police and judicial co-operation in criminal matters).

²⁴² Joint Cases C-187/01 *Gozutok* and C-385/01 *Brugge* [2003] ECR I-1345.

²⁴³ Case C-467/04 *Gasparini*.

²⁴⁴ Case C-469/03 *Miraglia* [2005] ECR I-2009.

²⁴⁵ Case C-436.04 *Van Esboeck*, 20th October 2005; Case C-150/05 *Van Staaten*.

case.²⁴⁶ We consider that such a provision could be introduced into Irish law without interfering with the sacrosanct nature of an acquittal by a jury.

Ultimately, we consider that, as with the analysis of fundamental features of due process in *Palko v. State of Connecticut*,²⁴⁷ where Cardozo J. distinguished between protections that are of the “very essence of a scheme of ordered liberty”²⁴⁸ and those that are not, we consider that the traditional approach which would militate against a with prejudice appeal is not so fundamental a feature of the constitutional landscape that it could not be modified by statute. Indeed the principle must be seen in the context that there was no appeal by either side before 1924, and insofar as the prosecution has been constrained since then, that constraint has been eroded by the introduction of reviews in respect of unduly lenient sentences in 1993.

With Prejudice Appeals on indictment

As stated above, the prosecution rights of appeal conferred by sections 21 and 22 of the Criminal Justice Act 2006 in respect of trials on indictment are broad enough to encompass any question of law arising during the trial, including preliminary rulings or evidential rulings that significantly weaken the

²⁴⁶ See Criminal Justice Act 2003, part 9, in particular sections 59 and 63.

²⁴⁷ 302 US 319 (1937).

²⁴⁸ 302 US 319 at 325.

prosecution case, as well as acquittals directed on a point of law. However, as currently framed, the exercise of those rights is without prejudice to the verdict in favour of the accused. Part of the background to this issue being referred to the Review Group is the fact that the Tánaiste undertook to have the matter examined in response to amendments submitted by Brendan Howlin T.D. in the course of the parliamentary proceedings on the Bill for the Criminal Justice Act 2006.

The simple question presented by the first of the issues relating to with prejudice appeals is whether there is a significant public interest in preserving the present law that a miscarriage of justice in favour of the accused cannot be challenged on appeal. The Review Group considers that this question must be answered in the negative.

The *Working Group on the Jurisdiction of the Courts* considered two options for a with prejudice appeal, firstly a “narrow with prejudice model” which would restrict with prejudice prosecution appeals to questions of law arising from rulings which terminate the proceedings²⁴⁹, and the “broad with prejudice model” which would allow with prejudice prosecution appeals on questions of law and questions of mixed law and fact arising from any rulings.²⁵⁰

²⁴⁹ Paragraph 686.

²⁵⁰ Paragraph 687.

The Review Group notes that, since the report of the Working Group, the Criminal Justice Act 2006 has followed the “broad” approach in relation to without prejudice appeals, in that it allows review on appeal of any decision on a question of law arising during the trial.

Ultimately the Working Group did not recommend a with prejudice appeal because “that is a question of substantive law which falls outside the Terms of Reference of the Working Group”.²⁵¹ The Working Group did offer a view in passing that with prejudice appeals would encroach in the rule against double jeopardy, would be a major change, and was not supported by a significant body of opinion to the effect that our courts are unduly favourable to the defence.²⁵²

The Law Reform Commission also considered the issue in their *Report on Prosecution Appeals and Pre-Trial Hearings*, and took the view that a with prejudice appeal which would involve a re-hearing of the evidence would raise “serious constitutional questions”.²⁵³ Such a form of appeal would be akin to the full re-hearing on appeal from the District Court to the Circuit Court. Obviously these problems do not arise at all or at least to the same extent in the context of a with prejudice appeal on points of law. The Commission did not, in fact, proffer any reasons for not recommending a with prejudice appeal on points of law, but

²⁵¹ Paragraph 689.

²⁵² Paragraph 689.

²⁵³ Paragraph 2.18.

rather stated that as their focus was on ensuring that erroneous rulings could be corrected, the Commission has recommended changes in relation to without prejudice appeals.²⁵⁴

Overall the Review Group considers that no significant argument has been advanced against the principle of the “with prejudice” appeal and that by contrast a very strong public interest exists in ensuring that a defendant who does, in fact, have a case to answer, should not benefit from a miscarriage of justice by reason of an erroneous ruling on a point of law by the trial judge.

We consider that a with prejudice right of appeal could include an appeal against one or more of the following types of decision, viz., where an acquittal was directed by the trial judge, where a verdict is set aside by the Court of Criminal Appeal, without directing a re-trial, or where the trial judge makes a ruling, for example on admissibility of evidence, that has the effect of weakening (or, alternatively, substantially weakening) the prosecution case (including a case where the accused is subsequently acquitted by a decision of the jury).

²⁵⁴ See paragraphs 1.35 and 2.18.

For reasons already alluded to we could not contemplate any appeal against a perverse jury finding on the merits, or allowing an appeal court to substitute a verdict of guilty for an acquittal in the trial court.

Safeguards would be provided in the sense that the Director would in any case have a discretion as to whether or not to seek to invoke the with prejudice appeal (as opposed to the without prejudice option which would co-exist with that power as an alternative), and ultimately in any case the court would have a discretion as to whether to direct a retrial in the event of setting aside the acquittal. We also consider that any legislation providing for such a right of appeal should provide for certain additional safeguards for an accused as counter-weight to this important change. We thus suggest that, in order to address some of the practical points made by Henchy J. in his dissent in *O'Shea*, court should also have to be given power to award costs, or allow legal aid on such an appeal, irrespective of the result.

We ultimately have come to the conclusion that a trial that founders on an error of law made by a trial judge cannot reasonably be described as a trial in due course of law. There must, logically, therefore be a "with prejudice" right of redress against erroneous decisions by a trial judge, whether that is an

interlocutory or evidential ruling (including a ruling which weakens the prosecution case, followed by a jury acquittal) or a directed acquittal. The same logic would militate in favour of a right of appeal from a Court of Criminal Appeal decision not to order a retrial. The fact that such a trial judge error might be followed by a jury acquittal does not in our view mean that the principle of jury trial is in any way compromised by allowing a with prejudice appeal. The jury decision on the merits following reception of all admissible evidence is totally impregnable under our proposal. Only where the jury is directed as to its verdict, or wrongly prevented from considering admissible evidence, could the jury verdict be impugned.

In the event that the trial court decides to deal with any evidential issue by way of pre-trial hearing, our proposal would also permit the Director to launch what would be an interlocutory appeal against such a decision, if unfavourable to him, prior to a jury being sworn to consider the prosecution case. It could be pointed out that the defence would not have an interlocutory right of appeal against such a decision which was unfavourable to them, but this lack of appeal is not a significant imbalance or injustice given that the defence would always have the right to apply for leave to appeal any conviction if one is recorded at the end of the trial.

Given the appeal machinery in the Criminal Justice Act 2006 it would seem appropriate to have such an appeal to the Supreme Court rather than the Court of Criminal Appeal.

We also consider that a greater rationality needs to be brought to the piecemeal development of the jurisdiction of the Court of Criminal Appeal. In particular the requirement for leave to appeal from the trial court, and the option of an appeal being certified by the Attorney General or the Director of Public Prosecutions, are features of the system that call for further examination, as is the problem identified in *The People v. Campbell*²⁵⁵, namely, the absence of a power for the defence to appeal an issue to the Supreme Court where the Court of Criminal Appeal allows a defence appeal on a different issue.

Appeal in respect of District Court Decisions

The *Working Group on the Jurisdiction of the Courts* considered the prosecution right of appeal from District Court decisions and concluded that present arrangements were satisfactory.²⁵⁶ However, it should be noted that over 50% of

²⁵⁵ [2005] IR

²⁵⁶ Paragraph 346.

Garda respondents surveyed by the *Working Group on the Jurisdiction of the Courts* expressed dissatisfaction with arrangements for review of District Court decisions.

The Working Group went on to consider prosecution appeals against sentence in the District Court and took the view that there should be no change for a number of reasons, particularly the fact that by virtue of the venue, any perceived leniency will not be of appreciable significance in any event; it would not be practicable to require prosecuting members of the Garda Síochána to report on cases that might be considered to be unduly lenient; conflict could occur with the defendant's right to appeal to the Circuit Court; an appeal could be hampered by a lack of record of reasons; and arguably the resources required by the prosecution to undertake this additional responsibility would outweigh the minor gain likely to be achieved through the introduction of such a right of appeal.²⁵⁷

The Law Reform Commission also considered the question of prosecution appeals from sentences (but not acquittals) arrived at by the District Court²⁵⁸, and recommended no change. The precise reasons for this recommendation were not spelled out in detail, but appear to be related to the difficulty for an appellate court to assess whether the sentence imposed by the District Court was a

²⁵⁷ Paragraph 347.

²⁵⁸ LRC81-2006, chapter 3.

substantial departure from the appropriate sentence²⁵⁹, and the difficulty in having appeals against sentence heard before the Defendant has served his or her sentence.²⁶⁰

It should be noted that the Law Reform Commission had previously recommended that the prosecution should have the power to seek review of District Court sentences.²⁶¹ In addition, the Committee on Court Practice and Procedure also concluded that a right of prosecution appeal against sentence was desirable in all cases.²⁶²

The Commission noted that a right of prosecution appeal against sentence imposed at summary level exists in New Zealand²⁶³ and Scotland.²⁶⁴

Looking at the Scottish example, the provisions of section 175 of the Criminal Procedure (Scotland) Act 1995 are quite extensive in that they give the prosecution a right of appeal against an acquittal in summary proceedings²⁶⁵, and against a sentence passed on conviction in summary proceedings²⁶⁶ on the

²⁵⁹ Paragraph 3.20.

²⁶⁰ Paragraph 3.21.

²⁶¹ See *Report on Sentencing*, LRC53-1996 at paragraph 7.6, and Consultation Paper LRCCP33-2004, *Prosecution Appeals from Unduly Lenient Sentences in the District Court*, paragraph 6.46.

²⁶² See 22nd Interim Report of the Committee on Court Practice and Procedure, *Prosecution Appeals*, 1993.

²⁶³ Section 115A of the Summary Proceedings Act 1957.

²⁶⁴ Section 175(4) of the Criminal Procedure (Scotland) Act 1995.

²⁶⁵ Section 175(3)(a).

²⁶⁶ Section 175(3)(b).

grounds of undue leniency²⁶⁷, and the appeal against acquittal includes an appeal based on an alleged miscarriage of justice on the basis of the existence and significance of additional evidence which was not heard at the trial and which was not available and could not reasonably have been made available at the trial.²⁶⁸ The scope of the appeal in relation to undue leniency is limited to such class of cases as are specified by Order made by the Secretary of State by Statutory Instrument.²⁶⁹

From time to time significant public concern can arise relating to acquittals or unduly lenient sentences in the District Court. This is to some extent reflected in the fact that the 2002 Programme for Government contained a commitment to provide for a prosecution right of appeal from the District Court. The Review Group takes the view that the objections enumerated by the Working Group on the Jurisdiction of the Courts and the Law Reform Commission are not in principle, insuperable, with the possible exception of the resources argument.

The Review Group has considered the following options in respect of with prejudice appeals from the District Court:

²⁶⁷ Section 175(4).

²⁶⁸ Section 175(5).

²⁶⁹ Section 175(4) and (6).

- Option A. No change in present arrangements whereby there is in general no prosecution right of appeal from an acquittal or an unduly lenient sentence.
- Option B. Retain the prohibition on redress against wrongful acquittals, but allow review of unduly lenient sentences in a limited class of cases, e.g. where death or personal injury results and there has been a significant departure from proper sentencing principles.
- Option C. Allow both a review of acquittals and a review of unduly lenient sentences in a limited class of cases (e.g. death or personal injury cases).
- Option D. Allow a prosecution right of appeal against acquittal and sentence in all cases.

The Review Group is conscious of the resources argument outlined by the Working Group on the Jurisdiction of the Courts, and considers that, on balance, having regard to the practical difficulties of operating this mechanism, together with the resources issue and the fact that offences prosecuted in the District Court are inherently less serious than those prosecuted on indictment, no change is warranted at this time, but the matter should be kept under review.

Issue 7 – Re-opening acquittals following new evidence

We emphasise at the outset that – particularly following from the safeguards we think it right to impose – it is likely that any power to provide for an appeal in respect of an acquittal following new evidence, or an allegation of trial tampering, would be rarely used.

The issue of re-opening jury acquittals in circumstances where a new or newly discovered fact provides compelling evidence of guilt was not addressed in the recent Law Reform Commission Report.²⁷⁰ Likewise the Working Group on the Jurisdiction of the Courts did not specifically address the question of re-opening jury verdicts in the case of miscarriages of justice.

The Review Group considers that while strong arguments can be made against general appeals against jury verdicts on the evidence, those arguments do not rule out the desirability of appeals where new or newly discovered facts provide compelling evidence of guilt. The Review Group stresses that, in order to avoid interference with a jury decision on the merits, safeguards would have to be introduced in the form of:

²⁷⁰ LRC81-2006.

- (a) an exacting threshold for the obligation, such as that the evidence is compelling (for example DNA evidence or a confession to the offence);
- (b) advance judicial approval for the application and
- (c) a setting aside of any acquittal in the State prior to the question of a retrial arising.

It seems clear that a new trial could not occur in circumstances where there was an extant jury acquittal by a jury in the State, or an acquittal by the Special Criminal Court on the merits. The obvious form of mechanism for both avoiding conflict with an extant acquittal and securing advance judicial approval for the re-trial would be, by analogy with the right of the accused to apply for review by the Court of Criminal Appeal of an alleged miscarriage of justice under section 2 of the Criminal Procedure Act 1993, to provide for a similar procedure to apply for prosecution appeals.

Under such a procedure the prosecution would apply to the Supreme Court for an order quashing an acquittal in circumstances where, as with an application by the defence to the Court of Criminal Appeal, it is alleged "that a new or newly discovered fact shows that there has been a miscarriage of justice".²⁷¹ Such an

²⁷¹ Section 2(1)(b) of the Criminal Procedure Act 1993.

application would be in camera, and only a redacted version of the judgment would be published. Issues would fall for consideration as to how to deal with a situation where the defendant was a flight risk, although it is hard to see any immediate answer to this conundrum. It would also have to be acknowledged that the constitutional issues which arise in the case of prosecution appeals also certainly arise in this context as well.

The United Kingdom law, Part 10 of the Criminal Justice Act 2003 allows a retrial following either a domestic or foreign acquittal, where the evidence is new and compelling, which means highly probative.²⁷² That Act would also permit a retrial in circumstances where a foreign acquittal has not been set aside.²⁷³

The United Kingdom provisions have only resulted in one conviction. This was in *R. v. Dunlop*²⁷⁴, a case of a murderer who was acquitted following two trials and then admitted to the murder. He was tried and convicted for perjury, but was only convicted of murder following a change in the law. The new evidence in that case following the defendant's acquittal was described by the Court of Appeal (Criminal Division) as follows:

²⁷² Section 78.

²⁷³ Section 76.

²⁷⁴ Sub nom *R. v. D.* [2006] EWCA Crim 1354.

10. "On a number of occasions between 8 March and 12 May 1999 D admitted to a prison officer that he had murdered Julie H. He referred to the fact that he had confessed his guilt in letters to a male friend, an ex-girl friend and to a nurse who had looked after him in hospital. In a witness statement made for the purpose of Children Act proceedings relating to his daughter on 20 April 1999 he stated:

"I have accepted that I have problems and I have spoken with the Prison Doctor and I have admitted that I was responsible for the death of Julie H. I stood trial at Newcastle Crown Court for her murder and was acquitted. I denied the offence and I accept that I lied."

11. On 15 October 1999 D was arrested on suspicion of perjury. In interview he admitted that he had killed Julie H and referred to making various confessions to her murder.

12. On 18 November 1999 D was charged with two counts of perjury - one in relation to each of his trials for the murder of Julie H. On 14 April 2000 he pleaded guilty to each count at the Teesside Crown Court and was sentenced to 6 years imprisonment on each count concurrent. His appeal against sentence was dismissed by this Court on 23 November 2000. "

The court also referred to the Law Commission's comment²⁷⁵ as to the need for such a law:

43. "There is, further, the spectre of public disquiet, even revulsion, when someone is acquitted of the most serious of crimes and new material (such as that person's own admission) points strongly or conclusively to guilt. Such cases may undermine public confidence in the criminal justice system as much as manifestly wrongful convictions. The erosion of that confidence, caused by the demonstrable failure of the system to deliver accurate outcomes in very serious cases, is at least as important as the failure itself. "

As regards compliance with the European Convention, Articles 2 and 4 of Protocol 7 to the Convention provide as follows:

Article 2 - Right of appeal in criminal matters

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

²⁷⁵ Law Com No 267, March 2001.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

Article 4 – Right not to be tried or punished twice

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
3. No derogation from this Article shall be made under Article 15 of the Convention.

The Review Group takes the view that the European Convention on Human Rights would not be breached by a provision along the lines of the United

Kingdom legislation, as the Convention allows both appeals against acquittal and the re-opening of acquittals following new evidence or a defect in the procedure.²⁷⁶

As can be seen, the Convention would even allow a conviction in one state following an acquittal in another state, as is provided for in the United Kingdom legislation, given that the right not to be tried or punished twice only applies to trial and punishment “under the jurisdiction of the same state”.²⁷⁷

The Review Group recommends that legislation be enacted to give a right to the prosecution to complain in respect of miscarriages of justice on the basis of new or newly discovered evidence. Any such legislation should contain the safeguards which we have set out and which are designed to guard against a possible abuse of procedure which, of its nature, should only be used in exceptional cases.

The prosecution right could be exercised if the Supreme Court so decides, notwithstanding a foreign acquittal. In considering whether to allow such an application notwithstanding an acquittal in another EU member state, the Court

²⁷⁶ See European Convention on Human Rights Protocol 7, Articles 2(2) and 4(2).

²⁷⁷ Protocol 7, Article 4(1).

would have to consider the legal issues arising under the Schengen implementation agreement.

Issue 8 – Nullifying acquittals tainted by Trial Tampering

In *The People (D.P.P.) v. O’Shea*²⁷⁸, Walsh J. said:

“It would be totally abhorrent if a conviction which had been obtained by improper means, such as the corruption or coercion of a jury, should be allowed to stand, it would be equally abhorrent if an acquittal obtained by the same methods should be allowed to stand. If attempts to sway the verdicts of jurors by intimidation or other corrupt means were allowed to go unchecked, they could eventually bring about the destruction of the jury system of trial. Persons who are tempted to do so would think twice about it if they were faced with the possibility that such efforts on their part could negative results which they had corruptly achieved. All prosecutions on indictment are, by virtue of the Constitution, brought in the name of the people and it is of fundamental importance to the people that the mode of trial prescribed by the Constitution should be free to operate, and be seen to operate, in a manner in which the law is respected and upheld.”²⁷⁹

²⁷⁸ [1982] IR. 384.

²⁷⁹ [1982] IR 384 at 418.

The Review Group considers that there are clear advantages to the creation of a statutory mechanism for review of improperly achieved acquittals. Such a mechanism would in the first instance correct a miscarriage of justice which has improperly resulted in the acquittal of an accused person. Such a mechanism would also provide a much more significant deterrent to the improper behaviour of defendants who interfere with the trial process than would be provided by the alternative possibility of prosecution for a free standing offence of perverting the course of justice or contempt of court. And thirdly, such a procedure would enhance confidence in the courts system and ensure the integrity of trials so far as that can be achieved.

Most of the objections that could be considered to “with prejudice” appeals generally would also apply to a mechanism for review of a verdict which has been arrived at following interference with the trial process. The Review Group has carefully considered all of these objections, as set out in an earlier section of this report, and takes the view that none of them are convincing. Again, we consider that any such appeal should be to the Supreme Court.

In addition to those objections, however, the case of review of a verdict arrived at following interference with the trial process does involve the additional factor that in this case, the Director would be seeking to interfere with what would ostensibly be a decision by a jury on the merits. However, for the reasons

outlined by Walsh J. in *O'Shea*, there is no public interest in preserving as inviolable a jury verdict which has been tainted by interference with the trial process. Instead the overwhelming public interest is in ensuring that criminal trials are conducted, in the words of Article 38.1 of the Constitution "in due course of law." For the reasons outlined by Walsh J., the Review Group considers that there can be no fundamental constitutional or principled objection to revisiting jury acquittals which were brought about by or influenced by interference of an unlawful kind with the trial process.

Options for Change

The Review Group has considered a number of possible options for a statutory provision dealing with this issue. In particular the Review Group has considered the following:-

Issue 1: Whether review should be permitted where there is evidence of interference with the jury, with witnesses, or with evidence or other aspects of the trial, or in all such circumstances.

Issue 2: Whether the review should be permitted in cases of intimidation only, or also where there is bribery or any other form of corruption or unlawful interference.

Issue 3: Whether the standard of review should be reasonable possibility, probability or compelling evidence of interference with the trial process, or whether the legislation should merely provide for the evidence to be such as to be sufficient in the opinion of the Supreme Court to warrant a quashing of the acquittal.

The Review Group has considered these options carefully. We consider that review of acquittals should be available in the event of interference with the trial process, whether in respect of the jury or otherwise. The Supreme Court would have to be satisfied that there is sufficient evidence warranting a quashing of the acquittal.

Issue 9 – Prosecution Submissions on Sentence

Introduction

The right of the prosecution to make submissions at the sentencing stage of criminal proceedings is not, at present, regulated by statute. Neither does any specific regulation govern, for example, the right of a private prosecutor to make submissions at the sentencing stage. In *The People (DPP) v. Botha*²⁸⁰, however, the Court of Criminal Appeal held that the prosecution was under a duty to assist the court with relevant information regarding sentencing precedents.

In introducing this topic it may be useful to refer to the Director of Public Prosecution's *Guidelines for Prosecutors*²⁸¹, which now include a code of ethics for prosecutors²⁸². The code stresses the obligation of prosecutors to comply with the codes of conduct of the Bar or Law Society as the case may be.²⁸³ The Director's guidelines could not of themselves affect either the professional codes of conduct or the law and are not, in any event, binding on private prosecutors.

²⁸⁰ [2004] 2IR 375.

²⁸¹ First edition, 2001, second edition 2006. . (See www.dppireland.ie)

²⁸² *Guideline for Prosecutors*, second edition, chapter 3.

²⁸³ Paragraph 3.1.

The Director's guidelines deal in some detail with the prosecutor's role in the sentencing process²⁸⁴. The guidelines set out the duties of a prosecutor in relation to sentence, including ensuring that the court has before it all available evidence relevant to sentencing²⁸⁵, all available relevant evidence concerning the impact of the offence on its victim in accordance with section 5 of the Criminal Justice Act 1993²⁸⁶, and ensuring that the court has before it all relevant evidence concerning the accused's circumstances, background, history and previous convictions as well as any evidence relevant to the circumstances in which the offence was committed which is likely to assist the court in determining the appropriate sentence.²⁸⁷

As regards submissions, the guidelines require the prosecution to ensure that the court has before it "appropriate submissions" concerning victim impact²⁸⁸, that the court is aware of the range of sentencing options available²⁸⁹, that the court is referred to any relevant authority or legislation²⁹⁰ and that the court is assisted in avoiding make any appealable error or any error of fact or law²⁹¹.

²⁸⁴ See paragraph 8.14 and subsequent paragraphs.

²⁸⁵ Paragraph 8.14(a).

²⁸⁶ Paragraph 8.14(b).

²⁸⁷ Paragraph 8.14(c).

²⁸⁸ Paragraph 8.14(b).

²⁸⁹ Paragraph 8.14(d).

²⁹⁰ Paragraph 8.14(e).

²⁹¹ Paragraph 8.14(f).

In addition, the prosecutor is required to deal with any questions of forfeiture, compensation or restitution²⁹² and to seek to establish the facts upon which the court should base its sentence in circumstances where there is a significant difference between the factual basis on which an accused pleads guilty and the case contended for by the prosecution²⁹³. The prosecutor is also required to challenge any matters advanced by the defence in mitigation “which the prosecution can prove to be wrong, and which, if accepted, are likely to lead the court to proceed on a wrong basis”²⁹⁴ as well as items “of which the prosecution has not been given prior notice or the truth of which the prosecution is not in a position to judge.”²⁹⁵

As regards advocacy in the strict sense regarding sentence, the guidelines provide that:

“The prosecutor must not seek to persuade the court to impose an improper sentence nor should a sentence of a particular magnitude be advocated. However, the prosecutor may, at the request of the court, draw the court’s attention to any relevant precedent.”²⁹⁶

²⁹² Paragraph 8.15.

²⁹³ Paragraph 8.16.

²⁹⁴ Paragraph 8.17.

²⁹⁵ Paragraph 8.18.

²⁹⁶ Paragraph 8.20.

This guideline is arguably more permissive than the Bar Council's code of conduct which as we will see prohibits *any* advocacy which influences the sentence. It is also of interest that the reference to precedent is envisaged as occurring only at the request of the court.

The code also goes on to deal with a situation where the court seeks the views of the Director as to whether a custodial sentence is required. In this situation the prosecutor should not express his or her own views, but seek express instructions from the Director.²⁹⁷

While the *Guide to Professional Conduct of Solicitors in Ireland*²⁹⁸ does not prohibit sentencing submissions by solicitors, barristers are governed by the code of conduct for the Bar of Ireland. The current version adopted on 13th March 2006, devotes a section to the duty of a barrister in the conduct of a criminal case²⁹⁹, which largely imposes duties on barristers appearing for the defence. As regards the duties of the prosecution in relation to sentence, the code provides:

“Prosecuting barristers should not attempt by advocacy to influence the court in regard to sentence. If, however, an accused person is unrepresented, it is proper for a prosecuting barrister to inform the

²⁹⁷ Paragraph 8.21.

²⁹⁸ 2nd ed., 2002.

²⁹⁹ Section 10 of the code.

court of any mitigating circumstances as to which they are instructed³⁰⁰.

The Problem

It can reasonably be contended, by virtue of the Court of Criminal Appeal decision in *Botha*, that there is no real problem with the role of the prosecution in giving information to the sentencing court regarding previous sentencing precedents. The law in this regard has now been clarified and clearly is binding on prosecutors. The Code of Conduct for the Bar must therefore be interpreted in the light of the state of the law.

It might be contended, however, that a significant anomaly arguably arises in the context of the existing right of the prosecution to apply for a review of sentence which the Director of Public Prosecutions contends was unduly lenient, pursuant to section 2 of the Criminal Justice Act 1993. On such a review of an unduly lenient sentence, prosecuting counsel are in effect called upon to make submissions which influence the imposition of a sentence. It might be thought that there is an anomaly in permitting such submissions at the appeal stage, but not at the original sentencing stage.

³⁰⁰ Paragraph 10.23, this is identical to the former para. 9.23 apart from gender-proofing.

Options

The options considered by the Review Group in relation to the role of the prosecutor at the sentencing stage were as follows:

Option A: A purely declaratory provision which restates the current position, permitting the prosecutor to adduce and challenge evidence at the sentencing stage and to give information to the court regarding sentencing precedents at the request of the court.

Option B: A slightly more expanded version of option A, which would allow the prosecutor to also volunteer information regarding sentencing precedents whether this was requested by the judge or not.

Option C: An even more permissive option would be to permit the prosecutor to volunteer previous precedents and to make submissions at the outset of the sentencing stage, and to make submissions to the court as to the aggravating factors, but without advocating a particular sentence or range of sentences.

Option D: Under this option the prosecutor could advocate a range of sentences.

Option E: This would be a completely permissive regime which would allow the prosecution to advocate a particular sentence.

Views of the Review Group

We are of the view that this area presents more difficulties than first meet the eye. It would, in addition, be important to emphasise that it would be wrong to suggest that the prosecution has only a limited role at the sentencing stage. As will be seen from the details of the Guidelines for Prosecutors set out above, the prosecution has a key role in adducing the evidence that sets the parameters of the sentencing process, and in challenging defence evidence relating to that process. The current restriction is on making a submission, but the prosecution at present has ample power, for example, to put aggravating factors clearly before the court by way of evidence, or to challenge evidence regarding mitigating factors.

The context for any change in this area is the availability of greater information regarding sentencing. Like the Law Reform Commission,³⁰¹ we welcome developments in providing more comprehensive sentencing information to the judiciary, and look forward to developments in this regard being carried out by

³⁰¹ *Report on Prosecution Appeals and Pre-Trial Hearings* (LRC 81-2006), pp. 39-41.

the Irish Sentencing Information System (ISIS) project under the chairmanship of Mrs Justice Susan Denham.

As regards changes in procedure, the Review Group considers that options D and E would represent a significant change in the role of the prosecutor that is not required or warranted in current conditions. The Review Group is not aware of any significant demand for such an extension of the role of the prosecutor, either on the part of the Director of Public Prosecutions himself or otherwise.

Those options would also have very significant resource implications for the Director's office in that the power to recommend a specific sentence or even a range would not be one that the Director would be likely to be anxious to devolve to all prosecutors at a local level. That recommendation, as the current guidelines indicate in respect of custodial sentences, would need to be one to be made by the Director himself. It would thus not be feasible to provide for a regime where by the Director would be called upon to make a judgment on the appropriate sentence or range of sentences to be imposed in each and every case, as the foundation for a prosecution submission.

Furthermore advocating a sentence or even a range might give rise to almost irresistible pressure to seek a review of a decision that fell below the sentence sought or outside the range, and such a process would put further strain not only

on the system but in particular on victims and their families. These objections would be likely to persist even following the availability of greater sentencing information. There might also be a danger that, over time, a perception might develop that the prosecution would be under pressure to engage in making a tactical submission as to sentence by, e.g., urging eight years as the appropriate sentence while being privately satisfied if six years was imposed.

One could anticipate a degree of institutional resistance to a change of this nature, but those who advocate such a change take the view that there is something unbalanced about a system that gives express attention principally to the mitigating factors at the sentencing stage. As stated above, in order to make sense of the proposal to provide useful precedents, we look forward to developments in collecting, updating and making readily available a well-organised system of precedents, as far as possible from all criminal courts. We are fully in favour of the continuation and development of this task by the Courts Service through the Irish Sentencing Information System, as a matter of priority. It properly falls within the responsibility of the Courts Service to collect and publish all relevant facts and statistics on court proceedings.

The Review Group considered the other alternative options, A, B and C. Option A reflects what is stated in the current Guidelines for Prosecutors and in those

circumstances the Group does not see the necessity of a declaratory provision which would simply re-state the relevant sections of the Guidelines. The Group favours Option B. This would require the prosecutor without request to volunteer information in relation to sentencing precedents. We consider that this would be an important step. We recognise however that this proposal may not achieve its full potential until a sentencing database has been established. In providing the sentencing judge with any precedent the prosecutor will of necessity offer a comparison between the facts of the particular case and those of the earlier case or cases, in terms of aggravating or mitigating circumstances. For example, in a fatal road traffic case the presence or absence of such factors as speed or the consumption of alcohol would clearly be relevant. Furthermore, the Group understands that it is the invariable practice of sentencing judges in indictable cases in explaining the reason why they have arrived at a particular sentence to take great care in identifying the relevant aggravating and mitigating factors in the case.

In relation to sentencing precedents these can be provided both by judgments in the Court of Criminal Appeal (or, indeed, the Supreme Court) and by sentencing practice over time. The ISIS project is looking at the feasibility of a database to which the sentencing judge could have access so as to be aware of sentences imposed in other comparable cases.

The Group believes that it would be of considerable benefit to sentencing judges if the Court of Criminal Appeal (or Supreme Court) were to give guideline judgments in relation to particular offences or categories of offences. Alternatively a reference mechanism such as exists in England and Wales could be looked at.

In relation to Option C some members of the Group felt that the appropriate occasion for drawing attention to aggravating (or indeed mitigating) factors was in the context of making comparators with sentencing precedents. Furthermore, they were of the view that requiring the prosecutor to identify aggravating factors did not achieve any great purpose where the practice was for the sentencing judge to identify any aggravating and mitigating factors when passing sentence in the case and that the proposal might be difficult to implement in a uniform way throughout the country. Others felt that there was no strong reason not to allow the prosecution draw the judge's attention to aggravating factors. They felt that such a requirement would bring a necessary balance into the sentencing process. They would therefore be inclined to favour a model along the lines of option C. We recommend that the matter be kept under review by the Department of Justice, Equality and Law Reform in consultation with the Director of Public Prosecutions in the light of the ongoing developments to which we have referred.

If a proposal along the lines of option C were to be proceeded with, we assume that the prosecution would make an initial submission to which the defence would reply, but an issue would arise as to whether and in what circumstances the prosecution would have a right of reply. There is no automatic right of reply at present to any plea in mitigation. We consider that to avoid any imbalance as between prosecution and defence, the prosecution should not have any right of reply but would continue to have the right to intervene in order to object to any proposition put by the defence in a speech in mitigation without the factual basis having been laid.

The Review Group would also be uneasy if the right of the prosecution to make a submission at the sentencing stage were to become a vehicle for the prosecution to “denounce” the accused, by, for example, calling for exemplary sentences. While it is difficult to frame a statutory provision which would exclude over-zealous advocacy on the part of the prosecution, the Review Group considers that a combination of the Director’s guidelines and professional codes of conduct will be sufficient to avoid abuse of any new right to make submissions at the sentencing stage.

The Group recommends that Option B be implemented, namely to allow the
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prosecutor to also volunteer information regarding sentencing precedents whether this was requested by the judge or not, by way of amendment to the Guidelines for Prosecutors. The Group recommends that Option C be kept under review by the Department of Justice, Equality and Law Reform, in consultation with the Director of Public Prosecutions.

We would also wish to see the development of guideline judgments by the Court of Criminal Appeal or Supreme Court, where a number of appeals concerning the same offence would be heard together and a general guideline judgment given, indicating the approximate mid point on the scale of severity and the factors that might result in a significant adjustment up or down. One option that could be looked at in that regard would be to provide a statutory mechanism for the requesting of a guideline judgment by the Director or the giving of such a judgment on the court's own motion.

Issue 10 - Hearsay evidence

Introduction

The law as to hearsay is a truly gigantic subject. Any comprehensive account of this subject would have taken years to produce. Given the time available to us, we cannot make any claims that we have engaged in such a root and branch analysis. We think, however, that this is an area where there is a case in the longer term for examining the need for further legislative reform.

The classic judgment on the law of hearsay is that of Kingsmill Moore J. in *Cullen v. Clarke*³⁰² where he said:

“[I]t is necessary to emphasise that there is no general rule of evidence to the effect that a witness may not testify as to the words spoken by a person who is not produced as a witness. There is a general rule subject to many exceptions that evidence of the speaking of such words is inadmissible to prove the truth of the facts which they assert; the reasons being that the truth of the

³⁰² [1963] IR 368.

words cannot be tested by cross-examination and has not the sanctity of an oath. This is known as the rule against hearsay.”³⁰³

While the rule against hearsay has numerous exceptions - many of them grafted on to the law by ad hoc judicial decisions over the centuries, with yet others created by statute - and while many (especially non-lawyers) regard the rule as a fussy technicality, the fundamental principle of the rule is sound.

The fundamental reason for the rule is that if out of court statements made by persons who were not required to attend to give evidence were freely admissible in evidence, the path would be clear for those who wished to invent and fabricate evidence. This would be especially true in criminal cases. If the rule were to be generally relaxed, it would, for example, be possible for an accused to tender evidence of alleged admissions to the crime made by third parties who were not before the court for cross-examination. As Lord Bridge said in *R. v. Blastland*³⁰⁴ - where this very point was at issue -

“To admit in criminal trials statements confessing to the crime for which the defendant is being tried made by third parties not called

³⁰³ [1963] IR 368 at 378.

³⁰⁴ [1986] AC 41.

as witnesses would be to create a very significant and, many might think, a dangerous new exception.”³⁰⁵

Even in civil cases the potential for injustice is significant. In *Kiely v. Minister for Social Welfare (No.2)*³⁰⁶ the issue was whether the deceased had died by reason of an occupational injury or by reason of a pre-existing cardiac condition. While the deceased’s own doctor gave evidence and was cross-examined before an administrative tribunal, that tribunal also acted on the basis of a letter from a consultant who had never treated the deceased in his lifetime and who expressed the view that the deceased had died by reason of his existing condition. The effect of the reception of such evidence is to deny the person affected thereby of any fair opportunity “to test its veracity, accuracy and reliability and the credibility of the declarant by means of cross-examination”³⁰⁷ and not surprisingly, the Supreme Court held that this procedure amounted to a breach of fair procedures.³⁰⁸

³⁰⁵ [1986] AC 41 at 52-53.

³⁰⁶ [1977] IR 267.

³⁰⁷ McGrath, *Evidence* (Dublin, 2004) at 217. McGrath also quotes the views of a celebrated 19th century New York judge, Chancellor Kent, in *Coleman v. Southwick* (1812):

“A person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities: he entrenches himself in the simple assertion that he was told so, and leaves the burden on his dead or absent author.”

³⁰⁸ See also to the same effect, *Borges v. Medical Council* [2004] 2 ILRM 81.

The Review Group is accordingly of the view that the rule against hearsay should not be generally relaxed. At the same time, it is conscious of the fact that the rule can operate in a highly technical and almost absurd fashion.³⁰⁹ There could be much to be said for a statutory exercise of codifying and, where necessary, extending the rule against hearsay, in order to bring greater clarity to the law.

Allowing hearsay evidence by consent does not require any change in the law as it is permissible at present. However, certain fundamental principles are clear in respect of allowing hearsay without the consent of the accused. Any significant easing of the position regarding hearsay evidence would be much more than a procedural issue, and would cause significant problems in a jury-based system. The right to cross-examine is a fundamental constitutional right: see *In re Haughey*³¹⁰ and *Maguire v. Ardagh*.³¹¹ Allowing hearsay in criminal cases deprives the Defendant of that right in practice or at least has the potential to undermine that right. Therefore there would need to be very considerable caution in allowing much greater hearsay evidence. It seems doubtful whether the State

³⁰⁹ In *Director of Public Prosecutions v McDermott* [2006] 3 IR 378 it was argued that it was hearsay for a father to give evidence regarding the age of his child, since he was not present at the birth. Given the existing of new statutory provisions dealing with the proof of age of children, it was not necessary for Peart J. to decide this point, which, in any event, would appear to come well within the long-established exception as to declarations by family members as to birth, death and marriage and family pedigree generally.

³¹⁰ [1971] I.R. 217.

³¹¹ [2002] 1 I.R. 385.

could go the route of Part 11 of U.K. Criminal Justice Act 2003, which makes all hearsay admissible subject to an “interests of justice” test.³¹² We consider that rather than a radical break from existing norms, the way forward in dealing with hearsay evidence would be to identify any particular areas that warrant specific exceptions being permitted.

There is not the same principled objection to hearsay in merely quasi-criminal matters, such as bail or confiscation of assets, but to allow widespread hearsay in the criminal trial itself would pose a major threat to fundamental principles.

We would be sympathetic to provisions which would allow proof of purely formal or technical matters to be proved by certificate, and we suggest that the Department keep under review section 6 of the Criminal Justice (Miscellaneous Provisions) Act, 1997, which provides for evidence of scene preservation to be proven by certificate and section 188 of the Criminal Justice Act, 2006 regarding handling of forensic samples, to see whether any extension of these provisions is warranted.

³¹² 2003 Act s 114.

Issue 11 – Other Proposals

Identity Parades

Issues were raised with us regarding identity parades, firstly that an inference might be drawn from failure to attend an identity parade, and secondly that the injured party would identify the person from behind a one-way screen.

As regards the first of these proposals, the Group considers that under our present system, too many issues would arise in respect of whether the parade was properly organised for it to be fair to draw an inference from a failure to attend an identity parade.

As regards the second issue, we favour the concept of allowing the injured party to identify the suspect through a one-way screen, as far as practicable although it is not clear that a change in the law is required to achieve this result, as pointed out by the Leahy Committee.³¹³

³¹³ Leahy Committee Report, recommendation 7.

The judge's charge

We have received representations to the effect that problems can occur where the closing speech for the defence takes liberties with the evidence and seeks to put in evidence matters that have not been canvassed at the trial. The prosecution has no right of reply and obviously has no incentive to seek to collapse the trial in a response. We have considered whether to provide for a right of reply, even with leave of the trial judge, but we consider that on balance the principle that the defence should have the last speech is an important safeguard in the system and we would not wish to interfere with this. An application to deal with the matter in the judge's charge seems to be the practical way of dealing with this.

Secondly, our attention has been drawn to proposals that in respect of the judge's charge, greater standardisation could be brought to bear on the formulae to be used for various statutory or common law warnings, or for explaining the principles on which the jury must act. The view exists that such standardisation – which is common in, for example, the US – could only be of benefit and would reduce the scope for complaints regarding the scope of the charge. We note the reference in the recent Law Reform Commission *Report on Prosecution Appeals and*

*Pre-Trial Hearings*³¹⁴ to the prospect of the development of “Bench Books” by the proposed Judicial Council.

We would in general welcome a development along the lines referred to whereby Bench Books would be drawn up by the Judicial Council, when established, that could bring greater standardisation to the formulae used for certain aspects of judges’ charges.

Victim Impact Reports

The Review Group has considered the role of Victim Impact Reports in the sentencing process. The current statutory provision for such reports is section 5 of the Criminal Justice Act 1993 which relates to sexual offences within the meaning of the Criminal Evidence Act 1992, or offences involving violence or the threat of violence to a person, or related inchoate offences.

The section provides that a court shall take into account and may where necessary receive evidence or submissions concerning any affect of the offence

³¹⁴ LRC 81-2006 at pp. 40-41.

on the person in respect of whom the offence was committed.³¹⁵ On application by the person in respect of whom the offence was committed, the court shall hear the evidence of that person as to the effect on such person of the offence.³¹⁶

The section is clearly drawn in restrictive terms in two respects, namely the limited scope of the offences to which it applies, and the fact that it is limited in terms of its application to the injured party himself or herself, rather than any other category of person affected by the offence. In that regard our attention has been drawn to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,³¹⁷ which defines victim as including where appropriate “the immediate family or dependents of the direct victim”.

It has also been represented to us that expanded victim impact statements could also have a beneficial impact on the defendant. As one parent of a homicide victim put it in her submission to the Group:

“It can also be considered an important part of the rehabilitation of the convicted person in facing the reality of what he/she has done. Being made to sit and listen to the victim impact statement of a family may well begin to give them some sense of the consequences of their actions.

³¹⁵ Section 5(1).

³¹⁶ Section 5(3).

³¹⁷ UN Doc ARES/40/34 (1985).

Rehabilitation is one of the points of a custodial sentence, and this process can best begin in the courtroom.”

The issue of the entitlement of the victim to confront the offender may also arise at the parole or remission stage. While many victims or their families will not wish to engage in restorative justice, others will welcome the opportunity to speak directly to the offender and explain the impact of the offence – as, to take a U.K. example, one wife of a murdered man said of her experience in meeting the offender in prison, having initially encountered resistance from the authorities, “it’s not for them to say what’s right for me. I knew I needed to do it ... it was the first time I could say what I wanted ... I am glad I did it because I got my point over and I do think he listened”.³¹⁸ It would be a matter for consideration whether to provide that an offender who has committed an offence against the person should not be eligible for remission or parole unless he or she has consented in writing to participate in a restorative justice programme with the injured party or his or her family, and whether to provide that it would then be a matter for the victim(s) to decide whether or not to participate and also to determine the nature of the participation – for example whether it is to be by letter, in person, or the format of the session. While we do not propose to make a specific recommendation on this matter, we suggest that it be considered further by the Department of Justice, Equality and Law Reform.

³¹⁸ Smith, Laura, “Facing the Consequences”, *The Guardian*, Society Section, 7th February 2007

Such an arrangement could in certain circumstances be of benefit to those relatives or victims who for one reason or another did not get an opportunity to make a victim impact statement at the sentencing hearing, and who wish to look the offender in the eye or otherwise communicate with him or her as to the impact of the offence.

The Review Group takes the view that the difficulties with victim impact statements should be ameliorated in the interests of doing justice to all victims of crime, and that the statutory provision should be recast so as to permit the person or persons who have been most directly affected by an offence, to give evidence at the sentencing stage – for example next of kin of a deceased victim of crime. This would be subject to the Court’s discretion in any case where the impact on the person was too remote or more than a very limited class of immediate relatives wished to make a statement. Some flexibility in the judicial discretion might be of benefit to deal with situations where, for example, a deceased victim left an unmarried or same-sex partner, or where more than one separate family member wished to make a statement.

In order to avoid any possibility of inappropriate use of statements, the amended

statutory provision we envisage would include a power vested in the court to direct that the statement as delivered or any part of it would not be published or broadcast, without prejudice to any other power of the court. This would seem to us to be a sensitive way to deal with any such problems that would suffice in the vast majority of cases where any issue might arise.

The victim impact statement is also relevant at the parole stage. We welcome the Tánaiste's recent decision to ensure that the Parole Board would have access to the book of evidence in any case in which parole was applied for. We consider that the victim impact statement should also be given to the Parole Board and considered prior to any decision on parole. In addition, and particularly as regards the category of relatives or victims who did not get the opportunity to make a victim impact statement, we suggest that the Department should examine further whether there might be merit in allowing them to be heard by the Parole Board in the presence of the offender, perhaps as a condition for eligibility for consideration of the request for parole.

Implications for Defence Acts

We would also note that, as regards our recommendations in general, many of these recommendations would also have an impact on the administration of military justice in that corresponding amendments would be required to the Defence Act 1954. The recent Defence (Amendment) (No. 2) Bill 2006, for example, transposes a number of elements of general criminal procedure into the military justice context, and likewise in the event that our recommendations for change in the criminal justice system are accepted, corresponding amendments should be made to the Defence Acts, for example in relation to prosecution appeals or victim impact statements.

We recommend amendments to the Defence Acts to reflect (in the military justice context) the changes to the criminal justice system proposed by the Group.

Other issues which came to the attention of the Group

The Group was invited to consider a large number of other proposals related to criminal justice, many of which we consider warrant further examination and

study by the Department of Justice, Equality and Law Reform. Those issues include the following:

- Issues regarding the playing of recordings of interviews in respect of a part-exculpatory statement.
- Detention periods, including events that would “stop the clock” for the purposes of calculating those periods.
- More general legislation on search warrants, including the question of by whom warrants should be issued and the manner of issue (e.g. electronically).
- Regulation of investigatory powers.
- Refinement of powers regarding photographs, samples, etc.
- Time periods for service of the book of evidence.
- Extension of anonymity provisions for victims and accused persons in certain circumstances.
- Reducing delays caused by judicial review.
- Ensuring that juries are selected on a more inclusive basis, and issues regarding peremptory challenges and electronic random selection.
- Regulating the cross-examination of injured parties by unrepresented defendants.
- Whether legal aid for victims ought to be channelled through the Legal Aid Board or private solicitors.

- Addressing the financial and other civil consequences of offending, including enjoining orders against an offender, and restraint on profiteering from an offence.
- Achieving greater permanence to the membership of the Court of Criminal Appeal.

While we are not in a position to make a recommendation on these issues, we suggest that the Department give further examination to the above issues.

Summary

The following is a summary of the proposals which we recommend:

Right to Silence.

We recommend that legislation provide for inferences as to the credibility of a defence to be drawn from a failure to mention the fact relied on in the defence when in custody. We further recommend that inferences be drawn from a failure to explain suspicious circumstances in custody.

We favour legislation which would provide that the Judges' Rules would cease to have effect and would be replaced by regulations, to be made by the Minister, regarding the conduct of interviews.

Subject to suitable safeguards, a recorded interview should not be required to be the subject of a written note. The requirement for a note would, however, apply to any admission made in an interview where the detained person requests that recording would not apply. This would involve providing that rule 9 and Article 12(11) of the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987 would no longer apply. Provision of good quality recordings would also be important in practice.

We would also wish to see routine audio and video taping of common areas such as corridors etc to minimise the potential for issues arising concerning utterances or incidents in such common areas.

The Review Group recommends that the present practice regarding the supply of the videotapes of Garda interviews to suspects be changed so that the videotapes are only required to be made available by way of prosecution disclosure following the charging of the suspect or by order of a court. This recommendation would entail an amendment of the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997.

We also suggest a new offence of disclosing or showing an interview videotape without lawful excuse.

We favour an increase in the penalties for breach of sections 15 and 16 of the Criminal Justice Act 1984 (which have already been increased to €2500 and €1500 respectively by the Criminal Justice Act 2006 s. 62 and the Criminal Justice (Theft and Fraud Offences) Act 2001 s. 19) to a fine of €5000 (the existing imprisonment for 12 months as an alternative would remain).

A majority of the Group considers that neither the trial judge nor the prosecution should be permitted to comment on the failure of the accused to give evidence at his or her trial.

Character Evidence

We consider that, on balance, in a case where the injured party has died or has become incapacitated such that he or she is unable to give evidence, where the defence attacks the character of the injured party, the shield would be dropped and the accused would be liable to cross-examination as to his or her character without leave of the court. This would involve amendment of s. 1(f)(ii) of the Criminal Justice (Evidence) Act 1924 to allow a further category of case in which such cross-examination is permitted (i.e., by adding reference to the injured party including a deceased or incapacitated injured party).

We also consider that 10 days notice of an intention to make an imputation against a deceased or incapacitated victim should be given, and that in the absence of such notice, the leave of the court would be required by the defence to make the imputation.

Where the accused has engaged in an attack on the character of the prosecution witnesses or, under our proposal, the injured party who is deceased or

unavailable to give evidence, or has adduced positive evidence of his own good character, or asked a question designed to elicit such evidence from any witness, the prosecution would be entitled to adduce evidence regarding the defendant's character.

There would appear to be merit in allowing an express power to call further prosecution evidence regarding the character of the deceased or an incapacitated victim where the victim's character has been put in issue.

Exclusionary Rule

The majority recommendation can be summarised as follows. We would wish to see a situation where the court would have a discretion to admit unconstitutionally obtained evidence or not, having regard to the totality of the circumstances and in particular the rights of the victim. In the first instance we suggest the approach of seeing whether a change in jurisprudence emerges following use of the appeal provisions of the Criminal Justice Act 2006. If not, the other options would then have to be examined and considered. As stated above, these other options include various legislative models or possibly constitutional change.

Defence Disclosure

On balance and having regard to the difficulties of moving to a defence statement regime we consider that in the first instance the obligation of additional disclosure should be limited to the expert or technical reports or witness statement of experts on which the Defendant intends to rely. Provision should be made that following such disclosure, the Prosecution would not be entitled to call any witness making such a report without the consent of the defendant.

Likewise we consider that it should not be open to the prosecution to require the defence to tender a witness where a report or witness statement has been furnished but the defence does not, in the event, wish to call the witness at the trial.

We recognise that in many circumstances the obtaining of expert evidence may take a longer period of time and in such instances the defence should be permitted to give details of the efforts being made to obtain a statement if the statement itself is not to hand at the time for disclosure. But in any event such reports should be disclosed well in advance of the trial.

We recommend that legislation provide that admissibility issues be determined prior to the swearing in of a jury, on the first day or days of a trial.

We further recommend that the principle that consideration be given in sentencing to the stage at which a plea is tendered should be stated expressly in statute.

With Prejudice Appeals

We ultimately have come to the conclusion that a trial that founders on an error of law made by a trial judge cannot reasonably be described as a trial in due course of law. There must, logically, therefore be a “with prejudice” right of redress against erroneous decisions by a trial judge, whether that is an interlocutory or evidential ruling (including a ruling which weakens the prosecution case, followed by a jury acquittal) or a directed acquittal. The same logic would militate in favour of a right of appeal from a Court of Criminal Appeal decision not to order a retrial. The fact that such a trial judge error might be followed by a jury acquittal does not in our view mean that the principle of jury trial is in any way compromised by allowing a with prejudice appeal. The jury decision on the merits following reception of all admissible evidence is totally impregnable under our proposal. Only where the jury is directed as to its

verdict, or wrongly prevented from considering admissible evidence, could the jury verdict be impugned.

In the event that the trial court decides to deal with any evidential issue by way of pre-trial hearing, our proposal would also permit the Director to launch what would be an interlocutory appeal against such a decision, if unfavourable to him, prior to a jury being sworn to consider the prosecution case. It could be pointed out that the defence would not have an interlocutory right of appeal against such a decision which was unfavourable to them, but this lack of appeal is not a significant imbalance or injustice given that the defence would always have the right to apply for leave to appeal any conviction if one is recorded at the end of the trial.

Given the appeal machinery in the Criminal Justice Act 2006 it would seem appropriate to have such an appeal to the Supreme Court rather than the Court of Criminal Appeal.

We also consider that a greater rationality needs to be brought to the piecemeal development of the jurisdiction of the Court of Criminal Appeal. In particular the requirement for leave to appeal from the trial court, and the option of an appeal being certified by the Attorney General or the Director of Public Prosecutions, are features of the system that call for further examination, as is the

problem identified in *The People v. Campbell*, namely, the absence of a power for the defence to appeal an issue to the Supreme Court where the Court of Criminal Appeal allows a defence appeal on a different issue.

Re-opening acquittals following new evidence

The Review Group recommends that a procedure be introduced to give a right to the prosecution to complain in respect of miscarriages of justice on the basis of new or newly discovered evidence. The prosecution right could be exercised if the Supreme Court so decides, notwithstanding a foreign acquittal. In considering whether to allow such an application notwithstanding an acquittal in another EU member state, the Court would have to consider the legal issues arising under the Schengen implementation agreement .

Nullifying acquittals tainted by trial tampering

The Review Group has considered these options carefully. We consider that review of acquittals should be available in the event of interference with the trial process, whether in respect of the jury or otherwise. The Supreme Court would have to be satisfied that there is sufficient evidence warranting a quashing of the acquittal.

Prosecution submissions on sentencing

The Group recommends that Option B discussed in the Report be implemented, namely to allow the prosecutor to also volunteer information regarding sentencing precedents whether this was requested by the judge or not, by way of amendment to the Guidelines for Prosecutors. The Group recommends that Option C outlined in the Report (namely to allow submissions on aggravating factors) be kept under review by the Department of Justice, Equality and Law Reform, in consultation with the Director of Public Prosecutions.

We would also wish to see the development of guideline judgments by the Court of Criminal Appeal or Supreme Court, where a number of appeals concerning the same offence would be heard together and a general guideline judgment given, indicating the approximate mid point on the scale of severity and the factors that might result in a significant adjustment up or down. One option that could be looked at in that regard would be to provide a statutory mechanism for the requesting of a guideline judgment by the Director or the giving of such a judgment on the court's own motion.

Other issues

We favour the concept of allowing the injured party to identify the suspect through a one-way screen, as far as practicable although it is not clear that a change in the law is required to achieve this result, as pointed out by the Leahy Committee.

We would in general welcome a development along the lines referred to whereby Bench Books would be drawn up by the Judicial Council, when established, that could bring greater standardisation to the formulae used for certain aspects of judges' charges.

The Review Group takes the view that the difficulties with victim impact statements should be ameliorated in the interests of doing justice to all victims of crime, and that the statutory provision should be recast so as to permit the person or persons who have been most directly affected by an offence, to give evidence at the sentencing stage – for example next of kin of a deceased victim of crime. This would be subject to the Court's discretion in any case where the impact on the person was too remote or more than a very limited class of immediate relatives wished to make a statement. Some flexibility in the judicial discretion might be of benefit to deal with situations where for example a

deceased victim left an unmarried or same-sex partner, or where more than one separate family member wished to make a statement.

In order to avoid any possibility of inappropriate use of statements, the amended statutory provision we envisage would include a power vested in the court to direct that the statement as delivered or any part of it would not be published or broadcast, without prejudice to any other power of the court. This would seem to us to be a sensitive way to deal with any such problems that would suffice in the vast majority of cases where any issue might arise.

The victim impact statement is also relevant at the parole stage. We welcome the Tánaiste's recent decision to ensure that the Parole Board would have access to the book of evidence in any case in which parole was applied for. We consider that the victim impact statement should also be given to the Parole Board and considered prior to any decision on parole. In addition, and particularly as regards the category of relatives or victims who did not get the opportunity to make a victim impact statement, we suggest that the Department should examine further whether there might be merit in allowing them to be heard by the Parole Board in the presence of the offender, perhaps as a condition for eligibility for consideration of the request for parole.

We recommend amendments to the Defence Acts to reflect (in the military justice context) the changes to the criminal justice system proposed by the Group.

Appendices

Appendix 1 - List of submissions made to Group and persons with whom the Group met.

Submissions Received

- ADvic (Advocates for Victims of Homicide)
- Professor Ivana Bacik, Law School, Trinity College Dublin
- Ms Joan Deane, Co. Dublin
- Mr Maurice Fitzgerald, Co Cork
- Forensic Science Laboratory
- An Garda Síochána
- Dr. Liz. Heffernan, Law School, Trinity College, Dublin.
- Mr Brendan Hurley, Cork
- Irish Centre for Human Rights, National University of Ireland Galway
- Irish Human Rights Commission
- Mr Bernard Leddy, Co Waterford
- Mr James MacGuill, MacGuill & Company Solicitor
- Mr Patrick James McCarthy, S.C.
- Mr Patick Joseph McCarthy, Dublin 11
- Mr Edward McGarr, McGarr Solicitors

- The Mulvaney Family, Dublin 24
- Mr John P. O'Malley, Solicitor (Making a submission on behalf of a client)
- Ms Ailbhe O Siurtáin, Co Wicklow
- Rape Crisis Network Ireland
- St. Louise's Child Sexual Abuse Assessment and Treatment Unit, Our Lady's Children Hospital and St.Clare's Sexual Abuse Assessment and Therapy Service, The Children's University Hospital , Dublin.
- Mr Fergal Sweeney, Barrister at Law
- Support After Homicide

The Review Group met with the following interested parties;

- Representatives of ADvic (Advocates for Victims of Homicide):
Ms Joan Dean and Ms Annie Mulvaney
- Professor Ivana Bacik, Trinity College Dublin
- Mr Tom Brady, Journalist, The Irish Independent
- The Hon Mr Justice Peter Charleton
- Representatives of the Garda Síochána: Mr Noel Conroy,
Commissioner of An Garda Síochána, Mr Fachtna Murphy,
Deputy Commissioner of An Garda Síochána, Mr Gerard Blake,
Chief Superintendent
- Mr James MacGuill, Solicitor

- Mr James Hamilton, Director of Public Prosecutions and Ms Claire Loftus, Chief Prosecution Solicitor
- Mr Conor Lally, Journalist, The Irish Times
- The Irish Human Rights Commission: Professor William Binchy, (Commissioner), Ms Suzanne Egan (Commissioner), Mr Michael Farrell (Commissioner), Ms Lia O' Hegarty (Commissioner)
- Mr Patrick J. McCarthy S.C.
- Ms Kate Mulkerrins, Irish Rape Crisis Network
- The Hon Mr Justice Kevin O'Higgins
- Mr Paul Reynolds, RTE Crime Correspondent
- Mr Garrett Sheehan, Solicitor
- His Honour Judge Michael White
- Mr Paul Williams, Journalist, The Sunday World

Appendix 2 - Draft heads of legislation relating to inferences from silence

PART X

INFERENCES

Head 1

Provide that

Section 7 of the Criminal Justice (Drug Trafficking) Act 1996 and section 5 of the Offences against the State (Amendment) Act 1998 are repealed, but those sections shall continue to apply to any failure or refusal to mention a fact which occurred prior to the commencement of this Part.

Note

It is proposed to have a new, single inference drawing provision in relation to matters not mentioned by the detained person. It would be illogical and confusing to retain three separate provisions by keeping the two existing provisions and adding a new provision.

Head 2

Provide that

(1) This head applies to any arrestable offence within the meaning of section 2(1) of the Criminal Law Act 1997 as amended by section 8 of the Criminal Justice Act 2006.

(2) Where in any proceedings against a person for an offence to which this head applies evidence is given that the accused –

(a) at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, or

(b) when being charged with the offence or informed by a member of the Garda Síochána that he or she might be prosecuted for it,

failed to mention any fact relied on in his or her defence in those proceedings, being a fact which in the circumstances existing at the time he or she could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, then the court, in determining whether a charge should be dismissed under Part IA of the Criminal Procedure Act 1967 or whether there is a case to answer and the court (or, subject to the judge's directions, the jury) in determining whether the

accused is guilty of the offence charged (or of any other offence of which he or she could lawfully be convicted on that charge) may draw such inferences from the failure, as to the truthfulness of the fact so relied on, as appear proper.

(3) *Subhead (2)* shall not have effect unless the accused was told in ordinary language when being questioned, charged or informed, as the case may be, that it may harm the credibility of his or her defence if he or she does not mention when questioned, charged or informed, as the case may be, something which he or she later relies on in Court.

(4) Nothing in this head shall, in any proceedings –

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct in respect of which he or she is charged, in so far as evidence thereof would be admissible apart from this head, or

(b) be taken to preclude the drawing of any inference from the silence or other reaction of the accused which could properly be drawn apart from this head.

(5) This head shall not apply in relation to a failure to mention a fact if the

failure occurred before the commencement of this Part.

(6) In deciding whether to draw, and in drawing, an inference under this head, the court (or, subject to the judge's directions, the jury) shall have regard to when the fact in question was first mentioned by the accused.

(7) This head shall not apply to a question asked in an interview unless either the interview has been recorded by audio or audio-visual means or the detained person has consented in writing to the non-recording of the interview.

(11) No person may be convicted by reason only of an inference drawn pursuant to this section.

Note

This is based on section 5 of the 1998 Act with a number of changes.

Fundamentally the provision is limited to the question of recent invention of a defence. The inference that can be drawn from failure to mention a fact relied on is as to the falsity of the fact.

We consider that logic and principle dictate that rather than being at large as to any inference that can be drawn from a failure, the failure to mention the fact should go to the truthfulness of the fact relied on, and thus to the credibility of the defendant in raising a late defence. The fact that a defence is false, however, does not mean that the accused is guilty or corroborate the prosecution case. We accordingly consider that the reference to corroboration is potentially inappropriate and should be removed.

Likewise the reference to the fact that the accused cannot be convicted because of the inference alone is not required, because the inference is not part of the prosecution case but rather a factor to negative a positive defence put forward by the accused. We propose changing the condition for the application of the head from the existing test (informed in ordinary language what the effect of failure would be) to a much clearer test, namely, that he or she told that it may harm the credibility of his or her defence. This mirrors the proposed caution and avoids any uncertainty as to what amounts to explaining in ordinary language the effect of the provision. Our proposal furthermore applies to all arrestable offences.

Subhead (4) preserves the existing law that, for example, the reaction of the accused to the charge is admissible as part of the *res gestae*.

Subhead (6) is new - this would have the effect of giving some credit to a detained person who volunteered an explanation at an early stage, albeit not when questioned at a Garda station.

Subhead (7) would give a further important protection for detainees.

Head 3

Provide that

(1) The Minister for Justice, Equality and Law Reform may by regulations make provision for giving full effect to this Act and without prejudice to the generality of that power may make provision for:

(a) the form of any caution to be administered to a person, in any case or category of cases, or in cases generally, or pursuant to any enactment:

(i) at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence,

or

(ii) when being charged with the offence or informed by a member of the Garda Síochána that he or she might be prosecuted for it or

(iii) in any other case where a caution is required,

(b) the procedures (including the form of words) to be applied where it is proposed that a person who has been given a caution should have that caution withdrawn and a different caution given;

(c) any matter that is incidental or supplementary to the foregoing.

(2) Where a caution is given in accordance with a form prescribed which is prescribed in respect of a particular enactment under this head or a form to the like effect, the person giving the caution shall be deemed to have complied with any requirement under that enactment to explain to the person to whom the

caution is given any matter which the person giving the caution is required to explain.

(3) On the making of regulations pursuant to this head, the rules of law or practice known as the Judges' Rules shall cease to have effect insofar as those rules prescribe a form of caution.

Note

This makes statutory provision for the new caution, and is worded so as to avoid any express determination of the existing legal status of the Judges' Rules.

We envisage that if head 2 is enacted the general caution would be in the following terms or terms to the like effect (as with the U.K. general caution, albeit that our proposed wording is somewhat different):

“You do not have to say anything. But it may harm the credibility of your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence.”

If head 5 is enacted the special caution under that head would be in the following terms:

“The caution you were given previously no longer applies. Please listen carefully to the caution I am about to give you because it will apply from

now on. I am now requesting you to account for suspicious circumstances in your case. You are not obliged to say anything but if you fail to account for the suspicious circumstances or if you give an account that is false or misleading, it may harm your defence. In addition it may harm the credibility of your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence.”

Following the special caution, the questioner would be required to put the specifics of the suspicious circumstances.

We suggest the informal, although perhaps not technically accurate term “harm your defence” rather than a less intelligible formula such as “the prosecution may rely on such failure” in the interests of ensuring that the person understands the caution.

If the special caution is proposed to be withdrawn and the original caution reinstated, a formula along these lines might be used:

“The caution you were given previously no longer applies. Please listen carefully to the caution I am about to give you because it will apply from now on. You do not have to say anything. But it may harm the credibility

of your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence.”

Head 4

Provide that

Sections 18 and 19 of the Criminal Justice Act 1984 are repealed, but those sections shall continue to apply to any failure or refusal which occurred prior to the commencement of this Part.

Note

As sections 18 and 19 of the 1984 Act appear to have fallen into disuse it seems preferable to make a fresh start with a new provision which would command confidence.

Head 5

Provide that

. – (1) This head applies to any arrestable offence within the meaning of section 2(1) of the Criminal Law Act 1997 as amended by section 8 of the Criminal Justice Act 2006.

(2) Where in any proceedings against a person for an offence to which this head applies evidence is given that the accused -

(a) at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, or

(b) when being charged with the offence or informed by a member of the Garda Síochána that he or she might be prosecuted for it,

was asked to account for suspicious circumstances and failed to give an account of those circumstances, being an account which in the circumstances existing at the time he or she could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, or gave an account which was false or misleading, then the court, in determining whether a charge should be dismissed under Part IA of the

Criminal Procedure Act 1967 or whether there is a case to answer and the court (or, subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence charged (or of any other offence of which he or she could lawfully be convicted on that charge) may, if it is satisfied that the circumstances were suspicious circumstances which called for an answer from the person, draw such inferences from the failure as appear proper; and the failure or refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any other evidence in relation to which the failure or refusal is material, but a person shall not be convicted of an offence solely on an inference drawn under this head.

(3) *Subhead (2)* shall not have effect unless the accused was told in ordinary language when being questioned, charged or informed, as the case may be, of the consequence if he or she failed to account for suspicious circumstances or provided an account that was false or misleading.

(4) Nothing in this head shall, in any proceedings—

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct in respect of which he or she is charged, in so far as evidence thereof would be admissible apart from

this head, or

(b) Be taken to preclude the drawing of any inference from the silence or other reaction of the accused which could properly be drawn apart from this head.

(5) This head shall not apply in relation to a failure or refusal to give an account, or to the giving of a false or misleading account, if the failure or refusal or the account occurred before the commencement of this Part.

(6) In deciding whether to draw, and in drawing, an inference under this head, the court (or, subject to the judge's directions, the jury) shall have regard to when (if ever) the account in question was first mentioned by the accused.

(7) This head shall not apply to a question asked in an interview unless either the interview has been recorded by audio or audio-visual means or the detained person has consented in writing to the non-recording of the interview.

(8) In this head, "suspicious circumstances" means circumstances which tend to implicate the person in the offence concerned and which clearly call for an answer from the person, and may include the possession by or presence on the person of any object, substance or mark, or the presence of the person in or in the vicinity of a particular place, or in the vicinity of any object,

substance or mark.

(9) References in *subhead (2)* to evidence shall, in relation to the hearing of an application under Part IA of the Criminal Procedure Act 1967, for the dismissal of a charge, be taken to include a statement of the evidence to be given by a witness at the trial.

(10) *Subhead (8)* shall apply to the condition of clothing or footwear as it applies to a substance or mark thereon.

(11) No person may be convicted by reason only of an inference drawn pursuant to this section.

Note

This is designed to replace sections 18 and 19 of the 1984 Act. Note that 18 and 19 (1) and (2) have been amended by s 16 of the 1999 Act.

In the interests of consistency this provision has been modelled on our proposed head 2.

The changes from the existing sections 18 and 19 are as follows:

First, the requirement can be made by any member, not just simply the arresting member.

Second, the provision is extended to cover false and misleading replies as well as no reply.

The head seeks to amalgamate the existing sections 18 and 19 into a single, simpler, formula with a simplified test for drawing the inference.

Subhead (8) covers the territory of those existing sections as well as a more general clause covering other suspicious circumstances which will again be a matter to be determined by the trier of fact.

Note of Dissent on Right to Silence: Nora Owen and David Gwynn Morgan

We recommend subject to safeguards, that the present rule by which the prosecution and, even, the Judge may not comment on a defendant's failure to give evidence should be revoked. Thus under our proposal the jury could have their attention directed to this factor and it may be taken into account, with the rest of the prosecution and defence evidence. We should emphasise though that the present position is that the defendant has the right not to give evidence at their trial and we are proposing no change to that. Our recommendation may put some pressure on a defendant to testify. However, we believe, for reasons advanced below, that this is not illegitimate pressure, in the context of securing a balanced trial.

We should emphasise, in the first place, that this immunity from prosecution comment is a peculiarly important feature since we have been told on good authority that the defendant exercises their right not to give evidence in about three quarters of all trials on indictment. A further preliminary point is that it seems to us that the immunity we are discussing is not part of the presumption of innocence, which is the golden thread running through the criminal justice system; that the prosecution must prove its case beyond reasonable doubt. That fundamental principle means that the defence starts with a presumption that the

defendant is innocent and accordingly the prosecution, if it is to secure a conviction, must adduce substantially more evidence than the defence. But it does not follow from this that the defence must be given auxiliary advantages, such as the one under discussion here. There may be good policy reasons why the defence should have this advantage and this possibility is considered below. However the present immunity is not a necessary part of the presumption of innocence.

At the moment, where defendants who plead not guilty exercise their right not to go into the witness box, the jury is thus denied the chance to hear the defendant's side of the case so that it can be tested by cross-examination against the prosecution case. Many lay-persons, approaching the legal system with a fresh mind would consider this a curious restriction which requires good reason to justify it. In fact, as we explain below, this immunity was the natural consequence of a particular historical feature which is no longer relevant and we go on to consider whether at the moment there can be any other reason to justify it.

Whilst the bar on comment on the defendant not giving evidence has recently been gathered in under the head of the right to silence which actually goes back to the early 17th century, there is in fact a rather different historical explanation for it. It goes back to the fact that it was not until the Criminal Justice (Evidence)

Act 1924 that the defendant was permitted in all cases to give evidence on oath. And, significantly for a long time after 1924, the defendant was frequently not represented by experienced counsel. At that time it seemed natural, therefore, not to allow comment on a strategic choice since this would usually have had to be made by an uninformed lay-person, on their own and without legal assistance.

One may take the classical view that victims and, beyond them, the community do not have any rights in regard to the criminal trial. But even so, it looks strange for counsel to the defence to be allowed to subject prosecution witnesses to vigorous cross-examination whilst the defendant remains placidly outside the witness box.

Justifications for the Immunity

While the 'right to silence' is sometimes used as a very broad concept, it may (as indicated earlier) be divided into situations bearing on the defendant's silence at the Garda station or (as in the present section) the defendant's not testifying at the trial. Yet the arguments usually advanced in favour of the right seem to bear mainly on the question of comment on the silence in the Garda station. And what is striking is that, starting about 20 years ago with the Criminal Justice Act 1984 and including certain limited recommendations made by the present

Review Group, there have been qualifications of the right to silence as to what is said or not said in the Garda Station; (which we regard as the main channel of the right). By contrast, the immunity regarding prosecution comment in court continues in its pristine state. It seems fair to ask: why strain at the gnat, when one has swallowed the camel and the gnat is undermining a balanced criminal justice system?

The reasons³¹⁹ advanced for the 'right to silence' in its broadest form are usually the following.

1. In a "straightforward case of interrogation by the police ... the defendant may be shocked by the accusation and unable at first to remember some facts which would clear him." But this state of shock would hardly continue through the months leading up to the trial.
2. Traditionally the defendant may not have had access to legal advice at the Garda station. But again, the reverse will be the case in regard to trial, when the defendant will have had ample access to legal advice.

³¹⁹ These four classic policy considerations are taken from *UK Criminal Law Revision Committee 11th Report*, 1972, Criminal 4991 para. 35. from which the quotation in the next para comes. The Committee's proposal for reform of the law relating to the defendant not giving evidence at the trial (essentially the same as those advanced here) were received with less criticism than those made by the Committee in regard to the right of silence at the police station.

Moreover, after a defendant has been cross-examined by counsel for the prosecution they can be re-examined by their own counsel, which would enable them to explain any misconceptions arising from the earlier cross-examination. Another feature which is sometimes suggested is that the defendant may be under the influence of drink or drugs at the Garda station. This will not be so at the trial.

3. It might be embarrassing for the defendant to give evidence of an exculpatory fact, which might apart from its significance at the trial have the incidental consequences of revealing something which the defendant would otherwise wish to conceal. The stock example here is where the defendant, in giving evidence, might be drawn into admitting that he or she was conducting an adulterous affair. This is, of course, a function of the fact that trials are held in public and it would be as true of all witnesses (defence or prosecution) as for the defendant; yet the law makes it a contempt of court for other witnesses to refuse to give evidence. For instance, a defendant might subpoena a married woman as a witness whose evidence would be to say that she was carrying on an affair with him at the precise time of the robbery, or equally, the prosecution might subpoena a witness to say that, precisely because she was carrying on such an affair, she had a unique view of the scene of the crime. In each case this giving of such

evidence would (presumably) have disastrous consequences for the witness's marriage. Yet the law has always taken the robust policy view that the witness must choose between being embarrassed or committing a contempt of court. It certainly seems to us a little disproportionate that when such a serious matter, from everyone's perspective, as the administration of Justice is being calibrated, third party embarrassment should be a governing factor.

4. Perhaps the strongest argument against interfering with the defendant's immunity is that the defendant might prove to be a 'bad witness' and give a bad performance in the witness box. This, too, is partly the result of a general consideration of the importance of a public cross-examination. (What, for instance, if it is the defence's key witness who happens to sound unconvincing: this has never been advanced as a reason for him or her to give written testimony?) To cater for this difficulty, one possibility might be that any change in this area should (like the UK *Criminal Justice and Public Order Act* 1994, section 35), include a provision that any new rule in this area would not apply where "it appears to the court" [that] "the physical or mental condition of the defendant makes it undesirable for him to give evidence."

Practical consequences of the immunity

In practice, this immunity of the defendant is even more important than might appear at first sight. For, as it has been explained to the Group by an experienced trial lawyer, the advantage to the defendant is magnified by the fact that video taping now occurs at most interviews in Garda custody. When statements made by the defendant are 'exculpatory' (that is they tend to prove the defendant's innocence), then the video must be shown to the jury. (Note that this is another advantage to the defendant, which has crept into the law and, in practice is not challenged by the prosecution: despite the fact that these videos are hearsay and do not fall under any of the exceptions of the rule barring hearsay.)

The result of this is that a statement favourable to the defendant, on which counsel for the prosecution has not had the opportunity to cross-examine, is shown to the jury. Moreover it is possible that in some cases, the jury will get it into their heads that they have actually heard directly from the defendant.

It is sometimes sought to justify the rule that the prosecution may not comment on the defendant not going into the witness box by saying that the jury is bound to regard the omission as suspicious. Consequently, the defendant, will not, in the end, take any advantage from it. However, the reality is that many defence

counsel now anticipate this danger to the defendant and seek to forestall it by saying something like the following to the jury: ‘Members of the jury, you might be thinking it odd that the defendant, X is not going into the box to give evidence. There is a reason for this, members of the jury. The defendant wished very strongly to let you hear their account of their case. However, for reasons which I cannot tell you, because they are a matter of privilege between the defendant and his counsel, I have advised the defendant not to take the stand.’ There may be a question as to whether such an intervention is in breach of Rule 10.12 of the Conduct for the Bar of Ireland (March, 2006).³²⁰ But there has never been, so far as we know, a disciplinary case to test the issue.

The Change

The change we propose is that it will be open to prosecuting counsel to comment on the defendant’s omission to give evidence. It would by no means follow automatically from this that the Judge would also comment. Whether this happens would involve the same considerations as regards whether and how the Judge comments on any other aspect of the prosecution case. For instance, the Judge might, depending on the circumstances, wish to say to the jury that: ‘there was nothing odd in the defendant’s not giving evidence since, as his defence was

³²⁰ Rule 10.12 states: “every defendant has the right to decide whether to give evidence in his or her own defence. Barristers may properly advise their client upon this but the defendant themselves must make such decision.”

that he knew nothing about the robbery, there was nothing he could have known, to give evidence about, if he had gone in the witness box.’

Our Report already contains a comprehensive account of constitutional and ECHR case-law on the ‘right to silence’. In fact, the case-law has been exclusively on the main channel of the right, the right to silence under police questioning. Without going over the same ground again, we can say that the consensus to be drawn from this case-law seems to be that even the main channel of the right is not absolute: it may be restricted provided that the restriction is: proportionate; expressly provided for in law; and subject to adequate safeguards of which the most significant is timely legal advice. We believe that the change proposed meets each of these conditions.

Safeguards

To avoid any possibility of prejudice to a defendant’s legitimate rights, we propose the following safeguards.

1. To deal with situations in which the defendant would be, possibly from lack of familiarity with the language, mental or physical disablement, youth or recent bereavement, at a disadvantage, we propose a version of the UK provision quoted above. We recommend, however, that it should

be widened to give the judge a discretion to exclude the prosecution's comment where the failure to give evidence was due to: 'physical or mental condition or other exceptional personal characteristics relevant to the defendant's capacity to giving testimony'.

2. In the U.K. Law there are two sets of protections³²¹ for the defendant in the practical operation of the trial when it comes to the defendant's failing to give evidence. The first of these is that, by virtue of a Practice Directive issued by the Lord Chief Justice, the trial judge must, at the stage of the trial, when the defendant would be giving evidence give him a formal warning in the presence of the jury, of the consequences of the omission to give evidence. We do not recommend this because this is something about which the defendant would have been advised by their lawyers and furthermore to issue this warning in open court without the controls to be mentioned below could be prejudicial.

The second layer of protection in the UK was laid down in *Cohen* [1996] QB 373. The Lord Chief Justice, Lord Taylor, for the Court of Appeal said there were certain essential matters on which the judge must direct the jury under s. 35, namely:

³²¹ For material covered here, see M. Zander, *Cases and Materials on the English Legal System* (8th Ed) 381-83.

- The burden of proof remains on the prosecution at all times
- The defendant is entitled to remain silent.
- An inference from failure to give evidence cannot on its own prove guilt.
- The jury must be satisfied that the prosecution have established a case to answer before drawing an inference from silence.
- The jury may draw an adverse inference if, despite any evidence relied on by the defendant to explain his silence or in the absence of such evidence, the jury conclude the silence can only sensibly be attributed to the defendant having no answer or none that would stand up to cross-examination.

We would recommend that this protection should be laid down by legislation in Ireland. Of the elements of this wording we regard the last as especially important because it directs the jury to consider whether there is some legitimate reason for the defendant's failure to take the natural course of denying the charge in the witness box. Under the present law, the jury is expected to assume that the defendant has a legitimate reason for not giving evidence; despite the fact that, in the nature of things, this will not be true in most cases. The change proposed, therefore will bring into issue, something which at present has always been assumed in favour of the defendant.

3. The general professional ethic scrupulously observed by prosecuting counsel is that the prosecutor must act as 'Minister of Justice', meaning that they must take a non-partisan approach and not make unfair comments against the defendant. This would mean, in the present context, that prosecuting counsel would be more measured in their cross-examination than would be the case for instance, in counsel for the defendant's cross examination of prosecution witnesses. Apart from counsel's professional duty, there is another concrete sanction against any departure from this standard in that if counsel for the prosecution goes too far, this could lead to a successful appeal.

Recommendation

In summary, it seems to us that the defendant's immunity goes back to a historical era which is no longer with us; it is not part of the main channel of the right to silence.

Accordingly, we propose that legislation permit the prosecution to comment on the failure by a defendant to give evidence. With the necessary

safeguards as outlined, we believe this change will help to restore balance to the trial.

Note of Dissent on Exclusionary Rule: Gerard Hogan

I agree that the operation of the exclusionary rule may result in the exclusion in particular cases of highly probative evidence, resulting in turn in what might be thought to be an unmeritorious acquittal of a defendant. This fact was itself acknowledged by the Supreme Court in *The People v. Kenny*³²² where Finlay CJ stated that:

“The exclusion of evidence on the basis that it results from unconstitutional conduct, like every other exclusionary rule, suffers from the marked disadvantage that it constitutes a potential limitation of the capacity of the courts to arrive at the truth and so most effectively to administer justice. I appreciate the anomalies which may occur by reason of the application of the absolute protection rule to criminal cases.”³²³

But I cannot agree that by reason of this fact alone the exclusionary rule ought to be significantly modified. Our society has committed itself to abiding by the rule of law and to respect and vindicate the fundamental freedoms enshrined in the Constitution. It behoves us to take these rights

³²² [1990] 2 IR 110.

³²³ [1990] 2 IR 110 at 134.

and freedoms seriously and if the occasional exclusion of otherwise relevant evidence is the price of respecting these constitutional rights, then that is a price society should be prepared to pay in the interests of upholding the values solemnly enshrined in our highest law, even if one unfortunate consequence is that a particular victim may feel that “their” case has not been fairly dealt with.

The development of the exclusionary rule was the logical corollary of a series of inter-locking constitutional provisions. Article 34.5 of the Constitution requires that each judge, upon appointment, will make a formal declaration in open court that he or she “will uphold the Constitution.” Article 38.1 guarantees that the trial of any criminal offence will be “in due course of law.” Article 40.3.1 provides that the State will by its laws “as far as practicable....defend and vindicate the personal rights of the citizens.” How could a judge, who has made a solemn declaration to uphold the Constitution, receive and act upon evidence which he or she is aware has been obtained in breach of the very Constitution which he or she is committed to upholding? How, moreover, could it be said that such a trial was in “due course of law”, when, *ex hypothesi*, evidence has been obtained in breach of these constitutional guarantees? Likewise, if Article 40.3.1 requires the State to respect and, as far as practicable, to defend and vindicate these constitutional rights, how can it be said not to be

“practicable” to disregard such evidence if this is in truth necessary to defend and vindicate these fundamental rights?

While, therefore, the exclusionary rule as formulated in cases such as *Healy* and *Kenny* is strict, this rule is nonetheless broadly in line with the approach adopted by the US Supreme Court and the German Constitutional Court. Any substantial relaxation of the rule along the lines of the “balancing” rule which presently applies in respect of mere non-constitutional illegality would, moreover, undermine the overall effectiveness of the rule. In practice, the courts almost never exclude evidence on the ground there has been a mere illegality (as distinct from unconstitutionality) and there is nearly always a reason why such evidence should be held to be admissible in the overall public interest. The exclusionary rule, however, has a salutary effect in ensuring that proper standards are adhered to and this important objective, would, I think, be unwittingly compromised if the exclusionary rule were to be significantly relaxed.

The Legislative Amendment Option

If we assume that the *Kenny* doctrine is upheld by the Supreme Court, then it is very hard to see how this rule could be reversed by the

Oireachtas by ordinary legislation. This was the very point made by Rehnquist CJ in *Dickerson v. United States*³²⁴:

“The law in this area is clear. This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals.Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution.

But Congress may not legislatively supersede our decisions interpreting and applying the Constitution. This case therefore turns on whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction. Recognizing this point, the Court of Appeals surveyed *Miranda* and its progeny to determine the constitutional status of the *Miranda* decision. 166 F. 3d, at 687-692. Relying on the fact that we have created several exceptions to *Miranda*'s warnings requirement and that we have repeatedly referred to the *Miranda* warnings as "prophylactic," *New York v. Quarles*³²⁵, and "not themselves rights protected by the Constitution," the

³²⁴ 530 US 428 (2000)

³²⁵ [467 U.S. 649, 653](#) (1984).

Court of Appeals concluded that the protections announced in *Miranda* are not constitutionally required.”³²⁶

Rehnquist CJ went on to hold that as *Miranda* was “constitutionally based”, the rule could not be legislatively overruled. But, as Scalia J. noted in his colourful dissent, this is not quite the same thing as saying that the rule is *actually derived from* the Constitution and that is the sole reason for his dissent. But even Scalia J. agreed that a constitutional rule could not be overruled by a simple legislative act of Congress.

But whatever about the precise provenance of the decision in *Miranda*, it is clear that *Kenny* is derived from the Constitution itself. Finlay CJ clearly stated prior immediately to formulating the rule that:

“The constitutional rights with which all these cases are concerned are personal rights, being either the right to liberty.....or the inviolability of the dwelling. The duty of the Court pursuant to Article 40.3.1 of the Constitution is as far as practicable to defend and vindicate such rights.”³²⁷

Having then formulated the rule, the Chief Justice then went on to state:

³²⁶ 530 US 428 at 435.

³²⁷ [1990] 2 IR 110 at 134.

“The detection of crime and the conviction of guilty persons, no matter how important they may be in relation to the ordering of society, cannot, however, in my view, outweigh the unambiguously expressed constitutional obligation ‘as far as practicable to defend and vindicate the personal rights of the citizen.’”³²⁸

There is no doubt but that a constitutional rule cannot be reversed by a mere Act of the Oireachtas. If, therefore, *Kenny* is a constitutional rule, it can only be changed by constitutional amendment and referendum. For the reasons just set out, I believe it clear that the Supreme Court made clear in *Kenny* that the exclusionary rule was derived from the Constitution. It follows that the rule cannot be changed, altered or overruled merely by an ordinary Act of the Oireachtas.

Constitutional amendment

As the Supreme Court itself recognised in *Kenny*, there is no doubt but that the rule produces anomalous effects. But this will always be the case with any exclusionary rule. This would still be the case even if the exclusionary rule were modified so as to exclude only evidence obtained by reason of deliberate misbehaviour.

³²⁸ [1990] 2 IR 110 at 134.

But whatever the anomalies produced by the application of the exclusionary rule to certain types of cases, it could not, I think, justify a special *ad hoc* constitutional amendment to deal with this limited class of cases. The Supreme Court is the ultimate arbiter under our constitutional system of the manner in which the constitutional rights of citizenry is to be protected. This sometimes produces results which are not popular with the general public. But the whole theory of the Constitution is that certain fundamental rights - such as free speech, habeas corpus, personal liberty, fair trial and religious freedom - are not dependent on the whim of a legislative majority or the protestations of a populist media.

It is, of course, true that the people are the ultimate sovereigns so far as the Constitution is concerned and that they are free to change the Constitution by referendum as they see fit. But, in my view, it would be an unwise move to change the Constitution simply because there was disagreement with a particular line of Supreme Court jurisprudence or because another view of this problem was possible. The integrity of the 1922 Constitution was first undermined and then subsequently destroyed by a series of *ad hoc* constitutional amendments. We have thus far (more or less) resisted that temptation with the present Constitution and, for these reasons, I believe that this sort of *ad hoc* amendment should, where possible, be avoided.

The European Convention of Human Rights and the Exclusionary Rule

Nor do I agree with the suggestions of some that the exclusionary rule violates the European Convention of Human Rights. I fail to see how this could be given that Article 53 ECHR expressly provides that:

"Article 53 - Safeguard for Existing Human Rights

'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.'

Given that the exclusionary rule is formulated to protect fundamental freedoms, it is hard to see how it could violate the substantive provisions of the Convention.

While it is true that the Convention imposes positive obligations on Contracting States to secure an effective criminal justice system, these obligations are not at all compromised by the exclusionary rule. There is no substantive limitation imposed by the rule on the nature and ambit of

Irish criminal law and nor is there any artificial rule which prevents, for example, effective complaints being made by or behalf of victims. The Irish criminal justice system has adapted well to live with the exclusionary rule and the very fact that the huge majority of accused persons charged with indictable crime plead guilty is its own testimony to the effectiveness of that very system.