

**REPORT
OF THE
EXPERT GROUP**

APPOINTED

**TO CONSIDER CHANGES IN THE CRIMINAL LAW WHICH
WERE RECOMMENDED IN THE GARDA SMI REPORT**

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Introduction

Arising out of the recommendations in the Report of the Steering Group on the Efficiency and Effectiveness of the Garda Síochána (the Garda SMI Report), the Minister for Justice, Equality and Law Reform established the Expert Group and gave us the following terms of reference:

"To consider changes in the Criminal Law recommended in the Report of the Steering Group on the Efficiency and Effectiveness of the Garda Síochána with particular reference to Constitutional and European Convention on Human Rights implications and having regard to the critical balance referred to in the Report between the rights of the individual and that of the common good; and to report to the Minister for Justice, Equality and Law Reform not later than 30 June, 1998."

The Garda SMI Report was published in November, 1997. While it dealt mostly with the structure and functions of the Garda Síochána, it recommended changes to the criminal law (in Section 4 - Legal Framework) which in the view of the Steering group would enhance Garda efficiency and effectiveness.

The Steering Group acknowledged that their proposals would give significant additional powers to the Gardaí, and recognised that there would need to be an assessment of the implications for the proposals of the Constitution and the European Convention on Human Rights.

The membership of the Expert Group is set out in Appendix I to the Report. We held our first meeting on 6 May, 1998 and we met on a total of 9 occasions. We examined in detail each of the recommendations contained in Section 4 of the Steering Group's Report. In considering the different options for dealing with each recommendation, we had particular regard, in accordance with our terms of reference, to the implications for it of the Constitution and the European Convention on Human Rights and to the effect it would have on the balance between the rights of the individual and the common good.

Where we have recommended legislative change, we have thought it useful to outline as far as possible the shape such a provision might take, but we are conscious that any such proposal would be subject to the advice of the Attorney General and its precise terms would need to be considered in the normal way by the Parliamentary Draftsman.

While we have not quite kept to the deadline, set out in our terms of reference, of reporting to the Minister for Justice, Equality and Law Reform by the 30th of June, 1998, we did not, as we have mentioned, start our work until the 6th of May, and the complexity of the issues to be considered made a slight prolongation unavoidable.

Finally, we would like to record our sincere thanks for the support given to us by our secretary, Martin Power. His expertise, dedication and efficiency helped us greatly in our task and were very much appreciated.

Scope of recommendations

The Steering Group makes it clear, at paragraph 23 of its report, that its recommendations for additional powers of investigation relate only to serious offences, defined as offences punishable by five years imprisonment or more. This is already the threshold used for powers of detention in the Criminal Justice Act, 1984 and for powers of arrest without warrant in the Criminal Law Act, 1997, and we adopt this definition for the purposes of our proposals.

While we note that there are, in the opinion of the Steering Group, some offences which are not currently punishable by five years imprisonment but which ought to be so punishable, we feel that an individual assessment of the adequacy of sentences for particular offences would go beyond our remit.

Recommendation 1

Crime Scene Preservation

A statute should be introduced allowing for the exclusion of individuals from a crime scene for a reasonable length of time. This would provide that parties may be excluded from a crime scene for a reasonable time to allow a proper examination and investigation to take place.

The Steering Group identified as a deficiency in the criminal law the lack of a statutory power enabling the Garda Síochána to preserve the scene of a crime, in particular by temporarily preventing members of the public from entering a scene and, even if unintentionally, interfering with or destroying evidence.

The proposal for a new statutory power to preserve the scene of a crime strikes us as worthwhile. Of course, practical measures are routinely put in place where necessary to preserve scenes of crime, but it is better in our view for the powers of the Garda Síochána in an important matter such as this to be provided for on a statutory basis in order to clarify the extent of Garda powers and, conversely, the extent to which personal and public rights of access to any place could be temporarily restricted in the interests of justice.

While the recommendation of the Steering Group relates to excluding persons from the scene of a crime, it seems to us important that the proposed provision should apply to any place where there is or may be evidence of an offence. Limiting the provision to a scene of a crime could be too restrictive in many cases, such as where a murder is committed in one place but the body is found in another.

It is always a consideration, when legislating for existing practice, to retain as far as possible the greatest degree of flexibility so that the statutory intervention is enabling rather than restrictive. We suggest, therefore, that while the exclusion of persons from a crime scene should certainly be provided for, it should be as an element of a general power of a Garda to preserve evidence.

We propose that the new statutory power to preserve evidence should be exercisable by a Garda who is lawfully in any place. This would include any public place, any private place into which a Garda has been invited or permitted, as well as any private place which a Garda is searching under a power conferred by law. The Steering Group, in making its recommendation, was primarily concerned with locations other than in public, but we feel that there are advantages in the new power being applicable both to public and private places.

While a power to exclude persons from any place is in general a significant one, it has particular significance where what is at issue is the exclusion of an individual from his or her home or place of work, or the exclusion of persons in general from a place of public importance. We would propose, therefore, that the duration of any exclusion should be strictly limited to what is necessary for the preservation of evidence and that in any event it should be subject to an absolute limit (which we suggest should be twelve hours), unless there is judicial authority for its extension. As regards any such extension, we would propose that an application to a judge should be at a senior (inspector) level of the Garda Síochána and that the judge, before granting any extension, ought to be satisfied not only that the extension is necessary, but that the investigation as a whole is being conducted diligently and expeditiously.

An outline of our proposal is set out below.

Recommendation 1
Crime Scene Preservation

Draft Provision

- (1) A member of the Garda Síochána who is lawfully in any place where the member reasonably believes there to be evidence may take any steps reasonably thought necessary by the member for the preservation of that evidence.
- (2) Without prejudice to the generality of subsection (1), a member acting under that subsection may direct a person to leave or prohibit a person from entering the whole or part of the place if the member reasonably believes that such a direction or prohibition is necessary for the preservation of the evidence.
- (3) A direction to leave or a prohibition on entering a place by virtue of subsection (1) may exclude a person from all or part of a place only to the extent that, and only for as long as, is reasonably required for the preservation of the evidence, and in any event shall cease to have effect after a period of 12 hours.
- (4) Notwithstanding subsection (3), a judge of the District Court, on hearing evidence on oath by a member of the Garda Síochána not below the rank of inspector, may, if he or she is satisfied -
- (a) that there are reasonable grounds for believing that there is evidence in that place;
 - (b) that a person has been lawfully excluded from all or part of that place by virtue of a direction or prohibition under subsection (1);
 - (c) that the continued exclusion of that person from the whole or part of that place is necessary for the preservation of the evidence; and
 - (e) that the investigation of the offence to which the evidence relates is being conducted diligently and expeditiously;

make an order continuing in force the direction or prohibition under subsection (1) for such further period not exceeding 48 hours as the judge considers appropriate.

(5) A judge of the District Court, on hearing evidence on oath by a member of the Garda Síochána not below the rank of inspector, may, if he or she is satisfied -

(a) that a direction or prohibition under subsection (1) is in force by virtue of an order under subsection (4);

(b) that its further continuance in force is necessary for the preservation of the evidence to which the order relates; and

(c) that the investigation of the offence to which the evidence relates is being conducted diligently and expeditiously;

renew the order for such further period not exceeding 48 hours as the judge considers appropriate, such renewal to take effect upon the expiry of the subsisting order.

(6) A member of the Garda Síochána may arrest without warrant any person who -

(a) obstructs or attempts to obstruct a member of the Garda Síochána in the exercise of his or her powers under or by virtue of this section; or

(b) fails to comply with a direction or prohibition under or by virtue of subsection (1), subsection (4) or subsection (6).

(7) A person who obstructs or attempts to obstruct a member of the Garda Síochána in the exercise of his or her powers under this section or who fails to comply with a direction or prohibition under or by virtue of subsection (1), subsection (4) or subsection (6) shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500 or to imprisonment for a period not exceeding 6 months or to both.

(8) In this section -

"evidence" means evidence of or relating to the commission of an offence;

"offence" means an arrestable offence as defined in section 2 of the Criminal Law Act, 1997;

"place" includes a dwelling; and

"preservation" means prevention from concealment, loss, alteration, contamination or destruction.

Recommendation 2

Evidence search warrant

The search warrant provisions in the Criminal Justice (Miscellaneous Provisions) Act 1997, have significantly improved the situation and should be extended to all serious offences, as defined in paragraph 23.

In exceptional cases, where a delay in securing access to a District Judge could seriously prejudice an investigation into a serious offence, a member of the Garda Síochána not below the rank of Superintendent should have power to authorise a search subject to satisfactory safeguards.

There should be a statutory power of entry, search and seizure in circumstances of hot pursuit, such power to be strictly limited so as to protect personal rights.

Section 10 of the Criminal Justice (Miscellaneous Provisions) Act, 1997 provides for the issuing by a judge of the District Court of a warrant authorising a Garda to search a place for evidence of certain offences. It currently applies only to a limited number of serious offences, namely indictable offences involving the death of or serious bodily injury to a person, false imprisonment, rape and certain other sexual offences. We fully agree that section 10 should be extended to all serious offences. It seems to us to be clearly in the interests of justice that the Garda Síochána should, on judicial authority, have the power to search for and seize evidence of serious offences.

The recommendation that a senior member of the Garda Síochána should also have the power under section 10 to issue a search warrant, in exceptional cases where a delay in appearing before a District Court judge could seriously prejudice an investigation, raises different issues. Search warrants are of their nature invasive,

as they authorise the search of private property, including homes (and in the case of section 10 including also the search of persons found at the place), if necessary by the use of reasonable force. In recognition of this, and of the desirability of ensuring an independent and objective assessment of the need in each case for the issue of a search warrant, it is normally provided that they are issued by a judge on the application of a Garda. We believe, as the Steering Group clearly did, that this principle should be departed from only in exceptional cases. The exceptional case instanced by the Steering Group, which is where an unavoidable delay in getting to see a judge of the District Court could seriously prejudice an investigation, seems to us to be reasonable and to respect the principle that any such interference with personal or property rights under the Constitution is limited to a clearly justifiable exception and that the means used are proportional to the objective.

We believe that efforts to detect or solve crimes may be hampered in some cases if there is a delay in the Gardaí obtaining a search warrant and we propose, therefore, that where circumstances of immediate urgency require it a member of the Gardaí, not below a certain rank (which we suggest should be superintendent), should be empowered to issue a search warrant but that such a warrant would cease to have effect after 24 hours.

Provisions similar to that which we are proposing here have been made in other recent statutes, such as the Criminal Justice (Drug Trafficking) Act, 1996 and the Criminal Assets Bureau Act, 1996. It would be important, in our view, for any such provision to be narrowly drawn, along the lines of the 1996 examples, so as to reflect the restricted nature of the exception, and we include such a provision in the outline of our proposal below.

As regards statutory powers of entry, search and seizure, we are not proposing any specific provision, as we believe that the existing law, taken together with our proposals both on this recommendation and on recommendation 3, deal adequately with the matter.

Recommendation 2
Search warrants in relation to serious offences

Draft provision

The Criminal Justice (Miscellaneous Provisions) Act, 1997 is hereby amended by the substitution for section 10 of the following -

"10.- (1) A judge of the District Court, on hearing evidence on oath by a member not below the rank of inspector, may, if he or she is satisfied that there are reasonable grounds for suspecting that evidence of or relating to the commission of an offence is to be found in any place, issue a warrant for the search of that place and any persons found at that place.

(2) A member not below the rank of superintendent may, subject to subsection (3), if he or she is satisfied that there are reasonable grounds for suspecting that evidence of or relating to the commission of an offence is to be found in any place, issue a warrant for the search of that place and any persons found at that place.

(3) A member shall not issue a warrant under subsection (2) unless he or she is satisfied that circumstances of urgency giving rise to the need for the immediate issue of the search warrant would render it impracticable to apply to a judge of the District Court under this section for a search warrant.

(4) Subject to subsection (5), a warrant under this section shall be expressed to and shall operate to authorise a named member, accompanied by such other person as the member thinks necessary, to enter, within one week of the date of issuing of the warrant (if necessary by the use of reasonable force), the place named on the warrant and to search it and any persons found at that place and seize anything found at that place, or anything found in the possession of a person present at that place at the time of the search, which the said member reasonably believes to be evidence of or relating to an offence.

(5) Notwithstanding subsection (4), a search warrant issued under subsection (2) -

(a) shall be expressed to and shall operate to authorise the named member to be accompanied only by another member; and

(b) shall cease to have effect after a period of 24 hours has elapsed from the time of the issue of the warrant.

(6) A member acting under the authority of a warrant under this section may -

(a) require any person present at the place where the search is carried out to give to the member his or her name and address, and

(b) arrest without warrant any person who -

(i) obstructs or attempts to obstruct that member in the carrying out of his or her duties,

(ii) fails to comply with a requirement under paragraph (a), or

(iii) gives a name or address which the member has reasonable cause for believing is false or misleading.

(7) A person who obstructs or attempts to obstruct a member acting under the authority of a warrant under this section, who fails to comply with a requirement under paragraph (a) of subsection (6), or who gives a false or misleading name or address to a member shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500 or to imprisonment for a period not exceeding 6 months or to both.

(8) The power to issue a warrant under this section is in addition to and not in substitution for any other power to issue a warrant for the search of any place or person.

(9) In this section -

"commission" in relation to an offence includes an attempt to commit such offence;

"offence" means an arrestable offence as defined in section 2 of the Criminal Law Act, 1997; and "place" includes a dwelling."

Recommendation 3

Seizure of evidence

Legislation should be enacted giving Gardaí a general power to seize evidence of a suspected crime and retain it for a reasonable time, subject to appropriate safeguards.

As the Steering Group notes, there is a statutory power for a Garda (under section 9 of the Criminal Law Act, 1976) to seize evidence of any offence found at any place where the Garda is exercising a power of search. This provision is an essential part of the investigating powers of the Garda Síochána. It would clearly be absurd if a Garda, in searching a place for one purpose, was obliged to ignore unexpected evidence in that place of another serious offence. However, section 9 applies only to situations where a Garda is exercising a power of search, and we agree with the Steering Group that it would be better if the power to seize evidence in other situations were clarified, rather than relying on uncertain common law. We would propose, therefore, that the power of a Garda to seize evidence should apply to any place where the Garda is lawfully present. This is the formula which we proposed earlier in relation to crime scene preservation and, as we noted, it would include any public place, any private place into which a Garda has been invited or permitted, as well as any private place which a Garda is searching under a power conferred by law.

An outline of our proposal is set out below.

Recommendation 3

Seizure of evidence

Draft provision

(1) A member of the Garda Síochána who is lawfully in any place may seize anything which is in that place if he or she has reasonable grounds for believing -

(a) that it is evidence of or relating to the commission of an offence; and

(b) that it is necessary to seize it in order to prevent it being concealed, lost, altered, contaminated or destroyed.

(2) The power conferred by this section is in addition to and not in substitution for any other power to seize evidence of or relating to the commission of an offence.

(3) In this section -

"offence" means an arrestable offence as defined in section 2 of the Criminal Law Act, 1997;
and "place" includes a dwelling.

Recommendation 4

Power to arrest

These powers should apply to serious offences, as defined in paragraph 23.

The proposal that there should be a power of arrest without warrant for all serious offences, that is offences punishable by five years imprisonment or more, has, with one exception, been provided for in the Criminal Law Act, 1997. The exception relates to offences punishable under common law, as the Criminal Law Act applies only to offences punishable under or by virtue of any enactment. This exception can be removed by a straightforward amendment of the Criminal Law Act, and an outline of such an amendment is set out below.

We note that the Deloitte and Touche Report, commissioned by the Steering Group, had recommended that a power of arrest without warrant should exist for any offence which carries imprisonment as a penalty. The Steering Group in their Report departed from this in favour of allowing the power to be exercised only in relation to serious offences, and we agree with this approach.

Recommendation 4

Power to arrest

Draft provision

The Criminal Law Act, 1997 is hereby amended by the deletion in section 2(1), in the definition of "arrestable offence", of ", under or by virtue of any enactment,".

Recommendation 5

Power to detain

Certain anomalies exist under present legal arrangements in relation to detention which inhibit the proper investigation of serious offences and which should be removed. In addition to the present powers under the Offences Against the State Act and the Drug Trafficking Act, the Steering Group recommends that the Criminal Justice Act, 1984 should be amended to allow for:

- An initial period of detention of 12 hours authorised by the member in charge.***
- A further period of 12 hours authorised by a Superintendent.***
- A further period of 24 hours authorised by a Judge of the District Court.***
- A Judge of the District Court should be able to authorise an additional period of time up to a maximum of 48 hours in relation to serious and aggravated crimes such as a grave offence involving death or grievous bodily harm or sexual assault, an offence involving kidnapping or similar extraordinary circumstances or where there are a multiplicity of complicated cases, e.g. complex fraud cases.***

The reckoning period of detention should be suspended for sleep, waiting period for solicitor, reasonable consultation with a solicitor, for medical attention, or for court appearance. This procedure should not apply to detention under the Offences Against the State Act 1939 or the Drug Trafficking Act 1996.

If a person is in custody on remand or serving a sentence for other offences, it should not preclude a proper investigation of a particular crime and there should be a procedure whereby such person can be

arrested or detained and the crime investigated as if he or she were not already in custody.

The power to detain a person suspected of a serious offence is an important element of the capacity of the Garda Síochána to investigate such offences. As the Steering Group noted, there are a number of different statutory provisions in relation to the detention of suspects.

The basic provision is in section 4 of the Criminal Justice Act, 1984, which provides for 12 hours detention, made up of 6 hours initial detention with scope for a 6 hour extension on the authority of a senior member of the Garda Síochána (this 12 hours can in effect rise to 20 hours because a suspect can be allowed up to 8 hours sleep). Section 4 applies to any serious offence, that is an offence punishable by five years imprisonment or more.

Section 30 of the Offences against the State Act, 1939 provides for the detention of a person arrested under that section for up to 48 hours, made up of an initial detention of 24 hours with scope for a 24 hour extension on the authority of a senior member of the Garda Síochána. Section 30 applies to offences under the Act and offences which are scheduled under the Act (for example, firearms offences). The overlap between this provision and the 1984 provision can lead to some anomalies. A person suspected of murder can normally only be detained for 12 hours under the 1984 Act, but if for example the murder weapon is a firearm he or she can be detained for up to 48 hours under the 1939 provision. It is difficult to justify this disparity in treatment.

A more recent provision on detention is contained in the Criminal Justice (Drug Trafficking) Act, 1996, which provides for detention for up to 7 days for persons suspected of drug trafficking, made up of initial detention of 6 hours with scope for extensions up to a total of 48 hours on the authority of a senior member of the Garda Síochána (bringing the total to 2 days) with provision for further extensions of up to an additional 5 days on the authority of a judge of the District or Circuit Court.

It should be noted that there were thought to be specific reasons why such periods of detention for suspected drug traffickers were necessary.

The conclusion of the Steering Group was that the 1984 provision, which allows up to 12 hours detention, is inadequate for the proper investigation of murder, rape or other similar serious crimes. The Steering Group also thought it insufficient for the proper investigation of complex offences, such as corporate fraud. Their recommendation was that the 1984 Act should be amended to provide for an initial period of 12 hours detention, extendable by a senior member of the Garda Síochána for a further 12 hours, extendable again for a further 24 hours on the authority of a judge of the District Court and, in particularly serious cases, extendable by a final period of up to 48 hours by a judge of the District Court. In other words, a person could be detained for 24 hours on Garda authority, plus a further 24 hours on judicial authority, plus in particularly serious cases a further 48 hours on judicial authority.

We accept that there is a case for increasing the available period of detention of suspects to allow for the proper investigation of serious offences, and we think that it is desirable that existing anomalies of the kind we mentioned are as far as possible removed. On balance, taking into account the requirements of the common good in the proper investigation of offences and balancing that against the rights of suspected persons, we feel that the proposed new detention period of up to 48 hours is about right (subject to our views below on the offences to which it might apply, the suspension of the reckoning period and the authorisation required for the second period of 24 hours). However, having regard to that same balance of Garda needs and suspects' rights, we are not inclined to favour the extra detention period of 48 hours which is proposed, even though it would be available only on judicial authority. Any such proposal should, in our view, be supported by clear evidence of operational need to an extent which outweighs its effects on the rights of suspects, and we are not persuaded that this is the case.

While we agree that there is a case for a period of up to 48 hours being available for detention for the purpose of investigating serious offences, we believe that this is an

increase of such significance that it ought to be targeted on the more serious offences, where such length of detention is justified, and not applied to every offence punishable by five years imprisonment or more. The exact composition of such a list of offences would be a matter for Government and the Oireachtas, and to that extent the list attached to the outline of our proposal below should be regarded as illustrative.

We would also favour a more restricted approach than the Steering Group recommend to the question of suspending the period of reckoning. At present, where a person is in detention in a Garda station under the 1939, 1984 or 1996 Acts, the clock is stopped for visits to hospital and (as regards the 1984 Act only) sleep, as well as visits to court to challenge detention. The Steering Group recommend that the reckoning period for the proposed new power of detention should be suspended for sleep, waiting for a solicitor, consultation with a solicitor, medical attention and court appearance. The effect of this could be to extend very considerably the actual period of custody in individual cases. Suspension for sleep could by itself increase 48 hour detention to 64 hour detention. If one adds to that waiting periods for solicitors, as well as time for, perhaps, several consultations, together with the other proposed suspensions, two day detention might well become three day detention (and there would of course be a similar proportional increase in respect of the proposed further period of 48 hours - which as we say we do not support).

We have reservations about the complexity and effect of such a number of suspensions. It could, we fear, be cumbersome to administer and excessively extend the actual period in detention of a suspect. With the exception of suspension for hospital treatment and court appearances, in line with current law, we believe that the proposed new detention period should be a fixed period.

There remains the question of the authorisation which would be needed for the second period of 24 hours. The Steering Group was of the view that this should be a matter for a judge of the District Court. This is an issue to which we gave careful thought, balancing the operational needs of the Garda Síochána with the right of

suspects, and in particular having regard to the point at which Garda detention ought to be judicially authorised. In considering this, we recalled that section 30 of the 1939 Act permits 48 hour Garda-authorised detention, and that the first 48 hours detention under section 2 of the 1996 Act is also Garda-authorised. We also operated on the assumption that, if there were to be provision for an application to a judge for an extension of detention, it should, as in the 1996 Act, be *inter partes* and not *ex parte*, a procedure less easily accommodated in a detention period of 48 hours than the much longer period provided for in the 1996 Act.

Our conclusion, bearing in mind that we propose that the new detention should apply only to very serious offences, that the total period of detention we propose is shorter than that recommended by the Steering Group, and that detention would under our proposal largely be for a fixed period, was that, on balance, Garda authorisation for the second period of 24 hours would be appropriate.

Our draft proposal, which is set out below, also provides that the safeguards included in the 1984 Act relating to detained persons, including the same limitations on re-arrest, would apply to persons who are detained under the new proposal allowing for detention for up to 48 hours for certain serious offences. Furthermore, the 1987 regulations governing the detention of persons in Garda stations will also apply.

The final part of recommendation 5 relates to the investigation of an offence where the suspect is already in prison, either on remand or following conviction, for a different offence. The investigation might concern an offence committed within prison or an offence committed prior to the person's imprisonment. The Steering Group identified as a weakness the lack of a provision in law for the arrest and detention in a Garda station of such prisoners, and recommended that they should be subject to the same investigative powers as suspects in general.

At our first meeting we were requested by the Minister to give priority consideration to this part of recommendation 5, as recent operational experience had given rise to

concern over the absence of a procedure for the investigation of serious offences by prisoners, particularly within prison.

We agreed to examine this aspect of recommendation 5 first, and to draft a proposal on it before proceeding to examine the other recommendations. Having discussed the issue and agreed on our approach to it, which we set out below, we forwarded a draft provision to the Minister on 28 May, 1998.

While it is nowhere explicitly stated that statutory powers of arrest and detention cannot be exercised in relation to someone in prison, in practice they are not. Indeed, the exercise of a power of arrest would on the face of it conflict with the court order directing the person's imprisonment, and it is difficult to see how this could be the case without a specific statutory provision allowing it. It might also be worth noting that a prisoner is by statute deemed to be in the lawful custody of the Governor of the prison in which he or she is detained. It is also the case that, while a Garda may question a prisoner in prison, existing prison rules require the consent of the prisoner.

There is one statutory provision relating to the removal of prisoners from prison which also ought to be noted, and that is section 11 of the Prisons Act, 1898. This provides that the Minister for Justice, Equality and Law Reform may, if satisfied that a prisoner is required in any place in the interests of justice or for the purpose of any public enquiry, order the prisoner to be taken to that place, and that any prisoner so taken shall be deemed to be in legal custody while outside the prison. It is understood that this power is used where, for example, a person is to be brought before court to face charges. It is not used - nor would it appear to us appropriate to use it - to have a prisoner brought to a Garda Station for the purposes of questioning.

We believe that the special circumstances of prisoners, including the fact that they are imprisoned on foot of a court order, make it desirable if not essential that there should be a judicial involvement in authorising their detention in a Garda Station. While not an exact parallel, it is nevertheless perhaps worth noting that a rearrest

under the Criminal Justice Act, 1984 for the purposes of detention must be authorised by a Judge of the District Court.

Another important issue is the extent to which the powers contained in all of the present relevant legislation on detention, that is the 1939, 1984 and 1996 Acts, should apply to the detention of a prisoner. A point to bear in mind is the fact that the appropriate period of detention has to take into account the unique circumstances of a prisoner, who, unlike persons in the community, will remain in detention after leaving Garda custody. In the circumstances, we considered it appropriate to confine the period of detention of a prisoner who is arrested to that specified in the Criminal Justice Act, 1984, although some of us felt that prisoners should in principle be subject to the same periods of detention as persons in the community.

The draft provision which was forwarded to the Minister is set out below.

Recommendation 5

Power to detain

Draft provision

Detention after arrest

1. (1) This section applies to the offences set out in the schedule.

(2) Where a member of the Garda Síochána arrests without warrant, or under the authority of a warrant issued by a judge of the District Court under section 2(1), a person ("the arrested person") whom he or she, with reasonable cause, suspects of having committed an offence to which this section applies, the arrested person -

(a) may be taken to a Garda Síochána Station, and

(b) if the member of the Garda Síochána in charge of the station has, at the time of the arrested person's arrival there, reasonable grounds for believing that his or her detention is necessary for the proper investigation of the offence, may be detained in that station for such period as is authorised by subsection (3).

(3) (a) The period for which a person may be detained under subsection (2) shall, subject to the provisions of this section, not exceed 12 hours from the time of his or her arrest.

(b) A member of the Garda Síochána not below the rank of superintendent may direct that a person detained under subsection (2) be detained for a further period not exceeding 12 hours if he or she has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned.

(c) A member of the Garda Síochána not below the rank of chief superintendent may direct that a person detained pursuant to a direction under paragraph (b) be detained for a further period not exceeding 24 hours if he or she has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned.

(d) A direction under paragraph (b) or (c) may be given orally or in writing and, if given orally, shall be recorded in writing as soon as practicable.

(e) Where a direction has been given under paragraph (b) or (c), the fact that the direction was given, the date and time when it was given and the name and rank of the member of the Garda Síochána who gave it shall be recorded.

(f) The direction or, if it was given orally, the written record of it, shall be signed by the member giving it and -

(i) shall state the date and time when it was given, the member's name and rank and that the member had reasonable grounds for believing that such further detention was necessary for the proper investigation of the offence concerned, and

(ii) shall be attached to and form part of the custody record (within the meaning of the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987) in respect of the person concerned.

(4) If at any time during the detention of a person pursuant to this section there are no longer reasonable grounds for believing that his or her detention is necessary for the proper investigation of the offence to which the detention relates, he or she shall, subject to subsection (5), be released from custody forthwith unless he or she is charged or caused to be charged with an offence and is brought before a court as soon as may be in connection with such charge or his or her detention is authorised apart from this Act.

(5) If at any time during the detention of a person pursuant to this section a member of the Garda Síochána, with reasonable cause, suspects that person of having committed an offence to which this section applies, other than an offence to which the detention relates, and the member of the Garda Síochána then in charge of the Garda Síochána station has reasonable grounds for believing that the continued detention of the person is necessary for the proper investigation of that other offence, the person may continue to be detained in relation to the other offence as if that offence was the offence for which the person was originally detained.

(6) To avoid doubt, it is hereby declared that a person shall not be detained pursuant to this section for more than 48 hours from the time of his or her arrest, not including any period which is to be excluded under section 4(8) and 4(8A) (inserted by section 2 of the Criminal Justice (Miscellaneous Provisions) Act, 1997) of the Criminal Justice Act, 1984.

(7) Nothing in this section shall affect the operation of section 30 of the Offences against the State Act, 1939, section 4 of the Criminal Justice Act, 1984 or section 2 of the Criminal Justice (Drug Trafficking) Act, 1996.

Rearrest

2. (1) Where a person is detained pursuant to section 1 and is released without any charge having been made against him or her, he or she shall not -

(a) be arrested again in connection with the offence to which the detention related, or

(b) be arrested for any other offence which, at the time of the first arrest, the member of the Garda Síochána by whom he or she was arrested suspected, or ought reasonably to have suspected, him or her of having committed,

except under the authority of a warrant issued by a judge of the District Court who is satisfied on information supplied on oath by a member of the Garda Síochána not below the rank of superintendent that further information has come to the knowledge of the Garda Síochána since the person's release as to his or her suspected participation in the offence for which his or her arrest is sought. A person arrested under that authority shall be dealt with pursuant to section 1.

(2) A person arrested in connection with an offence other than one to which section 1 relates, under a warrant issued pursuant to subsection (1), shall be dealt with -

(a) under section 4 of the Criminal Justice Act, 1984 in like manner as a person arrested without warrant to whom the said section 4 applies, or

(b) where the offence is one to which the Criminal Justice (Drug Trafficking) Act, 1996 applies, under section 2 of that Act in like manner as a person arrested without warrant to whom the said section 2 applies.

(3) Notwithstanding subsection (1), a person to whom that subsection relates may be arrested for any offence for the purpose of charging him or her with that offence forthwith.

(4) Where a person who has been arrested under section 30 of the Offences against the State Act, 1939 or detained under section 4 of the Criminal Justice Act, 1984 or section 2 of the Criminal Justice (Drug Trafficking) Act, 1996 in connection with an offence is released without any charge having been made against him or her, he or she shall not be detained pursuant to section 1 -

(a) in connection with the first-mentioned offence, or

(b) in connection with an offence to which section 1 relates which, at the time of the first arrest, the member of the Garda Síochána by whom he or she was arrested suspected, or ought reasonably to have suspected, him or her of having committed.

Application of certain provisions of Criminal Justice Act, 1984

3. Sections 4 (4), 4 (7), 4 (8), 4 (8A), 4 (11), 5, 6 (1) to (4) and 8 of the Criminal Justice Act, 1984 shall apply with any necessary modifications in relation to persons detained under section 1 as they apply to persons detained under section 4 of that Act.

Schedule

(illustrative only)

1. Murder.
2. Manslaughter.
3. Kidnapping.
4. False imprisonment.

5. Rape.
6. Robbery.
7. Aggravated burglary.
8. Burglary.
9. Any offence under section 1 (defilement of girl under 15 years of age) and section 2 (defilement of girl under 17 years of age) of the Criminal Law Amendment Act, 1935.
10. An offence under section 3 of the Criminal Law (Sexual Offences) Act, 1993.
11. Any offence under section 3 (aggravated sexual assault) and section 4 (rape under section 4) of the Criminal Law (Rape) (Amendment) Act, 1990.
12. Any offence under the following provisions of the Explosive Substances Act, 1883 -
 - (a) section 2 (causing explosion likely to endanger life or damage property);
 - (b) section 3 (possession etc. of explosive substances); and
 - (c) section 4 (making or possessing explosives in suspicious circumstances).
13. Any offence under the following provisions of the Non-Fatal Offences Against the Person Act, 1997 -
 - (a) section 4 (causing serious harm);
 - (b) section 5 (threats to kill or cause serious harm);
 - (c) section 6 (syringe, etc., attacks);
 - (d) section 13 (endangerment); and
 - (e) section 15 (false imprisonment).
14. Any offence under section 15 of the Firearms Act, 1925 (possessing firearm or ammunition with intent to endanger life or cause serious injury to property).

Recommendation 5
Investigation of offences by prisoners

Draft provision

(1) A member of the Garda Síochána may arrest a prisoner within prison on the authority of a judge of the District Court who is satisfied on information supplied on oath by a member of the Garda Síochána not below the rank of superintendent that the conditions in subsection (2) are fulfilled.

(2) The conditions referred to in subsection (1) are -

(a) that there are reasonable grounds for suspecting that the prisoner committed an offence other than an offence in respect of which he or she is imprisoned;

(b) that the arrest of the prisoner is necessary for the proper investigation of the offence; and

(c) where the prisoner has previously been arrested for the same offence, whether prior to his or her imprisonment or under the provisions of this section, that further relevant information has since come to the knowledge of the Garda Síochána.

(3) A prisoner arrested on an authority given under this section shall be taken forthwith to a Garda station and shall, subject to the provisions of this section, be dealt with pursuant to section 4 of the Criminal Justice Act, 1984, save that subsections (4), (5) and (6) of that section and section 10 of that Act shall not apply.

(4) The detention of a prisoner by virtue of this section shall be determined forthwith where there are no longer reasonable grounds for suspecting that he or she has committed the offence in respect of which the arrest was authorised or for believing that his or her detention is necessary for the proper investigation of that offence.

(5) A prisoner arrested and detained by virtue of this section shall be deemed to be at all times in legal custody and, upon the determination of the detention, the member in charge of the Garda station where the prisoner is detained shall transfer the prisoner or cause him or her to be transferred forthwith back into the custody of the Governor of the prison where he or she was imprisoned prior to the arrest.

(6) This section shall not prejudice any power conferred by law apart from this section in relation to the arrest or transfer of prisoners.

(7) In this section -

"offence" means an arrestable offence as defined in section 2 of the Criminal Law Act, 1997;

"prison" means a place of custody administered by the Minister for Justice, Equality and Law Reform; and

"prisoner" means a person in prison on foot of a sentence of imprisonment, on committal awaiting trial, on remand, or otherwise.

Recommendation 6

Right to silence

In recognising the right to silence, the Supreme Court held that it may be qualified in order to maintain public peace and order. It is submitted that it could be qualified on compelling interest grounds, such as the detection of serious crime or the recovery of the proceeds of crime, not only by the suspect but by accomplices.

It is submitted, therefore, that the particular instances specified in sections 18 and 19 of the Criminal Justice Act 1984 may be broadened into a general principle by the introduction of a narrowly worded statute providing that a refusal or failure to answer relevant questions put by members of the Gardaí would entitle the Judge or Jury (as the case may be) in subsequent proceedings to draw such inferences as are appropriate.

The Steering Group, having regard to the particular complexity of this issue, including the difficulty of satisfactorily defining the term "relevant question", recognises the importance of an urgent solution which will be acceptable as part of a fair trial, and not amounting to self-incrimination as contemplated by the Irish Constitution, the European Convention on Human Rights and Fundamental Freedoms, and the International Covenant on Civil and Political Rights. The Group recommends that the issue be referred to an expert body for early resolution. Any further legislation should provide for adequate safeguards.

In the interim, the Steering Group recommends that the provisions of Section 7 of the Criminal Justice (Drug Trafficking) Act 1996 should extend to all serious offences, as defined earlier. This would mean that if any person charged with a serious offence fails, during questioning

by the Gardaí, to mention a fact which he/she later relies on at the trial, the Court can draw "such inferences from the failure as appear proper".

The Steering Group gave considerable attention to the issue of the right to silence and the potential which, in its view, the exercise of this right has for unreasonably restricting the capacity of the Garda Síochána to investigate crime, especially where evidence is peculiarly within the knowledge of the suspect. Set against this, the Steering Group acknowledged that this is a particularly complex issue which has to be considered in the context not only of the Constitution, but also of the European Convention on Human Rights and the International Covenant on Civil and Political Rights. The Steering Group emphasised that any change to the right to silence must not interfere with the right to a fair trial and must not amount to an obligation of self-incrimination.

Taking their interim recommendation first, the Steering Group recommended that the provision in section 7 of the Criminal Justice (Drug Trafficking) Act, 1996 should be extended to all serious offences. Section 7 provides that where, in a drug trafficking case, a defendant relies on a fact in his or her defence which he or she could reasonably have been expected to have mentioned on being questioned or charged, such adverse inference as appears proper may be drawn from the failure to mention it. In our view such an extension of section 7 would be worthwhile. It clearly accords with common sense and justice for an adverse inference, if proper in the circumstances, to be drawn from a failure to mention an exculpatory fact when it would have been natural to mention it and which is subsequently relied on at trial. 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. That is why the provision permits only such inferences as appear proper to be drawn, and provides that a jury is subject to the judge's directions on the matter. A further safeguard is that such an inference is corroborative only and cannot of itself support a conviction.

We can see no reason, therefore, given that such a provision currently applies to drug trafficking offences, and given the safeguards incorporated into it, why it should not be extended to all serious offences, and we set out below an outline of such a provision. It might be noted that, as with the drug trafficking provision, we propose that the new provision should not apply unless the suspect is told in ordinary language what the effect of failure to mention a fact might be. This has implications for the caution which will be administered to suspects.

The other half of this recommendation raises more complex issues. It recommends that section 18 and 19 of the Criminal Justice Act, 1984 should be broadened into a general provision permitting the drawing of adverse inferences from a refusal or failure to answer "relevant questions". This proposal differs substantially from the proposed extension of the drug trafficking provision in that it would apply to mere silence during questioning, whereas the drug trafficking provision applies to the positive assertion of a fact by the defence which was not mentioned when it reasonably could have been.

Before considering this proposal further, it is worthwhile first looking at sections 18 and 19 of the 1984 Act. These provide for adverse inferences to be drawn from a failure to explain certain suspicious circumstances. Section 18, briefly put, relates to a failure or refusal by an arrested person to account for marks or substances on his or her clothing, or objects in his or her possession, on being told by the arresting Garda of the belief that they are linked to the offence. Section 19, in summary, relates to a similar failure by an arrested person to account for his or her presence at the place and time of the offence on being told by the arresting Garda of the belief that his or her presence at that time is linked to the offence. The question, therefore, is whether and to what extent these provisions could be extended to other "relevant questions". The Steering Group did not attempt a definition of relevant questions, and indeed recognised the difficulty there would be in arriving at a definition.

In our view, the difficulty in extending sections 18 and 19 is more one of substance than of drafting. Sections 18 and 19 permit adverse inferences to be drawn from a

failure or refusal to explain suspicious circumstances. It is difficult to imagine what other suspicious circumstances there might be which are not, in one way or another, caught by the existing wording of the provisions. An extension of these provisions of any effect would therefore, it seems to us, necessarily mean a move from an obligation to account for suspicious circumstances towards a general obligation to account for certain matters (most probably an account of movements at the time of an offence) unrelated to suspicious circumstances. We think it wrong in principle that adverse inferences should be drawable from silence unrelated to suspicious circumstances and, as we feel that suspicious circumstances are adequately covered by the existing sections 18 and 19 of the 1984 Act, our conclusion is that there should be no change to these provisions.

Recommendation 6

Right to silence

Draft provision

(1) Where, 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 endeavouring to ascertain whether an offence had been committed, or by whom, 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 failure.

(2) Subsection (1) shall not have effect unless the accused was told in ordinary language when being questioned, charged or informed, as the case may be, what the effect of such failure might be.

(3) Nothing in this section 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 section, 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 section.

(4) This section shall not apply in relation to a failure to mention a fact if the failure occurred before the commencement of this section.

(5) This section applies to arrestable offences as defined in section 2 of the Criminal Law Act, 1997, other than drug trafficking offences as defined in section 3(1) of the Criminal Justice Act, 1994.

Recommendation 7

Identification parades

Suspects should be required to stand in an identification parade. The present procedure whereby a witness/victim is required to lay his or her hand on the person to be identified (which is not a legal requirement) should be abandoned and instead be entitled to identify the suspect from behind a one-way glass. Failure to co-operate will constitute an offence of comparative gravity. Because of the penalties that might be involved, sufficient safeguards should be provided.

The conduct of identification parades is governed by administrative procedure, rather than legislation. In a recent administrative change to identification parade procedure, the Garda Síochána removed the requirement on a witness to place his or her hand on the suspect. This part of the Steering Group's recommendation has, therefore, already been implemented.

In considering the other part of this recommendation, the nature and purpose of identification parades must be kept in mind. They are not directly analogous with other forms of evidence gathering, such as forensic examinations, and can be requested by a suspect as much as by the Gardaí. In addition, the nature of an identification parade, which requires the complete co-operation of every participant, leaves it peculiarly open to frustration by an unwilling participant.

The recommendation is that it should be an offence to refuse to participate in an identification parade, of comparative gravity to the offence under investigation. The Steering Group recognised the scale of penalties that this might involve, and recommended that sufficient safeguards should be provided.

We believe that there are serious difficulties with this recommendation. It contemplates a suspect in, say, a murder investigation being subject to a very heavy penalty for the offence of refusing to participate in an identification parade, even if

he or she were subsequently not convicted, or perhaps even shown to be innocent, of the main offence. To link the severity of punishment with an offence of which the suspect may not subsequently be convicted is in our view open to such serious objection that it is not sustainable. We would not in any event favour the creation of an offence of refusal or failure to take part in an identification parade. It would in our view, especially bearing in mind the nature of identification parades, weigh too heavily in the balance of individual rights and the common good.

It seems to us that the furthest one might go, although it would be far from free of difficulty, would be to provide for adverse inferences to be drawn, where proper, from the refusal or failure of an accused, without reasonable excuse, to take part in an identification parade. It is likely that there would be scope for considerable argument over the adequacy of the conduct of parades, with the arrangements in each contested case coming under close legal and judicial scrutiny. Any provision along these lines would need the most careful consideration and, if proceeded with, detailed statutory procedures for the conduct of parades, such as the recording of parades and a suspect's reason for his or her failure or refusal to participate.

It is in any event the case that, where a suspect refuses to participate in an identification parade, alternative methods of identification can be used, such as group identification or, in exceptional cases, dock identification (exceptional, because of the potential prejudice to the accused of being readily identified in court as the suspect).

Recommendation 8

Fingerprinting, Photographing Suspects and Forensic Evidence

Suspects should be required to permit fingerprinting, photographing and the taking of non-intimate and intimate body samples. The taking of specified intimate body samples should be carried out by a suitable professional, such as a doctor or dentist.

Refusal to co-operate should constitute an offence of comparative gravity. The present position in relation to inferences should also remain.

If the offence involved is of a very serious nature, failure of the suspect to co-operate should result in an immediate application to a District Judge where the Gardaí would have to justify their requirements. If the Court was satisfied that co-operation should be furnished, the Court should have the usual powers to enforce its own Order.

Samples, fingerprints and photographs should be retained so as to provide a proper investigatory data base which would be used in the investigation of serious crimes in the future. This provision should be subject to suitable safeguards.

Before dealing with the specific recommendations, we might first of all propose a related change in relation to the photographing of arrested persons. At present, Gardaí have the power to photograph persons who are detained, but not those who are arrested and released and dealt with by way of summons. We feel that it would be useful if Gardaí were permitted to photograph every person who is arrested, so as to have a reliable means of identification (not least for ensuring that the summons is served on the proper person). The same safeguards which apply to the photographing of detained persons could be applied to the proposed new power, and an outline of such a proposal is set out below.

Turning to the recommendations, it might be helpful if we were to give a brief outline of existing law on the taking of photographs, prints and forensic samples.

Section 6 of the Criminal Justice Act, 1984 provides for the taking of fingerprints, palmprints and photographs of persons detained under section 4 of that Act. Section 28 of the 1984 Act deals with taking fingerprints, palmprints and photographs of convicted persons or persons on probation. Section 2 of the Criminal Justice (Forensic Evidence) Act, 1990 deals with taking forensic samples from persons in Garda custody or in prison. The consent of the person concerned is not required in any of these sections, with the exception of certain forensic samples, generally known as intimate samples, provided for in the 1990 Act. These are blood, pubic hair, urine, saliva, a swab from a body orifice or a genital region, and a dental impression (forensic samples under the 1990 Act where consent is not required, generally known as non-intimate samples, are hair other than pubic hair, a nail, any material found under a nail, a swab from any part of the body other than a body orifice or a genital region, and a footprint or similar impression of any part of a person's body other than a part of his or her hand or mouth). It is an offence to obstruct a Garda in exercising a power to take a photograph, print or a non-intimate forensic sample. As regards those forensic samples where the consent of the suspect is required, the question of an offence clearly does not arise, but an adverse inference may be drawn from a refusal, without good cause, to give consent. Such an inference can corroborate other evidence but cannot on its own support a conviction.

Turning to the recommendations, and dealing first with the proposed requirement to permit the taking of photographs, prints and forensic samples, it is implicit in the legislation that a Garda can, with the exception of intimate forensic samples, proceed to take these without consent, but we feel that it would be useful to make clear that, where consent is not required, reasonable force may be used by a Garda if necessary. Of course, it would remain an offence to obstruct a Garda in the exercise of his or her powers in the matter. We would not favour the proposal that the penalty for such an offence ought to reflect the gravity of the offence under investigation, as the suspect might not be convicted of that offence, although we see no difficulty in increasing the available fine from £1,000 to £1,500, which we include

in our outline proposals below. In any event, the objective of obtaining a sample will essentially be addressed by our proposal to authorise the use of reasonable force.

We have reservations concerning the proposal that it should be an offence to refuse to permit the taking of an intimate sample. Such samples are of a very different character to non-intimate samples and we feel that different considerations apply. However, we believe that there is scope for significant change through the different mechanism of re-classifying saliva as a non-intimate sample (to which the existing offence and the proposed authorisation of reasonable force would then apply). We understand that current technology permits a complete DNA profile to be established from saliva.

As regards the period during which samples may be retained by the Gardaí, there are of course restrictions on this in the relevant legislation. Essentially, photographs, prints and forensic samples can be retained for up to six months after they are taken and must then be destroyed unless proceedings are taken against the suspect (and thereafter their retention or destruction depends on conviction or acquittal). There are balancing considerations to be taken into account here, principally the operational desirability of retention of samples set against what must be accepted as the principle that there can be no open-ended retention of identifiable samples from unconvicted suspects. On balance, we propose that the existing period of retention should be extended to twelve months, with provision for further retention on judicial authorisation.

Recommendation 8
Photographing of arrested persons

Draft provision

- (1) Where a member of the Garda Síochána arrests a person under any power conferred by law the member may photograph the person or cause him or her to be photographed.
- (2) The provisions of section 8 of the Criminal Justice Act, 1984 shall apply with the necessary modifications to photographs taken under this section.

Reasonable force in taking fingerprints etc.

Draft provision

A member of the Garda Síochána may use reasonable force, if necessary, in the exercise of any power conferred on him or her by sections 6 or 28 of the Criminal Justice Act, 1984 or section 2 of the Criminal Justice (Forensic Evidence) Act, 1990, except where the power may only be exercised with the consent of some person (other than a member of the Garda Síochána).

Increase in fine for obstructing Garda in the taking of fingerprints etc.

Draft provision

Section 6 of the Criminal Justice Act, 1984 is hereby amended by the substitution in subsection (4) of "£1,500" for "£1,000".

Section 2 of the Criminal Justice (Forensic Evidence) Act, 1990 is hereby amended by the substitution in subsection (9) of "£1,500" for "£1,000".

Re-classification of saliva

Draft provision

Section 2 of the Criminal Justice (Forensic Evidence) Act, 1990 is hereby amended by the substitution of the following paragraph for paragraph (b) of subsection (4):

"(b) in the case of a sample mentioned in subparagraph (i), (ii) or (iii) of paragraph (a) of subsection (1) of this section, or in paragraph (c) or (d) of the said subsection (1), the appropriate consent has been given in writing."

Period of retention of fingerprints etc.

Draft provision

Section 8 of the Criminal Justice Act, 1984 is hereby amended by the substitution of "twelve months" for "six months" in subsections (2) and (7).

Section 4 of the Criminal Justice (Forensic Evidence) Act, 1990 is hereby amended by the substitution of "twelve months" for "six months" in subsection (2).

Recommendation 9

Station bail

Legislation should be enacted to provide that suspects may be released from Garda custody for a defined period of time to allow proper investigation of the crime and/or processing of forensic evidence. The suspect would be required to return to custody at a future time for further questioning. This process would be subject to a maximum time frame.

In considering the recommendation on powers of detention, we had regard to this related recommendation on station bail, as clearly a capacity on the part of the Garda Síochána to suspend detention is an important consideration in determining the period of detention.

We agree that the power to suspend detention would be a useful addition to the capacity of the Garda Síochána to investigate crime, while not adversely affecting, in any significant way, the rights of suspects. Indeed, it could in many cases as much improve the position of suspects as be of assistance to the Gardaí. Neither the Gardaí nor a suspect benefit from a situation where the suspect is kept in detention awaiting the results of a forensic examination or while an alibi is checked.

It would be important, we believe, having regard for the rights of the individual, for limits to be placed on the number and duration of suspensions. We suggest, in the outline of our proposal below, that there should be a maximum of two suspensions in a period of detention and that each suspension should last for no more than six months (we propose this period particularly because of the length of time we understand it can take to obtain a DNA analysis of material). We also propose that the power of suspension should apply only to the proposed new power of 48 hour detention.

Recommendation 9
Suspension of detention

Draft provision

(1) Where a person is detained under section [], the member in charge of the Garda Síochána station may at any time suspend the detention and release the person subject to a duty to return to detention in the station at such time as the member may appoint.

(2) A member who appoints a time under subsection (1) shall give, or cause to be given, either on release or subsequently, written notification of that time to the person concerned, and any such subsequent notification may be served personally on the person or by registered prepaid post.

(3) A copy of a notification given under subsection (2) shall be attached to and form part of the custody record (within the meaning of the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987) in respect of the person concerned.

(4) The time of the giving of a notification under subsection (2) and the time specified therein as the time appointed for the return to detention in the station by the person concerned shall be entered in the records of the Garda Síochána station without delay.

(5) A time appointed by a member under subsection (1) shall not be more than 6 months from the time of the release of the person concerned.

(6) A period of detention under section [] may be suspended twice, but no more than twice, under subsection (1).

(7) A person who fails, without reasonable excuse, to attend a Garda Síochána station as required under subsection (1) shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500 or to imprisonment not exceeding 12 months or both.

(8) If a member of the Garda Síochána reasonably suspects that a person has committed, or is about to commit, an offence under this section, the member may arrest that person without warrant.

(9) The time during which a person is released under subsection (1), and any additional time during which a person remains at large in contravention of a requirement under subsection (1), shall be excluded in reckoning a period of detention permitted by section [].

Recommendation 10

District Court Jurisdiction

The Steering Group notes that the Criminal Law Act, when enacted, will abolish the distinction between felonies and misdemeanours and that this will go some way to resolving present difficulties. Apart from this, however, the Group recommends that the decision as to whether a case should be tried summarily or on indictment should be a matter for the D.P.P., subject to the overriding constitutional provision that only minor offences can be tried summarily.

The Criminal Law Act, 1997 is of course now in force and has abolished the distinction between felonies and misdemeanours. As regards providing that the Director of Public Prosecutions should be enabled to choose the form of trial for any offence, subject to the Constitutional limitation noted by the Steering Group, we note that this has for some considerable time been a standard feature of new statutory offences, i.e. modern offences in general may be tried either summarily or on indictment at the election of the Director of Public Prosecutions. The process of replacing older statutes with modern legislation, which is a feature of Government legislative programmes, in effect represents a continuous implementation of this recommendation and we do not feel that any further proposal is needed.

Recommendation 11

Delay and Trial Procedure

The present system of arranging for the trial of persons suspected of serious criminal offences should be streamlined while preserving a procedure whereby any person who considers there is not sufficient evidence to warrant trial on indictment should be able to have that issue decided by a District Judge similar to the present consideration of "sufficient case to answer".

The accused should be obliged to furnish a list of witnesses intended to be called at the trial of the action and outline the issues of defence.

The procedure whereby written evidence can be read at a trial pursuant to Section 21 Criminal Justice Act, 1984 should be extended irrespective of the consent of the accused where the Court is satisfied that it would not be against the interest of justice to do so.

Recommendation 11 raises 3 issues: streamlining trial procedures; requiring an accused to furnish a list of witnesses and to outline issues of defence; and using written statements under section 21 of the Criminal Justice Act, 1984.

Regarding the streamlining of trial procedures and the matter of delay, to which it relates, our view was that the Criminal Justice (No. 2) Bill, 1997, which is currently before the Dáil, deals adequately with the matter. The Bill provides for the abolition of the preliminary examination procedure which had been seen as contributing to delays in bringing cases to trial. The Bill also provides a procedure whereby, after a person has been sent forward for trial and after the book of evidence has been served, he or she may make an application to the trial court for the dismissal of the charge. We feel that the Bill thus represents an adequate response to this aspect of recommendation 11.

The second issue, namely the proposal to oblige a defendant to furnish details of his or her defence in advance of trial, raises important and complex issues. Before dealing with the specific aspects of the recommendation, we might comment in general terms on the question of advance disclosure. It seems to us desirable in principle, subject of course to any constitutional limitations there might be, that proper preparation is made for every trial and that as many issues as possible are dealt with in advance by a judge. We particularly have in mind the determination of the admissibility of evidence at a pre-trial hearing, so as to avoid as far as possible the occurrence of trials within trials, but other issues, such as advance notifications, could also be dealt with by this mechanism.

This is not, of course, a new idea. Detailed recommendations on this were made in the 1992 report of the Advisory Committee on Fraud which could be applied to trials on indictment in general. It may be that such a system of pre-trial hearings could first be established by the courts on a non-statutory basis and we would fully support such a development. (Indeed, we understand that some consideration has already been given to a trial scheme).

Any such procedures, to be effective, would need to be backed up by appropriate sanctions against a party to a trial whose actions, in disregard of pre-trial obligations, cause unnecessary prolongation of the trial. It seems to us that, as a general principle, relevant admissible evidence could not safely be excluded from a trial because of a failure to observe requirements of advance notification. However, the type of sanction which could be considered might relate to costs, so that a party could be penalised by having costs disallowed for the time which the court considered had been taken up unnecessarily on matters which should have been decided before the trial (this could involve amending the law governing the scheme for criminal legal aid).

Turning to the specific recommendations, we have reservations on the proposal to require an accused to outline issues of defence in advance of a trial. We are concerned that this might shift the balance too far against the accused. However,

different considerations apply to the proposal to require an accused to give advance notice of witnesses whom he or she proposes to call at the trial. Such a requirement would not, in our view, be altogether dissimilar from the requirement in section 20 of the Criminal Justice Act, 1984 on giving notice of alibis, and we see no reason in principle why this could not be provided for. In circumstances where the accused failed to give prior notice, such witnesses could then only be called with the leave of the court.

The third issue raised by this recommendation is that related to the use of written statements under section 21 of the Criminal Justice Act, 1984. This allows the prosecution or defence to submit a written statement and for it to be admissible in evidence, subject to the agreement of the other party. The proposal here is to do away with the need for consent where the court is satisfied that admitting the statement would not be against the interests of justice. While we would fully support the principle of improving the efficiency of the trial process, it seems to us that this particular proposal sits uneasily with the general principle that a defendant ought to be able to challenge any evidence put forward against him or her, and for that reason we would not favour it.

Recommendation 12

Offences of Dishonesty

The thrust of the relevant proposals of the Law Reform Commission and the Advisory Committee on Fraud should be enacted without delay.

Section 3 of the Larceny Act, 1990 (handling stolen property) should be strengthened to as to place on an accused person who is in possession of stolen property in circumstances where there is reason for him to know or believe that the property is stolen, the onus of establishing the contrary.

We note that this recommendation is being dealt with in the context of the preparation of the Criminal Justice (Fraud Offences) Bill. The technical proposal relating to the onus of proof in a case of handling stolen property can be considered in that context, and no specific proposal by us is called for.

Recommendation 13

On the Spot Fines

There should be an extension of on the spot fines to cover all road traffic summary offences where there is no appreciable degree of moral culpability or controversy as to the offences committed, and where a small or moderate fixed penalty would be appropriate.

Responsibility for on the spot fines is a matter for the Department of the Environment and Local Government and we wrote to them seeking their views on the recommendation. In particular we stated that we would be anxious to ascertain what measures would be necessary to give effect to recommendation 13, whether any particular difficulties would be likely to arise and any suggestions on how these could be overcome.

A list of road traffic offences which the Garda authorities considered would be suited to the issue of on the spot fines (see Appendix II) was also forwarded to the Department of the Environment and Local Government.

Their reply pointed out that for an on the spot fines system to be feasible and successful a number of criteria should be met. These were that the offence must be obvious, it must be a minor one and the fine must be at a level which would encourage payment but not so low as to undermine the offence. They also stated that they had no objection in principle to the extension of the system of on the spot fines to other minor road traffic offences. This would require amendment of the Road Traffic Act, 1961 (Section 103) (Offences) Regulations, 1997 which, they indicated, should not give rise to any particular difficulty where that Department is concerned.

A copy of the reply from the Department of the Environment and Local Government is at Appendix III.

Further safeguards

The Steering Group was conscious throughout its recommendations on legislative change of the need to balance additional powers with appropriate safeguards. We have, course, been careful to include in our proposals any specific safeguards which we thought necessary, and to that extent our proposals, individually and in their totality, are designed to respect the critical balance, referred to in our terms of reference, between the rights of the individual and the common good.

We believe, nevertheless, that positive consideration should be given to the introduction of video-recording of interviews in Garda custody or, to the extent that video-recording is not possible or in certain cases desirable, the establishment of a right of a suspect, subject to any necessary limitations, to have his or her solicitor present during questioning (as distinct from the existing right to consult a solicitor). This would be consistent with recommendations of the report of the Committee To Recommend Certain Safeguards For Persons In Custody And For Members Of An Garda Síochána (the O'Briain report), the report of the Committee To Enquire Into Certain Aspects Of Criminal Procedure, and the report of the Advisory Committee on Fraud. We understand that trials of video-recording have been under way for some time and we would hope that, subject to the outcome of those trials, facilities for video-recording could quickly be made widely available.

Appendix I

Membership of the Expert Group

Mr. Eamon Leahy S.C., Chairman

Mr. Richard Barrett, Office of the Attorney General

Deputy Commissioner Noel Conroy, Garda Síochána

Ms. Mary Devins, Solicitor

Mr. Michael Flahive, Department of Justice, Equality and Law Reform

Mr. Simon O'Leary, Deputy Director of Public Prosecutions

Mr. Martin Power, Department of Justice, Equality and Law Reform, Secretary to the Expert Group

Mr. Patrick McGrath of the Attorney General's Office attended a number of meetings of the Expert Group and Assistant Commissioner Pat O'Toole attended one meeting.

Appendix II

**Road traffic offences which the Garda
authorities consider would be suited
to the issue of on the spot fines**

ITEM 13 Road Traffic offences take up a great amount of Garda and court time. Hundreds of thousands of offences are dealt with annually which have the effect of deflecting Gardaí from more pressing crime duties.

The following is a list of Road Traffic related offences for which it is recommended that Fine on the Spot Notices be issued by the Gardaí:-

1. Breaches of the law relating to the wearing of seat belts.
2. Crashing Red/Amber traffic lights.
3. Failing to comply with yield right of way or stop signs.
4. Breaches of the law relating to crossing continuous single/double white lines.
5. Excessively worn tyres.
6. Box Junctions
7. Failure to carry Driving Licence

Note:

This offence is provided for by Sec. 25 Road Traffic Act, 1994 - a Commencement Order has not yet been introduced to bring it into operation

Appendix III

**Reply received from the
Department of the Environment
and Local Government
concerning on the spot fines**

25 June 1998

Mr. Martin Power
Department of Justice,
Equality and Law Reform
72-76 St. Stephen's Green
Dublin 2.

Extension of On-the-Spot Fines

Dear Martin,

I am directed by the Minister for the Environment and Local Government to refer to your letters of 8 and 27 May 1998 seeking this Department's views on a recommendation of the Steering Group on the Efficiency and Effectiveness of the Garda Síochána regarding the possible extension of the road traffic on-the-spot fine system.

First I should say that this Department is of the view that in order for an on-the-spot fine system to be feasible and successful, it is critical that the following criteria are met:

The offence must be obvious.

The offence must be a minor one.

The amount of the fixed penalty must be pitched at a level which would encourage payment and at the same time not be so low as to undermine the offence.

In addition to the above it must be seen that, in the event of non-payment of the on-the-spot fine, it will be virtually guaranteed that court proceedings will follow.

On-the-spot fine notices are issued under two separate enactments:

1. Section 103 of the Road Traffic Act, 1961, under which the system may be applied by the Garda Síochána on a national basis and by traffic wardens appointed by the Garda Commissioner (Dublin and Killarney).

2. The Local Authorities (Traffic Wardens) Act, 1975 under which the system is applied by traffic wardens employed by local authorities.

/....

Regulations made by the Minister for the Environment and Local Government under the above Acts prescribe the offences to which each of the two systems applies, the amount of the fixed penalties applying to each offence, and the form of notice to be used.

The system is currently applied to the following offences:

- Various parking offences, including clearways and bus lanes.
- Non-display of a valid tax disc.
- Overloading a vehicle.
- Exceeding speed limits.

This Department has no objection in principle to the extension of the system to other minor road traffic offences. The list of additional offences which the Gardaí consider to be appropriate for the on-the-spot fine system is noted and it is considered that the offences listed at 1 to 6 of the list should be included in the system. We would stress, however, that the system, in so far as it would apply to these offences, should be operated by the Gardaí only. The failure to carry a driving licence is not applicable, however, as section 25 of the Road Traffic Act, 1994 which provides for this offence has not yet been commenced and there are no immediate plans to do so.

Other minor traffic offences might also be considered for inclusion, e.g. breaches of No Entry signs and various mandatory and prohibitory signs such as those indicating direction to be taken or not taken at junctions.

The addition of new offences to the on-the-spot fine system would require amendments to the Road Traffic Act 1961 (Section 103) (Offences) Regulations, 1997. This should not, however, give rise to any particular difficulty where this Department is concerned.

Yours sincerely,

John Doyle
Assistant Principal
Traffic Control Section
Department of the Environment