

BALANCE IN THE CRIMINAL LAW REVIEW GROUP

THE RIGHT TO SILENCE

INTERIM REPORT

JANUARY 31st, 2007

Introduction

Following a speech delivered in Limerick on October 20, 2006 by the Tánaiste and Minister for Justice, Equality and Law Reform, Michael McDowell TD, the present Review Group was established on November 2, 2006. The Review Group consists of the following persons:

Dr. Gerard Hogan SC, Law School, Trinity College, Dublin (Chairman)

Barry Donoghue, Deputy Director of Public Prosecutions

Richard Humphreys, Barrister-at-Law

Tony McDermottroe, Assistant Secretary, Criminal Law Reform and

Human Rights Divisions, Department of Justice, Equality and Law Reform

Professor David Gwynn Morgan, Faculty of Law, University College, Cork

Caitlín Ní Fhlaitheartaigh, Advisory Counsel, Office of the Attorney General

Ken O'Leary, Assistant Secretary, Crime, Mutual Assistance and Extradition Division, Department of Justice, Equality and Law Reform

Nora Owen, Former Minister for Justice (1994-1997), member of the Commission for the Victims of Crime.

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.

The Review Group was also given a general discretion to report on any other related topics which seemed relevant to the general issues of criminal procedure and the law of evidence.

The Review Group would first wish to express its heartfelt thanks to the three members of its Secretariat: Caroline Davin-Power, Executive Officer, Criminal Law Reform, Ann Barry, Administrative Officer, Criminal Law Reform and Peter Jones, Assistant Principal, Criminal Law Reform. All three responded promptly to our requests for documentation and research and organized the meetings of the Group which were invariably held at short notice and out of ordinary office hours.

The Review Group was asked to report by March 1, 2007. To this end it placed advertisements in the national newspapers asking for submissions from the public by January 5, 2007. The Tánaiste subsequently asked the Review Group to produce an interim report on the right to silence by January 31, 2007.¹

Given the very severe time constraints imposed on us, it has simply not proved possible for the Review Group to meet with members of the public but the Group has received 21 written submissions which it has carefully considered. The Review Group nevertheless has either met or has agreed

¹ 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").

to meet representatives of victims' groups, members of the judiciary, the Director of Public Prosecutions, the Garda Commissioner, defence solicitors nominated by the Law Society, members of the bar, and journalists specializing in this area.

This consultation process is not as yet complete and accordingly the present interim report contains only the provisional thinking of the Review Group subject to such further views as are put forward in the consultation process. The Review Group intends to issue a final report on the right to silence and the other issues which it is considering by 1 March 2007 and in the circumstances it should be made clear that the provisional views contained in this interim report may be modified in the course of preparing the final 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 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.² 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

² 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."

Garda custody.³ One practical effect of this is that if a suspect either 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.”⁴ 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.”⁵ Third, the prosecution are expressly forbidden by statute from commenting on the fact that the accused has exercised his right to remain silent.⁶

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:

“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.”⁷

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.

³ *People v. Finnerty* [1999] 4 IR 364.

⁴ *Report of the (UK) Criminal Law Revisions Committee, Eleventh Report, Evidence (General)* Cmnd. 4991 (1972) (“the UK Eleventh Report”) at para. 28.

⁵ *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].”

⁶ Criminal Justice (Evidence) Act 1924, s. 1

⁷ *Treatise on Evidence* at 241.

First, it may be that an accused is “shocked by the accusation and unable at first to remember some fact which would clear him.”⁸ 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 which would have exculpated our conduct. As the *Report of Committee to Review the Offences against the State Acts 1939-1998*⁹ 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.”¹⁰

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 inculpate 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 (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*¹¹ that it would be

⁸ 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.”

⁹ May 2002.

¹⁰ At page 210.

¹¹ (1996) 23 EHRR 29.

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 a different days - up to seventy two hours in the case of detention under section 30 of the Offences against the State Act 1939¹² - 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.

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."¹³

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 Gardai 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 theory) for the sole purpose of charging the suspect and bringing him directly before a court and not for the purposes of questioning.¹⁴

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

¹² Provided, of course, that a District Judge has authorised the third day's detention.

¹³ McGrath, *Evidence* (Dublin, 2005) at 628.

¹⁴ *People v. Walsh* [1980] IR 294.

facto detention. In *The People v. Finnerty*¹⁵ 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....

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 Gardai 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 Gardai 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.”¹⁶

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

¹⁵ [1999] 4 IR 364.

¹⁶ [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.”

right to liberty.¹⁷ 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.¹⁸ 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.¹⁹

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 hours²⁰ 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.

Why are such detention periods necessary? While one reason is to give the Gardai the opportunity to eliminate particular suspects and check out alibis etc., the principal reason is that the Gardai 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 solicitors²¹ or visits from family members. In an increasing number of cases involving the detention of non-nationals, it is also necessary for the Gardai to secure the services

¹⁷ *People v. McLoughlin* [1979] IR 85; *People v. Coffey* [1987] ILRM 727.

¹⁸ See, e.g., *People v. Howley* [1989] ILRM 629.

¹⁹ 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.

²⁰ Or 32 hours if a rest period is availed of by the detained person.

²¹ 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 Gardai 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.”

of an interpreter. All of this serves to reduce the time available to the Gardai 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.

The Judges' Rules

By virtue of Rules 2, 3, 4 and 5 of the Judges' Rules²² 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 accused²³ and to ensure in "the public interest that the law should be observed even in the investigation of crime."²⁴ 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*²⁵:

"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."²⁶

While it may be that the test in *Farrell* has not always been followed in practice in every subsequent case²⁷, serious breaches of the Rules are regarded with judicial disfavour.

²² See generally, McGrath, *Evidence* (Dublin, 2005) at 411-423.

²³ *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."

²⁴ *The People v. O'Brien* [1965] IR 142 at 160, per Kingsmill Moore J.

²⁵ [1978] IR 13.

²⁶ [1978] IR 13 at 21,

²⁷ See the comments of McGrath, *Evidence* at 413.

The origin of the Judges' Rules was explained by Walsh J. in *The People v. Cummins*²⁸:

"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*.²⁹ 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 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."³⁰

It may be somewhat anomalous that what amounts to the code of conduct for the questioning of suspects by members of the Gardai 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 Gardai 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.

²⁸ [1972] IR 312.

²⁹ [1918] 1 KB 531.

³⁰ [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 Gardai, 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."³¹ If this is so, then as Cory J. said in *R. v. Chambers*³²:

"...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 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."³³

This point was also tellingly made by the Supreme Court in *People v. Finnerty*³⁴ 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."³⁵

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."³⁶ The 11th Report also identified other serious objections:

³¹ McGrath, *Evidence* at 656.

³² [1990] 2 SCR 1293.

³³ [1990] 2 SCR 1293 at 1316.

³⁴ [1999] 4 IR 364.

³⁵ [1999] 4 IR 364 at 379.

³⁶ Para. 43.

“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 excuse for keeping back a false story until it becomes difficult to expose its falsity.”³⁷

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 1996³⁸ and section 2 and section 5 of the Offences against the State (Amendment) Act 1998.³⁹

³⁷ Para. 43.

³⁸ 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.”

³⁹ 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 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)):

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*⁴⁰ 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 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

"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."

⁴⁰ [1996] 1 IR 580.

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."⁴¹

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.⁴²

Heaney was subsequently applied by the Supreme Court in *Rock v. Ireland*⁴³, 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 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:

⁴¹ [1996] 1 IR 580 at 589-590.

⁴² 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."

⁴³ [1997] 3 IR 484.

“...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.”⁴⁴

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.”⁴⁵ Against this background the Court concluded that the legislation in question did not disproportionately interfere with the right to silence.

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*⁴⁶ 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

⁴⁴ [1997] 3 IR 484 at 497-498.

⁴⁵ [1997] 3 IR 484 at 501.

⁴⁶ (1996) 23 EHRR 313.

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”⁴⁷, 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 does not prevent their later use in criminal proceedings from constituting an infringement of his rights.”⁴⁸

Just as importantly, perhaps, a few months before *Saunders* that Court had also held in *Murray v. United Kingdom*⁴⁹ 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 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.

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

⁴⁷ (1996) 23 EHRR 313 at 337

⁴⁸ (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.

⁴⁹ (1996) 22 EHRR 29.

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.”⁵⁰

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 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.”⁵¹

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.⁵² Nor were the inferences unfairly or unreasonably drawn:

⁵⁰ (1996) 22 EHRR 29 at 60.

⁵¹ (1996) 22 EHRR 29 at 60-81.

⁵² 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.”

"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 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."⁵³

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:

"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

⁵³ (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.

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.”⁵⁴

The potential implications for this jurisdiction of this important decision are diminished somewhat by reason of the fact that reasonable access to a solicitor during police custody is constitutionally guaranteed⁵⁵ and this right is, in any event, protected by statute.⁵⁶ 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.*⁵⁷ 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:

“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.”⁵⁸

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

⁵⁴ (1996) 22 EHRR 29 at 67. See also *Averill v. United Kingdom* (2001) 31 EHRR 839.

⁵⁵ See, e.g., *The People (Director of Public Prosecutions) v. Healy* [1990] 2 IR 73.

⁵⁶ Criminal Justice Act 1984, s.5.

⁵⁷ [1999] 1 IR 145.

⁵⁸ [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.

answers were inadmissible in a subsequent criminal prosecutions, 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*⁵⁹ 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*⁶⁰ 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-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 Gardai 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."⁶¹

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.

⁵⁹ [2002] 2 IR 60.

⁶⁰ [1999] 4 IR 364.

⁶¹ [1999] 4 IR 364 at 380.

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 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.”⁶²

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 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

⁶² McGrath, *Evidence*, at 108.

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."⁶³

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

⁶³ [1999] 4 IR 364 at 373-374.

information so given shall not be used in evidence against him in any other proceedings.⁶⁴ 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*.⁶⁵ 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:

“(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

⁶⁴ 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.

⁶⁵ 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.

(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.”⁶⁶

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.

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

⁶⁶ 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.”

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.”⁶⁷

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.

⁶⁷ A virtually identical provision is contained in the Criminal Justice (Drug Trafficking) Act 1996, s 7.

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.

In the case of section 2, the failure⁶⁸ to answer material questions⁶⁹ can in and of itself be regarded as corroboration, although an accused shall not be convicted solely by reason of the failure to answer.⁷⁰ 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 would have been the case in *Finnerty* - to negating a defence advanced by the accused.⁷¹

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 her 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*.⁷² In this case quantities of heroin were found in the boot of the accused's car. In addition to the usual caution, Gardai 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 Criminal Appeal quashed his conviction on a number of grounds, among them that the prosecution in opening had sought to lead evidence as to

⁶⁸ Which includes a false or misleading answer: see section 2(4)(b).

⁶⁹ 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).

⁷⁰ Section 2(1).

⁷¹ 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.

⁷² [2004] 4 IR 223.

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."⁷³

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*⁷⁴ 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

⁷³ [2004] 4 IR 223 at 238-239.

⁷⁴ (2001) 33 EHRR 334.

statement being later used in evidence against them in subsequent proceedings. But 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 point⁷⁵, 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 court⁷⁶ but does not expressly authorize or encourage such comment either, and in practice 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."⁷⁷

⁷⁵ See *Report of the Committee to Review the Offences against the State Acts 1939-1998* (Dublin, 2002) at 203-204.

⁷⁶ 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."

⁷⁷ *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 Gardai he was cautioned and said nothing. The Court of Criminal Appeal, per Maguire

Contemporary practice is illustrated by two subsequent decisions of the Court of Criminal Appeal, namely, *The People v. Coddington*⁷⁸ and *The People v. MK*.⁷⁹ 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 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:

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 Gardai if the accused was, in fact, innocent of the charge.

⁷⁸ Court of Criminal Appeal, May 31, 2001.

⁷⁹ [2005] IECCA 93.

“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.”

Time did not permit the Review Group to give full consideration to the suggestion that the 1924 Act be amended so as to permit such comment by prosecutors and expressly to authorize such comment in the case of trial judges.

Time has not permitted the Review Group to reach a final conclusion on this issue. While the Review Group intends to return to this issue when presenting its final report, it suffices for the present purposes if the arguments for and against change.

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 indictment⁸⁰ "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 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."⁸¹ But this state of shock would hardly continue through the months leading up to the trial. The second reason sometimes adduced is that

⁸⁰ With the exception of prosecutions before the Special Criminal Court.

⁸¹ *UK 11th Report*, para. 35.

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 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 the any new rule in this area would not apply where it appears to the court that "the physical or mental condition of the accused make sit 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 category⁸². 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 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.

⁸² This matter is considered separately by the Review Group.

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 1997⁸³ 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 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."⁸⁴ Many of the submissions to the Review Group nevertheless made the point that this requirement was unduly burdensome on the Gardai. 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 Gardai 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 Gardai 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.

Of course, the recording of the interviewing of suspects has greatly improved matters. 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 Gardai 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

⁸³ SI No. 74 of 1997.

⁸⁴ *People v. Towson* [1978] ILRM 122 at 126 per O'Higgins CJ.

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 Report⁸⁵ in some depth and wishes to consider the Committee's deliberations before making any recommendation.

There are, of course, also argument 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 and to say that we will seek to return to this issue in our final report.

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, 1997⁸⁶ 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 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 the 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 Gardai. There is some – admittedly anecdotal – evidence to suggest that this sort of abuse may be widespread. The Review Group provisionally 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.

⁸⁵ September 2004.

⁸⁶ SI No. 74 of 1997.

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.⁸⁷ 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 prosecution⁸⁸ 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.⁸⁹

⁸⁷ Criminal Justice (Evidence) Act 1924, s. 1(a).

⁸⁸ See Walsh, *Criminal Procedure*, at 912.

⁸⁹ Criminal Justice (Evidence) Act 1924, s. 1(b).

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.

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.

Provisional Recommendations

The Review Group has considered a number of options for change and sets out below a summary of our analysis and provisional recommendations. It has decided to leave over until its final report the question of amending the law and existing practice so as to permit comment by the prosecution and the trial judge on the fact that the accused has not given evidence at this trial.

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 provisionally 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

The Review Group proposes to return to this issue in its final report.

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 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 Gardai 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 provisionally recommend 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 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 provisionally 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 in the interview, and where it emerges for the first time in the trial.

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.”⁹⁰

⁹⁰ 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

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 provisionally 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 which the Review Group has yet fully to consider including disclosure of the defence case, review of the Judges' Rules, the manner in which interviews are recorded, and access to videotapes of interviews.

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 provisional 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.⁹¹

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 "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.

⁹¹ See *Report of the Expert Group to Consider Changes in the Criminal Law*, Recommendation 6.

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

Another option which time has not permitted the Review Group to consider fully is that the prosecution should be allowed to adduce video tape evidence of the accused's failure to answer questions while in Garda custody. It suffices to say for present purposes that 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 he refused to answer the questions posed.

While the Group has not arrived at a concluded view of this topic, it is clear from the analysis elsewhere in this Interim Report that such a proposal would, in several respects, be problematic. The Review Group intends to return to this matter when preparing its final report.

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.

Accordingly the Review Group provisionally recommends these changes.

The Review Group attaches an Annex setting out draft heads of the legislative changes which we recommend.

Other provisional recommendations

Subject to further consideration in our final report, we are provisionally of the following view:

A. The Review Group provisionally recommends that the existing Judges' Rules be overhauled in the light of modern conditions. Ideally, this would be done by legislation which would set down general parameters and provide that details (such as, for example, the form of caution) would be subsequently prescribed by regulations made by the Minister for Justice, Equality and Law Reform. The draft heads attached reflect this approach to the extent that they provide for the form of caution to be so prescribed.

B. The Group would wish to see a situation develop in which digitalised transcripts of the interviews were available to Gardai, 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. On balance, the benefits of such an approach probably outweigh the disadvantages. However, this issue requires further consideration by the Review Group.

C. The Review Group suggests 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, of course, entail an amendment of the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997. While this would not entirely eliminate the potential for abuse, it might help to curb it.

APPENDIX TO INTERIM REPORT
DRAFT HEADS OF PROVISIONS RECOMMENDED
IN PROVISIONAL RECOMMENDATION

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 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 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.

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.

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.
