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EmpRiSe
IRELAND

The Right to Silence and Related Rights in Pre-Trial Suspects' Interrogations in the EU: Legal and Empirical Study and Promoting Best Practice - Ireland

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1. Executive Summary

1.1 The EmpRiSe Project

The EmpRiSe Project is an EU-funded study, examining the law and practice relating to the right to silence during suspect interrogations at the investigative stage of the criminal justice process. Little is known about the exercise of the right to silence in the pre-trial phase of criminal proceedings – for instance, what influences suspects' decisions to remain silent or otherwise, how do legal professionals form their advice in relation to silence and are there any practical consequences of exercising one's right to silence?

By comparing the different processes and issues in four European jurisdictions (Belgium, Ireland, Italy and the Netherlands), the EmpRiSe Project hopes to identify good practice in relation to safeguarding the right to silence in the pre-trial phase of criminal proceedings. A review of the law on the right to silence has been carried out in each jurisdiction, followed by qualitative empirical research that used interviews and focus groups to unpick the perceptions held by professionals working within the criminal process in relation to the right to silence. This has facilitated the development of recommendations that will improve the practice of suspect interviewing and decision-making in the criminal justice system.

This report focuses on the research findings in the Irish context. Legal analysis of the relevant legislation and case law that applied in Ireland was conducted. The empirical phase of the research in Ireland consisted of 2 focus groups with 19 criminal defence solicitors and interviews with 10 barristers, 11 staff from the Office of the Director of Public Prosecutions, 4 judges (covering the Circuit Criminal Court, the Central Criminal Court and the Special Criminal Court), and 6 recently retired members of An Garda Síochána (AGS).

Through these focus groups and interviews with 50 professional actors across various roles within the Irish criminal process this study has garnered previously unrecorded insights into the operation of the right to silence and the perceptions of those who frequently encounter it within their roles.

1.2 Background

The pre-trial landscape of criminal proceedings in Ireland has undergone significant changes over the past four decades, since the introduction of arrest for the purposes of detention and questioning. Garda powers and suspect rights have been expanded and contracted in various ways over the course of that time, and different iterations of procedural safeguards have come and gone also. Garda interviews have been audio-visually recorded since 1999 and since 2014 solicitors have been permitted to attend garda interviews.

The right to silence is both a constitutional right and a right protected under the European Convention on Human Rights (ECHR), and yet it is also a controversial right. Legislative provisions which allow adverse inferences to be drawn against individuals who remain silent in certain circumstances represent significant curtailments of the right to silence in Ireland.

In 2007, a number of safeguards were inserted into the adverse inference legislative provisions. These were aimed at reflecting both constitutional and ECHR jurisprudence on the right to silence/privilege against self-incrimination, and seem to ultimately have had the effect of promoting usage of the inference provisions by providing a more solid basis for their operation.

A further recent, yet underexplored development in the context of the right to silence is the roll out of the Garda Síochána Interview Model. This was developed in 2008, but not operationalised until 2014. This involved a complete shift in how interviews are conducted, moving from a process based on seeking confessions, to an information-gathering approach. The current research, the first of its kind to examine the reality of the operation of the right to silence in garda interviews, is set against this backdrop. It provides a snapshot of contemporary practice, as well as grounding recommendations for improvement in ensuring the protection of suspect rights in the criminal process.

1.3 Research Findings: Legislation

1.3.1 The Right to Silence in Irish Law

Under the Constitution of Ireland, the right to silence is both a corollary of the right to freedom of expression and a constituent element of the right to fair trial. Therefore, a statement which is obtained under the compulsion of potential criminal sanction is likely to be deemed involuntary and inadmissible at trial. The Irish courts have increasingly recognised the importance of police custody as a part of the overall trial process, and seek to insist on fairness therein. The rules governing police interviews and custody are contained in European Union law, domestic primary and secondary legislation, as well as case law. Relevant issues have also been canvassed before the European Court of Human Rights, and the right to silence is protected within the Art 6 ECHR right to a fair trial.

This study confirmed that some of the rules and practices relating to police interviews in Ireland are in need of reform. In particular, the Judges' Rules are antiquated and in need of modernisation. The requirement that statements be taken down in writing is unnecessary, given that interviews are now audio-visually recorded. Moreover, this study identified that the contradiction between the traditional caution issued and the explanation of adverse inference provisions is confusing and inaccurate. In this regard, we recommend that the Judges' Rules be repealed and replaced with legislation, and that the Minister make regulations providing for two separate cautions: one to be given at arrest and at the beginning of most interviews, and the second at the beginning of inference interviews.

1.3.2 Limits on the Right to Silence

This study reviewed multiple offences on the statute book that criminalise the failure to provide certain information. While a person may be compelled to give information for fear of prosecution, such information cannot be used for the purpose of evidence against them in a trial for another offence. In 2001, the European Court of Human Rights (ECtHR) found that one such provision, section 52 of the Offences Against the State Act 1939, was contrary to the European Convention on Human Rights because it "destroyed the very essence of [the accuseds'] privilege against self-incrimination and their right to remain silent."[1] This provision was never repealed.

The legislature has largely moved away from criminalising failures to provide information, and towards providing for the drawing of evidential adverse inferences from silence in certain circumstances. While these were initially introduced to apply to limited offences, and only where certain grounding evidence had been adduced by the gardaí, it appears that over time they have expanded in remit and the threshold for invoking such provisions has lowered.

1.3.3 Other Procedural Rights

A related recent procedural rights development is the entitlement to have a solicitor in attendance at garda interviews. In 2014, the Supreme Court ruled that interrogation of suspects should not commence until after legal advice, where sought, has been obtained. While the Court declined in that case to find that there was a right to have a solicitor present in the interview with the suspect, the Court indicated that such a right might be found in an appropriate case. Following that judgment, the DPP and An Garda Síochána initiated the practice of allowing solicitors to attend the interviews. In the case of DPP v Doyle,[2] a majority of the Supreme Court refrained from recognising that the constitutional right of reasonable access to legal advice extended to having a solicitor present in the interview. When the case was appealed to the European Court of Human Rights, that Court clarified that the presence of a lawyer at interview is an integral aspect of the ECHR right to legal assistance, and the right to a fair trial.[3] Other important, related, procedural protections include the right to information, legal professional privilege, and the exclusion of improperly obtained evidence.

1 Heaney v Ireland (2001) 33 EHRR 334 para. 55.

2 [2018] 1 IR 1.

3 Application No. 51979/17; 23 May 2019.

1.4 Research Findings: Practice

1.4.1 Prevalence of Reliance on the Right to Silence

Participants pointed to a spectrum of response patterns that fell between a fully "no comment" interview and individuals who answered every question. For instance, some individuals may shift from "no comment" in early interviews to a more responsive position. There appeared to be a general consensus that maintaining a position of full silence was rare but, beyond this, participants across all groups found it difficult to make definitive statements about how often individuals relied on their right to silence partially or intermittently.

When participants did indicate their perception of the proportion of accused people availing of silence in some manner, there was variance in their opinions. Such differences may be explained by the impact that remaining silent may have on the progression of criminal proceedings, the different courts that they might operate in, and different offences in which they may specialise. Therefore, without quantitative data it is not clear if these different perceptions are as a result of non-prosecution in the context of suspect silence or perhaps guilty pleas taking effect. Currently, without such data, the role that silence may play in influencing these events and knowing how often they occur is hard to distinguish.

1.4.2 Circumstances Leading to Reliance on the Right to Silence

The findings showed that there were categories of individuals that legal professionals perceived to be less likely to avail of their right to silence than others. These included people with little or no experience of the criminal justice system and vulnerable individuals (those with drug addictions, severe mental ill-health and/or intellectual disabilities). These individuals may be unaware of or may not have a full understanding of the protection that exercising their right to silence may afford them. The research suggested that such individuals may have difficulty focusing on the long-term consequences of their approach to garda questioning over the short-term desire to be released from custody. Additionally, they may be more susceptible to garda interviewing techniques.

Participants also reported different proportions of individuals remaining silent depending on offence type. People questioned about more minor offences may answer questions to facilitate a speedy release from custody. It was generally suggested that suspects being interviewed in relation to serious crimes tend to rely on their right to silence and respond "no comment" in interviews more often. In some cases, participants suggested that this was due to certain suspects having more experience in the criminal justice system and being more confident in asserting their rights. Those suspected of involvement in paramilitary groups or organised crime groups were also said to be likely to remain silent under questioning. On occasion such silence might be the result of fear relating to the external consequences for the individual or their family if it became known that they co-operated with gardaí in any way.

Regardless of which of these categories applies to an individual, it is imperative that they receive legal advice from a solicitor of their choice as it may be the case that exercising their right to silence is in their best interests, rather than answering questions, even where they have an exculpatory explanation.

There were a number of considerations that solicitors took into account when forming legal advice as to whether the suspect should remain silent, answer questions, or make admissions. First, participants reported that in the context of investigations into certain offences, it was advisable that suspects should get their defence on record early, such as proffering their account of self-defence in an assault case or that consent was present in a sexual offence investigation. However, it was also noted that, particularly in investigations for historic crimes, silence may be advisable, rather than the proffering of an exculpatory account, since answering questions and confirming even innocuous facts may be used as corroboration of the allegations.

Participants also spoke about the important decision relating to how the suspect would get their account of events across at any future trial. "No comment" at garda interviews means that suspects may need to give their evidence at trial, and expose themselves to cross-examination, a generally undesirable position for an accused. In this regard, participants reported another option for a suspect at the investigation stage was submitting to the gardaí a statement, which they may or may not have prepared with their solicitor, outlining their account of the events at issue. It may be possible to avoid arrest through the proffering of a voluntary statement.

Furthermore, whether given voluntarily or subsequent to an arrest, a prepared statement gives the suspect some control over their defence, as it could be admitted as evidence at trial, helping them avoid giving live testimony and surrendering to cross-examination.

On the garda approach to questioning suspects, and in particular, the approach to encouraging suspects to answer questions rather than rely on their right to remain silent, our findings show a mix of techniques and tactics, some of which are inappropriate and oppressive, including building rapport; adopting an approach of allyship; letting silence hang in the air; engaging in emotive questioning; threatening to arrest family members or stop social welfare payments; selectively presenting evidence; and undermining the suspect's legal advice. There is clearly an ongoing need for garda training in interview techniques. Participants were clear in their experience that more specialised and senior gardaí respond with greater professionalism during interviews in general.

1.4.3 Consequences of Reliance on the Right to Silence

Juries are not informed about a suspect's silence during garda interviews to minimise the risk that jurors could draw inferences of guilt from such silence. This was confirmed by participants across all groups although there was some speculation that jurors could learn of silence informally – especially where "partial" or "intermittent" silence might lead to only brief extracts of interviews being put to a jury.

The findings showed that there could be some positive consequences that flowed from a suspect remaining silent. First, by remaining silent, the suspect avoids the situation where they make a statement in evidence at trial which is inconsistent with the statements they made in the garda interview. As noted by participants, there are various legitimate reasons why there may be inconsistency in accounts, such as lapses in memory or poor communication skills, however, these inconsistencies are often emphasised in cross-examination at trial to undermine credibility.

Secondly, suspects who rely on their right to silence avoid making corroborating statements, as well as admissions or inculpatory statements that can be used as evidence against them in bail hearings or at trial.

This study also identified negative consequences associated with the decision to rely on the right to silence in the garda station, meaning that decisions surrounding whether to exercise the right to silence were complex, high-stake matters that could determine case strategy from an early point in proceedings. This again highlights the importance of the solicitor's role in the garda station.

First, those who remained silent endured a greater number of interviews, were more likely to be detained for questioning for longer, were more likely to be exposed to oppressive garda interviewing tactics, and more likely to experience an inference interview.

Secondly, exercising one's right to silence put individuals at a relative disadvantage in terms of sentencing as compared with those who did not, in that they could not claim "cooperation" as a mitigating factor. Still, all participants were firm in their understanding that the purpose of this differential treatment is not to punish silence but to reward cooperation.

Further, participants reported that availing of the right to silence could have repercussions for the defence case strategy that could place suspects at a disadvantage at trial. Without having offered an account in the garda station, accused persons will find it difficult to put their version of events across at trial. They may of course opt to give their own evidence by taking the stand, but they will be cross-examined by prosecuting counsel, which participants universally agreed was an extremely undesirable situation for an accused person to be in. Some concern was raised around the judge's charge to a jury wherein the value of unsworn pre-trial statements might be minimised, in comparison with live, sworn, cross-examined testimony. While there is a distinction between the two, certainly, the authors are of the view that juries should not be presented with an unduly negative characterisation of the evidential value of statements made by suspects in garda interviews. Indeed, pre-trial statements proffered in garda stations have the significant benefit of being a more contemporaneous account of the events in question when compared to evidence given at trial, which can take place years after the alleged offending. Oaths or affirmations are not administered in garda interviews with suspects, but the seriousness of matters at that point is clear and the potential negative consequences of dishonesty apparent. Moreover, while

evidence given in court is tested by cross-examination, an account given in the garda station can be assessed and challenged by the interviewing gardaí and subsequent investigation of the claims made therein may provide the prosecution with evidence to contradict such account at trial.

1.4.4 Inferences at Trial from Silence During Garda Questioning

Given the significance of legislative incursion on the right to silence through provisions allowing for silence in the face of garda questioning in prescribed circumstances to be used as evidence at trial, this study sought to get a sense of the operation of such provisions both within garda stations, and at trial.

In relation to the invocation of the inferences in garda stations, this happens late in a detention period, usually after a series of interviews during which the suspect has failed to answer garda questions. The traditional caution, which will have been administered at the time of arrest and prior to any earlier interviews, is withdrawn, and the operation of the inferences is explained in its place. The authors see a value in continuing the current practice under which inferences are not continually in play throughout all interviews, but only in specific, separate interviews late in the process. This makes sense in the context of the late disclosure model of interviewing currently in use by An Garda Síochána, and ensures more protection for the right to silence in initial interviews.

The explanation, or special caution, given by gardaí at the beginning of an inference interview was widely regarded, particularly by solicitor participants, as both an inaccurate explanation of inferences (demonstrating factual rather than legal inferences) and as being too long and complicated for suspects to understand. Participants reported gardaí reading out the entirety of the relevant legislative provision, which is not required and adds complexity.

Further, participants reported that sometimes the questions put to the suspect, silence in response to which will lead to an inference, were not sufficiently precise or grounded in evidence. This was confusing for suspects, but also meant that the questions were not admissible at trial and the inference could not be drawn. Participants noted that the same admissibility issues were less likely when specialist gardaí, such as the Special Detective Unit, were involved in the interview process but other gardaí displayed a lack of confidence when conducting interviews under the inference provisions. This highlights a need for improved training to ensure that suspects who are questioned pursuant to the inference provisions are having those provisions accurately explained to them, or the use of inferences should be restricted to adequately trained gardaí.

While most adverse inference provisions require that the questions be grounded on some evidence, such as CCTV footage of the suspect present at a particular place for example, certain inference provisions are more broadly set out and the wording of the legislation is unclear or open to interpretation. It would be preferable for all inference provisions to clearly require that an inference only be drawn from a failure to respond to evidence which was in existence and presented to the suspect at the time of questioning.

Adverse inference provisions are not commonly featured as evidence in trials, with the Special Criminal Court being a clear exception to this. Participants reported their views that the inferences were often "surplusage" as the evidence grounding the inference question, such as evidence of an object found on the person or their presence at a certain location, was already admitted. This raises the question of whether such an incursion on the right to silence is proportionate and justified.

Conversely, despite being a weak form of evidence, participants reported that adverse inferences were very important to trials in the Special Criminal Court: the extraordinary, non-jury court. In particular, participants discussed the offence of "membership of an unlawful organisation" contrary to section 21 of the Offences Against the State Act 1939, whereby the belief of a Garda Chief Superintendent that the accused is a member of an unlawful organisation can be accepted as evidence by the court, often based on privileged information which is unchallengeable by the defence; and such belief, combined with evidence that the accused failed to answer "any question material to the investigation of the offence" during garda interrogation, can lead to conviction and a possible sentence of up to 8 years imprisonment (see section 2 of the Offences Against the State (Amendment) Act 1998). A question is regarded as being "material" if the garda reasonably believed that the question related to the participation of the accused in the commission of the offence. This legislative threshold for allowing an inference from silence is significantly vaguer than other inference provisions, where there has to be evidence grounding the inference question, which "clearly call[s] for an explanation".

Layered on top of these general concerns around the heightened impact of inferences on the outcome of trials before the Special Criminal Court is an additional uneasiness around the use of inferences from silence based on fear. Persons with involvement in organised criminality at any level may legitimately be fearful that any engagement on their part with gardaí during custodial interrogation could expose them or their family members to the risk of serious harm. There may be no safe way for them to explain the reasons for their silence, and their silence may count, significantly in the Special Criminal Court, towards their conviction.

1.5 Recommendations

Our research findings have led to a number of specific recommendations, which are listed below. They are set out in greater detail, and with clear justification, within Chapter 8.

Legislative Recommendations

1. Retain the position whereby no reference to a suspect's reliance on their right to silence is made at trial, except in the context of legislative inference provisions.
2. Retain the position that an inference cannot be drawn against an accused person for failing to give evidence at their own trial.
3. All legislative adverse inference provisions should clearly state the need for existing evidence to ground the request for a suspect's account or explanation.
4. Retain the "inference interview" as a separate interview towards the end of the detention period, which has a specific caution.
5. The statutory regulation of interviews should be modernised.
6. Section 52 of the Offences Against the State Act 1939 should be repealed.
7. The right to have a solicitor in attendance at the garda interview should be put on a legislative footing.

Recommendations for Policy and Practice

1. Gardaí should provide sufficient pre-interview disclosure to allow suspects (and their legal advisors) to make an informed decision on any reliance or otherwise on the right to silence, where it would not interfere with the investigation.
2. Gardaí should be careful not to directly or indirectly induce suspects to waive their right to silence.
3. Judges should not be informed during bail applications that an accused was "uncooperative".
4. Inference interviews should only be carried out by gardaí who have received specific training on the inference provisions.
5. Both gardaí and judges should be alive to the fact that a failure or refusal to answer garda questions may be influenced by factors other than guilt, including a suspect's concern for their safety and that of their family members, particularly in the context of organised criminal groups. Inferences from silence in such circumstances ought not to be relied on as evidence at trial.
6. Gardaí should notify suspects and solicitors at the earliest opportunity of all of the potential charges which might be considered to allow for meaningful legal advice, particularly in the context of inference interviews.
7. Gardaí should increase the practice of arranged arrests and/or voluntary interviews, where possible.
8. The Garda Station Legal Advice Scheme should be extended to voluntary interviews and/or prior consultations.
9. Judges should be cautious and insist on inferences being properly administered in the garda station.
10. The judge's charge to the jury in relation to drawing an inference from pre-trial silence should be limited and not give undue emphasis to this relatively weak form of evidence.
11. Guidance for judges on the appropriate handling of jury directions relating to unsworn evidence should be developed.
12. The ODPP should collect data on how often the inference provisions are used in prosecutions.
13. A permanent joint working group of An Garda Síochána and legal practitioners should be established to engage on matters relating to the questioning of suspects in garda detention.

Training Recommendations

1. The Law Society should consider requiring solicitors who advise detained suspects at garda stations to undertake an annual minimum level of continuing professional development (CPD) training specific to that role.
2. An Garda Síochána should provide more advanced and practical training to Level 1s and 2s, within the GSIM framework, on the right to silence generally and specifically on the invocation of adverse inference provisions.
3. Professional legal bodies should provide training on the right to silence and adverse inferences.

Future Research

1. A review of judgments of the Special Criminal Court to determine the significance of inferences in the Court's decisions.
2. A study of jurors in relation to their perception of right to silence, their understanding of inferences when explained by the judge, and the role that inferences play in their decision-making.
3. A qualitative study of suspects, and their experience of the use of garda tactics in interviews.
4. An Garda Síochána should collect data on the exercise of the right to silence, in combination with a variety of other factors.

2. The Empirical Setting

In this chapter, we broadly outline the setting in which this study takes place. This chapter briefly describes the legal framework of the Irish criminal justice system, before continuing on to provide a succinct overview of the various stages of the criminal justice process.

2.1 The Legal Framework of the Irish Criminal Justice System

The Irish criminal justice system is adversarial in nature and is based, for historic reasons, on the traditional English common law system. Legislation, both primary (i.e. enacted by the Oireachtas, the Irish parliament) and secondary (i.e. regulations issued by government ministers), governs certain aspects of the criminal process, but many of the rules of evidence and criminal procedure stem from the case law of the superior courts.

There is a very strong constitutional tradition in Ireland and many facets of criminal procedure have constitutional underpinning, within Bunreacht na hÉireann (the Constitution of Ireland), 1937. Certain articles of the Constitution are overtly and specifically relevant to the criminal process, e.g. Article 38.1 states that "No person shall be tried on any criminal charge save in due course of law". In essence this constitutional provision acknowledges the right to a fair trial. The specific meaning of "due course of law" in this context has been teased out in relevant cases, and includes matters such as the presumption of innocence, the right to proportionality in sentencing, and the right to legal aid. The Supreme Court has clarified that the right to a fair trial requires fairness of process within the period of investigation following an arrest.

Ireland is a member of the European Union but it does not participate fully in Justice and Home Affairs matters. Ireland maintains an "opt in" approach to Directives in this area. While Ireland has, for example, opted in to Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime and Directive 2012/13/EU on the right to information in criminal proceedings, it has not opted in to other criminal justice Directives, such as Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings, and Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence.

Ireland is also, since 1953, a party to the European Convention on Human Rights (ECHR), which has been incorporated into domestic law by way of the European Convention on Human Rights Act 2003. This Act requires courts to interpret laws in a Convention-compatible manner and to take "judicial notice" of the Convention and the jurisprudence of the European Court of Human Rights (ECtHR). An Irish court may make a declaration of incompatibility if it holds that a statutory provision or rule of law is incompatible with the State's obligations under the Convention.[4] Such a declaration places the legislature on notice that there is a difficulty with the law which they ought to remedy. Ireland has been before the European Court of Human Rights on numerous occasions, including on the right to silence in the case of Heaney & McGuinness v Ireland,[5] and on the right of access to legal advice for suspects detained in police custody in Doyle v Ireland.[6]

4 European Convention on Human Rights Act 2003, section 5.

5 (2001) 33 EHRR 12.

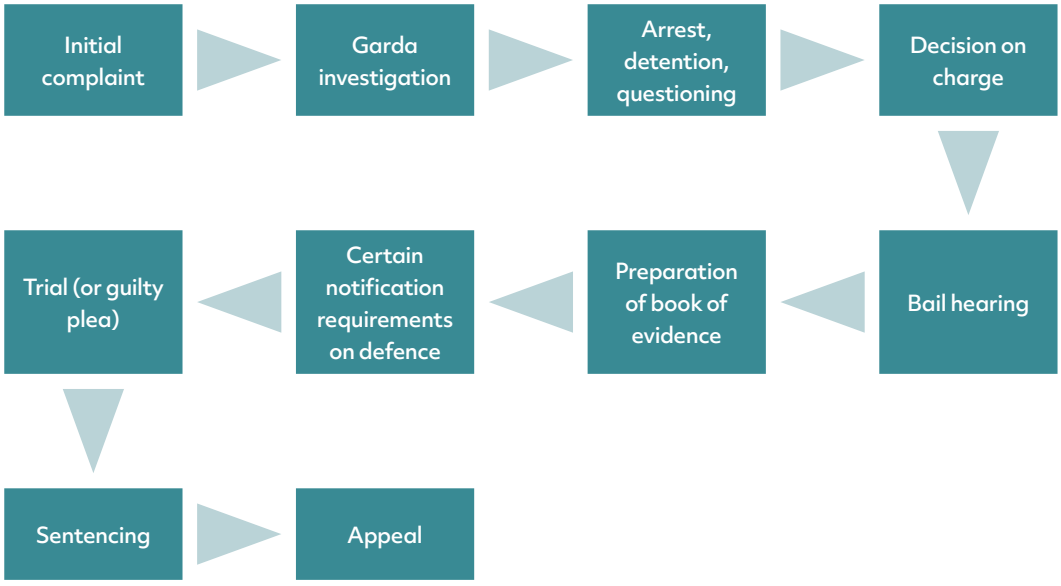
6 Application No 51979/17; 23 May 2019.

While trial by jury is the norm for serious offences in Ireland, there is a Special Criminal Court which sits as a three-judge court with no jury, and can hear certain cases, usually, though not exclusively, relating to paramilitary or organised crime.[7] The trial is still the main focus of the Irish criminal process, with oral testimony subject to cross-examination. However, over the past 35 years the relative weight and impact of the investigative stage of the criminal process has been increasing, following an increase in police powers of arrest for the purposes of detention. For most serious offences (those with a potential term of imprisonment of 5 years or more) suspects can be held for questioning for a specified period of time. These range from a maximum of 24 hours for most serious offences up to a maximum of 7 days for offences relating to drug trafficking, organised crime, or murder involving the use of a firearm. Most significantly in terms of police questioning and the right to silence, as discussed in more detail below, a failure to mention certain facts, account for certain things, or answer certain questions during police questioning may, dependant on the relevant circumstances, lead to an inference being drawn against the accused at later trial.

2.2 Overview of the Criminal Justice Process

The image below gives a general overview of the criminal process in the context of "arrestable offences" (offences with a potential sentence of imprisonment of 5 years or more), though there are specific arrest power for other offences provided for in legislation. For most minor offences the process would be more truncated, with, for example, no period of police detention and questioning prior to charge.

The following graphic demonstrates the progression of a serious offence through the criminal justice process:



7 See further Alice Harrison The Special Criminal Court: Practice and Procedure (Bloomsbury Professional, 2019).

2.2.1 Arrest and Detention

Generally, the process of suspect interrogation begins with the arrest of suspect. In some cases, a suspect may voluntarily attend a garda station to submit themselves to an interview. Where a suspect is arrested, they must be informed of the factual basis for the arrest and the legal authority for it. Following arrest, the suspect will be transported to the garda station where a decision will be made on whether to detain them for the purpose of interviewing them. Different statutes provide for different periods of detention, as well as extensions of the initial detention period, as can be seen in the table below:

Legislation - and relevant offences	Initial detention period	Garda-authorised Extensions - and minimum rank of authorising member		Court-authorised Extensions		Total detention period
Criminal Justice Act 1984 s. 4 - all arrestable offences (potential sentence of 5yrs+)	6 hours	6 hours - Superintendent	12 hours - Chief Superintendent			24 hours
Offences Against the State Act 1939 s.30 - specific offences listed in the Act and schedule to the Act	24 hours	24 hours - Chief Superintendent		24 hours - District Court (application by Superintendent)		72 hours
Criminal Justice (Drug Trafficking) Act 1996 s. 2 - drug trafficking offences	6 hours	18 hours - Superintendent	24 hours - Chief Superintendent	72 hours - District or Circuit Court (application by Chief Superintendent)	48 hours - District or Circuit Court (application by Chief Superintendent)	168 hours (7 days)
Criminal Justice Act 2007 s. 50 - murder involving the use of a firearm/ explosive, capital murder, false imprisonment with use of firearm, possession of firearm with intent to endanger life	6 hours	18 hours - Chief Superintendent	24 hours - Chief Superintendent	72 hours - District or Circuit Court (application by Chief Superintendent)	48 hours - District or Circuit Court (application by Chief Superintendent)	168 hours (7 days)

2.2.2 Legal Assistance

On arrival at the Station, the suspect will be informed of their right to consult a solicitor prior to questioning. Often, solicitors will have a telephone consultation with a suspect before attending the garda station, or as an alternative to attending, where for example, the suspect is familiar with the garda interview procedure. If attending at the station. solicitors will have a consultation with the suspect where they will explain the process, get the suspect's instructions, provide legal advice, and observe if there are any reasons the interview should not take place. Prior to 2014, solicitors were only permitted to attend garda stations to provide legal advices to detained persons. Nowadays, however, they are also permitted to attend garda interviews with suspects, though this has not been set out in legislation. A training programme for solicitors on their role in garda interviews was developed through the EU-funded SUPRALAT project and almost 100 solicitors have been trained through this programme to date.[8]

2.2.3 Garda Questioning

The purpose of garda interviewing is to gather all evidence relevant to the offence for which the suspect was arrested, whether that be inculpatory or exculpatory for that particular suspect. For a long time gardaí who conducted interviews had no training at all.[9] In 2008, An Garda Síochána developed a new model of conducting interviews, the Garda Síochána Interview Model (GSIM).[10] This involves a complete shift in how interviews are conducted, moving from a process based on seeking confessions, to an information-gathering approach. Under this model, interviews are conducted in a structured manner, going through specific phases. The prioritisation of active listening, empathy and rapport-building in this new approach is particularly notable. Training for garda members began to be rolled out in 2014/2015 and, at least in the context of investigations into serious crime now, interviews will most likely be conducted by gardaí who have been GSIM trained. There are specialist gardaí trained to interview child witnesses or vulnerable witnesses. There are four different levels of training available within this model. All gardaí are to be trained in the basic interviewing skills under the model, and some can advance to further stages of training appropriate to more serious and sensitive offences. Level 3 is the highest level for interviewers relevant for more serious complex crime, with Level 4 being for those in a supervisory role within investigations.[11]

At the beginning of the interview, gardaí seek to build rapport with the suspect. They then move on to seek an account of relevant matters from the suspect themselves, without any sort of head-on interrogation or cross-examination. After this the suspect may be challenged on their account and asked to clarify certain details, in a persistent but patient manner, though the questioning may be robust. Finally, gardaí seek to bring closure to the interview, reviewing the account given by the suspect, outlining the next steps and responding to any questions. Interviews should be conducted in the same way whether the individual is a suspect, victim or witness. There is a focus on the particular individual being interviewed, though, taking into account his/her specific characteristics in terms of age, and intellectual and psychological capacity.

2.2.4 Charge and Preparing for Trial

Following the investigation, a decision will be made on whether or not to prosecute. In minor offences, which can be tried summarily in the District Court, the gardaí make that decision. In the case of more serious offences that could be tried in the Circuit Court or higher courts, or complicated minor offences, the gardaí send a file to the Director of Public Prosecutions (the DPP) and the DPP will then assess this file as to whether there is sufficient evidence to prosecute the suspect for the offence and what the charge should be.

8 Conway, Vicky and Daly, Yvonne (2019) "From Legal Advice to Legal Assistance: Recognising the Changing Role of the Solicitor in the Garda Station" Irish Judicial Studies Journal 103.

9 The Garda Inspectorate, Report on Crime Investigation (2014).

10 Noone, Geraldine "An Garda Síochána Model of Investigative Interviewing of Witnesses and Suspects" in Pearse (ed) Investigating Terrorism: Current Political, Legal and Psychological Issues (Wiley-Blackwell, 2015), p. 268.

11 Kevin Sweeney (2016) "The Changing Nature of Police Interviewing in Ireland" Thesis submitted for the Degree of Doctor of Philosophy, School of Law, University of Limerick, p. 147

When a decision is made to take a prosecution, the gardaí charge the suspect. The gardaí bring the suspect before a District Court judge. From this point on, the suspect is known as "the accused" if the case is tried on indictment or "the defendant", if the case is tried summarily in the District Court.[12] The judge will inform the suspect of their right to legal aid and consider whether the accused qualifies.

The District Court judge will decide where the case is heard. If the offence is summary only, it must be dealt with in the District Court. The judge may deal with it on the first day in court, or they may adjourn the case. If an offence only provides for trial on indictment it must be dealt with by the Circuit Criminal Court, the Central Criminal Court or the Special Criminal Court. The District Court judge will adjourn the case until the Book of Evidence is prepared by the DPP, and then send the case forward to trial. There are also offences which can be dealt with either summarily or on indictment, whereby the DPP and District Court judge, and in some instances the accused, must all consent to summary disposal.

The solicitor and defence counsel are responsible for preparing the accused's defence case. In minor offences, the gardaí will prepare the case against the accused. In more serious offences, the DPP and prosecution counsel will prepare the State's case.

2.2.5 Bail

An accused is usually entitled to bail. In most cases, the application will be made to the District Court.[13] Where the accused is charged with a murder offence, piracy, treason, an offence under section 6 of the Offences Against the State Act 1939, genocide, or certain other offences, the application must be made to the High Court. Bail may also be granted by the Special Criminal Court. The prosecuting garda or DPP, as the case may be, may object to bail being granted if they are concerned that the accused will evade justice and/or commit serious crimes while released on bail. If granted, bail will be subject to the person entering into a recognisance, which may be "with or without sureties", as well as other conditions that the judge may deem appropriate. For discussion on the impact of silence in garda interviews, see section 7.3.

2.2.6 Notifications in Advance of Trial

Disclosure obligations in Ireland require the defence to provide the prosecution with advance notice of any alibi on which they will seek to rely at trial[14]; if seeking to adduce evidence of a mental condition[15]; if intending to call an expert witness or adduce expert evidence[16]; if intending to adduce evidence of a witness that would involve imputations on the character of a prosecution witness or complainant (who is either deceased or so incapacitated as to be unable to give evidence)[17]; or, on a charge of membership of an unlawful organisation under the Offences Against the State Acts, advance notice of any witness to be called.[18]

2.2.7 Plea and Trial

In the vast majority of cases, the accused will plead guilty and there will be no trial, especially in the lower courts.[19] The Annual Report of the Courts Service for 2019 states that 18,539 serious criminal offences came before the courts in that year, with minor offences before the District Court amounting to 406,480 (of which 226,692 were Road Traffic offences).[20]

12 For the sake of simplicity, this report will use "suspect" when discussing a person who is being investigated for a crime, and "accused" when discussing a person who is charged with a crime.

13 In many cases, the gardaí may make the decision to grant the defendant "station bail", where the defendant is released on recognisance to appear before the District Court on a date within 30 days of the next sitting of the District Court.

14 Criminal Justice Act 1984, section 20.

15 Criminal Law (Insanity) Act 2006, section 19(1).

16 Criminal Procedure Act 2012, section 34.

17 Criminal Justice (Evidence) Act 1924, section 1A.

18 Offences Against the State (Amendment) Act 1998, as amended, section 3(1).

19 Court Service, Annual Report 2019. See pp. 83 – 89, available at: https://www.courts.ie/acc/alfresco/9bd89c8a-3187-44c3-a2e9-ff0855e69cb5/CourtsServiceAnnualReport2019.pdf/pdf#view=fitH Accessed 16/06/2021

20 Ibid.

In the Circuit Criminal Court (which sits with a judge and jury to try serious offences) in 2019, there were 10,295 guilty pleas, 910 convictions following trial, and 561 acquittals following trial. In the Central Criminal Court (which also sits with a judge and jury and tries the most serious offences) there were 157 guilty pleas, 157 convictions following trial, and 179 acquittals following trial. In the Special Criminal Court (3-judge court for serious offences) there were 31 guilty pleas, 10 convictions following trial, and 13 acquittals following trial.

Where the accused pleads not guilty and the case proceeds to trial, it must be assigned to the appropriate court. For summary offences (minor offences), which are contested, the case will be heard in the District Court, it is heard only by a judge with no jury. The prosecutor will usually be a member of An Garda Síochána, but a representative from the DPP or Chief State Solicitor's office may present the case in more complicated hearings. After hearing the evidence from witnesses and any applications by counsel, the judge will either adjourn to consider their verdict, convict, or dismiss the prosecution.

Where the matter is more serious, the case will be heard in the Circuit Court, the Central Criminal Court, or the Special Criminal Court. If the accused pleads not guilty, a jury will be empanelled (though not in the Special Criminal Court, which is a 3-judge court with no jury). These cases will be prosecuted by the DPP, represented in court by staff from the Solicitors Division of the DPP's office in Dublin, or by local state solicitors in other parts of the country. The DPP may also involve barristers to present the prosecution argument in court.

After the evidence has been concluded, counsel for both sides will deliver closing speeches, the judge will usually address the jury on the evidence and relevant law. The purpose of the address is to assist the jury in determining on the evidence whether the accused is guilty or not guilty of the offence or offences charged. The judge cannot direct the jury to find the accused guilty, that is a matter for the jury. When the judge has completed their charge, they will ask the jury to retire and consider their verdict.

2.2.8 Sentencing

If the accused has been found guilty, a judge in the District, Circuit, or Central Criminal Court, or a panel of judges in the Special Criminal Court, will impose a sentence. They will weigh up the gravity of the offence, the impact on the victim and the personal circumstances of the accused, as well as any mitigating or aggravating circumstances. The primary sentencing options include, among others, imprisonment, suspended sentences, fines, and probation.

Most statutes provide for a maximum sentence, such as specifying the upper limit of a fine or prison sentence that can be imposed. A small number of offences carry a mandatory sentence, which the judge has no discretion but to impose, for example, life imprisonment for murder. Similarly, a few offences carry a mandatory minimum sentence, whereby the judge may impose a sentence greater than the minimum.

3. The Law on the Right to Silence in Ireland

In this chapter, we outline the most important legal protections and limitations of the right to silence in Ireland. This includes the right's constitutionally protected status; the legal framework providing for the caution put to the suspect; and the permissible limitations on the right to silence, such as offences for failing to provide information on request by the gardaí, legislative provisions providing for the drawing of adverse inferences from the suspect's silence in response to garda questioning, as well as the deprivation of the benefit of mitigation for cooperation in sentencing. The chapter then continues to outline various other rights and protections related to the right to silence, including the right to information and the right to access legal advice.

3.1 The Right to Silence in the Constitution

Under the Irish Constitution, the right to remain silent is protected as a corollary to the right to freedom of expression (Art 40.6), and proportionate interference with that right is allowable. However, the right to a fair trial (Art 38.1) is also extremely significant because a statement which is obtained under the compulsion of potential criminal sanction is likely to be deemed involuntary and therefore inadmissible at trial. The Irish courts have increasingly recognised the importance of police custody as a part of the overall trial process, and seek to insist on fairness therein. Furthermore, the right to a fair trial within the Irish Constitution encompasses the presumption of innocence and the Irish criminal justice system adheres to the traditional common law view that the burden of proof in a criminal trial is on the prosecution, and the accused is under no obligation to assert his innocence. An accused at trial in Ireland cannot be compelled to testify and no inferences may be drawn from their failure to give evidence at trial in their own defence.

Where legislative incursion on the right to silence has been introduced the courts, who have the power to strike down unconstitutional legislation, have not objected thereto per se. The doctrines of proportionality and judicial deference, along with the presumption of constitutionality and the proviso to Article 40.6 have allowed the courts to read such provisions in a constitutionally-compliant manner. However, the incursionary statute must be clear in its terms and the courts will not sanction any interference with the right which goes beyond those terms.[21]

The central focus of the right to silence in this jurisdiction is on a failure or refusal to answer questions in police custody, and the potential trial consequences of same. In that context, the right to silence requires that a jury in a criminal case should not usually be told about any failure or refusal of a detained suspect to answer garda questions or provide information to gardaí during the pre-trial process.[22] Exceptions to this general rule exist, in the form of specific statutory provisions which allow for the jury to be told about, and invited to draw adverse inferences from, specific failures of the detainee. Inferences can also be drawn at trial in Ireland from a suspect's refusal, without reasonable excuse, to consent to the provision of "intimate" samples for forensic analysis during the investigative stage.[23]

21 DPP v Wilson [2019] 1 IR 96.

22 DPP v Finnerty [1999] 4 IR 364.

23 Criminal Justice (Forensic Evidence and DNA Database System) Act 2014, section 19. This is beyond the scope of this study.

3.2 Caution: How and When is the Suspect Informed About the Right to Silence?

In Ireland, the taking of statements by gardaí is guided by the "Judges' Rules".[24] This set of 9 rules are now somewhat outdated given the introduction of the Treatment of Persons in Custody Regulations 1987, which are more modern, detailed and practical in their approach.[25] However, at present, the two regimes provided for under these differing sets of rules co-exist.

The Judges' Rules provide that gardaí investigating an offence may ask anyone from whom they think useful information may be obtained to participate in voluntary questioning and they may put questions to them without administering a caution (Rule I). However, once a garda has made up their mind to charge someone with an offence, they should caution them before questioning or continuing to question them (Rule II). This seems to require that if a person being questioned as a witness becomes, in the eyes of the interviewing garda, a suspect, a caution should be administered before questioning continues. Persons who are being held in garda custody should not be questioned without first being cautioned (Rule III).

When a suspect is formally charged he should be cautioned as follows: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say may be taken down in writing and may be given in evidence" (Rule V). In the context of an interview pre-charge, the caution is usually administered in the following manner: "You are not obliged to say anything unless you wish to do so, but anything you say will be taken down in writing and may be given in evidence."[26] This caution is also given at the time of arrest, and a suspect is given a notice of his legal rights, in writing.

Rule IX states that if a suspect makes a statement it should, if possible, be taken down in writing, read back to him and signed by him. These Rules creates a somewhat strange phenomenon in Ireland, in this age of modern technology: despite police interviews now being routinely audio-visually recorded, gardaí also take a contemporaneous hand-written note of what is said. This slows the pace of interviews significantly.

There have been calls to alter the wording of the caution in order to allow for the tape, and any related transcript, to suffice as a record.[27] At the time of writing, legislation is in the process of being drafted to strengthen the use of electronically recorded interview evidence provided for under section 57 of the Criminal Justice Act 2007.[28] This legislation, if enacted would also alter the caution, removing reference to taking any statement down in writing. This proposed new caution would be administered on arrest and at the start of any interview with the detained suspect (and on other specified occasions), as the traditional caution is now.

Generally, at present, a suspect may undergo a number of interviews where the caution is administered, before arriving at an interview in which the inference-drawing provisions are to be invoked. This is current garda practice; an initial number of interviews without administering the warning about inference-drawing provisions, and then one or more interviews in which the relevant legislation is specifically invoked. In such an interview, gardaí must withdraw the traditional caution and explain "in ordinary language" the potential consequences of a failure or refusal to provide information in response to specific questions that are about to be asked. The question as to whether or not the accused truly understands the effect of the inference-drawing provisions is a difficult one, given how at variance this is with the traditional caution which will also have been administered throughout the process.

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24 The Judges' Rules are not rules of law and breach thereof will not lead to anything other than a remote, but highly unlikely, possibility that a trial judge might exclude evidence obtained thereafter.

25 The Balance in the Criminal Law Review Group recommended a modernisation of the Judges' Rules by way of legislation. See Balance in the Criminal Law Review Group, The Right to Silence Interim Report (31 January 2007) p.43, and Final Report (15 March 2007), p. 97.

26 Under Reg. 6 of the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997 gardaí are obliged, before commencing the electronic recording of an interview, to "caution the person being interviewed 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."

27 See further McGillicuddy, Tony (2008) "Restrictions on the Right to Silence under the Criminal Justice Act 2007 – Part 2" 18(4) Irish Criminal Law Journal 112.

28 Department of Justice, General Scheme of Garda Síochána (Powers) Bill, 2021, available at: http://www.justice.ie/en/JELR/Pages/Garda-S%C3%ADoch%C3%A1na-(Powers)-Bill Accessed 16/06/2021.

While there have been calls in the past to amend the traditional caution to account for the inference-drawing provisions,[29] we see a value in continuing the current practice under which inferences are not continually in play throughout all interviews, but only in specific, separate interviews late in the process. This makes sense in the context of the late disclosure model of interviewing currently in use by An Garda Síochána, and ensures more protection for the right to silence in initial interviews (see further Chapter 6).

3.3 Offences of Failing to Provide Information

There are a number of offences in existence which criminalise a failure or refusal to provide certain information to the gardaí.[30] Some such provisions compel only the utterance of an individual's name and address, though others are more onerous. Section 2 of the Offences Against the State (Amendment) Act 1972, for example, criminalises a failure to answer certain questions put by a garda who is investigating certain offences covered by the Act. The section 2 offence can result in a fine or a period of imprisonment of up to 12 months, or both.

Section 52 of the Offences Against the State Act 1939 makes it an offence for a detained suspect to fail to account for his movements and actions during a specified period and to give all the information which he possesses in regard to the commission or intended commission by another person of a specific offence. Such failure is punishable by up to six months' imprisonment. The constitutionality of this provision was tested in Heaney v Ireland.[31] The Supreme Court considered the right to freedom of expression under Article 40.6 and the proviso thereunder that freedom of expression may be curtailed where the exigencies of public order or morality so require. Using the proviso to Article 40.6, in the context of the threat posed by paramilitary activity to public order, the Supreme Court deemed section 52 a proportionate interference with the right to silence.

The Heaney case went on to the European Court of Human Rights (ECtHR) where it was held that the right to silence/privilege against self-incrimination is protected under Article 6 European Convention on Human Rights (ECHR), the fair trial provision of the Convention, and that section 52 "destroyed the very essence of [the accuseds'] privilege against self-incrimination and their right to remain silent".[32] A virtually identical finding was made in Quinn v Ireland,[33] the judgment in which was handed down on the same day as Heaney.

It was held by the Supreme Court in Re National Irish Bank (under investigation) (No.1)[34] that a statement obtained from a suspect under the compulsion of a legislative provision which deemed the failure or refusal to answer particular questions to be an offence would not generally be admissible, unless the trial judge was satisfied that it was voluntary. The admission of an involuntary statement would be in breach of the right to a fair trial, under Article 38.1. Walsh has noted that "it is difficult to see how information obtained from a person pursuant to a demand under section 52 would be admissible against him in a criminal trial for an offence other than that created by section 52 itself."[35] The judgment in Re National Irish Bank, along with the ECtHR judgment in Heaney reasserted the link between the right to silence and the right to a fair trial, and made provisions which criminalise silence largely undesirable.

29 Balance in the Criminal Law Review Group, Final Report, (15 March 2007), p. 88.

30 These include section 30 of the Offences Against the State Act 1939, section 2 of the Offences Against the State (Amendment) Act 1972, section 107 of the Road Traffic Act 1961, and sections 4, 15 and 16 of the Criminal Justice Act 1984. Failure or refusal to provide the relevant information under each of these legislative provisions amounts to an offence punishable by imprisonment, or fine, or both.

31 [1996] 1 IR 580; (2001) 33 EHRR 12.

32 (2001) 33 EHRR 12, para. 55.

33 (2001) 33 EHRR 264.

34 [1999] 3 IR 145; [1999] 1 ILRM 321.

35 Walsh, Dermot Walsh on Criminal Procedure (2nd Edition, Round Hall: Dublin, 2016), p. 334.

However, section 52 has not been removed from the statute book. Indeed, the legislature amended section 52, to add a requirement that its impact be explained to a detained suspect in ordinary language, under the Offences Against the State (Amendment) Act 1998. The section does seem to have largely fallen into disuse though, perhaps as a result of Heaney and Quinn, and/or the decision in Re National Irish Bank. On the basis of those decisions, Walsh states in relation to section 2 of Offences Against the State (Amendment) Act 1972 (mentioned above) that "[t]here can be little doubt that section 2 falls foul of the decision of the ECtHR in Quinn [and Heaney] in so far as it seeks to penalise the suspect's failure to give an account of his movements at the time of the commission of the offence under investigation."[36] He observes that, equally, given the Supreme Court decision in Re National Irish Bank, any information obtained pursuant to section 2 would likely be inadmissible in evidence against the suspect, except in relation to the section 2 offence itself.[37]

In 2019, in Sweeney v Ireland,[38] the Supreme Court was called upon to consider the constitutionality of a provision which had been declared unconstitutional by the High Court on the basis of interference with the right to silence as well as impermissible vagueness. The Supreme Court, however, upheld its constitutionality. Section 9(1)(b) of the Offences Against the State (Amendment) Act 1998 provides that a person shall be guilty of an offence if s/he has information which s/he knows or believes might be of material assistance in (a) preventing the commission by any other person of a serious offence, or (b) securing the apprehension, prosecution or conviction of any other person for a serious offence, and fails without reasonable excuse to disclose that information as soon as it is practicable to a member of An Garda Síochána. Potential punishment ranges from a fine to 5 years' imprisonment.

The accused in this case had been, at one time, a suspect in a violent murder. He was not ultimately charged with the murder, but was charged under section 9(1)(b) as it was suspected that he had information relating to the involvement of others in the offence. The Supreme Court, in upholding the constitutionality of the provision, held that the privilege against self-incrimination was not invoked within the provision, and that the risk of self-incrimination would be a "reasonable excuse" for non-disclosure of the relevant information.

Charleton J held that:

> "Section 9(1)(b) of the 1998 Act protects the right to silence of any person who does not wish to speak about their own involvement in a crime. The section protects the right to silence where to speak would incriminate that person. It does not change the principle that unless a participant wishes to speak of their own volition, the law should not compel them to self-incriminate as to their commission of a crime."

The more practical concern as to how a witness could outline their reason for not giving information about others without drawing suspicion on themselves was not addressed in the Supreme Court judgment. In the High Court, on the other hand, Baker J, who had found the provision to be unconstitutional, considered the matter somewhat more pragmatically. She wondered, for example, how a solicitor might advise a person with regard to section 9(1)(b) when that person was detained in regard to another offence, noting that while a suspect has a right to silence, in this context "… should that right be exercised in pursuance of a choice not to speak, the actual exercise of the right could give rise to a separate charge and the commission of a separate criminal offence…" The Supreme Court judgment in this case is somewhat confusing, and does not offer very strong protection for the right to silence in such circumstances. Furthermore, it has been suggested by Harrison that "[t]he offence created by section 9 has been utilised as an investigative tool, where acquaintances or relatives of a suspect are arrested in order to put pressure on a suspect or obtain information."[39]

36 Walsh, Dermot Walsh on Criminal Procedure (2nd Edition, Round Hall: Dublin, 2016), p. 335.

37 Ibid.

38 [2019] 3 IR 431.

39 Alice Harrison, The Special Criminal Court: Practice and Procedure (Bloomsbury Professional, 2019) p. 114.

3.4 Inference-Drawing Provisions

The Oireachtas has also provided other incursions on the right to silence through the creation of adverse inference provisions, which allow the trier of fact at trial (i.e. the judge in the District Court, the jury in the Circuit or Central Criminal Courts, or the three-judge panel in the Special Criminal Court) to draw inferences from the failure of the accused to mention certain facts or provide certain information during police questioning, at the time of charging, or at any time in advance of the trial.

The legislation gives no specific guidance on the types of inferences that might be drawn from the pre-trial silence of the accused,[40] but it is clear that the aim of such provisions is to restrict the right to silence (by attaching adverse consequences thereto) in order to increase efficiency in the investigation, prosecution, and conviction of criminal suspects. In the same way that fear of committing an offence by silence can compel a suspect to provide certain information, fear that silence may be used against a suspect at later trial can also put pressure upon a suspect and make it undesirable for them to insist upon their right to silence in the pre-trial process. Where a suspect does rely on the right to silence in the pre-trial period this very reliance may be used, under specific legislative provisions, as evidence against him at trial.

Over the years the formulation of inference-drawing provisions in the Irish criminal process has changed. The first provisions introduced were sections 18 and 19 of the Criminal Justice Act 1984, which allowed for the drawing of inferences from the accused's failure or refusal in the pre-trial period of investigation to account for the presence of any object, substance or mark on his person, clothing or footwear, or in his possession, or in the place where he is arrested[41] or for his presence at a particular place.[42]

Initially, sections 18 and 19 referred to inferences being drawn "if evidence of the said matters is given in later proceedings", but the provisions were reformulated under the Criminal Justice Act 2007. Sections 18 and 19 now refer to inferences being drawn where, following a request by a questioning garda to give an account of the relevant matters, "the accused failed or refused to give an account, being an account which in the circumstances at the time clearly called for an explanation from him or her."[43] Notably, there is now no requirement that the accused should seek at trial to rely on any fact or account of events which he declined to mention during questioning. Silence in the face of circumstances which "clearly called for an explanation" during the pre-trial period is enough for the drawing of an inference adverse to the suspect's interests at trial. While there has been no in-depth analysis of the meaning of the phrase "clearly called for an explanation" in the Irish courts to date, it seems to suggest that at least some level of reasonable suspicion should exist linking the suspect's presence in a particular place, possession of an object, or having a mark or substance on his clothing with his potential involvement in a specific criminal offence.[44]

40 By comparison, an English Judicial Studies Board Specimen Direction provided in 2010 listed the inferences which could be drawn under section 34 of the Criminal Justice and Public Order Act 1994, where the accused sought to rely on a fact at trial which he did not mention in the pre-trial period, which, in the circumstances which existed at that time, was a fact he "could reasonably have been expected to mention". Possible inferences included that: the fact now relied on is true but the defendant, for reasons of his own, chose not to reveal it; the fact now relied on is irrelevant; the 'fact' now relied on is of more recent invention; the defendant's present answer to the prosecution case is fabricated; the defendant is guilty. See "Crown Court Bench Book: Directing the Jury" (March 2010), p. 261, available at www.jsboard.co.uk. This has now been superseded by Judicial College, "The Crown Court Compendium: Part I: Jury and Trial Management and Summing Up" (December 2020) available at https://www.judiciary.uk/wp-content/uploads/2020/12/Crown-Court-Compendium-Part-I-December-2020-amended-01.02.21.pdf Accessed 17/06/2021.

41 Section 18.

42 Section 19.

43 Sections 18 and 19 of the Criminal Justice Act 1984, as substituted by sections 28 and 29 of the Criminal Justice Act 2007. The sections require that the questioning garda should reasonably believe that the relevant object, substance, mark, or presence in a particular place may be attributable to the suspect's participation in the commission of a relevant offence, and the garda should inform the suspect of this belief.

44 See Daly, Yvonne (2007) "Silence and Solicitors: Lessons Learned from England and Wales?" 17 (2) Irish Criminal Law Journal 2.

Broadly defined inference-drawing provisions were included in both the Criminal Justice (Drug Trafficking) Act 1996[45] and the Offences Against the State (Amendment) Act 1998.[46] In relation to specific offences, these provisions allowed for inferences to be drawn at trial from a suspect's failure to mention, during the pre-trial process, a fact which he later relied on in his defence, being a fact which he ought reasonably to have mentioned at the time of questioning or charging. These provisions have now been repealed and replaced by the Criminal Justice Act 2007 which inserts section 19A into the Criminal Justice Act 1984. This is the broadest inference-drawing provision which the Oireachtas has sanctioned to date.

Section 19A[47] applies to all arrestable offences[48] and provides that inferences may be drawn at trial from a suspect's failure in the pre-trial period to mention any fact, when he is being questioned, charged or informed that he might be charged with a particular offence, which he later relies on in his defence at trial, being a fact which in the circumstances existing at the time "clearly called for an explanation". A number of safeguards, aimed at reflecting both constitutional and ECHR jurisprudence on the right to silence/privilege against self-incrimination, are provided for suspects under section 19A and they are also applicable to sections 18 and 19:[49]

— The inference may not be the sole or main basis for a conviction but may serve as corroboration of any evidence in relation to which the failure is material;

— The accused must be told in ordinary language what the effect of any relevant failure or refusal to account for a pertinent matter might be;

— The accused must be afforded a reasonable opportunity to consult a solicitor prior to the relevant silence;

— The court or jury in deciding whether or not to draw inferences ought to consider when the account or fact concerned was first mentioned by the accused; and

— No inference shall be drawn in relation to a question asked in an interview unless either the interview has been electronically recorded or the detained person has consented in writing to the non-recording of the interview.

The specific formulation of section 19A requires that an inference can only be drawn from the failure to mention a particular fact when (i) such a fact "clearly called for an explanation" during the pre-trial period, and (ii) it was a fact which the suspect sought to rely upon at trial. This two-pronged threshold requirement is more stringent than the reformulated sections 18 and 19, which omit the second element. Of course, those provisions are narrower in terms of their application as they attach consequences for failure to account for particular matters only, e.g. substances, objects etc.

A further addition to the inference-drawing stock is section 2 of the Offences Against the State (Amendment) Act 1998. That section provides that in a trial against an accused for membership of an unlawful organisation, an adverse inference may be drawn where the accused failed to answer "any question material to the investigation". The section defines "material questions" extremely broadly, including any questions "requesting the accused to give a full account of his or her movements, actions, activities or associations during any specified period."

45 Section 7.

46 Section 5.

47 Criminal Justice Act 1984, section 19A as inserted by the Criminal Justice Act 2007, section 30. The general content of section 19A was proposed by the Balance in the Criminal Law Review Group, The Right to Silence Interim Report (31 January 2007) p.43, and Final Report (15 March 2007), p. 97.

48 Thereby encompassing, amongst many others, the offences covered by both the Criminal Justice (Drug Trafficking) Act 1996 and the Offences Against the State Acts and scheduled offences.

49 The safeguards were inserted into sections 18, 19 and the new section 19A of the Criminal Justice Act 1984 by sections 28, 29 and 30 of the Criminal Justice Act 2007.

A similar provision is section 72A of the Criminal Justice Act 2006 which was inserted by section 9 of the Criminal Justice (Amendment) Act 2009. This provision operates in the context of the rather broad concept of participating in or contributing to any activity of a "criminal organisation".[50] In this regard, section 72A is significantly broader in ambit than section 2 of the 1998 Act, which only applies to the offence of membership of an unlawful organisation. The same safeguards apply as per sections 18, 19 and 19A.[51]

Similar to section 2, section 72A provides that, in such cases, an inference may be drawn at trial from the pre-trial failure of a suspect to "answer a question material to the investigation of the offence".[52] "Any question material to the investigation of the offence" is defined within the section as including, inter alia,

— a request that the suspect give a full account of his or her movements, actions, activities or associations during any specified period relevant to the offence being investigated;
— questions related to statements or conduct of the suspect implying or leading to a reasonable inference that he was at a material time directing the activities of a criminal organisation;
— and, questions relating to any benefit that the suspect may have obtained from directing a criminal organisation or committing a serious offence within a criminal organisation.[53]

A question is not to be regarded as being material to the investigation of the offence unless the garda concerned reasonably believed that the question related to the participation of the defendant in the commission of the offence.[54] However, this threshold requirement in section 72A seems significantly easier to satisfy than those in section 18 and 19 (where an account for very particular matters was "clearly called for") and 19A (failure to mention a fact (i) which at that time "clearly called for an explanation" and (ii) which they then sought to rely on at trial as part of his defence.)

Some of the relevant questions which may be asked by gardaí and may lead to inferences at trial might be backed by a certain level of evidence, e.g. a question related to statements or conduct of the suspect implying or leading to a reasonable inference that he was at a material time directing the activities of a criminal organisation,[55] while others seem to allow for very little grounding in evidence, e.g. a request that "the suspect give a full account of his or her movements, actions, activities or associations during any specified period relevant to the offence being investigated".[56]

A number of the inference-drawing provisions specify that providing false or misleading accounts in answer to certain questions may lead to the drawing of an inference at trial. Such a caveat is included in section 2(4)(b) of the Offences Against the State (Amendment) Act 1998 and in section 72A(8) of the Criminal Justice Act 2006, as amended. Other provisions do not include this proviso, and the courts have considered, in a number of cases, whether an account of any kind, even rather unlikely, can avoid the drawing of inferences under such provisions.

50 A "criminal organisation" is defined by section 70 of the Criminal Justice Act 2006, as amended by section 3 of the Criminal Justice (Amendment) Act 2009, as "a structured group, however organised, that has as its main purpose or activity the commission or facilitation of a serious offence". The section defines a "structured group" as "a group of 3 or more persons, which is not randomly formed for the immediate commission of a single offence, and the involvement in which by 2 or more of those persons is with a view to their acting in concert; for the avoidance of doubt, a structured group may exist notwithstanding the absence of all or any of the following: (a) formal rules or formal membership, or any formal roles for those involved in the group; (b) any hierarchical or leadership structure; (c) continuity of involvement by persons in the group."

51 Criminal Justice Act 2006, section 72A.

52 Ibid.

53 Criminal Justice Act 2006, section 72A(7).

54 Ibid.

55 Criminal Justice Act 2006, section 72A(7)(b)(i) as inserted by the Criminal Justice (Amendment) Act 2009.

56 Criminal Justice Act 2006, section 72A(7)(a) as inserted by the Criminal Justice (Amendment) Act 2009.

In People (DPP) v A.McD[57] the Supreme Court held that, even where the legislation does not specify that a false or misleading account might result in inference-drawing, a "minimum level of plausible engagement"[58] is necessary in order to satisfy the requirements of a relevant provision. As discussed, section 19 of the Criminal Justice Act 1984 allows for an inference to be drawn at trial from the failure or refusal of a detained suspect to account for his presence at a particular place, when requested by a garda so to do.[59] While no mention is made of the consequences of giving a false or misleading account, McKechnie J said:

> "It surely cannot be the case that a person being investigated in respect of an arrestable offence can nullify the operability of this statutory provision by simply giving any manner of account, however plainly unrelated or potentially farcical it may be. To hold otherwise would be to enable such a person apprised of this fact to void the provision of its utility."[60]

The constitutionality of inference provisions was tested, and upheld, in Rock v Ireland.[61] As it had previously held in Heaney, the Supreme Court stated that the right to silence is protected as a corollary of the right to freedom of expression in Article 40.6 and it may be restricted in order to serve the exigencies of public order and morality. The Court applied a proportionality test and held that the restriction on the right to silence contained within sections 18 and 19 of the Criminal Justice Act 1984 was proportionate to the aim which was sought to be achieved, as the sections represented the necessary balance between the right to silence and the duty of the State to defend and protect the life, person and property of all its citizens. The Court also held that two important limiting factors were in operation to combat any perceived imbalance within the sections. First, the inferences which might be drawn were evidential in nature only and the legislation provided that such inferences could not be the sole basis for the conviction of the accused. Secondly, the court is obliged to act in accordance with the principles of constitutional justice and, having regard to an accused's right to a fair trial, is under a constitutional obligation to ensure that no improper or unfair inferences are drawn or permitted to be drawn from such failure or refusal.[62]

The Irish iterations of such provisions have not been tested before the ECtHR, but similar provisions in the United Kingdom have been accepted by the Court.[63] While the ECtHR accepts the notion of inference-drawing provisions, it has consistently linked the right of access to legal advice with the privilege against self-incrimination and found breaches of Article 6(3) ECHR where legal advice was not provided in a timely fashion to persons against whom inferences were later drawn.[64] The jurisprudence of the ECtHR on this appears to have been influential in policy and legislative decision-making in Ireland and has been the basis of many of the safeguards added by the Criminal Justice Act 2007. [65]

57 [2016] 3 IR 123; [2016] IESC 71.

58 [2016] 3 IR 123, 162; [2016] IESC 71, para. 103.

59 Under section 19(1)(b) the garda who requests the relevant information must hold a reasonable belief that the suspect's presence at a particular place, may be attributable to the suspect's participation in the commission of the offence for which he has been arrested.

60 [2016] 3 IR 123, 161–162; [2016] IESC 71, para. 103.

61 [1997] 3 IR 484; [1998] 2 ILRM 35.

62 [1997] 3 IR 484, 501; [1998] 2 ILRM 35, 47 per Hamilton CJ.

63 See Murray v United Kingdom (1996) 22 EHRR 29 and Averill v United Kingdom (2001) 31 EHRR 839 re the Northern Ireland Order 1988.

64 For example, in Averill v United Kingdom (2001) 31 EHRR 839.

65 See, for example, section 2 of the Offences Against the State (Amendment) Act 1998, as amended by section 31 of the Criminal Justice Act 2007.

3.5 Mitigation in Sentencing

Co-operation with gardaí during a period of detention in custody may be taken into account in mitigation at the sentencing stage.[66] Early guilty pleas are particularly encouraged through reduction in sentencing, especially in the area of sexual offences, where the victim is saved the trauma of trial.[67] Section 29 of the Criminal Justice Act 1999 provides, generally, that the courts may take a guilty plea into account when sentencing, considering: (a) the stage at which the person indicated an intention to plead guilty, and (b) the circumstances in which this indication was given. In the specific context of drug offences, an accused person who has "materially assisted" in the investigation of the offence may avoid the imposition of an otherwise mandatory minimum 10-year sentence.[68]

3.6 The Right to Remain Silent and Other Procedural Defence Rights

3.6.1 The Right to a Lawyer

In 2014, in DPP v Gormley and White,[69] the Supreme Court ruled that interrogation of detained suspects should not commence until after legal advice, where sought, has been obtained. The Court shifted its past focus from viewing a breach of the right of access to legal advice as rendering the detention unlawful, to viewing this as a breach of the right to a fair trial. On this, Clarke J importantly found that the arrest of an individual, by 'the coercive power of the State',

> "…represents an important juncture in any potential criminal process… Thereafter the suspect has been deprived of his or her liberty and, in many cases, can be subjected to mandatory questioning for various periods … It seems to me that once the power of the State has been exercised against a suspect in that way, it is proper to regard the process thereafter as being intimately connected with a potential criminal trial rather than being one at a pure investigative stage."[70]

Clarke J, relying on case law of the ECtHR, recognised the need at this point for the solicitor to engage in work connected to building the defence,[71] to advise on the lawfulness of the arrest and detention, and advise on questioning. Hardiman J, concurring, highlighted the increasing complexity of the law for which the specialist expertise of a solicitor is required and indicated that the Court might well find a right to have the solicitor present in the interview if asked in an appropriate case.

This obiter indication of an inclination to find a right to have a lawyer attend the interview prompted an unexpected response. Two months later, in May 2014, the DPP issued a letter to An Garda Síochána instructing that where requested, the attendance of solicitors should be facilitated and that all suspects should be advised that they may request a solicitor to attend interviews. Solicitors were permitted to attend the very next day, though by way of concession rather than a legal or constitutional right, with no legal clarity on how attendance should operate.[72]

66 People (DPP) v Maloney (1989) 3 Frewen 267.

67 See People (DPP) v Tiernan [1988] IR 250 wherein the Supreme Court agreed that a plea of guilty "is a relevant factor to be considered in the imposition of sentence and may constitute, to a greater or lesser extent, in any form of offence, a mitigating circumstance" per Finlay CJ, p. 255.

68 Misuse of Drugs Act 1977, as amended, section 27(3D)(b)(ii).

69 [2014] 2 IR 591.

70 p. 628.

71 p. 620.

72 See further Conway, Vicky and Daly, Yvonne (2019) "From Legal Advice to Legal Assistance: Recognising the Changing Role of the Solicitor in the Garda Station" 1 Irish Judicial Studies Journal 103-123.

In April 2015 An Garda Síochána issued a Code of Practice on Access to a Solicitor by persons in Garda Custody [73] and in December 2015 the Law Society issued Guidance for Solicitors Providing Legal Services in Garda Stations.[74] The Garda Code provides a narrow interpretation of the role of the solicitor: "[t]he solicitor's only role in the garda station should be to protect and advance the legal rights of their client."[75] This language is mirrored in the Law Society Guidance which comments that "Solicitors are required to protect and advance their client's rights without fear or favour."[76] As Legal Aid does not cover the detention period, in 2001 the Garda Station Legal Advice Scheme was established to provide payment for solicitors' work in garda stations and is available to persons in receipt of social welfare payments or whose earnings are less than €20,316 p.a.. The scheme was extended in 2014 to provide additional fees for solicitors' attendance at garda interviews.

Another significant case on legal assistance in Ireland is DPP v Doyle,[77] decided by the Supreme Court in January 2017, and the ECtHR (Doyle v Ireland) in May 2019.[78] In that case, on the facts presented, a majority of the Supreme Court refrained from recognising that the constitutional right of reasonable access to legal advice extended to having a solicitor present in the interview. A number of the judges stated that they might find the right within the Constitution in a future case, with one suggesting that an inference-drawing case might ground such a finding. The ECtHR in Doyle emphasised the importance of the right to legal advice, and clearly stated that Article 6(3)(c) encompasses a suspect's right to have their lawyer physically present during police interviews.[79] However, applying the approach adopted in Beuze v Belgium,[80] the Court held that on the facts in Doyle the overall fairness of proceedings had not been irretrievably prejudiced by the lack of access to a lawyer during garda interviews, and there was no violation of Article 6. Despite the decision on the facts, the Doyle case clarifies that the presence of a lawyer at interview is required as part of the right to legal assistance, and the right to a fair trial.

At the time of writing, legislation is being drafted on the reform and codification of police powers and interviews. The General Scheme of the relevant Bill seeks to provide for the right of a legal representative to attend garda interviews.[81]

3.6.2 The Right to Information

While Ireland has opted in to the Directive on the Right to Information, it is unclear what real impact this has on procedures in garda custody. It has not been transposed into Irish law, but is directly effective. A detained suspect is given a "C72(S) Notice of Rights" "without delay" following arrival at the garda station. The content of that is set out in Reg. 8 of the Custody Regulations 1987, and it does not fully comply with the Directive. It includes matters such as the right of access to a solicitor, the fact that legal aid may be granted in certain cases, the fact that a detainee may request a medical examination (including by a doctor of their own choice), certain details about the bail system, information for foreign nationals on access to diplomatic or consular representatives, and the fact that a person over 18 can have another person informed that they are detained and a parent or guardian will be requested to attend the station in relation to a detainee under 18. However, the C72(S) Notice does not include information on interpretation and translation; on the possibility of challenging the lawfulness of an arrest; on the maximum time a suspect may be deprived of liberty before being brought before a judicial authority; or on the right to remain silent.[82]

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73 An Garda Síochána, Code of Practice on Access to a Solicitor by persons in Garda Custody (2015) available at: https://www.garda.ie/en/about-us/publications/policy-documents/code-of-practice-on-access-to-a-solicitor-by-persons-in-garda-custody.pdf Accessed 17/06/2021.

74 Law Society of Ireland, Guidance for Solicitors Providing Legal Services in Garda Stations (2015) available at: https://www.lawsociety.ie/globalassets/documents/committees/criminal/guidance-for-solicitors-providing-legal-services-in-garda-stations.pdf Accessed 17/06/2021.

75 Garda Code, p. 2.

76 Law Society Guidance, p. 2.

77 [2018] 1 IR 1.

78 Application No 51979/17; 23 May 2019.

79 Para. 74.

80 Application No. 71409/10; 9 November 2018.

81 Department of Justice, General Scheme of Garda Síochána (Powers) Bill (2021) available at: http://www.justice.ie/en/JELR/Pages/Garda-S%C3%ADoch%C3%A1na-(Powers)-Bill Accessed 16/06/21.

82 See further FRA: EU Agency for Fundamental Rights, "Rights of suspected and accused persons across the EU: translation, interpretation and information" (2016) available at: http://publications.europa.eu/resource/cellar/aa2353b0-de15-11e6-ad7c-01aa75ed71a1.0001.02/DOC_1 Accessed 17/06/2021.

Turning to consider disclosure protocol in the garda station, there are no statutory guidelines in place in relation to this. Nonetheless, the Law Society guidance for solicitors places significant emphasis on the need to request pre-interview disclosure from gardaí.

The Code of Practice on Access to a Solicitor by Persons in Garda Custody states that "there is no legal requirement to have a meeting with a suspect's solicitor, or to provide information prior to interview." The Garda Code states that:

> "…the premature disclosure of information/details may sometimes impede or interfere with the investigation. It must be remembered that an interview is part of the investigation process and there must be some spontaneity about the actual interview. If information is handed out first, the suspect can make up his/her answers and there is no spontaneity about the matter."[83]

However, it does advise gardaí to be as accommodating as possible, without compromising the integrity of the investigation, in order to decrease the chances of a "no comment" interview or multiple requests for consultations throughout the interview by the solicitor or detainee.[84]

The Garda Code lays out information that should, as a general principle, be disclosed pre-interview, including information relating to the alleged offence, the arrest, when the request for legal advice was made, and any available material evidence which would not prejudice an investigation.[85] Gardaí are also obliged to ensure that any information that is given to a detainee or solicitor is accurate and true and must not misrepresent the strength of the evidence they are presenting.

The Law Society guidance suggests that where investigating gardaí are unwilling to make disclosures, solicitors may find it helpful to inform them that "in the absence of full and proper disclosure, clients cannot receive comprehensive legal advice".[86]

Particular information procedures should be followed where gardaí intend to invoke inference-drawing provisions. The Garda Code envisages a pre-interview briefing between the investigator and the solicitor in such circumstances. While it is noted in the Code that provision of information in this context is not the same as any post-charge prosecutorial disclosure requirement, it provides that the investigator should furnish the solicitor with enough information to enable them to perform their role without compromising the interview process. Specifically, it states that the solicitor should be provided with "certain basic facts that contextualise the matters to which the questions are going to relate" so that the solicitor can advise the suspect appropriately on any decision to answer or not answer such questions. This links with the safeguards within inference provisions allowing for access to legal advice where questions are to be asked thereunder, and the judicial clarification that there must be an opportunity to consult specifically in relation to the inference provisions, rather than merely a general right of access.[87]

3.6.3 Legal Professional Privilege

One general difficulty in relation to inference-drawing provisions relates to legal professional privilege. This important procedural protection is afforded to a suspect in the criminal process so as to allow them to speak freely with their legal adviser without fear that any information exchanged will be used against them or will go beyond their confidential relationship A threat to this protection arises where a suspect seeks to persuade a court that his reason for failing to mention certain facts in the pre-trial period was the advice of their solicitor to remain silent. In order to prove the genuineness or reasonableness of the suspect's reliance on such advice it may be necessary for legal professional privilege to be waived by the accused at trial in order to have the solicitor explain the reasons for their advice to the court. Once privilege is waived, the prosecution is free to ask questions on all of the communications between the suspect and his solicitor.

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83 Garda Code, section 6, p. 5.
84 Ibid.
85 Ibid.
86 Law Society Guidance, para. 5.6.
87 DPP v Fitzpatrick [2013] 3 IR 656.

In England and Wales, the effect of section 34 of the Criminal Justice and Public Order Act 1994 on legal professional privilege was mentioned by Lord Woolf CJ in R v Beckles:

> "Where the reason put forward by a defendant for not answering questions is that he is acting on legal advice, the position is singularly delicate. On the one hand the Courts have not unreasonably wanted to avoid defendants driving a coach and horses through section 34 and by so doing defeating the statutory objective. Such an explanation is very easy for a defendant to advance and difficult to investigate because of legal professional privilege. On the other hand, it is of the greatest importance that defendants should be able to be advised by their lawyer without their having to reveal the terms of that advice if they act in accordance with that advice."

A threat to the continued existence of a meaningful legal professional privilege in turn threatens the quality of legal advice which can be provided to suspects in the pre-trial process as solicitors may feel inhibited in what they can say to or hear from their clients.

3.6.4 Exclusion of Improperly Obtained Evidence

Until April 2015, Ireland operated one of the strictest - if not the strictest - exclusionary rules in the common law world in relation to evidence obtained in breach of constitutional rights.[88] While a trial judge had discretion to exclude or admit evidence obtained in breach of legal rights, where evidence was obtained in a manner that breached the accused's constitutional rights a much stricter rule of exclusion applied. Exclusion could only be avoided if there were "extraordinary excusing circumstances", and this proviso was very rarely used. Notably, unconstitutionally obtained evidence had to be excluded even if the garda who breached the rights was unaware that they were doing so at the time. A rationale of protectionism was overtly selected, in order to safeguard constitutional rights.

In April 2015, however, the Supreme Court expressly overturned the 1990 decision in People (DPP) v Kenny,[89] which had solidified the strict nature of the rule and had remained in place for 25 years. In DPP v JC,[90] a 4-3 majority decision of the Supreme Court, Kenny was held to have been erroneously decided, and a new exclusionary rule was established in its place. In general terms, the rule allows for evidence obtained in inadvertent breach of constitutional rights to be admitted at trial while evidence obtained in knowing, reckless or grossly negligent breach must be excluded, except in exceptional circumstances.

The exact operation of this rule is still being teased out in the courts,[91] and it is unclear as yet what impact it might have on cases where there is a breach of the right to silence, or the related right to legal advice. In the past, when the right to silence was curtailed it was possible to point to the strict exclusionary rule as a safety net for suspect rights which perhaps lessened concerns about the need to protect rights such as the right to silence in an absolutist manner. It remains to be seen in an appropriate case if the new rule still provides a significant layer of protection for suspect rights.

88 Daly, Yvonne (2011) "Judicial Oversight of Policing: Investigations, Evidence and the Exclusionary Rule"55 Crime, Law and Social Change, 199–215, p. 199; Daly, Yvonne (2015) "Overruling the protectionist exclusionary rule: DPP v JC" 19(4) International Journal of Evidence and Proof 270-280, p. 270; Dimitrios Giannoulopoulos, Improperly Obtained Evidence in Anglo-American and Continental Law (Bloomsbury Publishing, 2019), p. 232.

89 [1990] 2 IR 110.

90 [2017] 3 IR 417.

91 See People (DPP) v Colm Roche [2015] IESC 67 (July 23 2015); People (DPP) v Marcus Kirwan [2015] IECA 228 (October 27 2015); DPP v Eamon Murphy [2016] IECA 287 (October 12 2016); and Criminal Assets Bureau v Murphy [2018] IESC 12 (Feb 27 2018). For a discussion of these cases see Daly, Yvonne, "'A Revolution in Principle'? The Impact of the New Exclusionary Rule" (2018) 2 Criminal Law and Practice Review 1-17. See also Hamilton, Claire "A Revolution in Principle: Assessing the impact of the new evidentiary exclusionary rule" (Irish Council for Civil Liberties, 2020).

3.7 Relevant Rules Concerning Interrogations and Evidence

The rules governing garda interrogations are drawn from a number of different sources: legislation setting out relevant detention periods for offences of varying natures, regulations on the treatment of detained suspects in garda custody, regulations on the electronic recording of interviews, the Judges' Rules, domestic case law on the ambit of various constitutional and legal rights, as well as ECHR and EU law.

A witness or victim can be questioned by gardaí, under the Judges' Rules, in a voluntary capacity. Alternatively, once a garda forms a reasonable suspicion that a person speaking with them in a voluntary capacity may in fact be involved in the commission of an offence, that person must be properly arrested and questioned in accordance with the relevant rules for detained suspects. A financial difficulty arises for solicitors if their client is asked or wishes to present for interview at a garda station in a voluntary capacity, without arrest. In such circumstances there is no provision for a solicitor to be paid under the Garda Station Legal Advice Scheme for attendance at the station, or for prior consultation.

There is nothing in Irish law which prohibits an interrogation if a suspect asserts their right to remain silent. Gardaí can, and do, continue to put questions to the suspect even if the response is complete silence, or "no comment".

3.7.1 The Custody Regulations

On introducing the general power of arrest for the purpose of detention under section 4 of the Criminal Justice Act 1984 the legislature introduced certain safeguards for suspects under the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987.[92] These regulations apply to all suspects detained for questioning in garda custody.

Amongst other things, the Regulations provide a general requirement for gardaí to act "with due respect for the personal rights of persons in custody and their dignity as human persons".[93] They specify that no garda shall subject a person in custody to ill-treatment of any kind or the threat of ill-treatment (whether against the person himself, his family or any other person connected with him) or permit any other person to do so.[94]

92 These regulations were not promulgated until April 1987 and the commencement of many of the main provisions of the 1984 Act, including the introduction of the general power of arrest for detention, were accordingly delayed until those regulations were put in place.

93 Reg 3.

94 Reg 20.

On interrogation, more specifically, Regulation 12 states that interviews with detained suspects are to be conducted in a fair and humane manner and it goes on to set out the procedures which are to be adopted in relation to such interviews:

— before the interview begins the garda conducting the interview must identify himself and any other garda present by name and rank to the arrested person[95];
— no more than two gardaí shall question the arrested person at any one time[96];
— no more than four gardaí shall be present at any one time during the interview[97];
— an interview must last no longer than four hours[98];
— as far as practicable interviews should take place in rooms specifically designated for that purpose[99];
— detained suspects should not usually be questioned between midnight and 8 a.m.[100];
— an arrested person who is under the influence of alcohol or drugs to the extent that he is unable to appreciate the significance of questions put to him or his answers must not be questioned in relation to an offence while he is in that condition except with the authority of the member in charge[101];
— if, while being interviewed, an arrested person makes a complaint to a garda in relation to his treatment while in custody, the garda must bring it to the attention of the member in charge and record it or cause it to be recorded in the record of the interview[102];
— a record of each interview must be kept[103]; and
— no garda shall use force against a detained suspect except such reasonable force as is necessary in self-defence, to secure compliance with lawful directions, to prevent his escape, or to restrain him from injuring himself or others, damaging property or destroying or interfering with evidence.[104]

The Regulations do not confer any statutory rights on suspects: for example, while they provide that as far as practicable not more than one person should be kept in each cell at a garda station,[105] no attendant legal right to be placed in a cell alone accrues to a detained suspect. Furthermore, section 7(3) of the Criminal Justice Act 1984 states that breach of the Regulations alone does not provide grounds for an action, either civil or criminal, against a member of An Garda Síochána and does not of itself affect the lawfulness of the suspect's detention or the admissibility of any statement made by him. There is, accordingly, no robust method of enforcement of these Regulations. While there is judicial discretion to exclude evidence obtained in breach of the Regulations, such breach must be causatively linked to some prejudice suffered by the accused.[106] Even then, the courts have seemed reluctant to exercise the discretion in favour of exclusion. It seems that breach of the Regulations which is not persistent and is not coupled with any other misconduct will not be enough to give rise to the exercise of the discretion.[107] It is likely only to be exercised where the court has evidence of multiple or continuing breaches of the Regulations which could be said to amount to unfair procedure and has resulted in prejudice to the accused.

95 Reg 12 (1).
96 Reg 12 (3).
97 Reg 12 (3).
98 Reg 12 (4).
99 Reg 12 (5).
100 Reg 12 (7).
101 Reg 12 (9).
102 Reg 12 (10).
103 Reg 12 (11).
104 Reg 20 (2).
105 Regulation 19(5).
106 People (DPP) v Murphy, unreported, Court of Criminal Appeal, July 12, 2001.
107 See People (DPP) v Connell [1995] 1 IR 244; DPP v Spratt [1995] 1 IR 585; [1995] 2 I.L.R.M. 117; People (DPP) v Darcy, unreported, Court of Criminal Appeal, July 29, 1997; DPP v Gillespie [2011] IEHC 236.

Of course, depending on the circumstances, a breach of the Regulations may also be a breach of the constitutional or legal rights of a suspect, or may affect the voluntariness of a confession made by a suspect, so as to result in the exclusion of evidence on grounds other than a mere breach of the regulations. For example, Regulation 11 provides for a suspect to consult with his solicitor in private, which is also a constituent part of the constitutional right of reasonable access to legal advice.[108]

3.7.2 Electronic Recording Regulations

Audio-visual recording of garda interviews is now the norm in Ireland. This took some time to become established. While the general power of arrest and detention for serious offences was legislated for in 1984, and the practice really began in 1987 (following the provision of the Custody Regulations), the Electronic Recording Regulations were not provided until 1997.[109] It took another number of years before the recording of interviews became routine.

All of the main inference-drawing provisions now require that an interview must have been electronically recorded, or the detained suspect consented in writing to the non-recording of the interview, for an inference to potentially be drawn.

While garda interviews in relation to serious offences are now almost invariably audio-visually recorded, the tapes of such recordings are not automatically made available to the defence. A court order must be obtained for this.[110] This procedure was introduced, at least in part, to protect suspects with associations with organised crime from retribution by criminal associates.[111] Prior to this, tape recordings were given to suspects at the end of their detention, and members of criminal groups would seek to obtain and watch those tapes to ensure that the suspect did not divulge any information to the gardaí.

Tapes are not routinely transcribed either. As noted earlier, gardaí keep a contemporaneous note of interviews. This is generally typed up and made available as part of the Book of Evidence.

3.7.3 Confession Evidence

There are certain rules which govern the admissibility in evidence at trial of confessions made by suspects in the pre-trial period of detention. While these rules truly relate only to evidence presented at the trial stage of the criminal process they clearly affect the pre-trial process also by prohibiting the use of certain procedures at that time and by prescribing the manner in which statements should be taken.

A confession in this context is a pre-trial statement by the accused which was inculpatory and which was therefore against their interests. This need not necessarily be a comprehensive statement, but can be an utterance or throwaway comment.

The rules on confession evidence in Ireland are entirely judicially constructed; the Oireachtas has played no part in formulating these rules. They can be categorised as follows: (i) the voluntariness requirement; (ii) breach of constitutional rights; and (iii) issues of fundamental fairness.

108 See People (DPP) v Finnegan, unreported, Court of Criminal Appeal, July 15, 1997.

109 Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997.

110 Section 56 of the Criminal Justice Act 2007.

111 This change was first proposed by the Balance in the Criminal Law Review Group, The Right to Silence Interim Report Final Report (15 March 2007). See also Dáil Éireann debate - Wednesday, 28 Jun 2006, available at: https://www.oireachtas.ie/en/debates/debate/dail/2006-06-28/speech/445/

(i) The Voluntariness Requirement

A confession which is found by a court to be involuntary will be excluded from evidence at trial.[112] The concept of voluntariness evolved within the common law but it has been held by the Irish courts that it also has constitutional status within the protection of the right to a fair trial under Art.38.1. As discussed above, this led to the exclusion at trial of statements obtained on foot of a legislative provision criminalising silence.[113] Therefore, unlike the consequences of a breach of the Judges' Rules, the Custody Regulations, or the Electronic Recording Regulations, if a trial judge deems that a relevant statement was obtained due to a threat, or an inducement, or because of oppression, they must exclude it from evidence at trial.[114]

The main rationale behind the rule is reliability as it is thought that a confession which is proffered voluntarily is more likely to be reliable than one which is coerced from a suspect.[115] However, other rationales also exist, such as the deterrence of garda misconduct, and the protection of the right to silence and other suspect rights.[116]

The legal definition of "voluntariness" was laid out by Lord Sumner in Ibrahim v R[117] and was adopted in Ireland in A.G. v McCabe.[118] It prescribes that a voluntary statement is one which "has not been obtained … either by fear of prejudice or hope of advantage exercised or held out by a person in authority and the onus is on the prosecution tendering that statement to show that it is voluntary in that sense."[119]
Basically, a statement which is obtained on the basis of either a threat or an inducement will be seen as involuntary and deemed inadmissible at trial. However, the traditional voluntariness rule has also been expanded to apply in cases where a statement has been obtained in circumstances of "oppression".

The concept of "oppression" was defined in the English case of R v Priestly[120]
as "something which tends to sap and has sapped the free will which must exist before a confession is voluntary."[121] A more specific definition of oppressive questioning was adopted from the English case of R v Prager[122] in People (DPP) v Pringle, McCann and O'Shea[123]:

> "questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent."[124]

The test for oppression is subjective. In the Pringle case, O'Higgins CJ held that—

> "what may be oppressive to a child, an invalid, or an old man or somebody inexperienced in the ways of the world may turn out not to be oppressive when one finds that the accused person is of tough character and an experienced man of the world".[125]

112 Ibrahim v R [1914] A.C. 599; A.G. v McCabe [1927] IR 129; People (A.G.) v Cummins [1972] IR 312.

113 Re National Irish Bank Ltd. (No. 1) [1999] 3 IR 145.

114 In People (A.G.) v Cummins [1972] IR 312, 322 Walsh J stated that "… a trial judge has no discretion to admit an inculpatory or an exculpatory confession, or statement, made by an accused person which is inadmissible in law because it was not voluntary. It is a matter for the trial judge to decide, when he has heard the evidence on the point, whether or not he will admit a statement, but if he is satisfied that it was not voluntary then his decision can be only to exclude it."

115 In Braddish v DPP [2001] 3 IR 127 at 133 Hardiman J stated that "…relatively recent history both here and in the neighbouring jurisdiction has unfortunate examples of the risks of excessive reliance on confession evidence".

116 Note the varying rationales adopted by McCarthy J, Walsh J and Henchy J for their findings of involuntariness in the case of People (DPP) v Hoey [1987] IR 637.

117 [1914] AC 599.

118 [1927] IR 129; see also McCarrick v Leavy [1964] IR 225.

119 A.G. v McCabe [1927] IR 129, 134 based on Ibrahim v R [1914] AC 599, 609.

120 (1965) 50 Cr. App Rep 183; [1966] Crim. L.R. 507.

121 This definition was adopted into Irish law in People (DPP) v Breathnach (1981) 2 Frewen 43 later affirmed in the Supreme Court in People (DPP) v Lynch [1982] IR 64.

122 [1972] 1 All E.R. 1114; [1972] 1 W.L.R. 260; 56 Cr. App Rep 151.

123 (1981) 2 Frewen 57.

124 [1972] 1 W.L.R. 260, 266 per Edmund Davies L.J

125 (1981) 2 Frewen 57, 82.

In order for the court to find that a tendered statement was involuntary, it would have to be of the opinion not only that the words allegedly amounting to a threat or inducement were objectively capable of being seen as such but also that the particular suspect in question understood them to amount to a threat or inducement.[126] The relevant threat or inducement must have led the suspect to make the confession.[127] Furthermore, it is not sufficient that threats or inducements have been in existence, such threats or inducements must have emanated from a "person in authority". Usually where a suspect has been arrested and detained for questioning the "person in authority" will be an interrogating garda.

(ii) Breach of Constitutional Rights

A confession obtained in breach of constitutional rights may also be excluded at trial. It seems that the decision on exclusion will now be made on the basis of the new rule from DPP v JC, discussed above. Under this rule, an inadvertent breach of rights will not lead to the exclusion of evidence resultantly obtained; evidence obtained in knowing breach of constitutional rights will be automatically excluded; and, there is a rebuttable presumption against the admission of evidence obtained in reckless or grossly negligent breach of constitutional rights. Exclusion will only occur where there is a causative link between the knowing, reckless, or grossly negligent breach of constitutional rights and the making of the confession or statement.

(iii) Fundamental Fairness

Fundamental fairness, in the context of the admissibility a suspect's statements at garda interview, was first referred to in the Supreme Court case of People (DPP) v Shaw.[128] There Griffin J made the influential observation that—

> "[b]ecause our system of law is accusatorial and not inquisitorial, and because … our Constitution postulates the observance of basic or fundamental fairness of procedures, the judge presiding at a criminal trial should be astute to see that, although a statement may be technically voluntary, it should nevertheless be excluded if, by reason of the manner or of the circumstances in which it was obtained, it falls below the required standards of fairness. The reason for exclusion here is not so much the risk of an erroneous conviction as the recognition that the minimum of essential standards must be observed in the administration of justice."[129]

The notion of fundamental fairness is linked in some ways to the concept of oppression, however, it was held in People (DPP) v C[130] that there may be circumstances where the causative link necessary to exclude evidence on the basis of oppression may not be present, but the behaviour and general circumstances of the case may be said to be so unfair as to necessitate the exclusion of the evidence obtained on broader public policy grounds or on grounds of a breach of fair procedures.[131]

In the case of People (DPP) v Murphy[132] it was made clear that even where there have been no inducements, no threats, no oppression and no breach of constitutional rights, circumstances of unfairness can lead to the exclusion of confession evidence at trial.[133] This case involved an appeal against a murder conviction. One of the grounds for appeal was that the suspect had been emotionally manipulated into making certain inculpatory statements by the actions of certain gardaí, particularly an Inspector who had spent an hour and fifteen minutes alone with the suspect, ostensibly getting his signature on a request for the release of his medical records. During this period of time, the Inspector provided the suspect with a take-away meal of chicken and chips which he was allowed to eat in a room other than his cell, gave him a cigarette and spoke with the suspect's solicitor in relation to making money available for the suspect's mother. Following all of this the suspect made certain inculpatory statements and revealed to the Inspector where the clothing of the victim could be found. It was submitted on behalf of the appellant that it could not and should not have taken an hour

126 People (DPP) v McCann [1998] 4 IR 397.

127 Ibid.

128 [1982] IR 1.

129 [1982] IR 1, 61.

130 [2001] 3 IR 345.

131 See also People (DPP) v Breen, unreported, Court of Criminal Appeal, March 13, 1995; People (DPP) v Paul Ward, unreported, Special Criminal Court, November 27, 1998.

132 [2005] 4 IR 504.

133 See also People (DPP) v Paul Ward, unreported, Special Criminal Court, November 27, 1998.

and fifteen minutes for his signature to be acquired and that he had been clearly manipulated into making the admissions. The Court of Criminal Appeal held that the Inspector had not offered any improper inducements to the suspect or sought to manipulate the emotions of the suspect. However, the Court further held that there was substance to the suggestion that the Inspector had hoped that if he remained in the suspect's company long enough in relaxed circumstances the suspect might say something of an incriminating nature. The Court suggested that the suspect was on that day in a vulnerable position and that in those circumstances the actions of the Inspector were, possibly at an unconscious level, tactically unfair and took advantage of that unusual level of vulnerability.[134] Therefore, the Court held, the statements made on that occasion ought to have been excluded from evidence by the trial judge.

Physical coercion, including both torture and any inhuman or degrading treatment, of a statement from a suspect would not be tolerated by the Irish criminal process. Gardaí are allowed to use "reasonable force" when necessary, but any use of force to elicit a statement would result in its exclusion at trial. Only voluntary statements can be admitted.

Chapter 3 Recommendations

- Retain the position whereby no reference to a suspect's reliance on their right to silence is made at trial, except in the context of legislative inference provisions.
- Retain the position that an inference cannot be drawn against an accused person for failing to give evidence at their own trial.
- All legislative adverse inference provisions should clearly state the need for existing evidence to ground the request for a suspect's account or explanation.
- Retain the "inference interview" as a separate interview towards the end of the detention period, which has a specific caution.
- The statutory regulation of interviews should be modernised.
- Section 52 of the Offences Against the State Act 1939 should be repealed.
- The right to have a solicitor in attendance at the Garda interview should be put on a legislative footing.

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134 [2005] 4 IR 504, 519–520.

4. Data Collection and Analysis

In this chapter we describe the method of collecting and analysing data for this study, including the features of the participant groups and how they were recruited, as well as explaining the way in which the findings are shared throughout this report.

4.1 Sample

This research involved multiple groups of participants. Self-selection, convenience recruitment strategies were used. For the solicitors, barristers and staff from the Office of the DPP, this involved advertising amongst professional networks and circulating details of the opportunity to participate in focus groups or interviews within accredited/professional organisations. Participants were invited to put themselves forward if they wished to participate. Researchers then used purposive sampling to select a spread of participants in terms of gender, years of experience and in some instance (e.g., DPP staff) different roles. This helped to form a more rounded picture of the processes involved and the different perspectives on suspect silence. A different approach was used to recruit participants who were judges, where researchers employed a purposive approach of contacting judges to present the opportunity to participate in the study.

In relation to retired members of An Garda Síochána, this involved advertising among garda retiree networks and asking participants to circulate details of the opportunity to participate with other retired former colleagues. Participants were invited to put themselves forward if they wished to participate. The researchers did apply through the Garda Research Unit to request research access to currently serving gardaí but this request was denied. Of the six retired gardaí interviewed one retired within the past seven years, one retired within the past four years, and four retired within the past two years.

An overview of our data collection methods and sampling sizes is presented in the table below. In total we gathered data from 50 participants.

Participant Group	Data Collection Method	Number of Participants
Criminal Defence Solicitors	Focus Groups (FG)	2 x FG, with 10 participants in FGA and 9 participants in FGB (19 total)
Barristers	Interviews	10
DPP Staff	Interviews	11
Judges	Interviews	4
Retired gardaí	Interviews	6

In the presentation of the findings below, a participant's profession is indicated by an assigned letter as follows: solicitor focus group participants (S), barrister interviewees (B), DPP staff interviewees (D), retired member of An Garda Síochána (G), and judges (J). This letter is followed by a number, to refer to specific participants (e.g., B1, D2, J3 etc). For focus group participants, there will also be an additional letter (A or B) to show which focus group the participant attended (e.g., S1A or S1B). In instances where excerpts of focus group dialogues are provided, 'Mod' is used to identify the focus group moderator. Where dialogue from an interview is presented, 'I' is used to identify the interviewer.

4.2 Methods

This project employed a qualitative research methodology to explore the experiences and perceptions of the right to silence among individuals who have insight into the practical exercise of the right to silence at the pre-trial investigative stage. This involved using a combination of focus groups and interviews with those who encounter the right to silence in a professional capacity. Ethical approval for this project was granted both by Dublin City University Research Ethics Committee and Maastricht University Ethics Review Committee Psychology and Neuroscience.

Focus groups

Two focus groups were conducted with criminal defence solicitors. This was the only group of a participants that it was possible to speak with using this method of data collection, due to the COVID-19 restrictions in place during the project. Each focus group lasted approximately 2 hours, with the first being attended by 10 participants and the second being attended by 9 participants. For the first section of the focus group, participants were asked to respond to a number of questions relating to the right to silence in pre-trial custody and encouraged to discuss their experiences and opinions relating to the right to silence with the group The second part of the focus group involved presenting a hypothetical case scenario to the participants and asking them to discuss their approach to dealing with the issues within the scenario. The focus groups were guided by questions developed by the cross-jurisdictional EmpRiSe Project Team, as well as questions more specifically relevant to the Irish context (see Appendix).

Interviews

Interviews were conducted with barristers, DPP staff, retired members of An Garda Síochana, and judges. The majority of these interviews were conducted remotely due to COVID-19 restrictions, via video conferencing platforms or over the phone, with the exception of two judges who preferred to participate in face-to-face, socially distanced interviews. Interviews ranged from 46 mins to 99 minutes, with an average duration of 65. Participants were asked questions from a semi-structured interview schedule (see Appendix). This, like the focus group schedule, was developed based on the research literature in conjunction with the cross-jurisdictional research partners, whilst preserving the ability to address the different roles that participants may play in the different jurisdictions. Questions specific to the Irish context were also included.

Analysis

The focus groups and interviews were audio-recorded using a Dictaphone. These were then transcribed by a member of the research team and cleaned of identifiable information. NVivo software was used to undertake thematic analysis to understand the perspective on the right to silence and the practical issues relating to its implementation in custody. Each participant group was analysed in turn through a semantic lens, using a combination of inductive and deductive coding, before comparisons were made between the different participant groups.

Parameters of the study

The research reported herein focused on the right to silence in garda interviews with adult suspects. While there is reference to child suspects in places, that experience was not the main focus of this project.[135] Furthermore, the project did not examine closely the issues relating to the investigation and prosecution of money laundering offences, wherein specific presumptions can be accepted at trial in relation to financial transactions and activities.[136] This specialised aspect of the criminal law is not a focus of this study.

Reporting the findings

As this research captured a wide range of viewpoints from people who play very different roles across the criminal process in Ireland, particular participants were best placed to give detail on certain issues or experiences. Resultantly, certain sections of this report focus on what those participants have to say. Having said that, many of the DPP staff with whom we conducted interviews had previous professional experience as criminal defence solicitors, and as such, they offered both prosecution and defence perspectives at times. Similarly, many of the barrister interviewees had both prosecution and defence experience, and indeed some of the judges had the same from practice prior to appointment to the bench. The researchers have considered the viewpoints of all participants, regardless of role, for each section of this report and have, as part of their analysis, flagged inconsistencies or tensions in the perspectives and experiences of different participants or participant groups.

135 On child suspects in garda interviews see further Kilkelly, Ursula and Forde, Louise Children's Rights and Police Questioning: A Qualitative Study of Children's Experiences of being interviewed by the Garda Síochána, 2020, available at: https://www.policingauthority.ie/assets/uploads/documents/Children%E2%80%99s_Rights_and_Police_Questioning_-_A_Qualitative_Study_of_Children%E2%80%99s_Experiences_of_being_interviewed_by_the_Garda_S%C3%ADoch%C3%A1na.pdf Accessed 17 June 2021.

136 In a money laundering trial, it can be presumed that the suspect had the required state of mind (i.e. they knew or believed or were reckless as to whether or not relevant property was the proceeds of criminal conduct.), where they engaged in certain conduct in relation to relevant property in circumstances where it is reasonable to conclude that they knew, believed or were reckless about the fact that the property was the proceeds of crime. The relevant conduct includes (a) concealing or disguising the true nature, source, location, disposition, movement or ownership of property, or any rights relating to property; (b) converting, transferring, handling, acquiring, possessing or using property and (c) removing property from, or bringing property into, the State or a place outside the State. See Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, sections 7 and 11.

5. Silent Suspects in Garda Interviews

In this chapter we outline the study's findings in relation to suspects' silence in garda interviews. In particular, we highlight participant's attitudes towards suspects' silence and the right to silence; the ways in which suspects tend to manifest silence during garda interviews; the factors which influence a suspect's reliance on silence; and the many issues considered by criminal defence solicitors when advising suspects on whether it would be beneficial to remain silent or to engage with the gardaí at interview. While garda practice, particularly in the context of pre-interview disclosure, is mentioned briefly in this chapter, such issues are discussed in more detail in Chapter 6.

5.1 Attitudes Towards Suspect Silence and the Right to Silence

Many participants in this study were clear in their support of the right to silence as a constitutionally protected right in Ireland. Great importance and significance were placed on the right to silence, regardless of the participants' status as criminal defence solicitor, barrister, retired garda, prosecutor, or judge. This is indicative of a general underlying culture of deference concerning the right to silence and a desire to safeguard an accused person's ability to avail of that right in criminal proceedings.

> "They are innocent til proven guilty going into the interview and their right to silence protects that" (S2A)

> "it's a constitutional right and it has to be properly respected." (B1)

> "They are exercising their constitutional right to silence, they are fully entitled to do it, so I wouldn't have any certainly any negative thoughts about a person over that. I think they're absolutely, more power to them in one way." (D1)

> "I have a traditional view that the right to silence should be maintained, that there shouldn't be encroachments into it" (J3)

> "I agree with the right to silence and I would like to think that I would have the right to silence if I was ever suspected of anything." (RG6)

However, while the existence of the legal right to silence and the need to uphold it was generally accepted by most participants, this was not without concern or thought for other interests in the criminal process, including victims of crime and the general public.

> "I mean look from my perspective, I was always trying to operate the policing part, like if it was one of my son's that was brought in, you know, would I want the guards in there getting stuck into them like, or would I prefer them to be able to go in there and say nothing and speak to a solicitor. Yes, I prefer that they have the right to say nothing. And I struggle with that because I met the worst of the worst criminals you could imagine. And to see them in interview rooms just playing the field and head down on the table, saying nothing, you then say 'jaysus, there's a terrible imbalance here, and the damage and the harm that they've caused, and to be able to come in here and say nothing'. But you know what, when you take the balance out, it's absolutely necessary." (RG3)

There was evidence of a blurring between the concepts of non-cooperation and silence. This was particularly relevant at bail applications. Participants reported judges (who should not be made aware of a suspect's silence) being informed by gardaí about whether or not a suspect had been 'cooperative' during interviews as a by-word for silence. And yet, as this participant explains,

> "Not answering questions isn't being uncooperative, it's relying on your constitutional rights." (S6B)

There appeared to be a similar blurred, overlap at the sentencing stage. How "cooperativeness" and silence are treated at the bail and sentencing stages is discussed further in Chapter 7.

5.2 Manifestations of Silence in Police Interviews

When a suspect is asked questions in a garda interview, they may respond in different ways – denials, admissions, supplying information, or remaining silent. Given the absence of quantitative data on the exercise of the right, participants' views as to how often the right is invoked varied considerably. Their views, discussed below, on the factors which influence suspect decision-making in this context, and the legal advice proffered in particular circumstances, were more convergent.

Exercising one's right to silence remains an option throughout the interview process. When a suspect invokes their right to silence, however, this does not mean that the interview ceases. As this participant explains,

> "It has to be put to them. I don't believe that they [gardaí] have the power to not interview in certain offences because the clients needed to be awarded the opportunity to comment…" (S6A)

Retired garda participants spoke about the need from both a prosecution and a defence perspective to give the suspect an opportunity to respond to the evidence, and the garda questions:

> "The obligation is on the member of An Garda Síochána to establish the guilt or innocence of that individual. So he must or she must continue to apply these questions. So even though they might say 'no' at the start, there will be different questions. And then you go back and pose that first, second or third question again to give that individual that opportunity, because it's the guilt or innocence. And it's the gathering of that evidence to establish that guilt or innocence is important. Even at the end of it, nobody is saying that individual is guilty or that individual is innocent because if there's enough evidence there and the DPP is satisfied a charge is preferred, then you go the court for the jury to decide the guilt or innocence." (RG5)

> "So if you stop after the first one or two 'no comment no comment', and then you submit the file to the DPP or the prosecutor, and then they say, 'well you never asked my client this and you never gave him an opportunity to deny it' or whatever. So you're coming at it from both ends then, really." (RG2)

Suspects can exercise silence in different ways. They can say no words at all, or they may say "no comment". Participants also observed suspects executing strategies to maintain a no-comment position, such as picking a point on the wall and staring silently, or placing their head on the table and not engaging at all. Participants reported that these may be as a result of learning such strategies from peers who had experience of such interviews, whether this be criminal associates or members of paramilitary organisations.

> "Well they're schooled… There's a couple of things that take place when you're dealing with serious crime. First and foremost, generally speaking, they don't operate on their own. They're part of a crew." (RG3)

Many of the retired garda participants mentioned that this can be stressful and frustrating, but their focus is on carrying out a thorough investigation and their personal impressions of the case are not relevant to the ultimate progress of the case. One retired garda noted that suspects sometimes answer some questions but not all, displaying 'partial silence' by selecting which questions to answer:

> "…they might answer some questions but they'll go to 'no comment' when the difficult questions come… it kind of does make me feel that they might be guilty." (RG6)

Notably in terms of the impact of silence during garda questioning on later proceedings, where suspects exercise total silence, no part of their interview appears before the jury so the jurors do not learn that they chose to exercise their right to silence. However, where a suspect has answered some questions and not others, the answers given may be provided to the jury. This may lead to a level of jury speculation on the sorts of questions that might also have been asked and received no answer.

S5B: I don't know if they know or not, but I would certainly be worried that they might… certainly, I think, they would be asking questions amongst themselves, "why is there only one question and one answer?" and I think that they will find that really strange so they might instinctively know there must have been more questions asked…

Mod: And what impact do you think that has on them then? If they're wondering about that?

S5B: I think that they would think, potentially, the worst-case scenario is that they are thinking that the person has something to hide…

Depending on the nature of the questions, there is the potential for this to cause confusion among jurors as to why gardaí seemed to only ask those specific questions and could even cause jurors to infer that a suspect did not answer other questions. The danger would be that jurors would then speculate on the reasons as to why other questions were not asked and answered, maybe thinking the gardaí had not investigated properly or indeed that the person had not answered other questions because they had no innocent answer to provide. For that reason, generally speaking, a jury must not be told whether someone has exercised their right to silence, lest they infer that a person is guilty because of their silence. The only exception to that is where the inference provisions are invoked and a person remains silent. The implications of silence in these specific circumstances are discussed in chapter 7.

5.3 Factors Influencing Suspects' Reliance on Silence

Participants across groups identified the main factors which influence a suspect's tendency to remain silent or not. These included their degree of knowledge or experience of the criminal justice system; involvement in criminal or paramilitary groups; vulnerability; the need to tell their story and perceptions of silence; as well as cultural norms and beliefs about engaging with police.

These factors influenced whether a person tended to remain silent or not, but they also impacted the advice a solicitor was likely to give, in terms of whether exercising one's right to silence would be beneficial.

5.3.1 Knowledge or Experience of the Criminal Justice System

Among the participants there was a strongly held and almost universally accepted perspective that more experienced individuals were more likely to remain silent.

"Often, I think that the more experience that a person has of the justice system the more likely they are to do that, to not answer. Usually kind of people who, certainly people who have little experience would tend to be much more forthcoming in what they have to say." (B10)

"What I would call hardcore robberies, professional lads, who make their business in it, serious criminals, the majority of those boys I'd say would maintain their right to silence." (D9)

"Some clients you walk in and they're like, 'no comment, it's fine, I know' and you go in and they do it and there's not a bother" (S5A)

"My own guess would be that you'd want to be certainly very psychologically tough and probably have experience of the criminal justice system at the wrong end to say 'no comment' completely throughout an interview. It is a rule that I suppose protects hardened criminals more than it protects people who have never had any experience of the criminal justice system before." (J3)

"…you have your seasoned criminals; he's not going to give you anything to help your case." (RG2)

> "you couldn't really pin it down, but it's more likely to be someone from a paramilitary background or someone who has been involved in crime all their lives." (RG4)

This may be an accurate factual observation that participants have based on their experience — but it is also indicative of an association in the minds of legal professionals about how those with greater experience of the criminal justice system are more likely to rely on their right to silence. People with more experience of the criminal justice system are those with frequent encounters with gardaí and with histories of criminal behaviour. There is a risk that the conclusion that greater experience of the criminal justice system increases the likelihood of reliance on silence operates, even on a subliminal level, to inform the underlying, unspoken assumption that reliance on silence is more likely to be used by those who are guilty. The language used in discussing those with greater experience of the criminal justice system who rely on their right to remain silent is interesting to note, with references to "seasoned criminals" (RG2), "hardened criminals" (J3), and "experienced 'no comment' merchants" (J2).

An underlying fear or distrust of the gardaí was also identified by some retired garda participants, solicitor participants and barrister participants as a determinant of whether the suspect would remain silent.

> "…someone might have a total mistrust of the police and wouldn't believe a word a police man says. And they could have had a bad experience with the police. So there's just no relationship going to develop there whatsoever." (RG4)

In contrast to those with greater experience of the criminal justice system, individuals who had less experience of being arrested and questioned were more likely to answer questions rather than avail of their right to silence.

> "If the person has been in custody before, then they will be more able to kind of make I suppose what you might describe as 'advanced' decisions about how to deal with an interview…they won't be experiencing, they won't be experiencing any kind of, or as much shock or surprise at things, as anyone does the first time they're arrested and brought into custody." (S3B)

A lack of familiarity with the process and downstream consequences of waiving their right to silence could mean that individuals fall back upon the social conventions of politeness and acquiescence, or feel compelled to explain themselves.

The experience of the suspect was a determinant of legal advice. Solicitor participants spoke of how clients with familiarity of the criminal justice process were more at ease with the situation, meaning that they could make more 'advanced' (S3B) decisions about how to navigate the interviews. A sense of familiarity and confidence in relation to the interview process may even mean that the suspect does not wish for the solicitor to attend.

However, this confidence could mean that 'experienced' suspects over-estimate their ability to maintain their desired "no comment" approach. Solicitor participants reported that they found it more difficult to advise such suspects effectively because they were sometimes less likely to stick to the advice.

> "The worst thing is when a client just goes 'yeah yeah no comment, I know that…' y'know or something like that. That is like a red light like…because you know they're probably the most likely to start talking when they're in there. So you really then have then be like, 'look I'm not being condescending…' well you wouldn't say condescending but y'know, you're saying 'look I'm not trying to be smart and I know it seems really easy in the movies and everything, just no comment but it's actually quite difficult.' I've spent a long time with clients who say that to me, before we even go anywhere I would just repeat that point over and over and over, 'we're going "no comment"…'" (S8A)

At the other end of the spectrum, solicitors may need to consider that inexperienced suspects, with a lack of previous experience of garda interviews, may be more susceptible to garda questioning tactics. This tendency to struggle to remain silent can impact the legal advice a solicitor gives a person, in terms of needing to prepare them for how the gardaí may question them and that remaining silent may not be a simple task.

"I think it depends on the client. I think if you have a client who is going in and is not…is not familiar with the situation, has not been in that kind of situation before, is coming from the frame of mind of 'well it's better to get my side of the story over because I can explain all this and it's better for me to do that now' will then revert straight back to that 'yeah I agree, I see how this looks and I don't think this looks good so I feel I like I need to say something'. And you have to prep them for that." (S7B)

Often individuals with greater degrees of experience of garda questioning were individuals who had histories of criminal convictions. This in itself could impact the legal advice on whether to remain silent, particularly in relation to navigating any bail applications. Solicitors had to consider the impact of previous offences on chances of getting bail and how this could impact the choice to answer questions or not. It could reduce the importance/knock on consequences of the decision whether to remain silent, as having many convictions for serious offences could mean that getting bail is unlikely in any case.

5.3.2 Organised Criminal and Paramilitary Groups

All participant groups also reported that silence was much more likely in cases where the suspect is involved in organised crime or paramilitary groups.

"People who are up for very serious charges will in the main probably be saying 'no comment'." (B6)

"In the Special [Criminal Court] still obviously the membership cases will start out as 'no comment', maybe three interviews where there's no comments" (J1)

"[…] the kind of gangland things that we get, they would be experienced 'no comment' merchants" (J2)

"When you have the likes of the crime gangs in and the people there. And they would be like, similar to people in paramilitary organisations. A lot of time they will not want to discuss." (RG5)

For individuals who were arrested for offences linked to organised criminal activity, their involvement in/position as part of such an organisation could mean that they faced acute external pressures to remain silent. There could be extremely detrimental consequences for informing the gardaí of anything relating to organised criminal activity that meant individuals were more likely to remain silent as a result of these pressures.

"You do need to be very careful about asking them to make comment on something when their head might not be in the right place to make comment then you don't know the underlying factors in relation to the offence, or whether they're protecting someone or they're worried about different factors within the community" (S6A)

Retired garda participants reported that in the past suspects would be given a copy of the audio-visual recording of their interview when they left the garda station and these recordings would be immediately watched by criminal associates to ensure that the suspect did not disclose any incriminating information about the criminal group. This practice of giving out the recording to suspects was stopped in 2007, pursuant to section 56 of the Criminal Justice Act 2007.

"They know that Johnny is after being arrested and he's being questioned. They know the interview is being taped and they know that Johnny is going to get a copy of that tape of it when he's leaving. So they all go down to the pub the following night and they're sitting down watching the interview to make sure that he didn't say anything. So that's part and parcel of what you're up against. And that was absolutely happening all of the time. You had to come out of the front door with your tape. And they watch it to make sure you didn't incriminate anyone else and you kept your mouth shut." (RG3)

Participants also reported that criminal associates would take the Book of Evidence when it was served on the accused, again, to ensure that they did not disclose any incriminating information. Solicitors are now in the practice of retaining the Book of Evidence on behalf of their clients.

"…it's exactly the same thing with the Book [of Evidence]. When the Book is out, they're looking for a copy of the Book of Evidence. It's all about pressure and intimidation against the person inside, and they're looking and saying that they're going to fare much worse outside than I am inside. So the incentive is there to say, 'I'm not talking at all'". (RG3)

"One of the bigger problems is that the same book of evidence can be served on five or six individuals and statements from all of them are in the same book… So when the book of evidence is served, Client A has made a full and lengthy statement, B, C, D, and E have made none so Client A is then known by other people to have made a statement potentially implicating them and it's in the same book. It's something they'd be very cognisant of." (S2B)

One of the retired gardaí was very understanding of the difficult position a suspect is in in such circumstances:

"It's very understandable. I mean, I'd do the exact same thing myself after 38 years of policing. I would have said 'no, this will be over in 7 days or 24 hours or whatever it is, and I'm out. I have no relationship to these people. But outside it won't be over.' They're just weighing it up, weighing up their option. They might not engage in any abuse while they're in. They might just put their head on the table and just snooze or just not even look at you. It's not as if they're just sitting in chair and they stare at you or they're nodding or anything. Some of them just won't. Some of them will just sit down, head on the table, hands over the head, that's it. And they do that for 24 hours. And you get nothing. No response to anything from them." (RG3)

That retired garda also observed that even lower level offending can have an organised criminal element to it nowadays:

"…there's huge pressures, and there are very few of them not moving in some sort of gang or other, whether it's low level crime or whatever it is and they really have to protect themselves and they are trying make a name for themselves and they're coming in and acting the hard man for whatever they're in for." (RG3)

Pressures from criminal groupings were also reported by solicitors as being a relevant influence on their advice to suspects. This participant highlighted that if a suspect has revealed that they were acting under duress during the commission of the offence, then it is important that this account is offered to the gardaí early in the interview process. Any delay in doing so may risk the credibility of this claim later in proceedings.

"I think if your client is under duress possibly, and that, my experience of that would be mostly section 15s, section 15As, where somebody maybe had been asked to hold drugs and obviously particularly in Dublin now with all that's going on, y'know, there are people that are under duress and they are having to commit certain acts for their own safety so I think in those situations where you feel that your client may be under duress, you really need to take time to consider whether it is worth, at that stage, making admissions, because to say you were under duress when a matter like a section 15 or a section 15A makes it to a Circuit Court, it's maybe less believable, because it wasn't put to the gardaí at the time but you know it's about striking the right balance between whether your client is safe to be released back into the community after identifying the source or getting off with a section 15 down the line so duress…." (S6A)[137]

The legal advice had to be tempered with "real world" (S3B) considerations in terms of what revealing such a claim may mean for a person in custody. This participant explains how it is important, then, to factor this into the advice that they give about whether or not to answer garda questions, because of the potential repercussions the suspect may face due to the backdrop of pressures from criminal groups.

"So then your role becomes something a little different in the garda station. You provide the legal advice but that's not difficult. What you're then into, really, is explaining to your client what may be required of them or what may be asked of them in terms of rendering assistance. And you're nearly into a protecting life and limb situation actually. Because y'know, everybody knows, who has been reading a newspaper for the last

137 Section 15 of the Misuse of Drugs Act 1977 provides for the offence of possession of controlled drugs for unlawful sale or supply. Section 27 of the Act provides the court has discretion in sentencing, and may sentence a person to up to life imprisonment. Section 15A provides for the offence of possession of drugs with a value greater than €13,000. That offence carries a minimum sentence of 10 years imprisonment.

twenty years, that invariably the low hanging fruit ends up in custody. These are people who are frightened, they're a lot more frightened of the bad boys outside than they are of the police and they may not just appreciate what's going to be demanded of them. Particularly when the solicitor leaves and they're sitting in the cell and policemen sometimes come to the door of the cell late at night. So you have to explain to them, listen this is what you may be asked for, understand the consequences and they ain't legal consequences a lot of the time. They are real world consequences. And that is perhaps just one of the many situations I think where solicitors who are prepared to do police station work find themselves providing a very different type of service than what they tell you about in the legal textbooks." (S3B)

5.3.3 Vulnerability

Vulnerability was also highlighted as influencing a person's tendency to remain silent or not, and the legal advice that solicitors were likely to give. Suspects could be regarded as vulnerable in a number of ways, for instance, due to cognitive difficulties, mental ill health, age, low educational background, and addiction issues. Generally, the presence of these vulnerabilities made it less likely that a person would invoke their right to silence. For example, individuals with cognitive disabilities may be more likely to focus on short-term motivations, like being released from the garda station and so answering questions to enable this, rather than considering whether silence might be in their best interest. The same appeared to be true for individuals suffering from addiction, who may prefer to speed up the investigation process by answering questions or making admissions rather than rely on their right to silence:

"It really depends on the client, if they're very needy and very dependent and have a difficulty or any type of intellectual difficulty of any kind, then they're more than likely going to not observe the right to silence because they just want to get out and want to get home" (S1A)

"Certainly, with addicts I would observe more inclination to make admissions." (D7)

These vulnerabilities could also mean that individuals were increasingly susceptible, then, to certain modes of garda questioning.

"I think some suspects with mental health issues which we mentioned earlier, they can really think that the guards are on their side, friendly and that it's better to talk and they can have a real impulse to talk and sometimes y'know... they can say some very harmful things, particularly if they're not really grounded in reality at the time that they are being questioned. But they can also very much mistake a guard who has been friendly and courteous as someone who is on their side and that can be a real issue." (S5B)

Additionally, some individuals who were not considered vulnerable could just simply be more suggestible, which decreased their ability to withstand questioning and remain silent, even if silence was in their best interests. There could be variability in a person's ability to withstand questioning which was not related to any mental health issues, but which could be related to the inherent stress of the situation.

Vulnerable suspects and those dealing with addiction issues might also tend to be more focused on short-term goals, specifically their release from custody and did not attach much weight to the more long-term consequences of answering questions.

"... it's all very much short term, 'what'll let me out of here as quickly as possible'." (S6B)

"It really depends on the client, if they're very needy and very dependent and have a difficulty or any type of intellectual difficulty of any kind, then they're more than likely going to not observe the right to silence because they just want to get out and want to get home" (S1A)

"And the solicitor walks out then having given that legal advice and then you're talking to the person, that can change. And it has changed an awful lot of the time, and you suddenly see that they felt guilt, remorse, or they see an advantage of pleading guilty early. You wouldn't be saying that to them. But they'd see the advantage. Or they might say, 'I've had enough, I want to get out' or whatever they say." (RG4)

Legal advice can be influenced by a suspects' vulnerabilities. Intellectual disabilities were mentioned as influencing the legal advice given by solicitors, with there being a tendency to advise such suspects to remain silent.

> "if you're advising a person who you have concerns that they may not understand the consequences or understand some of the nuances, well I certainly will be more inclined to advise that person to remain silent because I would be worried about the permanent nature of what they've said at that stage so I try and keep my options open. Whereas if I have a client who can fully understand the consequences, exactly what they're saying, where the pitfalls might be and choose their words carefully, I'd be way more inclined to advise them to make a statement, depending on obviously what their instructions were and the disclosure given and all of that but when it comes to issues of capacity, and intellectual ability, if there is a query over that then I would be, in very general terms, more inclined to advise them not to answer questions." (S5B)

For some vulnerable suspects, it was imperative that the delivery and communication of legal advice was altered, as well as the substance. It may mean that suspects required more extensive support in order to help them to follow the legal advice to remain silent, such as constant input from the legal advisor or shorter periods of questioning.

Apart from increasing the likelihood that the legal advice would be to remain silent, vulnerability could also mean that solicitors may consider trying to arrange for a voluntary interview to take place, to avoid an arrest in the first place.

> "Or if you have a vulnerable person or a child who, the arrest, the detention process and the possibility of being held in the cell… and not being able to leave and all that, you know you can obviate that by saying we'll attend voluntarily, our answers to the questions aren't going to be any different, there's no need for you…. Almost, though maybe you wouldn't be able to go quite as far as saying that it would be an abuse of process, there's no need to arrest…" (S7B)

Mental ill health may pose difficulties in relation to whether a person was competent to be interviewed at that time, and this could have a bearing on solicitors' advice about whether they should be interviewed, as well as advice regarding response if the interview was to go ahead. Participants regarded it as advisable to adopt a position of "no comment" until a medical report could be issued.

While the process of attendance by doctors at interviews was beyond the scope of this study, participants reported the value of placing any disagreement regarding the capacity assessment on record during the interview:

> "And even in circumstances where a garda doctor has said somebody is fit to be interviewed, which frequently happens when people aren't fit to be interviewed, if I feel that they're not fit, I would put in a statement at the start to say that…and that my consultation and the instructions lead me to believe that they're not at all fit to give instructions or are fit for interview and that has worked down the road at trial." (S7A)

Yet, even if an individual with mental health difficulties has been deemed competent to be interviewed, participants linked mental ill health to greater impressionability and susceptibility especially for those who may be very impressionable and susceptible to certain garda tactics (discussed further in section 6.4).

Drug use can also put a suspect in a vulnerable position, especially if they were not competent due to being under the influence or going through withdrawal. This was something solicitors had to catch early at the station to ensure interviews did not take place while a suspect was under the influence or otherwise unfit for interview. A doctor had to be obtained to deem the suspect unfit to be interviewed for a number of hours.

Solicitors also found that this had a bearing on how they interacted with their client in terms of communicating their advice, as drug use may contribute to difficulties in communicating instructions and comprehending/following advice. However, it may not be simple to ascertain if a suspect has taken drugs. In addition, disclosing issues relating to drug use to the gardaí (for example, for the purpose of getting a doctor to certify unfitness to take part in an interview) could result in a more prolonged detention which often suspects were not keen on.

Youth was also relevant to the legal advice given to their clients because young suspects may be less able to understand the consequences of foregoing their right to silence. One participant highlighted that, as with other vulnerable suspects, a wise choice of action may be voluntary attendance at the station so as to avoid the upset of an arrest and detention of a young suspect.

Notably, parents or other responsible adults may also be in attendance during garda detention in the context of child suspects. This adds another dimension to giving legal advice given that they may have their own opinions about whether or not their child should remain silent. One solicitor gave the following example in the context of advice in relation to adverse inference provisions (discussed below at section 6.5 and section 7.4.4):

> "…the solicitor advised [the child suspect], 'Look if you don't answer this question or give your version of accounts, be it consent or whatever, this could have adverse effects for you in the trial' and so all of the advices as you normally would. And the parent then said, who had his own position and view in respect of the guards, 'You're saying nothing, say absolutely nothing, you're not to say a word to the guards in respect of this.' And the client did that and said nothing…" (S5A)

Another issue of note in the context of suspects under the age of 18 is that access to the Garda Diversion Programme (the Programme), which could result in an informal or restorative caution administered by a Garda Juvenile Liaison Officer (JLO), or a formal caution and supervision by a JLO rather than criminal prosecution, is dependent on the child accepting responsibility for their criminal or anti-social behaviour.[138]

The procedural operation of the Programme appeared to be unclear to some of the retired gardaí and solicitors with whom we engaged in this research. Our understanding is that a "no comment" position at garda interview does not preclude the later acceptance of responsibility by the child suspect as part of the process of determining suitability for admission to the Programme.[139] However, solicitor participants reported difficulty in formulating legal advice in relation to the position which might best be taken by a child suspect in the context of garda interviews, at a point when it is not certain if they will be admitted to the Programme. One of the retired gardaí raised a concern about solicitors advising a "no comment" approach in such cases, and was of the understanding that the opportunity to avail of diversion might be lost in such circumstances.

> "…And there's an opportunity for that guy to go to the juvenile diversion programme, but he has to admit that it [a sexual offence] has happened. But solicitors are advising them to stay silent. Which means that the option of the Juvenile Diversion Programme is gone. And the file goes to the DPP to consider whether or not he's prosecuted. The Diversion Programme is just gone.… And I've said it to solicitors, 'do you understand that if he admits this he can go through the Juvenile Diversion programme?' And they don't trust the guards to do that. But they will." (RG6)

Greater clarity on this aspect of the Programme's operation ought to be provided, so as to avoid any misunderstanding as to the impact of the exercise of the right to silence during garda interviews on access to the diversionary scheme.

5.3.4 Need to Tell Story and Perceptions of Silence

Participants also spoke of how some suspects were consumed by an urge to communicate their version of events and this could make it difficult for individuals to sustain a position of "no comment". It was commented upon that this was particularly the case for individuals who were innocent of the charges they were being questioned in relation to.

138 Children Act 2001, section 18, as amended.

139 See Part 4 of the Children Act 2001, as amended.

> "A person who wants to talk, in my experience will talk. I've heard, I've received files where a client has created enormous trouble for himself by proffering accounts and I have queried with the solicitor how it came about that it happened and the message loud and clear back to you would be he wouldn't listen to any advice, he just wanted to talk." (B8)

Further, where such charges were in relation to offences that involved a greater degree of stigma, individuals also struggled to resist the need to give their version of events.

> "They do not understand the concepts of the right to silence and the presumption of innocence, because sometimes when someone says something, particularly when it's a sexual offence, they want to scream 'I'm not guilty'." (S3A)

Entwined with this urge to share their version of events is the fact that some suspects felt there were underlying assumptions about what silence implicitly communicated in terms of guilt. Some suspects believed that only guilty people would avail of their right to silence and that innocent people had nothing to hide. These beliefs could influence individuals' decision-making, by decreasing the likelihood of them invoking their right to silence, in the hopes of demonstrating a lack of guilt.

> "Sometimes I can find […] that you have a client who believes that a no comment that there is an inference of guilt there, 'sure why wouldn't I say it?'. Because you need to just protect your best interests here and sometimes giving a full account will actually corroborate evidence that they already have and paint a picture that they don't necessarily have. So I think sometimes you are battling with that, that you're trying to protect their best interests but they believe that 'that's what guilty people do', by going 'no comment'" (S4B)

There are many reasons why waiving the right to silence and answering questions, even where innocent, may be contrary to the suspect's best interests. These will be examined in greater detail in section 5.5, which outlines the complex considerations defence solicitors take into account when advising suspects in garda interviews. However, it is briefly worth mentioning some of these issues here. First, any inconsistency in an account given at garda interview and one given at trial will be accentuated by the prosecution in cross-examination. Inconsistencies in accounts of events may occur naturally, due to lapses in memory, or for other reasons. However, because any inconsistencies will be highlighted in cross-examination as a means of undermining credibility in the eyes of the trier of fact, it may be better for the suspect not to give any account in the garda interview. Similarly, particularly in investigations for certain types of offences, confirmation by the suspect of innocuous facts can be seen as corroboration of allegations. Therefore, while the suspect may wish to communicate their innocent account of events, they may inadvertently strengthen the prosecution case against them.

5.3.5 Cultural Norms About Engaging with Police

Cultural norms surrounding engaging with the police may also impact the decisions a person made about whether to answer questions in garda interviews. Many suspects held values that were opposed to providing information to the police.

> "There can also be sort of cultural influences I think, there are certain clients who will absolutely never say anything, no matter what. They'll say to you, 'my father told me never to say anything if I'm in a garda station', there can be that aspect to it as well, so some people no matter what even if they could actually see the benefit from making a statement they are not going to" (S5B)

> "The country criminal will give you nothing, tell you nothing. You know, he would see everybody, he's local. Everybody knows everybody. But they just won't engage with you at all. Now, I'm generalising obviously but this is just what we saw over years. But the Dub, generally speaking, once he's caught will say, 'alright lads what's the story, how do we get through this or where do we go from here next'…these are the lower level ones now. We're talking burglary downwards." (RG3)

5.4 Garda Interview Tactics and Disclosure

The use of particular garda interview tactics and the garda approach to disclosure of evidence will also influence whether a suspect remains silent or not. As detailed above in section 2.2.3, since 2014, An Garda Síochána has employed the Garda Síochána Interview Model. This involves four levels of training, and provides a structured approach to interviewing. The Model also emphasises rapport building as a key tool to eliciting information. Gardaí will begin interviews by asking the suspect innocuous questions about their family and sports.

Participants in this study reported other tools engaged by gardaí to elicit responses, including repetitive questioning, selective representation of evidence, emotive questioning regarding family members, and even threats that family members would be arrested and their homes would be searched. The issue of pre-interview disclosure was also very prevalent in discussions with participants across this project and impacted significantly on solicitor's advice to suspects on their reliance, or otherwise, on the right to remain silent. These issues will be discussed further in Chapter 6.

5.5 Legal Advice on the Right to Remain Silent

There are a number of offence-specific and suspect-specific factors, including those listed above in section 5.3, which solicitors need to consider in formulating their advice in relation to the exercise of the right to silence. In this section we outline the specialist, legal considerations which factor into solicitor advice to suspects, with a view to the longer-term consequences and the ultimate disposal of the case.

It is ultimately the suspect's decision whether they will remain silent or not. Solicitor participants expressed the importance of allowing clients to actively choose for themselves whether they wished to remain silent or to answer questions and recognised the limitations of their own role. They could advise silence but ultimately, if a client wished to go against that advice, they were entitled to do so.

Still, a defence solicitor has an important role in being able to use their knowledge and experience to judge the situation and evidence against their client, and anticipate downstream consequences of any decision to answer questions or remain silent. In general, the solicitor participants did feel like some suspects tended to listen to the advice they gave and that such advice was taken on board when suspects decided if they would try to remain silent or answer questions. Some solicitor participants described some suspects as being "cognisant" (S7B) of the evidence against them and how this impacted the advice they were given and the extent to which they took this advice on board.

While the retired garda participants did not generally think that access to legal advice made a significant impact on whether or not a suspect would adopt a particular position in relation to their right to silence, one spoke about the need for solicitors to not adopt a blanket policy of advising only "no comment":

> "And I know myself where there've been a few cases where I've interviewed people and they've observed their right to silence and the solicitor's told them to observe their right to silence. And it would have been a lot better for them if they didn't." (RG6)

Solicitor participants identified several key factors that influenced their advice to a suspect in relation to whether they should exercise their right to silence or waive this right in some way, many of which were tied to attempts to navigate events yet to transpire further along the criminal justice process whilst balancing the needs of each individual suspect. These included the nature of the offence, the strength of the evidence, the decision to go "on record" (including the option of a prepared statement), the opportunity to demonstrate cooperation and the potential overriding impact of a guilty plea.

5.5.1 Nature of Offence

The nature of the offence in question was of huge significance to the decision of whether or not to advise silence. In general, solicitor participants reported that they were more likely to advise their clients to remain silent if they were being questioned for serious offences.

Historic offences

Participants reported that the general advice for historic offences was to remain silent as anything stated, even accounts of innocence, could provide corroborating evidence in these types of cases:

S6B: Yeah but then I suppose, depending on the case like in S4B's example of a historic case, if you say nothing you're probably less likely to be charged whereas if you say anything in a historical case that they can latch on to in some ways and say they can corroborate their evidence then you probably are going to be charged… anything at all, even if it's a denial but a denial saying I…

S1B: Even if it's yes, I used to babysit her…

S6B: I accept that I used to babysit her, I accept that they would have been in my house, or even where your house was, that can be…so you're much better off saying nothing,

S4B: Yeah absolutely, the corroborating… so in this instance it was to do with a farm and the guards were asking to draw a picture of the farm, and he, he, in good faith, was thinking sure I've got nothing to hide here, I didn't do this. So here's the barn, I was like absolutely not, the guard then gets very heated so as S6B said, these are the corroborating elements that will impact on the weight of the evidence against the accused because you are actually painting more of a picture, corroborating an injured party's statement.

Sex offences

Legal professional participants agreed that great care had to be taken when formulating advice in sex offence cases. Most agreed it was important to get some sort of account on the record where consent was to be raised as a defence. This was to avoid cross-examination at trial and at the same time facilitate reliance on consent as a defence, as it was already an account put forward in the garda station:

> "the main issue is they, the vast majority of rape cases are consent cases. In the event of consent being a defence, that has to come from the accused, it either comes from them in the station or if it doesn't come from the station it must come from them in the trial. So if you do not advise a person who is contending that it was a consensual encounter to say that in the station, what you're doing is you're forcing them to give evidence at trial" (B8)

If the statement was a strong denial, then this could prevent the charge proceeding.

> "Just on that, it can even stop the charge, to have to dial down that early. It's not sometimes a case of wait and see, particularly if it's an allegation of assault, sexual assault, a denial at an early stage could very well stop the charge altogether so… y'know, it's very very important at that stage possibly to make a statement." (S7A)

However, it was also to avoid an adverse inference being drawn from a failure to raise consent as a defence earlier.

> "yeah, just in terms of somebody thinking that they can rely on the 'no comment' interview and then subsequently raising a defence of consent… well then if inferences, at an inferences interview and you've said 'no comment', well then an adverse inference can be drawn from their failure to account for this consent, this explanation at the interview stage…" (S4B)

Similar to the historic offence cases, in sex offence cases even minor corroborations of the prosecution case could be used against the accused at trial so this also needs careful consideration before providing an account:

> "this would perhaps be more so in sex cases but if the complainant had said that it happened in a particular room of someone's house, there was a brown sofa and a red armchair and you confirm at interview that my house has a brown sofa and a red armchair, well there's… so you're not in any way admitting to the offence but you're still giving information that will be of some assistance so… it can… even I suppose saying things that are seemingly innocuous can be used by the prosecution." (B10)

Self-defence cases

Where self-defence is going to be argued, generally the perception was that this should be put forward as soon as possible, as this can stop a charge arising in the first place.

> "But in self-defence and in sex cases where consent is a defence, it's usually the view would be the sooner you say that the better and then in terms of the DPP considering that, that's very important on whether they will proceed to charge." (S5B)

However, the main benefit of putting an account on record and therefore likely to influence legal advice to waive one's right to silence was the fact that this account could serve as a way to put one's defence forward at trial, without being cross-examined:

S2B: it also means that your client mightn't have to give evidence at a trial, if they've made some kind of statement as to self-defence or consent.

S3B: An explanation on the record can put your client in the position where they can rely on their police statement and they don't have to give evidence.

Mandatory minimum offences

Some offences which carry "mandatory minimum sentences" provide for an exception, whereby a judge can impose a sentence below the prescribed minimum if the suspect provides "material assistance", which can be demonstrated by answering questions and making admissions in the garda station.[140] Accordingly solicitor participants relayed that this was a factor they take into consideration in advising suspects in relevant detentions. (Material assistance and mandatory minimum offences are discussed further in section 7.5.5).

> "Absolutely, like some offences will require you to give an account of why you're caught in possession of a large quantity of drugs and the only way to get down the kind of the mandatory sentence structure length is by giving material assistance at interview stage." (S4B)

5.2.2 Strength of Evidence

A further factor that influenced case strategy and solicitor advice was the strength of the evidence against the suspect. Assessing the strength of the evidence involved looking further ahead to the trial process and the role the evidence might play at that point in proceedings.

In this regard, if a suspect was caught "red-handed", the retired gardaí noted that suspects were more likely to answer questions in interviews and make early admissions, in order to receive some benefit of mitigation in sentencing.

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140 For example, a mandatory minimum sentence of 10 years imprisonment applies to the offence of possessing controlled drugs to the value of €13,000 or more for the purposes of sale or supply, under section 15A of the Misuse of Drugs Act 1997, as amended. However, under section 27 (3D) of the same Act, that mandatory minimum "shall not apply where the court is satisfied that there are exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make a sentence of not less than 10 years imprisonment unjust in all the circumstances and for that purpose the court may…have regard to any matters it considers appropriate, including - (i) whether that person pleaded guilty to the offence and, if so - (I) the stage at which he or she indicated the intention to plead guilty, and (II) the circumstances in which the indication was given, and (ii) whether that person materially assisted in the investigation of the offence."

Even outside of the specifics of sex offences or historic offences, solicitors were conscious, in cases where there was little supporting evidence of the allegation, that any response or acknowledgement of a certain piece of evidence or that the suspect knew the victim may be used as corroboration. Therefore, in some cases, solicitors advise silence rather than risk the suspect's exculpatory account being used as corroborating evidence.

As discussed in section 5.3.4 above, until the evidence and information is adequately disclosed to the suspect and their solicitor, the suspect is generally advised to stay silent. Solicitors continually assess the evidence as it is revealed and consider whether it is sufficiently strong to outweigh the benefits of remaining silent. As more evidence emerges, it is important for solicitors to be reflexive and to view the evidence in totality in terms of assessing whether making a statement would be beneficial.

> "I would certainly be waiting, okay maybe sort of further down the line I'd be saying 'okay you now know what we're dealing with, what do you think?' But I would definitely be waiting to see what evidence there was against the client in this situation before anything is volunteered." (S3B)

5.5.3 Going On-Record

There can be benefits to suspects in providing an account. "No comment" at interviews means that a suspect could be exposed to cross examination at trial, as there may be no other way to deliver their version of events to the jury. This was especially the case if they had a defence to offer, such as self-defence or consent. These defences need to be put forward early or they may seem much less credible. Solicitors consider that an early account involving a defence, or a denial might lead to no charge being brought in the first place, or if a charge was brought, it could enable counsel to point to this explanation, and to show the jury that their client had put forward a defence or denied allegations at the earliest opportunity.

The advantages of putting an account on the record at an early stage have to be weighed against the potential disadvantages, such as the risk that the suspect's account could provide corroboration of aspects of the prosecution case, or could ultimately be disproved. Solicitors also need to consider the negative impact of potential inconsistency in accounts tendered by the suspect at garda interview and under any future cross-examination at trial, at a much later date. As noted in section 5.3.4, these inconsistencies in accounts of events may be simply due to lapses in memory, inattention to detail, or a suspect's poor communication skills but they may be emphasised by the prosecution at trial to undermine credibility.

A solicitor may consider advising that the suspect only answer certain questions, bearing in mind that it might be difficult for the suspect to discern the appropriate questions to answer, as well as the fact that it may look strange to the jury to have only a small number of answers on record. Another possible option is to make a prepared statement.

5.5.4 Prepared Statements

A prepared statement occurs where a suspect composes their account of relevant matters with the help of their solicitor, either in advance of a voluntary interview, or while detained in garda custody. This may be particularly useful for suspects concerned with having an arrest on their record, perhaps due to certain occupations (e.g., nursing, taxi drivers) or implications for future travel visas. Some individuals may volunteer to be interviewed to avoid being arrested and detained.

> "I think a lot of clients want to avoid being arrested so they do want to do them…like particularly kind of middle class and children… if it's on the cards at all where you can avoid an arrest, because I think you have to declare it on certain visas to America or wherever" (S7A)

> "… the purpose is it's an interview under caution and when I think of those where garda vetting is a huge issue, I don't want them being arrested and detained for the purpose of garda vetting further down the road…" (S1B)

A voluntary statement could prevent a charge altogether, even where there was otherwise strong evidence against the suspect.

> "I had a case where, we put in a very strong statement in in relation to, he ended up stabbing of someone in the stomach... where we said we were acting in self-defence and no charge followed from it." (S3A)

In this way, prepared statements give the suspect and the defence solicitor some feeling of "control" in the process. Participants viewed this advantage as all the more important in cases with suspects who were vulnerable or eager to give their account, who may inadvertently give inconsistent accounts in answering questions.

> "you're giving a very controlled prepared statement addressing just very specific allegations and just keeping it very tight." (S5B)

Putting an account forward in a prepared statement also minimises the risk of making contradictory or inconsistent statements inadvertently through the re-telling of one's account throughout the process.

> "if there's any slight inconsistencies in how you tell your defence, then a lot is made of that as well. So a prepared statement would help with that, just eliminating any risk of telling a story slightly different, which you do. If you saw a car accident, you might tell the first person you met and then you tell your mum on the phone later, you might remember it slightly differently then, it's just human nature." (D5)

Though prepared statements might technically be viewed as hearsay evidence (an out of court statement that is offered as to the truth of its contents), there is a practice of permitting the accused's exculpatory statements from the garda interview to be admitted as evidence at trial. In this way, solicitor participants also viewed a prepared statement as a potentially useful way of putting the suspect's account on record early and avoiding the suspect having to give evidence at trial, which would expose them to cross-examination. Participants across all groups of legal professionals generally viewed the situation where the accused must give evidence at their own trial so as to provide their version of accounts as a very undesirable position to be in. They pointed to the risk of losing control of the defence's narrative in the case where the accused was exposed to cross-examination and under such pressure could deliver inconsistent or unconvincing accounts. While the accused's right to silence means that the court cannot take a negative view of a failure to give evidence at one's own trial, such a failure makes it difficult to put one's "side of the story" across. Prepared statements offer a way to avoid cross-examination whilst also putting one's account forward in a controlled way.

> "what's very helpful in an interview situation where you're trying to avoid the suspect, and you play the long game and presuppose that your suspect is not going to get in the box, if you have a prepared statement, which you draw up in tandem with the suspect or the detainee, that can sometimes be very helpful." (D10)

One judge participant also pointed to the fact that a jury at trial will be provided with a copy of any statement from interview, but not a transcript of trial witness testimonies.

> "Take a sex case for example, the complainant's evidence could be days or weeks back and if they're [the jury] scratching their heads in there [during deliberations], the one thing they actually have in front of them is the accused's words in black and white and the opportunity of making an unsworn statement in the garda station and getting it in front of a jury without cross examination, it's a golden opportunity..." (J2)

While a suspect might avoid cross-examination at trial through the provision of statements during garda interviews, retired gardaí pointed out that the giving of a voluntary statement does not preclude a subsequent arrest and detention, and the giving of a prepared statement does not preclude further interrogation or investigation.

> "Yes, I've seen it [people presenting voluntarily at the station to make a statement] many times. It doesn't stop anything...Come in with your prepared statement. But the arrest and the detention is all part of the investigative process, and nothing really can interfere with that. Unless now, and now I can't even remember a situation where a prepared statement interfered with any of the process. Generally speaking, the guards will look at it and say 'ah yeah, here it is, here it comes, here is a first attempt at interfering with the overall process.' To be able to read it in court and say 'My client came in on the 14th of March and presented a prepared statement and they still came and arrested him.' And the judges then will now say 'Yes, and that's quite appropriate that they would.' And you go through the process and they may or may

not read the prepared statement to them in it. And very often at the end of it, they'll find discrepancies and inconsistencies between the prepared statement and what the evidence itself is showing." (RG3)

"…in the interview room, we take [the giving of a prepared statement] as he's made his statement and now we have questions to ask. And he or she can say 'no comment' if they want, but we still have our investigation to do, and we'll dictate what's asked in the interview room, not the suspect." (RG6)

In this regard, the account is still being tested by the gardaí in the interview, by their assessment of its credibility and by challenges to inconsistencies and implausible explanations. Further, prepared statements, in comparison to a "no comment" response at this stage of the process, means that gardaí have an account proffered by the suspect which they can investigate, and corroborate or disprove accordingly.

DPP participants reported that prepared statements were not often used by criminal defence solicitors, but both retired gardaí and solicitors indicated that this approach is taken increasingly, though not overwhelmingly. Using prepared statements appeared to have specific implications for trial strategy and potentially trial outcomes (discussed further in section 7.4.2).

5.5.5 Cooperation and Guilty Pleas

When formulating legal advice in relation to whether or not a suspect should answer questions, solicitors may also have an eye towards the benefits of demonstrating cooperation and an early guilty plea through waiving the right to silence and answering questions. These would be mitigating factors in sentencing.

In relation to offences carrying mandatory minimum sentences, such as drug offences under section 15A of the Misuse of Drugs Act 1977 (as amended), cooperation was seen as particularly important given that it could reduce sentence length (discussed more in section 7.5.5).

The appropriateness of a guilty plea was seen as being a significant consideration in the solicitor's legal advice. Where the suspect was caught red-handed and where disclosure was given, outlining a strong case against the suspect, solicitor participants reported the benefit of the guilty plea and likely mitigation in sentencing outweighing the benefits of remaining silent.

This could perhaps inform a strategy of not making comments in the interview, holding back until all the evidence has been disclosed and then, once the evidence has been considered, the option of a guilty plea as a powerful source of mitigation is still available without a suspect being prejudiced by not commenting in interviews.

"Is there any benefit to him making a comment at this stage? That would be my other question, I don't… there's still a lot, there's more to play for with 'no comment' in this scenario than there is to make any admission, and that's just my opinion. He could, if he wants to once you have all the evidence and you go through the process, he could put in an early plea. At that stage you can see where you can fight it or where you can't." (S7A)

To some extent then, with the exception of the circumstances specific to mandatory minimum sentences, even if there is a strong case against a suspect, there may be little benefit to answering questions in a garda interview, when the suspect can simply later decide to avail of the sentencing benefits of an early guilty plea.

Chapter 5 Recommendation

— The Law Society should consider requiring solicitors who advise detained suspects at garda stations to undertake an annual minimum level of continuing professional development (CPD) training specific to that role.

6. Garda Interview Practice and Silent Suspects

In this chapter, we focus on garda professionalism and training for interviews, their professional goals in suspect interviews in the context of the right to silence, their attitudes towards silence at interview, and the methods used in interviewing suspects who seek to rely on their right to remain silent. The chapter also charts the oversight mechanisms in relation to police interrogation of silent suspects.

6.1 Garda Interview Professionalism and Training

Retired garda participants emphasised that the interview process has become increasingly professionalised, efficient, and fairer in recent years. Other types of participants similarly pointed out that instances of extreme garda misconduct in interviews nowadays are rare.

> "I mean all that business of kind of pressurising people into saying something, that's really gone" (J1)

This professionalisation of interviews was largely attributed by the participants to the introduction of the Garda Síochána Interviewing Model (GSIM). This model emphasizes "the importance of seeking an account of knowledge from all interviewees and represents a shift from a confession-seeking approach with suspects to an information-gathering approach".[141] The interview is cast as a fact-finding interview rather than guilt-locating interrogation.

> "It's was very clear from the start that this was not about just getting your admission or confession, it was just about getting the suspect to talk to you and give their account… The goal is to get an account of knowledge from the suspect. That's the real goal. I suppose that's a really successful interview, getting the account of knowledge, whatever it is." (RG6)

After initial stages which prioritise getting suspects to give their account of knowledge, gardaí move to assess, corroborate and challenge such an account.

> "…that's one of the changes that has taken place over the past number of years. Previously, the guards only ever sought evidence from the person associated with the crime. But they never went back and said, 'hold on a sec now, you told us that this is what you did, but if that's the truth you could have never have done this.' So they've certainly moved closer to discovering the truth, as opposed to determining whether he's guilty of this or not. Like, 'let's just find out, if he says he was there, just take it down, it's good enough for us.' They've moved on now to the point, 'well, hold on a second now, I'm not sure if this guy is telling the truth, some of things he's telling us just doesn't figure.' So they go back in and say 'you told us this, but if that is the truth, then this cannot be.' So they really are trying to uncover the truth, which is quite different." (RG3)

The model is built around the principle of rapport-building, through empathy and active listening. Noone describes rapport-building as aiming to create a "non-judgemental, non-coercive atmosphere conducive to disclosure".[142] The different types of participants spoke of how effective some garda interviewers could be through the deployment of these principles. In particular, participants emphasised the higher levels of confidence, competence and professionalism of gardaí who completed the higher level training – the level 3s and level 4s.

141 Noone, Geraldine "An Garda Síochána Model of Investigative Interviewing of Witnesses and Suspects" in Pearse (ed) Investigating Terrorism: Current Political, Legal and Psychological Issues (Wiley-Blackwell, 2015), pp. 108 – 109.

142 Ibid. p. 112.

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"…I think the new model is excellent… there's a police in action element to the training to make sure people have the right social skills and the right understanding of the law and the Constitution. Because that's what the model is about, it's about building on skills that people already have and getting that structure. And I think the guys who are playing on level 3 appreciate that there's a more professional nature to the work." (RG6)

"All the guards are trained now. Your ordinary guard in the street is trained up to level 2. It's a high enough standard now. You wouldn't need a whole lot more. But level 3s are the ones that will come in for the real real stuff where everything needs to be spot on." (RG3)

"I've noticed in serious cases now where, sort of homicide stuff like that, you get in the National Bureau of Criminal Investigation Officers and they are specially trained and you can see a big difference in how they do it. […] they're doing it in a very sort of discursive way, back and forward, back and forward, back and forward, it's a conversation, getting the person on board and they're using lots of sort of psychological knowledge I suppose and training in the interview and people are more inclined to talk then, they're more inclined to sort of explain themselves and give more information and it's more natural." (B3)

"…the level 4s are a different area, they're so skilled they're actually unbelievable they're so skilled, they're so well trained and they train each other as well so the best ones, I mean I have to say, they're brilliant to deal with, the way they're so engaged and there's also the new process that they're doing as well, a different, behavioural way of doing the interviews." (D9)

This professionalisation and enhancement of garda interviewing skills is very welcome, but, as outlined below, elements of suboptimal practice were still reported by participants in this study.

6.2 Disclosure

As discussed in section 3.6.2, the Garda Code of Practice on Access to a Solicitor by Persons in Garda Custody states that "there is no legal requirement to have a meeting with a suspect's solicitor, or to provide information prior to interview."[143] The Code warns that "…the premature disclosure of information/details may sometimes impede or interfere with the investigation."[144] The GSIM is a late disclosure model, seeking to have the suspect provide their own account of information prior to the revelation of evidence obtained by the gardaí. While this has the benefit of avoiding the contamination of any inculpatory statement which might be made with information which the suspect might not otherwise have, it has a significant impact on the efficiency of garda interviews and on solicitor's ability to comprehensively advise suspects.

The retired garda participants further explained that the reason that fuller pre-interview disclosure is not granted is so that when they present the evidence and allegations to the suspect in the interview room, they receive a genuine and spontaneous reaction, without the possibility of any false excuse being fabricated ahead of the interview with their solicitor.

143 An Garda Síochána, Code of Practice on Access to a Solicitor by persons in Garda Custody (2015) at p. 5, available at: https://www.garda.ie/en/about-us/publications/policy-documents/code-of-practice-on-access-to-a-solicitor-by-persons-in-garda-custody.pdf accessed 16/06/2021.

144 Section 6, p. 5.

"We want the interview to be spontaneous, not telling the solicitor everything we have, and then the suspect coming in with prepared answers to the evidence the guards have. That would be the garda perspective on that… We like spontaneous answers, not prepared answers…Particularly, when he tells a lie, and you can show him later on that he's telling lies. That's a huge thing for the guard. And it goes against his credibility. Whereas if you told him you had that piece, he might never tell the lie. And it's preparing him for it. And I think that's, it's important to see what type of person the suspect is in relation to how they utilise that." (RG6)[145]

"…the guards have a duty of care by the truth. And what they can't do is prepare the person coming in to put a defence up to what they're going to see. If they're telling the truth, that won't be necessary…We have to put the evidence in format that we can… having looked at said, okay if we do this, he's likely to do that. So we'll do this and this and if he does that, then we can do this and this. So we're trying to pre-empt his reactions to it. It's not to catch him out or it's not create anything that isn't there. It's just using evidence that has the best opportunity to getting him to the truth." (RG3)

However, many solicitors reported that they regularly encountered a lack of disclosure. They emphasised the need for disclosure so as to place them in a position to adequately advise their clients. It was essential that they had information if they were to carefully assess the merits of remaining silent or otherwise.

"Listen we need to get disclosure that enables us to give real advice to our clients, so we're not advising in a vacuum and it may be more beneficial." (S3A)

"The other problem the solicitor has is that often the solicitor is advising blind because they won't have the full extent of the evidence available to them, they will have very often nothing more than an outline of the accusation." (B8)

However, both the solicitor participants and the retired garda participants noted how the information and evidence was disclosed during the interviews. The purpose of this was observing the suspect's spontaneous reaction, but also because of a belief that there was an obligation on the gardaí to give the suspect an opportunity to respond to all the evidence against them.

"And the person is entitled to every piece of evidence you have and if you don't present that evidence then you're lost, you're gone. So everything you have, from forensics, to witnesses, to CCTV, phone analysis, alibis, et cetera. all has to be put to the witness." (RG4)

Solicitor participants, however, reported difficulties in responding to new evidence sprung upon the suspect/solicitor in the interview, especially if it contravenes their understanding of events from their consultation with the suspect.

"You're kind of expected to react to it in the interview so you can't really advise your client in advance what the evidence is because you haven't seen it." (S6B)

"A lot of the time we have to sit through one or two interviews before we have… that's how we get our disclosure. So meanwhile you're saying to your client or advising your client in most of those cases to remain silent so they…so that you can just get the basics of what the evidence is, what exactly is being investigated, what role they say your client had in the alleged offence and then you can advise your client… so that could be several hours into a detention before you can actually advise your client." (S5B)

145 The impact of lies at any later sentencing is discussed below at section 7.5.3. It is important to note here that if a suspect's pre-trial demonstrable lie is entered into evidence at trial the judge may provide the jury with a so-called "Lucas" warning, explaining that there are many reasons why a person might tell a lie and that it may not necessarily indicate guilt. Furthermore, solicitors and barristers have an ethical obligation not to mislead the court and cannot advance arguments at trial which are based on lies.

The general consensus was that the best response in such situations was to pause the interview and ask for a consultation with the suspect. However, there were reports of gardaí attempting to impede this practice on occasion.

Solicitor participants indicated that their inability to properly advise suspects caused by insufficient disclosure resulted in a 'wait and see' strategy, whereby solicitors were more likely to advise their clients to remain silent until enough information had been given to enable proper legal advice to be given.

> "They have all the power and all the cards and we wait for them to give us bits and pieces so we can advise… it's very unsatisfactory for a client because all you can say to a client is … 'in our experience they hold back on some information and on that basis, at this stage perhaps you're best to say 'no comment' for the first interview at least.'" (S7A)

Solicitor participants also highlighted that it was not merely an issue of when disclosure was given but also the quality and extent of the disclosure itself. Participants spoke of the challenges of advising suspects in instances where gardaí claimed to have CCTV evidence against them, for example, as the majority of participants reported not having an opportunity to view the CCTV before interviews as the norm. They explained that, in their view, it was not sufficient to be told sparse details about CCTV or non-representative selective extracts from witness statements or expert forensic reports.

> "Even if they tell you, for instance, that they have CCTV you don't know what's on it or what it shows… they might say it shows your client, but you can't really advise your client to, y'know, incriminate themselves or herself without having seen the evidence and having a chance to reflect on it…" (S4A)

> "You won't get the DNA report though, they'll only give you whatever excerpts they want to give you, they won't give you the final line that tells you whether it highly supports or barely supports whatever contention they're making so you don't get that…" (S2B)

There was a call for more detailed disclosure to be granted, ideally by allowing solicitors to view CCTV and to have access to a witness statement or report in its entirety prior to the interviews taking place so that solicitors could formulate their advice to suspects.

Solicitor participants also stressed the importance of basing their advice solely on the basis of what evidence the gardaí had against their client, rather than speculations about the evidence which the gardaí may have.

> "I don't know if you've had it before but sometimes I've had them come in and tell you before they go into an interview, we have fingerprints and we're going to put this to your client blah blah blah, and then you go into interview and they ask questions that are like 'IF we find your fingerprints' (Everyone: Yeah yeah yeah) hold on a minute, you either have them or you don't… (S5A)

There is an ongoing disjuncture between the fact that GSIM is a late disclosure model and the solicitors' position that they cannot properly advise suspects in a disclosure vacuum. This seems a difficult circle to close. While the value of seeking an account of knowledge from the suspect prior to the revelation of the extant evidence held by the gardaí is understandable, it really is quite difficult for a solicitor to advise a suspect on the best approach to protect their presumption of innocence and privilege against self-incrimination/right to silence in the absence of knowledge of the case against them.

In certain circumstances, delayed disclosure of evidence in the interview may be required in order to elicit a spontaneous reaction from the suspect or avoid the concoction of an alibi or excuse. However, gardaí should be discerning about the cases where this is necessary and the cases where it is not. Participants reported that more experienced gardaí are more forthcoming with disclosure while those with less experience seems to operate more of a blanket policy of denying disclosure prior to interview.

"…we had one where it was an assault and thankfully, I had a very… fairly sound guard who showed me all of the evidence before we went in for a voluntary statement and like including the injured party's statement. So I told him, I said this is what the guard is going to want to talk to you about and he goes, hold on a minute here, he came after me, this was the position, I have these witnesses, none of this is referred to and I was like grand we'll get that across…I don't think there's been anything that came of it after he spoke to them." (S5A)

Early, comprehensive disclosure of the evidence which already exists to implicate the detained suspect is far more likely to lead to engagement, to answering questions, to the proferring of an account which can then be tested, or indeed to the giving of an exculpatory account which might resolve the allegations. In terms of legal advice, solicitors ought not to be recommending "no comment" on a blanket basis either, and are more likely to advise engagement, including admissions (with a view to future mitigation for example), where the evidence has been revealed. The benefits of late disclosure as an aspect of the GSIM ought not to blind gardaí to the advantages which early revelation of evidence could bring.

6.3 Attitudes to Silence and Silent Suspects vis-à-vis Police Professional Goals

Based on the reports from both the retired garda participants and solicitor participants, it appeared that garda attitudes to silence could vary, depending on training/experience levels, garda station cultures, pre-existing relationships with the suspect, and the strength of the case in question.

The starkest difference in attitudes to silence seemed to be based on the level of training which gardaí had. More specialised and senior gardaí respond with greater professionalism during interviews in general. This came across in discussions on the Garda Síochána Interview Model (GSIM), on which there are four possible levels of training – Levels 1 and 2 cover the basics of interviewing, Level 3 is more specialised, and Level 4 is for those acting in an oversight or supervisory role. This model of interviewing has changed the garda approach to interviews considerably (see discussion of GSIM in section 2.2.3).

"It changed the nature of investigations, and interviewing considerably... The new system of questioning people now is so different. Investigative interviewing has changed almost entirely since I was a guard [i.e. a junior police officer]. You did your own thing. There were no rules except for treating people properly. In terms of approaching the questioning, it's very, very different now. Whereas there was an awful lot of unintentional leading questions and providing information inappropriately in interviews prior to the actual proper training that was introduced, when we transferred to Level 1, 2, 3 and 4. It's very, very different now." (RG3)

"I think the guys who are playing on level 3 appreciate that there's a more professional nature to the work. Better understanding, say even in the middle of all this training starting, then we had the solicitors coming into the interview room. And I think it gave them more confidence for dealing with solicitors and trying not to have that adversarial confrontation in the interview room. That's a thing it's concentrated on. Both sides are doing their job as such, you know. But I think it has, the model really has professionalised interviewing much in the guards, yeah." (RG6)

"I think the more senior you go up as a guard, the more specialised units, the kinda more professional they are and they seem to have everything… they're a lot easier to deal with than, I do agree that, than I suppose a lot of younger guards who wouldn't have had maybe that training that they've had, because I do know that the more senior you go, the more interview techniques you're supposed to learn, there's Level 1,2,3 when you're at the guards so they have to do those courses in order to be able to interview about certain crimes so I think that when they've gotten a higher level of training in the interviews, it probably shows when we're dealing with them down at the stations" (S5A)

In response to the exercise of the right to silence, the retired garda participants reported that they found "no comment" answers frustrating but "got on with it". Solicitor participants similarly observed that more senior gardaí were unperturbed by it, but reported that they noticed that less experienced gardaí tended to react more when confronted with "no comment". Garda interview training prepared gardaí to respond to suspect silence more professionally also.

> "I think more experienced guards are absolutely fine, everyone knows their role and then certainly the young pups who are just fresh out don't really know what to do with it and just go on the attack straight away and it's, I mean look, it's laughable at times" (S1B)

> "Very frustrating [if someone is not answering questions], and it takes a little bit of time in your career to make sure you don't blow the lid, you know…And make sure that your prisoner never sees you getting frustrated or furious or annoyed or anything like that, because of course, if you do, the dynamic changes completely." (RG1)

> "I think what the training in the model has done, has made the guards take the 'no comment' thing less personal, that they understand people have the right to do that. Certainly, in the model, it's kind of said to you at training, you don't take that personal." (RG6)

Attitudes towards silence may also be influenced by different cultures in different stations, perhaps influenced by the relationships between gardaí and local solicitors which may be particularly close-knit in rural locations, that can in turn influence reactions to silence at interview:

> "Different garda stations have different responses so they would know this stable of solicitors who were local solicitors and they would trust them probably more so and possibly refer work, who knows, to local solicitors. […] I said I'm advising you to remain a 'no comment' interview and not to… and the guard got very very annoyed, saying that have I read the regulations and I'm not entitled to answer the questions for the client and he would put me out and get the member in charge and I said perfect. He got very animated and very aggressive." (S4B)

Managerial pressures/bureaucratic pressures encountered as a result of performance/accountability mechanisms in garda stations may also play a role. Solicitor participants reported that their views that less experienced gardaí may feel pressured by securing convictions in order to advance up the ranks and therefore may feel frustration when a suspect remained silent.

> "They've targets like any other job where y'know if they are particularly just newly into a drugs unit or they're out of uniform, the more convictions or charge sheets that they get then the higher up the ranks they go and I think that anybody…they want to get those convictions and if you have a solicitor there interjecting to stop that client giving evidence that may lead to a prosecution…" (S6A)

Retired garda participants did not emphasise performance goals, but highlighted pressures relating to protecting society from criminality and the pressure arising from seeking to do justice for victims of crime. This was felt, on occasion, quite strongly when dealing with a silent suspect.

RG4: …in general, my experience is that people who go into interview these people, they feel… it's a societal thing, there's a problem, there's a huge crime, or whatever crime. Say burglary, burglary is a serious crime if you're convicted. Somebody's trespassing your home, if you're there, it's horrific. And it's all to protect society, it's very much a public service ethic. But at the same time, they're also into the balance and the weight of, this is what I've seen. But the biggest frustration is when you put all that work into it. You have all your evidence and you know. You basically know, because we have other sources for letting us know that somebody's done something, do you know what I mean. Now, it wouldn't reach the threshold or anywhere near the threshold of a court case or even an arrest. Like there's a system called CHIS, Covert Human Intelligence Sources. It's an informant system that's very much well managed. There's people that are being paid by the state and they'll let you know who's doing things. And they'd be credible. And the information would be accurate. But we mightn't get anywhere near an arrest because we need evidence. So the hardest part for me was knowing that someone who was smarting in front of me who had done some crime was just stonewalling me, and picked his spot on the wall. Picked the spot on the wall, that's the hardest part to kind of… Especially when you're invested in the crime or you've seen the victim, which you do see. So sometimes you can become a bit emotional, I suppose. It's stressful. Which again goes back to the training side of it. 1,2,3,4 is really important. And it helps you move away from that.

I: From the emotional side of it?

RG4: Yeah. It's an emotional process.

6.4 Garda Practices and Suspects' Silence

Participants reported a number of different garda approaches to address suspects' silence in interrogations, and efforts to encourage suspects to answer questions. Gardaí are not obliged to refrain from questioning a suspect who asserts his right to remain silent, and indeed gardaí believe themselves to be under an obligation to put all extant evidence to detained suspects.

"It's your job to try to convince them without threatening them or offering them any inducements to get them to talk but if they don't talk, they don't talk. They have to prove the case." (RG6)

"It's a process of patience and trying to get them to open up. And there's a number of different avenues you might explore." (RG1)

"But again, like if they're seasoned criminals you'll know the ones that are going to shut up and say nothing. And you'll know the guys who if you get a good interviewer in who can get under them and get under their skin and maybe get at them or whatever. It is an art to interviewing and I've seen some very good guys that walk in there and they'll get people that you'll say 'no he won't say anything' and next thing they get them to talk. So yeah, you have to try and maybe get the interviewer to build a rapport with the person. And if they can do that, then they have some chance." (RG2)

"It's always going to be an exercise of psychological pressure. There's an element of that you cannot get away from in a police interrogation but there's a difference and I think everyone understands the difference between unavoidable psychological pressure and unfair psychological manipulation." (S3B)

6.4.1 Rapport

Participants spoke about the importance of rapport building, and how the GSIM model emphasises this as a crucial step in the process. The retired garda participants highlighted the importance of rapport building at the start of interviews, whereby they would chat about sports and families in order to build trust and initiate responses. They would often already have existing relationships with the suspects, based on previous interactions.

> "…you have someone go in and they just maybe initially just try to build a bit of rapport with the person. Just some general stuff like you know, their family or their circumstances or whatever." (RG2)

> "there's a whole introductory piece to it, where you're trying to engage with the person in a particular way, trying to you know, get some form of a relationship going with them, establish a trust with them. But the most difficult one is when they're not engaging with you at all." (RG3)

> "Again, going back to the emotional side of it, it's the individual that you're talking to. And whether you have a relationship. Relationships, well it's not a real relationship per se, but it is a relationship and if that's developed you can get the hardened criminals then to say okay, and I'm going to say this is what happened." (RG4)

> "Some people will answer questions on like where they live, the guards ask questions like what sports do you play, I think it's to get them relaxed and to answer that kind of question then they would go 'no comment' or deny it." (D10)

However, the solicitor participants were wary of when rapport ends and the investigative interview begins, viewing some trust-building questions as efforts to ensnare suspects either in terms of starting them talking or revealing something incriminating:

> "[…] the client will start to answer and the next thing something extremely incriminating is said and the client hasn't known that they've been led to this situation where they are now giving evidence." (S6A)

6.4.2 Allyship

In tandem with efforts to build rapport, participants reported that gardaí sometimes present themselves as allies to the suspect, in an effort to build their confidence in sharing information. This can particularly confuse inexperienced suspects and those who are more vulnerable may be particularly susceptible to this approach.

As part of this, a garda may emphasise that the interview is a chance for a suspect to get their story across and that this was in their best interests.

> I: What can a garda do then? What are the strategies that would be used to try… someone who is, starts out saying "I'm not going to answer your questions" or they're going "no comment" and so on, how do you try to get them to give some account? Or to start speaking at least?
>
> RG6: Well it's to convince them that to give their account is the best way to go. That's the strategy is to convince them, despite their right to silence, they also have a right to speak as well and that's kind of put to them.

Participants also reported that gardaí sometimes emphasise the benefits of co-operation/answering questions, along with highlighting the negative consequences of not doing so. At times this could come close to being, or in fact be misleading, especially in relation to the likelihood of bail (see section 7.3)

"Well, the main problem we have like in our practice is that the guards really try to undermine the legal advice that was given to the client actually by going… by not trying to cooperate you are making yourself, you are making your situation even worse than it was before, so just cooperate it would make our life easier and your life easier, let's get it done…" (S9B)

"I say that the gardaí often adopt the roles of psychiatrists or priests, saying things like you'll feel better if you let it off your chest and it'd be the right thing to do to do this that and the other." (B7)

6.4.3 Interactions Outside of Interview

Participants reported that some suspects were 'softened' prior to interview through their interactions with the gardaí. This could take the form of friendly interactions that could make individuals more likely to answer questions. They further reported that sometimes, prior to interview and therefore not recorded by video, gardaí suggest to suspects that co-operating by answering questions would be in the suspect's best interests, including that they would be granted bail, a more lenient sentence, and a general speeding up of the detention/interview process.

"The journey to the station, there can be a lot of similar things, undermining in advance the legal advice, the legal advisor… plus softening them up to answer questions […], even in some cases saying things like a certain sentence, a minimal sentence will be imposed, things like that, they will be promising things." (S5B)

One of the retired gardaí also mentioned threats made on the way to the station, that gardai would engage with a suspect's family, in order to induce co-operation.

RG1: …if someone is threatened on the way to the station, depending on what the threat is, they would do their utmost to keep anything from happening to their families. Especially their mother. Wives and partners are you know, there or thereabouts. The one person they don't want you to go to is the mother. And that's a cultural thing.

I: That's interesting. And what's the threat? Just that we'll go and have a word with your mum or?

RG1: Oh yes. It could be as simple as that. Or it could say, "are you storing gear?" - gear could be anything – "are you storing gear in your ma's place? Your mother's place?" Whether it be a house or a flat. "I think we'll have to go up and search it." That's a threat. If they thought you were going up to their mother's flat, like, to do that, then they would open up fairly quickly, mostly.

One of the solicitor participants outlined clearly the impact this could have on suspects:

"House raided, drugs found, so the young lad is being brought across in the car, 'well, oh we know your girlfriend lives next door, we're going to raid that house and she's going to be detained unless you make admissions, and your mum's going to be detained also.' It's this kind of noose tightening in that they feel that they are being kind of attacked from all angles and they need to save everybody by taking responsibility for it. So, they are absolutely softened up between arrest point and garda station …" (S4B)

Solicitor participants also noted that some gardaí make efforts to "soften up" suspects in between interviews. This was based on their experience of suspects changing their approach between interviews, indicating that gardaí had opportunities to talk to them in the absence of their legal advisor. They mentioned gardaí escorting suspects to the bathroom or for cigarettes as opportunities to interact with suspects unsupervised.

"Definitely in between a first interview and a second interview, or a second interview and a third interview, they could be going 'no comment' the whole way through. You go off for your hour's break or whatever waiting for the second interview to start and then you go in and it's a completely different interview." (S9A)

"Like I've had an example where I'd, we'd gone in, we'd given a statement and then maintained 'no comment' throughout, the rest of them were taking a break but coming back for the second interview and the guards just went in when my client was having a meeting with his wife and said that they were being badly advised and that 'no comment' was not the best approach and I come back from the break thinking that we've left everything fine and you go in and the client is crying in the consultation room. I think obviously they shouldn't be having any interactions with our clients apart from in the interview room. That isn't the case, that isn't what happens. I don't know what anyone else's experience is but for me it's a constant breach, y'know, even basically the walks to the bathroom, or the cigarettes, it's all…sure I'll bring him out, it's fine." (S1B)

Retired garda participants were of the view that formally no such unofficial discussions ought to occur, and that it is dangerous to engage with suspects in that manner.

"Don't forget the suspect will use that to their advantage. So they can use it against the investigation team later. So the investigation teams know to shut that down straight away." (RG5)

In the context of a suspect who might wish to discuss something off-camera, the same retired garda pointed to formal channels of engagement:

RG5: If he wants to talk. And if they do want to talk, you have somebody with you and you start writing it down, and you put it into your notebook with them, and get him to sign it. And if there was another person who was there at the time to witness it as well, get them to sign it too at your writing. In the majority of cases, the members would know to shut that down and wait for the interview for that lads, and we'll get that out there then. The people who try to use that now would be using it to their advantage to discredit the investigation team…

I: Would there be any occasions where it would be sort of legitimate, let's say if someone like can't be seen on tape to be saying x, y, z but they do want to let you know something, does that happen?

RG5: You can do that. But I would only do that in the presence of their solicitor. If they didn't wish to be interviewed, but there's a direction there from and legislation there to say they have to be interviewed. And you're getting that approved beforehand so you would not be allowing the investigation team to go down the road to turn off the video recording and things like that or the DVD. No you'd be getting the details first, and you'd be engaging with the Chief Solicitors Office first before you'd be go anywhere near a thing like that. Again, you're there and see the reason for that. Because if you've somebody like that, you're looking at the CHIS the system, where you're bringing the teams that they want and become registered informants and things like that. So there's a settled process for things like that as well. And a certain team deal with that, if that's what they want to do and they have that conversation with that team. And again, we have a structure and a process in place for that.

On the other hand, in the context of suspects who are concerned for their safety, another retired garda acknowledged that discussions outside of interview sometimes occur, though they will be of no evidential value:

"…what can happen occasionally when [a suspect is] finished [the garda interview], if he badly wants to tell you something, it's on his way back to cell, and he says that I need to go for fresh air. And they're entitled to go for fresh air and to be able go for a walk and have a cigarette outside. And they'll say 'look can I have a chat with you outside'. And you say, 'well I prefer if you did it inside'. Then he'll say 'I can't, you know I can't, because it's on camera and I'm dead'. And then he'll go on, 'yeah I know this', or 'Johnny Murphy did that' or 'they're the two' or whatever it is. It's of no value to you because it's off camera but it might put you in the right direction. It hasn't happened terribly often but it has happened. And it has happened often enough for me to be able to say that yeah, this is an issue as well." (RG3)

6.4.4 Threats

Solicitor participants reported that gardaí might point out that it could be necessary for them to arrest a family member or to search their house. Where an arrest had already occurred and a family member or partner was already detained and being questioned themselves, this exerted a strong degree of pressure on the individual in question in terms of moving them from a position of "no comment" to instead answering questions. Solicitor participants also reported individuals feeling compelled to answer questions in an effort to shield their family from hearing details about the charges.

> "They've been told perhaps, as S3A said in the corridor, that y'know, we're going to have to down and get or go to your mother's house and these types of things and that has a huge impact." (S1A)

One retired garda (RG1) also gave an example of threatening to have a suspect's social welfare payments stopped:

> I: So tell me, if someone was not answering the questions you wanted answered, you mentioned some of this earlier already, but what was your approach then in trying to get them to share something?
>
> RG1: You could threaten them.
>
> I: How do you mean?
>
> RG1: You could stop their social welfare.
>
> I: Oh right. Do you actually have the power to do that?
>
> RG1: No.
>
> I: Okay.
>
> RG1: …if you find someone in possession of €1000, you ask them "where did you get it? Are you working?", and if they're not working, then they got it some other way. But if they have the money, we can ring social welfare, then we can say that Charlie Murphy, or whoever, is carrying around wads of cash on him, why are you paying him social welfare? So then the social welfare people have to go to interview him…They will cut them off for a week or two. And all the benefits that go with that…So, you know, that's very annoying for them. So they might make a bit of a deal with you, not to cut them off, you know.

6.4.5 Misrepresentation of Evidence

Solicitor participants also reported that, in their experience, gardaí might sometimes present the evidence, or parts of the evidence in a manner that could be viewed as selective or even misrepresentative, such as putting forward inaccurate summaries of reports, or selective excerpts of witness statements.

> "…while they refuse to give you disclosure, they'll give you some juicy excerpts from the victim statement or from the forensic statement, all carefully selected to create concern in your client but then when you actually get the actual report at the end of the day, what was quoted was actually at the first paragraph and the paragraph at the end was something quite different… so selective reading of excerpts from statements and forensic reports." (S2B)

> "The extract parsing from witness statements to me is a huge, huge problem that is being encountered time and time again, and y'know when you're asking to read it in their entirety because they're going to leave out the whole 'I'm not sure but I'm nearly certain, I think it was' they leave out all of that and that's obviously the position you're stuck with in terms of advising your client" (S1B)

Other non-solicitor participants acknowledged that gardaí put evidence to suspects as part of regular interview processes but did not make any suggestion that the gardaí would put a strategic slant on the evidence in the manner the solicitor participants reported.

> "They put the evidence up to the suspect and ask them to comment" (D10)

> "if you have something that they're not expecting, you know. And a statement from people who they respect, maybe, or who are friends, a statement saying 'yes, I my mate John did this,' you know, that's very simplistic way of putting it but if you present that the shock of it to them is immense, you know. Their mate, they're out and about. It's, in their world, it's a terrible, terrible thing." (RG1)

Retired garda participants outlined the preparation and planning that goes into an interview conducted under the GSIM, and the way in which evidence might be unveiled to the suspect in a piecemeal manner as part of the interview process:

> "That's why the part and parcel or the planning of an interview is really, really important. You don't just end up with all your exhibits outside and say, 'alright we'll use this one first, just to get through it'. You have to know what … the case is and say, 'no that's not the appropriate time to show it. We're going to show that after showing this this this and this.' Because we want to get a response to this. If he denies being here, this one proves it…" (RG3)

There is a material difference between presenting the suite of evidence to a suspect in order to give them an opportunity to comment upon it, or even presenting particular items of evidence in a particular strategic order, and selectively presenting evidence in a manner which misrepresents the case in order to pressure a suspect into waiving their right to silence. If the latter is the approach that is taken this may be regarded as coercive and veers into unacceptable, potentially unlawful and unconstitutional, practice. There are elements of the GSIM which are appropriate and work well when properly actioned, but risk a claim of unfairness if operated in a suboptimal manner. It is important that garda training is refreshed regularly, and that those in supervisory positions insist on compliance with the highest standards of ethical interviewing.

6.4.6 Silence in Response to Silence, and Repetitive Questions

Participants reported a variety of questioning styles utilised in response to "no comment" responses. The use of silence in response to silence was mentioned by both retired garda participants and solicitor participants.

> "I suppose we'd talk them around. Like the solicitor's going to say 'you have a right to silence', and we'd say, yes they have but we're trying to convince them … Yeah, it would be trying to talk them around. Talking them through what's there and let them listen for a while. I suppose, actually, one thing that actually helps someone to give up their right to silence is silence from our side…we'll ask a question and just stay silent if they're not answering questions." (RG6)

Some solicitor participants noted that styles went in and out of trend in some instances, perhaps due to recent training:

> "…for a period of time they [the gardaí] used to sit there with their hand on their knee and look intently into your client's eyes for about a minute and a half. Eventually one of my clients said to the guard, 'this isn't an episode of Blind Date, will you move back?' And I mean, this was very pertinent at one point, must have been some training workshop they had, and you sat there and you put your elbow and you looked intently into someone's eyes, seriously lads. But it happened for ages." (S2B)

There were a number of ways in which questioning of suspects could veer into oppressive practice. For instance, solicitor participants reported gardaí repeatedly asking the same question, even after receiving a "no comment" response from a suspect or asking several questions at once, which could be confusing for suspects. Both these tactics could amplify the intensity of the interview atmosphere.

6.4.7 Emotive Questioning

Additionally, participants noted that gardaí sometimes use emotive statements and questioning, with highly charged vocabulary. These can also involve references to the suspect's family. This could be either in terms of how their family would respond to hearing about the suspect's behaviour or, as previously mentioned, that the gardaí would have to arrest their family members.

> "So you're trying to appeal to their sense of fairness and justice, you may very well introduce family members. Not actually bring them into the room, but to say, 'look I was talking to Johnny the other day' or say 'your mother is going to be really really cut up over this'. So you're trying to use it but you're trying to use it fairly. There was a time when it wasn't used fairly, it was just ah, anything goes really. So it certainly is a much better position now." (RG3)

> "Any sort of oppressive interviewing technique, y'know, they might not all be used in one interview but to a certain degree, they will always sort of infiltrate into the interview in some sort of way, depending on the gardaí." (S6A)

> "The guard said 'well what would your mother think, Johnny, if she knew this, really, do you not feel bad about this?'" (D3)

> "It's a process of patience and trying to get them to open up. And there's a number of different avenues you might explore. If they have families, 'if you go away to prison, what's your family going to do? And your children, make sure they go to school', and all the rest of it you know. And you come at it from every angle, to see if you can break them down, to give you one small admission…What's at the back of their minds all time is what's going to happen when they leave the station if they talk to you. If they can keep that in their head, they can wear you out. But a lot of them are short tempered. And say something offensive about their mother or their girlfriend or that she's going with some other fella and the child is not his or whatever, there will be an outburst usually." (RG1)

6.4.8 Undermining the Solicitor

In addition, solicitor participants reported experiences of gardaí acting in ways that they perceived as attempts to undermine their advice, especially attempts to diminish how "in control" of the situation they may seem to be.

> "They can undermine you in interview on tape, it's happened to me before with a juvenile, quite a serious offence we had recently… where they said I wasn't that old, that I didn't really know what I was talking about and that she could end up in custody on the advice that I'd given her and at that stage… none of the gardaí have legal qualifications, I just remind the client that I'm the only one in a position to advise her and just try to reassure the client but it really does depend on the guard because there's gardaí that will go to all levels to ensure that your client is manipulated into thinking that making a comment is in their best interests and in this situation definitely was not.." (S6A)

Many solicitor participants had experienced being threatened with removal from the interview. Participants especially reported experiencing this when advising a suspect to exercise their right to silence.

> "I've had one instance where, as we started, the interview I pointed out that it would be a 'no comment' interview and I was threatened to be removed from the interview at that point." (S5B)

> "I said no I'm advising you to remain a 'no comment' interview and not to… and the guard got very very annoyed, saying that have I read the regulations and I'm not entitled to answer the questions for the client and he would put me out and get the member in charge and I said perfect. He got very animated and very aggressive." (S4B)

Similarly, solicitor participants reported that gardaí can be hesitant to allow mid-interview consultations:

S10A: If you have them for like say…oh "only your client can request a consultation"…

S7A: They do that, so "it's for your client to request a consultation".

Solicitor participants also perceived the way that the room was arranged to be tactical in nature. For instance, they found that their chair could be positioned so as to make it hard for the solicitor to have eye contact with their client, or to communicate in general.

While the retired garda participants spoke about the difficult initial adjustment to having solicitors in the room, where there was a lack of confidence and understanding by the various parties about their roles, they mostly reported how the practice has "bedded in" (RG3). In this regard, many of the retired gardaí participants reported a lot of professional respect for criminal defence solicitors and their important role in protecting suspects' rights and ensuring fair trials.

> "…my experience of the solicitors in the interview room has always been pretty good. They're just there to look after their client. I suppose it's a matter of both, the solicitor and the guard having the confidence to interact properly." (RG6)

However, it was noted by some participants that there are inevitable competing interests between the solicitors' duty to act in their clients' best interests, and the duty of the gardaí to investigate crimes. There were reports from the retired garda participants that solicitors sometimes acted obstructively and had the goal of getting their client "off at all costs" (RG3).

> "If it never gets to the truth in there, it's the best outcome for solicitors…Their main focus, their only focus is on their client. That's just the way it is. The police fully accept that and understand that. That's just part and parcel of life. But, they're not worried about the victim, they're not worried about society, they're not worried about the public. None of that comes into it for them. They have a single focus, I have to get this person off. That's it. I mean I know there's a far more noble aspect, or there was or is, that interested in the truth and everyone's entitled to a fair trial, which they are. But that really isn't the way it is in reality anymore." (RG3)

> "…have found some solicitors to be obstructive in the interview room. And not just to challenge something that was said wrong, but to try, I don't know, to try maybe to delay the interview and to reduce the time that's available. That has happened with some solicitors, just like there's some bad guards, you see some bad solicitors." (RG6)

It's important that gardaí and solicitors continue to build upon existing professional respect for the roles they each play in the criminal process in order to enhance the efficiency of investigations and ensure the protection of suspect rights.

6.5 Adverse Inference Provisions and Practice in Garda Stations

In Ireland, there are specific legislative provisions that allow for a judge or a jury, as the case may be, to draw adverse inferences from silence. When such inference provisions are invoked by the gardaí and a person fails to provide an answer, the trier of fact at trial can be informed of this and permitted to draw an inference of guilt. These provisions may only be properly invoked in certain circumstances and they do not apply in all garda interviews.

The application of the inference provisions allows for the trier of fact to learn of the suspect's exercise of the right to silence. Current garda practice is to hold these separate interviews towards the end of a detention period, during which the suspect has not provided information on certain matters of interest. Given that the idea of drawing an inference from a suspect's silence contradicts the standard caution given to suspects, gardaí must withdraw that caution and deliver an amended version relating to the inferences.

The Garda Code of Practice indicates that, prior to an inference-drawing interview, gardaí should inform the suspect of their intention to invoke the provisions, remind the suspect of their right to remain silent, and explain the effect of the relevant provision(s) in ordinary language in a step by step fashion. Gardaí should inform them that the member reasonably believes the facts may link the suspect to the offence, advise them that the interview will be electronically recorded (unless the suspect consents in writing to it not being recorded) and that evidence of their silence may be given at any future trial.

Given the fact that there are different repercussions to reliance on silence in these specific interviews, as compared with those which will have gone before them, it is helpful that they are distinguished from each other in this way. This may help to ensure that suspects do not get confused about the implications of exercising their right to silence at different points in the process.

One retired garda participant was of the view that it would be preferable if the inference provisions were in operation in all interviews:

> "…my attitude with rights is that they come with responsibilities as well, and there should be some responsibility there in relation to inferences from the very start in every question that's asked in interview, that's my view." (RG6)

However, we suggest that the holding of a separate, standalone "inference interview" at the end of the process works well in the context of the late disclosure nature of the GSIM. It is really only at that point in the process that the existing case and evidence against the suspect will have crystallised and there will be a case presented for answer. As one barrister participant put it:

> "…the greater degree of information afforded to an accused, the more prejudice perhaps …could result in their failure to account for a mark or whatever, their presence etc. There must be a commensurate level of information available to them before they are prejudiced for not responding." (B8)

The inference provisions represent a significant departure from the normal operation of the right to silence in standard interviews. It is therefore important to understand how often these provisions are used, the various influences on their use and challenges encountered during their operation.

6.5.1 Prevalence of Adverse Inferences

Participants had differing experiences in relation to the frequency that they encounter inferences in garda stations. Though, it was accepted across groups that they were infrequently raised at trial.

> "You spend half your time at the garda station dealing with it" (S2B)

> "I don't think I've ever had a jury trial where inferences have been successfully introduced" (S3B)

> I: how often do they actually come up in real life trials?

> B2: Not as much as they could, because for some reason, in many cases … the guards don't go that far in the interview process.

Where inferences are used against an accused at trial, it tends to be in relation to more serious offences and so they appear more often in the higher courts. Participants specifically identified the Special Criminal Court as being a huge exception in relation to how frequently inferences were used. Inferences were regarded as a commonplace occurrence in the Special Criminal Court.

> "They use it for prosecution in the Circuit Court, I've rarely seen it in the District Court. I suppose I have seen it a handful of times in the District Court but almost all the time in the Circuit Court" (B6)

> "Yeah, they're mainly big issues before the Special." (B1)

The reasons for which inference provisions tended to be relied on more frequently in the Special Criminal Court are explored in greater detail below (at section 7.4.5). Leaving the Special Criminal Court aside, participants reported that the use of inference provisions appeared to be increasing in other courts as well. Solicitors reported them being deployed more in garda stations, and other participants also reported a corresponding increase in reliance on these provisions in court.

> "They are being used in court… they're not only being used more by gardaí, but they are also being used more in court." (S5B)

> "No, I think inferences are working. I can see in the last 2, 3, 4, 5 years a significant uptake in terms of their use by gardaí." (B8)

The fact that participants report an increase in these previously rarely deployed provisions warrants a closer exploration of what influences the use of these inference provisions. The influences relevant to use in garda interviews are discussed below, while their use at trial is considered in section 7.4.4.

6.5.2 Influences on Use of Inference Provisions in Garda Interviews

"No Comment" Position

The most fundamental influence on whether the inference provisions are invoked against a suspect is whether or not they have relied on their right to silence. The inference provisions cannot be invoked if a suspect has already answered questions or has already offered an account to explain a piece of evidence, such as a mark or object, or their presence at a particular place.

> "…what do you do if someone says 'no comment'? Well, eventually, there's an hour to go in the interview, or there's two hours to go, you'll do the inference interview, because you have to do that. And then it will all go into the mix then." (RG4)

> "Yeah, and it's usually the last interview you do. Because the whole basis of the inferences is that you've interviewed him and he has made no comment about all those issues and now you're putting the inferences to him." (RG6)

Strength of Evidence

The strength of the evidence which the gardaí have against a person at this stage in the investigation also plays a significant role in equipping the gardaí with a factual premise, which they ask an individual to account for. Without such evidence, supporting a very specific question, it is not appropriate to use the inferences and so this could mean that guards were less likely to use them.

> "if there are forensics or anything like that then I would expect inferences to be put to them" (D11)

> "…you pre warn the solicitor, 'here's what we're going to put to them, they were observed, we have 3 witnesses saying that they were here, we have the CCTV on the car registration.' And you give them the whole lot. And then you say, 'now, if you're going to mount a defence, you need to tell us now what you were doing', or 'what reasons you were there' or whatever." (RG2)

> "It is very often the case that the inference provisions are put completely inappropriately in the sense that where a person's presence at a scene is hotly disputed and not proven beyond doubt, on the material available to the guards, they will account for their presence at a certain location. And it would assert… that's not a proper application of the provision because you cannot be using this to put propositions that are not actually established, why should you account for being present at a location that the guards can't actually put any proof to you that you were there" (B2)

Gardaí had to possess this evidence in order to invoke inferences, but it was also necessary to inform a suspect of this information. Some participants expressed the view that this requirement meant that the inferences were not always invoked because the gardaí either did not possess sufficient information to ground the invocation of inferences, or did not wish to disclose the information.

> "From an accused's perspective, well what do you want me to say? All I know is that you told me that I was meant to have been at the centre of robbing a Spar at 2 o'clock, tell me more. I just think that perhaps the greater degree of information afforded to an accused, the more prejudice perhaps could be, could result in their failure to account for a mark or whatever, their presence etc. there must be a commensurate level of information available to them before they are prejudiced for not responding." (B8)

Furthermore, in the context of section 19A which requires an account to be given of certain matters if one is likely to seek to rely thereon at trial without having an inference drawn for failure to mention it during garda questioning, solicitor participants noted the difficulty in advising on this at this relatively early stage of the overall trial process.

> "So if they want to rely on… particularly in section 19A inferences where they say 'tell us anything you intend to rely on in your defence', if you've had no disclosure, you haven't seen the forensic report or the witnesses' statement, it's a bit absurd to be asked, tell us something you intend to rely on in your defence." (S2B)

Even if the evidence is shared with the suspect and the solicitor at the stage that the inference interviews are being conducted, there is an unsatisfactory lack of clear guidance about the extent of evidence that must be provided to ground the invocation of the inference provisions.

Garda Training

The procedure relating to the invocation of inferences could be tricky and cumbersome. As a result of this, participants regarded the level of training that guards had received as being linked to their confidence in and ability to use inferences effectively. Gardaí trained to Level 2 of the GSIM will have been given lectures on the inference provisions and those trained to Level 3 will have undertaken a greater level of experiential learning in that regard. Those trained to Level 4 act as supervisors on serious investigations.

> "The more experienced the guard, the more likely you are to have the inference provisions put to an accused. Sometimes, I dunno, I think guards might be a little bit afraid of them sometimes and don't utilise them" (D11)

"So they [the investigation team] get to a point where they say, 'this isn't going well, very little happening here, so we need to start getting our inferences together now.' They could start two days out. So they say, 'okay, let's get the inferences, let's get working on the inferences, what do we need to put to him in inferences here.' So like, nothing in the serious interviews is left to chance. They are very well planned, very well put together, very well structured. As I say, you have interview teams. You have your level 2s, level 3s in doing the interviews. You have your level 4s outside sometimes watching, sometimes just interviewing the lads as they come out, saying 'okay, what have we got? And let's prepare for the next interview.'" (RG3)

Seriousness of Offence

This apparent correlation between the use of inferences and the level of training that gardaí have is linked to another reported influence on their usage, namely the seriousness of the offence. More specialised gardaí with higher training in how to conduct interviews and use inference provisions are involved in investigations into serious offences. This coheres with the observations noted above that suspects were more likely to remain silent in interviews relating to investigations for serious offences. As a result, participants observed that inferences were more likely to be deployed in serious cases.

"Yeah, probably for the most serious crimes down to firearms. But having said that, they can be used for anything. The provision is there, so they can. But you wouldn't normally see them…" (RG5)

"The guards use them less in smaller cases and more in the more serious cases which is probably to be expected but sometimes they would have been really appropriate to use in kind of maybe minor cases, like drugs cases and you don't see them there. You don't see them sometimes being used in those situations but you do then see them being used a lot in more serious murder, gangland, those types of cases" (D7)

Yet an important nuance was added here by participants, who commented that inferences were rarely used in sex offence cases.

"In the sexual offences cases, really they are next to never employed to be honest, it's usually one interview, two interviews and you either give your account or you don't." (D8)

"In rape cases you hardly ever see inference provisions relied on" (J1)

Two possible reasons for this seem likely. First, where the question of consent is the central issue in a sex offence case, as it often is, inferences are of little value. There may be sufficient evidence to pose inference questions in terms of whether or not sexual relations had occurred but not questions that would help to establish if such relations were consensual. Secondly, as noted in section 5.5.1, suspects rarely rely on their right to silence in interviews relating to investigations for sex offences, and will instead often deny that the encounter was non-consensual.

Resources

Some participants also pointed to the resource-intensive nature of inferences which can be very costly in terms of time during investigations. As these participants explain, this is a lengthy procedure that requires gardaí to develop their questions appropriately on the basis of the extant evidence, provide adequate pre-interview disclosure to a suspect and their solicitor, caution the individual, deliver an explanation of what inferences are, allow the suspect time for consultation with their solicitor and indeed to administer the inference questions themselves. Therefore, in some investigations, there simply may not be sufficient time to invoke inferences.

"I presume it's a matter of resources and time, that it takes more time to go through all these explanations and consult with the solicitor and the guards may on occasions make an assessment and go, well we've got enough here already, or the case isn't serious enough to justify another three or four hours, however long it would take." (B2)

"…I think sometimes they feel it's just not the best use of time and that given the likelihood of them being allowed in at court they might be better using their time in some other way, some other interview." (D8)

It was noted by one retired garda participant (RG5) that a potential part of the rationale for extending a period of detention under relevant legislation might be that inferences are to be put to a detained suspect, due to a failure to answer questions. It was clearly stated, however, that the extension in such cases would not be granted on the basis that the suspect had exercised their right to silence, but in order to allow for the invocation of the inference provisions, the opportunity to do so having arisen from the suspect's failure to answer relevant questions (see further discussion in section 7.1).

6.5.3 Reactions to Adverse Inferences

Generally, the invocation of inferences, in and of themselves, did not appear to induce individuals to start answering questions. There was a tendency for individuals in such interviews to continue to remain silent.

> "Yeah, mostly inferences are called in on a 'no comment' interview I find and they make no comment to the inferences as well. I would find it very unusual to have a 'no comment' interview and then an answer to one of the inference questions" (D10)

> "We do an interview under that particular Act and caution them in respect of the inferences. But to a criminal who's looking at 5 years, 10 years, possibly life in prison, it doesn't make an ounce of difference. The reality is…if somebody is exercising their right to silence, we're professional people. We have to accept that." (RG4)

Retired garda participants had some experience of suspects providing an account of relevant matters in inference interviews, but where this occurred it was often a relatively limited account.

RG4: My experience is you would get a lot of people saying something because they're now being told that something can happen as a result of them not doing something. You're not going break, you're not going to get the big, 'we've sunk the case' job out of it. That's not going to happen. But they do… In my experience, they did respond to that. In my experience.

I: And would they account for the thing?

RG4: They might, but it could be very vague or could be something, they wouldn't be saying, 'oh yeah that's the baseball bat I used to smash Michael's head in.' Again, I speak in my experience. Other people might say, 'no, they never say a bloody thing.' It depends on the individual.

On the occasions that a person did answer inference questions, some participants viewed this as potentially more likely due to the number of interviews that the person was subject to, and the revelation of the evidence the gardaí then held as part of that process.

> "There has been changes, yes, they have changed their position. But I would put it down to good interviewing technique [rather] than using the inferences. Because your investigation and interview process is a process that you're going through. And it must be quite robust because it will be tested in the courts and rightly so, that it would be tested. So it has to be very fair and very transparent…So I think in situations like that people have, been like, 'you know what, at this stage, you might as well come through with something and see'." (RG5)

> "… so my experience, where accused or suspects tend to change their story is when they've done loads of interviews. And at the last interviews, they tend to change, if they change. It's not through the use of inference provisions generally speaking." (B1)

Some participants were of the opinion that maintaining "no comment" was the best option for a suspect even in the face of the inference provisions.

> "Most people would have advice, they'd just say 'no comment'." (D7)

> "They're just going to stare at the wall. They will be well advised to do that, in fairness, in reality." (D2)

In such a scenario, both the garda questions asked and the failure of the suspect to respond become admissible at trial. Of course, if the suspect does answer the questions, those statements become admissible as evidence at trial:

> "If they choose to answer that question it's not an inference anymore - it's evidence, the answers that you give are evidence and you can be convicted on evidence. So, as it were, extreme caution would be required" (B7)

There were some cases where solicitors may advise someone to speak, usually if they did have an exculpatory statement to make.

> "You maybe have an eye on what you're going to…maybe, to advise in relation to inferences. Sometimes it'll be, I think, in case there's something helpful to say, maybe at that stage… but if there's not, a lot of the time I think the advice is the same." (S7B)

> "And when I was a solicitor in the defence if it was a 'no comment' interview, unless there was an exculpatory thing I could say to the inferences, I would say 'no comment' to them as well" (D10)

> "But now with the inference provisions obviously there's a much greater… it's much… you're kind of damned if you do and damned if you don't. If they invoke the inference provisions properly and if they ask the right questions, you nearly have to give an answer I think, if you happen to have an explanation" (B4)

In relation to investigations into historical offences, solicitor participants noted a difficulty arises for some suspects who may struggle to account for objects/presence if they cannot remember.

> "Partly still it's down to the set of facts that they're trying to draw the inference from, and often times I think it's misused by the gardaí, (S3A: absolutely) I actually don't know how anyone can draw an inference that they're trying to draw from like… please explain why you weren't in that field 15 years ago. Y'know?" (S2A)

Navigating inferences was described as a "minefield" (S2B) for solicitors, especially those who are inexperienced or who do not normally attend garda stations as there was the potential for them to potentially be cross-examined on their advice in relation to inferences. Solicitors advising on inferences must weigh up the other evidence against the person, the strength of that evidence, and other options also available to their client. One solicitor participant was of the view that the invocation of the inference provisions could, along with other evidence, ultimately influence how the suspect might plead.

> "it has a bearing on your advice in terms of the weight of the evidence and a plea of guilty or not guilty so it definitely has a trickle-down effect." (S5B)

6.5.4 Challenges Associated with Administering Inference Provisions

A number of challenges arise in relation to the adverse inference provisions. These issues relate to the delivery of the caution and explanation of inferences, deficits in garda practice in relation to inferences, and training needs. These are important to understand because they can render the silence encountered under the inference provisions inadmissible at trial.

> "…the courts would be quite careful about admitting inference evidence because it's an exception to the rule against self-incrimination, they tend to be quite strict and they are quite strict as to the exceptions to it…" (B10)

Caution and Explanation

At the beginning of an inference interview, gardaí need to revoke the traditional caution and explain to the suspect that silence in response to specific questions, or in relation to a fact which they subsequently seek to rely on at trial, could potentially result in adverse inferences being drawn at any trial. Participants described the procedure of invoking the inference provisions as "cumbersome" (J3), and there was some degree of understanding of the difficulties that gardaí faced when undertaking such interviews.

A question arises for solicitors who attend inference interviews as to whether or not they should intervene to correct any defect in the way that gardaí administer the inferences.

> "I don't think I've ever been at an interview in a garda station where they've actually explained inferences correctly, instead of explaining a legal inference, they always give the factual inferences which are not the same… and therefore I'm thinking, should I say something… but then I'm not going to assist them so that's when I would really say to my client, make sure you make no comment here, it is very important because you know it is likely, if you are right, that the… that even if they try to introduce the inference evidence, that it's not going to pass, not going to be admissible… because (Moderator: because of the way they've explained it) of the way it was explained." (S1A)

Even where the caution was delivered correctly, participants reported the caution and the explanation of inferences to be very confusing for suspects and were not convinced there were good levels of understanding. They highlighted that for some suspects, such as those with intellectual disabilities or for particularly young suspects, the inference provisions were difficult – and perhaps impossible – for them to understand. The confusion was compounded by the length of the caution and explanations. Retired garda participants also recognised that the meaning and operation of the inference provisions is complicated and can be difficult for suspects to understand.

> "To tell somebody that inferences will be drawn if you refuse to answer this question, it really means nothing to them. Unless they're educated. And a lot of people who get caught in crime are not educated." (RG1)

> "I do think clients find it confusing [widespread agreement]. They definitely do and particularly when y'know it's so easy to advise them in terms of their right to silence and then suddenly you have this very… for some people it's just a concept that is very hard to understand and the way the caution is given is really confusing… It's too long, I mean honestly sometimes by the time the guards are finished, I don't know what an inference is either." (S5B)

> "…you have guards taking 20 minutes to read out the legislation and then they'll turn around to the fella and go, you understand that now? And he says nothing, and everybody moves on." (B8)

This raises important questions about how to ensure that the caution and explanation are effectively communicated to suspects by the guards and how to establish whether or not someone has indeed actually understood what is meant.

Many participants reported that the inference invoking procedure was lengthened by the fact that gardaí read out the relevant piece of legislation, even though one retired guard specifically noted that this was not necessary.

> "With the inferences, there were all of these issues with how the legislation was provided, explained, was the explanations clear, were the examples given clear and often as well the guards are running out of time… you have to read through the entire legislation to the person and then explain it to them in layman's language and then give them an hour to have a consultation with their solicitor and their solicitor has to be provided with the questions that are going to be asked in print in advance so that they can discuss them with the accused person." (D8)

"I think for years guards were getting tied up with inferences. So what they would do is that they would read out the whole piece of legislation … Then they'd explain what it is in the ordinary language. Then they'd let the suspect go and speak to the solicitor. Then it's back to the inferences interview room. Then it's back through that whole process again, of reading over the legislation. And then explain what it is and then asking the questions and going back sometimes to explain different things about inferences to make sure that the suspect is always clear on it. They really tied up the guards in knots because it also meant you have to go through and reading over, and it's a lengthy piece of law when you're doing the inferences. You have to go through it and say it a third time because you'd be reading over the notes at the end of the interview as well … it doesn't require you to read the legislation over to the suspect, you just have to tell them what it means in ordinary language. So we started doing that and that works out a lot better... probably still lots of guards around the country tying themselves up in knots over that reading the legislation…you usually only have an hour or two left at the end of your detention period to get your inferences interview done and you can be flying through it reading really fast so it has no benefit to his understanding anyway, if you're reading the legislation." (RG6)

Whatever about the need to read the legislation, it is clear that gardaí also try to explain the inference provisions in ordinary language to suspects, as required by the legislation. Participants consistently reported the use of two specific examples.

"So they always give two examples, one is there's a child in the kitchen with loads of chocolate on its face and there's a slice taken from a chocolate cake, the inference you can draw is that the child ate the cake… and the other is, in your house someone has come in and they're soaking wet with a wet umbrella or it's wet after you wipe up, you can draw an inference that it rained last night or whatever." (S5A)

Many participants across the different groups were critical of how effective the examples were, in terms of helping suspects understand what inferences meant and how it applied to them. Part of this difficulty, participants appeared to suggest, related to the fact that the examples did not accurately reflect what is actually happening in the context of the legislative inference provisions.

S3B: That is not an inference… that is a conclusion based on circumstantial evidence. An inference is where you don't have any direct evidence and you are inferring what probably took place. Jimmy is in a part of town in which he does not live. A jewellery shop was robbed and Jimmy is apprehended by a guard 200 yards away. The question is put, jimmy, what were you doing in that part of town. If Jimmy fails to answer, then one will… the court will be invited to infer that Jimmy had something to do with the robbery. There is no evidence, there is nothing to connect him other than the supposition that, because he's in a part of town he doesn't belong, that he has something to do with the crime. That's…

Mod: So the inference is from his silence, not from his presence in the place, his unaccounted-for presence?

S3B: Yeah, his failure to respond to the question, why were you there? The fact that he was there, the fact that he was in maybe his best mate's girlfriend's house and doesn't want to admit it in interview. Well, that's one reason why people don't answer questions in interview. I mean, but the whole stuff, I mean I would totally agree that the examples that the cops give are misleading and not correct and whatever numpty counsel they got to write down the big plain language explanation of what constitutes an inference…good luck!

Deficits in Garda Practice on Inferences

The inference provisions are deployed when a suspect has exercised their right to remain silent in relation to relevant matters throughout the interview process. The gardaí must possess sufficient evidence to ground the request for a suspect to account for a mark, a substance or an object (section 18) or their presence at a place (section 19). This evidence must be adduced at trial and the judge must be satisfied that the evidence on which the question was asked was sufficient to give rise to an inference from the suspect's failure to account. In the context of sections 18 and 19, and indeed sections 2 and 72A, the questions that the gardaí ask the suspect must not be based on speculation, or else the evidence of silence will be inadmissible.

"I always say in the Special, if you're asking us to draw inferences under section 2, you must establish the facts which are the premise of the question because we cannot draw inferences where we don't know whether the question is a speculative one or not… So 'no comment' in relation to 'when did you stop beating your wife?', that kind of question, that's not fair or proper to draw an inference. But if there's a specific factual premise within the question which has been established by other evidence and if we regard that as a question which calls for an answer in the light of proof of that fact, well then it's not so much that you're drawing an inference from not answering the question, you're drawing an inference from not addressing the content of the question and if there's content in the question, that's fine, if it's a speculative or if the content of the question hasn't been established well then we just strike it, no inference from that." (J2)

Participants reported that sometimes the specific questions that were put to suspects in the inference interviews were not sufficiently focused, or grounded in existing evidence. This barrister participant explains:

"How they're not invoked well would tend to be because it's done too generally, the questions asked aren't sufficiently focused, […] a homeowner makes a complaint to the guards, we were burgled at half past midnight on this street and there is evidence suggesting perhaps, you become a suspect of the offence, they could ask for your explanation as to why at 12.35am that night you were on the same street. If they were to say to you, why were you on that street, or were you on that street committing that burglary – would be an improper use." (B10)

Under the main inference provisions, the suspect is being invited to provide an account in response to the garda position, based on the evidence at hand, e.g. CCTV of the suspect on the relevant street at the relevant time. Questions should not be too broad or speculative.

There were also reports of gardaí using the inferences improperly, at times when it was not appropriate to do so. For example, invoking inferences when a suspect had not remained silent but had already offered an account, or gardaí seeking to rely on inferences at trial for a different offence than that for which the person had been arrested, cautioned, and interviewed.[146]

"He's given an account, he's mentioned what his defence is, what are you putting inferences from? […] Well, the minute they invoke the inferences with my client, I would interject and say my client has given an account in a previous interview, why are you putting this to him" (S3A)

S6B: There was an issue with the making inferences in relation to a specific offence and then them charging you with a different offence and you couldn't rely on that inference.

S2B: So they arrest you for… they arrested him for robbery, possession of firearms and they charged him with burglary, so the inferences were raised in relation to an offence other than the offence for which they ultimately charge…

Mod: So it's been answered…

S6B: and they now try and do a catch all where they say the inference in relation to the following charges…

While the effort to cover all bases is understandable, the addition of a multiplicity of potential charges prior to the inference interview causes a significant difficulty for solicitors in providing advice across a range of offences, each of which may have their own legal intricacies.

146 See DPP v Wilson [2019] 1 IR 96, wherein it was held that inference provisions may only be relied upon at trial where the offence charged is the same as that in relation to which the questioning took place.

Garda Training on Inferences

There was a sense among participants that inexperienced guards generally struggled with inferences, displaying a lack of confidence and clarity in what they were doing. In contrast, guards with more experience and higher levels of training in conducting interviews are seen as able to administer inferences with more confidence and with better outcomes in terms of admissibility.

> "The Special Detective Unit guard who would be doing those interviews are trained to do it correctly." (B3)

While the numbers of gardaí trained to Level 3 of the GSIM are increasing, it may be important to ensure that those trained to Level 2 also have an advanced, practical understanding of the operation of the inference provisions, and indeed an enhancement of the training for Level 3s might also be useful. Training for solicitors on inferences specifically would be beneficial too. As part of the current project a training programme was developed and delivered on a train-the-trainer basis to 30 criminal defence solicitors practising in Ireland. It consisted of e-learning modules on the law, a reflective writing exercise, and a three-hour small-group face-to-face session (conducted via Zoom due to ongoing Covid-19 restrictions) centred on peer learning and experiential exercises to aid decision-making in advising detained suspects. Overall this training programme focused on enhancing solicitors' understanding of the operation of the right to silence, the inference provisions, and the downstream consequences of a suspect's decision to remain silent throughout garda questioning.

6.6 Oversight of Police Interrogations and the Right to Silence

There are several oversight mechanisms in place, at interview and at trial. In the context of the interview itself, these oversight mechanisms include the impact of a solicitor's presence, the audio-visual recording of interviews, recourse to the member in charge and higher ranking gardaí. Oversight mechanisms which apply in the post-interview, post-charge phase include discussions about the admissibility of evidence between prosecution and defence counsel and voir dires (whereby a judge decides on the admissibility of a piece of evidence in a trial, in the absence of the jury).

6.6.1 Solicitor Presence

Solicitors provide a direct level of contemporaneous oversight during the interview which can help ensure that interviews are being conducted in line with regulations. This can involve interjecting in interviews to highlight when inappropriate tactics are used, such as improper questions being put to suspects, or overly repetitive questioning taking place.

While acknowledging that the change to having solicitor present in interviews was a challenge for many at first, the retired garda participants generally welcomed having solicitors in interviews.

> "But I have to say, my experience of the solicitors in the interview room has always been pretty good. They're just there to look after their client. I suppose it's a matter of both, the solicitor and the guard having the confidence to interact properly." (RG6)

> "… I would look on it as being a huge advantage. It should have been in a long, long time ago because the allegations that were made against the guards were completely outrageous." (RG5)

Some participants spoke of how the presence of solicitors could ensure better interviewing practice from the gardaí, speaking of the "civilising impact" (B8) that a solicitor's presence could have.

> "I think it means that a lot of interviews are conducted correctly, that their line of questioning can be cut off or stopped" (J4)

> "…some of the good solicitors they'd know the law inside out, and say, "you can't be asking my client that." (RG2)

"But overall as a system, it's the way it should be [having solicitors present], that's the reality. And I don't think it interferes too much in the process. I mean, look, the guards are holding their own on it. We're putting a better service and better product from a policing perspective. The way that we're approaching interviews, the way we're questioning, we're still coming up with our side with some really really serious outcomes, you know that are fine for our society. I mean we never, I don't think had so many serious criminals incarcerated… So it certainly hasn't hampered us having solicitors inside or having videotapes or anything." (RG3)

Though garda interview tactics are now under much more scrutiny from solicitors, this is not regarded by staff from the ODPP as having affected their ability to elicit evidence and admissions. This could be because the presence of solicitors in garda stations coincided with the improvement of interview skills through the GSIM.

"Yeah funny I expected it to make a big difference actually. I expected there to be much fewer admissions but I don't… it hasn't really panned out in my experience, I'm still seeing the same trends." (D7)

"I don't think there is any magnificent sea change there and certainly I think anyone who thought that there would be has probably taken a contrary view now." (D2)

6.6.2 Audio-visual recordings

Retired garda participants were very enthusiastic about the value of audio-visual recording of interviews.

"…first of all, you have to be fair. Fairness is key. And one of the biggest things, of course, is and it's the best thing that ever happened is the videotaping of interviews. Because, invariably, you would have a complaint after the interview about something about the operation. You're absolutely in the position that everything you do has to be fair and has to be seen to be fair." (RG4)

"There's no garda in their right mind that would do an interview without a camera now, because they all see it as a protection for themselves as much as it is for the suspect." (RG6)

Solicitor participants reported using the video recording of interviews as a tool to document deficiencies (as they saw it) in disclosure. This could be beneficial at a later stage in the process, in terms of explaining that a suspect remained silent on the advice of their solicitor as a result of the insufficient information.

"I'd be very quick to say in an interview that we are reserving our position to comment when we've heard all the accusations and all the evidence being put to us or to criticise the lack of disclosure while you're on camera. I think that's important to do but that'd be my take on it." (S3A)

"I would always say on camera that they have been advised until we are aware of the case against the client and at that stage we can reconsider the position and at that stage if they want to make comment, they can…" (S6A)

Videos could serve another important role, relating to the requirement that gardaí take handwritten contemporaneous notes in interviews. These were referred to as memorandums ("memos") of interview and these would generally be incorporated into the book of evidence against an accused person and would appear before a jury at trial.

The videoing of interviews could have an important impact on a case due to the ability to identify inconsistencies or omissions within the memos, or identify where the memo misconstrued the tone in which a statement was said.

However, whilst video recordings can help to identify inconsistencies and errors, such inconsistencies can only be detected if counsel watch the videotapes back and check them against the memos of interview, or arrange for a proper transcript of the interview to be produced. These are time consuming and costly processes, and some legal practitioner participants criticised the lack of transcripts.

> "if I get a Book of Evidence and the memos of interview are in it and I get the DVD of the interview, the audio video, and I sit down, I have to sit down and play that DVD and match it to what's in the memo and it takes forever to do it. We're not paid to do it… So it's a very unpleasant task to have to do it, because it has to be done" (B3)

> "I really want to get the transcript of the interview done because the amount of times that it has changed the case is significant, very significant." (B1)

Section 57 of the Criminal Justice Act 2007 provides that an electronic recording or a transcript of an electronic recording of a garda interview is admissible at trial, even where the statements of the accused were not taken down in writing at the time. The authors understand that this section may be amended by the previously mentioned forthcoming legislation on the powers of An Garda Síochána.

6.6.3 Member in Charge

Every garda station has a "member in charge" who is responsible for ensuring that the rules relating to treatment of persons in garda custody are adhered to. The Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987 (S.I. 119 of 1987) provide for these rules, as well as the specific duties of the Member in Charge, including informing the suspect of their rights, ensuring that interviews are conducted in a fair and humane manner, and recording the complaints of suspects. In this regard, solicitor participants spoke about complaining to Member in Charge if there were any issues with how the interviews were being conducted.

6.6.4 Complaints to Higher Ranking Gardaí

Participants reported that where they received inadequate disclosure from the interviewing garda, they sometimes wrote a statement of complaint to a higher ranking garda, seeking to have it attached to the custody record so that it would be in the Book of Evidence.

> "What I often do, is I do a letter to the superintendent and I ask them to attach it to the custody record, setting out… the deficiencies in relation to disclosure, any issues about the detention and I ask them to staple it on to the custody record so that it's there…you do a big long statement to the Superintendent saying, y'know we've been asked these questions but we've been refused access to this, this and this and in those circumstances we're not in a position, at this point in time… there's nothing to stop you making your statement at a later point prior to trial when you have the information." (S2B)

6.6.5 Exclusion of Evidence

A further layer of oversight is the potential exclusion, from trial, of any prejudicial or irrelevant content from the memo of interview, as well as any evidence obtained involuntarily, as a result of oppression, in the absence of fundamental fairness, or in breach of a suspect's constitutional or legal rights. Such exclusion might be agreed in advance of trial in discussions between prosecution and defence counsel, or it may be decided on by the judge in voir dire after hearing submissions from both sides as to its admissibility. Of course, this only acts as a direct method of oversight in the cases which go to trial, though the decisions of the courts in this context can set the precedent for interactions in garda interviews.

Chapter 6 Recommendations

— Gardaí should provide sufficient pre-interview disclosure to allow suspects (and their legal advisors) to make an informed decision on any reliance or otherwise on the right to silence, where it would not interfere with the investigation.

— Inference interviews should only be carried out by gardaí who have received specific training on the inference provisions.

— Gardaí should notify suspects and solicitors at the earliest opportunity of all of the potential charges which might be considered to allow for meaningful legal advice, particularly in the context of inference interviews.

— Gardaí should increase the practice of arranged arrests and/or voluntary interviews, where possible.

— The Garda Station Legal Advice Scheme should be extended to voluntary interviews and/or prior consultations.

— A permanent joint working group of An Garda Síochána and legal practitioners should be established to engage on matters relating to the questioning of suspects in garda detention.

— An Garda Síochána should provide more advanced and practical training to Level 1s and 2s, within the GSIM framework, on the right to silence generally and specifically on the invocation of adverse inference provisions.

7. Downstream Consequences of Silence

Participants from all groups identified consequences of silence in garda interviews that could be traced throughout the criminal justice process. This chapter charts the implications of decisions to remain silent, or not, in terms of detention extensions, decisions on the charge brought against the suspect, being granted bail or not, the trial process and outcome, as well as sentencing.

7.1 Detention Extensions

Gardaí may prolong the period of detention of a suspect to enable further questioning and investigation. Statutes relating to different offences provide for various lengths of detention and for the processes and periods for extending those detentions. Section 4 of the Criminal Justice Act 1984, for example, provides for an initial period of 6 hours detention for persons arrested in connection with "arrestable offences", i.e. those which are punishable by 5 years imprisonment or more. An extension of the detention for a period of 6 hours may be authorised by a Superintendent and then a further 12 hours may be authorised by a Chief Superintendent where they are satisfied that further detention is necessary for the proper investigation of the offence. There are different statutes governing the detention periods and extension processes for persons charged with offences against the state, murder, and drug trafficking, among others, some of which allow for a total of 72 hours' detention, and others up to 168 hours (or 7 days). While an extension of detention can initially be authorised by gardaí of specified rank, any extension beyond 48 hours can only be granted on application to the courts (see section 2.2.1).

Participants noted that if a suspect is exercising their right to silence in response to garda questioning, this can lead to additional interviews

> "I think if there's no comment they'll…any one I've been in, there certainly have been more interviews, I think there's definitely a direct correlation between the two. And because they're going to keep trying." (S1A)

This consequence of exercising one's right to silence was criticised by some solicitor participants.

> "I do think that that's something that possibly needs to be reviewed because if your client is making no comment, there's been interviews where I've been in with the same question has been put again, again, to the client […] there should a more structured environment in terms of how the gardaí conduct their interviews because the clients are being penalised for making no comment and they shouldn't be…" (S3A)

The process of deciding on detention extension authorisations was discussed with the retired garda participants. They clarified that while a suspect's reliance on their right to silence would not in itself justify a detention extension, such extension could be granted on the grounds of seeking to put inference questions to the suspect which would of course arise as a result of the exercise of the right.

> "…there's provisions in legislation to draw inferences - where an investigating person can put inferences to the individual. And if they're indicating to [the authorising member], when they request an extension that they want to put inferences to the individual and the inferences are being put to them because they didn't answer this question or that question, then [the authorising member] will document that." (RG5)

Accordingly, a period of detention may be longer for a suspect who exercises their right to silence than one who answers garda questions.

7.2 Decisions on Charges

As noted in section 2.2.4, in the case of minor offences, gardaí will make the decision to charge and prosecute. In the context of serious offences, decisions on specific charges are made by staff at the Office of the Director of Public Prosecutions (ODPP/DPP). After interviewing a suspect and carrying out other investigations, the gardaí submit a file to the ODPP containing a covering report and the evidence relating to the case (such as memos of interview, witness statements and forensic reports etc).

On the basis of this information, Directing Officers will make a decision whether to bring charges against the individual. DPP staff spoke of applying two tests when determining if a prosecution was appropriate. First, an evidential test was applied to establish if there was sufficient evidence to prosecute the person and secondly, a public interest test was used to determine if it was in the public interest to bring a prosecution. DPP staff also decide on what specific charges to bring and in which court these cases will be heard. Different court venues have different implications in terms of whether the case is heard by a jury or not, and in terms of the sentences which can be imposed. DPP participants spoke of deciding these issues based on the seriousness of the offence and a weighing up of the factors that aggravate or mitigate the seriousness.

Whether a person has remained silent, made denials, or made admissions will have an impact on the decisions to charge and prosecute. Whether a person has answered questions or has exercised their right to silence is evident, from the documents within the file sent to the ODPP and also from the garda covering report.

First, participants noted how credible denials will reduce likelihood of charge.

> "So as a big generalisation, I'd say if your client has made denials and they are anyway believable and coherent denials, I think you increase your chances of not being charged…" (S5B)

> "It can even stop the charge, to have to dial down that early. It's not sometimes a case of wait and see, particularly if it's an allegation of assault, sexual assault, a denial at an early stage could very well stop the charge altogether so…" (S7A)

In relation to admissions, one DPP participant described admissions as being "definitely something of massive interest to any prosecutor" (D1), as admissions could greatly strengthen the case against a suspect. Still, participants spoke of an informal practice of assessing these admissions to ensure that it was appropriate to include them as evidence against the accused when deciding on the charge. This could include treating the admission in a manner that gave the suspect the benefit of any doubt and looking more closely at the circumstances of the detention during which the admission was made, including how gardaí may have influenced the suspect's decision to make an admission.

> "[Certain garda tactics] would certainly make me have more disregard for what was said and give it less weight when assessing the evidence so yeah…" (D7)

Still, even with this careful treatment of admissions made by suspects in garda interviews, inculpatory statements were of clear relevance to decision-making on charges by serving to strengthen evidence against a person.

In cases where a suspect exercised their right to remain silent, other sources of evidence needed to be stronger in order to meet the evidentiary test to support prosecution. Notably, adverse inferences drawn from silence, under specific legislative provisions (see section 3.4) could function as a source of other evidence, that could mean that the evidentiary test was in fact met.

Outside of the inference provisions, DPP staff spoke of mentally setting aside any "no comment" interviews, ensuring that the exercise of the right to silence did not weigh against the suspect in their consideration of whether or not to charge them. Generally, DPP staff suggested that they simply viewed it as non-evidence.

> "No, I don't form any judgment of them, I just look at the evidence and when I see 'no comment' I'm like 'well that's useless, I can't use that', and that's all I think of. And I'll just see, I have to find what is my evidence because that's not evidence now so and what I think of is 'that's less to put in the book, there's no interview and there's no statement from the member of charge.'" (D3)

Still, other DPP staff seemed to echo the view reported by some of the retired garda participants that while a "no comment" interview would not by itself be viewed as indicative of guilt, it might strengthen a suspicion of guilt:

> "I mean you wouldn't say that person is guilty because he made no comment because obviously it's their constitutional right to make no comment so it wouldn't be an incriminatory thing, it would be a peripheral thing that would support your decision if you decided to prosecute to a certain extent." (D10)

While silence in such a case, outside of the inference context, might not amount to evidence in and of itself then, it perhaps confirms the prosecutor's interpretation of the rest of the evidence in the case as indicating suspect guilt.

7.3 Bail

In Ireland, once a person is charged with an offence, they are brought before the District Court where an application can be made to be released from garda custody on bail.[147] In the case of a specified number of serious offences (including, for example murder), this function must be carried out by the High Court, instead of the District Court. The judge must decide whether or not it is appropriate to continue to detain the individual or to release them, on the understanding that they will return to court when required. The right to bail emanates from the presumption of innocence and therefore the courts will grant bail unless there is a strong reason to refuse it. The prosecuting garda or DPP, as the case may be, can make submissions to the presiding judge opposing bail on two grounds.

First, an objection could be made under section 2 of the Bail Act 1997, where the accused is charged with a serious offence and a refusal of bail is reasonably considered necessary to prevent the commission of a further "serious offence" by the suspect. In considering this objection, the judge may consider a number of limited factors, including the nature and seriousness of the offence with which the suspect is charged, the nature and seriousness of the offence apprehended (i.e. the offence which might be committed while released on bail), the strength of the case against the accused, whether the accused has any previous convictions, and whether the accused has any drug addictions.

Secondly, an objection to bail could be made on the basis that the accused would attempt to evade justice while on bail, in line with the considerations set out in the case of People (AG) v O'Callaghan.[148] Under an O'Callaghan objection, the judge may consider factors including the nature of the evidence to support the charge, the likely sentence to be imposed on conviction, or the possibility of evading justice by absconding, disposing of evidence or interfering with witnesses and jurors.

A suspect's reliance on their right to silence in garda interviews, or even cooperation in a broader sense, is not a reason to object to bail under either section 2 or O'Callaghan. Still, some participants reported that gardaí were nevertheless informing judges of whether the right to silence was relied on and this appeared to be taken into account by judges.

147 However, there are different types of bail. Here we describe "court bail", which is what is generally referred to when people speak of "bail". This is where a judge orders the defendant or the accused to be released conditionally on a bail bond. Station bail, on the other hand, is where a defendant is released from Garda Station custody on bail bond to appear before the District Court on a specific date. For more information see O'Malley, The Criminal Process, (Round Hall, 2009) Chapter 13 - Bail and Remand.

148 [1966] IR 501.

"I've had an argument with a couple of judges about it where they say, "sure why can't I be told that?" … but they shouldn't be told it." (S6B)

In some cases, this was communicated through the by-word "uncooperative".

S2B: One of the things that they'll say is he was interviewed, and he made no comment in the interview, and that does happen.

S1B: Or that he was uncooperative, that's my favourite.

S6B: Yeah exactly, not answering questions isn't being uncooperative, it's relying on your constitutional rights.

Mod: And do you think in the bail sense, do you think that they are taking that into account?

S2B: Very much so.

Barrister and prosecutor participants, on the other hand, had not encountered a judge being told about the suspect's silence in a bail application and indicated that if mention of silence, or the euphemism of "uncooperativeness", did occur then they would voice their opposition to this. This difference in experience may be due to different informal practices in the District Court, as compared to the High Court. In particular, barristers will be representing the DPP in the High Court, whereas it would be a garda acting on behalf of the DPP in the District Court.

Whilst exercise of the right to silence during garda interview is not supposed to factor in judicial decisions on bail, participants did comment on an observed relationship between silence and the potential granting of bail. Given that one of the considerations under the section 2 and O'Callaghan objections is the strength of the case against the accused, it follows that bail is more likely if a person remains silent in garda interviews, rather than making inculpatory statements or admissions in answering garda questions.

"Here's the paradoxical thing, if you strictly applied the law, and judges would be conscious of this, if your client has made admissions in custody and has been helpful and cooperative, they are probably less likely to get bail. Particularly if it's a threshold case and the reason why is amongst the criterion that applies when it comes to getting bail is the strength of the evidence against the person and if the person has made admissions, you can take it that the strength of the evidence is pretty high" (B7)

"You've a much stronger chance of getting bail if there's no admissions made." (S5A)

However, despite the fact that there is a greater likelihood of being granted bail in the absence of inculpatory statements made in the course of garda interviews, participants reported that at times gardaí suggested to suspects that they would be less likely to oppose bail if the suspect answered questions, especially if they made admissions. One retired garda mentioned this as a tactic that was used in the past, but solicitors gave current accounts of similar suspect experiences.

"…tell them you're going to oppose their bail, was always… Call it an inducement or call it whatever you like. It was up to the judge at the end of the day whether they got bail or not. But it was one the tricks of the trade, you know." (RG1)

Mod: Does a failure to answer questions have an impact on bail?

S7B: Well the guards tell them it does.

> "The other big one that they say to them is y'know 'look you've a lot of previous convictions, we're going to have to bring a section 2 bail application… but if you make a statement that would make it much easier for us, we don't have to do the section 2.' And one client said this to me last week, so I said, 'okay ask him on camera what his attitude to a bail application'… and immediately your man [the garda] nearly choked and said 'oh I never said anything'. 'You did, you said to me that if I made a statement I could get out.'" (S3A)

This issue is particularly problematic for vulnerable suspects who may be especially suggestible, and, as noted in section 5.3.3, such individuals may be more inclined to focus on short-terms goals like release from custody rather than long-term considerations regarding the future consequences of remaining silent, or not doing so. If gardaí present the likelihood of obtaining bail in this way, or if the suspect considers themselves that gardaí have more power on this issue than they in fact have, they could be inappropriately persuaded to waive their right to remain silent. One retired garda participant noted that while the granting or otherwise of bail is within the power of the court, not the gardaí, "[i]t's what's in the mind of the suspect about what the guard could do is what's important there." (RG6) In this context, gardaí should be careful not to directly or indirectly induce suspects to waive their right to silence by suggesting that doing so might more readily lead to the granting of bail, or indeed any other benefit.

7.4 Trial Process and Outcome

While this section will outline some of the consequences at trial of relying on the right to silence in police interviews, it is nevertheless important to note that the vast majority of investigations do not lead to a trial see section 2.2.7).

7.4.1 Taking the Stand

It is an accused's own decision as to whether they will give evidence in their own trial. Legal professional participants emphasised that their role was solely to advise. In that regard, they generally advised against their clients giving evidence at trial. Participants pointed to the difficulty in asserting an account in cross examination: under such pressure persons could deliver inconsistent or unconvincing accounts. As noted in section 3.1, the accused's right to silence means that the court cannot take a negative view of a failure to give evidence at one's own trial, and no inference can be drawn. This can be contrasted with the law in England and Wales, whereby an inference can be drawn where the accused chooses to not give evidence at all or refuses to answer questions having been sworn.[149]

> "They're usually just an ordinary person and they're going to be questioned by someone who is very skilled in questioning people, who is very skilled in the law, who is looking to catch you out, who is looking to incriminate you, for you to incriminate yourself or to say something that doesn't make sense and it's not an equal match so hardly… it would be just be very rare that you would put someone in a box and it would only be if there was no other rational thing to do." (D10)

The suspect's silence in garda interviews was also a key consideration, greatly influencing whether a person took the stand or not. Without having advanced an account during these interviews, this could mean that a suspect was in a position of necessarily having to take the stand simply to deliver their own account to the jury. If there is no defence or no account offered either through responding in garda interviews or taking the stand, a vacuum exists in terms of the suspect's position.

> "If someone hasn't given their account, and they don't get into the box to give evidence, then the jury is left with the situation where they've got the state's version of events…and they've got the victim's version of events but they don't have the accused's version of events and that makes the situation for them very difficult." (B3)

149 See Criminal Justice and Public Order Act 1994.

Therefore, exercising one's right to silence in garda interviews can increase the pull towards taking the stand. This meant that it was important to consider what had or had not been said in the garda interviews when advising a suspect on whether or not they should give evidence. Conversely, when considering if their client should remain silent or give an account in garda interviews, solicitors also, at that early point in proceedings, had to assess the probability and wisdom of their client giving evidence.

S2B: it also means that your client mightn't have to give evidence at a trial, if they've made some kind of statement as to self-defence or consent.

S3B: An explanation on the record can put your client in the position where they can rely on their police statement and they don't have to give evidence.

S2B: Which is very beneficial when it comes to the more serious…

S3B: Because you're immunized from cross examination, that's probably one of the most significant tactical decisions you'll make in a garda station in an awful lot of cases.

The benefit is then that an account is already on the record and can provide the jury with the suspect's version of events, without the suspect being subjected to cross-examination on that account at trial.

Further, as noted previously, participants highlighted that making a statement in the garda station was particularly useful for defendants in sexual assault cases where consent was to be advanced as a defence or in assault cases where an accused person wished to rely on self-defence.

"so the consequences say in a rape situation where somebody needs to give an account because consent is the issue, they choose to go a 'no comment' approach and then they're exposed to potentially senior counsel cross examining them, having to testify to give account for a consent situation and so they're exposing themselves at the far end, if indeed a charge materialises …" (S4B)

A layer of uncertainty exists in relation to the impact of suspect silence in garda interviews on jury perceptions of suspects who do or do not take the stand. An exploration of this is beyond the scope of this study but it would be very beneficial to practitioners, and their clients, to have a greater understanding of jury decision-making in terms of their assumptions, perceptions and assessment of suspects who exercise their right to silence, both in the garda station and in the courtroom. In the absence of this information, legal professionals draw on their own speculations and assumptions about how juries perceive hearing evidence from the accused at trial to formulate their advice as to what a suspect should do so. Still, in order to mitigate any possible negative opinions about an accused not taking the stand, judges give robust directions to jurors to not regard an accused's choice to refrain from giving evidence negatively.

7.4.2 Pre-Trial Statements

A strategy among solicitors in some cases, discussed above, is to advise their client to put an account on record early in the process, to avoid the client being forced to give evidence at trial. The term "pre-trial statements" here refers to statements made by the accused person in garda interviews, either by answering questions posed by garda members or by submitting a prepared written statement (see also section 5.5.4).

Legal practitioner participants regarded pre-trial statements as a way to keep suspects "immunized from cross-examination" (S3B) at trial.

"It's very clever if you think about it because then when you are defending you can say you have given your perspective and it can actually be read out as part of the prosecution case and normally what would happen in that situation is it might be read out by the guard in the box and then the defence say look that was agreed, that's how it happened on the day, it was read into the record. The advantages of that negate a risk, if you want, of having to feel that you have to call your client because then you're leaving yourself open to cross-examination" (D9)

"Really accused people shouldn't be giving evidence because there's always going to be a problem with their evidence, I mean the smallest thing that maybe in the cold light of day isn't of significance in the pressure of a trial with somebody cross examining you on behalf of the prosecution, things are always going to go wrong, there is … nobody ever comes well out of giving evidence" (J1)

However, there was a sense that if unsworn, prepared statements were entered into evidence jurors might regard them as having less weight than sworn testimony, given from the suspect in person at trial.

"I think when someone comes in with that sort of statement, it's going to carry less weight, less force than something that is said during the course of an interview and certainly something that was said that is subject to cross examination during the course of a trial. That would be my own view but then you'd have to ask a juror what they thought of that." (B9)

The context of how pre-trial statements were made was also regarded as impacting how this evidence was received by juries. The credibility of prepared statements could suffer if juries got the impression that issues at hand were addressed too neatly therein.

"I do think that it kind of always smacks of 'I've kinda sat down and thought this out with my solicitors and it's covered off all the problems and I've now dealt with the whole thing' and I do think that juries are a bit sceptical of that" (J1)

The main draw of making pre-trial statements, whether prepared or otherwise, from a defence point of view, was to avoid cross examination and yet participants also spoke of this lack of cross-examination as being harmful to juries' perceptions and treatment of these statements.

"I think juries like to hear an accused person get in the box and say they didn't do it, where it boils down to an issue of what they were thinking at the time so going back to rape cases, an issue about consent, I think juries really do want to hear the accused get into the box and say that he thought the woman was consenting." (B9)

However, participants were aware themselves that these were speculations about how jurors may perceive pre-trial statements and in reality, it is not known what jurors think of such statements and the impact this may or may not have on their decision-making. Given that this study was unable to include juror participants, this remains a gap in research knowledge that merits exploration.

In their directions, or charges, to jurors, judges note a distinction between pre-trial statements and sworn live testimony.

"The judges are now saying that's all very well but that's not sworn evidence, he didn't subject himself to cross examination and you can treat that whatever way you think you should treat that as a jury." (B3)

The judge participants in this study all described making some degree of distinction between sworn and unsworn evidence to the jury.

"I do say now, in weighing this, it's different to weighing the evidence of somebody who is live. first of all, it's sworn for all the difference that might make but more importantly you've seen the person giving their evidence and you've seen them be tested by very experienced counsel and you've seen how they were able to respond to cross examination. You don't have that with a piece of paper, you simply have words, you didn't hear them spoken and policemen are not able to cross examine witnesses in the same way as barristers so you can bear that in mind when weighing it and evaluating it but you can also bear in mind that he didn't have to say a word of it, in his favour, you can put that into the pot.." (J2)

"Well as part of the charge you identify the evidence in the case, you identify, you say that the statements a person has made in custody in the case, that can be evidence for or that can be evidence against the accused, it's a matter for the jury to decide what the evidence means, either way but it is unsworn evidence, unlike the other evidence in the case it's not sworn evidence" (J3)

However, some participants expressed concern that the charge was "devaluing" (B3) pre-trial statements and there was a danger that it was "confusing" (D8) to jurors that a distinction was being made, without clarity on the value of that distinction being provided to them.

Notably, one judge participant spoke of the implications of allowing the accused to put an account on record without it being cross-examined, remarking that "it is a system [they] feel is being abused" (J4):

> "Suspects I suspect are being advised that, make a self-serving statement, say whatever it is you want to say, you can't be cross examined on it, at the trial the judge has to put it before the jury and say this is evidence and the defence will say, this is what the accused has to say about this matter. He is not exercising his right to silence; he has told you in his own words what his version of events is and he doesn't have to say anything more and he's being advised he doesn't have to say any more, so you have his side of the story. So, it puts both parties on a very unbalanced footing, in a way that could never happen in a civil court. So therefore, I do feel that if… as I say, the premise, I have no difficulty with the right to silence but if you are going to exercise your right to silence then I feel it should be silent that you remain. If you choose then to either make a statement, you should be cross examined on it or any differences or inconsistencies should be open to examination. That you can't have it effectively with jam on both sides. Either you observe your right to silence or you don't." (J4)

Barrister participants also perceived the distinction in the charge as an attempt by judges to curtail the practice of putting forward an unsworn account whilst "immunizing" (S3B) an accused person against cross-examination.

> "Yes, that has been trotted out now in trials in order to remove some of the assistance that you might have given to yourself by giving an explanation because they're saying that's of a different nature, a different quality from evidence given in a witness box where you're under oath and where you are subject to cross examination. So, there's kind of an infringement there of the right to silence by the judges just saying, 'well we're not letting you get away from that particular trick'." (B3)

In this respect, one judge participant highlighted their perception of a lack of fairness in comparison with victims and complainants, who do not similarly get the opportunity to avoid giving evidence and being subjected to cross examination by submitting a voluntary statement:

> "…it does skew matters because an accused can, through his lawyers, or if he appears for himself which is practically never in a criminal trial, can beat the bejaysus out of a complainant if there is the slightest variation between the statement made many years previously, the complainant's statement and the evidence, the testimony of the court. And you can make a witness look foolish or forgetful or uncertain or undermine their confidence in their evidence so they become hesitant, they become more pliable to a defence lawyer. And that doesn't happen for the accused. So, I have no problem with the accused exercising a right to silence, but I think once that right, they choose to abandon it then they should be exposed to the same rigours testing the credibility of their evidence as the complainant or a state witness" (J4)

While it is accepted that pre-trial statements, whether prepared or otherwise, are different from live evidence and cross examination, legal professionals should be careful to ensure that juries are not presented with an unduly negative characterisation of the evidential value of such statements. Indeed, pre-trial statements proffered in garda stations have the significant benefit of being a more contemporaneous account of the events in question when compared to evidence given at trial, which can take place years after the alleged offending. Certainly, oaths or affirmations are not administered in garda interviews with suspects, but the seriousness of matters at that point is clear and the potential negative consequences of dishonesty apparent. Moreover, while evidence given in court is tested by cross-examination, an account given in the garda station can be assessed and challenged by the interviewing gardaí (indeed this is a specific aspect of GSIM) and subsequent investigation of the claims made therein may provide the prosecution with evidence to contradict such account at trial.

As previously highlighted, cross-examination often focuses on undermining credibility by emphasising inconsistencies. However, there are many reasons why an accused, victim, or witness might give inconsistent accounts, such as lapses in memory and poor communication skills. While live evidence and cross-examination can be useful tools for ascertaining the truth of a matter, this is not universally so and an overemphasis on credibility and inconsistencies may obscure fact-finding. In this regard, other forms of evidence can aid fact-finding in different ways. Pre-trial statements, including prepared statements, while not subject to the rigours of cross-examination, are challengeable by gardaí at interview and investigation of the claims made therein may ultimately lead to a guilty plea, a decision not to prosecute, or stronger evidence against the accused at trial. As such, there is a policy value in the continuance of the practice, where appropriate, of allowing such statements to be put to the trier of fact, along with any countervailing evidence, and while it is accurate to note that such statements are not identical to sworn, live trial testimony, it is also appropriate, in our view, that such evidence be presented without suggestion that it is a significantly weaker form of evidence.

7.4.3 Judge's Charge on Right to Silence

The right to silence means that, except where the specific inference provisions are invoked, no adverse inference may be drawn from the accused's decision to remain silent in garda questioning and/or their decision to forego giving evidence in their own defence at trial.

Where the accused remained silent in interview, the judge participants reported that they would be slow to mention that decision in their charge to the jury, out of concern that such a direction would only serve to highlight the accused's silence and may prejudice them.

> "I'd be slow to comment on it, now. I would just simply say 'they have a right not to answer questions in garda custody, they have a right to not take part in the trial if they do not wish to… they have no obligation to go into evidence but they have a right to go into evidence, they have no obligation to do so and you can't draw any adverse inferences from that, it's a fundamental protection that exists for all of us and that can't be the basis on which you decide their guilt or innocence.' I'd say it in strong terms." (J3)

However, in cases where the accused largely remained silent but answered a small number of questions, the answers to which are admitted in evidence, the judge participants noted that it may be necessary to explain to the jury that irrelevant evidence has been excluded so as to avoid jury speculation or to emphasise that remaining silent was the accused's right and no adverse inference may be drawn. Sometimes the input of counsel might be sought, so as to ensure that parties are agreed on the best approach.

> "…sometimes you could have as little as three questions answered in an interview and they go in because they are relevant and it'll be obvious from…there may be a start time at the top of it and there may be a finish time, it'll be obvious that [the suspect did not answer other questions asked]… so I think, I would always try and discuss it with the parties beforehand, I think it's important for them [the jury] not to be guessing, just to know, as I said to you a moment ago, 'these are the relevant bits, obviously there's a lot of conversations that are irrelevant and inadmissible and we don't need to worry about those, they've all been recorded, they've all been looked at, this has been edited for your benefit so that you get what's relevant and please don't worry or speculate about anything else.' It's better to have that rather than them sort of saying 'well that lasted for an hour and a half what was going on there? Was he having seven bells knocked out of him?'" (J2)

> "Well if the jury pick up on the fact that he said nothing at interview, well he said nothing at interview. But it's really up to the defence. If they want me to tell them that y'know 'he never had to say anything then and now, and you must draw no adverse inference from that.' But that in itself tends to highlight the fact that he didn't say anything so, in those particular circumstances, I always give the defence the option. I'll say 'What do you want me to say?' Then we can have no dispute about it." (J2)

However, as jurors can see for themselves that an accused has decided not to give evidence at trial, judge participants reported the importance of explaining to the jury the meaning of the right to silence and that the accused is under no obligation to prove their innocence.

"Well definitely I would say something to the jury about, there is a right to silence and the accused isn't required to give evidence at court and you shouldn't have any regard in relation to that or think any the less of him, you can't draw any inference from that." (J1)

Judge participants explained that, having informed jurors that they are bound to try the case on the evidence before them in line with the relevant law, they would then outline some of the fundamental legal principles, including the presumption of innocence and the burden of proof.

"…I'll always start with legal principles and the presumption of innocence and how important that is and that the burden of proof is always always always is on the Director [of Public Prosecutions]. And then I will say, 'So, from those two things, if you've got the presumption of innocence and the burden of proof being on the state, that implies that an accused person has to prove absolutely nothing to you and when you think about it, that means that they don't have to say anything about anything because they don't have to do anything in relation to it.' And I think then juries do sit back and understand, 'goodness, I might think that this person should have come and given evidence. But actually, if they're the legal principles, well then they don't have to.' So I think when you do it that way, it's not this kind of great big benefit that has been given to accused people, it is because the fundamental principles of the criminal justice system are that the presumption of innocence is given to the accused person and the burden of proof is always on the prosecution. So they have to prove everything to you, he has to prove nothing (or she) and therefore they don't have to say anything, whether it be during the investigation stages or at trial" (J1)

Judge participants were very confident that juries follow their directions, and that doing so puts jurors in a position different to other members of the public in terms of their potential approach to an accused's exercise of the right to silence.

"So I think juries really do take that on board, that they may well know, they do know, that there's lots of other stuff that has gone on but I think they are pretty diligent about whatever the other stuff that's gone on or whether this accused actually didn't say an awful lot and we're being presented with this, that they realise that it doesn't really make a difference what he might have said or what he didn't say, this is what we're being told that we have to address our attentions to. So again I think, the public looking at that would be suspicious of it and would rely on 'aw sure he didn't answer things' but I think juries, they're fabulous. Juries are utterly fabulous and I really do think that they take on board, if you say, 'this is the only thing that's of your concern', that they actually will focus on that and put aside whatever other suspicions that they have." (J1)

7.4.4 Adverse Inferences

Allowing the trier of fact to draw an inference from the silence of the accused during earlier garda interviews is one of the most direct downstream consequences of silence. Inferences from pre-trial silence can only be sought at trial if the inference provisions were invoked in the garda station, and this must have been done in a procedurally compliant manner. If the procedure was not correctly followed, the judge will deem the interview inadmissible. This may be because the incorrect administration of the caution, insufficiently focused questioning or insufficient pre-interview disclosure:

"…the courts would be quite careful about admitting inference evidence because it's an exception to the rule against self-incrimination, they tend to be quite strict and they are quite strict as to the exceptions to it so if the questions are too broad, would be a significant reason" (B10)

"Now that would still have to be all proved by the prosecution that it was done correctly and all the formalities were observed and everything was properly recorded, and that the legislation was properly explained in ordinary language, all of those things" (B3)

"I don't think I ever saw them done properly, honestly, I never saw them done properly" (D9)

The fact that inferences are sometimes excluded for want of procedural correctness, and the fact that gardaí may often not invoke them during detention, means that inferences only appear in a small proportion of trials in the "ordinary" courts (see section 7.4.5 in relation to their use in the Special Criminal Court).

"I mean again it's a small proportion of cases where those inference provisions are used in that separate final interview and it's an even smaller proportion of those cases in which it provides a basis upon which a court could use it in a useful sense" (D2)

"Inferences are never… they're very rarely used because they're a mess." (J1)

"I don't think I've ever had a jury trial where inferences have been successfully introduced" (S3B)

Generally, prosecution and barrister participants reported that "[i]f you had them, you'd probably run them" (D1) and they could be effective as an additional piece of evidence. They were described as "potentially potent" (B2), "pretty damning" (B3), "powerful evidence" (B8).

"Now in the past, … [the jury] would never get to hear the fact that the accused didn't give an explanation for it. Now, the jury will either hear what that accused person's response to that suggestion is or they will be told that they can draw an inference from the fact that the accused did not respond when given an opportunity to do so. So you can immediately see how incredibly damaging that could be to an accused, to their defence, because a jury will immediately want to know 'well how in the world could it be that the victim's DNA is found on the gloves?' for example." (B9)

Some participants were of the view that inferences can be particularly useful in cases that turn on circumstantial evidence. In this regard, the nature of the case may influence whether inferences are used at trial.

"The cases where it is invaluable are cases where the prosecution is based on circumstantial evidence. It's not going to be the case where we can prove all of the good stuff straight away on the basis of solid evidence because if we had that evidence, we wouldn't need to rely on the inferences in the first place. So, it's going to be almost exclusively confined to very serious cases which rely on certain types of evidence which is inevitably going to be cases that involving organised crime or something like that" (D2)

Participants also reported that the use of inferences at trials can undermine a defence or alibi, as well as identify contradictory accounts.

"if you've a fella who is meant to have been murdering someone on the 1st December at a particular location where he was seen and you say to him 'Come here, I'm giving you a chance, tell me why you were here at midday and you're there on CCTV, just tell me if there's a good reason and an innocent reason why you were there and if you can't tell me, by the way, we're going to be telling the jury that you couldn't tell us and that's a problem' and he stays dumb, I mean it's powerful evidence." (B8)

"They would be in the sense of we like to get them in because then if somebody at a later stage comes along with a contradictory or a different version of events then we want to be able to question that." (D6)

Because inferences can only be an ancillary piece of evidence, in that a person cannot be convicted solely or mainly on inference evidence, many participants spoke about how the inferences were additional to already strong evidence. Some participants viewed them positively as "icing on the cake" (D11), "the jelly on the ice cream" (J2), "bolstering" (D10) the other evidence, and establishing that there is no innocent explanation for the other evidence:

"…well the third bit [inference from silence] also supports the prosecution case but the third bit simply reassures us that there's no innocent interpretation of the first two bits because he simply refused to answer questions about them. So we said 'Look, it's part of the equation.' But it's simply, it's icing on the cake which wouldn't have made any difference, we would have convicted without the inference provisions." (J2)

The latter part of the above quotation, of course, suggests that the inference might not add much, if anything, to an already strong prosecution case. The same judge participant acknowledged the superfluous nature of inferences in some cases:

"I think there's a bit of surplusage or circularity about the inference provisions because you're invoking the inference provisions where you have a good bit of evidence anyway and you just really want to sort of drive it home." (J2)

Similar sentiments were expressed by others also.

"at that stage it's kind of, the case is almost made against the accused, I always think – now maybe I'm wrong about that but I always feel that you're so far ahead of the game at that stage that I don't know what additional icing they in fact give… I've never seen a case where it's actually the inference is what ultimately hangs the accused. I've never seen that. I mean you're… a lot of circumstantial evidence has already come and you're really giving someone the opportunity to explain their situation but the circumstantial evidence is already there." (J1)

"Sometimes it doesn't add any value because you actually need to prove that the person was there before you can use it." (D7)

Many participants were of the view that an inference is unlikely to tip the scales to conviction, though others contended that they form a part of the cumulative process of arriving at a conviction.

"I don't think it would tip the scale really because also the inferences would say, it won't be what convicts you but it'll just go towards it but it's not the nail in the coffin if you know what I mean so I think jurors would be much more… they have such a, it's such a high standard that I don't think it would tip it." (D9)

"They can tip the scales certainly; you wouldn't use them if you didn't think they would. I think that they're a small part of that." (B10)

"so if you were to take …evidence the jury were going to hear and forensics are one of them, some sort of complainant identification is another one, maybe another witness account of it and after 'no comment,' an inference - the place the person was on, that was put to them that they were there - well then you will say 'Look, that's four pieces not three pieces.' So it does matter yeah" (D4)

Some participants reported that they were wary of inferences, and would be concerned about introducing them where they were not necessary and could heighten the risk of appeal:

"…I'm not going to bring in a superfluous piece of evidence that could cause me problems when I don't need it. Because what I don't want to happen is I've a really strong case, bringing the inferences is the cherry on top, jury convicts, I go to the court of appeal and the court of appeal says 'well hang on, the inferences are a really really kind of strictly construed area and actually what the defence said is correct, you didn't dot all your 'I's, you didn't cross all your 't's so your conviction is unsafe.' I'm not going to run that risk if I don't need to." (B8)

Participants raised concerns in relation to juror understanding of inferences, which were regarded as being quite "legal heavy" (B6). Judges described their approach to directing juries in relation to inferences, attempting to keep it simple.

"I try to follow the sections and say now these are the steps in the section and trying to get the legalese down to ordinary English. First of all, do you think that there was something here that called for an answer and if you pass that and you're satisfied with that, well then you must look then at the absence of an answer, I mean clearly you can, if my memory serves, they don't have the false and misleading aspect so if there is no answer well then you have to ask well is that the only reason that there was no answer and you can only be satisfied to draw an inference, it can only be proper to draw an inference if you're satisfied beyond reasonable doubt that there was no possible other reason for not answering that question so y'know, you just…" (J2)

Participants thought that the mere fact of a judge directing a jury on this issue can emphasise the value of adverse inferences.

"The trial judge has spent so much time giving them the inference drawing option and then the corroboration, caution…they have to sit there and go all right this must actually mean something pretty big" (S5A)

"…So where you do have a judge saying you are now entitled to draw an adverse inference because the accused has failed to mention something that he is relying on in his defence, I think it has a very strong impact on a jury…" (J4)

Of course, little is known about how juries in fact regard inferences or use them in their decision-making. Most participants were unsure what impact inferences from silence in garda interviews have on jury members.

"But it's a real black hole, a black hole in every criminal practitioners' point of view, y'know." (D1)

Some thought that they would ask common sense questions, wondering why a suspect did not give an explanation for a substance on his person or item in his possession and so on.

"I believe personally that an inference interview where, in the face of a very strong account that requires an explanation, that's being met by silence by an accused, I believe in front of a jury that's powerful evidence." (B8)

Others, however, thought that they might have no impact at all on jury deliberations, and more wondered if juries really understood what they were being told about drawing inferences from suspect silence in the garda interview. Without the possibility of conducting qualitative research with juries, the impact of inferences from silence on juror views and deliberations remains uncertain.

7.4.5 Special Criminal Court

While inferences do not seem to be a very significant feature in jury trials for the most part, they seem to play a much more significant role in the Special Criminal Court in the context of organised crime offences and paramilitary offences, such as membership of an unlawful organisation ("membership"). In those sorts of cases detained suspects are more likely to give "no comment" responses because of fear of reprisal from organised crime associates as well as distrust of gardaí; they are more likely to be investigated by specialised and highly-trained gardaí (e.g. from the Special Detective Unit); and longer detention periods apply, giving greater time for gardaí to invoke the inference provisions.

"…they are being used quite a bit in the Special which is of course a longer detention period …I think especially in the Special where you will have a right to silence being availed of because people are usually either involved in some sort of gangland, where they are just not going to be making any admissions or they are involved in some sort of republican or other terrorist organisations where again they are just not going to be making any admissions but I think that they are, they are of use to the prosecution in those cases" (D8)

In addition to suspects mostly remaining silent, cases before the Special tended to make use of inferences because of the nature of the offences themselves and difficulties proving them otherwise. Membership cases, for example, often lack other physical evidence so inferences play a much greater role. In fact, a conviction for the offence of membership can be based on an inference from silence under section 2 of the Offences Against the State (Amendment) Act 1998 (see section 3.4) combined with another unusual type of evidence – the belief of a Garda Chief Superintendent that the accused was at a material time a member of an unlawful organisation[150] – and nothing more.

"Inferences provisions will be employed in the interview and they will be important when it comes to particularly membership trials, where you've got belief evidence from the Superintendent, you can't be convicted on the belief evidence alone but belief evidence and inference can convict you." (B3)

150 Offences Against the State (Amendment) Act 1972, section 3(2). See further Harrison, Alice "Disclosure and Privilege: The Dual Role of the Special Criminal Court in Relation to Belief Evidence" and Heffernan, Liz and O'Connor, Eoin "Threats to Security and Risks to Rights: 'Belief Evidence' under the Offences Against the State Act" in Mark Coen (ed.) The Offences Against the State Act 1939 at 80 (Hart Publishing, 2021).

> "You have the belief evidence but the belief evidence has to be supported by other evidence and that's [inferences] invariably where you're going to find your support. And the membership cases, often there's not much else in the case, there is only the belief and the section 2 interviews that have been held and the inferences that can be drawn from the answers that have been given." (J1)

> "We've had membership cases where the only additional evidence over and above the chief superintendent's belief, is a refusal to answer material questions […]. where yes, the only additional evidence over and above the belief was either a failure or giving false and misleading answers to material questions under the s2, so that would have been a case where a failure to answer questions did tip the balance." (J2)

One judge participant stated clearly that without inferences there would not be convictions in membership cases:

> "Well obviously you've got your section 2 and that's, they're vital in the Special […] membership is completely different and you are relying on those, so you know you'll end up, usually in membership cases there might be 7 interviews, 3 of them would be all 'no comment's, then the inferences are invoked in section 2 and then they know to say 'I'm not nor have I ever been a member of the IRA' and that's the mantra and then you have to go back through the things that called for an explanation and they're very helpful in those cases, you wouldn't have convictions is the truth of it, otherwise" (J1)

There is cause for concern that inferences are so weighty in the Special Criminal Court, as compared with their impact in trials in the "ordinary" courts, especially in the context of the offence of membership of an unlawful organisation. The Special Criminal Court, as a non-jury court, is an extraordinary court in the Irish criminal process; the offence of "membership of an unlawful organisation" is an extraordinary type of offence, which lacks clear definition and actus reus; the belief of a Garda Chief Superintendent that the accused is a member of an unlawful organisation can be accepted as evidence by the court, often based on privileged information which is unchallengeable by the defence; and such belief, combined with evidence that the accused failed to answer "any question material to the investigation of the offence" during garda interrogation, can lead to conviction and a possible sentence of up to 8 years imprisonment. Two weak forms of evidence, before an unusual court, leading to conviction on an unusual offence. The experience in such cases might be compliant with a literal reading of section 2 of the 1998 Act, which requires that the inference not be the sole or main basis for a conviction, but it seems that the inference can be definitive in a way that is not experienced in relation to most other offences, or in other courts. The situation is particularly acute in the context of the membership offence, but other offences which often come before the Special Criminal Court often also involve inferences, either under sections 18, 19 or 19A, or under section 72A of the 2006 Act, as amended, which applies in the context of organised crime.

Layered on top of these general concerns around the heightened impact of inferences on the outcome of trials before the Special Criminal Court is an additional uneasiness around the use of inferences from a silence based on fear. As discussed in section 5.3.2, persons with involvement in organised criminality at any level may legitimately be fearful that any engagement on their part with gardaí during custodial interrogation could expose them or their family members to the risk of serious harm. This is recognised as an issue within the criminal justice system, and certain arrangements have been put in place to minimise the risk including, for example, altering the previous practice of providing a suspect with a copy of their recording of interview as they left garda custody (see section 3.7.2). However, outside of the formal CHIS (Covert Human Intelligence Source) system, and reliance on prosecutorial discretion, a suspect in such circumstances may well face a charge, and prosecution in the normal way, including through reliance on inferences from interview silence. There may be no safe way for them to explain the reasons for their silence, and their silence may count, significantly in the Special Criminal Court, towards their conviction. We recommend that both gardaí and judges should be alive to the fact that a failure or refusal to answer garda questions may be influenced by factors other than guilt, including a suspect's concern for their safety and that of their family members, particularly in the context of organised criminal groups. Inferences from silence in such circumstances ought not to be relied on as evidence at trial in any court.

7.5 Sentencing

Whether a suspect makes admissions, answers questions, lies or relies on their right to silence in garda interviews could influence the eventual sentence a person receives. Cooperation and early guilty pleas are mitigating factors in sentencing. The policy justification underpinning favourable sentencing treatment of an early guilty plea is well established:

> "It makes sense, you're preventing first of all anybody having to go through all that really horrific evidence, you're preventing the state from added costs, from paying barristers taking a trial date, from bringing in witnesses who have to take time off work, so all of that goes towards mitigation and it's seen as a positive when judges are sentencing" (B6)

Cooperation can have a favourable impact for the convicted person also.

7.5.1 Right to Silence

A suspect can maintain a "no comment" position and later plead guilty. Some sentencing benefit may accrue, depending on the timing of the plea.

Answering garda questions and providing certain information while detained for questioning can also have a beneficial impact at sentencing stage. In this context, participants pointed out that suspect who choose to remain silent at interview are not punished for their reliance on the right to do so, but they relinquish the opportunity to demonstrate cooperation and thereby seek mitigation.

> "They're not being punished, and their sentence isn't being made any harsher by the virtue of the fact that they didn't answer questions but they are being denied a benefit, and denied that bit of credit that would have accrued, had they cooperated in the garda station" (B5)

7.5.2 Cooperation

In order to amount to a mitigating factor in sentencing, the cooperation provided to the gardaí has to reach the standard of material assistance. This could be reached by an accused person admitting some of the charges relating to an incident, even if they denied others, or if a witness was saved from having to take the stand and give evidence, for example. Clearly the mitigation is less than in the context of a guilty plea to all charges though.

> "Cooperation by the accused with the investigation, even if they haven't pleaded guilty, is definitely a factor given weight in mitigation. Not a huge amount, because if they fought the case and were convicted, the mitigation that they are going to get across the board is reduced" (J3)

> "I suppose counsel can put that forward in mitigation but for me that would hold little weight, because they fought the case and made everyone go through the evidence and depending on what type of case it was… saying something in custody is kind of negated by the fact that you might have taken up two weeks of a trial and fought it vigorously so no I don't think so to be honest." (D11)

> "Even in a case where someone says I didn't do this but I do accept all of these things, if that has shortened the prosecution case it means time is saved, it also means that witnesses haven't had to come, and just the I suppose stress and difficulty of proving all those elements are taken out of it so somebody should get a recognition for that." (J1)

One DPP participant questioned the language used in this context, the distinction between assistance and cooperation, and considered its impact for the constitutional entitlement to rely on the right to silence:

> "The right to silence is actually undermined in the court process I think because when it comes… they call it cooperation here in Ireland, did he cooperate? And that's not right because how can you, and a judge will say that if someone pleads guilty, was there cooperation in the garda station – what, so it's not cooperating

when you exercise your legal right? That's something that used to drive me mental, you know. But I suppose what they're saying is 'did they assist?' – but that's different because if a person makes admissions that's a huge assistance to the state, that should be the question that's asked, 'did they save you a lot of work and time by making admissions'. But then I suppose someone might say, you still, you can't rely too much on admissions just in case there's an argument later that they were made under… in improper circumstances or they're unreliable but I think it is… I think it's important that that needs to stop because people are being asked if they cooperated in the garda station" (D5)

Even if, as set out above, there is a theoretical difference between rewarding material assistance – which is done in sentencing - and penalising silence – which is not done in sentencing - the situation may appear otherwise in practice. If cooperation requires someone to waive their right to silence in order to get access to the benefit of a reduced sentence, then suspects who rely on their right to silence are in a relatively worse off position because of that reliance.

7.5.3 Lying

If a suspect lies to the gardaí while being interviewed, this could be an aggravating factor when it came to sentencing. In the best-case scenario, false statements would bar access to potential mitigation in sentencing and in the worst-case scenario, individuals may encounter a penalty for lying:

"Now the cooperation only can have a benefit if it's true. If you answered a pile of questions but they were ultimately were all lies, well I don't care how many questions you answer, it's of no significance to me" (J1)

"And for sentencing. Especially in more serious cases… somebody has said something that has not been helpful or created stories that are not correct and it becomes clear that it is not correct, that can be an aggravating factor." (S7B).

7.5.4 Guilty pleas

Participants noted that waiving one's right to silence by answering questions or even making admissions in garda interviews did not have as powerful a mitigating effect as making a guilty plea.

"if they plead, the plea is the big factor, the cooperation with the gardaí only adds to it to an extent (J3)

The impact of a guilty plea was regarded as overriding instances of non-cooperation that had occurred in the garda station, including "no comment" interviews.

"And in fact, I think I would be right in saying that in most cases where nothing is said at interview but where there's an early plea at trial, you kind of overlook that nothing was said because…you're dealing with, you're so pleased to get a plea" (J2)

7.5.4 Mandatory Minimums

Certain serious drug and firearm offences carry mandatory minimum sentences. However, a judge need not impose the mandatory minimum sentence if the accused has pleaded guilty, and has "materially assisted in the investigation of the offence".

"Section 15A of the Misuse of Drugs Act, that is a provision whereby there is a mandatory minimum sentence of 10 years imprisonment if there is possession of drugs with the intention of selling or supplying, with the drugs valued at 13000 Euro or more. The logic behind talking in those particular circumstances is because if there's a mandatory minimum sentence of 10 years or more and the judge can disregard the mandatory minimum, well decide not to apply the mandatory minimum in certain circumstances and amongst the circumstances that apply is where the individual has been exceptionally helpful or cooperative towards gardaí. And guilty pleas and all the rest of it." (B7)

The structure and mechanisms of such offences exert a clear pressure on individuals to assist guards by cooperating at interview, in the sense of waiving one's right to silence and answering questions. Yet, individuals in these circumstances may face oppositional pressures, external to the investigation, particularly in the context of organised criminal activity. In such circumstances, a suspect may be under duress and may fear for their safety or the safety of their family if they were to "materially assist" the gardaí in any way. One participant put it very clearly:

> "everybody knows, who has been reading a newspaper for the last twenty years, that invariably the low hanging fruit ends up in custody. These are people who are frightened, they're a lot more frightened of the bad boys outside than they are of the police and they may not just appreciate what's going to be demanded of them. Particularly when the solicitor leaves and they're sitting in the cell and policemen sometimes come to the door of the cell late at night. So you have to explain to them [suspects],' listen this is what you may be asked for, understand the consequences' and they ain't legal consequences a lot of the time. They are real world consequences." (S3B)

Solicitor participants spoke somewhat pragmatically in relation to how an individual in such circumstances would be treated, indicating that revealing that they were under duress could be sufficient to access the benefits of cooperation in terms of reducing mandatory minimum sentences.

> "Material assistance is considered to be, that my understanding is that you can... you can give a response to a question by saying, I can't answer that because I'm in… there would be a threat against me, I'm concerned for my safety, that in itself can be considered to be material assistance to a certain extent because you're giving an explanation as to why you're not, why you can't respond, because you're concerned." (S4B)

> "Even the biggest, even a really mean judge has to hold back if somebody says look, they'll kill me if I tell you. But it's in a very particular context where this arises." (S3B)

Issues relating to duress exist in very specific contexts rather than in the majority of cases. Interestingly, and unfortunately, it is in cases of serious drug and firearm offences that (i) mandatory minimum sentencing arises, and (ii) the inference provisions are most likely to be invoked because suspects are more likely to be involved in organised crime-related activity and find themselves subject to such duress to remain silent. The inferences may have a significant impact at trial, particularly if tried before the Special Criminal Court. In such cases, the reasons for a lack of response to garda questions ought to be taken into account both in terms of the inferences, and as suggested by participants, in relation to the imposition of any mandatory minimum sentence.

Chapter 7 Recommendations

- Gardaí should be careful not to directly or indirectly induce suspects to waive their right to silence.
- Judges should not be informed during bail applications that an accused was "uncooperative".
- Both gardaí and judges should be alive to the fact that a failure or refusal to answer garda questions may be influenced by factors other than guilt, including a suspect's concern for their safety and that of their family members, particularly in the context of organised criminal groups. Inferences from silence in such circumstances ought not to be relied on as evidence at trial.
- Judges should be cautious and insist on inferences being properly administered in the garda station.
- The judge's charge to the jury in relation to drawing an inference from pre-trial silence should be limited and not give undue emphasis to this relatively weak form of evidence.
- Guidance for judges on the appropriate handling of jury directions relating to unsworn evidence should be developed.
- The ODPP should collect data on how often the inference provisions are used in prosecutions.
- Professional legal bodies should provide training on the right to silence and adverse inferences.

8 Conclusions

8.1 Concluding Observations

The right to silence is viewed as an important right in the Irish criminal process, though there are many ways in which reliance thereon can have negative consequences for those who are suspected or convicted of criminal offences. The most obvious of these is the legislative provision for inferences to be drawn at trial from a suspect's failure or refusal to answer certain questions or provide certain information under garda questioning. This is clearly an incursion on the right to silence, and privilege against self-incrimination, and seems at variance with the presumption of innocence. However, inferences from pre-trial silence are now so embedded within the Irish criminal process that it is seems futile to recommend their removal. Indeed, research emerging from our partners in other jurisdictions on this project seems to suggest that inferences from silence are a feature elsewhere also, even in the absence of legislative provision for same.[151] The benefit of providing for inferences in legislation is that there is transparency around their operation and safeguards attached to ensure the provision of related procedural protections, such as access to legal assistance specific to the drawing of inferences, audio-visual recording of interviews, and an explanation of the operation of the inferences. It is important to ensure that such protections are practical and effective, however, and in that regard we recommend certain improvements, including, for example, the placing of the right to have a solicitor present throughout garda interview on a statutory footing, and the need to update the special caution/explanation given to suspects at the beginning of inference interviews to ensure that it is understandable and accurate. We also recommend that inferences should only be allowable in relation to a failure to respond to evidence which exists at the time of questioning and is disclosed to the suspect, and that this requirement of grounding evidence be clarified in the legislation relating to all inference provisions.

We are concerned about the use of inferences in the Special Criminal Court in particular, where they appear to have much greater impact on the outcome of trials, particularly in relation to the offence of "membership of an unlawful organisation". We have noted also the specific circumstances of suspects who may be under external pressure to avoid any and all engagement with gardaí, and whose failure or refusal to answer questions or provide accounts may be attributable to fear for their safety or that of their family members. It is important for both gardaí and judges to remain conscious of this issue, and to insist that inferences should only be drawn where the trier of fact is satisfied beyond a reasonable doubt that there is no innocent explanation for the relevant silence.

Our research also provides interesting insights on the garda approach to interviewing suspects, and the methods adopted to encourage silent suspects to speak. While various methods were mentioned and discussed by participants, including retired garda participants, it seems that one of the most impactful matters is the strength of the evidence. A suspect is more likely to respond to garda questions once the case existing against them has been disclosed. Indeed, solicitor participants made clear that they often advise silence at the beginning of the interview process when gardaí are very reluctant to provide disclosure, and that a number of interviews might take place throughout which the garda case against the suspect is incrementally revealed. While gardaí are now being trained in this model of interviewing, which focuses on getting the suspect's account of knowledge prior to unveiling the extant evidence, and there are some good reasons for such an approach, the findings seem to suggest that in many cases investigations would be more effective and efficient if early, comprehensive disclosure was made instead. This is an issue which ought to be considered, and we suggest that gardaí should not operate a presumption against disclosure, but should be adequately trained to assess the need for non-disclosure in certain specific circumstances while providing disclosure of substance at an early point in most cases.

Linked with this, our research has clarified the current practice of holding specific, separate inference interviews towards the end of detention periods in Ireland. Inferences are not in play within all interviews. This differs to the situation in England and Wales and has partly come about as a result of a failure to update the caution emanating from the Judges' Rules. We see this practice as preferable, in fact, and view it as the only one which makes sense in the context of the late disclosure nature of the Garda Síochana Interviewing Model. We advocate for the retention of this procedure.

151 Daly, Yvonne, Pivaty, Anna, Marchesi, Diletta and ter Vrugt, Peggy (2021) "Human rights protections in drawing inferences from criminal suspects' silence," forthcoming in Human Rights Law Review. Available at: https://doi.org/10.1093/hrlr/ngab006.

Access to greater quantitative data on the use of inferences from silence, both in garda interviews and at trial, would assist in providing a clearer understanding of their prevalence and significance across all courts and offence types. It would also allow for a clearer assessment of their value, and whether or not the incursion on the right to silence which they bring about is really necessary, given, as we have found, that many legal professionals view them as simply adding a gloss to an already strong case. The opportunity to conduct jury research on this issue would also be extremely valuable, to gain insights on the impact of inferences from silence on juror deliberations, and related issues such as the possible drawing of inferences from silence outside of the specific operation of the legislative provisions.

Beyond inferences our findings also show other potential negative consequences arising from a suspect's exercise of the right to silence. These include more, and potentially longer, garda interviews, resulting in longer detention periods. Lengthy detention, of course, is felt more acutely by those with substance addiction issues or other vulnerabilities. Gardaí must be careful not to play on the desire of suspects, particularly those with vulnerabilities, to be released as soon as possible. In that context it is important that suspects are not led to think, or allowed to continue assuming, that gardaí might have an impact on decisions around bail, and that they might more likely be released on bail if they do not rely on their right to silence.

The findings suggested that certain types of suspects are less likely to remain silent than others. These included suspects who have little or no experience of the criminal justice system, and those charged with minor offences. Vulnerable suspects, such as those with drug addictions, severe mental ill-health and/or cognitive disabilities, were also reportedly less likely to rely on their right to remain silent during interviews.

Criminal law and procedure is complex, and reliance on silence can have many consequences which are likely to be unclear to a detained suspect. These potential consequences reinforce the importance of the solicitors' role in pre-interview consultations and in attending the garda interview with the suspect. Their expertise enables them to weigh up the many factors at play, and the longer term impacts of the position taken at interview, and advise their client on the advantages or disadvantages of opting to rely on the right in given circumstances.

This research provides an important insight into garda interview practices and the downstream consequences of reliance on silence in garda interviews in Ireland. The collation and analysis of qualitative empirical research on the practical operation of the right to silence within the criminal process, for the first time in Ireland, is significant in and of itself. In addition to that, the authors have compiled a list of recommendations which arise from the legal and empirical research conducted. These suggested retentions of good law and practice, as well as reforms and improvements within legislation, policy and practice, and training, and are set out below.

In the end, it is important to remember the value of the right to silence as a constituent part of the presumption of innocence. Each and every one of us could find ourselves accused of committing a crime, find ourselves arrested by police, taken from our homes to the unfamiliar, uninviting surroundings of a police station, questioned, fingerprinted, sampled, asked to account for our movements, charged and detained, brought to trial, believed or disbelieved, convicted or acquitted. The criminal process does not exist for the conviction of guilty persons only. The process, and its rules of engagement, are, and must be, designed for all of us – to apprehend those who transgress, certainly, but to identify also those who are innocent, and to ensure that no one is convicted of an offence that they did not commit. The power and ability of the state to reach into the private lives of individuals is arguably most acute in the context of the criminal process. Changes made to the rules of engagement in this process – to police powers or to suspect rights – can alter the reach of the state and the boundaries of personal freedom and liberty. One of the most powerful concepts within the criminal process is the presumption of innocence, and the related right to silence. No one is to be presumed guilty, no one should be required to prove their innocence. In order to deprive an individual of their rights – to imprison them, to fine them, to subject them to community service or probation – the state must prove that they have broken the criminal law, beyond reasonable doubt. A criminal conviction has significant and long-lasting implications for a person's good name, their freedom, their relationships with friends and family, their mental wellbeing, their future job prospects, their whole life. It is a conclusion that must not be lightly reached.

Not only is it important that the presumption of innocence should operate in individual cases, it is an essential part of ensuring the legitimacy of the criminal justice system as a whole. Compliance with the criminal law, and the organs of the criminal process, is enhanced by the legitimacy of the system, both in its outcomes and in its procedures. Due process is an end in itself, not merely a means to an end. Conclusions in criminal prosecutions

must be arrived at in a procedurally correct and fair manner, based on the long-established understanding that miscarriages of justice can and do occur when short-cuts are taken or assumptions untested. The silence of a suspect in police interview is not a reliable indicator of guilt. It is important that this is understood and that even where legislation allows for the fact of silence to be revealed at trial, its value is not overrated.

8.2 Recommendations

Legislative Recommendations

1. **Retain the position whereby no reference to a suspect's reliance on their right to silence is made at trial, except in the context of legislative inference provisions.**

All the participants confirmed that no mention of the suspect's reliance on their right to silence is made at trial, with the exception of the invocation of the legislative inference provisions. The prohibition of referencing the accused's reliance on the right to silence is an important protection of the right to silence, the privilege against self-incrimination, the presumption of innocence and the right to fair trial. No change should be made to this rule.

Reference to the accused's silence is currently permitted where the inference provisions were correctly invoked in garda questioning, and where the relevant safeguards were adhered to. These safeguards include that the suspect must have an opportunity to consult with their solicitor before the inference questions were put to them and that the provision is explained in ordinary language. These are important protections to ensure that the suspect understands the consequences of his right to silence and the incursion on it, so they can make an informed decision.

Still this study found that, in practice, the inference provisions were not being explained in a clear and accurate way. The examples of inferences used, and the recital of the legislation are confusing and complex. Accordingly, in order to ensure that the safeguards are effective, the explanation given to suspects of the inference provisions needs to be amended to use more accurate examples of the drawing of inferences from silence, and gardaí should refrain from reciting the legislation.

2. **Retain the position that an inference cannot be drawn against an accused person for failing to give evidence at their own trial.**

The authors are also in support of the current position that no adverse inference can be drawn by the court where the accused does not give evidence at his own trial. While this is permissible in other common law jurisdictions, the authors are of the view that this would be a disproportionate incursion on the accused's right to silence. As noted throughout this report, inference evidence is a weak form of evidence of guilt. This is even more so the case where such an inference is drawn from the failure to give evidence at trial, where such a failure could be explained by many reasons other than guilt, such as fear of not maintaining composure under cross-examination. Therefore, such legislative inferences should not be introduced in this jurisdiction.

3. **All legislative adverse inference provisions should clearly state the need for existing evidence to ground the request for a suspect's account or explanation.**

The adverse inference provisions represent a significant incursion on suspects' rights, including right to silence and right to due process. Therefore, such incursions must be necessary and proportionate to the aim of the State to defend and protect the life, person and property of all its citizens. While all the legislative inference provisions discussed in this report have the limiting factors identified in Rock v Ireland, which rendered the impugned provisions in that case constitutional, namely, that the inferences were evidential in nature only, could not be the sole basis for the conviction of the accused, only such inferences "as appear proper" can be drawn (see section 3.4 for discussion), the authors submit that the threshold for the invocation for the inference provisions should also be considered in the proportionality assessment.

In this regard, a distinction can be drawn between inferences which require evidence underpinning the inference questioning (sections 18 and 19 of the Criminal Justice Act 1984) and those which do not (section 19A of the Criminal Justice Act 1984, section 2 of Offences Against the State (Amendment) Act 1998, and section 72A Criminal Justice Act 2006).

Drawing an adverse inference from silence in response to a question regarding evidence of a mark, object, or presence at a place where a response is "clearly called for" can be viewed as a proportionate incursion on the right to silence, because it is limited in nature and corresponds to facts established.

The inference provisions which do not require grounding evidence, on the other hand, are not similarly limited in nature, at least not on the face of the relevant legislation. An inference can be drawn under section 19A where the accused was silent in response to a request for an account of facts which might later be relied upon at trial. Sections 2 of the Offences Against the State (Amendment) Act 1998 and 72A of the Criminal Justice Act 2006 permit an inference to be drawn where the accused was silent in response to questions "material to the investigation of the offence". A question is regarded as being material if the garda reasonably believed that the question related to the participation of the accused in the commission of the offence.

The absence of a specified requirement for evidence grounding the invocation of these provisions and the lower threshold for invocation has a bearing on the actual evidential value of the inference drawn. Specifically, a suspect's silence in response to an ungrounded question is weaker evidence than silence drawn from a question that is based on existing evidence. The more tenuous and ungrounded a question is, the more reasons, aside from guilt, that a suspect could have for remaining silent.

While courts may be careful to ensure that no improper inferences are drawn, the legislative provisions ought to be reconsidered and reviewed to insist on grounding evidence in relation to all situations which might lead to a later inference at trial.

4. **Retain the "inference interview" as a separate interview towards the end of the detention period, which has a specific caution.**

In Ireland, the practice is to invoke the inference provisions in a separate interview towards the end of a detention period. This is because, unlike other jurisdictions, a specific caution is necessary to invoke the inferences and the ordinary caution must be revoked. In England and Wales for example, suspects are informed from the beginning of questioning that it may harm their defence if they do not mention when questioned something which they later rely on in court. In Ireland, see initial interviews where inferences are not in play at all, and then a later, inference-specific interview, following specific pre-interview disclosure.

This process affords the greater level of respect for the right to silence, and clarity to the suspect. This procedure should be retained. It is also, in the authors' view, the only procedure which makes sense in light of the late disclosure nature of the Garda Síochana Interview Model.

5. **The statutory regulation of interviews should be modernised.**

The Judges' Rules 1922 provide guidance in relation to the questioning of suspects. However, some of the requirements therein are outdated and impractical. For the sake of clarity, accessibility, and oversight, the Rules should be abandoned and legislation should be provided to govern garda interviews.

The Rules also provide for a caution to be given to suspects who are being questioned. This should be placed on statutory footing to assist in codification and accessibility of the relevant regulatory framework.

Rule 9 requires that statements should be taken down in writing. Participants in this study reported how taking down notes slows down the interview process, and is often redundant when defence counsel feel like they have to watch the audio visual recordings anyway, to make sure there are not any discrepancies between the memorandum and the recordings.

While section 57 of the Criminal Justice Act 2007 provides for the admissibility of recorded interview evidence and transcripts thereof, the Rule that statements be taken down in writing remains in force. Legislation should be enacted specifically dispensing with this requirement.

As noted above, this study endorses the distinction of the traditional caution and the adverse inference caution. Therefore, it is recommended that an adverse inference caution be developed and also placed on a statutory footing. The current inference caution and explanation is an ongoing source of potential confusion for suspects. The caution should be developed to ensure that it is an accurate and accessible explanation of the concept of drawing an inference from silence, to ensure that suspects understand. Providing for a caution in secondary legislation would ensure consistency in application, to the benefit of members of An Garda Síochána and to suspects, as well as their solicitors.

These cautions could be provided for in primary legislation or in secondary legislation made under section 32 of the Criminal Justice Act 2007.

6. **Section 52 of the Offences Against the State Act 1939 should be repealed.**

Section 52 was found by the European Court of Human Rights to violate Article 6 of the Convention. While it has been noted in this Report that the provision appears to have fallen into disuse, it should be formally repealed.

7. **The right to have a solicitor in attendance at the garda interview should be put on a legislative footing.**

Ireland has not opted in to the Directive on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (Directive 2013/48/EU), and while the European Court of Human Rights has been clear that suspects are entitled to have solicitors present during interview, there is no legislative framework for that in Ireland at present.

The current system of facilitating access to legal advice in garda custody is somewhat haphazard. There is no duty solicitor scheme in operation, for example, and there is no formality to the way in which solicitors are selected if an accused cannot name one. While there are Codes of Practice/Guidelines for gardaí and solicitors, there are no legal regulations. Furthermore, while inferences are not to be drawn unless a suspect has been afforded a reasonable opportunity to consult a solicitor, it is not altogether clear what should occur if no solicitor is available to attend. All of these matters should be clearly provided for in legislation.

Recommendations for Policy and Practice

1. **Gardaí should provide sufficient pre-interview disclosure to allow suspects (and their legal advisors) to make an informed decision on any reliance or otherwise on the right to silence, where it would not interfere with the investigation.**

Solicitor participants consistently reported not receiving sufficient pre-interview disclosure from gardaí in order to properly advise their client in relation to the offence for which they were being questioned. Article 6 of the EU Directive on the Right to Information in Criminal Proceedings (Directive 2012/13/EU) provides that:

> "Member States shall ensure that suspects or accused persons are provided with information about the criminal act they are suspected or accused of having committed. That information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence."

Notwithstanding that obligation, An Garda Síochána employ a late disclosure model of interviewing. The Code of Practice on Access to a Solicitor by Persons in Garda Custody provides "the premature disclosure of information/details may sometimes impede or interfere with the investigation" because "if information is handed out first, the suspect can make up his/her answers and there is no spontaneity about the matter." In this regard, the Code states that "An Garda Síochána is not obliged to disclose any information that could prejudice an investigation."

It is accepted that there are some cases where it is necessary for the investigation to receive a spontaneous response to the evidence presented. However, this is not conceivably necessary in the vast majority of cases. Where the evidence against a suspect is irrefutable, a spontaneous reaction from the suspect will not be necessary. This is indeed evident by virtue of reports from solicitor participants that senior, more experienced gardaí are more forthcoming in pre-interview disclosure, which would indicate that the main determinant is not how complicated or sensitive the case and the evidence is, but rather the experience and the confidence of the investigating garda.

There are benefits to more comprehensive pre-interview disclosure, including a more efficient interview process and earlier resolution. Moreover, gardaí have an obligation to promote human rights in their duties, including ensuring the effective realisation of the right to legal advice

Gardaí should receive further training on decision-making concerning pre-interview disclosure. There should be a presumption in favour of pre-interview disclosure, except where it would interfere with the investigation. In this regard, training should enable gardaí to weigh up the necessity for the spontaneous response in any given case, against the benefits of the efficiency of the interview process and the suspect's right to comprehensive legal advice.

2. **Gardaí should be careful not to directly or indirectly induce suspects to waive their right to silence.**

Participants reported that suspects were being induced to waive their right to silence by being offered benefits, such as indications that the garda would not object to bail. Garda training should emphasise that such inducements are entirely inappropriate and could render any statements inadmissible on the grounds of unfairness or involuntariness.

3. **Judges should not be informed during bail applications that an accused was "uncooperative".**

Participants raised the concern that judge's in bail applications were being informed that accused persons were "uncooperative" in garda interviews, and this was a by-word for being "silent". This is not appropriate and not a relevant consideration in a bail application under DPP v O'Callaghan or section 2 of the Bail Act 1997.

4. **Inference interviews should only be carried out by gardaí who have received specific training on the inference provisions.**

Given the encroachment on the right to silence, the inference provisions should only be invoked by gardaí who have advanced, practical training on the inference provisions. It is imperative for the vindication of the right to silence that the suspect understands the consequences of such an invocation and any decision to remain silent. Moreover, this would help to ensure that the inference provisions are only being used in appropriate circumstances and that gardaí are constructing the questions in accordance with the legislation.

5. **Both gardaí and judges should be alive to the fact that a failure or refusal to answer garda questions may be influenced by factors other than guilt, including a suspect's concern for their safety and that of their family members, particularly in the context of organised criminal groups. Inferences from silence in such circumstances ought not to be relied on as evidence at trial.**

A significant theme amongst participants in this study was that suspects who remained silent often did so because they are concerned that they will be faced with violent repercussions from criminal associates if they give any information to gardaí. These suspects may be innocent of the offence charged, but unable to give an exculpatory explanation because of their fears. The inference provisions are nevertheless invoked against such suspects, even when the gardaí are aware or suspect that they are not answering questions because they are in genuine fear. In these cases, where it is clear that the individual is in fear, gardaí should use their discretion to not invoke the provisions. If they were invoked, judges should refuse to allow any inference to be drawn at later trial from silence in such circumstances. Inferences should only to be drawn where the trier of fact is satisfied beyond a reasonable doubt that there is no innocent explanation for the relevant silence.

6. **Gardaí should notify suspects and solicitors at the earliest opportunity of all of the potential charges which might be considered to allow for meaningful legal advice, particularly in the context of inference interviews.**

A challenge reported by solicitors was the difficulty in advising suspects in relation to additional potential charges which were mentioned only at the point of inference interview, especially where these offences are complex or not frequently advised on. It would be preferable for gardaí to notify the suspect and their solicitor of any and all potential charges at the earliest opportunity to ensure that suspects can access meaningful legal advice.

7. **Gardaí should increase the practice of arranged arrests and/or voluntary interviews, where possible.**

Solicitor participants reported gardaí sometimes arresting suspects during unsocial hours, which had the effect of rendering the suspect more susceptible to questioning due to tiredness and confusion, as well as making it harder for them to access a solicitor. In the absence of specific need for arrests in such circumstances, this type of tactic is oppressive, hostile, and unfair.

This recommendation is also grounded in broader concerns around the provision of legal advice to detained suspects. Solicitors often struggle to make themselves available to attend detained suspects during unsocial hours, for obvious work-life balance reasons, and even during office hours when they have other commitments. This challenge, and the need to be on call for garda station attendances runs the risk of driving solicitors, particularly those with with family obligations or caring responsibilities, away from this type of work, contributing to a lack of diversity in this area of the profession.

Increased use of planned arrests and/or pre-arranged interviews, where possible, would be beneficial to all parties.

8. **The Garda Station Legal Advice Scheme should be extended to voluntary interviews and/or prior consultations.**

There is no provision for a solicitor to be paid under the Garda Station Legal Advice Scheme for attendance for interview at a garda station in a voluntary capacity, or for prior consultation. Arrests should be avoided where possible, and the scheme should facilitate this goal and early resolution of investigations.

9. **Judges should be cautious and insist on inferences being properly administered in the garda station.**

We welcome the reports by participants that judges take a restrictive approach to the admission of adverse inference evidence. Adverse inference evidence should only be admitted where all the requirements of the relevant legislation were complied with, where the questions put to the accused were relevant and limited in scope, and the accused understood the nature and consequences of the invocation of the inference provisions.

10. **The judge's charge to the jury in relation to drawing an inference from pre-trial silence should be limited and not give undue emphasis to this relatively weak form of evidence.**

Some participants reported concerns that the judge's charge to the jury in relation to adverse inferences overemphasised the weight of such inferences as evidence. As discussed within the Report, there are many reasons why a suspect may stay silent in response to the inference provisions being invoked that are unrelated to their guilt. Therefore, adverse inferences drawn from silence in response to questions are a weak form of evidence. There is a concern that overemphasis and lengthy explanations of the provisions may lead juries to give undue regard to the inference.

Therefore, it is recommended that the charge in relation to the inference should be simple and refer plainly to the relevant piece of evidence, the asserted failure to account for it, and the accused's right to silence.

11. **Guidance for judges on the appropriate handling of jury directions relating to unsworn evidence should be developed.**

Some participants reported an impression from the judge's charge on unsworn evidence, such as prepared statements, that such evidence was less valuable than sworn, live testimony.

While it is accepted that cross-examination is a rigorous testing mechanism, the authors are also of the view that certain types of pre-trial statements have evidentiary and policy advantages, such that they should not be unduly negatively characterised in the judge's charge.

In this regard, it would be beneficial if a coherent approach was developed in relation to the admission of, and judge's charge in relation to, unsworn statements of suspects in garda interviews.

12. **The ODPP should collect data on how often the inference provisions are used in prosecutions.**

There was a lack of certainty among participants on the prevalence of use of adverse inferences in the Circuit Court and the Central Criminal Court. Nevertheless, a substantial proportion of participants reported their view that the inferences provisions were surplus and unnecessary in the cases in which they had seen them.

For an encroachment on constitutional rights to be permissible, it must be rationally connected to an objective and not be arbitrary or unfair, impair rights as little as possible, and be proportionate to the stated objective.[152] If it is indeed the case that the adverse inferences are being drawn from silence in response to broad questions or contexts where there are other explanations for the silence, then such an interference with the right to silence is arguably arbitrary and disproportionate.

The ODPP should collect data on the prevalence of use of adverse inferences, the outcome of trials in which they were used, and the other evidence which existed in such cases. This would allow for a more quantitative analysis of the value of inferences within the Irish criminal process.

13. **A permanent joint working group of An Garda Síochána and legal practitioners should be established to engage on matters relating to the questioning of suspects in garda detention.**

Participants reported that while relations between members of An Garda Síochána and defence solicitors attending suspect interviews had improved in recent years, there still appeared to notable discord in relation to particular issues, such as pre-interview disclosure.

In this regard, a joint working group should be established to jointly develop guidance on appropriate practices when the right to silence is exercised so as to encourage best practice development and dialogue for collective ownership of outcomes. This group could organise joint events for the professional development of both groups, on topics such as psychology, vulnerable suspects, interpretation, new technologies, and other contemporary issues relevant to both professions.

Training Recommendations

1. **The Law Society should consider requiring solicitors who advise detained suspects at garda stations to undertake an annual minimum level of continuing professional development (CPD) training specific to that role.**

Solicitors who advise detained clients, either regularly or intermittently, should receive training on how the right to silence intersects with the overall management of case strategy, and the implications of these intersections. Garda detention and questioning is an extremely critical stage of the criminal justice process and it is imperative that solicitors can adequately advise suspects, so as to ensure the realisation of their right to a fair trial.

As noted throughout this report, there are complex considerations to be taken into account when advising whether a suspect should remain silent or waive that right. Many solicitor participants reported a lack of confidence in their own understanding of how to appropriately react in garda interviews to impropriety, or even identifying the appropriate moments to react and interject. Attendance at interviews in this regard involves a specific set of skills, training on which should be made available by the professional bodies.

EmpRiSe has developed bespoke training on the right to silence in garda interviews and the adverse inference provisions. As of June 2021, EmpRiSe has run "train-the–trainer" sessions for 25 criminal defence solicitors. Further sessions could be delivered into the future, on a CPD basis.

152 Heaney v Ireland [1994] 3 IR 593.

2. **An Garda Síochána should provide more advanced and practical training to Level 1s and 2s, within the GSIM framework, on the right to silence generally and specifically on the invocation of adverse inference provisions.**

A number of solicitor participants remarked that some gardaí they encountered lacked confidence in relation to the inference provisions and could not clearly explain them to suspects. All gardaí should receive adequate training on the invocation of the provisions. Training for gardaí in terms of administering the inference caution should be provided, and re-training on a universal template that is both legally accurate and easy for suspects to understand.

3. **Professional legal bodies should provide training on the right to silence and adverse inferences.**

Training should be provided and encouraged on the right to silence and adverse inferences among all legal professional bodies, including the Law Library, the ODPP, and the Judicial Council.

Future Research

1. **A review of judgments of the Special Criminal Court to determine the significance of inferences in the Court's decisions.**

The data indicated a serious cause for concern that adverse inferences are given significant weight in the Special Criminal Court. As noted above, these are inherently a weak form of evidence. Therefore, it is important for the vindication of the right to silence to understand their prevalence of use and their bearing on the outcome of a trial. A review should be therefore conducted of Special Criminal Court judgments to shed further light on this important issue.

2. **A study of jurors in relation to their perception of right to silence, their understanding of inferences when explained by the judge, and the role that inferences play in their decision-making.**

A drawback of this study was the absence of the perspectives of juries on the right to silence and adverse inference. A study of jurors would help understand whether juries are giving undue weight to adverse inferences or whether they are ascribing negative value to the accused's failure to give evidence or deducting that the accused remained silent in the garda interview. This information is critical to understanding whether the accuseds' rights are actually being realised and whether more specific directions are necessary to address any biases. It would also assist in considering whether inferences are of significant or negligible value in particular cases. Accessing real juries to conduct this type of research may be problematic at present, but steps could be taken to allow for bona fide researchers to conduct such study, with all necessary protections for privacy and data protection in place.

3. **A qualitative study of suspects, and their experience of the use of garda tactics in interviews.**

A further drawback of this study was the absence of data from suspects. In particular, it is important to understand their experiences of garda tactics in interviews and whether they are being unfairly compelled to waive their right to silence. Further, it is imperative to understand whether suspects are comprehending the adverse inference caution and explanation, and the consequences thereof.

4. **An Garda Síochána should collect data on the exercise of the right to silence, in combination with a variety of other factors.**

There is a lack of quantitative data on garda practices, interviewing, and interactions with suspects. This is important to develop an understanding of how the right to silence is being protected, and to allow for an assessment of the fairness of the criminal justice process. In particular, it would be valuable to collect information regarding the characteristics of the suspect, the presence of a solicitor, the point at which the suspect relied on or waived their right to silence, and how often the inference provisions were invoked. Over time this quantitative data would provide a useful overview of garda interviews, and the factors impacting on suspects' exercise of their right to silence. This would augment the findings of the current project, to the benefit of our understanding of this important part of the Irish criminal justice system.

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Appendix – Focus Group Discussion Guide and Interview Schedules

FOCUS GROUP – Criminal Defence Solicitors

Discussion Guide

1. How do you decide what advice to give to a detained person in relation to the garda interview? What factors do you take into account?

- Nature of the offence
  - Seriousness
  - Specific category
    - Sexual offence/terrorism/white collar/drug-related
    - Other

- Nature of the person
  - Previous experience with the gardaí
  - no previous experience with gardaí
  - young/old
  - Mental health/vulnerability/addiction
  - other

- Disclosure
  - When do you ask for it?
  - How much do you get?
  - How does this impact your advice?

2. What are the possible negative consequences to remaining silent?

- - Are there positives to remaining silent?

3. Besides inferences being drawn at trial, what potential consequences exist elsewhere in the system for relying on the right to silence in garda interview?

  - Detention extension?
  - Bail applications?
  - General view of judge/jury?
- Silence – partial statement – untrue statement – full statement

4. Turning to the detained suspect himself or herself then, what are the most common factors that detained persons take into account in deciding whether or not to remain silent in the interview?

- Need to get out
- View of the judge or jury on silence
- Fear of gardaí
- Wanting to tell their side of story
- Advice of the solicitor
- Impact on/of other co-suspects
- External factors – gang pressure etc

What is the detained suspect's role in deciding on strategy for the interview?

- In consultation with the solicitor?
- Want to be told what to do?
- Nature of solicitor/client relationship?

5. How do gardaí generally interact with detained suspects outside of the interview room?

What impact does any prior interaction have on the suspect's decision to remain silent or otherwise during the interview?

6. Moving to the interview then, how do gardaí generally respond when a suspect exercises his or her right to silence?

- Tactics to get suspect to change approach

What factors impact on the garda response?

- Training/lack of training?
- Different if voluntary/under arrest?
- First time/repeat offender?
- Nature of the offence?

7. What is your role in the interview, in relation to the right to silence?

- What do you do if suspect starts to speak when they planned not to?

8. In your experience, what impact does silence in garda interviews have on decisions made by the Office of the DPP?

9. What impact does silence in garda interviews have on judges and juries?

- Adverse inferences
- Credibility, guilt
- Non-cooperation

What factors influence the impact of that silence on judges or jurors?

CASE SCENARIO:

You get a call from a garda station to let you know that a client of yours, Tom Jeffers, has been arrested on suspicion of robbery. As he is an existing client, you know that Mr Jeffers, who is originally from Cork, now lives homeless on the streets of Dublin and is a drug addict. He has regular encounters with the gardaí and has past convictions for drug-related offences.

The Garda on the phone tells you that Mr Jeffers is suspected of grabbing a bag from a woman who was locking up a restaurant at around midnight. He says that Mr Jeffers knocked the woman down and smashed her head on the ground as she had initially refused to give him the bag.

You speak to Mr Jeffers on the phone. **What would you say to him at this point?**

— Would you ask him anything?

You attend at the station. **What would you do first on arrival at the station?**

You ask to speak to the investigating garda. You ask him to tell you what evidence exists against your client at this stage. He tells you that the injured party, Mrs Orla Murphy, has given a statement in which she described her attacker as having "dark hair and wearing dark clothes, looks ill, like a junkie". Mrs Murphy also apparently said that the attacker shouted "give me your bag" at her, and she thought he spoke with a thick Dublin accent.

The investigating garda also tells you that they have already gathered CCTV evidence from the street next to the one where the incident took place, and Mr Jeffers can be seen walking there at around midnight.

What advice would you give to Mr Jeffers in your consultation? What would you ask him?

At the beginning of the interview Mr Jeffers tells gardaí that he does not wish to answer any questions. **In your experience, how would gardaí be likely to react to that?**

At interview, gardaí state that they now have a witness statement from another known drug addict who says that he saw Mr Jeffers near the crime scene and he saw him putting a woman's bag behind a big wheelie bin. This is a spot in which homeless people usually sleep. The gardaí have now checked that area and found the victim's bag. It is currently being checked for fingerprints. What would you do at interview if this was revealed? What would change your advice? **What other information would you want to have?**

In a second interview later that day, gardaí state that Mr Jeffers fingerprints have been found on the bag. Would this change your advice?

Your client asks for a consultation with you, which is allowed. He tells you that he did see a woman's bag in the area behind the wheelie bin. He just picked it up and looked inside it, but it was empty, so he left it there. He says to you "I could say I was looking for ID in the bag so I could return it to whoever owns it". **What advice would you give him at this stage?**

In fact, it turns out that the bag had the victim's fingerprints, those of Mr Jeffers, and those of two unknown persons on it. **Would this information be important for you to have? Would the gardaí be likely to inform you of all of that information?**

Conclusion

Is there any issue in relation to the right to silence in the garda station that we haven't covered?

Or anything that anyone would like to add?

INTERVIEW – Barrister

Interview Schedule

Introduction and Process

Has the majority of your work to date been for defence, prosecution, or a relatively even mix?

I want to get a picture of how criminal cases first come to your attention.

- How and when do you first hear that you are to be engaged in relation to a specific criminal case?
    - prosecution
    - defence
- Would you ever have any involvement during the investigative stage?
    - DPP/gardaí seeking advice in a prosecution?
    - solicitor seeking advice in a defence situation, e.g. re issues during garda interview/detention?
    - habeas corpus application?

First Impressions

Thinking about offences which would be covered by the jurisdiction of the Circuit or Central Criminal court then, when you first begin to work on such a case, what are the first things you want to know?

- When you receive the Book of Evidence, how do you assess it?
    - Do you have a standard approach to engaging with the Book or will it vary depending on what the solicitor has advised/instructed?
- What information is usually provided within the Book of Evidence in relation to any Garda interviews?
    - typed notes – from garda written notes?
    - transcript from audio-visual recording?
- Do you ever ask for access to the audio-visual recording (section 56) and/or transcripts?
    - In what circumstances? (Certain offences? Reasons for seeking transcript?)
- At what point do you check to see whether the accused person made any statements to the gardaí?
    - Would the solicitor/DPP's office mention this when introducing the case to you? Or in the cover letter?
- What impact does it have on your initial view of the case if the accused person answered questions at Garda interview or did not do so?

Garda Interview

- In your experience, what proportion of people answer questions at Garda interview and what proportion maintain their silence? (Different types of offences/suspects?)
- From your viewpoint, have you noticed a difference in suspect's exercise of the right to silence since solicitors have begun to attend garda interviews? (Impact of not having a solicitor present?)
- When solicitors are advising clients in custody, they are trying to imagine how answering or not answering questions at that point will play out at trial – do you ever find yourself wondering why certain strategies were adopted at the interview stage?
    - example – someone has a factual defence but did not mention it
    - someone made admissions when there was little evidence against them…

Trial Strategy

When you have been selected for the case and have reviewed the Book of Evidence then…

- How do you arrive at your advice as to whether the accused ought to plead guilty or contest the charges?
- Is this impacted by whether or not the accused has answered questions in the Garda interview?
- If contesting charges then, how do you develop a strategy for a trial?
    - with the solicitor
    - with the client
- What impact, if any, does it have on your strategy for trial if the suspect exercised their right to silence during police questioning?
    - Is your strategy impacted by the possible drawing of inferences in a case?
    - How often are the inference provisions at play in criminal trials?
    - What is your view of those provisions?
        - impact on jury?
        - impact on suspect in garda station?
        - use by gardaí?
- Outside of the inference situation, the jury are not supposed to be informed of any failure on the part of the accused to answer questions in the Garda station – is that the reality in practice?
- If admissions were made, and the accused now wants to contest the charges, how would you approach that?
- If there is a dispute on admissibility, do the Prosecution and Defence teams sometimes come to an agreement on which evidence will be presented? How does this arise and play out? Is the exercise of the right to silence relevant in terms of this?
    - relevant re invoking the inference provisions?

- If a matter such as that cannot be agreed between Counsel, how might it play out before the judge, in the absence of the jury?
- What if the suspect seems to have given an untrue statement to gardaí? What impact does that have at trial?
- Does a suspect's failure to answer questions in the garda station have an impact on sentencing? How so?
- What percentage of accused persons would take the stand at their own trial?
    - What are the factors that influence that decision?
    - Is adverse comment ever made on a failure to do so?
- Does the accused person's silence in garda custody come up at bail hearings? Does it have an impact?

Conclusion

Is there any issue in relation to the right to silence that we haven't covered?

Or anything that you would like to add?

INTERVIEW – Office of Director of Public Prosecutions staff

Interview Schedule

Introduction and Process

Can you give me a brief outline of what an average day's work looks like for you?

I want to get a picture of how criminal cases first come to your attention.

- How and when do you first hear about a specific case?
- What information is provided to you, and in what format?
- Would you ever have any involvement during the investigative stage?

First Impressions

Thinking about offences which would be covered by the jurisdiction of the Circuit or Central Criminal court, when you first begin to work on such a case, what are the first things you want to know?

- At what point do you check to see whether the accused person made any statements to the gardaí?
    - would the gardaí mention this when introducing the case to you? Or in any cover letter?
- What information is usually provided to you in relation to any Garda interviews?
    - typed notes – from garda written notes?
    - the audio-visual recording?
- What is the practice in terms of viewing any audio-visual recording?
    - how often would you do so?
    - what are the factors that influence whether or not you would do so?
    - in what circumstances would a transcription be produced?
- What impact does it have on your initial view of the case if the accused person answered questions at Garda interview or did not do so?

Garda Interview

- In your experience, what proportion of people answer questions at Garda interview and what proportion maintain their silence? (Different types of offences/suspects?)
- Why do you think some people refuse to answer questions during garda interview?
- Do you think garda interviews are generally effectively conducted?
    - In your experience, what strategies do gardaí employ to encourage suspects to answer questions?
- From your viewpoint, have you noticed a difference in suspect's exercise of the right to silence since solicitors have begun to attend garda interviews? (impact of not having a solicitor present?)
- When solicitors are advising clients in custody, they are trying to imagine how answering or not answering questions at that point will play out later in the process – do you ever find yourself wondering why certain strategies were adopted at the interview stage?
    - - example – someone has a factual defence which emerges at trial but did not mention it
    - - someone made admissions when there was little evidence against them…

- When you have reviewed existing evidence, what happens next?
    - Asking for additional garda work?
- How do you arrive at your decision on charge?
- Is this impacted by whether or not the accused has answered questions in the Garda interview?
    - What is the impact of that?
    - What if the accused has answered some questions but not others?
- Does the accused person's silence in garda custody have an impact on any directions in relation to bail?

Trial Strategy

If the accused is contesting the charges, how do you develop a strategy for trial?

- Who is involved? What factors are considered?
- What impact, if any, does it have on your strategy for trial if the suspect exercised their right to silence during garda questioning? (partial/full…)

Inferences

- Does the exercise of the inference provisions at interview have any impact on directing decisions? How so?
- How often are the inference provisions at play in criminal trials?
- What are the factors considered in deciding whether or not to rely on inferences at trial?
    - nature of the offence?
    - concerns around how the provisions were administered in the garda station?
    - weight of the other evidence?
- What is your view of those provisions?
    - impact on jury (+ jury understanding)?
    - impact on suspect in garda station (+ suspect understanding the inference caution)?
    - use by gardaí (+ are gardaí confident in using the provisions)?
- In your view, what should be the impact of such inference on a case?
    - additional weight to the prosecution case?
    - failure to provide alternative to prosecution case, leaves prosecutor/fact-finder with only that?
- Outside of the inference situation, the jury are not supposed to be informed of any failure on the part of the accused to answer questions in the Garda station – is that the reality in practice?
- If you do think that the jurors figure this out themselves, what do you think jurors do with this knowledge?

Prep For Trial

- If there is a dispute on admissibility, do the Prosecution and Defence teams sometimes come to an agreement on which evidence will be presented? How does this arise and play out? Is the exercise of the right to silence relevant in terms of this?
- If a matter such as that cannot be agreed between Counsel, how might it play out before the judge, in the absence of the jury?
- What if the suspect seems to have given an untrue statement to gardaí? What impact does that have at trial?
- Does a suspect's failure to answer questions in the garda station have an impact on sentencing? How so?
    - certain offences?
    - would it be raised as an issue by the Prosecution at that point?
- What percentage of accused persons would take the stand at their own trial?
    - Is adverse comment ever made on a failure to do so?
- Does the accused person's silence in garda custody come up at bail hearings? Does it have an impact?
    - (lack of co-operation?)

Conclusion

Is there any issue in relation to the right to silence that we haven't covered?

Or anything that you would like to add?

INTERVIEW – Judge

Interview Schedule

Introduction

1. How long have you been a judge?

2. What was your area of practice prior to being appointed to the bench?

3. Which courts do you mainly preside over now?

4. What sort of cases do you normally encounter?

Research focus

How does a case that is to be before you in court first come to your attention?

— What documentation do you receive and how do you prepare for the case?

In this research we are interested in suspects' reliance on their right to silence in garda custody. In your view, how important is the garda interview in the context of the trial?

In your experience, what approach do the majority of suspects take to garda interviews? Silence? Partial silence? Answering all questions? Prepared statement?

What is your sense of why people sometimes refuse to answer garda questions?

Does the presence of a solicitor at interview make any difference to that? Why do you think this is?

In your view, if a suspect indicates that they wish to remain silent, is there a benefit in continuing the garda interview? Why/why not?

Do you think that garda interviews are generally effective?

Have you noticed strategies that gardaí use to encourage suspects to answer questions? What do you think of those strategies? Have they ever caused issues in any of the cases you've seen?

Do you ever have cause to view the tapes of garda interviews?

— in what circumstances?

Are the tapes ever shown to the jury?

— in what circumstances?

As a judge, have you ever had to address garda misconduct in interview? What did you do? Why?

Do issues around the admissibility of statements made at interview arise very often, in the absence of the jury?

— Is the right to silence an issue in such cases? Are there other issues that come up?

What factors do you take into account in determining admissibility disputes in relation to garda interviews with suspects?

Inferences

What about the inference provisions?

— Do these arise often in court, in your experience?

Do disputes on allowing inferences arise for your determination? What factors do you consider in coming to a decision on that?

What do you see as the value or function of these provisions?

— Do they achieve that function?

Are there any challenges or difficulties associated with the use of these provisions?

What impact do you think the inference provisions have on juries (or on the Special Criminal Court)?

Outside of the inference situation, the jury (or judges of the SCC) are not supposed to know of any failure on the part of the accused to answer questions in the Garda station – is that the reality in practice?

What if the suspect seems to have given an untrue statement to gardaí? What impact does that have at trial?

How often do accused persons take the stand at their own trial?

— Do you think there is any qualitative difference between a suspect statement given during garda interview and one given by the accused in court?
    — Is that something that judges ever remark on or mention in their charge?
    — Do you think juries see any distinction?

Judge's Charge

Obviously, the judge's charge to the jury in criminal cases is extremely important. How do you go about constructing your charge?

Are there any particular aspects of the charge that relate to the right to silence?

Do juries ever come back to seek further direction on matters relating to the right to silence / presumption of innocence / burden of proof?

Other

Would non-co-operation (including reliance on silence) be relevant in decisions on extending detention periods?

At a bail hearing, do you consider the accused's attitude towards garda questioning at all? How is it relevant?

Would gardaí sometimes mention at a bail hearing that the suspect was "uncooperative"? What does that mean to you?

Does a suspect's failure to answer questions in the garda station have an impact on sentencing? How so?

A guilty plea has a mitigating effect on sentencing. Does "co-operation" in the garda interview also have an impact even if it hasn't led to a plea of guilty?

Conclusion

Is there anything else you would like to say that you feel has not been covered?

INTERVIEW – Retired Garda

Interview Schedule

Background information

How long were you employed by An Garda Síóchána?

In what ranks did you serve?

What was your final rank and the job description of that role?

What sort of offences were you involved in investigating?

Did you have responsibility for conducting interviews with suspects at all ranks during your time in AGS?

— Is this still the same now – is there any distinction on which gardaí can conduct interviews?

How many years of experience of interviewing suspects do you have?

- Less than 2years
- 2 - 5 years
- 5-15 years
- More than 15 years

How often did you interview suspects?

- Rarely (once or twice a year)
- Occasionally (every few months)
- Once a month
- Once a week or less
- Almost every day
- Several interviews a day

Did you undertake any training for conducting interview?

What level of training have you undergone?

- GSIM 1, 2, 3, 4
- SIO?

Were you trained in GSIM? What did you think of it? Was it easy to implement? Was it effective?

Can you outline the general process of how an interview is conducted?

— How long do interviews generally tend to last?

— How often is a solicitor present in garda interviews?

— Are all interviews now audio-visually recorded?

— How does the taking of a contemporaneous note work? Does it impact on the interview in any way?

When you went into an interview, what was your goal? What is a "successful" interview from your point of view?

What is the most challenging aspect of conducting interviews with suspects?

Are there things that happen outside the interview (maybe before interviews, just after arrest, or in between interviews) that influence what happens in the interview?

Who oversees quality/practice of interviews? Would you have talked to the DPP/would DPP get back to you often about issues with interviews that would impact their admissibility?

Now that solicitors are allowed to attend interviews, are there additional challenges AGS members face when conducting interviews?

Silence at interview

I presume you have some experience of suspects exercising their right to silence in garda interview?

- How often does this happen?
- In what way do people actually exercise the right to silence?

When someone exercised silence, what did you do?

- Why did you do that?

Would you try to get someone who is silent to move from that position, and to answer questions? How?

How did you decide how to deal with a silent suspect? What's the most "effective" thing you do in this situation, and what exactly are you trying to achieve?

How do suspects respond to that?

Do you think people find it hard to remain silent?

- If so/if not, what does this depend on, if anything?

In your own view, why do you think that some suspects remain silent in interviews?

- Does it differ based on a suspect's characteristics? Nature of the offence?
- What influences partial silence?
- What impact do you think solicitors have on the decision to remain silent?
  - Has this changed since solicitors began attending interviews?

Does a suspect's silence at interview impact on your view of the investigation at that point?

If someone is maintaining no comment, how do you decide when to stop interviewing them?

If a suspect states from the outset of an interview that they intend to remain silent, does the interview still continue?

- What is the reason for this?

What impact do you think a suspect remaining silent during interview has on later proceedings (not specifically in terms of inferences)?

- Do you think it might affect applications for bail?
- Do you think it might affect sentencing?
- Do you think it might affect charging decisions in the Office of the DPP?

What about a suspect who answers questions with lies?

- Does this impact on your view of the suspect, or their likely involvement in the offence?
- Do you think that suspect lies can impact on the case at trial? In what way?

What is your view of the practice whereby a suspect gives a prepared statement?

- Are follow-up questions generally asked? Do detainees tend to answer such questions?
- In your opinion, do prepared statements create any difficulties in terms of conducting an interview and also in terms of generally pursuing a case?

Inferences

Have you had much experience with administering the inference-drawing provisions?

From a Garda perspective, are the inference provisions challenging to administer?

What factors influence the decision to invoke or not invoke the inference provisions at interview stage in a given investigation?

Is there a standardised approach to explaining these provisions to detained suspects?

- How was this developed? What does it entail?
- In your view, are they difficult to explain to detained suspects?

What impact do they tend to have, from a policing perspective?

- At interview
- At trial

Are there any changes you would like to see in relation to the inference provisions or how they operate?

Conclusion

The issue of pre-interview disclosure was raised with us by defence solicitors, who would like to have more of it in order to be able to advise their clients with more a sense of the evidence against them. Do you have any view on this issue?

Are there any changes at a legislative level that would be beneficial, in your view, from the perspective of AGS, in terms of detention, questioning, and the right to silence?

Is there anything else that comes to mind in relation to suspects remaining silent during garda interview that you would like to mention? Is there anything in particular that you would like us to take away from this interview?

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