

Criminal Justice Bill, 2007: Effects on the Pre-Trial Process

Yvonne Marie Daly

On the 1st of July, 1987, section 4 of the *Criminal Justice Act, 1984* came into operation, allowing for the first time within the ordinary corpus of Irish criminal law for the detention and questioning of arrested suspects prior to charge.¹ Under this provision, persons suspected of committing an arrestable offence² could be detained initially for up to 6 hours³. A second period of six hours could then be authorised by a member of the Garda Síochána not below the rank of superintendent if he had reasonable grounds for believing that such further detention was necessary for the proper investigation of the offence⁴. A total of twelve hours detention without charge was allowed.

At the time, of course, the *Offences Against the State Act, 1939* also allowed for detention without charge for offences covered by that Act or scheduled offences. The detention period allowed under section 30 of the 1939 Act amounted to a total of forty-eight hours: an initial period of twenty-four hours detention, which could be extended for a second twenty-four hour period under the authority of a member of the Garda Síochána not below the rank of Chief Superintendent.⁵

Since then, there have been a number of significant advances in the power given to the gardaí to hold suspects for questioning. The first of these is the *Criminal Justice (Drug Trafficking) Act, 1996* which introduced a potential period of detention of 168 hours, or seven days, for drug trafficking offences. Under section 2 of the 1996 Act, an arrested suspect may initially be held for six hours, which may be extended by an additional period of eighteen hours by a member of the Garda Síochána not below the rank of chief superintendent where he has reasonable grounds to believe that such

¹ The introduction of this power was delayed until the promulgation of the *Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987*.

² *Criminal Justice Act, 1984* s. 4 (1): an offence which has a possible sentence of five years or more severe penalty

³ *Criminal Justice Act, 1984* s. 4 (3) (a)

⁴ *Criminal Justice Act, 1984* s. 4 (3) (b)

⁵ The use of the detention powers under the 1939 Act in cases where there was no subversive element to the crime, and where the offence covered by that Act was but a minor concern of the gardaí when compared with other offences under investigation led to a number of interesting cases. These are outside the remit of this paper, however. See, for example, *People (DPP) v Quilligan* [1986] I.R. 495, [1987] I.L.R.M. 606.

detention is necessary for the proper investigation of the offence concerned⁶. Another period of twenty-four hours may then be added by a member of the same status, again, where he has reasonable grounds to believe that such further detention is necessary for the proper investigation of the offence⁷. Following this maximum period of forty-eight hours detention under the sole supervision of the gardaí, application must be made to a judge of either the District or the Circuit Court for any further detention of the suspect. Such application is to be made by a member of the Garda Síochána not below the rank of chief superintendent and a warrant for a further period not exceeding seventy-two hours may be granted where the appropriate judge has reasonable grounds to believe that such further detention is necessary for the proper investigation of the offence concerned and that the investigation is being conducted diligently and expeditiously⁸. Another similar application may later be made and, under similar criteria as before, a judge may grant a warrant to detain the suspect for an additional forty-eight hours⁹.

The 1996 Act is the first legislative provision to allow for detention beyond forty-eight hours and it insists on the added safeguard of judicial authorisation for extended detention periods beyond that threshold. Furthermore, it is within the 1996 Act for the first time that the concept of the investigation being conducted “diligently and expeditiously” is raised. The meaning of this phrase is not defined however and the manner in which the judge is to satisfy himself as to the diligence and expeditiousness of the garda investigation is not set out.

The second major advancement of garda powers to detain arrested suspects came within the *Offences Against the State (Amendment) Act, 1998*, which was enacted in the aftermath of the Omagh bombing and added to the period of detention permissible under its parent statute. It allowed that, following the maximum period of forty-eight hours detention under the sole authority of the Garda Síochána, a third period of twenty-four hours detention may be authorised by a judge of the District Court, upon application by a garda not below the rank of superintendent, if he has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned and that the investigation is being

⁶ s. 2 (2)(b)

⁷ s. 2 (2)(c)

⁸ s. 2 (2)(g)

⁹ s. 2 (2)(h)

conducted diligently and expeditiously¹⁰. The maximum period for which a suspect can be detained now under the *Offences Against the State Acts, 1939-1998* is seventy-two hours. It is notable that the provisions of the *Offences Against the State Acts, 1939-1998* are now also applicable to international terrorist groups and individuals by virtue of the *Criminal Justice (Terrorist Offences) Act 2005*.¹¹

The most recent adjustment to the garda powers of detention prior to charge came within the *Criminal Justice Act, 2006* which amended section 4 of the 1984 Act. Section 4(3) of the 1984 Act was inserted by virtue of s. 9 of the *Criminal Justice Act, 2006* and it provides that a third period of detention may be sanctioned by a member of the Garda Síochána not below the rank of chief superintendent in relation to the detention of a person suspected of any arrestable offence. This period may last up to twelve hours and must only be sanctioned when the relevant member has reasonable grounds for believing that it is necessary for the proper investigation of the offence. The detention powers under the 1984 Act, as amended, now amount to a total of twenty-four hours.

The proposal under the 2007 Bill should be made clear at this juncture. It is proposed that a total of seven days detention without charge will be possible for those arrested on suspicion of committing one of the following offences:

- a murder involving the use of a firearm or an explosive;
- capital murder (e.g. murder of a member of An Garda Síochána);
- possession of firearms; or,
- false imprisonment involving the use of a firearm¹²

The seven days would be authorised in the following manner:

- an initial period of six hours detention;
- a second period of eighteen hours detention, authorised by a member of the Garda Síochána not below the rank of superintendent where he has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned;

¹⁰ ss. 30 (4) and 30 (4A) of the *Offences Against the State Act, 1939*, as inserted by s. 10 of the *Offences Against the State (Amendment) Act, 1998*.

¹¹ It is also notable that the 1998 Amendment Act itself specified that certain provisions, including the extended detention provisions, would cease to be in operation on and from the 30th day of June, 2000, unless a resolution had been passed by each House of the Oireachtas resolving that that section should continue in operation. The relevant provisions have been renewed by Oireachtas resolution each year since then.

¹² Section 50(1) of the Bill as passed by Dáil Eireann

- a further period of twenty-four hours, authorised by a member of the Garda Síochána not below the rank of chief superintendent where he has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned;
- a fourth period of detention for up to seventy-two hours, authorised by warrant of a judge of either the District or Circuit Court upon application to him by a member of the Garda Síochána not below the rank of chief superintendent, where the member has reasonable grounds to believe that such further detention is necessary for the proper investigation of the offence concerned, and the judge is satisfied that such further detention is necessary for the proper investigation of the offence concerned and that the investigation is being conducted diligently and expeditiously;
- and a fifth period of detention for up to forty-eight hours, authorised by warrant of a judge of either the District or Circuit Court upon application to him by a member of the Garda Síochána not below the rank of chief superintendent, where the member has reasonable grounds to believe that such further detention is necessary for the proper investigation of the offence concerned, and the judge is satisfied that such further detention is necessary for the proper investigation of the offence concerned and that the investigation is being conducted diligently and expeditiously.¹³

In total then, a suspect arrested in relation to any of the offences covered by this provision could find himself in custody under the sole authority of the Garda Síochána for up to forty-eight hours and thereafter under the authority of the District or Circuit Court for one hundred and twenty hours, adding up to a total of 168 hours or seven days in detention. It would seem, though it is not entirely clear on the face of the 2007 Bill, that the rest period allowable for detained suspects between midnight and 8am would not be included in the reckoning of this 168 hours, and that, accordingly, a suspect might in reality find himself confined within the garda station for more than seven days. In fact, a suspect might conceivably find himself deprived of his liberty, in the custody of the Garda Síochána for a nine or ten days.¹⁴

¹³ Section 50(3) of the Bill as passed by Dáil Eireann

¹⁴ e.g. suspect is arrested at 8pm on Monday night, at midnight (after four hours' detention) a suspension notice is issued to cease at 8am. At 10am on Tuesday, the suspect's detention is extended by a superintendent for another 18 hours which, including 8 hours sleep during which a suspension notice is in place, brings the detention through until 12pm on Wednesday. At that point a further period of twenty-four hours detention is authorised by a member of the Garda Síochána not below the rank of chief superintendent. Allowing for another eight hour rest period, this detention will last until 8pm on

One of the main criticisms of the proposed provision which has arisen is that little, if any, evidence has been put forward as to the necessity for the expansion of garda powers in this manner. On introducing the Bill, the Minister for Justice referred to gangland crime and suggested that the provisions of the Bill were aimed at dealing with such issues.¹⁵ Firstly, it ought to be pointed out that many of the provisions of the Bill, including inferences to be drawn from pre-trial silence (discussed below) are not confined to “gangland”-type offences, but are far broader in their application. Secondly, in relation to the extended detention periods applicable to the offences set out in section 50 of the Bill (murder involving a firearm, capital murder, possession of firearms, false imprisonment involving the use of a firearms or explosives) it is unclear what necessity there is for seven days detention or whether this is truly likely to have an impact on gangland crime.

In relation to the seven-day detention period provided for within the 1996 Drug Trafficking legislation, a clear rationale was provided. It was stated, both at the time of the introduction of the Bill and at a later stage that such extended detention was necessary for two main reasons: firstly, the international nature of the organised drugs trade which can require enquiries to be made from various other countries which in some cases would not be practical in the more usual periods of detention allowed under Irish law; and secondly, to cope with the problem of people suspected of attempting to import drugs having ingested them (what are often referred to as “stuffers and swallowers”) where a considerable period might elapse before the drugs are excreted from the person's body.¹⁶ Even with this clear rationale, in their fact sheet on the 2007 Bill, the Irish Council for Civil Liberties suggested that the existing seven-day detention period available under the *Criminal Justice (Drug Trafficking) Act, 1996* is rarely, if ever, used.¹⁷

Thursday night. At that point a period of seventy-two hours detention is authorised by a judge of the District Court, and allowing for five eight-hour sleep periods, this brings detention up to 10am on Tuesday. At that point the judge of the District Court authorises a final detention period of forty-eight hours which, allowing for three sleep periods of eight hours, in fact leads to release at 10am on Friday morning. This would amount to a total of 254 hours or more than ten and a half days.

¹⁵ See Press Release – available at

<http://www.justice.ie/80256E01003A02CF/vWeb/pcDOJA6YDMT9-en>

¹⁶ See Response of the Irish Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 31 August to 9 September 1998, available at www.cpt.coe.int/documents/irl/1999-16-inf-eng.htm

¹⁷ See ICCL “What’s wrong with the Criminal Justice Bill, 2007?” Fact Sheet available at http://iccl.ie/DB_Data/publications/CJBFactSheet_FINAL.pdf

It is unclear what rationale might apply to the extended detention provided for under the 2007 Bill and it is even less clear what the impact of such prolonged detention is expected to be. No study was carried out into the issue of gangland crime to assess whether or not such powers of detention for the gardaí are necessary. No green or white paper was prepared to allow for discussion of the challenges created by gangland crime and the potential methods of dealing with investigations of these kinds of offences. The Law Reform Commission were not asked to consider the possibilities for reform of the law in relation to the offences specified under Head 50 of the Bill or the pre-trial processes associated therewith. No expert group was drawn together to consider whether or not there was a need for extended detention to be available in relation to particular types of offences or offenders, and if so what offences should be covered by such a provision. In fact, the main group working on the criminal justice system at the time of the initiation of the Bill, the Balance in the Criminal Law Review Group, was not asked to consider any issue in relation to detention periods generally.

Furthermore, with the *Criminal Justice Act, 2006* barely up and running it is difficult to see how any study, had one been undertaken, could have taken stock of whether or not the provisions therein allowing an additional period of detention for all arrestable offences under section 4 of the *Criminal Justice Act, 1984* ensured that detention periods were long enough to investigate such crimes fully, or needed to be longer for certain offences.

In the absence of any statistics or evidence to prove that crimes such as those listed in section 50 of the 2007 Bill necessitate a longer period of detention than other crimes, that investigations into such crimes have previously been irreparably hampered by the restrictive time-limits imposed to date, or that so called “gangland” criminals are more likely to co-operate with gardaí if held for longer, then questions must be asked as to the true rationale of the proposed legislation.

Human Rights Obligations: Domestic and International

Both the Irish Council for Civil Liberties and the Irish Human Rights Commission have expressed concerns that the Bill may lead Ireland to be in breach of International

human rights obligations.¹⁸ In this regard it is to be noted that the right to liberty is protected in international human rights documents such as the International Covenant on Civil and Political Rights (Article 9) and the European Convention on Human Rights (Article 5). It is also, of course, protected under Article 40.4.1 of the Irish Constitution. Generally, however, it is accepted that the right to liberty is not absolute and may be interfered with as prescribed by law, including a period of detention following a lawful arrest.

Whether or not seven days pre-trial detention can be said to be in breach of the right to liberty as expressed in the Constitution or the above-mentioned international human rights agreements is unclear. The Irish courts have certainly accepted the concept of legislative interference with the right to liberty and the existence of a pre-trial period of detention for questioning of arrested suspects. Indeed, the European Court of Human Rights also accepts such interference, but insists on judicial control of the detention as a safeguard against arbitrary interference with the right to liberty.¹⁹

The fact that the 2007 Bill allows for judicial control from the forty-eight hour mark onwards would appear to ensure compliance with the right to liberty under the ECHR jurisprudence at least. The question of seven-day detention (or the more realistic nine/ten day detention) in and of itself has not been addressed by the European Court, however, so it is possible that in an appropriate case an argument might be made that seven-day detention *per se* is excessive and may be in breach of Article 5.

“Diligently and Expeditiously”

Like the 1996 and 1998 Acts, the 2007 Bill provides an additional safeguard for arrested suspects by declaring that the judge authorising an extension of detention must reasonably believe not only that further detention is necessary for the proper investigation of the offence, but also that the investigation is being conducted “diligently and expeditiously”. This strengthens to a certain degree the level of protection being afforded to the accused’s right to liberty and such other rights as may be affected throughout the course of a garda investigation. However, these phrases

¹⁸ See ICCL “What’s wrong with the Criminal Justice Bill, 2007?” Fact Sheet available at http://iccl.ie/DB_Data/publications/CJBFactSheet_FINAL.pdf and IRHC Observations on the Criminal Justice Bill, 2007 available at http://www.ihrc.ie/_fileupload/banners/ObservationsonCriminalJusticeBill20071.doc

¹⁹ See *Brogan v United Kingdom* (1988) 11 EHRR 117

have not, as yet, been tested to any great extent before the courts and it remains to be seen in what circumstances an extension sought by the gardaí might be denied on these grounds.

In *People (D.P.P.) v O’Toole and Hickey*²⁰, a suspect had made inculpatory statements during the first six hour period of detention. A further period of detention was later authorised during which an identification parade was held. The argument on the part of the accused was that the second period of detention was unlawful as it was unnecessary for the “proper investigation of the offence” given the statements already made by the suspect. The Court of Criminal Appeal held, however, that the second detention period was lawful and had been correctly authorised by the member in question and the Court appeared to intimate that the phrase in question referred to that which was necessary for a full and proper investigation of the offence. Walsh has suggested that if the officer authorising the further period of detention is of the opinion that a further period is necessary for the proper investigation of the offence the courts will generally be slow to second-guess him²¹.

The meaning of the phrase “diligently and expeditiously” as well as the circumstances in which it might be appropriate for a judge of the District or Circuit Court to deny an extension of detention due to an absence of diligence or expeditiousness is unclear. The phrase in question was first used in the English *Police and Criminal Evidence Act, 1984*. That Act, however, sets out precisely the procedure to be adopted in the analysis of whether or not an extended detention should be granted. Under section 43(14) of the Act, the information provided to the judge for consideration of the application for extended detention must include:

- the nature of the offence for which the person to whom the application relates has been arrested;
- the general nature of the evidence on which that person was arrested;
- what inquiries relating to the offence have been made by the police and what further inquiries are proposed by them;
- and the reasons for believing the continued detention of that person to be necessary for the purposes of such further inquiries.

The precision of the English legislation in relation to this matter is admirable and it is submitted that greater clarification and guidance as to the operation of the Irish

²⁰ Unreported, Court of Criminal Appeal, July 20, 1990

²¹ Walsh, D. “*Criminal Procedure*” (Dublin 2002) p.233

legislation in this area is necessary, especially where the authorisation of detention may ultimately lead to a seven-day period of confinement in garda custody.

Seven Days and the Law on Confessions

If a suspect who has been detained for seven days makes a statement inculcating himself in the alleged offence, how likely is it that a court will accept evidence of this statement at trial, under the law on confessions? The main point to be made in this regard is that only confessions voluntarily given will be accepted as evidence at trial. In recent times, the concept of voluntariness has come to include not only the traditional prohibition on threats or inducements²², but also a prohibition on oppression.²³ Furthermore, the concept of oppression includes not only oppressive questioning, but oppression of circumstances. Oppression was defined in the English case of *R v Priestly*²⁴ as “*something which tends to sap and has sapped the free will which must exist before a confession is voluntary*”.

In *People (D.P.P.) v Lynch*²⁵ the Supreme Court held that the suspect’s lack of sleep, his being in a strange environment, isolated from all he was accustomed to and being under constant garda surveillance of which he was aware led to circumstances of oppression which meant that the confession made by him could not be said to be free and voluntary. Other case law suggests that there is a subjective test to be applied in relation to oppression and that what may be oppressive to one person may not be so to another. In *People (D.P.P.) v Pringle, McCann and O’Shea*²⁶, for example, the Court of Criminal Appeal held that as the suspect was a 42 year old fisherman who was an experienced man of the world and was not unused to conditions of physical hardship, it was open to the trial court to find that his will would not have been undermined by the interview he had experienced or by lack of sleep. The fact that the accused had had five visits from his solicitor who advised him to remain silent also appeared to make an impression on the Court. O’Higgins C.J. expressed the opinion that “*those visits and the advice he obtained must have strengthened his resolve and*

²² See cases such as *A.G. v McCabe* [1927] I.R. 129; *People (D.P.P.) v Hoey* Unreported, Supreme Court, 16 December 1987

²³ See *People (D.P.P.) v Breathnach* (1981) 2 Frewen 43 later affirmed in the Supreme Court in *People (D.P.P.) v Lynch* [1982] I.R. 64; *People (D.P.P.) v Pringle, McCann and O’Shea* (1981) 2 Frewen 57

²⁴ (1965) 50 Cr. App. Rep. 183; [1966] Crim. L.R. 507 This definition was cited with approval by the Court of Criminal Appeal in *People (D.P.P.) v Pringle, McCann and O’Shea* (1981) 2 Frewen 57

²⁵ [1982] I.R. 64

²⁶ (1981) 2 Frewen 57

assisted in counteracting any weakness of will which the conditions of his custody and the questioning by the Gardaí may have produced’.

It is possible to suggest that a period of seven days detention could be seen as oppressive in some, if not in many, circumstances, and that such a conclusion might lead to the exclusion of any confession obtained from the accused, thus defeating part of what might be the unexpressed rationale of the detention provision in the first place. Perhaps on the basis of *Pringle* it is possible also to suggest that unless a suspect has regular access to a solicitor while detained under the provisions of section 50 of the 2007 Bill for a maximum of seven days, there is at least a danger that statements made by him would be inadmissible at trial due to oppression and involuntariness. The right of access to a solicitor in Ireland however, may not be able to rise to this challenge given the lack of duty solicitor schemes among other factors.

Right to a Solicitor

The pre-trial right of reasonable access to legal advice was recognised as having constitutional status in *People (D.P.P.) v Healy*²⁷ and the rationale for its protection were stated in that case as being two-fold: firstly to ensure that the suspect is aware of this legal rights and that accordingly any statement made by him is more likely to be voluntary; and secondly to redress to some extent the imbalance of power between the State and the suspect in the pre-trial period. While the right is constitutionally protected, it has been expressed as a right of “reasonable access” only. In practice, this is said to amount to consultation between legal adviser and detained suspect for approximately ten minutes in every hour of detention, or one hour in every six hours of detention.²⁸ Furthermore, it has been held that a legal adviser is not entitled to be present throughout garda interrogation of a suspect. This was stated, bluntly, in the case of *Lavery v Member-in-Charge, Carrickmacross Garda Station*,²⁹ a case which involved the operation of the inference-drawing provisions of the *Offences Against the State (Amendment) Act, 1998*.

It is clear that the definition of the right to pre-trial legal advice in Ireland is quite limited. Furthermore, there are no duty solicitor schemes in operation within the jurisdiction which can lead to difficulties in the provision of legal advisers to detained

²⁷ [1990] 2 I.R. 73.

²⁸ White, J.P.M. “*The Confessional State – Police Interrogation in the Irish Republic*” Part I [2000] 10 (1) I.C.L.J. pp.17–18.

²⁹ [1999] 2 I.R. 390.

suspects.³⁰ Finally, while the Garda Station Legal Advice Scheme has ameliorated the situation in relation to provision of legal advice for impecunious suspects, it remains an administrative scheme only with restrictive means-tested limits on entry.³¹

Right to silence

Part IV of the 2007 Bill as passed by Dáil Eireann proposes certain amendments to existing legislation allowing for inferences to be drawn from silence, repeal of other inference-drawing provisions³² and the addition of a new provision in this regard. The new provision proposed would be inserted into the *Criminal Justice Act, 1984* as section 19A and would be applicable to suspects detained in relation to all arrestable offences. Section 19A would allow for such inferences as appear proper to be drawn at trial from the accused's failure 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. Inferences can only be drawn where the accused has been told in ordinary language that it may harm the credibility of his defence if he does not mention when questioned, charged or informed, something which he later relies on in court. The 2007 Bill also adds additional safeguards to the process of drawing adverse inferences under section 19A:

- no inference ought to be drawn unless the accused was afforded a reasonable opportunity to consult with a solicitor before his failure to account for the relevant matters or to mention the relevant fact occurred;
- no inference ought to 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;
- and, 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.

All of these safeguards are welcome given the added protection which they offer to the suspect both in the pre-trial period and at later trial. In particular, the inclusion of a statutory provision expressly stating that a detained suspect must be afforded a

³⁰ see Daly, Y.M. “*Does the Buck Stop Here?: An Examination of the Pre-Trial Right to Legal Advice in light of O’Brien v D.P.P.*” (2006) 28 D.U.L.J. 345.

³¹ In order to be eligible for the Scheme a detained suspect must either be in receipt of Social Welfare payments, or earning less than €20,316 per annum.

³² Repeal of section 7 of the *Criminal Justice (Drug Trafficking) Act, 1996* and section 5 of the *Offences Against the State (Amendment) Act, 1998*

reasonable opportunity to consult with a solicitor before any inferences will be allowable from his silence in the pre-trial period is a welcome measure and an admirable reflection of the jurisprudence of the European Court of Human Rights which has always emphasized the connection between the right to silence and the right of access to counsel.³³

However, it is submitted that the wording of the proposed section 19A may cause difficulties in practice. The proposed section provides that inferences may be drawn from the accused failure to mention “a fact which in the circumstances existing at the time clearly called for an explanation from ...” the accused.³⁴

A provision largely similar to this in England and Wales has led to much controversy in both the domestic courts and the European Court of Human Rights. Section 34 of the *Criminal Justice and Public Order Act, 1994* provides that inferences may be drawn at trial from the failure of the accused to mention a fact which he later relies on in his defence which in the circumstances existing at the time (during pre-trial interrogation or charging etc) he could reasonably have been expected to mention. The difficulty which has come to the fore in relation to this provision is the claims of suspects that the only reason they failed to mention the relevant fact during the pre-trial period was because their solicitor had advised them to remain silent. The question which has arisen is whether it can be said to be reasonable in the circumstances as they existed at the time for the accused to have mentioned the fact, despite the advice which he claims to have received from his legal advisor at that time. Obviously this gives rise to certain difficulties. On the one hand, if it is considered unreasonable to expect a detained suspect to answer police questions where he claims that his legal adviser has told him to remain silent, then in every case where the suspect claims that this is what occurred he will be able to circumvent the operation of the legislation and the drawing of any adverse inference against him. On the other hand, if a detained suspect truly does rely upon the advice received from his legal adviser to remain silent and that is the only reason that he did not mention the fact later relied on in his defence at the earlier time, is it fair to draw an adverse inference against him, or would the operation of section 34 in those circumstances amount to an unfair trial?

³³ See for example *Murray v United Kingdom* (1996) 22 E.H.R.R. 29.

³⁴ Head 30 of the 2007 Bill as passed by Dáil Eireann

It is submitted that the proposed section 19A may well give rise to similar difficulties in the Irish courts. If the detained suspect is given, and indeed must be given access to his solicitor under the provisions of the Act, and also as a constitutional rights, and relies upon advice given to him by such solicitor to remain silent, can an inference fairly be drawn against him at later trial for his failure to mention the relevant fact? Even though the Irish incarnation of the inference-drawing provision appears to side-step the dangers of the English experience referring to a fact which “clearly calls” for an explanation rather than a fact which it was “reasonable” to mention in the circumstances, it is submitted that the difficulty could still arise. If a solicitor advises his client to remain silent, surely it is possible that that client may consider that the fact in question could not “clearly call” for an explanation, or his solicitor would have advised him to mention and explain it.

In England, the conclusion which has been reached, through various cases in the domestic courts³⁵ and the European Court of Human Rights³⁶, is that a judge must direct a jury to consider both the genuineness of the accused’s reliance on legal advice and the reasonableness of such reliance in deciding whether or not to draw an inference against the accused for his failure to mention a fact later relied on in his defence.

Potential Difficulties for the Irish Criminal Justice System³⁷

Generally, it should be noted that a defence to a criminal charge is a legal construct. Defences such as self-defence, provocation, duress, insanity and so on have legal meanings which may not be readily apparent to the layman. It seems harsh then to place a burden upon a suspect in garda custody to mention at that point any fact which he thinks may be of relevance to a later defence. At this point he may not be aware of what sort of a defence might be appropriate in his case and he may have no idea what sort of facts would form a primary part of that defence. Expecting the suspect in the garda station to mention all such facts or to hold it against him for failing to do so is arguably overly burdensome.

³⁵ e.g. *R v Betts and Hall* [2001] 2 Cr. App. R. 257; *R v Howell* [2005] 1 Cr. App. R. 1; *R v Hoare and Pierce* [2005] 1 W.L.R. 1804, [2005] 1 Cr. App. R. 22; *R v Beckles* [2005] 1 W.L.R. 2829, [2005] 1 All E.R. 705

³⁶ See *Condron v U.K.* (2001) 31 E.H.R.R. 1; *Beckles v U.K.* (2002) 36 E.H.R.R. 162

³⁷ For a further analysis of the proposed section 19A and the difficulties which it might pose for the Irish criminal justice system see Daly, Y.M. “Silence and Solicitors: Lessons Learned from England and Wales?” in the next edition of the Irish Criminal Law Journal (forthcoming, May 2007)

In the Irish context also there is a further complication. While the accused might be provided a “reasonable opportunity” to consult with his solicitor in the early stages of his detention and the solicitor may advise him of the facts which he will need to make clear to the gardaí in light of a particular defence which the solicitor deems potentially relevant to the case, the Irish courts have not seen fit to recognise a broader right to legal advice, encompassing a right for the solicitor to be present throughout interrogation. If questioning were to take a turn in a new, previously unforeseen direction and the solicitor was not present to advise, at that point the suspect would again be burdened with the need to consider what facts might form part of a defence, the important legal elements of which are unknown to him. Furthermore, in the absence of duty solicitor schemes within this jurisdiction, not every suspect detained in a garda station gains access to legal advice in the first place. Whether or not the safeguards provided for in section 19A necessitate the creation of such schemes is unclear. It would seem, however, that an argument could be made that section 19A combined with the potential for seven days detention under the 2007 Bill necessitates a more comprehensive right to legal advice to be recognised in Ireland than that which has been so far accepted.

Conclusion

While the 2007 Bill introduces safeguards within its provisions to prevent abuse in the pre-trial process, it is submitted that they are not enough to balance the scales against the powers being given to the gardaí and the interference with the rights of suspects contained therein. Once again, the legislature is moving the centre of gravity of the Irish criminal process from the courts to the garda station.