

# The Criminal Justice Bill, 2007: Implications for Law and Practice

School of Law, TCD – 9 May 2007

## The Right to Silence and the Criminal Justice Bill, 2007

Michael Farrell, Solicitor, Free Legal Advice Centres

It is a curious irony that in an era when we are more committed than ever before to the protection of human rights and when forensic science has made extraordinary advances in the identification of suspects and the detection of crime, we are simultaneously chipping away at some of the basic protections of the rights of defendants that were put in place by a much less rights-oriented society and that have endured in some cases for over one hundred years.

### Introduction:

In the case of *Woolmington v. The DPP* in the House of Lords in 1935, Lord Sankey famously described the presumption of innocence or the onus on the prosecution to prove the guilt of the accused as a “golden thread” that ran through the common law of England.<sup>1</sup> The right to silence is the corollary of the presumption of innocence and is protected by the European convention on Human Rights (Article 6), the International Covenant on Civil and Political Rights (Article 14.2), and the Fifth Amendment to the US Constitution.

In *Saunders v. United Kingdom* in 1996, the European Court of Human Rights said that

“... although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6”.<sup>2</sup>

And, although the right to silence is not stated in terms in the constitution, the Supreme Court has held in *Heaney v. Ireland*<sup>3</sup> and *Rock v. Ireland*<sup>4</sup> that it is a constitutional right. In *Rock*'s case, Hamilton CJ said: “There is no doubt that the right to silence and the presumption of innocence in a criminal trial are implicit in the terms of the Constitution...” However, he also went on to say that “the right to silence is not absolute but is subject to public order and morality”.

The Strasbourg Court has also said in the case of *John Murray v. United Kingdom*<sup>5</sup>, where it held against the United Kingdom in the highly controversial area of anti-terrorist laws, that the right to silence is not absolute and may be restricted in certain circumstances. However, it is clear from the Strasbourg jurisprudence that the Court of Human Rights believes that any encroachments upon a right so fundamental to our whole justice system as the right to silence should be scrutinised with great care.

That point may be reinforced by the fact that in the case of *Heaney v. Ireland* the Supreme Court in 1996 held that Section 52 of the Offences Against the State Act, 1939, which makes it a criminal offence not to give an account of one's movements when arrested under Section 30 of that Act, was a proportionate restriction of the right to silence. Five years later, in parallel cases taken against Ireland by Heaney and his co-accused McGuinness, and by Paul Quinn, the Strasbourg Court stated that the degree of compulsion imposed by S. 52 "destroyed the very essence of [the] privilege against self-incrimination and [the] right to remain silent".<sup>6</sup> This followed an equally strong condemnation of compelled answers which could subsequently be used against the suspect in the case of *Saunders v. United Kingdom* (*supra*).

So what does the Criminal Justice Bill, 2007 say about the right to silence and should we be concerned about it?

### **The new provisions:**

Part 4 of the Bill contains five provisions, two of which (Sections 28 and 29) effectively re-enact the existing Sections 18 and 19 of the Criminal Justice Act, 1984. These allow a court to draw adverse inferences from an accused person's failure during questioning to give an explanation for objects or marks found on his/her person or clothing, or for his/her presence in a certain location at the time an offence was committed.

Section 30 of the 2007 Bill inserts a new Section 19A into the 1984 Act. This allows a court to draw an adverse inference from an accused person's failure to mention during questioning a fact that s/he later relies on in defence. Similar provisions had been introduced in the Criminal Justice (Drug Trafficking) Act, 1996 (Section 7) and in the Offences Against the State (Amendment) Act, 1998 (Section 5), but these applied only to drug trafficking offences or scheduled offences under the Offences Against the State Acts. The new provision will apply to all arrestable offences, including those at the lower end of the scale, and will potentially be used in a much wider spectrum of cases.

Section 31 of the Bill amends Section 2 of the Offences Against the State (Amendment) Act, 1998, which allows inferences to be drawn in prosecutions for membership of an unlawful organisation from the accused's failure to answer any question "material" to the investigation of the offence. "Material" questions are not defined other than to say that they include requests for a full account of a person's "movements, actions, activities or associations during any specified period". This is an extraordinarily broad provision but a conviction involving such inferences and relying heavily upon a Garda Chief Superintendent's opinion that the accused were members of the IRA was upheld recently by the Court of Criminal Appeal in the case of *DPP v. Binead and Donohue*<sup>7</sup>.

I will not deal further with the question of the Offences Against the State Acts and the Special Criminal Court in this paper other than to suggest that the higher courts have tended to take a much more tolerant view of the erosion of traditional safeguards in

that area than in the area of ordinary crime, and to hope that that attitude will not leach over into consideration of the new provisions in the 2007 Bill.

Section 32 of the 2007 Bill would allow the Minister for Justice, Equality and Law Reform to make regulations prescribing the type of caution to be given to persons being questioned where the inference-drawing provisions would apply – which in the future may well be most cases. It provides that failure by a Garda to observe the new caution regulations will not of itself affect the admissibility of anything said by, or the silence of, someone being questioned.

It must be acknowledged that the new provisions do contain some additional safeguards that were not in the original sections of the 1984 Act, the Drug Trafficking Act or the 1998 Offences Against the State (Amendment) Act. Inferences may not be drawn unless the accused has had a reasonable opportunity to consult with a solicitor beforehand; though it does not say that the accused must have had an actual consultation. This could be open to abuse if the solicitor is unable to attend the Garda station for some time – see *DPP v. Buck [2002] 2 IR 268*. It is to be hoped that the courts will refuse to allow inferences to be drawn unless the accused has actually seen a solicitor who can explain the inherently contradictory caution given to persons being questioned to the effect that they do not have to say anything, but if they don't the court may hold it against them. .

The new safeguards also provide that inferences may not be drawn unless the interview was recorded or the accused has consented in writing for it not to be recorded. An accused may not be convicted solely or *mainly* (new addition) on the basis of inferences and if the accused furnishes an explanation or a new fact subsequent to questioning, account should be taken of when it was furnished before any inferences can be drawn.

### **The effect of the new provisions:**

Do these new provisions make much difference if they consist mainly of re-statements or updating of existing provisions – and especially since a constitutional challenge to the old Sections 18 and 19 of the Criminal Justice Act, 1984 had been rejected by the Supreme Court in *Rock v. Ireland (supra)*?

In fact Sections 18 and 19 had been very little used since they were enacted and had fallen completely into disuse in recent years. One suggested explanation for this was that the wording seemed to suggest that inferences could be drawn only from failure to answer questions where the questioner was the arresting Garda. This was cumbersome and impractical.

In effect this appears to be a re-launch of these sections and it must be assumed that it is now the intention to use them extensively. However, it is worth noting here that the indecent haste with which this Bill was rushed through the Oireachtas may mean that it contains significant drafting errors that could cause problems when it is sought to rely on the new Sections 18, 19 and 19A.

Sections 18 and 19 both say that inferences may be drawn when “the accused failed or refused to give an account [of objects, marks, his/her presence etc.], being an account which in the circumstances at the time clearly called for an explanation from him or her ...” This does not appear to make any sense and I suspect that it was intended to say something like: ‘the accused failed to give an account etc. where the circumstances at the time clearly called for an explanation’. The new Section 19A is only slightly less clumsily worded. It refers to failing to mention “a fact which in the circumstances existing at the time clearly called for an explanation from him or her ...” but presumably it was the circumstances at the time, not the fact that was not mentioned, which called for an explanation.

The new Section 19A, which deals with inferences from failure to mention facts later relied on, is a more radical departure than the revamped Sections 18 and 19 and is in fact a statutory reversal of a decision given by the Supreme Court in 1999 in the case of *DPP v. Finnerty*<sup>8</sup>. In that case the accused refused to answer questions in the Garda station but gave evidence at his trial that set out a defence. The trial judge allowed evidence to be given about his failure to answer questions and allowed him to be cross-examined about his failure to give this explanation to the Gardai. He did not warn the jury that they should not draw any inferences or conclusions from the accused’s silence in the Garda station.

Keane J. said in the Supreme Court that the right to silence

*“would, of course, be significantly eroded if at the subsequent trial of the person concerned the jury could be invited to draw inferences adverse to him from his failure to reply to those questions and, specifically, to his failure to give the questioning Gardai an account similar to that subsequently given by him in evidence. It would also render virtually meaningless the caution required to be given to him under the Judges’ rules”.*

Keane J. went on to note that the right to silence was a constitutional right and that “*absent any express statutory provisions entitling a court or jury to draw inferences from such silence, the conclusion follows inevitably that the right is left unaffected by the 1984 [Criminal Justice] Act save in cases coming within Sections 18 and 19 [of that Act] and must be upheld by the courts*”. The conviction was quashed and a retrial ordered.

Murray J, as he then was, reinforced the message of *Finnerty* in the case of *DPP v. Coddington*<sup>9</sup> in the Court of Criminal Appeal in 2001, when he said: “*While the trial judge may remind the jury of the fact that the accused had, as it is right, not given evidence in the trial, they must be expressly instructed not to draw any inferences from the exercise of that right*”.

The inferences allowed to be drawn by the new Sections 18 and 19 of the 1984 Act, are not too far removed from what the European Court of Human Rights in *John Murray v. United Kingdom* (*supra*) said was compatible with the European Convention, namely: “*...these immunities cannot and should not prevent that the accused’s silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the*

*prosecution*”. However, the erosion of the right to silence by the new Section 19A is much more sweeping and will, among other things, require solicitors to think very carefully about the advice that they give to clients who are being questioned.

### **Why don't suspects answer questions?**

It may be useful at this stage to reflect for a moment on why persons being questioned in a Garda station might fail or refuse to give explanations about suspicious marks or objects, or about their movements, or might not mention facts later relied on in their defence – or why a solicitor might advise them to remain silent.

A great many of the people questioned in Garda stations are poorly educated and come from deprived backgrounds and many are vulnerable due to addiction to drugs or alcohol. As the minority group of members of the Committee to Review the Offences Against the States Acts rather delicately put it in the Committee's Report in 2002 “... *it is possible that an accused, placed in the unfamiliar and potentially hostile surroundings of Garda custody, may be confused or tongue-tied or may simply forget important matters which, in a calmer environment and on fuller reflection, he may wish to rely on ...*”<sup>10</sup>

Suspects rarely live ordered and regulated lives, keep diaries or have secretaries to record their appointments. They may not be able to remember where they were or who they were with on a given date or at a specific time and/or may be reluctant to give details that may subsequently turn out to be wrong, in case this would be used against them. And they may have no idea what facts may be significant for their defence until they have had an opportunity to discuss the matter in detail with their solicitor.

Solicitors may also feel that the safest advice that they can give to certain clients is not to answer questions because in their confused or frightened state they may only get themselves into trouble or, like the unfortunate – and innocent – Dean Lyons, confess to a murder he did not commit. Under Section 19A solicitors will have to consider very carefully the advice they give as it could result in an application to have inferences drawn against their client and/or lead to pressure on the solicitor to give evidence as to why that advice was given.

There is a danger that these new or revamped provisions could be used to bolster up a weak prosecution case, and not just in cases of supposed gangland crime but in run of the mill cases as well. The Section 19A provision is very closely modelled on Section 34 of the UK Criminal Justice and Public Order Act, 1994, about which the then Lord Chief Justice of England and Wales, Lord Bingham, said in the House of Lords in **R v. Webber**<sup>11</sup> in January 2004: “*It is indeed important, if the statutory provisions are not to be an instrument of unfairness or abuse, that the statutory safeguards are strictly observed, that jury directions are carefully framed and, in cases under Section 34, that care is taken to identify the specific facts relied on at trial which were not mentioned during questioning*”. Lord Bingham was referring in particular to the protection of legal professional privilege but his warning would seem to apply to the whole Section 34 scheme.

It is worth noting here that Section 34 of the UK Act only allows inferences to be drawn where the fact which the accused failed to mention is one that s/he “could reasonably have been expected to mention”. There is no such qualification in the Irish legislation. It remains to be seen how significant this omission may be.

### **Possible safeguards:**

It may be useful now to look at what safeguards have been identified in recent years in dealing with the revamped or new provisions or their equivalents in the UK – for the Section 18 and 19 provisions are also very similar to their UK counterparts.

There is little jurisprudence on this issue in this jurisdiction following the decisions in *Rock v. Ireland* and *DPP v. Finnerty*, referred to above. One case that did consider Section 7 of the Criminal Justice (Drug Trafficking) Act, 1996 was *DPP v. James Bowes*<sup>12</sup>. In that case, the Court of Criminal Appeal in November 2004 quashed Bowes’ conviction because the prosecution in opening the case against him had stated that Bowes had failed to comment on objects shown to him despite being warned that inferences could be drawn from his silence if he later provided an explanation in his defence.

Fennelly J. said that reference should not have been made to the accused’s silence during questioning unless or until he had opened his defence and it became clear that he was relying on facts which he had not mentioned while being questioned. Judge Fennelly also said that the warning that had been given to the accused was too vague and general to meet the requirements of the statute.

The European Court of Human Rights has dealt with a series of cases from the UK where inferences were drawn from the accused’s silence, beginning with *John Murray v. United Kingdom* (*supra*), where it held that because of the complexity of the issues surrounding the drawing of inferences, it would be unfair to draw inferences unless the accused had had access to his lawyer at the beginning of his questioning. This now seems to be covered in the new provisions put in place by the 2007 Bill, though that in turn begs the question: if the legislation is so complicated that an accused person should have access to a solicitor beforehand, should s/he not have a right to have a solicitor present during interviews, as is the practice in the UK?

In this connection, it must be borne in mind that the UK jurisprudence in this area all deals with a situation where the accused had or was entitled to have his/her solicitor present during questioning and so was both less isolated and vulnerable and had access to advice whenever required. Unless or until this is allowed in this jurisdiction, it is suggested that the interpretation and implementation of the other safeguards available should be correspondingly more rigorous than in the UK.

In the case of *Condron v. United Kingdom*<sup>13</sup> in 2000, the Strasbourg Court held that there had been a breach of Article 6.1 of the European Convention in a case where the Applicants’ solicitor had advised them not to answer questions because he considered that they were suffering from drug withdrawal symptoms. A police doctor had said they were fit to be questioned and the judge left it to the jury to consider whether to draw an inference against the accused couple because they had presented a defence

which they had not mentioned when being questioned. The European Court held that more weight should have been attached to the fact that they had been advised by their solicitor and said:

*“In the Court’s opinion, as a matter of fairness, the jury should have been directed that it could only draw an adverse inference if satisfied that the Applicant’s silence at the police interview could only be sensibly attributed to their having no answer or none that would stand up to cross-examination”.*

Two years later, in another UK case, *Beckles v. United Kingdom*<sup>14</sup> the Strasbourg Court reinforced the point. The Applicant had relied on his solicitor’s advice to remain silent when being questioned and had then given an explanation of his conduct at his trial. In this case no information had been given about the reason for the solicitor’s advice. Once again the judge had left it to the jury to decide on whether to draw an adverse inference. The Strasbourg Court held that the judge had not instructed the jury strongly enough on the Applicants’ right to silence. It noted that *“he invited the jury to reflect on whether the Applicant’s reason for his silence was ‘a good one’ without emphasising that it must be consistent only with guilt”* before an adverse inference could be drawn.

Interestingly, Beckles’ conviction was subsequently quashed by the England and Wales Court of Appeal<sup>15</sup>, which took account of the Strasbourg decision even though the original conviction had occurred before the incorporation of the European Convention into UK law via the Human Rights Act, 1998.

In a non-UK case, *Telfner v. Austria*<sup>16</sup> in 2001, the Strasbourg Court set out another pre-condition for drawing inferences from silence. The case concerned a fairly minor road accident caused by the Applicant’s mother’s car. It was normally driven by the Applicant but there was no evidence that he had been driving it on this occasion. The Applicant failed to give an account of his movements and the Austrian court relied on his silence to convict him. The European Court repeated that drawing inferences from silence was not necessarily in breach of the Convention but said that *“In requiring the Applicant to provide an explanation although they had not been able to establish a prima facie case against him, the [Austrian] courts shifted the burden of proof from the prosecution to the defence”*.

The UK appeal courts have had to consider a large number of cases involving Sections 34 and 35 of the Criminal Justice and Public Order Act, 1994 since its enactment – Section 35 allows the drawing of adverse inferences when an accused declines to give evidence at trial, a provision which thankfully, we have been spared so far. Many of the same considerations arise in relation to both Sections.

In *R v. Birchall*<sup>17</sup> in 1998, Lord Bingham said, very presciently, in the Court of Appeal:

*“The drawing of inferences from silence is a particularly sensitive area. Many respected authorities have voiced the fear that Section 35 and its sister sections may lead to wrongful convictions. It seems very possible that the application of these provisions could lead to decisions adverse to the United Kingdom at Strasbourg under Articles 6.1 and 6.2 of the European*

*Convention on Human Rights unless the provisions are the subject of very carefully framed directions to juries. Inescapable logic demands that a jury should not start to consider whether they should draw inferences from a defendant's failure to give oral evidence at his trial until they have concluded that the Crown's case against him is sufficiently compelling to call for an answer by him."*

In a case called **R v. Chenia**<sup>18</sup> in 2003 which, like many others, involved accused persons who had declined to answer police questions on the advice of their solicitors, the Court of Appeal first held that the trial judge's direction on drawing inferences was inadequate because he had failed to identify the facts raised in the defence which the accused had not mentioned in their interviews. The Court then said the trial judge's direction concerning the accused persons' reliance on the solicitor's advice

*"... was insufficient because it may have given the impression that the jury might draw an adverse inference because the appellant was sheltering behind his solicitor's advice, when they could only do so if they were **sure** (my emphasis), not only that his failure to mention facts was the result of the advice, however adequate or inadequate that explanation might be, but also that the appellant had at that stage no explanation to offer or none that would stand up to questioning or investigation"*.

Because of the difficulties arising from Section 34 in particular – it was described as “a notorious minefield” by the Court of Appeal in **R v. B. (K. J.)**<sup>19</sup> in 2003 – the Judicial Studies Board for England and Wales issued a series of guideline directions for judges to give to juries in cases where Section 34 inferences were at issue. The latest version of the guideline direction was summarised as follows and approved by the Court of Appeal in **R v. Bresa**<sup>20</sup> in May 2005:

*“First there needs to be the striking of a fair balance between telling the jury of a defendant's rights [to remain silent or not to disclose advice], and telling the jury that the defendant has a choice not to rely on those rights. Second there needs to be an accurate identification of the facts which it is alleged a defendant might reasonably have mentioned. Third there needs to be a warning that there must be a case to answer and the jury cannot convict on inference alone. Fourth there must be a direction to the effect that the key question is whether the jury can be sure that the accused remains silent not because of any advice but because he had no satisfactory explanation to give.”*

In conclusion, drawing on the terms of the actual legislation and the jurisprudence in this jurisdiction, Strasbourg and the UK, a number of key safeguards can be identified that should be observed before inferences can be drawn from an accused person's silence, failure to give explanations, or reliance in his/her defence on facts that were not mentioned in Garda interviews. Some of these safeguards are actually built into the scheme of the revamped Sections 18 and 19 of the Criminal Justice Act, 1984 and the full panoply of safeguards is probably most relevant to Section 19A, which is in any event the most worrisome of the new provisions.



These safeguards should also apply to proposals to draw inferences under Section 2 of the Offences Against the State (Amendment) Act, 1998. It would be interesting to hear the three judges of the Special Criminal Court publicly direct themselves as to how to approach the drawing of inferences and then spell out in their judgment just how they applied the safeguards.

### **List of Safeguards for drawing Inferences**

1. The accused person must have access to legal advice at the commencement of any interviews which might lead to adverse inferences being drawn; *quaere*: should this right to legal advice extend to having a solicitor present during interviews?
2. The caution given before questioning must be clear and specific as to what sort of inferences can be drawn from failure to answer questions, and what sort of questions may lead to inferences being drawn;
3. If an explanation for marks, objects, or being in a certain place at a specific time etc. is furnished some time after questioning but before trial, that fact and when the information was supplied must be taken into account in deciding whether to draw inferences;
4. Where it is suggested that an inference should be drawn from the accused's failure to mention a fact later relied on in the defence, no comment should be made on the accused's silence until the defence has been presented and it becomes clear that the accused is relying on something not previously mentioned;
5. The jury must be instructed as to exactly what fact or facts are the subject of an application for them to draw inferences;
6. The jury must be instructed not to consider drawing inferences unless they are satisfied that the accused has a clear case to answer without reliance on the suggested inferences;
7. The jury must take into account whether the accused was relying on his/her solicitor's advice when declining to answer questions;
8. Before drawing any adverse inference, the jury must be sure/satisfied that the accused's silence was due to having no answer to offer or none that would stand up to cross-examination. "*[I]f the defendant gives any exculpatory explanation of his failure to mention [something not mentioned earlier] which the jury accept as true or possibly so, it would be obviously unfair to draw any inference adverse to him from his failure to mention it*".<sup>21</sup>
9. Any adverse inference drawn can only be supportive of the State's case. It cannot form a substantive part of the reasons for conviction.

Having set out these safeguards, it may be instructive to return to a comment made by the England and Wales Court of Appeal in *R v. Bresca* (*supra*), when the Court said:

*“We can say at the outset that it is a matter of some anxiety that, even in the simplest and most straightforward of cases, where a direction is to be given under S. 34 it seems to require a direction of such length and detail that it seems to promote the adverse inference question to a height it does not merit”.*

In terser language it seems as if the court may have been querying whether this provision is really worth all the difficulty and legal contortions it has caused. It may be that before long the Irish courts will be asking the same question.

---

<sup>1</sup> Woolmington v The DPP [1935] AC 462

<sup>2</sup> Saunders v. United Kingdom (1996) 23 EHRR 313

<sup>3</sup> Heaney v. Ireland [1996] 1 IR 580

<sup>4</sup> Rock v. Ireland [1997] 3 IR 484

<sup>5</sup> Murray v United Kingdom (1996) 23 EHRR 29

<sup>6</sup> Heaney v. Ireland (2001) 33 EHRR 264; Quinn v. Ireland (2001) 33 EHRR 27

<sup>7</sup> DPP v. Binead and Donohue [2006] IECCA 147

<sup>8</sup> DPP v. Finnerty [1999] 4 IR 364

<sup>9</sup> DPP v. Coddington, Court of Criminal Appeal, 31 May 2001

<sup>10</sup> Report of the Committee to Review the Offences Against the State Acts, 1939-98, Dublin, May 2002

<sup>11</sup> R v. Webber [2004] 1 W. L. R. 404; [2004] UKHL 1

<sup>12</sup> DPP v. Bowes [2004] 4 IR 223

<sup>13</sup> Condrón v. United Kingdom (2001) 31 EHRR

<sup>14</sup> Beckles v. United Kingdom (2003) 36 EHRR 162

<sup>15</sup> R v. Beckles [2004] EWCA Crim 2766

<sup>16</sup> Telfner v. Austria (2002) 34 EHRR 207

<sup>17</sup> R v. Birchall [1998] EWCA Crim 177

<sup>18</sup> R v. Chenia [2003] 2 Cr App 6

<sup>19</sup> R v. B (K. J.) [2003] EWCA Crim 3080; The Times, 15 December 2003

<sup>20</sup> R v. Bresca [2005] EWCA Crim 1414

<sup>21</sup> R v. Webber [2004] 1 W. L. R. 404; [2004] UKHL 1